

# **Extraterritorial use of force against non-state actors and the transformation of the law of self-defence**

by

**Alabo Ozubide**

Submitted in fulfilment of the requirements for the degree

Doctor Legum (LLD)

In the Faculty of Law,

University of Pretoria

2016 September

Supervisor: **Professor Christof Heyns**

Co-supervisor: **Professor Hennie Stydom**

## Declaration

I, Alabo Ozubide hereby declare that this thesis which I submit for the degree Doctor Legum (LLD) in the Faculty of Law at the University of Pretoria is my original research work and it has not been previously submitted to any other university or institution for the award of a degree.

Signature: \_\_\_\_\_

Alabo Ozubide

Date: \_\_\_\_\_

Supervisor: \_\_\_\_\_

Professor Christof Heyns

Date: \_\_\_\_\_

## **Dedication**

To the memory of my late father Suku Ozubide, who laid the foundation for this seemingly protracted educational career.

Also, to HRH Turner Eradiri 11 (deceased), and Sir Lambert Eradiri, who, together kept my dreams and hopes alive by providing the tools for this educational journey.

## Acknowledgements

To God Almighty be the glory for his protection and for stretching my limited intellect this far to cope with the demands of my doctoral studies. My special appreciation goes to my main supervisor, Professor Christof Heyns, for his encouragement, guidance and meticulous comments which sharpened my thoughts and research skills. His experiences and vast knowledge of the law which he brought to bear on my area of study provided the pathway for my navigation. I also especially appreciate my co-supervisor Professor Hennie Strydom, for his insightful comments on my submissions and for directing me to available literature on the use of force which perhaps I would never have thought of using. The invaluable contributions by way of comments made by Professor Frans Viljoen and Professor Gus Waschefort at the proposal stage of my work are equally appreciated.

I am greatly indebted to Sir Lambert and Dame Eunice Eradiri for their invaluable contributions to my pursuit of the Golden Fleece. The financial and material resources they placed at my disposal greased my path to the pinnacle of my studies. God bless them.

The dream of realising this study could have remained an impossibility without the goodwill and kind words of encouragement from eminent legal scholars and friends. In this regard, my profound gratitude is due to Professor CM Fombad, Professor D Tladi, Professor Erika de Wet, Professor M Hansungule, Professor TS Ebobrah, Dr. AJ Beredugo, Chief (Barr.) NyesomWike (Governor of Rivers State), Dr. O Oluyeju, Dr. John-Mark Iyi, Dr. LA Abdulrauf, Dr. A Onuora-Oguno, Barr. A Ofuani-Sokolo; Barr. OL Niyi-Gafar, Barr. OE Eberechi, Dr. E Lubaale, V Ayeni, B Nkrumah, R Mafunga and Engr. SA Aasa. I also thank the staff of the Institute for International and Comparative Law in Africa (ICLA), particularly P Matwa and the staff of the OR Tambo Library, particularly Mahlodi for their immeasurable support.

My gratitude is also due to Mr. Fraser Okuoru, Barr. W Kemeasuode (Hon. Commissioner for Justice), Barr. P Agedah (Solicitor-General & Permanent Secretary), Barr. T Songi, Barr. E Ogorodi and my other colleagues at the Bayelsa State Ministry of Justice. Other friends and family members including Sir DM Eradiri, Hon. Justice I Eradiri, Prof. S Brisibe, Prof. D Wankasi, Dr. N Ayawei, Dr. F Woke, Dr. O Ogiriki, Dr. P Ikiyei, K Alaowei, Barr. F Okorotie, Mrs. T Tulagha, W Ozubide, K Ozubide, Dr S Tulagha, Engr. EJ Eradiri, Engr. U

Eradiri, D Inoyo, Insp. Ebi Diri, P Wariowei, W Kwokwo, Z Dickson and B Timisowei are equally appreciated for the roles they played in support of my studies.

Finally, and above all, my deep-seated appreciation goes to my mother, Rose Ozubide, my beloved wife, Bolou, and our children, Seleboere, Ayibamieye, Perebodo, Ebimobo and Ebinimi for their prayers, support, understanding and for bearing with my long absence.

## Abstract

The United Nations, states and regional organisations have spent invaluable time and resources to maintain international peace and security in a largely anarchical international system, owing to armed conflicts between states and non-state actors (NSAs). This state of affairs is exacerbated by the proliferation of weapons of mass destruction, transnational terrorist networks, failed states and a disregard for international norms by powerful states. This is in spite of the normative and policy frameworks that have been established to constrain the use of force by states in the territories of one another. Article 2(4) of the United Nations Charter prohibits the use of force by states in their relations, unless they rely on the exceptions in articles 51 and 42 and the customary law doctrine of ‘consent’. In addition, it was the requirement of international law that a state may use force against NSAs, only if it attributes the conduct of the NSAs to a state. This thesis examines the extraterritorial use of force by states against terrorist non-state actors, and the focus is to answer the question ‘whether the law of self-defence has been transformed’. The investigation has been conducted with particular attention to whether the post 9/11 practice of states, the Security Council resolutions 1368 and 1373, the use of pre-emptive self-defence by the United States, Israel and a few other states, the disregard for attribution of the conduct of NSAs to states and the overwhelming international support for contemporary incidents of the use of force by states against NSAs, such as Al Qaeda, the Taliban, Al-Shaabab, the Khorasan Group and the Islamic State of Iraq and the Levant, have caused a change in the law of self-defence.

Firstly, the study finds that pre-emptive self-defence which does not require imminence has not been accepted as part of international law and it argues that its unlawful use could not cause a change in the law. Secondly, as far as the use of self-defence against non-state actors is concerned, it finds that the actions of the United States against Al Qaeda following resolutions 1368 and 1373 of the Security Council, the lowering of the attribution standard and the toleration by the international community of the use of force against terrorists in Afghanistan, Iraq, Syria, Lebanon, Yemen, Pakistan, Ecuador, Somalia and Mali without attributing their conduct to states, could be interpreted as amounting to a transformation of the law of self-defence.

Accordingly, this study recommends the acceptance of the lowered threshold in the attribution requirement, but it also recommends a corresponding disregard of ‘pre-emptive

self-defence' as not forming part of the *corpus* of international law. It is also recommended that the jurisdiction of the International Criminal Court be enlarged to try transnational terrorism as one of the egregious crimes against mankind.

**Keywords:** Extraterritorial, use of force, non-state actors, transformation, self-defence, transnational, terrorism, attribution, pre-emptive self-defence and weapons of mass destruction.

## Acronyms/Abbreviations

ACHPR –	African Charter on Human and People’s Rights
ANC –	African National Congress
AU –	African Union
ANF –	Al-Nusrah Front
AQAP –	Al Qaeda in the Arabian Peninsula
AQIM –	Al Qaeda in the Islamic Maghreb
AI –	Amnesty International
ASEAN –	Association of South-East Asian Nations
AUMF –	Authorisation for Use of Military Force
CIA –	Central Intelligence Agency
CJCSSROE –	Chairman Joint Chiefs of Staff Standing Rules of Engagement
CRC –	Child Rights Convention
CTC –	Counter Terrorism Committee
CTED –	Counter Terrorism Executive Directorate
DASR –	Draft Articles on State Responsibility for Internationally Wrongful Acts
DARIO-	Draft Articles on the Responsibility of International Organisations
DFLP –	Democratic Front for the Liberation of Palestine
ECHR –	European Convention on Human Rights
ECOMOG –	ECOWAS Monitoring Group
ECOWAS –	Economic Community of West African States
FARC –	Revolutionary Armed Forces of Colombia
GA –	General Assembly
GC –	Geneva Convention
GWOT –	Global War on Terrorism
HAMAS –	Islamic Resistance Movement
HEU –	Highly Enriched Uranium
HRC –	Human Rights Council
HRW –	Human Rights Watch
HSBC –	Hong-Kong and Shanghai Banking Corporation
IAEA –	International Atomic Energy Agency
ICCPR –	International Covenant on Civil and Political Rights



ICESCR –	International Covenant on Economic, Social and Cultural Rights
ICJ –	International Court of Justice
IDF –	Israeli Defence Forces
IHL –	International Humanitarian Law
IHRL –	International Human Rights Law
ILC –	International Law Commission
ILD –	International Law Division
ISI –	Inter-Service Intelligence
ISIL –	Islamic State in Iraq and the Levant
ISAF –	International Security Assistance Force
IMU –	Islamic Movement of Uzbekistan
IATRA –	Inter-American Treaty for Reciprocal Assistance
JSOC –	Joint Special Operations Command
LOAC –	Law of Armed Conflict
MB –	Muslim Brotherhood
NTC –	National Transition Council
NAM –	Non-Aligned Movement
NATO –	North Atlantic Treaty Organisation
NGOs –	Non Governmental Organisations
NPT –	Treaty on Non-proliferation of Nuclear Weapons
NSAs –	Non-state Actors
NSS –	National Security Strategy
NTC –	National Transitional Council
OPT –	Occupied Palestinian Territory
OHCHR –	Office of the High Commissioner on Human Rights
OEF –	Operation Enduring Freedom
OIR –	Operation Infinite Reach
ONS –	Operation Neptune Spear
OAU –	Organisation of African Unity
OAS –	Organisation of American States
OIC –	Organisation of Islamic Conference
OSCE –	Organisation for Security and Cooperation in Europe
PCATI –	The Public Committee Against Torture in Israel
PET –	Danish Security and Intelligence Service

PFLP –	Popular Front for the Liberation of Palestine
PKK –	Kurdish Workers Party
PLO –	Palestinian Liberation Organisation
PoC –	Protection of Civilians
PoW –	Prisoners of War
R2P –	Responsibility to Protect
RPA’s –	Remotely Piloted Aircrafts
RENAMO –	Resistencia Nacional Mozambicana
SADC –	Southern African Development Commission
SC –	Security Council
SOFA –	Status of Forces Agreement
SPI –	Proliferation Security Initiative
SWAPO –	South West African People’s Organisation
TK –	Targeted Killing
UAVs –	Unmanned Aerial Vehicles
UDHR –	Universal Declaration of Human Rights
UIC –	Union of Islamic Court
UN –	United Nations
UNAMIR –	United Nations Assistance Mission in Rwanda
UNCRO –	United Nations Confidence Restoration Operation in Croatia
UNEF –	United Nations Emergency Force
UNGA –	United Nations General Assembly
UNITAF –	Unified Task Force
UNMOVIC –	United Nations Monitoring, Verification and Inspection Commission
UNIFIL –	United Nations Interim Force for Lebanon
UNODC –	United Nations Office on Drugs and Crime
UNOSOM –	United Nations Operations in Somalia
UNPROFOR –	United Nations Protection Force
UNSC –	United Nations Security Council
UPDF –	Ugandan People’s Defence Forces

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# Chapter 1

## Introduction

### Outline

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### 1.1. Background

States are the primary subjects of international law and, *prima facie*, all others are outside the scope of international law. The widening scope of international law that now affects the internal affairs of states, however, appears to bring the conduct of non-state actors (NSAs), such as terrorists, individuals and other armed groups within its area of concern.<sup>1</sup> The entire international system is state-centric, and even the concept of the ‘use of force’ is an international law concept that has to do with the relations of states, but which does not refer to forcible measures employed by a state within its borders. This creates difficulty in determining the accountability of NSAs. It has, thus, been suggested that the international legal regime should be expanded specifically to include non-state actors.<sup>2</sup> The extraterritorial use of force refers to forcible measures carried out by a state (acting state) in the territory of

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<sup>1</sup> Z Dabone ‘International law: Armed groups in a state-centric system’ (2011) 93 *International Review of the Red Cross* 395, at 396-397.

<sup>2</sup> L Zegveld ‘The accountability of armed opposition groups in international law’ (2002) 134; S Barbour & Z Salzman ‘The entangled web: The right of self-defence against non-state actors in the Armed Activities case’ (2008) 40 *International Law and Politics* 57.

another state (territorial state).<sup>3</sup> Such actions include those taken against other states and NSAs, such as terrorist groups and individuals, in the territories of other states and in occupied territories.<sup>4</sup> The focus of this study, however, is on the use of force by states against NSAs in foreign territories including occupied territories. Apart from when a state employs force against terrorists within its own territory or on the high seas, extraterritorial force employed against NSAs which occurs in the territory of another state infringes the sovereignty of such a host state.<sup>5</sup> While a state may, thus, have little or no constraint with regard to the use force against terrorists within its recognized borders, it may use extraterritorial force against terrorists in the territories of other states only under certain strict circumstances. In the context used in this study, NSAs refer to organized armed groups who are considered to be acting outside the control or on behalf of a state<sup>6</sup> and are alleged to be involved in carrying out transnational terrorist attacks against other states.<sup>7</sup>

The armed conflicts between the sometimes better organised state armed forces and the irregular forces of the NSAs qualify as asymmetric conflicts because of the unequal status of the parties to the conflict.<sup>8</sup> While the state is believed to possess greater firepower, technological resources and a strict chain of command, the irregular forces that characterise NSAs are most times loosely organised and do not conform to the laws of war by wearing uniforms with insignia and openly carrying arms.<sup>9</sup> Since the disparity in the strength of the opposing forces in asymmetric conflicts has manifestly portrayed the impossibility of the NSAs to win such a conflict militarily, there is the incentive to resort to non-conventional tactics such as terrorism or guerrilla warfare.<sup>10</sup> These conflicts between states and organized armed groups may qualify as non-international armed conflicts if the relevant criteria are present. A non-international armed conflict exists where the armed forces of a state government are involved in fighting against a non-state armed group or at least two non-state armed groups are engaged in fighting against each other within a state.<sup>11</sup> For such

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<sup>3</sup> N Lubell *Extraterritorial use of force against non-state actors* (2010) 13 – 14.

<sup>4</sup> Israel's use of force in the Occupied Palestinian Territories.

<sup>5</sup> Lubell (n 3 above) 25; C Tams 'The use of force against terrorists' (2009) 20 *European Journal of International Law* 362, 364.

<sup>6</sup> Lubell (n 3 above) 14; M O'Connell 'Enhancing the status of non-state actors through the global war on terror' (2005) 43 *Columbia Journal of Transnational Law* 437.

<sup>7</sup> Non-state actors include Al Qaeda, Taliban, Chechen Rebels, PKK, Hezbollah and al-Shabaab.

<sup>8</sup> C Finkelstein *et al* (eds.) *Targeted killings: Law and morality in an asymmetrical world* (2012) 2.

<sup>9</sup> Finkelstein *et al* (n 8 above) 2.

<sup>10</sup> R GeiB 'Asymmetric conflict structures' (2006) 88 *International Review of the Red Cross* 757-758.

<sup>11</sup> Art 1 of the AP 11 to the Geneva Conventions; *Prosecutor v DuskoTadic*, Case No: IT-94-IAR72, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70; M Sassoli 'The role of human rights and international humanitarian law in new types of armed conflict' in

fighting to qualify as an armed conflict, certain criteria, such as intensity, duration and the protracted character of the violence, organisation and discipline of the parties, among others, must be present. But mere riots, isolated sporadic acts of violence, disturbances and tensions do not constitute an armed conflict.<sup>12</sup> On the other hand, an international armed conflict refers to an armed conflict that involves the armed forces of two or more opposing states.<sup>13</sup>

International law has, however, prohibited the use of force by states against one another in their international relations. The prohibition relates to inter-state relations and does not concern the internal use of force within a state.<sup>14</sup> The use of force is banned mainly through the United Nations Charter,<sup>15</sup> although the ban is reinforced by other international conventions, UN General Assembly (GA) resolutions,<sup>16</sup> Security Council (SC) resolutions and constitutive instruments of other international and regional organisations.<sup>17</sup> Article 2(4) of the UN Charter is the most authoritative promulgation in this regard, and it bears the contemporary position of the law on the prohibition of the use of force by states.<sup>18</sup> The ban on the use of force under Article 2(4) is comprehensive, and, unlike the League of Nations Covenant and Kellogg-Briand Pact, it applies not only to the waging of wars, but also to all other forcible measures including threats, humanitarian interventions, rescue of nationals and armed reprisals.<sup>19</sup> The imperative of the prohibition is for the protection of the legal rights of states.<sup>20</sup> Given the customary nature of the prohibition, it is incumbent on all states, whether party to the UN Charter or not to observe the ban on the use of force, subject only to the exceptions that are considered hereunder.<sup>21</sup> The acceptance by states of the ban on inter-state use of force is expressed by the ratification of the Charter by about 194

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O Ben-Naftali (ed.) *International humanitarian law and international human rights law* (2010) 54, 56; Lubell (n 3 above) 99; Vegveld (n 2 above) 135.

<sup>12</sup> Sassoli (n 11 above) 54.

<sup>13</sup> Article 2 of the GC I-IV; Sassoli (n 11 above) 52 - 53; Lubell (n 3 above) 94 – 95.

<sup>14</sup> I Henderson & B Cavanagh ‘Unmanned aerial vehicles: Do they pose legal challenges’ in H Nasu & R McLaughlin (eds.) *New technologies and the law of armed conflict* (2014) 398-399.

<sup>15</sup> Art 2(4) of the UN Charter.

<sup>16</sup> A/RES/2625 (XXV) of 24 October 1970; A/RES/3314 (XXIX) of 14 December 1974.

<sup>17</sup> Art 4(f) of the Constitutive Act of the African Union; Art 1 of the North Atlantic Treaty; Art 3 of the Chapultepec Act.

<sup>18</sup> The prohibition under Article 2(4) of the Charter is the cornerstone of the UN system, see *Armed Activities on the Territory of the Congo (DRC v Uganda)* ICJ (2005) 168 at para 148; C Gray *International law and the use of force* (2008) 2; Tams (n 5 above) 359.

<sup>19</sup> G Distefano ‘Use of Force’ in A Clapham & P Gaeta (eds.) *The handbook of international law in armed conflict* (2014) 545.

<sup>20</sup> C Heyns ‘Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions’ of 13 September 2013, UN Doc. A/68/382, para 80.

<sup>21</sup> Art 2(6) of the UN Charter; D Brown ‘Use of force against terrorism after September 11<sup>th</sup>: State responsibility, self-defence and other responses’ (2003-2004) 11 *Cardozo Journal of International and Comparative Law* 4.

independent states, but what is worrisome is that asymmetric and surrogate wars continue to torment the UN system, hence the search for international peace and security dominates the UN agenda. It then shows that merely endorsing international instruments will have no meaning if practical steps are not taken to enforce compliance with international norms. The need to transform the law to cope with these security challenges becomes imperative.

Lauterpacht's dream that 'there shall be no violence' which he described as the primordial duty of the law<sup>22</sup> has continued to elude mankind, thus making absolute abstinence from violence impossible, even in the face of attempts at prohibiting the resort to force. There are, thus, three exceptions to the general prohibition of the use of force by states which permit the inter-state use of force in certain respects. Two of the exceptions are contained in the UN Charter itself, while the third exception is found in customary international law. These include: (a) Based on its Chapter VII powers and particularly under article 42 of the UN Charter, the SC can authorise an enforcement action;<sup>23</sup> (b) Under Article 51 of the Charter, force may be used without any requirement of permission in furtherance of individual or collective self-defence to an initial armed attack, as self-defence is deemed an inherent right of states;<sup>24</sup> and (c) A state may grant consent through invitation to another state to use force in its territory,<sup>25</sup> thereby establishing an exception to the general prohibition of the use of force.<sup>26</sup> In fact, an acting state may rely on consent as a defence against allegations of violating the customary principles of sovereignty, the UN Charter prohibition of the use of force<sup>27</sup> and also against claims if force is unlawfully used in the territory of another state.<sup>28</sup> For instance, Yemen was alleged to have granted its consent to the United States (US) to use

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<sup>22</sup> H Lauterpacht *The function of law in the international community* (2000) 64; see also *TM Franck Recourse to force: State action against threats and armed attacks* (2002) 1.

<sup>23</sup> Art 42 of the UN Charter; Franck (n 22 above) 20 - 21; Tams (n 5 above) 365.

<sup>24</sup> Art 51 of the UN Charter provides: '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 the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense 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'; see also Brown (n 21 above) 18.

<sup>25</sup> M Byers 'Terrorism, the use of force and international law after 11 September' (2002) 51 *International and Comparative Law Quarterly* 403.

<sup>26</sup> A Deeks 'Consent to the use of force and international law supremacy' (2013) 54 *Harvard International Law Journal* 15.

<sup>27</sup> J Odle 'Targeted killings in Yemen and Somalia: Can the United States target low-level terrorists?' (2013) 27 *Emory International Law Review* 646.

<sup>28</sup> Deeks (n 26 above) 4, 10, 14.

force in its territory against Al Qaeda in the Arabian Peninsula (AQAP).<sup>29</sup> A SC authorized enforcement action pursuant to a Chapter VII resolution, self-defence under Article 51 of the Charter and consent are, thus, lawful exceptions to the general prohibition of the use of force.<sup>30</sup> Both the prohibition and the exception in the UN Charter are now principles of customary international law.<sup>31</sup>

For an extraterritorial attack by a state against a NSA or another state on the basis of self-defence to meet the requirements of international law, such acting state must establish that it has suffered an armed attack from a NSA or a state.<sup>32</sup> Consequently, in their claim to pursue policies of self-defence against terrorist NSAs, some states have carried out attacks in the territories of other states.<sup>33</sup> For instance, overt and covert targeted operations have previously been carried out by the US in Afghanistan, Pakistan, Yemen and Somalia, by Turkey in Iraq, by Russia in Georgia and by Israel in the Occupied Palestinian Territory (OPT) and Lebanon.<sup>34</sup> Even as this thesis is being written, military operations by the US and coalition forces against the Islamic State of Iraq and the Levant (ISIL) and the Khorasan Group in Iraq and Syria are ongoing.<sup>35</sup>

It appears settled in law that sovereign states may wage wars or use force against their equals,<sup>36</sup> and even article 51 of the Charter, which allows self-defence, contemplates the use of force in response by states.<sup>37</sup> A state may respond to an armed attack by a NSA, only if the conduct of such a NSA can be imputed or attributed to a state.<sup>38</sup> This means, therefore, that for a state to respond to armed attacks from NSAs on the basis of self-defence, another

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<sup>29</sup> A Warren & I Bode *Governing the use of force in international relations: The Post 9/11 US challenge on international law* (2014) 123.

<sup>30</sup> Deeks (n 26 above) 15.

<sup>31</sup> Y Dinstein *War, aggression and self-defence* (2011) 193 - 200; J Dugard *International law: A South African perspective* (2011) 496; G Williams 'Piercing the shield of sovereignty: An assessment of the legal status of 'unwilling or unable' test' (2013) 36(2) *University of New South Wales Law Journal* 622. Article 51 of the UN Charter.

<sup>32</sup> Brown (n 21 above) 24-25; *Military and Para-military Activities in and Against Nicaragua (Nicaragua v USA)* Merits, Judgments, ICJ Reports 1986, 14 para 191.

<sup>33</sup> S Cenic 'State responsibility and self-defence in international law Post 9/11: Has the scope of Article 51 of the United Nations Charter been widened as a result of the US response to 9/11?' (2007) 14 *Australian International Law Journal* 212.

<sup>34</sup> ZI Miller 'U.S. launches air-strike campaign against ISIL in Syria' *TIME*, 15 September 2014.

<sup>35</sup> Distefano (n 19 above) 622; Brown (n 21 above) 2.

<sup>36</sup> H Kelsen *The Law of the United Nations: A critical analysis of its fundamental problems* (1950) 930; A Cassese 'Terrorism is also disrupting crucial legal categories of international law' (2001) 12 *European Journal of International Law* 995; E Myjer & ND White 'The twin tower attack: An unlimited right to self-defence?' (2002) 7 *Journal of Conflict and Security Law* 7; C Antonopoulos 'Force by armed groups as armed attack and the broadening of self-defence' (2008) 55 *Netherlands International Law Review* 163; Article 3 (g) of the Annex to the A/RES/3314 (XXIX) of 14 December 1974.

<sup>37</sup> *Nicaragua case* (n 33 above) para 195; Byers (n 25 above) 407-408.

state may have exercised some level of ‘effective control or played active role’ in support of such NSAs.<sup>39</sup> This remained the position without much challenge prior to the 9/11 attacks, although, before then, a few states had employed extraterritorial force in the protection of their nationals abroad.<sup>40</sup> Even then, they were condemned by the international community because the attacks appeared as if they were armed reprisals and were directed at the states alleged to be harbouring the terrorists.<sup>41</sup> In most instances, the conduct of NSAs that trigger responses from states in self-defence are founded on transnational terrorism.<sup>42</sup> In the event however, that states respond in self-defence to the conduct of NSAs without attribution to another, the implication is that the law on self-defence has been or is being transformed.

Several years ago, when the US and Israel asserted the right of self-defence against non-state actors,<sup>43</sup> their argument had little support because the predominant view was that terrorist attacks were a form of criminal conduct that were to be addressed by domestic or international criminal justice mechanisms.<sup>44</sup> The use of force in self-defence against NSAs was available to states only if: (a) a state suffered a terrorist attack that met the gravity threshold of an armed attack; (b) the terrorist attack was attributable to a state; and (c) the force in self-defence complied with the requirements of necessity and proportionality.<sup>45</sup> As the ICJ jurisprudence has shown, the use of force by NSAs may justify a legitimate response under article 51 only if the attackers are agents of a state and the attack attains a certain gravity that could trigger a counter attack if it were undertaken by a state.<sup>46</sup> In *DRC v Uganda*, therefore, the ICJ found no rationale to attribute the conduct of the irregular armed groups to the Democratic Republic of Congo (DRC) and it held the plea of self-defence to be untenable.<sup>47</sup> The ICJ’s earlier decision in the *Palestinian Wall case* reached a similar

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<sup>39</sup> *Nicaragua case* (n 33 above) para 15; Cenic (n 34 above) 202.

<sup>40</sup> Israel used force against Lebanon in 1968, and Tunisia in 1985, while the USA employed force against Libya in 1986, Iraq in 1993, Sudan and Afghanistan in 1998.

<sup>41</sup> Gray (n 18 above) 194-198; Cassese (n 37 above) 996; Cenic (n 34 above) 202.

<sup>42</sup> Byers (n 25 above) 406.

<sup>43</sup> G Shultz ‘Low Intensity Warfare: The challenge of ambiguity’ (1986) 25 *International Legal Materials* 204, 206. Shultz (Secretary of State) stated that ‘It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations, even for the purpose of rescuing hostages; or from using force against states that support, train and harbour terrorists or guerrillas’.

<sup>44</sup> A Garwood-Gowers ‘Self-defence against terrorism in the Post 9/11 World’ (2004) 4 *Queensland University of Technology, Law and Justice Journal* 1; G Travaglio & J Attenburg ‘Terrorism, state responsibility, and the use of military force’ (2003) 4 *Chicago Journal of International Law* 97, 98 - 100; O’Connell (n 6 above) 445, 448 – 9; Cassese (n 37 above) 996.

<sup>45</sup> Garwood-Gowers (n 44 above) 6.

<sup>46</sup> *Nicaragua case* (n 33 above) para 195.

<sup>47</sup> *DRC v Uganda* (n 18 above), para 147.



conclusion where it reasoned that Israel failed to attribute the attacks against it to another state and, by virtue of being an occupying power, it could not embark on self-defence against itself.<sup>48</sup>

A contrary view has, however, been canvassed by certain commentators to the effect that a right to self-defence is available to states against NSAs without attributing their conduct to another state. They contend, in support, that, while the UN Charter specifies the right of a state to respond to an armed attack in self-defence, the Charter did not indicate the entity that is expected to carry out an armed attack.<sup>49</sup> This emerging view appears to be inspired by the 9/11 terrorist attacks on the US, the subsequent SC resolutions 1368 and 1373 thereto<sup>50</sup> and support for the US operations in self-defence by states and organisations.<sup>51</sup> This shows a momentum towards a shift in the body of international law. The European Union considered any reaction by the US to the initial terrorist attacks following resolution 1368 to be legitimate.<sup>52</sup> NATO invoked article 5 of its Washington Treaty while describing the terrorist attack on the US as an attack on all its members.<sup>53</sup> The near global support for *Operation Enduring Freedom* (OEF) following resolutions 1368 and 1373 could be interpreted to mean that attacks from NSAs that attain the scale and effect of an armed attack

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<sup>48</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion ICJ Reports (2004) paras 131, 139; see also O'Connell (n 6 above) 451; J Dugard 'Israel the occupying power instead of the victim' *Business Day Live*, Friday, February 06, 2015, also at <http://www.bdlive.co.za/opinion/2014/08/04/Israel-the-occupying-power-instead-of-the-victim> (accessed 06/02/2015).

<sup>49</sup> NA Shah 'Self-defence, anticipatory self-defence and pre-emption: International law's response to terrorism' (2007) 12 *Journal of Conflict & Security Law* 105; Garwood-Gowers (n 44 above) 5.

<sup>50</sup> Security Council Resolutions 1368 (2001) 12 September 2001 and 1373 (2001) 28 September 2001; Lubell (n 3 above) 35; T Franck 'Terrorism and the right to self-defence' (2001) 95 *The American Journal of International Law* 839 - 840; T Franck 'What happens now? The United Nations after Iraq' (2003) 97 *American Journal of International Law* 610; D Bethlehem 'Principles relevant to the scope of a State's right of self-defence against an imminent or actual armed attack by non-state actors' (2012) 106 *American Journal of International Law* 5; Antonopoulos (n 37 above) 162 - 172.

<sup>51</sup> 56 UNSCOR, 4414<sup>th</sup> Mtg, UN Doc S/PV, 4414 (2001). In this meeting held on 13 November 2001 Mr. Michel (Belgian Deputy Prime Minister and Minister for Foreign Affairs) while speaking for the European Union stated 'The European Union firmly supports the targeted military operations that began on 7 October, which are legitimate and in accordance with the terms of the Charter and Security Council Resolution 1368 (2001); J Wouters & F Naert 'Responding to International Terrorism: What Role for NATO and the EU, <http://www.law.kuleuven.be/jir/nl/onderzoek/opinies/JWFNeunatoTerrorism.pdf> (accessed 16/09/2014).

<sup>52</sup> Extraordinary European Council Meeting of 21 September; SN 140/01; see Myjer & White (n 38 above) 8; Cenic (n 35 above) 208.

<sup>53</sup> On 2 October 2001 NATO Secretary General, Lord Robertson stated 'It has been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all,' <http://www.nato.int/docu/speech/2001/s011002a.htm> (accessed 11/09/2014).



are capable of triggering a response from impacted states in self-defence, even without imputing such attacks to a state.<sup>54</sup> Hence, the law on self-defence is seen to be transforming.

The few states that opposed the resolve to embark on military force against NSAs in Afghanistan, such as Malaysia, Iran<sup>55</sup> and Iraq, could not hold sway. No sooner had military force been commenced against Afghanistan than Malaysia gave its support to the US campaign, stating that it was a legitimate action in self-defence.<sup>56</sup> The military operations of the US and NATO against Afghanistan have, however, been criticised by certain commentators.<sup>57</sup>

Armed attack, necessity and proportionality are key requirements in the determination of an action in self-defence.<sup>58</sup> Self-defence is triggered only where an armed attack occurs.<sup>59</sup> While necessity means that lethal force may be employed only in self-defence if other non-violent measures are unavailable to bring an attack to an end or to avert an imminent attack,<sup>60</sup> proportionality requires that even where lethal force is necessary, its application must not be unreasonable or excessive in relation to the need to avert the attack or bring the attack to an end, but must be proportional to the seriousness of the armed attack.<sup>61</sup> Nevertheless, some states have acted either within or outside these parameters or other international law frameworks to carry out lethal attacks on terrorists in the territories of other states.<sup>62</sup>

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<sup>54</sup> A Arnold 'The US use of force in Afghanistan: A study of its legality' (2008) *Journal of Politics and International Affairs* 68; Antonopoulos (n 37 above) 162-163; Lubell (n 3 above) 30 – 35.

<sup>55</sup> In the Security Council Meeting held on the 13 November 2001, Iranian representative Mr. Kharrazi in opposition to military force in Afghanistan stated 'I need to note that military action is not the solution.'  
<sup>56</sup> Garwood-Gowers (n 44 above) 10.

<sup>57</sup> S Hassan 'The legality of the United States intervention in Afghanistan: A public international law essay,' <http://www.americasc.org.uk/Online/Forum/Afghanlegality.htm> (accessed 11/09/2014).

<sup>58</sup> J Gardam *Necessity, proportionality and the use of force by states* (2004) 6; see also Shah (n 49 above) 123; *Nicaragua case* (n 33 above), para 194; *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* ICJ Reports (1996) 226 para 141; *Oil Platforms (Iran v USA)* ICJ Reports (2003) 161 para 43; *(DRC v Uganda)*( n 18 above) para 147; Byers (n 25 above) 406 (401 - 414).

<sup>59</sup> Art 51 of the UN Charter.

<sup>60</sup> Lubell (n 3 above) 44; Rule 3 of the Chattam House principles of international law on the use of force by states in self-defence, <https://www.chattamhouse.org/sites/default/files/public/.../ilpforce.doc> (accessed 10/11/2013).

<sup>61</sup> Lubell (n 3 above) 64 - 65, N Melzer *Targeted killing in international law* (2008) 201 - 203; Rule 5 of the Chattam House Principles (n 61 above); D Kretzmer 'Targeted killing of suspected terrorists: Extrajudicial executions or legitimate means of defence' (2005) 16 *The European Journal of International Law* 88; A Deeks 'Unwilling or unable: Toward a normative framework for extraterritorial self-defence' (2012) 52 *Virginia Journal of International Law* 494.

<sup>62</sup> Art 6 of the International Covenant for Civil and Political Rights, Art 3 of the Universal Declaration of Human Rights, Art 4 of the African Charter on Human and People's Rights, Art 4 of the American Convention on Human Rights and Art 2 of the European Conventions on Human Rights guarantee the right to life.

The compelling need for states and the international community to stop incidents of transnational terrorism, or to reduce it to the barest minimum, has been the reason for the extraterritorial use of force in self-defence against NSAs. Terrorism, which is at most times directed at civilians, deals with threats or actual violence that is intended to create fear, tension and anxiety with a view to coercing the targets or governments to conform to the demands of the perpetrators.<sup>63</sup> The hallmarks of terrorism, which include the taking of lives and large scale destruction, have been felt in every corner of the world as terrorism undermines both international human rights law (IHRL) and international humanitarian law (IHL).<sup>64</sup> As a result of the menace of terrorists, there is increased multilateral collaboration under the platform of the UN to fight terrorist groups.<sup>65</sup> The extraterritorial methods employed by states in fighting terrorism range from targeted killings<sup>66</sup> and kill/capture missions to full-scale military operations.

This study proceeds specifically to consider the counter-terrorism approaches of the US and Israel by comparing and contrasting the lethal measures they employ against perceived terrorist NSAs and the policy and legal basis for the use of such measures. In doing this, the study intends to give particular attention to the fact that, while both states rely, in most cases, on self-defence for the extraterritorial use of force against NSAs, Israel finds itself in a much more peculiar situation because, by being an occupier of Palestinian land, it has assimilated to itself additional international responsibilities. In disregard for frameworks that international law has provided to trammel the use of unbridled force by states, Israel and the US have introduced the policy of pre-emptive self-defence in their extraterritorial raids against NSAs. Furthermore, these countries and a few of their allies have sought to disregard the jurisprudence of the ICJ on the requirement of attribution for a legitimate use of force in self-defence by relying on innocently providing safe havens for NSAs as a rationale for self-

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<sup>63</sup> O Schachter 'The extraterritorial use of force against terrorist bases' (1988-1989) 11 *Houston Journal of International Law* 30

<sup>64</sup> Office of the High Commissioner for Human Rights 'Human rights, terrorism and counter-terrorism' 1, Fact Sheet No. 32, <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> (accessed 19/03/2016).

<sup>65</sup> C Oudraat 'Combating terrorism' (2003) 26 *The Washington Quarterly* 163-164.

<sup>66</sup> K Clark 'The Takhar attack: Targeted killing and the parallel worlds of US intelligence and Afghanistan' *Afghanistan Analyst Network* 1 – 36, <http://www.afghanistan-analyst/wp-content/1> (accessed 07/08/2013) For instance, targeted killing has been employed by the US in fighting terrorism in Afghanistan against the Islamic Movement of Uzbekistan (IMU) when the US Special Forces unit targeted Zabet Amanullah and nine innocent civilians who were following a political campaign in the Takhar Province of Pakistan on 2 September 2010; W Sharon 'The targeted killing of Salah Shehadeh' (2009) 7 *Journal of International Criminal Justice* 617 – 631; see also S Goldenberg '12 died in attack on Hamas' *The Guardian*, 23 July 2002.

defence. This explains the fact that the practices of Israel and the US have played significant roles in transforming the law of self-defence.

The aberrant conduct of these states particularly their continued reliance on pre-emptive self-defence which appears to have been rejected by majority of states, is exacerbated by their elastic interpretation of international norms with a view to giving themselves greater latitude to use force against NSAs. For instance, when Israel was challenged in the *Afu case* for the deportation of protected persons, contrary to article 41, paragraph 1 of the Fourth Geneva Convention (GC IV), the Chief Justice Shamgar interpreted the provision in a manner that is manifestly inconsistent with the Vienna Convention on the Law of Treaties, when he held that the Court should adopt the interpretation that is least restrictive of Israeli sovereignty.<sup>67</sup> In another case, the Israeli Court interpreted the provisions of the GC IV in relation to deportations and forcible transfers as concerning only mass deportations and not individual deportations as in the Israeli-Palestinian situation.<sup>68</sup> Kretzmer described the Court's reasoning as flagrantly inconsistent with the general jurisprudence of the Court and the fundamental principles of interpretation of the conventions on IHRL or IHL whose object is to grant protection to individuals against abuse of state power.<sup>69</sup> Similarly, the US has interpreted 'imminence' not in the sense of impending attack, but on other considerations and 'armed attack' under article 51 of the Charter as being much more than a specific violent attack and including preparatory steps prior to an attack.<sup>70</sup>

The question then is whether the Security Council resolutions 1368 and 1373 and the support by some states and regional bodies, such as the EU, OAS and NATO, for the US war against non-state actors (Al Qaeda) have transformed the law of self-defence.<sup>71</sup> The views expressed by commentators vary. Some scholars have argued in support of the crystallisation of a new customary law which allows the use of force in self-defence against non-state actors.<sup>72</sup> To

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<sup>67</sup> HCJ 785/87, *Afu et al v Commander of IDF Forces in the Judea and Samaria et al*, 42(2) PD, p 4, 1988, p 17; D Kretzmer 'The law of belligerent occupation in the Supreme Court of Israel' (2012) 94 *International Review of the Red Cross* 215-216.

<sup>68</sup> HCJ 2690/90 *Yesh Din-Volunteers for Human Rights et al v Commander of the IDF Forces in the West Bank-Major General Gadi Shamni*, paras 22-23, 71-72.

<sup>69</sup> Kretzmer (n 67 above) 215.

<sup>70</sup> H Meiertons *The doctrines of US security policy: An evaluation under international law* (2010) 203-208; see also The United States National Security Strategy of 2002, at <http://www.state.gov/documents/organisation/63562.pdf> (accessed 09/04/2016).

<sup>71</sup> Cenic (n 34 above) 208-210.

<sup>72</sup> Y Arai-Takahashi 'Shifting the boundaries of the right of self-defence – Appraising the impact of the September 11 Attacks on *jus ad bellum*' (2002) 36 *The International Lawyer* 1905; Garwood-Gowers (n 44 above) 11, 18.

some commentators, it remains unclear as to whether the events of 9/11 occasioned a radical and lasting transformation of the law of self-defence, and they have preferred to be non-aligned to either view.<sup>73</sup> Gray argued that OEF was essentially a one-off, a response to a particular incident based on Security Council affirmation and (almost) universal acceptance by states.<sup>74</sup> There is, however, near scholarly consensus that even if international law is not completely transformed, there is a lowering of the attribution threshold for military action to be taken against NSAs.<sup>75</sup> That is to say that the ‘effective control’ requirement espoused in the *Nicaragua case* has been lowered to accommodate passive support, so that merely harbouring NSAs is capable of triggering a response of self-defence from a victim state.<sup>76</sup>

The existing literature appears to be elaborate on the treatment of self-defence generally and as it appertains to states using force in self-defence against one another. Though the use of force against NSAs has also got scholarly attention to an extent, this study investigates the use of force in self-defence by states against NSAs in relation to the changing face of international law. It therefore considers relevant factors that have caused a shift in the law of self-defence such as SC resolutions 1368 and 1373 of 2001, the lowered threshold of attribution, state practice, scholarly opinions and multilateral support for the use of force against NSAs in self-defence under contemporary international law. Accordingly, this study sets out to interrogate the question of whether the law of self-defence as it relates to NSAs has been transformed.

## 1.2. Thesis Statement

International law permits the extraterritorial use of force by states against NSAs in self-defence under certain strict parameters. There has, however, been an exponential increase in recent times in the incidents, where states used force against NSAs without regard to such parameters. The object of this study is, thus, to discover whether there has been a change in the law of self-defence. In doing this, this study adopts a multidimensional approach to

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<sup>73</sup> Cassese (n 37 above), he stated ‘The magnitude of the terrorist attack on New York and Washington may perhaps warrant this *broadening of the notion of self-defence*. I shall leave here in abeyance the question whether one can speak of ‘instant custom’, that is of instantaneous formation of a customary rule widening the scope of self-defence as laid down in Art 51 of the UN Charter and in the corresponding rule of customary law. It is too early to take a stand on this difficult matter. Whether we are simply faced with an unsettling ‘precedent’ or with a conspicuous change in legal rules, the fact remains however, that this new conception of self-defence poses very serious problems.’

<sup>74</sup> Gray (n 18 above) 194, 198; Cenic (n 34 above) 210.

<sup>75</sup> Garwood-Gowers (n 44 above) 18.

<sup>76</sup> Cenic (n 34 above) 202.

considering whether the pre-emptive use of force, disregard for the requirement of attribution, resolutions 1368 and 1373 and the overwhelming support for the US OEF have caused a transformation of the law of self-defence.

### **1.3. Research Questions**

This study seeks to examine the present position of the law on self-defence with regard to whether the law of self-defence has been transformed. In doing this, the broad question that this study sets out to answer will be ‘whether international law on the use of force by states in self-defence against non-state actors has been transformed.’

Other questions include:

- a. Whether the law on self-defence on the use of force has, in the past, been transformed owing to societal changes or demands, and whether the conduct of the international organisations suggest a change on the law of self-defence in relation to NSAs?
- b. What exceptional circumstances would warrant a lawful extraterritorial use of force by states against non-state actors?
- c. Whether the current legal framework regulating extraterritorial use of force by states against NSAs is sufficient to cover terror acts and counter-terrorism?
- d. Whether state practice reflects a change or transformation in the law on the use of force against NSAs?

### **1.4. Methodology**

The study defines and makes clarification of certain words, terms and concepts with a view to giving meaning and understanding to them in the context in which such terms are used in this study. The research study has employed an amalgam of descriptive, analytical and comparative methods. Firstly, a descriptive survey of international and regional normative and institutional frameworks dealing with the regulation of the use of force by states will be made. This shows the need for states to abide by the norms of international law to accomplish the reasons for which the UN and other regional institutions were established. The UN Charter, ICJ decisions and other legal frameworks will be examined. These instruments and judgments point to the state of the law and they have, no doubt, contributed immensely to the findings and conclusions of this study. Equally, an analytical method will be employed to examine the notion of the extraterritorial use of force in self-defence with specific regard to lawful circumstances in which states may use force in self-defence under international

law. These lawful circumstances are Security Council authorization, self-defence and intervention by consent. Similarly, an analysis of terrorism will be done with a view to identifying the obligations of both the United Nations and states in the fight against terrorism and ascertaining whether the steps being taken in that regard are appropriate.

This study also adopts a comparative method with a view to revealing the similarities and dissimilarities in the mode of conducting extraterritorial forcible measures in self-defence by the US and Israel in response to alleged terrorist attacks from NSAs. Several reasons have informed the choice of these two states for the comparative studies. The comparison underscores the contributions of the practices of these two states in transforming the law of self-defence. Firstly, they have the most sophisticated and formidable counter-terrorism infrastructure and they are leading states in the fight against terrorism, particularly in the Arab world. Secondly, they appear to be the most cooperative countries in the world as Israel's influence is deeply rooted in the US foreign policy. The Israel lobby group, the American and Israel Public Affairs Committee (AIPAC), is entrenched in the American political life and skews foreign policy decisions in favour of Israel. This relationship accounts for the incessant invocation of the US veto in the SC to block criticisms or condemnations of Israel. Thirdly, they profess to be democracies, though some commentators have doubted the democratic claim by Israel because of its sustained denial of basic rights for Palestinians and the brutal military incursions into the OPT.<sup>77</sup>

The study will rely on primary and secondary sources including statutes, case law (particularly ICJ decisions), government regulations, international and regional instruments, constitutive instruments of international organisations, intergovernmental reports, country reports, regional and international agency reports, UN resolutions, books, scholarly journal articles, newspaper articles, and other internet sources. The research will be generally library based.

## **1.5. Literature Review**

The extraterritorial use of force triggers sovereignty concerns which threaten world peace and it has, therefore generated considerable interest from legal commentators. Accordingly there is no paucity of scholarly works relative to the subject matter. Rather, the literature

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<sup>77</sup> J Cook 'Defending Israel from democracy' *The Electronic Intifada*, 5 June 2007.



increased radically after the 9/11 attacks in the US which ultimately stimulated a new consciousness that gave credence to the argument that armed attacks from non-state actors could trigger a response in self-defence.<sup>78</sup> The existing literature was quite useful to this study. This study is, nevertheless, an original contribution to scholarship regarding the contemporary debate on the transformation of the law of self-defence because of its different approach. Its approach departs from the existing literature to evaluate the use of force in self-defence against NSAs in relation to causing a shift in the body of international law.

The ancient Greek and Roman Empires were among the earliest groups to make efforts to prohibit the use of force with the formalisation of security pacts and non-aggression treaties.<sup>79</sup> Brownlie, Dinstein,<sup>80</sup> Martin,<sup>81</sup> McCoubrey and White<sup>82</sup> surveyed the evolutionary history of the constraints on the use of force from the writings of ancient philosophers such as Aristotle and Cicero, and Christian theologians such as Augustine, Aquinas, Vitoria and several others. During this era, the resort to war or the use of force was founded on just cause.<sup>83</sup> Martin even took a step further by considering national constitutional and legislative measures prohibiting the use of force, but that is outside the scope of this work.<sup>84</sup> While the historical background they provided is relevant to this study and it is captured, the emphasis of this study is on the contemporary international law frameworks that regulate the use of force.

Certain commentators have discussed the extraterritorial use of force against NSAs through three different paradigms or legal frameworks.<sup>85</sup> These paradigms are the ‘inter-state use of force’ which relates to the Charter framework that regulates the resort to force in the territory of other states, the law of armed conflict (LOAC) or IHL and the law enforcement framework which relates to human rights law. This study, however, dwells only on the inter-

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<sup>78</sup> Antonopoulos (n 37 above), 159 - 172; Odle (n 27 above) 604 - 659; J Paust ‘Self-defence targeted killings of non-state actors and permissibility of U.S. use of drones in Pakistan’ (2010) 19 *Journal of Transnational Law and Policy* 237 - 280; Brown (n 21 above) 1 - 53; K Trapp ‘Back to basics: Necessity, proportionality, and the right of self-defence against non-state actors’ (2007) 56 *International and Comparative Law Quarterly* 141 - 156.

<sup>79</sup> I Brownlie *International law and the use of force by states* (1963) 4 - 5; C Martin ‘Taking war seriously: A model for constitutional constraints on the use of force in compliance with international law’ (2011) 76 *Brooklyn Law Review* 633 - 634.

<sup>80</sup> Dinstein (n 31 above) 65-69.

<sup>81</sup> Martin (n 79 above) 633-639.

<sup>82</sup> H McCoubrey & N White *International law and armed conflict* (1992) 5.

<sup>83</sup> Martin (n 79 above) 634 - 635; McCoubrey & White (n 82 above) 5.

<sup>84</sup> Martin (n 79 above) 639-642.

<sup>85</sup> Melzer (n 61 above) 51- 60; Lubell (n 3 above) 25 - 192.

state use of force paradigm, out of the three paradigms which Melzer and Lubell examined. In addition, in his analyses of extraterritorial use of force by states, Franck identified state sponsored terrorism, ideological subversion and the protection of citizens abroad as bases for self-defence.<sup>86</sup> The approach of this study is, however, limited to terrorism as the sole reason for extraterritorial forcible measures. This study also subscribes to the view of some scholars that certain confrontations between some states and NSAs have not attained the threshold of an armed conflict, despite the fact that the US speaks of an international war against terrorism.<sup>87</sup>

Two views have been canvassed regarding the proper purport of self-defence contemplated under Article 51 of the Charter. While commentators in the first school advocate a restrictive interpretation of self-defence,<sup>88</sup> the second school gives a wider interpretation to self-defence.<sup>89</sup> The proponents of the restrictive approach have argued that anticipatory and pre-emptive self-defence cannot be read into Article 51, and that doing so will offend the canons of interpretation.<sup>90</sup> Hamid's reasons for holding this view are materially the same as those of Dinstein who contends that any other interpretation of Article 51 outside its literal meaning will be counter textual, counter factual and counter logical.<sup>91</sup> Furthermore, this school contends that the ICJ affirms the existence of an armed attack to trigger the employment of lethal force in self-defence as contained in the rulings of the *Nicaragua case*,<sup>92</sup> *Oil Platforms case*,<sup>93</sup> *Palestinian Wall case*,<sup>94</sup> and the *DRC case*.<sup>95</sup>

On the other hand, the second school posits that Article 51 leaves the customary right of self-defence unimpaired,<sup>96</sup> and it also states that this era of nuclear weapons and

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<sup>86</sup> Franck (n 22 above) 53 – 96.

<sup>87</sup> Gray (n 18 above) 1 – 2.

<sup>88</sup> AG Hamid 'The legality of anticipatory self-defence and the 21<sup>st</sup> Century World Order: A re-appraisal' (2007) *Netherlands International Law Review* 447 - 484; Dinstein (n 31 above) 193 – 200.

<sup>89</sup> L Van den hole 'Anticipatory self-defence under international law' (2003) 19 *American University Law Review* 69 - 106.

<sup>90</sup> Art 31 of the Vienna Convention on the Law of Treaties (1969).

<sup>91</sup> Dinstein (n 31 above) 193 - 200.

<sup>92</sup> *Nicaragua Case* (n 33 above) para 194.

<sup>93</sup> *Oil Platforms case* (n 58 above) para 78; see also N Ochoa-Ruiz & E Salamanca-Aguado 'Exploring the limits of international law relating to the use of force in self-defence' (2005) 16 *The European Journal of International Law* 510 – 511.

<sup>94</sup> *Palestinian Wall case* (n 48 above) para 136.

<sup>95</sup> Hamid (n 88 above) 455 - 456.

<sup>96</sup> Van den hole (n 89 above) 72; M Glennon 'The fog of law: self-defence, inherence, and incoherence in Art 51 of the United Nations Charter' (2001-2002) 25 *Harvard Journal of Law and Public Policy* 349 - 558; S Hamauswa & C Manyeruke 'A critique of United States' application of Art 51 of the United Nations Charter in Iraq and Afghanistan' (2013) 4 *International Review of Social Sciences and Humanities* 229.



sophisticated missile systems has made it imperative that anticipatory self-defence be employed.<sup>97</sup> Arguing in support of the expanded interpretation of self-defence,<sup>98</sup> Glennon highlights the confusion in Article 51 as to what constitutes an armed attack, and he argues that the entire gamut of the opposing arguments in respect of restricted or expanded interpretation of article 51 is brought about by the construction of the article.<sup>99</sup> According to him, article 51 says, in one breath, that self-defence is ‘inherent’ and, thereafter, it turns around to say, ‘if an armed attack occurs’.<sup>100</sup> Even within the expanded meaning of self-defence, anticipatory and pre-emptive self-defence are distinguished from each other, arguing that while anticipatory self-defence is lawful, pre-emptive self-defence is not.<sup>101</sup>

In the fight against terrorism, states employ a variety of lethal operations, but targeted killing is the modern method of choice for self-defence against non-state actors, and it has become a fertile area of scholarship from 2000 when Israel publicly admitted its employment of this method of fighting terrorism.<sup>102</sup> Like Israel, the US has also admitted to its policy of targeted killings on several occasions.<sup>103</sup> Alston,<sup>104</sup> Kwoka,<sup>105</sup> Mckelvey,<sup>106</sup> and Murphy and Radsan<sup>107</sup> have all queried the constitutionality or due process in targeted killing as a method of employing inter-state force. Murphy and Radsan considered the due process right of judicial review that is available to detainees<sup>108</sup> with case studies of *Hamdi v Rumsfeld*<sup>109</sup>

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<sup>97</sup> Shah (n 49 above) 112; see also W Reisman & A Amstrong ‘The past and future of the claim of pre-emptive self-defence’ (2006) 100 *American Journal of International Law* 526.

<sup>98</sup> Glennon (n 96 above) 552 - 553.

<sup>99</sup> Glennon (n 96 above) 553 – 555.

<sup>100</sup> Glennon (n 96 above) 553.

<sup>101</sup> Shah (n 49 above) 111 - 112.

<sup>102</sup> O Ben-Naftali & K Michaeli ‘We must not make a scarecrow of the law: A legal analysis of the Israeli policy of targeted killings’ (2003 - 2004) 36 *Cornell International Law Journal* 234; P Alston ‘Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions’ May 28, 2010, UN Doc. A/HRC/14/24/Add.6, para 13.

<sup>103</sup> J Brennan ‘The ethics and efficacy of the President’s counterterrorism strategy’, Speech at the Woodrow Wilson International Center for Scholars on 30 April 2012, <http://www.lawfareblog.com/2012/04/brennans> (accessed 20/03/2014); H Koh ‘The Obama Administration and international law’, Keynote Address at the Annual Meeting of the American Society of International Law on 25 March 2010, <http://www.lawfareblog.com/wp-content/uploads> (accessed 20/03/2014).

<sup>104</sup> P Alston ‘The CIA and targeted killings beyond borders’ (2011) 2 *Harvard National Security Journal* 283 - 443.

<sup>105</sup> L Kwoka ‘Trial by sniper: The legality of targeted killing in the war on terror’ (2011) 14 *Journal of Constitutional Law* 301 - 325.

<sup>106</sup> B Mckelvey ‘Due process rights and the targeted killing of suspected terrorists: The unconstitutional scope of executive killing power’ (2011) 44 *Vanderbilt Journal of Transnational Law* 1354 – 1384.

<sup>107</sup> R Murphy & J Radsan ‘Due process and targeted killing of terrorists’ (2009) 31 *Cardozo Law Review* 405 -450.

<sup>108</sup> Murphy & Radsan (n 107 above) 409-412.

<sup>109</sup> *Hamdi v Rumsfeld* 542 U.S. 507 (2004) where it was held that American citizens who are detained as combatants are entitled to due process guarantees.

and *Boumediene v Bush*.<sup>110</sup> Their contention is that the US policy of targeted killing in self-defence is lacking in transparency and accountability because of the absence of judicial review and legislative oversight. Also writing on lack of accountability and transparency in extraterritorial use of force in self-defence, Heyns and Knuckey<sup>111</sup> have expressed concern over implications inherent in the increased and expanded application of targeted killings outside the confines of law.<sup>112</sup> While this study generally discusses the disregard for international norms, particularly by the US and Israel in their extraterritorial operations, just as Franck,<sup>113</sup> Gray<sup>114</sup> and Glennon<sup>115</sup> have done, it will not specifically examine issues of transparency and accountability.

The concept of sovereignty is central to the extraterritorial use of force, whether against a state or a NSA. The host state's sovereignty is used by the terrorist organisation as a shield to deter and inhibit retaliation from the victim state.<sup>116</sup> Deeks had also discussed the constraints placed on the extraterritorial use of force by principles of territorial sovereignty,<sup>117</sup> and argued that such sovereignty is pierced when the victim state relies on the unwilling or unable test. The test requires the victim state to verify whether the host state is either unwilling or unable to prevent attacks from its territory. Many states including the US,<sup>118</sup> Turkey,<sup>119</sup> Israel, Iran and Russia have used this test to employ extraterritorial force in self-defence. Both commentators justified the controversial US incursion into Pakistan for being 'unwilling or unable' to halt terrorist activities from its territory.<sup>120</sup> The 'unwilling or unable' doctrine is copiously reflected in this study and it went further to argue that

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<sup>110</sup> *Boumediene v Bush* 128 S. Ct. 2229 (2008) where the Court held that non-American detainees at Guantanamo Bay had a constitutional right to seek a *habeas corpus* review in federal courts in compliance with due process guarantees.

<sup>111</sup> C Heyns & S Knuckey 'The long-term implications of targeted killing practices' (2013) 54 *Harvard International Law Journal* 101 - 114.

<sup>112</sup> Heyns & Knuckey (n 111 above), 106.

<sup>113</sup> Franck 'What happens now: The United Nations after Iraq (2003) 97 *American Journal of International Law* 608.

<sup>114</sup> C Gray 'The use and the abuse of the international Court of Justice: Cases concerning the use of force after Nicaragua' (2003) 14 *The European Journal of International Law* 867 - 905; see also Franck (n 113 above) 607 - 620.

<sup>115</sup> Glennon (n 96 above) 540-541.

<sup>116</sup> Williams (n 31 above) 619 - 641.

<sup>117</sup> Deeks (n 61 above) 483 - 550; also A Deeks 'Pakistan's sovereignty and the killing of Osama bin Laden' (2011) 15 *American Society of International Law Insights* 1 - 4.

<sup>118</sup> Williams (n 31 above) 626; see also A Entous & S Gorman 'US slams Pakistani efforts on militants' *Wall Street Journal*, October 6, 2010, <http://online.wsj.com/articles/s810001424052748> (accessed 10/08/2013).

<sup>119</sup> Minister of Foreign Affairs of Turkey, Letter dated January 3, 1997 addressed to the Secretary-General and President of the Security Council, UN Doc, S/1997/7 (January 3, 1997).

<sup>120</sup> Williams (n 31 above) 626; also Deeks (n 120 above) 545, President Obama stated, "if the United States has Al-Qaeda, (Osama) bin Laden, top-level lieutenants in our sights, and Pakistan is unwilling or unable to act, then we should take them out."

interventions on this basis are not always genuinely to fight terrorism or for the benefit of the territorial state, but sometimes were used as an excuse to further the national interest of the states claiming self-defence.

There is also considerable country-specific literature on the US and Israeli policies of extraterritorial use of force against NSAs. This thesis has benefited from such scholarly writings on these two states and has used it as basis to formulate a comparative analysis of the US and Israel. Solis,<sup>121</sup> Statman,<sup>122</sup> David,<sup>123</sup> Byman,<sup>124</sup> Gregory,<sup>125</sup> Arnold,<sup>126</sup> Odle<sup>127</sup> and Blum and Heymann<sup>128</sup> evaluated the US and Israeli extraterritorial counterterrorism policies with regard to the lawfulness or otherwise of these policies. In their analysis, David,<sup>129</sup> Solis<sup>130</sup> and Byman<sup>131</sup> considered the inherent advantages and disadvantages of targeted killings in self-defence. This study could not find any consensus in their views as to whether the advantages outweigh the disadvantages or *vice versa*. But the fact that targeted killings trigger retaliatory attacks, increase martyr-seeking terrorists, result in a dearth of Palestinian negotiating partners<sup>132</sup> and cause collateral damages resonated in the analysis by some of them.<sup>133</sup> While it is conceded that there may be some short-term advantages arising from the targeted killing of leading terrorist NSAs, this study holds the view that in the long run, targeted killings may do more harm than good in terms of pursuing international peace and security.

The legal debate on the transformation of the law of self-defence or otherwise reveals sharply split of scholarly opinion. While certain states and scholars contend that the law of self-defence in relation to NSAs has changed,<sup>134</sup> others contend that the events of 9/11 and

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<sup>121</sup> G Solis 'Targeted killing and the law of armed conflict' (2007) 60 *Naval War College Review* 127-142.

<sup>122</sup> D Statman 'Targeted killing' 1-17, at <http://www.ucl.ac.uk/-uctyho/StatmanTargetedKilling.html> (accessed 23/05/2012).

<sup>123</sup> SR David 'Israel's policy of targeted killing' (2003) 17 *Ethics and International Affairs* 111-126.

<sup>124</sup> D Byman 'Do targeted killings work?' (2002) 85 *Foreign Affairs* 95-111.

<sup>125</sup> D Gregory 'From a view to a kill: Drones and late modern war' (2011) 28 *Theory, Culture and Society* 188-215.

<sup>126</sup> Arnold (n 54 above) 63-84.

<sup>127</sup> Odle (n 27 above) 603-659.

<sup>128</sup> G Blum & P Heymann 'Law and policy of targeted killing' (2010) 1 *Harvard National Security Journal* 145-170.

<sup>129</sup> S David 'Fatal choices: Israel's policy of targeted killing (2002) 51 *Mideast Security and Policy Studies* 1 - 26.

<sup>130</sup> Solis (n 121 above) 140 – 142.

<sup>131</sup> Byman (n 124 above) 96 - 111.

<sup>132</sup> David (n 129 above) 8 - 9.

<sup>133</sup> Solis (n 121 above) 140.

<sup>134</sup> Garwood-Gowers (n 44 above) 11 - 12; Arai-Takahashi (n 72 above) 1094 – 1095; Byers (n 25 above) 414; M Wood 'The law on the use of force: Current challenges' (2007) 11 *Singapore Year Book of*

the subsequent state practice have not transformed the law in any material way.<sup>135</sup> The approach of certain commentators is, however, cautious, fearing that it is too early to take a definite stand on the debate.<sup>136</sup> Cenic rather suggested the need to create a new threshold of state responsibility that is wider than that which the *Nicaragua case* formulated, but narrower than merely harbouring non-state actors.<sup>137</sup> The nitty-gritty of this study is, therefore, to analyse these opposing arguments with a view to clarifying the contemporary position of the law of self-defence. It is not out of place to indicate from onset that this study is persuaded by the reasoning that the law of self-defence has been transformed.

## 1.6. Significance of the study

This study contributes to the thorny debate of the lawfulness or otherwise of the extraterritorial use of force against NSAs, particularly without attributing the conduct of such NSAs to other states. It is significant on the grounds that it highlights one of the most serious challenges to the contemporary global security architecture which states, both weak and powerful have been grappling with as can be discerned from the agenda of the political organs of the UN. Its significance is further underscored by the fact that it examines the law on self-defence both before and after 11 September 2001, giving consideration to the question whether the terrorist attacks on the US and the response that followed thereafter has changed the law on self-defence in any form.

This study will no doubt do an expository on the extraterritorial application of force with a view to enhancing an understanding of the phenomenon and the limits provided by international law on states that have allegedly suffered terrorist attacks. The recommendations of this study will also assist policy makers in the international community with suggestions on how to approach this global problem, including the regulation of the proliferation of terrorist groups and the need for the reform of the SC as a confidence-building measure. This study will ultimately stimulate renewed thinking by world leaders to evolve methods of coping with this global menace.

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*International Law* 6; N Ronzitti 'The expanding law of self-defence' (2006) 11 *Journal of Conflict & Security Law* 348.

<sup>135</sup> JJ Paust 'Use of armed force against terrorists in Afghanistan, Iraq and beyond' (2002) 35 *Cornell International Law Journal* 540.

<sup>136</sup> Cassese (n 37 above) 996 – 997; R Johnstone 'State responsibility: A concerto for court, council and committee' (2008) 37 *Denver Journal of International Law & Policy* 92 – 93.

<sup>137</sup> Cenic (n 34 above) 203, 213.

## 1.7. Conceptualisation of terminologies

### 1.7.1. Extraterritorial use of force

While the Black's Law Dictionary defined 'extraterritorial' as 'beyond the geographical limits of a particular jurisdiction',<sup>138</sup> The Concise Oxford Dictionary defined it as 'situated outside a country's territory'.<sup>139</sup> Extraterritorial use of force in the context of this study refers to lethal or military measures taken by a state outside its recognised borders.<sup>140</sup> For the purpose of this study, such extraterritorial measures are employed by a state in a foreign territory in which it has no effective control or where it exercises control by virtue of being in occupation. For instance, the Palestinian territory which is under Israeli occupation since 1967 will form part of such actions that are considered in this study.

Terrorists are individuals, or members of an organisation who perpetrate crimes that create terror or apprehension in a target population with the aim of influencing decisions of a government or other organisations.<sup>141</sup> Extraterritorial use of force against NSAs in this study refers to the employment of forcible measures by a state (outside state) against terrorists in the territory of another state (territorial state).<sup>142</sup> Extraterritorial forcible measures range from bombings by airborne systems, kill-capture missions and large-scale military operations.<sup>143</sup> Such use of extraterritorial force in the relations of states is not a new or strange phenomenon, as it has become a common practice in contemporary international law.<sup>144</sup> Guiora observed that Israel has been involved in taking forcible measures in self-defence against NSAs by way of targeted killings since June 1967.<sup>145</sup> Apart from employing force against terrorists within the borders of other states, as has been the case of US forcible measures against Al Qaeda and the Taliban in Afghanistan,<sup>146</sup> Israel's use of force in the

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<sup>138</sup> BA Garner *Black's Law Dictionary* (West Publishing Co. 2004) 8<sup>th</sup> edn. 625.

<sup>139</sup> J Pearsall *The Concise Oxford Dictionary* (OUP, 1999) 505.

<sup>140</sup> Lubell (n 3 above) 13.

<sup>141</sup> G Glickman 'Who are the terrorists?' *Counter Punch*, 27 August 2013, at <http://www.counterpunch.org/2013/08/27/who-are-the-terrorists/> (accessed 17/07/2015).

<sup>142</sup> Lubell 3. UN Doc. A/RES/3314 of 14 December 1974.

<sup>143</sup> Lubell (n 3 above) 3.

<sup>144</sup> Lubell (n 3 above) 3; C Ryngaert 'Extraterritorial use of force against non-state actors by Noam Lubell-Book Review' (2012) 13 *Melbourne Journal of International Law* 9.

<sup>145</sup> A Guiora 'Targeted killing as active self-defence' (2004) 36 *Case Western Reserve Journal of International Law* 319.

<sup>146</sup> Arnold (n 54 above) 63.

OPT against Hamas, Islamic Jihad and other terrorist groups also falls under the extraterritorial use of force against non-state actors.<sup>147</sup>

Though in most cases terrorists are understood to be independent organised armed groups that operate outside the control of states, there are instances where these organisations have been procured and utilised by states as their agents to carry out cross-borders attacks.<sup>148</sup> State-sponsored terrorist attacks, thus, equally trigger the extraterritorial use of force in self-defence against states directly for their complicity in acts of terrorism. Libyan alleged involvement in transnational terrorism is an example in this regard.<sup>149</sup> Furthermore, it has been suggested that extraterritorial forcible measures are also available against pirates for their conduct at sea.<sup>150</sup> Piracy is defined under the United Nations Convention on the Law of the Sea (UNCLOS) of 1982,<sup>151</sup> and it constitutes an offence against the law of nations because it is destructive to international commerce. All nations are empowered to capture

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<sup>147</sup> Ben-Naftali & Michaeli (n 102 above) 233-292.

<sup>148</sup> Schachter (n 63 above) 310.

<sup>149</sup> Firstly, a Berlin night club that was being frequented by US soldiers was bombed on 4 April 1986 by alleged agents of Libya. While three persons died in the attack, about 229 others were injured. Claiming self-defence against state-sponsored terrorism as its rationale the US launched *Operation El Dorado Canyon*, which took the form of an aerial attack on Libyan targets at Tripoli and Benghazi. In one of these attacks, Gaddafi's adopted daughter Hanna was killed. The action of the US was condemned by the UN General Assembly. See Franck (n 23 above) 89-90; A/RES/ 41/38 of 20 November 1986. Secondly, Libya was alleged to have been involved in the Lockerbie incident of 21 December 1988 in which a Pan Am Flight 103 from London to New York was bombed over Lockerbie in Scotland. 259 passengers and crewmembers aboard the plane were killed in the incident and 11 others on the ground in Lockerbie. Libyan authorities accepted liability for the incident and agreed to pay \$8 million dollars to the families of each of the victims. The Lockerbie incident remained controversial because allegations have also been made against Iran as being responsible for the bombing in retaliation for US navy's strike on Iranian passenger jet. See J Greenpeace 'Remembering the 1988 Lockerbie bombing' *History in the Headlines*, 20 December 2013, <http://www.history.com/news/remembering-the-lockerbie-bombing> (accessed 20/11/2014); G Rayner 'Lockerbie bombing 'was work of Iran, not Libya' says former spy,' *The Telegraph*, 20 November 2014. A former Iranian intelligence officer and defector to Germany, Abolghassen Mesbahi made the allegation implicating Iran.

<sup>150</sup> A Thorp 'Preventing and prosecuting piracy at sea: Legal issues' (2012) *House of Commons Library*, <http://www.parliament.uk/business/committees/committees-a-z/commons-select/foreignaffairs-committee/news/piracy---reports/> (accessed 11/11/2014); A Manners 'British drones may be used against Somali Pirates' *Future Directions International*, available at <http://www.futuredirections.org.au/publications/indian-ocean/29/indian-ocean-swa/849-british-drones-may-be-used-against-somali-pirates> (accessed 21/03/2015); JE Barnes 'U.S. expands drone flights to take aim at East Africa' *The Wall Street Journal*, 21 September 2011; L Ploch et al 'Piracy off the horn of Africa' 27, *Congressional Research Service (CRS)*, 27 April 2011.

<sup>151</sup> Art 101 of the United Nations Convention on the Law of the Sea defined piracy thus: Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b); see also Lubell (n 3 above) 108; F Sperotto 'The use of force against terrorists: A reply to Christian J. Tams' (2010) 20 *European Journal of International Law* 1047.



and punish pirates<sup>152</sup> and could seize a pirate vessel, aircraft or property without the consent of the owners of the flag ship.<sup>153</sup> The use of force extraterritorially against states or pirates is, however, outside the scope of this study.

### 1.7.2. Non-state actors

These are non-sovereign entities that sometimes wield economic and political power that influences national and international relations as a result of the globalisation-induced diffusion of technology and finance, thereby positioning themselves strategically to perform tasks that only states performed previously. Recent years have witnessed the proliferation of NSAs that primarily include multinational corporations, non-governmental organisations (NGOs) and philanthropic super-powered individuals. Terrorists, like the groups identified above, are among the NSAs. With the increase in the power of NSAs, they sometimes challenge the state central authority and influence political change.<sup>154</sup> While the existence of multinationals is driven by the quest for profit and growth, the NGOs are private, self-governing, voluntary non profit or interest oriented advocacy organisations. The terrorist NSAs exist as armed groups that employ force to achieve political and ideological ends. In a nutshell, a terrorist NSA is an organised armed group that has a command structure, operating outside the control of a state and are using force to achieve political ends.<sup>155</sup> According to Lubell, NSAs are individuals or groups who are not acting on behalf of a state, are not part of any state apparatus, and, therefore, maintain an independent identity and existence from a state.<sup>156</sup>

Terrorist NSAs are found in weak states, developing and developed states, and their proliferation is sometimes made possible by the out-sourcing of state power. For instance, the alleged engagement of the mujahideen by the CIA to confront Soviet troops in Afghanistan largely contributed to the emergence of Al Qaeda.<sup>157</sup> In the face of the growth of NSAs with highly destructive capabilities, the agreements on the non-proliferation of

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<sup>152</sup> R Wedgwood 'Responding to terrorism: The attacks against bin Laden (1999) 24 *The Yale Journal of International Law* 564.

<sup>153</sup> Thorp (n 150 above).

<sup>154</sup> O Schachter 'The decline of the Nation-state and its implications for international law' (1998) 36 *Columbia Journal of Transnational Law* 12-16.

<sup>155</sup> A Mishra 'Terrorism in the 21<sup>st</sup> Century: Battling non-state actors' *Indian Defence Review*, 31 March 2016.

<sup>156</sup> Lubell (n 3 above) 14-15.

<sup>157</sup> T Stratton 'Power failure: The diffusion of state power in international relations' (2008) *Infinity Journal* 3.

WMD are designed to constrain states only, when, in fact, the future challenge to international peace lies with the proliferation of weapons by terrorist NSAs.<sup>158</sup>

### 1.7.3. Transformation

The term ‘transformation’ is described as a ‘marked change in nature, form or appearance.’<sup>159</sup> Its proper purport becomes clearer when it is considered in relation to its synonyms such as alteration, change, conversion, metamorphosis, renewal, revolutionary change, transfiguration, transmutation and transmogrification.<sup>160</sup> Transformation as it is used in the context of this study thus refers to a change in the law of self-defence in relation to the use of force against NSAs.

### 1.7.4. Self-defence

This refers to the use of force to protect oneself, one’s family or one’s property from a real or threatened attack. Thus, a person is justified in using a reasonable amount of force in self-defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to avoid this danger. Under international law, which is the concern of this study, self-defence refers to the right of a state to defend itself against a real or threatened attack.<sup>161</sup> Article 51 of the UN Charter which is an embodiment of the contemporary law of self-defence does not explain what self-defence entails, but it indicates that it is an inherent right that is individually or collectively available to states in the event of an armed attack.<sup>162</sup> Since the entire *corpus* of international law is considered to be state-centric, it is expected that self-defence is available only against other states.<sup>163</sup> This point is, however, not quite clear because the Charter does not specify the author of an armed attack against whom a response in self-defence lies.<sup>164</sup> In the context used in this study and as the topic suggests, however, self-defence refers to an armed or lethal response by a state against a NSA for authoring or perpetrating an armed attack.

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<sup>158</sup> A Blum, V Asal & J Wilkenfield ‘Non-state actors, terrorism, and weapons of mass destruction’ (2005) 7 *International Studies Review* 133.

<sup>159</sup> Pearsall (n 139 above) 1523.

<sup>160</sup> Collins Thesaurus (1995) 961.

<sup>161</sup> Garner (n 138 above) 1390.

<sup>162</sup> Art 51 of the UN Charter.

<sup>163</sup> *Palestinian Wall case* (n 48 above) para 139.

<sup>164</sup> EE Hertz ‘Article 51-The right to self-defence: The international Court of Justice (ICJ) & the Goldstone Report’ Myths and Facts 1, at <http://www.mythsandfacts.org/media/user/documents/article-51-document.pdf> (accessed 03/04/2016).



### **1.7.5. Pre-emptive self-defence**

Murphy defined ‘pre-emptive self-defence’ as the use of armed coercion by a state to prevent another state or NSA from pursuing a particular course of action which is not yet directly threatening, but which, if permitted to continue, could result at some future point in an act of armed coercion against the first state.<sup>165</sup> Pre-emptive and anticipatory self-defence are sometimes conflated and used interchangeably by commentators since both concepts refer to future actions. Anticipatory self-defence, is denoted by the ‘imminence’ of the threat in question, while the threat that pre-emptive self-defence tackles is remote and not palpable. In this study, pre-emptive self-defence refers to an armed response to a threat of an armed force that is not imminent.

## **1.8. Scope and limitation of study**

The extraterritorial use of force in self-defence is a wide concept and it encompasses the application of force against other states and NSAs for a variety of reasons including the protection of nationals abroad, state-sponsored terrorism and terrorism in the territories of other states. This thesis primarily examines the use of force extraterritorially by states against NSAs in the territories of other states which is subsumed in the wider concept of the use of force by states in international law. The use of force by states against one another is, thus, outside the scope of this study, though references are constantly made to states to draw examples with a view to illuminating the point of view of this thesis. While an emerging trend indicates the possibility of employing extraterritorial force against pirates and the US has also listed drug barons in their kill lists for targeting, these are also outside the scope of this thesis. State sponsored-terrorism may be alluded to, in respect of Libya or other states, but it is also not discussed in concrete terms as it falls outside this scope of the study.

The thesis primarily interrogates the alleged transformation of the law of self-defence as it relates to NSAs. The investigation is done while limiting the evaluation to likely changes in the law brought about by SC resolutions 1373, the use of pre-emptive self-defence by some states, a disregard for the attribution requirement and the overwhelming support for the US declared military operations against Al Qaeda and the Taliban. Though the study is not manifestly limited in terms of geographical scope, it, has, however, selected the US and

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<sup>165</sup> S Murphy ‘The doctrine of pre-emptive self-defence’ (2005) 50 *Villonova Law Review* 703.

Israel for the comparative analysis because of their being in the fore-front of the fight against terrorism and their advanced and sophisticated counter-terrorism methods.

## **1.9. Overview of Chapters**

This study is presented in eight chapters. Chapter one provides the introduction to the study with particular reference to the background, thesis statement, research questions, methodology, literature review, significance of the study, scope and limitation of the study.

Chapter two surveys the evolution of the regulation of the use of force with particular consideration of all the important normative and institutional frameworks that have been established to constrain the once unbridled use of force. Starting from the just war theory as was postulated by classical Greek and Roman scholars and theologians, the study examines the Hague Conventions of 1899 and 1907, the League of Nations Covenant of 1918, Kellogg-Briand Pact of 1928 and the UN Charter of 1945. Some of the UN key resolutions and regional instruments that sought to reinforce the prohibition contained in the UN Charter by also containing provisions that ban the use of inter-state force will also be considered.

Chapter three considers the exceptional circumstances under which a state may be lawfully permitted to use force in the territory of another state. Such circumstances include a SC authorized enforcement action, self-defence under Article 51 of the UN Charter and the customary law requirement of consent. The SC authorised enforcement action may be undertaken by a ‘coalition of states’ in respect of an action undertaken by the UN itself or it may permit regional blocs to carry out such an action. This chapter also analyses the parameters of self-defence such as armed attack, necessity and proportionality and other specific principles that are relevant to the consideration of the law of self-defence.

Chapter four examines terrorism as the basis for an action by states against terrorist NSAs in self-defence with particular reference to certain terrorist groups and some properly orchestrated terrorist incidents because of the human cost and destruction in the wake of such attacks. That apart, the efforts being made by both the international community collectively and individual states in fighting transnational terrorism based on their obligations under international law are also considered. The chapter will be concluded by a consideration of the reasons for the proliferation of terrorist organisations.

Chapters five and six make a comparative analysis of the US and Israel's counter-terrorism approaches which have distinguished them from other states with less sophisticated methods of fighting terrorism. It considers specific methods of warfare employed by these states against NSAs such as overt and covert targeted killings, kill-capture missions and full-scale military operations. In contrast however, the fact that Israel is an occupying power created a major difference in the international obligations of these states, even in relation to the legal paradigms that regulate their conduct of the extraterritorial use of force. The contentious justifications relied upon by these states in employing self-defence against NSAs and whether these methods are effective or not, are also examined.

Chapter seven will critically examine the events of the 9/11 attack on the US, the SC resolutions 1368 and 1373, jurisprudence of the ICJ in respect of selected cases bordering on self-defence, use of pre-emptive self-defence by some states, the disregard of the attribution requirement and the international support for OEF to know whether they have caused any transformation of the law of self-defence. The relevance of scholarly opinions and the practice of states in the determination of the likelihood of the transformation of the law of self-defence will equally be evaluated.

Chapter eight concludes the study by way of summary/findings, recommendations and a final conclusion. The recommendations are intended to provide international policy makers with a guide, in their efforts to resolve the challenges to international peace and security and as pointers to areas of further research.

## Chapter 2

### International law frameworks that prohibit the threat or the use of force

#### Outline

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#### 2.1. Introduction

Every state requires the protection of its survival in one form or another and therefore through the instrumentality of law, the international community has regulated the use of force by states. Without this, the strong and powerful would have exterminated the weak. Prior to the legal prohibition of the use of force, there existed an era in which the sovereign state had unfettered discretion to use force, as doing so entirely depended on the whims and caprices of the sovereign leaders.

The first multilateral efforts to constrain the unbridled use of force by states are found in the Hague Conventions of 1899 and 1907, the Covenant of the League of Nations and the Kellog-Briand Pact. Though these instruments sought to abridge the hitherto right to use force, they nevertheless tolerated some degree of forcible measures by states against one another, particularly for the alleged protection of vital interests and national honour.

Furthermore, the prohibition sought to outlaw wars alone, thereby leaving lesser uses of force or threat thereof unhindered. As expected therefore, states bullied one another without a formal declaration of war. Upon the establishment of the UN, however, its Charter placed a total prohibition on all threats and uses of force by virtue of article 2(4).

This chapter discusses the various legal frameworks that have been formulated from the late 19<sup>th</sup> Century to the present day. It also considers the institutional mechanisms established under the UN, such as the General Assembly (GA), Security Council (SC) and the International Court of Justice (ICJ), and their roles in the prohibition of the use of force. The enforcement of the prohibition of the use of force is not the preserve of international or global organizations alone, and there is also the consideration of regional efforts at sustaining the ban on the use of force in consonance with Chapter VIII of the Charter. Recognising this, this chapter considers the efforts of regional organizations such as the Organisation of American States (OAS), African Union (AU), North Atlantic Treaty Organisation (NATO) and the Economic Community of West African States (ECOWAS) to enforce the ban on the use of force.

The traditional understanding is that prohibition of the use of force relates to states alone because the UN Charter, in particular, and the international system, in general, are state-centric.<sup>1</sup> There is, however, broad scholarly consensus that the Charter prohibition under Article 2(4) has a comprehensive scope that prohibits the use of force against even NSAs located in another state because extraterritorial force employed in another state invariably violates the territorial sovereignty of such states.<sup>2</sup>

## 2.2. Notion of the use of force

The use of force is an international law notion, and the rules governing the resort to force do not regulate measures such as the quelling of riots or the suppressing of insurrection, taken by a state to maintain order, peace and security within its borders.<sup>3</sup> The use of force was a common phenomenon in the relations of states, and, for that reason, the principles relating

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<sup>1</sup> O Corten *The law against war: The prohibition of the use of force in contemporary international law* (2010) 126.

<sup>2</sup> N Lubell *Extraterritorial use of force against non-state actors* (2010) 25; CJ Tams 'The use of force against terrorists' (2009) 20 *European Journal of International Law* 359, at 362 & 364; O Schachter 'The lawful use of force by states against terrorists in another country' (1989) 19 *Israel Yearbook of Human Rights* 209, at 213-214.

<sup>3</sup> MN Shaw *International law* (2008) 1126.

to when the use of force is allowed (*jus ad bellum*) and rules relating to the actual conduct of hostilities (*jus in bello*) were formulated.<sup>4</sup> Though the notion of the prohibition of use of force is not defined in Article 2(4) of the Charter, it embraces both the threat of force and the actual use of force. It states: ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’.<sup>5</sup> The use of force contemplated in the Charter refers to ‘armed force’ but not political or economic coercion.<sup>6</sup> The rules that prohibit the recourse to force are found in treaties, as enshrined in Article 2(4) of the UN Charter, the principles relating to the consent of states and also in customary international law which have evolved from the practice of states.<sup>7</sup> As a result of the customary nature of the restraint on the use of force which has been codified under Article 2(4) of the Charter, non parties to the Charter are also banned from the use of force in the territories of other states.<sup>8</sup> The customary nature of the prohibition on non members of the UN is reinforced by virtue of Article 2(6) of the Charter.<sup>9</sup>

In spite of the cruel, destructive and bloody nature of wars, the right to resort to war prior to the late 19th Century was considered to be an aspect of sovereignty.<sup>10</sup> Force was employed by some states as a last resort on the grounds of self-defence, self-preservation or for the protection of vital interests.<sup>11</sup> The word ‘force’ is a broader concept than war which was referred to both in the Covenant of the League of Nations and the Kellogg-Briand Pact. War is considered to be the most serious form of the use of force. In this chapter, the word ‘war’ and the phrase ‘use of force’ are used interchangeably.

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<sup>4</sup> H McCoubrey & ND White *International law and armed conflict* (1992) 1.

<sup>5</sup> Art 2(4) of the UN Charter.

<sup>6</sup> M Kinacioglu ‘The principle of non-intervention at the United Nations: The Charter framework and the legal debate’ 17 – 18, <http://sam.gov.tr/wp-content/uploads/2012/01/Muge-Kinacioglu.pdf> (accessed 12/10/2014).

<sup>7</sup> Corten (n 1 above) 5-6; M Wood ‘The Law on the Use of Force: Current Challenges’ (2007) 11 *Singapore Year Book of International Law* 2; C Gray ‘The ICJ and the use of force’ in Tams & Sloans (eds.) *The development of international law by the International Court of Justice* (2013) 246 & 247.

<sup>8</sup> Y Dinstein *War, aggression and self-defence* (2011) 94-98; Shaw (n 3 above) 1123-1124; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)* ICJ Reports (1986) para 99.

<sup>9</sup> Art 2(6) of the UN Charter.

<sup>10</sup> N Schrijver ‘The Use of Force under the UN Charter: Restrictions and Loopholes,’ The Academic Council for the United Nations System (ACUNS) 2013 John W. Holmes Memorial Lecture, available at [http://acuns.org/wp-content/uploads/2012/09/WebPageSchrijver\\_UseofForce.pdf](http://acuns.org/wp-content/uploads/2012/09/WebPageSchrijver_UseofForce.pdf) (accessed 21/07/2014).

<sup>11</sup> I Brownlie *International law and the use of force by states* (Clarendon Press, 1963) 41.

### 2.3. The state of war doctrine

Prior to the 1945 UN Charter prohibition of the use of force, measures short of war such as limited military operations, and certain armed reprisals were considered legitimate.<sup>12</sup> This is because earlier efforts to circumscribe the use of force were directed at curbing declared full scale wars and not other forcible measures. The term ‘war’ does not merely refer to the use of force, but it refers to force being used in the determination of a legal right which is brought about by the intention of the parties involved to go to war (*animo belligerendi*). A legal tussle for the preservation of rights is, therefore, material in the consideration of a state of war.<sup>13</sup> The scale and effect of hostilities culminating in the loss of lives and destruction of property did not *per se* determine the existence of war, but it becomes war if the parties intended it to be so.<sup>14</sup> All that a state involved in armed conflict needed to show is some kind of justification, ranging from the protection of nationals, territorial integrity, and natural resources to self-defence. For instance, the declaration of war in the United States was normally preceded by enactment of legislation to that effect permitting the President to declare war.<sup>15</sup> Certain states, though, avoided a formal declaration of war on other states, yet they employed forcible measures that were as destructive and had as far-reaching consequences as a declared war. Even when the armed forces of a state are engaged in conflict, the aggressor may deny the existence of a state of war, so that a victim state that responds in self-defence is adjudged the violator of the law.<sup>16</sup> This amounts to measures short of war, though with all the characteristics of a war, except that it had not been declared. The advantages derived by states from the undeclared use of force include the avoidance of their internal constitutional requirements (conditions precedent) that needed to be fulfilled before a declaration of war and keeping neutral states that would have invoked certain rights away.<sup>17</sup> The study will now turn to consider the historical evolution of the general ban of the resort to force by states.

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<sup>12</sup> Corten (n 1 above) 51.

<sup>13</sup> C Antonopoulos ‘The unilateral use of force by states in international law’ unpublished PhD thesis, University of Nottingham, 1992 14.

<sup>14</sup> Dinstein (n 8 above) 11-13; JB Moore ‘The new isolation’ (1933) 27 *American Journal of International Law* 607, at 622.

<sup>15</sup> Art 2(a) of S.J. RES 23, Authorization for Use of Military Force; JK Elsea & MC Weed ‘Declarations of war and authorisations for the use of military force: Historical background and legal implications,’ *Congressional Research Service* (CRS), 18 April 2014, 1, 5.

<sup>16</sup> Brownlie (n 11 above) 60.

<sup>17</sup> Antonopoulos (n 13 above) 14.



## 2.4. Evolution of the prohibition of threat or use of force

### 2.4.1. The *jus ad bellum* and the *jus in bello*

The *jus ad bellum* and *jus in bello* are the two levels in international law that regulate the use of force. The *jus ad bellum* refers to the rules that regulate the resort to force because the question of when force can be lawfully resorted to or not is determined by it.<sup>18</sup> The *jus ad bellum* norms which had been formulated since ancient time and developed gradually through the classical and medieval eras to the contemporary international law are evidenced by the Covenant of the League of Nations, the Kellog-Briand Pact and the UN Charter. These rules regulate the recourse to force by states in particular, but they also regulate international organizations and other NSAs in contemporary international law.<sup>19</sup> The UN Charter is the primary source of the contemporary *jus ad bellum*, and Article 2(4) is the cornerstone of the *jus ad bellum*.<sup>20</sup> The Charter prohibition has, however, recognized two main exceptions, namely self-defence under article 51<sup>21</sup> and military enforcement action under the Chapter VII powers of the SC.<sup>22</sup> Both the prohibition of the use of force under article 2(4) and the exception thereto under article 51 of the Charter have been interpreted as having crystallized into customary norms of international law.<sup>23</sup> Self-defence has, in turn, been subjected to other customary law principles of necessity and proportionality.<sup>24</sup> Article 51 expects nations to defend themselves and not wait for the protection of the UN otherwise they would be overwhelmed or be destroyed before the UN could mobilize to come to their aid, more so in the absence of a UN standby force contemplated under Article 39 of the Charter.<sup>25</sup> While the Covenant of the League of Nations is no more in force, the Kellog-Briand Pact purportedly remains in force only in principle as it is rarely referred to in the conduct of international relations by states, perhaps largely owing to the comprehensive nature of the UN Charter of 1945.

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<sup>18</sup> AC Arend & RJ Beck *International law and the use of force* (1993) 2.

<sup>19</sup> K Okimoto *The distinction and relationship between jus ad bellum and jus in bello* (2011) 9.

<sup>20</sup> Okimoto (n 19 above) 7.

<sup>21</sup> Art 51 of the UN Charter.

<sup>22</sup> Art 42 of the UN Charter.

<sup>23</sup> *Nicaragua case* (n 8 above) paras 183-200.

<sup>24</sup> *Nicaragua case* (n 8 above) para 186; *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226 para 41; *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, ICJ Reports, 2003, p. 161 para 43 and *Armed Activities on the Territory of the Congo (DRC v Uganda)* Judgment, ICJ Reports 2005, p. 168 para 147.

<sup>25</sup> L Henkin *How nations behave: Law and foreign policy* (1979) 143.



On the other hand, the *jus in bello* norms (IHL) deal with the actual regulation of the conduct of hostilities, that is permissible or prohibited methods of using force. This includes how to treat the wounded, sick, shipwrecked combatants, captured combatants and civilians.<sup>26</sup> The contemporary international law *jus in bello* rules were formulated in the 19<sup>th</sup> Century and quickly developed through the Hague Conventions of 1899 and 1907 to the Geneva Conventions of 1949 and the Additional Protocols of 1977.<sup>27</sup>

In the application of these rules they appear to overlap or conflate sometimes, although they are different concepts.<sup>28</sup> For instance, while proportionality under the *jus ad bellum* requires that a response in self-defence must be proportional to an initial armed attack both in scale and effect, proportionality in *jus in bello* requires that such a response in self-defence must have regard to the means and methods of warfare.<sup>29</sup> The *jus in bello* expects a balance between the anticipated military advantage and the reduction of harm to humanitarian values since it determines how much force is appropriate with a view to avoiding unnecessary suffering, damage and casualties.<sup>30</sup>

#### 2.4.2. Regulation of the use of force prior to 1899

In ancient times force was employed for several reasons, such as contrasts in culture, tussles for access to resources, trade and to appropriate territories which culminated in the vanquished becoming slaves or being subjected to death.<sup>31</sup> Some of the reasons for which force was employed, such as the forcible appropriation of territories, have been outlawed.<sup>32</sup>

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<sup>26</sup> Okimoto (n 19 above) 1-2; C Greenwood 'The relationship between *jus ad bellum* and *jus in bello*' (1983) 9 *Review of International Studies* 221.

<sup>27</sup> Okimoto (n 19 above) 2-3.

<sup>28</sup> E Cannizzaro 'Contextualizing proportionality: *Jus ad bellum* and *jus in bello* in the Lebanese war' (2006) 88 *International Review of the Red Cross* 781. According to him, 'The distinction between these two notions of proportionality, though clear in theory, tends to blur in practice, as they are not uncommonly merged together in a comprehensive assessment of the legality of the use of force. This is also what happened in the Lebanese war. Although emphasis in the reaction of many states is placed on the disproportionate character of the Israeli response, it is much more difficult to see which kind of proportionality was being referred to. Quite often their statements contain elements of both *jus ad bellum* and *jus in bello* arguments'.

<sup>29</sup> Cannizzaro (n 28 above) 781; R Kolb 'Origin of the twin terms *jus ad bellum* /*jus in bello*' (1997) 320 *International Review of the Red Cross* 553; Okimoto (n 19 above) 4.

<sup>30</sup> Art 51(5)(b) of the AP I to the GC of 1949; Cannizzaro (n 28 above) 785; AA Haque 'A theory of *jus in bello* proportionality', at <http://.com/abstract=2575841> (accessed 07/03/2016); A Moseley 'Just war theory' *Internet Encyclopedia of Philosophy*, at <http://www.iep.utm.edu/justwar> (accessed 07/03/2016).

<sup>31</sup> Brownlie (n 11 above) 3.

<sup>32</sup> A/RES/3314(XXIX) of 14 December 1974, Annex 5(1); see also M Sahovic 'Non-aligned countries and the current regulation of the use of force' in A Cassese (ed.) *The current legal regulation of the use of force* (1986) 482-483.

During this era, entities were at liberty to wage wars without constraint from any world body such as the UN. Some of the earliest attempts to circumscribe the resort to force to a very few specific circumstances are rooted in the classical Greek and Roman writings of Aristotle and Cicero.<sup>33</sup> Aristotle developed the natural law concept, which propounded that universal norms regulated everybody's conduct including the recourse to force. According to him, violence is permissible in defence of self, community or nation.<sup>34</sup> Cicero built upon this natural law concept and expatiated on the natural law justifications of resort to force or war which include the punishment of an enemy for wrongdoing and to repel an attack, though the overarching purpose was to establish peace.<sup>35</sup> He formulated specific criteria for using force that include: (a) it must be used on the command of a sovereign; (b) it must be employed for a just cause, which means that there must be a valid legal claim and, therefore, both parties to hostilities cannot simultaneously have a valid claim; and (c) it must be used for the right intention and that only certain categories of persons can engage in war effort.<sup>36</sup> In addition, the classical Roman Empire, during the time of the kings, the responsibility of deciding whether a particular war was just or not was given to a college of priests called *Fetiales*.<sup>37</sup> The criteria upon which the *Fetiales* could permit the going to war or to use force included the violation of a treaty or the sanctity of ambassadors and the infringement of territorial rights or offences committed against allies.<sup>38</sup> The rationale for the conduct of the procedure before the *Fetiales* is that wars are interventions of providence in the affairs of men and that victory comes as a gift of the gods who give wars legitimacy.<sup>39</sup>

Furthermore, the writings of St. Augustine and St Thomas Aquinas also influenced the regulation of the resort to force.<sup>40</sup> These Christian theologians inherited and propagated the just war doctrine with the belief that God himself sanctioned such conflicts which the kings led with the aim of projecting the good and to avoid the evil.<sup>41</sup> Recourse to force was founded on morality, hence waging wars to protect rights was divinely ordained and, God himself

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<sup>33</sup> Aristotle *The poetics* (E Baker ed. 1971) 317; Arend & Beck (n 36 above) 12-13.

<sup>34</sup> LS Cahill *Love your enemies: Discipleship, pacifism, and just war theory* (1994) 83.

<sup>35</sup> C Martin 'Taking war seriously: A model for constitutional constraints on the use of force in compliance with international law (2011) 76 *Brooklyn Law Review* 633-634.

<sup>36</sup> SC Neff *War and the law of nations: A general history* (2005) 50-51; Vitoria *Law of war* 306-307.

<sup>37</sup> Dinstein (n 8 above) 65-66; J von Elbe 'The evolution of the concept of just war in international law' (1939) *American Journal of International Law* 666.

<sup>38</sup> Dinstein (n 8 above) 65.

<sup>39</sup> Elbe (n 37 above) 666.

<sup>40</sup> N Blokker 'The Security Council and the use of force: On recent practice' in N Blokker & N Schrijver (eds.) *The Security Council and the use of force: Theory and reality-A need for change* (2005) 3.

<sup>41</sup> McCoubrey & White (n 4 above) 18.

was believed to direct such wars as he had sanctioned.<sup>42</sup> The early Christians abhorred wars and they did not enrol as soldiers because of their belief that, when all the inhabitants of the world had been converted to the Christian Faith, there would be perpetual peace. But upon Constantine's conversion, Christians accepted the resort to war concept because of the injustices Christians suffered, but they subjected the resort to war to certain rules.<sup>43</sup> Christians (Catholic Church), thus, became involved in the just wars in the 15<sup>th</sup> Century and enrolled in the army, contrary to complying with admonitions regarding violence as that were expressed by Jesus Christ. While Christians appreciated the fact that the Roman Empire was a divinely established institution, and they considered it a duty or praiseworthy public service to forcibly protect it against barbarians, to propagate the Christian faith and to safeguard civilization, the use of violence to achieve egoistical purposes was forbidden.<sup>44</sup> Augustine saw the need to protect Christianity against pagan attackers who accused Christians of causing Romans to abandon or turn away from their gods and goddesses culminating in the invasion of Rome in 410 AD.<sup>45</sup> There was, therefore, the necessity to project the concept of the just war (*bellum justum*) and to subdue pacifism because Augustine was determined to whittle down the strict adherence to the teachings of Jesus Christ as contained in the New Testament which promoted pacifism, and to return to the God of battle contained in the Old Testament.<sup>46</sup> The desire to depart from absolute pacifism by thinkers such as Augustine and Aquinas was the realization that intervention in the face of violence might avert the injustices suffered by Christians.<sup>47</sup> Building upon Cicero's foundations that war must be fought with the ultimate objective of peace, and combining this with the Christian theology of pacifism and non-violence, Augustine developed the moral and legal code to regulate the resort to force which became known as the 'just war theory'. He formulated the criteria for waging wars thus: (a) it must be waged for a just cause; (b) it must be waged for the right intention for the purpose of projecting good and to avoid evil; and (c) it must be waged on the authority of the Prince.<sup>48</sup> In St. Augustine's time,

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<sup>42</sup> Deuteronomy 20:4 *Holy Bible, King James Version, Standard edition* (2013) 176; Arend & Beck (n 18 above) 11-12.

<sup>43</sup> Elbe (n 37 above) 667; Arend & Beck (n 18 above) 13-14.

<sup>44</sup> Neff (n 36 above) 46-47; Cahill (n 34 above) 69.

<sup>45</sup> M Evans 'Moral theory and the idea of just war' in M Evans (ed.) *Just war theory: A reappraisal* (2005) 2; RJ Myers 'Notes on the just war theory: Whose justice, which wars?' (1996) 10 *Ethics & International Affairs* 119-121.

<sup>46</sup> Myers (n 45 above) 121.

<sup>47</sup> Cahill (n 34 above) 7.

<sup>48</sup> Martin (n 35 above) 634-635.

war was considered as punishment which God himself inflicts on the sinful so as to compel their return to obedience to the law.

St. Thomas Aquinas was one of the foremost medieval Catholic theologians who adopted the teachings of Augustine on the just war doctrine. He argued that the use of force for the common good was permissible.<sup>49</sup> He developed and expatiated on it by formulating his own rationale upon which to justify a resort to wars such as: (a) the war has to be conducted not privately by individuals who can apply to a tribunal for the defence of their rights, but under the authority of the Prince as a responsible leader of a nation; (b) there has to be a just cause for the war; and (c) belligerents must be animated by the right intention, that is, to promote good and avoid evil.<sup>50</sup>

Franciscus de Vitoria who discussed the just war theory against the background of the suffering of the Indians at the hands of the Spaniards abandoned previously identified and established causes of just wars, such as territorial expansion, religious differences or personal glory of the ruler.<sup>51</sup> He expressed the opinion that the personal ambition or glory of the sovereign is not a just cause to employ force, because that may occasion the abuse of sovereign power if the sovereign pursues personal benefits rather than the welfare of his people.<sup>52</sup> Like Augustine and Aquinas before him, he argued that the sovereign alone can declare war for a just cause against wrong doing. In this case, the wrong doing is the defiance of the natural law, as may be determined by the Prince who represents a superior authority.<sup>53</sup> To him, advancing justice by redressing harm is a just cause for resort to force.<sup>54</sup>

During the era before the establishment of the Westphalia in 1648, the modern state structure was absent, and the focus of international law was on the individual. This meant that the target belligerents to be constrained were clans, regions, princely states and other non-state entities. The modern state developed in the early 17<sup>th</sup> Century when the focus became state entities, and Hugo Grotius, a Dutch lawyer and theologian, elaborated the emergence of the modern state in 1625 in his treatise 'The law of war and peace'.<sup>55</sup> Though not completely

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<sup>49</sup> T Aquinas *On law, morality and politics* 221-222, cited in Neff (n 36 above) 48.

<sup>50</sup> Dinstein (n 8 above) 66; Elbe (n 37 above) 669; Arend & Beck (n 18 above) 14.

<sup>51</sup> RE Brigety II 'Ethics, technology and the American way of war: Cruise missiles and US security policy' (Routledge, 2007) 28; Moseley (n 30 above)

<sup>52</sup> Brigety II (n 51 above) 28.

<sup>53</sup> Elbe (n 37 above) 674-675.

<sup>54</sup> Brigety II (n 51 above) 28.

<sup>55</sup> Neff (n 36 above) 85; Martin (n 35 above) 636.

jettisoning the natural law doctrine which dominated medieval thought, Grotius' law of nations emphasized the duties and rights of states.<sup>56</sup> Both the law of nature and the law of nations co-existed to bring about international law.<sup>57</sup> These systems were fused with the just war theory to continue to regulate the resort to force because a breach of the law of nature by a state provided the justification for the victim state under the law of nations to use force in response against the offender.<sup>58</sup> Like Augustine or other theologians before him, Grotius argued against absolute Christian pacifism and formulated his own criteria for the use of force or fighting a just war which included just cause, right intention (*recta intentio*), property rights, defence against impending or ongoing wrong, action to obtain what is owed and the infliction of punishment for wrongdoing.<sup>59</sup> This also manifests a shift in the law. The significance of Grotius' writings lay in the fact that he injected innovations into the *corpus* of international law. The improvements are that the law of nations is based on the consent of states, the concept of the state of war, and the distinction between primary and secondary rights or actions. While primary actions were directed against a specific wrong doer which concept was distilled from natural law, a secondary action could lie against others vicariously. For instance, it involves an action of war against soldiers for no personal wrongdoing, but because they are members of the armed forces of the adversary.<sup>60</sup>

There were no uniform objective criteria upon which legitimate wars were founded, but it depended on the conception of the king, religious leaders, the belligerents themselves or even the commentators.<sup>61</sup> This study holds the view that the disadvantage in the just war doctrine lies in the fact that there were no objectively formulated and agreed upon criteria based upon which leaders and their communities could declare war. The acceptable rationale for waging war by a particular state might not constitute a just cause for others. Arguably, it was all dependent on the whims of the leaders and, therefore, wars were common whether the determination of what amounted to just cause lay with the Catholic Church or others. In

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<sup>56</sup> Neff (n 36 above) 85.

<sup>57</sup> Neff (n 36 above) 86 & 99.

<sup>58</sup> R Tuck *The rights of war and peace: Political thought and international order from Grotius to Kant* (1999) 102-103; Martin (n 35 above) 637.

<sup>59</sup> Neff (n 36 above) 96-97; H Grotius 'De jure belli ac pacis libri tres' (1625) in JB Scott (ed.) *Classics of international law* (1925) 2.1.2, cited in Lesaffer 4; H Scott *The Oxford handbook of early modern European history, 1350-1750: Vol. II: Cultures and power* (2015) 680-681.

<sup>60</sup> Neff (n 36 above) 97-102.

<sup>61</sup> Y Melzer *Concepts of just war* (Springer, 1975) 13, it was stated, to Grotius all wars sanctioned by the authority of the sovereign power on both sides were just wars, while to Tse-tung, all wars waged by imperialism are unjust, all communist and revolutionary wars are just; see also McCoubrey & White (n 4 above) 18.

certain respects, it was contended that the use of force could be just from the points of view of both adversaries. For instance, a party that acted in good faith despite ignorance of the facts or in self-defence after an earlier justified attack could also claim a just cause for using force.<sup>62</sup> Dinstein, therefore, contended that ‘once war qualifies as objectively just on the part of both adversaries, there is scarcely any reason why any state should feel inhibited from going to war at will. To that extent, any state or government can drum up some plausible justification for any policy that it wishes to pursue.’<sup>63</sup>

Each of the thinkers formulated his own basis for the use of force to be just because there was a momentum towards changing the law. Just as Suárez considers any conduct that affects the reputation or honour to be a just cause for the use of force, others see the denial of passage *en route* to wage war against a third party as just cause.<sup>64</sup> There is, however, consensus of scholarship to an extent that the just war theory permits violence under strict conditions ranging from just cause, defence of the common good, last resort, right intention and declaration by a legitimate authority.<sup>65</sup> What is important, however, is that certain fundamental concepts of contemporary international law are derived from, or have their origins rooted in, the just war theory. For instance, the concepts of self-defence, necessity and proportionality can be conveniently gleaned from the just war theory.<sup>66</sup> In fact the just war theory established the conditions for the *jus ad bellum* to include just cause, last resort, declaration by a proper authority, right intention, chance of success and proportionality.<sup>67</sup>

Arguably, in spite of the flaws inherent in the mode of determining when wars were just, there was some degree of restraining the resort to the use of force in the era prior to 1899. Since not all reasons for going to war were acceptable options to pursue, the unjust reasons for which nations checked their resort to wars were the control valves that put unwarranted uses of force in check.

### 2.4.3. The Hague Conventions

The Hague Peace Conferences of 1899 and 1907 brought about the enactment of the Hague Conventions which constituted the first major effort to regulate the use of force through

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<sup>62</sup> Dinstein (n 8 above) 68.

<sup>63</sup> Dinstein (n 8 above) 68 – 69.

<sup>64</sup> Dinstein (n 8 above) 67-68.

<sup>65</sup> Cahill (n 34 above) 2-3.

<sup>66</sup> Neff (n 36 above) 51.

<sup>67</sup> Moseley (n 30 above).



multilateral treaties.<sup>68</sup> There was no absolute ban on the use of force at this stage because states were left with the discretion of either going to war or explore arbitration since the Conventions merely gave conditions for declaring armed conflicts.<sup>69</sup> Article 1 which was common to the Hague Conventions of both 1899 and 1907 indicated that parties to these treaties agreed to restrain themselves from resorting to the use of force.<sup>70</sup> It became obvious that, at the close of the 19<sup>th</sup> Century, there was gradual resort to pacific settlement of disputes by the leading powers.<sup>71</sup> Parties, thus, agreed in the above Conventions that, in the event of serious disputes arising between them, they would first opt for mediation by friendly nations before exploring the possibility of the use of force.<sup>72</sup>

To enforce the obligations of state parties, the Hague Conference for the Pacific Settlement of Disputes of 1899 established the Permanent Court of Arbitration in 1907. This first international court had the responsibility of determining all the cases parties may consider appropriate to submit to it.<sup>73</sup> Though the conferences failed to make the resort to arbitration of disputes obligatory, states, nevertheless, were encouraged to explore arbitration as several bilateral agreements were formalized in that regard.<sup>74</sup> While these treaties excluded disputes of a political nature, disputes of a legal nature were subjected to arbitration.<sup>75</sup> The significance of these conventions lies in the fact that they introduced into the *corpus* of positive law a distinction between justiciable and non-justiciable disputes.<sup>76</sup> According to Antonopoulos, the resort to arbitration did little to change or douse the political tension that characterized the relations of states because these arbitration treaties were qualified by

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<sup>68</sup> G Boas *Public international law: Contemporary principles and perspectives* (Edward Elgar Publishing, 2012) 310; EA Prosser 'A theory of the laws of war' (2003) 70 *University of Chicago Law Review* 297, at 298.

<sup>69</sup> A Cassese *International law* (2005) 300.

<sup>70</sup> Art 1 of the Hague Convention 1 for the Pacific Settlement of International Disputes (Hague 1) (29 July 1899). It stated, 'With a view to obviating, as far as possible, recourse to force in the relations between States, the Signatory Powers agree to use their best efforts to insure the pacific settlement of international differences.'

<sup>71</sup> Bhering Fisheries Award (1912) 6 *American Journal of International Law* 72; *Alabama Claims of the United States of America against Great Britain*, Reports of International Arbitral Awards (1872) 133-134. Following an agreement of 8 May 1871, signed in Washington between the US and Britain, the Alabama Claims by the US against Britain was referred for arbitration. The US claimed against Britain for violating its neutrality. The tribunal found Britain to be in violation of its obligations and awarded to the US the sum of \$15,500,000 in gold as final indemnity to be paid by Britain in satisfaction of all the claims.

<sup>72</sup> Art 2 of Hague 1 of 1899 and 1907.

<sup>73</sup> Art 20 of Hague Convention 1 of 1899.

<sup>74</sup> R Lesaffer 'Too much history: From war as sanction to the sanctioning of war' in M Weller (ed.) *Oxford handbook of the use of force in international law* (2015) 20-21.

<sup>75</sup> Lesaffer (n 74 above) 21.

<sup>76</sup> Art 16 of the Hague Convention of 1899 & Art 38 of the Hague Convention of 1907; see also H Lauterpacht *The function of law in the international community* (2000) 27.



clauses of non-justiciability of certain disputes that related to the vital interests and the national honour of a state.<sup>77</sup> Similarly, these areas of vital interests and national interest which bred tensions between states were also excused in the League of Nations Covenant and the Kellogg-Briand Pact, but were ultimately prohibited in the UN Charter, thereby effectively foreclosing reliance by states as a basis for resorting to force.<sup>78</sup> In the face of these seeming loopholes, the Hague Peace Conferences achieved some goals, as parties were discouraged from the use of force in the recovery of contract debts involving their nationals from one another.<sup>79</sup> A resort to force, however, could be allowed in extreme cases where such a debtor state refused an offer of arbitration, prevented agreement on a *compromise* or rejected an arbitral award.<sup>80</sup> Arguably, international peace and security remained elusive during this era because states had so much latitude in deciding which issues bordered on their vital interests and national honour for which resort to force could be accommodated.

#### **2.4.4. Prohibition of the use of force during the period of the League of Nations**

The League of Nations was formed in the aftermath of the 1<sup>st</sup> World War which was believed to have been caused by lack of procedural restraints on the recourse to force.<sup>81</sup> The willingness to be bound by the Covenant of the League of Nations by states reflected their revulsion against armed conflicts after the 1<sup>st</sup> World War.<sup>82</sup> This war involved and affected not only the belligerents, but also entire populations and the economic resources of certain states.<sup>83</sup> The League Covenant represented one of the early multilateral efforts to qualify the right to use force.<sup>84</sup> Because of the desire to bring peace and save future generations from the scourge of war, it sought to make collective interest have priority over national interest.<sup>85</sup> In that regard, members were advised to rescind membership and terminate their obligations to other bodies if such obligations were inconsistent with the obligations of members under

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<sup>77</sup> Antonopoulos (n 13 above) 12.

<sup>78</sup> Henkin (n 25 above) 137.

<sup>79</sup> Art 1 of the Hague Convention II of 1907; DW Bowett *Self-defence in international law* (1958) 120.

<sup>80</sup> Art 1 of the Hague Convention 11 of 1907 Respecting the Limitation of the Employment of Force the Recovery of Contract Debts.

<sup>81</sup> Arend & Beck (n 18 above) 19.

<sup>82</sup> The Preamble of the Covenant of the League of Nations provided ‘The High Contracting Parties, in order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another, agree to the Covenant of the League of Nations.

<sup>83</sup> Antonopoulos (n 13 above) 25-26.

<sup>84</sup> Dinstein (n 8 above) 82.

<sup>85</sup> Article 11 of the League Covenant.

the League Covenant.<sup>86</sup> Principally, the League of Nations was established to achieve international peace and security through members refraining from the use of force.<sup>87</sup>

#### 2.4.4.1. Covenant of the League of Nations

The prohibition contained in the covenant was not cast in iron in absolute terms because the customary right of resort to the use of force remained permissible, but it was merely made conditional upon the failure of a peaceful, judicial or arbitral settlement of disputes.<sup>88</sup> McCoubrey contended that the prohibition encapsulated in the League Covenant was no less ineffectual than the Roman concept of the just war on the grounds that articles 12, 13 and 15 preserved the right of states to go to war, subject only to certain procedural requirements.<sup>89</sup> This appears to be contrary to article 10 which prescribed the refraining from aggression by members against the territorial integrity and political independence of other members.<sup>90</sup> The incompatible relationship between article 10 on the one hand and articles 12, 13 and 15 on the other hand is manifest because, while the former seeks prohibition of war, the latter created loopholes for war. Article 11 provided for collective security, meaning that issues of security were deemed to be concerns of all members of the League.<sup>91</sup> According to Kelsen, ‘We speak of collective security when the protection of the states, the reaction against the violation of the law, assumes the character of a collective enforcement action.’<sup>92</sup>

Although the Covenant appears not to have banned the resort to the use of force in absolute terms because of the manifest loopholes, it no doubt provided a certain limited degree of restraint that constrained some law abiding states.<sup>93</sup> The fact that the covenant was imbued with the presumption against the legitimacy of the use of force, states relied on article 10 in

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<sup>86</sup> Article 20 of the League Covenant.

<sup>87</sup> Antonopoulos (n 13 above) 26.

<sup>88</sup> Articles 12, 13(4) & 15(7) of the League Covenant, Paragraph 7 of Article 15 provides ‘If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice;’ Brownlie (n 11 above) 55-56.

<sup>89</sup> McCoubrey & White (n 4 above) 21; Martin (n 35 above) 634.

<sup>90</sup> Art 10 of the League Covenant provides ‘The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled’.

<sup>91</sup> Article 11 of the League Covenant; McCoubrey & White (n 4 above) 20.

<sup>92</sup> H Kelsen *Collective security and collective self-defence under the Charter of the United Nations* (1948) 42 *American Journal of International Law* 783.

<sup>93</sup> McCoubrey & White (n 4 above) 21.

their Communications, such as the Greco-Bulgarian dispute in 1925, China-Japan conflict in 1931 and Italy-Albania dispute in 1939.<sup>94</sup> States, therefore, that were alleged to have caused an infraction of the prohibition contained in the instrument, denied their application of force and, in other cases, sought justification under the canopy of self-defence.<sup>95</sup> Furthermore, the Council of the League was empowered to sanction erring states where its responsibility of reconciliation had failed. Such sanctions related to violations of articles 12, 13 and 15, and they included the ‘severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the Covenant-breaking state.’<sup>96</sup> Brownlie remarked that the imposition of military force driven sanctions was not the best of options and these were cautiously employed because they culminated in the economic burden on both the state in violation and the powerful members of the Council.<sup>97</sup> The League’s mandate was to keep peace and therefore, keeping the conflict localized was preferable.<sup>98</sup>

The League Covenant enacted no total prohibition, but it created safeguards against war, which was also allowed as an extreme measure to settle disputes.<sup>99</sup> States were, therefore, at liberty to resort to force in the event that a state in violation failed to comply with an arbitral award, judicial decision or report by the Council after three months.<sup>100</sup> The Council was, however, precluded from making any recommendations on matters that fell within the exclusive domestic jurisdiction of a party. The danger here was that a dispute of a non-international character could ultimately snowball into an international conflict.<sup>101</sup> The resort to arbitration or judicial decision did not affect all types of disputes, but only disputes relating to the interpretation of a treaty, questions of international law, such as to the existence of any fact which, if established, would constitute a breach of any international obligation, or such as to the extent and nature of the reparation to be made for any such

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<sup>94</sup> Antonopoulos (n 13 above) 26-27.

<sup>95</sup> Brownlie (n 11 above) 57.

<sup>96</sup> Article 16 of the Covenant of the League of Nations.

CA Ristuccia ‘1935 sanctions against Italy: Would coal and crude oil have made a difference?’ 5, at <http://www.nuffield.ox.ac.uk/economics/history/paper14.pdf> (accessed 15 November 2016). On 18 November 1935, non forcible sanctions imposed by the League of Nations against Italy came into effect to cause Italy to discontinue its aggression against Ethiopia. These sanctions include: ban on arms, denial of loans, ban on importation of Italian goods and suspension of all clearing agreements with Italy.

<sup>98</sup> Brownlie (n 11 above) 58; Antonopoulos (n 13 above) 30.

<sup>99</sup> Brownlie (n 11 above) 56; SA Alexandrov *Self-defence against the use of force in international law* (1996) 33.

<sup>100</sup> Article 12 of the Covenant of the League of Nations. Kelsen (n 92 above) 783.

<sup>101</sup> Article 15, para 8 of the League Covenant; Dinstein (n 8 above) 83.

breach.<sup>102</sup> By making the resort to the use of force subject to certain conditions, the Covenant appears to have introduced the concept of legal and illegal wars instead of the concept of just and unjust wars that was in vogue in the medieval era. Being legal or illegal could be discerned from a state's compliance or non-compliance with pacific settlement.<sup>103</sup>

The Covenant propagated collective security as one of its purposes, as against self-help in which individual states were allowed under general international law to resort to reprisals. Though armed reprisal in contemporary international is unlawful,<sup>104</sup> it was nevertheless considered to be legal at the time of the League of Nations in response to an initial act contrary to international law if an unsatisfied prior demand for remedies had been made.<sup>105</sup> Unlike the UN Charter, the League Covenant imposed an obligation on its members to refrain from war alone, but not on the use of force or threat thereof.<sup>106</sup> The League of Nations did not expressly provide for self-defence by states, because, in the opinion of the drafters, it was unnecessary on the grounds that self-defence remained an inherent right and was, therefore, to be taken for-granted. It was further argued that the express provision of self-defence may have been relevant 'within a legal order which generally prohibited the use of force in self-defence.'<sup>107</sup>

Even though the total prohibition of war was absent in the Covenant, its qualification of the right to embark on war was more comprehensive than any other normative framework at the time.<sup>108</sup> The League Covenant, thus, derogated substantially from customary law by seeking to prohibit the resort to war, though the effort ended in the provision of safeguards against war through procedures for settling disputes.<sup>109</sup> Merely providing for partial renunciation of wars created 'gaps' in the covenant. Gaps are contained in article 12(1) which permitted the resort to war three months after the arbitrator's award, judicial decision or report by the Council. War, therefore, was not prohibited for those who failed to comply with an award,

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<sup>102</sup> Article 13, para 2 of the League Covenant; see also Dinstein (n 8 above) 82.

<sup>103</sup> Brownlie (n 11 above) 57; EC Azubike 'Probing the scope of self-defence in international law (2011) *XVII Annual Survey of International & Comparative Law* 136; Alexandrov (n 99 above) 34.

<sup>104</sup> A/RES/2625(XXV) of 24 October 1970; R Barsotti 'The absolute prohibition of armed reprisals and attempts at reintroducing them' in A Cassese (ed.) *The Current Legal Regulation of the Use of Force* (1986) 79-102.

<sup>105</sup> *Nualilaa case (Germany v Portugal)* Reports of International Arbitral Awards (1928) 2 RIAA 1012; see also McCoubrey & White (n 4 above) 20.

<sup>106</sup> Kelsen (n 92 above) 787.

<sup>107</sup> Alexandrov (n 99 above) 6; Azubike (n 1103 above) 137.

<sup>108</sup> Alexandrov (n 99 above) 29.

<sup>109</sup> Alexandrov (n 99 above) 30-31.

decision<sup>110</sup> or unanimous report of the Council. Furthermore, article 15(7) permitted the resort to force even if it was the League Council that had failed to adopt a unanimous report, which might not have been the fault of any individual state in dispute. In spite of these gaps, states found it difficult to exploit the gaps as a basis for going to war, but instead relied on self-defence. The League Assembly also adopted resolutions relating to the prohibition of wars of aggression which were interpreted as constituting international crimes, and opted for pacific avenues to resolve international disputes.<sup>111</sup>

#### 2.4.4.2. Successes of the League of Nations

The League of Nations had one fundamental responsibility, viz. the prohibition of wars, particularly among its member nations. Its successes or failures, thus, are to be considered against the background of its ability to restrain recourse to war. Principally, the League established Mandates that administered formally defeated territories and also set up Special Commissions that administered the Saar Valley and the City of Danzig.<sup>112</sup> The League also intervened and settled the crises between Yugoslavia and Albania, Finland and Sweden (Aaland Islands), Poland and Germany (Upper Silesia), Iraq and Turkey (Mosul), and Greece and Bulgaria (Macedonia). It rendered humanitarian services by returning and settling some victims of war, such as refugees and prisoners in their countries, and also fought tropical diseases.<sup>113</sup> To complement the normative expressions encapsulated in the League Covenant, the League Assembly either enacted or was instrumental in enacting other legal frameworks to regulate the resort to force. Such instruments included, The Draft Treaty of Mutual Assistance, The Geneva Protocol of 2 October 1924, The Locarno Treaties of 1925 and The General Treaty for the Renunciation of War (Kellogg-Briand Pact) of 27 August 1928.<sup>114</sup> Neither the Draft Treaty of Mutual Assistance nor The Geneva Protocol, however, came into force.<sup>115</sup>

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<sup>110</sup> Article 13(4) of the League Covenant; see also Arend & Beck (n 36 above) 20.

<sup>111</sup> Both the Sixth Assembly of the League on September 25, 1925 and the Eighth Assembly of the League on September 24, 1927 adopted resolutions on war of aggression as an international crime.

<sup>112</sup> CH Levermore 'Achievement of the League of Nations in its first year' (1921) 96 *The Annals of the American Academy of Political and Social Science* 12-13.

<sup>113</sup> 'League of Nations: Successes and failures', at <http://www.ssag.sk/files/League-of-Nations.-Successes-and-Failures.pdf> (accessed 08/04/2016).

<sup>114</sup> Brownlie (n 11 above) 66-80.

<sup>115</sup> Brownlie (n 11 above) 68-71.

#### 2.4.4.3. Short-comings of the League of Nations

One fundamental weakness of the League Covenant was that it sought to ban full-scale wars, but not other uses of force short of war. Arend and Beck have observed that the Covenant created no restrictions on force that would fall below the threshold of war.<sup>116</sup> This gap was embraced by states which embarked on hostilities, but did not declare war, so as not to be caught under the partial ban created in the covenant.<sup>117</sup> Hence, Italy attacked the Greek island of Corfu in 1923.<sup>118</sup> In addition, both the League Covenant and other conventions that were formulated immediately after it failed to prohibit wars, particularly the 2<sup>nd</sup> World War. As a result of the League's failure, powerful nations continued to bully less powerful neighbours. For instance, Italy attacked the Corfu Island in Greece in 1923<sup>119</sup> and Abyssinia (now Ethiopia) in 1935.<sup>120</sup> Neither the imposition of economic sanctions by France and Britain on Italy for its aggression against Ethiopia nor the appeal of Emperor Haile Selassie (Ethiopian President) had much impact on Italy.<sup>121</sup> While sanction against Italy in respect of Ethiopia has been discussed above, there was no imposition of sanctions for its attack on Corfu Island.<sup>122</sup> The failure of the League of Nations to take decisive action against Italy for the unsolicited and unprovoked aggression against Ethiopia made commentators conclude

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<sup>116</sup> Arend & Beck (n 18 above) 22.

<sup>117</sup> McCoubrey & White (n 4 above) 22.

<sup>118</sup> The Italian chairman of the Greek-Albanian boundary commission was killed in Greece, and upon the failure by Greece to comply with Italy's ultimatum to pay reparations, Italy bombarded the Island of Corfu. Italy argued that the League of Nations was bereft of competence to deal with the matter, a war not having been declared, and that its actions were merely to show its unflinching resolve to enforce reparations; Alexandrov (n 117 above) 35. This contentious issue of whether forcible measures short of war that are taken without the prior exhaustion of procedures for judicial settlement or conciliation are compatible with the League Covenant was referred to a commission of jurists for determination. The commission's ambiguous reply was that 'coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of articles 12 to 15 of the Covenant,' see Minutes of the Twenty-Eighth Session of the Council, Sixth Meeting, March 13, 1924' (1924) *League of Nations Official Journal* 523; see also Alexandrov (n 99 above) 35. The League Council's decision 'whether it should recommend the maintenance or withdrawal of such measures' should depend on a case by case basis.' In spite of the Commission's ambiguous conclusions, however, the general view of the League is that measures involving the use of armed force short of war without prior recourse to pacific settlement were also violations of the Covenant, see Alexandrov (n 99 above) 36.

<sup>119</sup> JS Koliopoulos & TM Verernis *Modern Greece: A history since 1821* (2009) 102.

<sup>120</sup> D Nicolle *The Italian invasion of Abyssinia 1935-36* (2012) 50.

<sup>121</sup> Haile Selassie's Speech to the League of Nations, June 1936, 'Appeal to the League of Nations,' [http://astro.temple.edu/~rimmerma/appeal\\_to\\_the\\_league\\_of\\_nations\\_.htm](http://astro.temple.edu/~rimmerma/appeal_to_the_league_of_nations_.htm) (accessed 05/11/2014).

<sup>122</sup> J Barros *The Corfu incident of 1923: Mussolini and the League of Nations* (2015) 310; see also A Tooze *The Deluge: The great war and remaking the global order 1916-1931* (2014). Britain weighed the option of imposing sanctions on Italy by way of naval blockade for attacking the Corfu Island, but the idea was shelved because it may be cumbersome to implement, as it would require its entire fleet and collaboration of Italy's neighbours.



that the League of Nations was dead and powerless.<sup>123</sup> Similarly, the League failed to resolve the crises between Lithuania and Poland, France and Belgium, and Lithuania's seizure of Memel and the invasion of Ruhr by France and Belgium because of Germany's failure to pay its second reparations installment.

That apart, Japan, in defiance of the League Covenant, invaded Manchuria in 1937 and occupied it by establishing the puppet State of Manchukuo.<sup>124</sup> Upon condemnation by the League, Japan simply left the League in 1933 and continued its conquest of China. Among several other armed conflicts that involved the League member states were the Russo-Polish war of 1920-21, and Greece and Turkey from 1920-22. It is McCoubrey's view that these conflicts, indicated above, could not be categorized as exploitations of the Covenant's loopholes, but were wholesale violations or breaches of the obligations in the Covenant. To him, states such as Italy, Japan and Germany knocked down the structure of the League.<sup>125</sup>

#### **2.4.5. General Treaty for the Renunciation of War as an Instrument of National Policy (Kellog-Briand Pact)**

The feelings of disgust for wars which followed the 1<sup>st</sup> World War led to efforts by powerful nations to outlaw the resort to war. Following a discussion with James Shotwell, the Foreign Minister of France (Briand) sent a message to the American people on the tenth anniversary of their entrance to the First World War, April 6, 1929, suggesting the need to outlaw wars.<sup>126</sup>

While Briand's proposal for perpetual friendship was aimed at the US and France alone as evidenced in the initial draft agreement, Kellog (US Secretary of State) proposed an expanded would-be organization of all willing states when he wrote to France in this way, 'the two states should join in an effort to obtain the adherence of the principal powers of the world to a declaration denouncing war as an instrument of national policy.'<sup>127</sup> About 63

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<sup>123</sup> AJP Taylor *The origins of the Second World War* (1961) 37. Taylor stated: 'The real death of the League was in 1935, not in 1939 or 1945. One day it was a powerful body imposing sanctions, seemingly more effective than ever before; the next day it was an empty sham, everyone scuttling from it as quickly as possible. What killed the League was the Hoare-Laval plan. Yet this was a sensible plan, in line with the League's previous acts of conciliation from Corfu to Manchuria'.

<sup>124</sup> R Overy 'China's war with Japan, 1937-1945: The struggle for survival by Rana Mitter' *The Guardian*, 6 June 2013.

<sup>125</sup> McCoubrey (n 4 above) 21; see Brownlie (n 11 above) 75.

<sup>126</sup> H Muller *The Peace Pact of Paris: A Study of the Briand-Kellog Treaty* (1928) 8.

<sup>127</sup> Muller (n 126 above) 17.



states including USA, France, Britain, Australia, Canada, Japan, Germany, Czechoslovakia, India, South Africa, Poland, and Belgium, etc ratified the Pact, thereby giving it a universal outlook and it was interpreted as appearing to crystallize a rule of customary international law.<sup>128</sup> The Pact was opened for signatures on 27 August 1928 and entered into force on 24 July 1929.

Both the preamble and the operative part of the treaty expressed the outright prohibition on the use of force.<sup>129</sup> The preamble provided in part that relations of members with one another be sought only by pacific means through a peaceful and orderly process and that signatories that seek to promote their national interests by resorting to war shall be denied the benefits of the treaty provisions. Dinstein described this provision as permitting an action in individual or collective self-defence by members against erring states,<sup>130</sup> even though other sanctions by way of collective enforcement action against members were not contained in the Pact.<sup>131</sup> For this reason, Brownlie expressed the opinion that, while the normative character of the Pact was not contested because state practice affirmed its imposition of legal obligations on states, the absence of sanctions by way of mutual assistance was a weakness of the Pact.<sup>132</sup> Articles 1 and 2 are the main operative parts of the treaty prohibiting the resort to force by states.<sup>133</sup>

Kelsen contended that Article 1 forbade war only as an instrument of national policy, but it remained lawful to resort to war as an instrument of international policy.<sup>134</sup> To him, wars waged as sanctions against a violation of international law were permissible.<sup>135</sup> Kelsen's view expressed above seems to command no support because state practice has shown that states rarely wage wars because of a violation of international law. There is consensus among states that wars may be fought only based on the principle of self-defence or under the authority of the international organ, as state parties did not contemplate otherwise.<sup>136</sup>

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<sup>128</sup> McCoubrey (n 4 above) 22.

<sup>129</sup> Para 4 of the preamble & paras 1 & 2 of the operative part of the Kellogg-Briand Pact.

<sup>130</sup> Dinstein (n 8 above) 85-86; see also The Preamble to the Pact, 1928, 94 LNTS 57.

<sup>131</sup> Brownlie (n 11 above) 83.

<sup>132</sup> Brownlie (n 11 above) 83-84.

<sup>133</sup> Art 1 of the League Covenant provides that: 'The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the resolution of international controversies and renounce it, as an instrument of national policy in their relations with one another.'

<sup>134</sup> Art 1 of the Kellogg-Briand Pact.

<sup>135</sup> H Kelsen *Principles of International Law* (Reinhart, 1952) 33-34, 43; see also Dinstein (n 8 above) 69-70, 86.

<sup>136</sup> Brownlie (n 11 above) 89.

The importance of the Pact was underscored by the membership of the which sustained pressure on member states by constantly reminding individuals and member states, among them, Peru,<sup>137</sup> Japan and China, Hitler, Britain, France, the President Benes of Czechoslovakia,<sup>138</sup> Italy and Ethiopia<sup>139</sup> to meet their obligations not to cause infractions of the Pact. More importantly, the Pact avoided some of the loopholes in the League Covenant by generally proscribing war, except within the permissible limits of self-defence.<sup>140</sup> The Pact also provided the legal criteria upon which charges against war criminals in both the International Military Tribunals at Nuremberg and Tokyo were formulated, as had earlier been considered in the London conference.<sup>141</sup>

The Pact was criticized for lacking in provisions relating to exceptions, such as self-defence and collective enforcement action, to deter aggressor states. The concept of self-defence was considered as being intrinsic and inviolable to all states and was implicit in every treaty having anything to do with the use of force.<sup>142</sup> Although, there were no manifest exceptions, the reservations deposited by signatories had the effect of exceptions to the prohibition of the use of force.<sup>143</sup> These reservations with respect to self-defence appear to give states the unbridled right to use force which was sought to be avoided, since states were at liberty to determine the scope of self-defence. This is because the actions that could legitimately give rise to a response in self-defence were not specified.<sup>144</sup>

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<sup>137</sup> AJ Toynbee *Survey of International Affairs* (1933) 445.

<sup>138</sup> US Foreign Relations 1938, 1. 661, 663, President Roosevelt of the United States secured commitment from the President Benes of Czechoslovakia and the Prime Ministers of Britain and France on their obligations not to cause infractions of the Pact.

<sup>139</sup> The Report of the Committee in respect of the Italo-Ethiopian dispute which was adopted by the League Council on 7 October 1935 referred to the their obligations under the Pact, see also US Secretary of State in Communication to the Emperor of Ethiopia, Department of State Press Release, 14 September 1935. Arend & Beck (n 18 above) 23.

<sup>141</sup> H Kelsen 'Will the Judgment of the Nuremberg Trial constitute a precedent in international law? (1947) 1 *The International Law Quarterly* 155; Brownlie (n 11 above) 77-80.

<sup>142</sup> MC Alder 'The origin in international law of the inherent right of self-defence and anticipatory self-defence' *The Western Australian Jurist* 108-109, [http://www.murdoch.edu.au/School-of-Law/document/WA-jurist-documents/WAJ\\_Vol2\\_2011\\_M\\_Alder---Origin-in-International-Law-of-Inherent-Right-to-Self-Defence.pdf](http://www.murdoch.edu.au/School-of-Law/document/WA-jurist-documents/WAJ_Vol2_2011_M_Alder---Origin-in-International-Law-of-Inherent-Right-to-Self-Defence.pdf) (accessed 02/11/2014); see also William Borah ( Presiding as Chairman), Hearings before the Committee on Foreign Relations United States Seventh Congress on the General Pact for the Renunciation of War signed at Paris, August 27, 1928, held December 7 and 11, 1928.

<sup>143</sup> BAV Roling 'The Ban on the Use of Force and the United Nations Charter' Cassese (ed.) in *The Current Legal Regulation of the Use of Force* (1986) 5.

<sup>144</sup> Arend & Beck (n 18 above) 23.

Brownlie has contended that the reservation of the right of legitimate self-defence of states was a condition precedent for the signing of the Kellogg-Briand Pact<sup>145</sup> which was also expressed in Kellogg's correspondences to parties.<sup>146</sup> During the negotiations of the Pact, Kellogg had commented, before the US Senate Committee on Foreign Relations, on the freedom of the individual states to determine the scope of self-defence.<sup>147</sup> In response to this proposition, Lauterpacht expressed an opinion that a situation in which states determine what constitutes self-defence in finality makes it prone to abuse, as it is absurd and the efficacy of the Pact may be eroded. He stated, 'if the parties are free, not merely to make a provisional determination of the necessity to act but also to determine with conclusive finality the lawfulness of their own action, then the Pact would not be a legal instrument.'<sup>148</sup> Also, in its judgment, the International Military Tribunal at Nuremberg observed, 'But whether the action taken under the claim of self-defence was in fact aggressive or defence must ultimately be subject to investigation and adjudication if international law is ever to be enforced'<sup>149</sup>

#### 2.4.5.1. Successes of the Kellogg-Briand Pact

The defect in the League Covenant in respect of a lack of a general and clear prohibitive norm on the use of force was cured by the Kellogg-Briand Pact which clearly constrained the recourse to force.<sup>150</sup> The Pact provided for the renunciation of war as an instrument of national policy.<sup>151</sup> The Pact became a source of law or a guide in the formulation and drafting of international agreements thereafter. For instance, the Chaco Declaration, the Non-Aggression Treaty of 21 August 1937, Seventh International Conference of American States

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<sup>145</sup> Brownlie (n 11 above) 235-237, he said that several states entered reservations and the British reservation read thus: '...there are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect'.

<sup>146</sup> MC Alder 'The inherent right of self-defence in international law (2012) 56-57.

<sup>147</sup> Secretary Frank Kellogg stated, 'Certainly, the right of self-defense is not limited to the territory in the continental United States, for example it means that this Government has a right to take such measures as it believes necessary to the defense of the country, or to prevent things that might endanger the country; but the United States must be the judge of that, and it is answerable to the public opinion of the world if it is not an honest self-defense; that is all.'

<sup>148</sup> Q Wright 'The meaning of the Pact of Paris' (1933) 27 *American Journal International Law* 41-48.

<sup>149</sup> Brownlie (n 11 above) 239.

<sup>150</sup> JN Moore 'Strengthening world order: Reversing the slide to anarchy (1989) 4 *American University Journal of International Law & Policy* 9.

<sup>151</sup> Article 1 of the Kellogg-Briand Pact.

and the Montevideo Convention of 1933 drew inspiration from the Pact. Specifically, the clause on the non-recognition of forcible territorial acquisitions reflected in the UN Charter and other declarations and conventions were drawn from the Pact.<sup>152</sup> In addition, provisions of the Pact were relied upon in the determination of culpability of individuals who had responsibility in the wars of aggression.<sup>153</sup>

#### **2.4.5.2. Short-comings of the Kellog-Briand Pact**

The weakness that is common to both the League Covenant and the Pact is the non-prohibition of forcible measures short of war as nations employed forcible measures against others without formally declaring war.<sup>154</sup> The Pact sought to prohibit war, which is the gravest form of the use of force, and left other lesser uses of force unhindered, hence the resort to measures short of the declaration of war such as armed reprisals by states.<sup>155</sup> This position too is challenged on the ground that the subsequent practice of states has shown that even threats of resort to force are prohibited.<sup>156</sup> As a result of the failure of the Pact to abolish further wars, particularly the 2<sup>nd</sup> World War, the UN Charter dealt with the problem by lowering the threshold of the prohibition from ‘resort to war’ as contained in the Pact to ‘resort to the use of force’.<sup>157</sup>

Apart from generally providing in the preamble that benefits furnished by the Pact would be denied those in violation of the Pact, there was no specific sanction regime that could be discerned from the Pact.<sup>158</sup> Arguably, no organization could function without prescribed punishment against erring members. Lesaffer has, however, argued that, though specific sanctions were not listed in relation to breach of the Pact, contravention nevertheless resulted in such a party being made liable to costs and damages arising from the war. In addition, other parties could intervene against the perpetrator that might result in conquest or acquisition of any rights of the perpetrator under the maxim ‘*ex iniuria non oritur jus*’.<sup>159</sup>

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<sup>152</sup> Brownlie (n 11 above) 91.

<sup>153</sup> AA Ryan ‘Nuremberg’s contributions to international law’ (2007) 30 *Boston College International & Comparative Law Review* 79.

<sup>154</sup> GA Ruiz *The United Nations Declaration on Friendly Relations and the system of the sources of international law* (1979) 119; R Bernhardt *Use of force: War and neutrality peace treaties* (A-M) (2014) 238.

<sup>155</sup> Arend & Beck (n 18 above) 23.

<sup>156</sup> Wright (n 148 above) 23.

<sup>157</sup> Art 2(4) of the UN Charter; MG Fry et al *Guide to international relations and diplomacy* (2002) 462.

<sup>158</sup> Para 4 of the preamble of Kellog-Briand Pact.

<sup>159</sup> Lesaffer (n 74 above) 26-27.

#### 2.4.6. Prohibition of the use of force under the United Nations

The contemporary international law security infrastructure was erected after the 2<sup>nd</sup> World War as a result of the suffering of belligerents and civilians alike.<sup>160</sup> Advancement in technology, which culminated in the production of nuclear, biological and chemical weapons with potentially catastrophic effects, blurred the demarcation drawn by IHL in respect of military and civilian objectives and generally endangered humankind. The need to avoid subjecting future generations to the scourge of armed conflicts, therefore, brought the victors of the war together and established the security system that sought to ban the use of force to the greatest extent possible.<sup>161</sup> The aftermath of the coming together of the world powers including the US, France, China, the UK and Russia, was the inauguration of the UN in 1945. The UN had to draw on some of the experiences of the League of Nations. Even the structures of these two organizations are similar in certain respects. Both institutions created the office of the Secretary-General as the head of administration, permanent members and, normatively, they primarily sought to prohibit the unilateral resort to force by states thereby giving preference to centralized enforcement actions.<sup>162</sup> As expected, all these organisations sought to formed the existing law on the use of force.

##### 2.4.6.1. The United Nations Charter

The UN was established primarily for the purpose of maintaining international peace and security.<sup>163</sup> Its Charter is the most comprehensive formulation in contemporary international law that has tackled the issue of inter-state use of force. Article 2(4) thereof enjoins all states to refrain from the threat or use of force.<sup>164</sup> Specifically, article 2(4) of the UN Charter is considered to be comprehensive enough to outlaw war, not in its traditional sense alone, but also all forms of use of force, be it formally declared hostilities or not.<sup>165</sup> Apart from self-defence, SC authorization and consent, the prohibition expressed in article 2(4) covers all

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<sup>160</sup> A Weiner 'The use of force and contemporary security threats: Old medicine for new ills' (2006) 59 *Stanford Law Review* 421.

<sup>161</sup> A Weiner (n 160 above) 421.

<sup>162</sup> I Brownlie 'The United Nations Charter and the use of force, 1945-1985' in A Casesse (ed.) *The legal regulation of the use of force* (1986) 495; MJ Glennon *Limits of law, prerogatives of power: Interventionism after Kosovo* (2001) 16.

<sup>163</sup> Art 1(1) of the UN Charter.

<sup>164</sup> Art 2(4) of the UN Charter provides: '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 manner inconsistent with the purposes of the United Nations.'

<sup>165</sup> Henkin (n 25 above) 139-140.

trans-boundary applications of lethal force, whether in purported protection of nationals abroad or for unilateral humanitarian intervention short of SC authorization.<sup>166</sup>

Apart from comprehensively placing a restraint on the use of force including threats of the use of force, *vide* article 2(4), the Charter also stipulated that disputes between member states be settled through peaceful and pacific means only, that is, by using such methods as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements.<sup>167</sup> The UN Charter further strengthened and reinforced the customary norm of prohibition of the use of force which appeared to have been established by earlier treaties, particularly the Kellog-Briand Pact which had had an unprecedented degree of universal acceptance.<sup>168</sup> Among several fundamental additions to the Charter, which had been manifestly absent on the face of the Kellog-Briand Pact and which significantly distinguished these instruments, was the provision relating to self-defence.<sup>169</sup> The determination of states to wriggle of the trappings of the self-defence provision is what has culminated in the transformation of the law of self-defence. As a result of the universality nature of the UN Charter, particularly having regards to the fact that article 2(4) of the Charter bears a customary law status and, therefore binds non-state parties, Brownlie stated that the provisions of the Charter relating to the prohibition of the use of force represent the general international law.<sup>170</sup> For him, the Kellog-Briand Pact, which continued to remain relevant upon the convocation of the UN Charter and the UN Charter itself, formed the essential juridical basis of the world legal order.<sup>171</sup>

#### **2.4.4.2. Scope of article 2(4) of the UN Charter**

Article 2(4) of the Charter has two major components dealing with the prohibition of the use of force. These are the ‘prohibition of the actual use of force’ and the ‘prohibition of the threat of force’. These components will now be discussed in turn.

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<sup>166</sup> S Murphy ‘Terrorism and the Concept of Armed Attack in the U.N. Charter’ (2002) 43 *Harvard International Law Journal* 42; Henkin (n 43 above) 139-140.

<sup>167</sup> Article 33 of the UN Charter.

<sup>168</sup> Brownlie (n 11 above) 112.

<sup>169</sup> Article 51 of the UN Charter.

<sup>170</sup> Brownlie (n 11 above) 113.

<sup>171</sup> Brownlie (n 11 above) 113; see also H Kelsen *The Law of the United Nations: A critical analysis of its fundamental problems* (1951) 119-121.



### 2.4.6.3. Prohibition of the actual use of force

Article 2(4) is the most authoritative expression of the prohibition of the use of force and it represents a change in the content of international law.<sup>172</sup> When the *travaux préparatoires* on the UN Charter were being considered, arguments arose as to whether the prohibition in article 2(4) is limited to armed force alone or whether it also included economic, political or ideological forces.<sup>173</sup> Legal scholarship supports the fact that ‘force’ as used in article 2(4) is understood to mean ‘an organized military attack’ from the army, navy or air force. In practice, however, ‘force’ as a concept may include acts of armed bands, volunteers and aid given to insurgents by a Government using these groups as their agents.<sup>174</sup> The non military measures are, however, contained in article 41 of the Charter.<sup>175</sup> The concept of ‘force’ used in article 2(4) is wider than the word ‘war’ as had been used in the League Covenant and the Kellogg-Briand Pact.<sup>176</sup> While ‘war’ refers to the most serious form of the use of force which was sought to be constrained by those earlier instruments, the ban of the use of force in article 2(4) is more comprehensive. It covers measures short of wars which were not considered as constituting a violation of international law prior to the inauguration of the UN.<sup>177</sup> Legal commentators and states are concerned more with actual use of force because it constitutes tangible evidence or proof of the use of force which is easier than proving the unrealistic threat to use force. There are instances where threats occur without censure (expression of disappointment in the conduct of the adversary) or even comment, unlike the weightier actual use of force.<sup>178</sup> The threatening behaviour of a state is, therefore tolerated more than the actual use of force.<sup>179</sup>

Quite opposite to the interpretations by some scholars, the prohibition in article 2(4) is very comprehensive and watertight, and it bears the character of a *jus cogens* norm, from which

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<sup>172</sup> RA Mullerson ‘The principle of non-threat and non-use of force in the modern world’ in WE Butler (ed.) *The non-use of force in international law* (1989) 29-30.

<sup>173</sup> Sahovic (n 32 above) 482-483. While the Non-aligned Movement contended that the prohibition should be applicable to all uses of force in international relations including economic force, their view was not adopted because of the opposition by western nations, and so the ban contemplated under Art 2(4) applies exclusively to armed force.

<sup>174</sup> Brownlie (n 11 above) 361; Shaw (n 3 above) 1123.

<sup>175</sup> Art 44 of the UN Charter; Para 7 of the preamble to the UN Charter; B Simma *The Charter of the United Nations: A commentary* (2002) 118.

<sup>176</sup> C Gray *International law and the use of force* (2008) 6-7.

<sup>177</sup> Corten (n 1 above) 50 – 52.

<sup>178</sup> J Green ‘Questioning the peremptory status of the prohibition of the use of force’ (2011) 32 *Michigan Journal of International Law* 215, at 226; see also R Sadurska ‘Threat of force’ (1988) 82 *American Journal of International Law* 239.

<sup>179</sup> Corten, (n 1 above) 93.



no derogation is permitted, except that it may be modified subsequently by a norm having similar character.<sup>180</sup> Being a *jus cogens* norm, any other obligations of states, including their obligations under regional agreements that are in conflict with article 2(4), are void.<sup>181</sup> The *jus cogens* nature of article 2(4) has, however, been challenged by Green on the grounds that article 2(4) is surrounded by uncertainties relating to the exceptions and scope.<sup>182</sup> He also argues that whether a particular norm has the character of super norm of *jus cogens* is not dependent on its peremptory status advanced by writers but rather by the consent of states as evidenced by their practice.<sup>183</sup> In spite of Green's view, the weight of legal scholarship is in favour of projecting article 2(4) as a *jus cogens* norm.<sup>184</sup> To that extent, even bilateral or multilateral treaties between states that are believed to be procured through the instrumentality of threat or use of force are void on the grounds of being in violation of article 2(4) of the Charter.<sup>185</sup> The mandatory nature of the principle of the non-use of force is such that, apart from the two exceptions under Articles 51 and 42 of the Charter, even humanitarian intervention without Security Council authorization is illegal, (though debatable).<sup>186</sup> Simma argued that a humanitarian crisis that does not transcend borders occasioning armed attacks cannot be considered under article 51 of the Charter.<sup>187</sup>

Commentators have, however, argued that measures of force not directed at the overthrow of an existing state government or for the seizure of territory may not offend the prohibition of force encapsulated under article 2(4) of the Charter.<sup>188</sup> The reason for this is that article 2(4) contained the phrase 'against the territorial integrity or political independence of any state.'<sup>189</sup> In practice, though, states do not always rely on the above phrase as an exception and the preponderance of legal scholarship is not in support of that view. Even the reliance on that view by Britain in the *Corfu Channel case* and by Israel during the Entebbe raid crisis is without international support.<sup>190</sup>

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<sup>180</sup> B Simma 'NATO, the UN and the use of force: Legal aspects' (1999) 10 *European Journal of International Law* 2 – 3.

<sup>181</sup> Art 103 of the UN Charter.

<sup>182</sup> Green (n 178 above) 217.

<sup>183</sup> Green (n 178 above) 216-217.

<sup>184</sup> K Hossain 'The concept of *jus cogens* and the obligations under the U.N. Charter' (2005) 3 *Santa Clara Journal of International Law* 72, 88.

<sup>185</sup> Art 52 of the Vienna Convention of 1969.

<sup>186</sup> Simma (n 180 above) 5.

<sup>187</sup> Simma (n 180 above) 5.

<sup>188</sup> Gray (n 7 above) 247 & 249.

<sup>189</sup> Gray (n 176 above) 31; Bowett (n 79 above) 152; Waldock 'The regulation of the use of force by individual states in international law' (1952) 81 *Recueil des cours de l'Acad (RCADI)* 415.

<sup>190</sup> Gray (n 176 above) 32.

### 2.4.4.3. Prohibition of the threat of the use of force

Threats are the provocative conduct of states such as demonstrations of force, ultimatums and intimidating acts that could potentially degenerate into use of force. Sadurska defined ‘threat’ as ‘an act that is designed to create a psychological condition in the target of apprehension, anxiety and eventually fear, which will erode the target’s resistance to change or will pressure it toward preserving the *status quo*.’<sup>191</sup> Threats could be discerned from positive actions such as military manoeuvres, the deployment of weapons, moving into proximity with an opponent, communication as may be contained in an agreement, oral statements or communique.<sup>192</sup> The threat of the use of force is equally prohibited as is the substantive use of force, although this appears to be merely rhetoric and commands no significant adherence by states.<sup>193</sup> Henkin has, therefore, argued that the threat of force has no real significance because the threats to destroy Israel by Arab states have not in any way been treated as violations of the Charter.<sup>194</sup> Even the stock-piling of WMD has not been considered to be a violation of the provisions of the Charter.<sup>195</sup> The need to constrain even threats other than full-blown wars alone materialized after the two world wars because such threats had in the past degenerated into armed conflicts.<sup>196</sup> For instance, Italy’s war with Greece and Germany’s wars with Czechoslovakia and Austria were by-products of earlier threats. Both the ICJ and the UN General Assembly have expressed the need for states to refrain from threats of the use of force.<sup>197</sup>

The concepts ‘use of force’ and ‘threat of force’ are seen to go together in most cases as has been observed by the ICJ. Outside of the actual use of force, the threat of force may not have much legal significance because a threat is intended to precede real violence, and where there is no use of force its legal consideration diminishes or even ceases.<sup>198</sup> In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court held that, ‘The notions of ‘threat’ and ‘use’ of force under Article 2, paragraph 4 of the Charter

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<sup>191</sup> Sadurska (n 178 above) 241. (239-268).

<sup>192</sup> Sadurska (n 178 above) 242-243.

<sup>193</sup> Art 2(4) of the UN Charter.

<sup>194</sup> Henkin (n 25 above) 136.

<sup>195</sup> Henkin (n 25 above) 136.

<sup>196</sup> N Tsagourias ‘The prohibition of threats of force’ in N White & C Henderson (eds.) *Research Handbook on international conflict and security law* (2013) 2-3.

<sup>197</sup> *Nicaragua case* (n 8 above) para 187 – 190; *Consequences of the Construction of a Wall in the Palestinian Territory, Advisory Opinion*, ICJ Reports (2004), para 87; A/RES/2625 (XXV) of 24 October 1970; A/RES/3314 (XXIX) of 14 December 1974; Art 4 of the African Union Constitutive Act (2002).

<sup>198</sup> Sadurska (n 178 above) 239.

stand together in the sense that if the use of force itself in a given case is illegal-for whatever reason, the threat to use such force will be likewise illegal.<sup>199</sup> In short, if it is to be lawful, the declared readiness of a state to use force must be a use of force that is in conformity with the Charter. It is the law, however, that a threat to use force in breach of the Charter (that is, outside self-defence and SC authorized enforcement action) is inconsistent with law. A warning or threat to use force in furtherance of an action founded on self-defence or SC authorized action is, therefore, lawful. This is because such actions are not in contravention of the prohibition contemplated under the UN Charter.<sup>200</sup>

The above view with which this study completely agrees is a re-statement of the ICJ's decision by Dinstein in reaction to an earlier argument by Sturchler.<sup>201</sup> Sturchler had argued that a threat that is made in readiness to exercise a right of self-defence is also unlawful because it may degenerate into chaos or cause escalation. Tsagourias shared Dinstein's view when he stated that, 'the lawfulness of a threat of force is contingent on the lawfulness of the projected use of force, assessed by the standard of the United Nations Charter, which permits uses of force only in self-defence or as enforcement.'<sup>202</sup> This study agrees with the Court's position that a threat directed at carrying out a lawful purpose is equally lawful.

It appears that the constraints placed on the use of force do not affect the stock-piling or development of chemical or nuclear weapons.<sup>203</sup> There is, thus, no lawful basis for military forces to control their production in purported self-defence, unless there is a SC authorization.<sup>204</sup> This is because the use of force to control weapons development does not fall under the known exceptions to the prohibition of the use of force created by international law. While two express exceptions are contained in the UN Charter, i.e. individual or

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<sup>199</sup> *Nuclear Weapons case* (n 24 above) para 47; see also para 48 where, in answering the question of whether possession of nuclear weapons amount to threat to use force, it held that 'whether this is a 'threat' contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a state, or against the purposes of the United Nations, or whether, in the event that it were intended as means of self-defence, it would necessarily violate the principles of necessity and proportionality. In any of the circumstances the use of force, and the threat to use it would be unlawful under the law of the Charter;' see also Gray (n 7 above) 13.

<sup>200</sup> Y Dinstein 'The threat of force in international law by Nicholas Sturchler' (2008) 102 *American Journal of International Law* 919, (918-920).

<sup>201</sup> N Sturchler *The threat of force in international law* (2007) 358.

<sup>202</sup> Tsagourias (n 196 above) 2-3.

<sup>203</sup> Shaw (n 3 above) 1125.

<sup>204</sup> M O'Connell & RE Molla 'The Prohibition on the Use of Force for Arms Control: The Case of Iran's Nuclear Program' (2013) 2 *Penn State Journal of Law and International Affairs* 315.

collective self-defence and Security Council authorized enforcement action,<sup>205</sup> commentators have made a case, under customary international law, for invitation or consent of states for the use of force in their territories.<sup>206</sup>

O'Connell and Molla have contended that the argument for self-defence is not available to avert mere threats, that necessity and proportionality are to be distilled from an actual armed attack, and therefore, the development of WMD alone cannot trigger a military force in response, as it is not an armed attack.<sup>207</sup> With regards to this, the invasion of Iraq by the US and its allies in 2003, Israel's attacks of Iraq in 1981, and the Sudan in 2009 and Syria in 2007 and 2013 respectively were criticized and condemned.<sup>208</sup> Israel's confrontation with these states is briefly discussed in chapter six below. Sabel, however, justifies Israel's customary right of pre-emptive self-defence to threats, even though Iran, the potential attacker, had taken no preliminary steps.<sup>209</sup>

Under international relations, threats are used to give notice of impending sanctions to compel compliance with a norm or as a unilateral request of the threatener. Threats deter opponents and accelerate the settlement of disputes as either of the parties may feel that the adversary may be benefitting from a stalemate in negotiations.<sup>210</sup>

#### 2.4.4.4. United Nations institutional mechanisms and the use of force

The organs of the UN created under the Charter are expected to collaborate with all nations and work toward world peace in consonance with the purposes and principles of the

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<sup>205</sup> Articles 51 & 42 of the UN Charter.

<sup>206</sup> L Doswald-Beck 'The Legal Validity of Military Intervention by Invitation of the Government' (1986) 56 *British Year Book of International Law* (BYBIL) 189, 191-92; O'Connell & Molla (n 204 above) 316. O'Connell & Molla (n 204 above) 318-319; *Nuclear Weapons Case* (n 24 above) paras 49-73.

<sup>207</sup> O'Connell & Molla (n 204 above) 321. Syria was attacked in September 2007 for allegedly cooperating with North Korea in constructing a weapons production factory, for which Israel engaged eight fighter jets to bomb the facilities; see D Neff 'Israel bombs Iraq's Osirak Nuclear Research Facility' *Washington Post on Middle East Affairs*, June 1995. On 7 June 1981, eight Israeli F-16 fighter jets, protected by six F-15 escorts bombed Iraq's Osirak nuclear facility. Israel justified the attack on grounds that it posed existential threat to Israel and the facility was of strategic importance to Saddam Hussein; see also I Black 'Israel's attack on Sudanese arms factory offers a glimpse of secret war' *The Guardian*, 25 October 2012. Israel carried out two attacks against Sudan in January and February 2009 respectively. While the first attack which killed 119 people occurred because Israel believed that a convoy was carrying arms through Sudan to Hamas in Gaza, the second bombing targeted a ship in Sudanese port.

<sup>209</sup> R Sabel 'The legality of an attack against Iranian nuclear facilities' (2012) 345 *Institute for National Security Studies* (INSS INSIGHT) 1.

<sup>210</sup> Sadurska (n 178 above) 246.

organization.<sup>211</sup> The main institutions that perform responsibilities relating to the use of force are the GA, SC and the ICJ. They play complementary roles in the maintenance of world peace, as no particular organ can claim exclusive responsibility with regard to the realization of the purposes of the UN.<sup>212</sup> Decisions of the GA are reached through declarations and resolutions,<sup>213</sup> while the SC takes its decisions through resolutions by members. Resolutions of the UN are, strictly speaking, not sources of international law, but they qualify as expression of *opinion juris*, which may crystallize into the status of customary international law.<sup>214</sup> More importantly, resolutions relating to the use of force, even before attaining customary law character are capable of reinforcing the provisions of article 2(4) on the prohibition of the threat or use of force.

#### **2.4.4.5. Role of the General Assembly on the prohibition of the use of force**

The GA consists of all member states of the UN.<sup>215</sup> The GA has the subsidiary responsibility to maintain international peace and security, but its resolutions touching on the use of force do not command binding obligations, the primary role for that having been given to the SC.<sup>216</sup> In practice, however, the GA plays a significant role in the maintenance of international peace and security to the extent that it intervenes in the domestic affairs of a state, where gross violations human rights, such as racial discrimination, apartheid and colonization exist. In respect of issues relating to the use of force, the GA makes recommendations to the SC, but it must refrain from making any recommendation on a matter pending before the SC for consideration.<sup>217</sup> The GA's residual power in handling issues on the use of force, however, is activated when the SC's usefulness is hampered by a lack of consensus and the use of *veto*.<sup>218</sup> Little regard was given to the specific roles the GA will play in relation to the use of force in the event of a deadlock or the failure of the SC that

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<sup>211</sup> Art 1 of the UN Charter.

<sup>212</sup> D Akande 'The role of the ICJ in the maintenance of international peace' (1996) 8 *African Journal of International and Comparative Law* 592.

<sup>213</sup> MD Oberg 'The legal effects of resolutions of the UN Security Council and General Assembly in the jurisprudence of the ICJ' (2006) 16 *European Journal of International Law* 883.

<sup>214</sup> Oberg (n 213 above) 897.

<sup>215</sup> Art 9 of the UN Charter.

<sup>216</sup> K Hossain 'The complementary role of the United Nations General Assembly in peace management' (2014) *Journal of Turkish Weekly* 77.

<sup>217</sup> Art 12(1) of the UN Charter provides, 'While the Security Council is exercising in respect of any dispute or situation the functions assigned to in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.'

<sup>218</sup> A/RES/377 of 3 November 1950; M Rimaneli *The A to Z of NATO and other international security organisations* (2009) 607; WC Clemens *Dynamics of international relations: Conflict and mutual ain in an era of global interdependence* (2004) 525.

becomes a challenge to the UN security system. The mere mention of it during the consideration of the *travaux préparatoires* at Dumbarton Oaks was opposed by the permanent members.<sup>219</sup> They felt that member states should bring matters that are capable of causing the breach of peace through the GA, but that the GA must not deal with any matter on international peace and security that is being considered by the SC.<sup>220</sup>

Upon the SC becoming virtually paralysed during the cold war era because of the instrument of *veto*, member states were inclined to explore solutions to security problems in the GA. Exploiting its powers under the Charter to make recommendations on any matter which is not at the time pending before the SC, the GA adopted the ‘Uniting for Peace’ resolution 377.<sup>221</sup> Emergency sessions of the GA may be called in furtherance of its powers under the ‘Uniting for Peace’ procedure on the following grounds: (a) there appears to be a threat to the peace, breach of the peace or act of aggression; (b) there is lack of unanimity of the permanent members of the SC; and (c) because of these problems the SC has failed to exercise its primary responsibility for the maintenance of international peace and security.<sup>222</sup> The GA’s hitherto limited power to adopt resolutions that border only on administrative, financial and organizational issues was widened to accommodate resolutions of a political nature.<sup>223</sup> Based on the ‘Uniting for Peace’ procedure, the GA performed the duties which seemed exclusive to the SC even by establishing peacekeeping forces in the Middle East.<sup>224</sup> The involvement of the GA in matters of collective enforcement actions was interpreted as being in conformity to the Charter of the UN.<sup>225</sup>

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<sup>219</sup> N MacQueen *Peacekeeping and the international system* (Routledge, 2006) 51.

<sup>220</sup> TM Franck *Recourse to Force: State action against threats and armed attacks* (2002) 31; Art 12(1) of the UN Charter.

<sup>221</sup> A/RES/377(V) of 3 November 1950 provides that ‘if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to make the appropriate recommendations to members for collective measures, including in the case of a breach of the peace, or act of aggression to use armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within 24 hours of the request therefor: such emergency special session shall be called if requested by the Security Council on the vote of any seven members or by a majority of the Members of the United Nations.’

<sup>222</sup> Hossain (n 216 above) 83.

<sup>223</sup> N Elaraby ‘Some reflections on the role of the Security Council and the prohibition of the use of force in international relations: Article 2(4) revisited in light of recent developments’ 51, [www.mefacts.com/cache/pdf/icj/1149.pdf](http://www.mefacts.com/cache/pdf/icj/1149.pdf) (accessed 09/10/2014).

<sup>224</sup> Gray (n 176 above) 260.

<sup>225</sup> *Certain Expenses of the United Nations, (Article 17, Paragraph 2 of the Charter)* Advisory Opinion of 20 July 1962, ICJ Reports (1962) p. 151, when the UN incurred certain expenses for maintaining peacekeeping force in the Congo, and when states were requested to contribute to meeting those expenses, France and Russia refused to pay their shares on the ground that the operations authorised and embarked



Consequently, in the exercise of the procedure described above and in consonance with article 2(4) of the Charter, the GA has adopted several resolutions that touch on constraining the use of force.<sup>226</sup> These resolutions show the resolve of the GA that the contravention of the rules not to resort to force may mean a violation of both the UN Charter and international law generally and, therefore, attracts responsibility. The GA resolutions are not binding but of a recommendatory nature.<sup>227</sup> A resolution of the GA may, however, crystallize into customary law if states see it as obligatory, that is when *opinion juris* has been established.<sup>228</sup> Important GA resolutions in this regard include, but are not limited to: (a) 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. [Both in the preamble and the operative part, this resolution re-emphasized the provision of article 2(4) of the UN Charter, that is, its adoption was intended to further develop the law on the use of force];<sup>229</sup> (b) 1974 Definition of Aggression. [In adopting this resolution, the GA appears to give explanation to the concept of ‘armed attack’ contained in article 51 of the Charter while reiterating the ban on the use of force in the territory of another state];<sup>230</sup> and (c) Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.<sup>231</sup> [The GA used this resolution to reiterate the obligations of all states to refrain from use of force in the territories of other states]. The preamble indicated one of the rationales of its adoption as being to contribute to the improvement of

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upon by the Assembly were *ultra vires* the Charter. This position culminated in the Assembly invoking the advisory jurisdiction of the ICJ to determine whether these expenses constituted ‘expenses of the organisation. By 9 to 5 votes the ICJ confirmed the *vires* of the expenses.’

<sup>226</sup> A/RES/2625(XXV) of 24 October (1970); A/RES/38/7 (XXXVIII) of 2 November 1983, where the GA deplored the 1983 invasion of Grenada by the US.

<sup>227</sup> *South West African Case* (Second Phase) ICJ Reports (1966) p 6, para 50.

<sup>228</sup> *North Sea Continental Shelf Case* ICJ Reports (1969) para 3; *Nicaragua Case* (n 8 above) para 88, The adoption of the 1977 Additional Protocols to the Geneva Conventions by the General Assembly and the passage of other resolutions on the non use of force brought about the crystallization of customary law.

<sup>229</sup> A/RES/2625 (XXV) of 24 October (1970), the resolution proclaims the principle that: States 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 manner inconsistent with the purposes of the United Nations; States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; States have a duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter; States shall co-operate with one another in accordance with the Charter; there shall be equal rights and self-determination of peoples; there shall be sovereign equality of States; States shall fulfil in good faith the obligations assumed by them in accordance with the Charter.

<sup>230</sup> A/RES/3314 (XXIX) of 14 December 1974 provides in part ‘Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition;’ see also *Nicaragua Case* (n 8 above) para 195; *DRC case* (n 24 above) para 146.

<sup>231</sup> A/RES/42/22 (XLII) of 18 November 1987.



international relations, while re-emphasizing the Charter provisions of article 2(4). Paragraph 12 thereof indicated the complementary role the Assembly resolutions play because they were adopted in conformity with the Charter and relevant paragraphs of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Specifically, the ‘Uniting for Peace’ procedure was invoked to order the Soviet Union to stop its intervention in Hungary in 1956 and also to compel the withdrawal of Britain and France from the Suez Canal also in 1956. The procedure has become a potent weapon in the deployment of peacekeeping forces, the first instance being the deployment of a peacekeeping force to the Suez Canal, in 1956 when the SC was deadlocked by vetoes from Britain and France. Similarly, the Assembly deployed a peacekeeping force to the Congo in 1960, including the mandate to use military force when the SC was deadlocked by disputes between western powers and the Soviet Union.<sup>232</sup>

#### **2.4.4.6. Role of the Security Council on the prohibition of the use of force**

The SC is one of the principal organs of the UN, and it is composed of 15 members, five of whom are permanent members representing USA, UK, France, Russia and China, while the remaining 10 members are selected by the GA on a rotational basis for two years.<sup>233</sup> In their selection, regard is given to both the contribution of such a member state to the maintenance of international peace and security and other purposes of the organization, and to an equitable geographical spread.<sup>234</sup> The SC, which has the primary responsibility for the maintenance of international peace and security, is to perform its duties with adherence to the purposes and principles of the UN.<sup>235</sup> Based on the specific powers conferred on it by the UN by virtue of Chapters VII<sup>236</sup> and VIII which include the use of force to compel

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<sup>232</sup> Hossain (n 216 above) 85, 88; Franck (n 220 above) 33 – 39.

<sup>233</sup> Art 7(1) of the UN Charter.

<sup>234</sup> Art 23(1) of the UN Charter.

<sup>235</sup> Art 24 of the UN Charter.

<sup>236</sup> Art 39 of the Charter provides ‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security,’ while Art 42 provides that ‘Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.’

compliance with the purposes of the UN, its actions are seen as amounting to the prohibition of member states from the use of force.<sup>237</sup>

The SC has, no doubt, contributed immensely to the maintenance of peace and security, in spite of the fact that its usefulness was hampered by the cold war in which the five powers, particularly the US and Russia, maintained a war which never got hot. In the era of the cold war, the SC was alleged to have done no more than adopt resolutions of condemnations and, in certain cases, shrank from naming such states that were in violation of international law.<sup>238</sup> The cold war constituted a serious setback in terms of international security because it barred the Council from responding to about 100 conflicts that claimed about 20 million lives within the period.<sup>239</sup> Ideological barriers between the west and east were expressed through the exercise of the veto in the SC, as about 279 *vetoes* were used to block decisions during the period.<sup>240</sup> These ideological barriers found inseparable companions in distrust, hostility and terrible tools of destruction.<sup>241</sup>

The SC's activism was heralded by the liberation of Kuwait following the adoption of resolution 678 which was necessitated by Iraq's refusal to withdraw from Kuwait immediately and unconditionally, the result being a collective enforcement action against Iraq (*Operation Desert Storm*).<sup>242</sup> While O'Connell described the reaction of the SC leading to *Operation Desert Storm* as dramatic and swift,<sup>243</sup> Elaraby described the activism of the post cold war Council as one which behaves as if its decisions and actions are not subject to any form of review.<sup>244</sup>

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<sup>237</sup> S/RES/678 of 29 November 1990 authorised member states to dislodge Iraq from Kuwait when the former invaded and annexed Kuwait in 1990.

<sup>238</sup> Gray (n 176 above) 256.

<sup>239</sup> Boutros-Ghali 'Report of the UN Secretary General: An agenda for peace, preventive diplomacy, peace-keeping and peace-making'. SC Doc. S/24111, 17 June 1992.

<sup>240</sup> Boutros-Ghali report (n 239 above).

<sup>241</sup> Boutros-Ghali report (n 239 above).

<sup>242</sup> M O'Connell 'The United Nations Security Council and the authorisation of force: Renewing the Council through law reform' in N Blokker & N Schrijver (eds.) *The Security Council and the use of force: Theory or reality-A need for change* (2005) 50.

<sup>243</sup> M O'Connell 'Enforcing the prohibition on the use of force: The UN's response to Iraq's invasion of Kuwait' (1991) 15 *Southern Illinois University Law Review* 456.

<sup>244</sup> Elaraby (n 223 above) 51.

The Council became increasingly involved in setting up quasi judicial organs, imposing embargoes on erring states,<sup>245</sup> authorizing the use of force by regional organizations and creating temporary civil administrations as peacekeeping measures.<sup>246</sup> Imposing embargoes was a potent tool available to the SC in its commitment to regulate the use of force. For instance, apart from Yugoslavia and Kosovo, embargoes were placed on the Sudan,<sup>247</sup> Somalia,<sup>248</sup> Liberia,<sup>249</sup> Sierra Leone<sup>250</sup> and Cote d'Ivoire.<sup>251</sup> In carrying out collective enforcement action, it has the responsibility of also enforcing ICJ judgments.<sup>252</sup>

It appears to have a monopoly of use of force except on issues of self-defence, and it generally exercises a wide range of both explicit and implied powers. Such powers are, however, not exercised *carte blanche* because they are sometimes challenged.<sup>253</sup> Furthermore, the wide latitude of the Council's discretion in determining when there is a threat to peace, a breach of peace or a threat of aggression is constrained by considerations of the seriousness of the threat, proper purpose, last resort, proportional means and balance of consequences.<sup>254</sup> The Council adopts resolutions from time to time in its bid to restrain members from the use of force. Through resolutions directed at the UN itself which is an authorization of 'coalition of the willing' to embark on collective enforcement action or the authorization of regional blocs under its Chapter VIII powers,<sup>255</sup> the Council wields such

<sup>245</sup> S/RES/1160 of March 1998 was adopted to bring to effect a mandatory arms embargo on the Federal Republic of Yugoslavia, including Kosovo.

<sup>246</sup> E De Wet *The Chapter VII powers of the United Nations Security Council* (2004) 2.

<sup>247</sup> S/RES/1556 of 30 July 2004), which involved an arms embargo on all governmental entities and individuals including the Janjaweed.

<sup>248</sup> S/RES/733 of 23 January 1992.

<sup>249</sup> S/RES/788 of 19 November 1992, relates to an embargo halting the sale or supply to Sierra Leone of arms and petroleum products and related materials.

<sup>250</sup> S/RES/1132 of 8 October 1997, relates to an arms embargo and funds freeze on assets of parties that threaten the reconciliation process in 1994.

<sup>251</sup> S/RES/1572 of 4 February 2004.

<sup>252</sup> Art 94(2) of the UN Charter.

<sup>253</sup> Blokker (n 40 above) 8 – 9; De Wet (n 246 above) 35-36.

<sup>254</sup> A more secure world: Our shared responsibility; Report of the High-Level Panel on threats, challenges and change, UN Doc. A59/565 (2004) para 207. The basic criteria for legitimacy of a resolution on force must consider: (a) seriousness of threat [Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?]; (b) proper purpose. [Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?]; (c) last resort [Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?]; (d) proportional means [Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?]; and (e) balance of consequence [Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?].

<sup>255</sup> Articles 52 & 53 of the UN Charter.

powers that are capable of deterring states contemplating the use of force. In practice, the SC has shown that, from its inception to 1990, it passed only four resolutions touching on the use of force.<sup>256</sup> The weak disposition of the Council has since been overcome because, out of about 59 resolutions that were adopted in 2004, 35 related to the use of force. This shows a SC becoming active after the end of the cold war.<sup>257</sup>

The SC has, nevertheless, been grappling with certain challenges, which are both institutional and substantive, in recent times. The institutional challenge stems from the clamour by some member states for a change in its present composition, which, in their opinion, does not represent the interests of some geographical blocs. On the basis of these contentions, the former Secretary-General set up the ‘UN High-level Panel’ whose report has been to the effect that the SC should not be replaced as it can deliver on its mandate. The Panel, however, supported a reform of the body by possible enlargement.<sup>258</sup> On the other hand, the substantive challenge is the alleged non-effective performance of the SC in the face of crises in certain regions which it failed to avert. For instance, the failure of the SC to prevent the Rwandan genocide and the crises in Somalia and Yugoslavia are counted as being indicative of its failure.<sup>259</sup> In fact, Syrian crisis has even painted a worse impression of its failure. Specifically, the Somali crisis from 1991-1993 following the fall of Siad Barre, the 1994 Rwandan genocide in which 800,000 Tutsis and moderate Hutus were killed in 100 days, and the 1995 massacre of about 8,000 Bosnian Muslims by Bosnian Serbs brought the peace and security maintaining responsibility of the UN into question.<sup>260</sup> In addition, the use

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<sup>256</sup> Security Council resolution 83 called on member states to use such force as may be necessary in support of the Republic of Korea to repel armed attacks by North Korea with a view to restoring international peace and security in the area; SC resolution 161 and SC resolution 169 all adopted by the Security Council in respect of the crisis in the Congo. While resolution 161 urged the UN itself to take all necessary steps to avert a civil war in the Congo, resolution 169 authorised the Secretary General to take all appropriate steps, including relevant measures of force, to abate the crisis in the Congo; Similarly, SC resolutions 221 & 221 of 1966 authorized the UK to employ force where necessary to prevent the arrival at Beira of vessels carrying oil to Southern Rhodesia. This was because the resolution determined that there is likelihood of breach of the embargo on supply of oil to Southern Rhodesia in Mozambique, which supplies, if allowed, were capable of threatening the peace.

<sup>257</sup> Blokker (n 40 above) 15.

<sup>258</sup> Paragraph 198 of the Report of the High-level Panel on threats, challenges and change provides, ‘The Security Council is fully empowered under Chapter VII of the Charter of the United Nations to address the full range of security threats with which States are concerned. The task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has’; see also paragraphs 249 – 255 of the Panel Report.

<sup>259</sup> Blokker (n 40 above) 2.

<sup>260</sup> K Annan *Interventions: A life of war and peace* (Penguin Books, 2012) 39 – 79; J Iyi *Humanitarian intervention and the AU-ECOWAS intervention treaties under international law: Towards a theory of regional responsibility to protect* (2016) 89-137. In evaluating the attitude of the UNSC to crisis in the African continent, Iyi has argued that the absence of national self-interest of some major players in the

of the veto in its decision making process has a bearing on the effective performance of its functions, particularly apparent during the cold war era when its decision making was hindered by a lack of consensus on the part of the five permanent members because of their varying interests.<sup>261</sup> The SC requires the agreement or ‘yes’ vote of all permanent members for decisions (except on procedural matters) to be made. The interesting point, however, is that the abstention of voting by a permanent member does not bar the adoption of a decision.<sup>262</sup>

#### 2.4.4.7. Role of the ICJ on the prohibition of use of force

The ICJ was established by the UN Charter, and it is described as the principal judicial organ of the UN.<sup>263</sup> By virtue of Article 94 of the Charter every member state of the UN undertakes to comply with the Court’s decisions. The members of the UN are *ipso facto* parties to the Statute of the ICJ.<sup>264</sup> The Court has contributed immensely to the maintenance of peace in the furtherance of its primary function of the resolution of international disputes,<sup>265</sup> which the Court has done through the interpretation of rules and principles of international law. The Court elucidates existing principles of law and also develops rules with which it settles disputes involving the use or threat of the use of force. The important role played by the

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international arena, culminating in the failure of the SC to respond promptly to crises in Africa gave rise to the series of post cold-war conflicts in Africa. This attitude was responsible for Africans taking their destiny in their own hands, hence the AU-ECOWAS interventions in Liberia, Sierra Leone and Cote d’Ivoire. Referring to the conflicts in Liberia, Somalia, Rwanda, Darfur and Libya as case studies thereof, he concluded that the lack of economic or political interest of the extra-continental interveners which takes priority over genuine intervention to avert human rights violations was responsible for the withdrawn disposition of the major powers. According to him, Africans will not forget in a hurry the failure of the UN to prevent the atrocities that plagued the continent in the 1990s, more so, as the UN was busy with efforts to put an end to the crisis in the Balkans. Arguably, the attitude of the UN propelled regional organisations such as the AU and ECOWAS either to include out-rightly or via the amendment of their regulatory instruments provisions that would permit humanitarian intervention in the one another’s domain where human rights abuses exist. For instance, art 4(h) of the AU Constitutive Act allows for humanitarian intervention pursuant to a decision of the Assembly in respect of war crimes, genocide and crimes against humanity. Scholarly views have, however, criticised such provisions for appearing to be contrary to the prohibition of the use of force contemplated under art 2(4) of the UN Charter. This is more so since these interventions in practice have been conducted without the prior authorisation of the UNSC, contrary to Chapter VIII of the Charter.

<sup>261</sup> Blokker (n 40 above) 7.

<sup>262</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Reports 16, 22, para 22; see also Art 27(3) of the UN Charter which requires a positive vote by permanent members for decisions to be adopted.

<sup>263</sup> Article 92 of the UN Charter.

<sup>264</sup> Art 93 of the UN Charter.

<sup>265</sup> D Akande ‘The contribution of the International Court of Justice and the Law of the use of force’ <http://www.ejiltalk.org/the-contribution-of-the-international-court-of-justice-and-the-law-of-the-use-of-force> (accessed 29/09/2014).

Court in constraining the use of force which ultimately contributes to international peace is underscored by the patronage it enjoys from developing countries.<sup>266</sup> These states saw the Nicaragua judgment as unbiased, sound and intended to protect less powerful states from the claws of the unwarranted use of force by powerful states. The confidence in the Court grew after the Nicaragua decision.<sup>267</sup>

According to Akande, the contributions of the ICJ to the development of the law on the use of force may be seen from three perspectives which include the development of the sources of law on the use of force, the prohibition of the use of force and a contribution to the law on self-defence.<sup>268</sup> The ICJ's role of developing the principles of international law generally, and the law on self-defence in particular, are geared towards deterring states from the unlawful use of force. Firstly, the Court has pronounced that treaty law and customary law are complementary, even though they are different realms of law. It stated that the rule against the use of force does not exist only in the Charter of the UN, but is now part of customary international law.<sup>269</sup> For instance, article 51 of the Charter does not set limits on self-defence relating to the principles of necessity and proportionality. But on the basis of customary law, any use of self-defence that violates these principles of necessity and proportionality is unlawful. Secondly, the Court's ventilation of the concept of use of force in the *Nicaragua case* has made states appreciate the various limitations on the use of force. While certain uses of force may constitute a breach of article 2(4), and also amount to an armed attack capable of triggering a response in self-defence from an impacted state, other uses of force may no doubt breach article 2(4) but may not amount to an armed attack.<sup>270</sup> Furthermore, the ICJ succinctly espoused the law relating to a state's support for NSAs involved in transnational terrorism that may or may not amount to an armed attack, which depends on the degree of involvement of a state in the activities of the non-state actors. Recent scholarly arguments that self-defence against NSAs may be triggered even without the active connivance of another state are, thus, what necessitated this study with a view to interrogating whether indeed the law of self-defence has been transformed. The study, in that regard, argues that the law of self-defence has indeed been transformed owing to the shift through state practice from the ICJ jurisprudence.

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<sup>266</sup> Akande (n 265 above).

<sup>267</sup> C Gray 'Why states resort to litigation on cases concerning the use of force' in N Klein (ed.) *Litigating international law disputes: Weighing the options* (2014) 328.

<sup>268</sup> Akande (n 265 above).

<sup>269</sup> *Nicaragua case* (n 8 above) para 103; Gray (n 7 above) 246.

<sup>270</sup> *Nicaragua case* (n 8 above) para 249.



Apart from the first contentious case involving the use of force, that is the *Corfu Channel Case (UK v Albania)*, most of the contentious cases brought to the ICJ in recent years relate to the use of force. According to Gray,<sup>271</sup> the 10 Cases Concerning Legality of Use of Force brought by Yugoslavia against NATO states,<sup>272</sup> *DRC v Uganda*, *DRC v Rwanda*<sup>273</sup> and *Cameroon v Nigeria*<sup>274</sup> were matters relating to the use of force. In addition, both the *Nuclear Weapons case* and the *Palestinian Wall case* which invoked the advisory jurisdiction of the ICJ relate to issues of the use of force.

In some of the cases indicated above, the respondents have objected to the jurisdiction of the ICJ to entertain their cases. For instance, the US is among the states that consistently question the jurisdiction of the ICJ to hear matters on the use of force.<sup>275</sup> These contentions on jurisdictional competence or admissibility were rejected by the Court<sup>276</sup> on the grounds that: (a) parties that are not brought before the Court were at liberty to apply to be joined;<sup>277</sup> (b) there is no strict separation of powers among the various organs of the UN that was capable of barring it from assuming jurisdiction and the issue of maintaining world peace and security is a responsibility for all organs, as their responsibilities are complementary and granted, that the Security Council has the primary responsibility to maintain peace and security, such a duty is not exclusive<sup>278</sup>; (c) there is no requirement for the exhaustion of regional remedies in the UN Charter; and (d) the ICJ and the Security Council cannot wait for the exhaustion of such remedies before performing their functions.<sup>279</sup>

In the study's opinion, the contention of the US and other states in this regard may be flawed on other grounds as well because even the decisions or powers of the SC appear to be subject

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<sup>271</sup> Gray 'The use and abuse of the International Court of Justice: Cases concerning the use of force after Nicaragua' (2003) 14 *European Journal of International Law* 867 – 869, she states that 16 out of 25 cases before the Court as at October 2002 relate directly or indirectly to the use of force.

<sup>272</sup> *The LaGrand Case (Germany v United States of America Provisional Measures)*, ICJ Reports (1999) 124.

<sup>273</sup> *Armed Activities on the Territory of the Congo (New Application: 2002)*, (*Democratic Republic of Congo v Rwanda*), *Jurisdiction and Admissibility*, Judgment, I.C.J. Reports p.6.

<sup>274</sup> *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Reports (2002).

<sup>275</sup> Gray (n 271 above) 867-892.

<sup>276</sup> *Nicaragua case* (n 8 above) para 84.

<sup>277</sup> *Nicaragua case* (n 8 above) paras 86 – 88; see also *Haya le da Torre Case (Colombia v Peru)* (1951) 18 ILR 349, where the Court indicated conditions for interventions by non original parties by holding that intervention may not be automatic in all cases, and that intervention, being an incidental matter, must relate to the subject matter of the pending proceedings; Wallace-Bruce (n 290 above) 147.

<sup>278</sup> *Nicaragua case* (n 8 above) paras 91 – 98; Gray (n 7 above) 237 & 242; Wallace-Bruce (n 290 above) 175-177; see also Akande (n 212 above) 592.

<sup>279</sup> *Nicaragua case*, (n 8 above) paras 102 – 108.



to judicial review.<sup>280</sup> Akande has also succinctly argued that there are limitations placed on the powers of the SC which can be discerned from the UN Charter. According to him, the SC is bound by the provisions of the Charter, the principles of general international law, human rights obligations and peremptory norms of international law.<sup>281</sup> No question of international law is excluded from the purview of the ICJ. He, thus, stated, ‘if in a contentious case the ICJ is asked by one party to apply a Security Council resolution and the other party takes the position that the Council decision is unlawful, the ICJ is bound to decide the issue of legality. This power to review the legality of Council decision arises from the following propositions: the limits of the Council’s powers are derived from the Charter; Charter rules are higher norms than Council decisions; and where the International Court is asked to choose between a Council decision and a Charter norm, it must apply the higher Charter norm.’<sup>282</sup> Interestingly, it is the SC itself that recommended the *Corfu Channel case* to the ICJ for adjudication, thereby recognizing the role of the ICJ in the prohibition of the use of force which the ICJ views strictly.<sup>283</sup>

Furthermore, De Wet has argued that even the advisory opinion of the ICJ could reinforce or provide authoritative guidance on points of international law submitted to it and that non-compliance by certain states does not affect these opinions alone, but it is a fate suffered by contentious decisions as well. She said that states give consideration to these opinions in arguing their disputes, these having emanated from the principal judicial organ of the UN.<sup>284</sup> Relying on the cases of the *Certain Expenses of the United Nations* and the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, she concludes that decisions of political organs, including the SC, are subject to review by the ICJ.<sup>285</sup> In a

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<sup>280</sup> De Wet (n 246 above) 58-63, 67.

<sup>281</sup> D Akande ‘Are there limits to the powers of the Security Council?’ in ‘Old questions and New Challenges for the U.N. security system: The role of the Security Council in the light of the Charter’s reform’ (2007) 5 *Journal of International Law and Policy* 4 (1-48).

<sup>282</sup> Akande (n 281 above) 5.

<sup>283</sup> Gray (n 7 above) 238, 239 & 242.

<sup>284</sup> De Wet (n 246 above) 57.

<sup>285</sup> De Wet (n 246 above) 58-63, 67. De Wet argues on page 58 that, ‘a determination of the ICJ to the effect that a binding Security Council resolution is illegal would undermine the legitimacy of that resolution and weaken its claim to compliance. A determination in an advisory opinion that a Security Council resolution is illegal would justify non-compliance by states and would strengthen disrespect for the resolution.’ Also, on page 67, De Wet states thus: ‘Advisory opinions are an acknowledged avenue for obtaining authoritative interpretations of the law in a variety of national and international forms. This is also the case within the United Nations system, where advisory opinions of the ICJ have proved to be a mode for judicial review of the organisation’s political organs, including the Security Council’.

similar vein, Gray indicated that the jurisdiction of the ICJ extends to cover cases on the maintenance of international peace and security which are primary responsibilities for the SC.<sup>286</sup> According to her, the Court has interpreted the principle of the non use of force contained in article 2(4) of the Charter strictly, thereby not giving into arguments by certain states that an attack not directed at the overthrow of a government or to siege a territory be construed as exceptions to the prohibition.<sup>287</sup>

The jurisdiction of the ICJ is sometimes challenged by certain powerful countries, and in extreme cases the Court's judgments appear to be disregarded. If states voluntarily subject themselves to the jurisdiction of the Court, however, they abide by its rulings, as these decisions influence the ends of peace, justice and human rights.<sup>288</sup> Legal commentators have in some instances also criticized some of the decisions bordering on use of force generally and on self-defence in particular. Sofaer argued that the insistence of the ICJ on the existence of an armed attack as a basis for self-defence is contrary to the intent of article 51 which accommodates the customary right of self-defence.<sup>289</sup> It is his contention that the use of force is relevant for the preservation of human rights, and that the narrow interpretation of the principles of self-defence and armed attack in article 51 of the Charter by the ICJ is flawed.<sup>290</sup>

The necessary lesson one can draw from the disregarding of the rulings of the ICJ as canvassed above is that its judgments do not command a binding force in practice. The ICJ decisions are sources of law only for the particular case before it and have binding force only as between the parties.<sup>291</sup> In subsequent matters, however, the Court has the liberty to take consideration of its previous decisions with regard to the particular facts otherwise such judgments are merely advisory.<sup>292</sup> These decisions no doubt contribute to the development of international law because they indicate the absence of, or existence of, a particular rule of

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<sup>286</sup> Gray (n 7 above) 237.

<sup>287</sup> Gray (n 7 above) 247.

<sup>288</sup> A Sofaer 'The ICJ and armed conflict' (2004) 1 *Northwestern University Journal of International Human Rights*, para 2.

<sup>289</sup> Sofaer (n 288 above) para 10.

<sup>290</sup> Sofaer (n 288 above) paras 4 – 10.

<sup>291</sup> Article 59 of the UN Charter.

<sup>292</sup> Art 59 of the Statute of the ICJ; I Blishchenko 'Judicial decisions as a source of international humanitarian law' in A Cassese (ed.) *The New Humanitarian Law of Armed Conflict* (1979) 43.

international law. The GA, thus, affirmed the principles formulated in the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.<sup>293</sup>

## 2.5. Customary law and the regulation of the use of force

The use of force is regulated not by treaty law alone, but also by customary laws that have evolved over a period of time through the practice of states.<sup>294</sup> In fact, the origin of the legal regulation of the use of force pre-dated treaty regulation of the use of force.<sup>295</sup> Both the prohibition of resort to force and the exception by way of self-defence are inherently concepts in customary international law, but they have been developed further by treaty law.<sup>296</sup> A customary law principle could be developed and codified by a subsequent treaty, in which case such a treaty is declaratory of customary international law. It is seen ‘as incorporating and giving recognition to a rule of customary international law that existed prior to the conclusion of the treaty, or, on the other hand, as being the *fons et origo* of a rule of international law which subsequently secured the general assent of states and thereby was

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<sup>293</sup> A/RES/95 (1) of 11 December 1946; The GA directed the ILC to work toward the codification of the principles recognized in the Charter of the Nuremberg Tribunal and judgment, which gave birth to the Nuremberg Principles, see the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal 1950; The principles contained in the Nuremberg Charter and judgment influenced the development of the law relating to the crime of genocide, crimes against humanity and the protection of war victims, see 1948 Convention on the Prevention and Punishment of the Crime of Genocide; 1949 Geneva Conventions; see also A/RES/260 A (III), on the Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948); In spite of the formulation of principles from the Nuremberg judgment, the judgment in itself does not command binding precedent like most other international decisions. The Nuremberg judgment is not a precedent for subsequent cases as its source of law is the London Agreement, and it was exclusively for the military tribunal established by that agreement. A precedent is a judicial decision which serves as a model for subsequent cases, but international court decisions have no binding precedent, except as between the parties and for that particular case, see Kelsen (n 141 above) 162-163; A Court’s judgment becomes binding if it operates in a somewhat permanent nature, having powers to establish a new rule of law which will bind it and other inferior courts vested with jurisdiction to hear similar matters. A Court acting in an *ad hoc* capacity to try specific matters cannot establish precedent to bind other courts, see Art 59 of the Statute of the ICJ; and the London Agreement had a life span of only one year, see Article 7 of the London Agreement.

<sup>294</sup> O Corten The controversies over the customary prohibition on the use of force: A methodological debate (2006) 16 *European Journal of International Law* 803, 813.

<sup>295</sup> *Nicaragua case* (n 8 above), the Court held that, ‘There can be no doubt therefore of the innate legal existence of this basic reasoning, irrespective of the later developments in which have now found a place in the treaty provisions as reflected in Article 2, paragraph 4, and Article 51 of the United Nations Charter. However it is pertinent that the origin of legal regulation of use of force is much older than the United Nations Charter and this has been acknowledged to be so. If an issue was raised whether the concepts of the principle of non-use of force and the exception to it in the form of use of force for self-defence are to be characterized as either part of customary international law or that of conventional law, the answer would appear to be that both the concepts are inherently based in customary international law in their origins, but have been developed further by treaty law.’

<sup>296</sup> Articles 2(4) and 51 of the UN Charter; *Nicaragua case* (n 8 above) pp 151 – 152.

transformed into customary law.<sup>297</sup> In certain respects, customary law is equated with treaty law as both appear to command a similar effect.<sup>298</sup> For instance, article 51 of the Charter, being a treaty provision, was said not to impair the existence of the customary right of self-defence. This is in spite of the fact that the Charter obligations of states take precedence over their obligations in all other agreements.<sup>299</sup>

According to Melzer, the creation of customary law could originate through both the physical and verbal conduct of states. The physical conduct entails the practical aspect such as use of force by states against persons, while the verbal conduct entails legislation, legal opinions, manuals, guidelines from the government and inter-governmental organisations.<sup>300</sup> For a principle to be ascribed a character of customary law, therefore, there must be near general practice of states and such practice must be followed by *opinion juris*. The general practice of states contemplated to crystallize a rule of customary law, however, does not mean that all states must practice such a norm without infraction. The fact that certain states violate a particular rule may not make it less effective, provided that such a state in violation justifies its conduct or relies on exceptions and there is a greater degree of adherence to such a rule.<sup>301</sup>

Firstly, article 2(4) of the UN Charter is a creation of that treaty, but it has the character of customary law which forbids the use of force. In 2011, 193 states had become parties to the Charter of the UN and the practice of states has shown acceptance of a customary law of non-use of force, the statements made by representatives of states show reliance on the rule of the non-use of force. Their statements confirm the existence of *opinio juris*, as the prohibition contained in article 2(4) is referred to frequently not only as a principle prohibiting the use of force, but it is also seen as a fundamental and cardinal principle of customary law. For instance, both the US and Nicaragua stated in their Memorials in the

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<sup>297</sup> *Nicaragua case* (n 8 above) pp 530 – 531.

<sup>298</sup> Corten (n 294 above) 813.

<sup>299</sup> Art 103 of the UN Charter.

<sup>300</sup> N Melzer *Targeted killing in international law* (2008) 180 – 181.

<sup>301</sup> *Nicaragua case* (n 8 above) para 186, where the Court held thus, ‘The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent such with rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule;’ see also Gray (n 7 above) 7.

*Nicaragua case* that the principle of the non-use of force is a *jus cogens* norm and that it is a universally recognized principle of international law.<sup>302</sup>

Secondly, the resolutions of the UNGA possess the character of reinforcing the provisions of article 2(4) on the principle of the non-use of force.<sup>303</sup> These resolutions are expressions of the existence of customary law, and they provide similar provisions on the non-use of force contained in the UN Charter. They are expressions of *opinio juris* on the existence of customary law on the non-use of force. They reiterate the obligations of all states to refrain from the threat of, or use of force in their international relations, and to explore pacific means in the settlement of international disputes. Similarly, the acceptance of the principle of law prohibiting the use of force contained in the ‘Declaration on the principles governing the mutual relations of states participating in the Conference on Security and Co-operation in Europe (Helsinki Final Act, 1975)’ though not a UN resolution is also an expression of *opinio juris* on the existence of customary law to refrain from the use of force. All states that participated agreed to refrain from the use of force in their mutual relations.<sup>304</sup>

While the practice by states generally of a particular rule ultimately establishes customary law, such practice by major leading powers is more likely to crystallize or accelerate the crystallisation into a customary principle of law.<sup>305</sup> This stems from the fact that powerful states play a greater role in developing customary law through their practices and their interpretation of acceptable human values into the body of international law. Taking the crisis in Yugoslavia under Slobodan Milosevic as an example, the protests and actions of NATO (a body of democratic states) were more likely to generate a customary principle of law than the protests from the Non-aligned Movement. Nevertheless, the conduct of regional organizations such as ECOWAS regarding humanitarian intervention is also capable of

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<sup>302</sup> *Nicaragua case* (n 8 above) pp 100 – 103.

<sup>303</sup> A/RES/2625 of 24 October 1970; A/RES/3314 (XXIX) of 14 December 1974; A/RES/42/22 (XLII) of 18 November 1987.

<sup>304</sup> The relevance of the ‘Helsinki Final Act’ to the law on prohibition of the use of force is underscored by the quality of states in attendance, including the USA and Canada (non European countries), the UK and almost all other European countries. Non participating states, such as Algeria, Egypt, Israel, Morocco, Syria and Tunisia, also made presentations. Under paragraph A(II) the conference resolved that, ‘The participating States will refrain in their mutual relations, as well as in their international relations in general, from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations and with the present Declaration. No consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle.’

<sup>305</sup> Corten (n 294 above) 810 - 811. The powerful states also possess the capacity to enforce compliance with what in their opinion is an existing customary law.

bringing about regional customary law.<sup>306</sup> The role of customary law in relation to causing a change specifically on the law of self-defence against NSAs is evaluated in chapter six below.

## **2.6. Prohibition of use of force under regional normative and institutional frameworks**

The responsibility to maintain international peace and security is shared between the UN, regional organizations and individual states.<sup>307</sup> In consonance thereof, Chapter VIII of the UN Charter provides for the existence of regional arrangements or mechanisms to maintain regional peace and security, and, by extension, global peace.<sup>308</sup> In support of this Charter provision empowering regional organizations the former Secretary General, Boutros-Ghali, requested the co-operation of the regional organizations in that regard.<sup>309</sup>

Regional arrangements were introduced by the Latin American states into the UN Charter framework during the conferences of Dumbarton Oaks and San Francisco.<sup>310</sup> There is no definition of regional organizations in the Charter, but they refer to arrangements or agencies whose activities are consistent with the purposes and principles of the UN.<sup>311</sup> The purposes of the UN include the maintenance of international peace and security, the development of friendly relations among nations, the achievement of international cooperation and being a centre for harmonizing the actions of nations for common ends. Its principles include the sovereign equality of members, the fulfillment in good faith of obligations, the settlement of international disputes by peaceful means, refraining from the use of force in their relations and the giving of assistance to the UN, etc.<sup>312</sup> Furthermore, such organizations should be designed to assist the UN mandate with the maintenance of international peace and security by being equipped and empowered to settle local disputes. Even though maintaining a formal constitutive instrument is not a criterion for the existence of a regional organization, it should, nevertheless, share some commonalities, including geographic, cultural, linguistic,

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<sup>306</sup> Corten (n 294 above) 811.

<sup>307</sup> Chapter VIII of the UN Charter.

<sup>308</sup> Art 52 of the UN Charter.

<sup>309</sup> Boutros-Ghali Report (n 239 above), SC Doc. S/24111, 17 June 19792. In this report, Boutros-Ghali stated, 'The wider mission for the world Organisation will demand the concerted attention and effort of individual States, of regional and non-governmental organisations and of all Nations system, with each of the primary organs functioning in the balance and harmony that the Charter requires.'

<sup>310</sup> Gray (n 176 above) 170.

<sup>311</sup> Art 52(1) of the UN Charter.

<sup>312</sup> Articles 1 & 2 of the UN Charter.



community of interest or historical factors.<sup>313</sup> It has, however, been argued to the contrary that the criterion for regionalism need not be founded exclusively on multidimensional cultural factors, but that the pursuit of a single strong ideology may also be sufficient to congregate states that share such an ideology into a regional bloc.<sup>314</sup> According to Abass, ‘the internal cultural variables that must serve as indicators of a region need not be multidimensional in nature’.<sup>315</sup> In this regard, regional organizations include the Organisation of American States (OAS), African Union (AU), North Atlantic Treaty Organisation (NATO), Arab League and even sub-regional organizations, such as the Economic Community of West African States (ECOWAS) and Southern African Development Commission (SADC).<sup>316</sup>

In performing this complementary role of assisting the UN in its primary responsibility of maintaining world peace, regional organizations may undertake enforcement action with the authorization of the UN Security Council.<sup>317</sup> The jurisdiction of regional organizations relating to enforcement action is subject to the *veto* of an extra-regional power in the Security Council.<sup>318</sup> In addition, in compliance with article 51 of the Charter, regional organizations may employ the use of force in self-defence without violating the provisions of article 2(4) of the Charter.<sup>319</sup> While, by virtue of articles 34 and 35 of the Charter, individual states can take their complaints directly to the UN, regional organizations can initiate pacific settlement of disputes or through the instrumentality of the UN Security Council.<sup>320</sup>

Regional organizations have become increasingly powerful in recent times. In some cases even sub-regional organizations, such as ECOWAS, employ the unilateral imposition of sanctions and enforcement action.<sup>321</sup> The lack of control of these organizations is compounded by the lack of insistence on the authorization requirement by the UN Security

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<sup>313</sup> S Paliwal ‘The primacy of regional organisations in international peacekeeping: The African example’ (2010) 51 *Virginia Journal of International Law* 192 – 193.

<sup>314</sup> A Abass *Regional organisations and the development of collective security: Beyond Chapter VII of the UN Charter* (2004) 17.

<sup>315</sup> Abass (n 314 above) 17.

<sup>316</sup> ECOWAS was originally formed to pursue economic cooperation of its members through the Treaty of the Economic Community of West African States of 28 May 1975.

<sup>317</sup> Art 53 of the UN Charter.

<sup>318</sup> J Macdonald ‘The use of force by states in international law’ in M Bedjaoui (ed.) *International law: Achievements and Prospects* (1991) 725 – 726.

<sup>319</sup> P Pirrone ‘The use of force in the framework of the Organisation of American States’ in A Cassese (ed.) *The current legal regulation of the use of force* (1986) 227.

<sup>320</sup> Art 52(3) of the UN Charter.

<sup>321</sup> Paliwal (n 313 above) 210.



Council, which appears to be satisfied only by the retrospective reporting of an action in self-defence. In this regard, Weller has argued that, ‘It appears that any region (or even sub-regional) arrangement can obtain the benefits of a Chapter VII/VIII status, without, at the same time, having to pass a certain quality threshold relating to its representativeness of the region, its constitutional powers, its voting mechanisms, and the aims and functions of its purported collective mechanism.’<sup>322</sup>

The workings of the shared responsibility of maintaining peace and security between the UN and the regional groups are not without challenges. This study argues that, even in the face of mounting criticisms on the *modus operandi* of this relationship, it remains true that the advantages derivable from the involvement of regional blocs in the maintenance of peace and security far outweigh the disadvantages. Firstly, these organizations are better positioned to tackle local regional problems readily because of their proximity in geographical location and their shared linguistic, social, political and cultural affinities. They provide a first-instance response to a crisis with a view to avoiding the spread to neighbouring states,<sup>323</sup> since waiting for UN Security Council resolutions, which are sometimes blocked by the power of *veto*, may lead to the aggravation of the crisis. Logistical problems are minimized if regional organizations are involved because the UN has been stretched to its elastic limits owing to the difficulty of funding its growing missions in all continents and the reluctance of troop-contributing states to supply troops readily. Kofi Annan captured this problem succinctly.<sup>324</sup> For instance, the raid of the US troops in Somalia on 3 October 1993 and the capture and subsequent killing of ten Belgian troops in Rwanda in April 1994 made the attitude of states increasingly loath to supply troops.<sup>325</sup> For the

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<sup>322</sup> M Weller ‘The European Security Architecture in M Koskenniemi (ed.) *International law aspects of the European Union* (1998) 59.

<sup>323</sup> Paliwal (n 313 above) 187; OAU, Eminent Persons Report, where the Panel found that the refugee crisis arising from the Rwanda genocide culminated in the overthrow of Mobutu Sese Sekou of Zaire (para 2 of the Executive Summary).

<sup>324</sup> Annan (n 260 above) 52-53, Annan stated: ‘UNAMIR was meant to receive twenty-two armoured personnel carriers and eight helicopters to enable some flexibility in its response capability. But no country was willing to provide any helicopters, and only eight armoured personnel carriers could eventually be sourced for the force, which were cannibalised from the UN mission in Mozambique. The vehicles finally arrived but they were dilapidated and only five were serviceable; some of these often broke down and had to be towed by the remaining armoured personnel carriers. Such humiliating exhibitions of the force’s lack of capacity often occurred in Kigali and in the full view of Rwandan government forces’.

<sup>325</sup> Annan (n 260 above) 47 – 60, where, while quoting a Rwandan official, Annan stated, ‘A senior Rwandan official later said of the plan to kill the Belgian peacekeepers that “we watch CNN too, you know.” He was referring to the lessons that they had garnered from Somalia that year before: that the death of just a few foreign peace keepers will be enough to end the appetite for intervention and allow them get on with murderous plans. They were right. Five days after the grisly killings of its soldiers, the Belgian

purpose of this research, four regional institutions and their normative frameworks relating to the prohibition of the use of force, that is the OAS, AU, NATO and ECOWAS are considered hereunder.

### 2.6.1. The Organization of American States (OAS)

The normative frameworks established to regulate the inter-state use of force in the inter-American system are contained in the Havana Declaration,<sup>326</sup> Chapultepec Act,<sup>327</sup> Inter-American Treaty of Reciprocal Assistance (IATRA) and the Charter of the OAS, among others. The Charter of the OAS entered into force on 13 December 1951, while IATRA entered into force on 3 December 1948. Even before the OAS formalized the IATRA, the American states saw it as being imperative to consolidate their cooperation in the western hemisphere on the grounds of the fear of possible threats to their security from outside.<sup>328</sup> As far back as 1940, therefore, the Havana Meeting of Foreign Ministers passed resolution XV which sought to constrain the use of force in the territories of American States by outside forces.<sup>329</sup> While the Havana resolution sought to prohibit the use of force by non-American states, the Chapultepec Act, which was expected to have binding force only during the 2<sup>nd</sup> World War<sup>330</sup>, prohibited aggression from both American and non-American states from other regions.<sup>331</sup> In fact, Nicaragua has argued that the prohibition of use of force in the inter-American system, which was originally directed at non-American states was later extended to ban American states because of the fear of incursion into other states' territories by the US. In its view, articles 19 and 21 of the Charter of the OAS were created at the insistence of the Latin American States to prevent the US from its repeated intervention in the territories of other states.<sup>332</sup>

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government announced that it would withdraw its troops - the core fighting capability of UNAMIR - from Rwanda immediately.'

<sup>326</sup> Resolution XV of the Havana Declaration.

<sup>327</sup> Art 3 of the Chapultepec Act.

<sup>328</sup> M Garcia-Mora 'The law of the inter-American Treaty of Reciprocal Assistance (1952) 20 *Fordham Law Review* 1.(1-22)

<sup>329</sup> International Conference of American States, First Supp. 1933-1940, 360,361 (1940), Resolution XV provides 'any attempt on the part of a non-American State against the integrity or inviolability, the sovereignty or the political independence of an American State shall be considered as an act of aggression against the States which sign the declaration.'

<sup>330</sup> Art 5 of the Chapultepec Act.

<sup>331</sup> Art 3 of the Chapultepec Act.

<sup>332</sup> T Gill *Litigation strategy at the International Court: A case study of the Nicaragua v United States Dispute* (1989) 211-212

In enacting the IATRA, the drafters gave due regard to the provisions of the UN Charter, so as to avoid manifest inconsistencies between the two instruments and also to convey the idea that regional arrangements were complementary to the UN responsibilities.<sup>333</sup> Both the Charter of the OAS<sup>334</sup> and the IATRA<sup>335</sup> contain provisions on the prohibition of the use of force in the territories of member states. By articles 3(h) and 28 of the Charter of the OAS, an act of aggression against one American State is deemed to be an act of aggression against all other American States. This preceding provision which manifestly shows continental or regional solidarity is repeated in article 3(1) of the IATRA, which, like the UN Charter, also provided for individual and collective self-defence.

If a member state is attacked, each member state upon request by the attacked state may determine immediate measures in furtherance of its obligation to give support to the affected state until the Organ of Consultation (body of Ministers of Foreign Affairs of member states) agrees on measures to be taken in self-defence of a collective character.<sup>336</sup> For the purpose of the aforesaid collective self-defence, there are specific measures to be considered by the Organ of Consultation.<sup>337</sup> Like the UN Charter, measures of a non-forcible nature are also available in furtherance of collective self-defence. In fact, the idea of individual and collective self-defence is an inter-American regional organization practice which was imported into the UN Charter under article 51. Specifically, the desire of the inter-American states to maintain their security system relating to the ‘inherent right of individual and collective self-defence’ contained in the Chapultepec Act was responsible for the amendment of the Dumbarton Oaks Proposal and the subsequent adoption of article 51 of the UN Charter at San Francisco.<sup>338</sup>

The efficacy of the prohibition of the use of force in the inter-American system has been acknowledged through practice. Firstly, contrary to the practice of the UN from inception to date, the OAS has invoked its inherent powers (not being in its Charter) through its Organ

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<sup>333</sup> The Preamble of the IATRA.

<sup>334</sup> Articles 19, 20 & 21 of the Charter of the OAS.

<sup>335</sup> Art 1 of the IATRA provides.

<sup>336</sup> Art 3(2) of the IATRA.

<sup>337</sup> Art 8 provides, ‘For all the purposes of this treaty, the measures on which the Organ of Consultation may agree will comprise one or more of the following: recall of chief of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; partial or complete interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic, and radiotelephonic or radiotelegraphic communications; and the use of armed force.’

<sup>338</sup> M Garcia-Mora (n 328 above) 4.

of Consultation of Foreign Affairs Ministers to exclude Cuba from participating in its activities because Cuba was alleged to have embraced the Marxist-Leninist ideology which was at variance with the purposes of the OAS.<sup>339</sup> Secondly, the constraints created against the use of force contained in the Charter of the OAS were considered by the ICJ in the *Nicaragua case*.<sup>340</sup> While Nicaragua relied on articles 19, 20 and 21 of the OAS Charter to show breaches by the US of its obligations, which has parallel responsibilities of states under the UN Charter, the US pleaded self-defence by invoking the Charter of the OAS. The provisions invoked by Nicaragua deal with the inviolability of state territories and the prohibition of the use of armed force, similar to article 2(4) of the UN Charter.<sup>341</sup>

### 2.6.2. The African Union (AU)

Upon the attainment of their independence by a number of African States, the Organisation of African Unity (OAU) was formed after the adoption of its Charter in Addis Ababa, Ethiopia on 25 May 1963. The Charter entered into force on 13 September 1963. The OAU has been replaced by the Africa Union (AU) which came into being upon the adoption of the Constitutive Act of the African Union on 11 July 2000 in Lome, Togo and thereafter entered into force on the 26 May 2001. Both the AU<sup>342</sup> and its predecessor the OAU<sup>343</sup> were formed to promote regional co-operation and solidarity and to defend the sovereignty, independence and territorial integrity of member States. Additionally, the OAU was formed for the purpose of liberating Africa from colonization and apartheid.<sup>344</sup> Apart from generally providing for non-interference in the internal affairs of member states, not much about prohibition of the use of force was captured in the Charter of the OAU.<sup>345</sup> After the attainment of independence by almost all African states, the need to review the

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<sup>339</sup> H Caceres 'The use of force by international organisations' in M Bedjaoui (ed.) *International law: Achievements and Prospects* (1991) 746; see also The Eighth Meeting of Consultation of Ministers of Foreign Affairs acting as the Organ of the IATRA (1962).

<sup>340</sup> *Nicaragua case* (n 8 above) paras 36 – 56.

<sup>341</sup> Gill (n 332 above) 211.

<sup>342</sup> Art 3(a) & (b) of the Constitutive Act of the African Union.

<sup>343</sup> Art 2(1)(a), (b) & (c) of the OAU Charter.

<sup>344</sup> NJ Ndombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2014) 3 *Yale Human Rights and Development Journal* 55-56.

<sup>345</sup> Art 3(2) of the OAU Charter.

Organisation's Charter to bring it in line with contemporary realities<sup>346</sup> led to the formation of the OAU Charter Review Committee.<sup>347</sup>

The Constitutive Act of the AU, which brought about the birth of the new organization, specifically prohibited the use of force by states in the territories of other states in its article 4(f).<sup>348</sup> Similarly, article 4(g) of the Act provides for non-interference by member states in the internal affairs of other states. The ban on the use of force under article 4(f) appears to be fashioned after the provisions of article 2(4) of the UN Charter.

Exceptions to the general ban on the use of force are also contained in the Constitutive Act. Firstly, an exception to article 4(f) is provided for under article 4(h) which allows for the humanitarian intervention by member states in the territory of another if such a state commits war crimes, genocide or crimes against humanity.<sup>349</sup> Such a right to intervene in the territory of a state is pursuant on a decision by the Assembly of Heads of State and Government in the event that such grave crimes mentioned above are committed. Secondly, another exception which appears to import the customary right of a state to grant an invitation to another state to intervene lawfully in its territory is found in article 4(j) of the Act. For the purposes of restoring peace and security, member states have the right to request intervention from the Union. Before the enactment of the humanitarian intervention provision in the African system, African states had stood by helplessly while governments of certain states tortured their own people, relying on the non-intervention clauses contained in the Charter of the OAU.<sup>350</sup> One of the few exceptional cases however, is the Tanzanian intervention in

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<sup>346</sup> GA Aneme 'Introduction to the norms and institutions of the African Union 2, [http://www.nyulawglobalex/African\\_Union.htm](http://www.nyulawglobalex/African_Union.htm) (accessed 29/09/2014).

<sup>347</sup> Meeting of the Assembly of Heads of State and Government 'Decision on the Review of the Charter.' (Monrovia 1979) AHG/Dec.111 (XVI) Rev.1.

<sup>348</sup> Art 4(f) of the Constitutive Act of the African Union.

<sup>349</sup> GA Aneme 'The institutionalization of cosmopolitan justice: the case of the African Union's right of intervention' (2013) 22 *Minnesota Journal of International Law* 5.

<sup>350</sup> Ndombana (n 344 above) 46, 50, 55-57. Ndombana argues that, upon independence, African countries continued with the massive and systematic violations of the human rights of its people, which violations ranged from extra-judicial executions, massacres, disappearances, torture, and arbitrary detention to political surveillance and harassment. He considered the OAU as having been bogged down by the non-intervention or domestic jurisdiction clause, and so it never condemned the ruthless treatment of its people by states. For instance, even the behaviour of Jean-Bedel Bokassa of Central African Republic (CAR), Marcias Nguema of Equatorial Guinea and Idi Amin, among several other dictators, was condoned for the atrocities committed against their people. Instead of condemnation, these brutal leaders were allowed to take their turns as Chairmen of the OAU (with Idi Amin becoming its Chairman in 1976). The protection of sovereignty, territorial integrity and independence which were the basis for the struggles against colonial rule ironically became the foundation upon which human rights abuses were precipitated.

Uganda to overthrow Idi Amin.<sup>351</sup> Independent African states placed very high premium on non-interference in the internal affairs of their states while the OAU remained indifferent.<sup>352</sup> The impunity of the leaders could be deciphered from the remarks of President Sekou Toure, when he stated, ‘the OAU was not a tribunal which could sit in judgment on any member state’s internal affairs’.<sup>353</sup> Article 4(h) has, therefore, heralded the departure from the strict observance of the principles of sovereignty and inviolability of states which may have been inspired in part by the atrocities committed by some former African leaders and the 1994 Rwandan genocide.<sup>354</sup> Although article 4(h) has not been invoked,<sup>355</sup> an attempt was made to invoke it against Burundi in December 2015 by the Peace and Security Council (PSC) of the AU when it authorised the deployment of 5,000 men African Prevention and Protection Mission in Burundi (MAPROBU).<sup>356</sup> The attempted deployment could not take effect because the African Commission decided to exploit other political options to resolve the conflict. Also, the lack of funds and the reluctance of member states to contribute troops stalled the deployment.

Gazzini has, however, argued that, unilateral humanitarian intervention not being an exception to article 2(4) of the UN Charter, article 4(h) of the Constitutive Act is scarcely compatible with the UN Charter, even if the Assembly took the decision unanimously.<sup>357</sup> It is argued that only the UNSC can waive the prohibition. The *erga omnes* character of the prohibition is such that individual states cannot confer normative powers on the AU or any other regional organisation and that their practice cannot crystallize a regional custom to allow humanitarian intervention.<sup>358</sup> Arguably, while the obligations of states under the UN Charter will take priority over other international obligations,<sup>359</sup> there appears to be an emerging trend in contemporary international law that tolerates regional efforts at using

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<sup>351</sup> DG Acheson-Brown ‘The Tanzanian invasion of Uganda: A just war?’ (2001) *International Third World Studies Journal and Review* 3-10.

<sup>352</sup> UO Umozurike ‘The African Charter on Human and Peoples’ Rights’ (1983) 77 *American Journal of International Law* 902.

<sup>353</sup> Umozurike (n 352 above) 902-903.

<sup>354</sup> International Panel of Eminent Personalities, Rwanda: The preventable genocide (2000), [http://www.africa-union.org/Official\\_documents/report\\_rwanda\\_genocide.pdf](http://www.africa-union.org/Official_documents/report_rwanda_genocide.pdf) (accessed 29/09/2014).

<sup>355</sup> JF Mutton ‘Article 4 (h) and the citizen’s right to be protected’ in D Kuwali & F Viljoen (eds.) *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act* (2014) 106.

<sup>356</sup> Institute for Security Studies (ISS) ‘The African Union’s challenged responsibility to protect in Burundi’, 18 January 2016, at <https://issafrica.org/pscreport/addis-insights/the-aus-challenged-responsibility-to-protect-in-Burundi> (accessed 11/11/2016).

<sup>357</sup> T Gazzini *The changing rules on the use of force in international law* (Manchester University Press, 2005) 113-114.

<sup>358</sup> Gazzini (n 357 above) 114.

<sup>359</sup> Art 103 of the UN Charter.



force to maintain peace, even without prior SC authorization.<sup>360</sup> This trend appears to soften or relax the substantive norms relating to the use of force.

The inadequacy of the commitment of the UN to tackle security problems in Africa was alleged to be responsible (in part) for African regionally-based organizations to intervene militarily in Liberia, Sierra Leone, Cote d'Ivoire and Sudan.<sup>361</sup> Iyi has argued, and rightly too, that the indifferent disposition or failure of the international community in general, and the SC in particular, was responsible for the intervention in Liberia by ECOWAS.<sup>362</sup> The Liberian and Sierra Leonean conflicts and the 1994 Rwandan genocide were issues that made continuous adherence by African states to the principles of sovereignty and non-interference impossible.<sup>363</sup> According to Levitt, armed conflicts in the African Continent have killed 650, 000 in Angola, 3,000,000 in DRC, 1,000,000 in Rwanda, 2,500,000 in Sudan, 300,000 in Burundi, 250,000 in Liberia, 75,000 in Sierra Leone and 40,000 in Uganda.<sup>364</sup> As indicated above, intervention is sometimes done without prior SC authorization under Chapter VIII, but such actions are thereafter retrospectively authorized. In fact, the hitherto seriously contested doctrines of protection or rescue of nationals abroad as a basis of self-defence and armed humanitarian intervention have also found some degree of justification.<sup>365</sup>

### 2.6.3. The North Atlantic Treaty Organisation (NATO)

The North Atlantic Treaty Organisation is a regional organization made up of countries in North America and Europe, and its constitutive instrument 'The North Atlantic Treaty' entered into force on 24 August 1949.<sup>366</sup> Its membership increased from 12 upon foundation

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<sup>360</sup> Art 22 of the ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security; Paliwal (n 313 above) 1, at 17 & 26; F Francioni & C Bakker 'Responsibility to protect, humanitarian intervention and human rights: Lessons from Libya to Mali (2013) *Transworld, Transatlantic relationship and the future global governance*, Working Paper 15, at [http://www.transworld-fp7.eu/wp-content/uploads/2013/04/TW\\_WP\\_15.pdf](http://www.transworld-fp7.eu/wp-content/uploads/2013/04/TW_WP_15.pdf) (accessed 28/11/2015); see also G Amvane 'Intervention pursuant to article 4(h) of the Constitutive Act of the African Union without United Nations Security Council authorisation' (2015) 15 *African Human Rights Law Journal* 297-298, where it has been suggested that the AU may intervene in a state in consonance with article 4(h) of its Constitutive Act without prior authorisation from the SC contemplated under article 53(1) of the UN Charter, if the SC does not timely respond to such a request or situation.

<sup>361</sup> Iyi (n 260 above) 96.

<sup>362</sup> Iyi (n 260 above) 96.

<sup>363</sup> Aneme (n 349 above) 6.

<sup>364</sup> JI Levitt 'Pro-democratic intervention in Africa' (2006) 24 *Winconsin International Law Journal* 785-786. (785-833); see also Ndombana (n 366 above) 50-52.

<sup>365</sup> Weller (n 322 above) 58.

<sup>366</sup> Art 14(3) of The North Atlantic Treaty.



to 19 in 1999. NATO was formed and designed to deal with the Soviet Union and the Warsaw Pact because the Soviet and that alliance were believed to pose threats to states that were on different ideological paths to theirs.<sup>367</sup> The Warsaw Pact was dominated by the Soviet Union which maintained a balance of power with the US by confronting any ideological realignment of its client states by western liberal governments.<sup>368</sup> The battle to maintain the *status quo* in terms of keeping smaller and less powerful states along ideological lines was responsible for the crisis of Warsaw - Hungary in 1956, the US - Dominican Republic in 1965 and the Union of Soviet Socialist Republic (USSR) - Czechoslovakia in 1968.<sup>369</sup>

Apart from strengthening the collective self-defence capabilities of member states, the general purpose for the establishment of NATO was to complement the primary role of the UN by encouraging the settlement of international disputes through peaceful means, and, to that extent, it prohibited members from the threat or use of force in their international relations.<sup>370</sup>

For a comprehensive approach to cope with international security challenges, NATO has worked with other international organizations, such as the UN, EU and Organisation for Security and Cooperation in Europe (OSCE). NATO operates with regard to the purposes of the UN as expressed in the UN Charter and Security Council resolutions in relation to its non-article 5 operations.<sup>371</sup> Article 5 of the North Atlantic Treaty is on collective self-defence, while its other purposes are geared towards maintenance of international peace and security as contained in the UN Charter.<sup>372</sup> The UN is in alliance with NATO and works closely with it in the maintenance of international peace and security because NATO has resources, skills and the capacity to prosecute the purposes of the UN. It has military capacity which is unrivaled, and it has also cooperated with the UN in the Balkans in the 1990s,<sup>373</sup> in

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<sup>367</sup> Simma (n 180 above) 14; United States Deputy Secretary of State, Strobe Talbot's Address on a new Strategic Concept for NATO at the negotiating phase leading to NATO's 50<sup>th</sup> Anniversary.

<sup>368</sup> Franck (n 220 above) 69-75.

<sup>369</sup> Franck (n 220 above) 69-75.

<sup>370</sup> Art 1 of the North Atlantic Treaty provides: 'The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations'.

<sup>371</sup> DS Yost 'NATO and international organisations' (2007) *NATO Defence College Forum Paper* 31.

<sup>372</sup> Art 1 of the North Atlantic Treaty.

<sup>373</sup> S/RES/1244 of 10 June 1999, (para 17 & Annex 2(4)); E Milano 'Security Council action in the Balkans: Legality of Kosovo territorial status' (2003) 14 *European Journal of International Law* 1000; (99-1022);

Afghanistan<sup>374</sup> and in Libya in 2011<sup>375</sup>. In furtherance of the desire to consolidate and strengthen its partnership with the UN, NATO prepared a proposal of a memorandum of understanding which did not come into effect because of its non approval by the UN.<sup>376</sup>

While article 7 of the treaty recognized the primary role of the UN Security Council in the maintenance of international peace and security, article 5 of The North Atlantic Treaty is fashioned after article 51 of the UN Charter which has a similar provision on individual and collective self-defence.<sup>377</sup> This is one of the most important provisions of NATO because its constituent countries came together to defend member states collectively against external aggression. The purport of article 5 is that any armed attack on any of its members is deemed to be an attack on all of them, thereby creating room for collective self-defence in response to such an attacker.<sup>378</sup> Thus, NATO's involvement in *Operation Enduring Freedom* conducted in Afghanistan following the 9/11 terrorist attacks on the US was massive, culminating in the leadership role it played in the International Security Assistance Force (ISAF) in Afghanistan.

In considering new options to cope with the threats posed to the contemporary international security infrastructure by terrorist networks and the proliferation of WMD made possible by technological growth, however, NATO has developed a new 'strategic concept.' This concept, which invariably widened the scope of NATO's operation outside its article 5 powers, was adopted in the Lisbon Summit of the NATO Heads of State and Government

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KJ Kille & RC Hendrickson 'NATO and the United Nations: Debates and trends in institutional coordination,' [http://journal-iaudies.org/sites/journal-iaudies.org/files/1105201121final\\_4.pdf](http://journal-iaudies.org/sites/journal-iaudies.org/files/1105201121final_4.pdf) (accessed 08/11/2014).

<sup>374</sup> IH Daadler & JG Stavridis 'NATO's victory in Libya: The right way to run an intervention' *Foreign Affairs*, March/April 2012. About 50 nations were placed under NATO command as part of the intervention in Afghanistan under the ISAF. Thus, NATO was not involved in the Afghan war on the invocation of its art 5 obligations of collective self-defence under the North Atlantic Treaty alone, but as a partner of the UN.

<sup>375</sup> Daadler & Stavridis (n 374 above), the authors point out that 'when a group of countries wants to launch a joint intervention as a coalition-which confers political legitimacy-only NATO can provide the common command structure and capabilities necessary to plan and execute complex operations'.

<sup>376</sup> Yost (n 371 above) 9-10.

<sup>377</sup> Article 5 of the North Atlantic Treaty.

<sup>378</sup> Art 5, para 1 of the North Atlantic Treaty provides 'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that all, if such an attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by ART 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of force, to restore and maintain the security of the North Atlantic area.'

in November 2010.<sup>379</sup> Even though, NATO had indicated its roles during its foundation as including a complementary responsibility to realize the purposes of the UN, widening its scope of operation through the strategic concept came retrospectively to give credence to its previous use of force outside self-defence. NATO's bombing campaign in Yugoslavia, which was in response to President Milosevic's repression of Kosovo Albanians, could be interpreted to mean that NATO had left its primary role of collective self-defence to redefine itself.<sup>380</sup> That apart, in consonance with the Bush Doctrine expressed in the US 'National Security Strategy' of 2002,<sup>381</sup> NATO considered giving effect to the principle of anticipatory self-defence in its strategic concept.

NATO's strategic expansion of its operations was also contingent upon the fact that direct cases of aggression against its members were less likely than they had been, but it feared that economic, social, political and ethnic problems might create tensions and so the strategic concept became imperative. Global security concerns, thus, propelled it to be involved in the use of force in Yugoslavia, which was outside the collective self-defence concept contemplated under its article 5, for humanitarian reasons.<sup>382</sup> NATO's intervention in Kosovo in furtherance of the purposes of the UN has generated enough controversy on the grounds of a lack of authorization by the SC, as NATO is a regional organization.<sup>383</sup> Because its actions were aimed at halting a humanitarian catastrophe, however, its action has been described as being morally justified, but it was, nevertheless, incompatible with international law (that is, illegal but justified).<sup>384</sup> This view has been expressed by several commentators, including Simma and Franck. Simma has argued that sometimes there are 'hard cases' where political and moral considerations leave states no choice but to act outside the law.<sup>385</sup> In Franck's opinion, if genocide is about to occur and the Security Council is incapacitated by threats of the use of *veto* as was the case of Kosovo, then it is not necessary to insist on the

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<sup>379</sup> The North Atlantic Treaty Organisation, 'Active Engagement, Modern Defence' strategic concept for the defence and security of the members of the North Atlantic Treaty Organisation, (Brussels: North Atlantic Treaty Council, November 2010), [http://www.nato.int/cps/en/natolive/official\\_texts\\_68580.htm](http://www.nato.int/cps/en/natolive/official_texts_68580.htm)

<sup>380</sup> Gray (n 176 above) 39.

<sup>381</sup> The National Security Strategy of the United States of America, September, 2002, 6, where President Bush stated 'While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defence by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country.'

<sup>382</sup> Gray (n 176 above) 39.

<sup>383</sup> Article 53 of the UN Charter.

<sup>384</sup> A Roberts 'Legality vs legitimacy: Can uses of force be illegal but justified?' in P Alston & E Macdonald (eds.) *Human rights, intervention and the use of force* (2008) 179.

<sup>385</sup> Simma (n 180 above) 1.

legality of humanitarian intervention. The consideration, though, is on the moral and mitigating grounds for intervention, as greater wrong was imminent without intervention.<sup>386</sup> The idea of finding justification for illegal actions, ultimately sustains the prohibition of the use of force and permits justice in individual cases.<sup>387</sup>

Arguably, the unauthorized enforcement actions of regional organizations finding justification in non-legal policy formulation pose a danger to positive international law. If articles 2(4) and 53(1) of the UN Charter are disregarded to create room for unilateral interventions, there might well be chaos in the security system. While this study appreciates the urgency of UNSC authorized interventions to save lives, existing legal frameworks should not be circumvented with impunity. If NATO avoided a likely veto by Russia or China to block its resolve to intervene militarily in Kosovo, what would have been the outcome if these two countries had also maintained a resolve to protect Yugoslavia militarily?

#### **2.6.4. Economic Community of West African States (ECOWAS)**

ECOWAS was established by the Treaty of Lagos on 28 May 1975 in Lagos as a sub-regional organization for the purpose of economic cooperation.<sup>388</sup> Even though it was formed as a body to promote regional economic integration and cooperation, by virtue of its Protocol Relating to Mutual Assistance of 1981, it expanded its mandate to provide collective self-defence against aggression similar to that of the inter-American system.<sup>389</sup> Nevertheless, security challenges which were not foreseen at the time of inauguration compelled ECOWAS to engage in humanitarian intervention in some states within the sub-region.<sup>390</sup> In consonance therewith, the constitutive instrument of ECOWAS was amended in 1993 to extend its mandate to intra-regional peacekeeping.<sup>391</sup> Further developments occurred to strengthen the ECOWAS normative framework to cope with the task of

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<sup>386</sup> Franck (n 220 above) 181, 191.

<sup>387</sup> Roberts (n 384 above) 180.

<sup>388</sup> Article 2 of the Treaty of Economic Community of West African States of 1975.

<sup>389</sup> Article 3(h) of the charter of the OAS.

<sup>390</sup> Paliwal (n 313 above) 207.

<sup>391</sup> Art 58 of the Treaty of ECOWAS.

maintaining peace and security in the sub-region.<sup>392</sup> ECOWAS has successfully carried out enforcement actions in West Africa, two of which are discussed hereunder.

## 2.7. Humanitarian intervention: Lawful or legitimate use of force

Humanitarian intervention has been defined variously by several international law scholars,<sup>393</sup> but this study adopts Brownlie's definition which states that it is 'the threat or use of armed force by a state, a belligerent community, or an international organization with the object of protecting human rights' because it captures humanitarian intervention not only by states, but also by international organizations.<sup>394</sup> It has a customary law origin which is traced back to the 16<sup>th</sup> and 17<sup>th</sup> Century writings of Vitoria, Gentili, Suarez, Vattel and Grotius.<sup>395</sup> It is traced back to wars over religious differences in which the right of one sovereign was recognized to wage war on behalf of oppressed people who are denied the freedom to worship or practise their religion in the territory of another sovereign.<sup>396</sup> The legality or legitimacy of the concept of humanitarian intervention has emerged as one of the controversial areas of contemporary international law discourse in relation to the prohibition of the use of force. Some commentators consider this concept as a subset of the laws

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<sup>392</sup> At the Abuja conference of Heads of State and Government ECOWAS adopted the Framework Establishing the ECOWAS Mechanism for Conflict Prevention, Management and Resolution, Peace-keeping and Security on 31 October 1998. This was followed on 10 December 1999 with a further adoption of the Protocol Relating to the ECOWAS Mechanism for Conflict Prevention, Management and Resolution, Peace-keeping and Security.

<sup>393</sup> A Roberts 'Humanitarian war' Military intervention and human rights' (1993) 69 *International Affairs* 426, where humanitarian intervention was defined as 'a military intervention in a state without the approval of its authorities, and with the purpose of preventing wide spread suffering or death among the inhabitants'; WD Verwey 'Humanitarian intervention in the 1990s and beyond: An international law perspective' in JN Pieterse (ed.) *World orders in the making* (1998) 180, where humanitarian intervention was defined as 'coercive action taken by states, at their initiative, and involving the use of armed force, for the purpose of preventing or putting a halt to serious and wide-scale violations of fundamental human rights, in particular the right to life, inside the territory of another state'; M Stanulova 'Has humanitarian intervention become an exception to the prohibition on the use of force in Art 2(4) of the UN Charter?', at Stanulova-Humanitarian-Intervention.pdf (accessed 04/03/2016). Stanulova defined humanitarian intervention as the legitimate use of force by states against another for the purpose of alleviating human suffering in the latter'.

<sup>394</sup> I Brownlie 'Humanitarian intervention' in JN Moore (ed.) *Law and civil war in the modern world* (1974) 217.

<sup>395</sup> S Kardas 'Humanitarian intervention: The evolution of the idea and practice' (2001) 6 *Journal of International Affairs* 2, also at <http://sam.gov.tr/tr/wp-content/uploads/2012/+%DEaban-Karda+%FE.pdf> (accessed 08/03/2016).

<sup>396</sup> S Chestermern *Just war or just peace?: Humanitarian intervention and international law* (OUP, 2001) 7-8, 13-16.

regulating the use of force because it is sometimes examined alongside self-defence and SC authorized action which are exceptions to the ban on the use of force.<sup>397</sup> Humanitarian intervention aims at alleviating the sufferings of the citizens of a particular state territory, even though its legality remains debatable.

Upon the coming into being of the modern state structure after the 1648 Peace of Westphalia, the sovereign states contended that intervention in their territories was unlawful because it violated their sovereignty since whatever happens within the borders of a state remains an internal affair.<sup>398</sup> This manifests the tension between sovereignty which seeks to prevent foreign interference in the internal affairs of states and humanitarian intervention which seeks to protect the human rights of citizens from being abused.<sup>399</sup> In addition, the proponents of non-intervention have argued that humanitarian intervention is illegal because it appears to be contrary to the general prohibition of the use of force under article 2(4) of the UN Charter by not being one of the exceptions to the use of force.<sup>400</sup> Hurd argued that the ban in the Charter is total and gives no regard even to the motive behind any intervention by a state, as was shown in the Entebbe airport raid.<sup>401</sup> Israel intervened in Uganda in 1976 to rescue its nationals who were being held hostage by terrorists, but Sweden and other states considered the raid to be contrary to the ban under the Charter.<sup>402</sup> Humanitarian intervention is not aimed at protecting nationals of the intervening state but rather to avert human rights abuses in another state. There, thus, need not be any link between the intervening state and the victims of such violations.<sup>403</sup> The argument of the illegality of humanitarian intervention stems from the language of article 2(4) of the Charter and some of the UNGA resolutions which have resonated in or reinforced the Charter prohibition on non-interference.<sup>404</sup> Arguably then, since articles 24, 39 and 42 have consigned the power of determining when force may be used to the SC, this means that humanitarian intervention may be lawful only if it is authorized by the SC.

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<sup>397</sup> I Hurd 'Is humanitarian intervention legal? The rule of law in an incoherent world' (2011) 25 *Ethics & International Affairs* 293.

<sup>398</sup> Iyi (n 260 above) 41.

<sup>399</sup> JM Welsh *Humanitarian intervention and international relations* (2004) 1 & 3.

<sup>400</sup> Hurd (n 397 above) 293 & 294.

<sup>401</sup> Hurd (n 397 above) 298.

<sup>402</sup> Hurd (n 397 above) 298.

<sup>403</sup> RB Lillich 'Forcible self-help by states to protect human rights' (1967-1968) 53 *Iowa Law Review* 332, see also RB Lillich 'Intervention to protect human rights' (1969) 15 *McGill Law Journal* 209.

<sup>404</sup> A/RES/2131(XX) of 21 December 1965; A/RES/2625(XXV) of 24 October 1970.



On the other hand, proponents of humanitarian intervention have relied on recent state practice to justify interference, often without SC authorisation. Humanitarian intervention has occurred in instances such as India in East Pakistan (now Bangladesh), Tanzania in Uganda, ECOWAS in Liberia and Sierra Leone and NATO in Kosovo.<sup>405</sup> They have argued that an intervention aimed at halting massive human rights abuses is legitimate even if it remains illegal.<sup>406</sup> The position being advocated is that, if a state fails to conduct the affairs of state responsibly including the protection of the rights of its citizens, it cannot then complain about the violation of its sovereignty by third party intervention because the inviolability of sovereignty is contingent upon a government's responsibility to protect its people.<sup>407</sup> Upon taking office as the UN Secretary-General in 1997, Kofi Annan saw the compelling need to demystify the concept of sovereignty, and he resolved to challenge the immutable and inviolable outlook of sovereignty. He found it unacceptable to observe the tenets of sovereignty scrupulously in the face of massive violations of human rights within the borders of certain states.<sup>408</sup> According to him, sovereignty has to be made contingent and conditional on the willingness and ability of states to provide security for their citizens if

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<sup>405</sup> Iyi (n 260 above) 41-51; Annan (260 above) 87-101.

<sup>406</sup> Brownlie (n 11 above) 16; Roberts (n 384 above) 179; Independent Commission on Kosovo, Kosovo Report: Conflict, international response, lessons learned (2000), at.... <http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-kosovoreport.pdf> (accessed 06/03/2016). The Independent Commission found the legitimacy of the Kosovo intervention on the compelling need to avert or halt humanitarian catastrophe for civilian Kosovar Albanians, against background of earlier failure to avert the events in Bosnia. Those events culminated in the capture of Srebrenica and the summary execution of an estimated eight thousand Bosnian Muslims, mainly men and boys, see Commission Report p 163; see also Annan (n 284 above) 70. The urgency of intervention in Kosovo, the Commission reported, was underscored by the fact that Milosevic was not to be trusted and that he is an adversary with a record of manipulation and criminality, p 163; see also Annan Interventions (n 260 above) 87-91 (To Annan, forcible intervention was a lesser evil than allowing massacres and extreme oppression). The Commission went further by suggesting that international law should go beyond strict legality of the prohibition of force to incorporate more flexible views of legitimacy p 164. The Commission, nevertheless, found NATO's intervention to be on shaky ground for not having secured a prior authorisation from either the SC under Chapter VII, or sought a secondary mandate from the GA under the 'Uniting for Peace Resolution', p 166. Interestingly, the Commission conclusively found the NATO intervention to be illegal, but, nevertheless, legitimate thus: 'It is however, possible to argue that, running parallel to the Charter's limitations on the use of force is Charter support for the international promotion and protection of human rights. In this vein, it has been asserted that, given the unfolding humanitarian catastrophe precipitated by the Serb pattern of oppressive criminality toward the civilian population in Kosovo, the use of force by NATO was legitimate, as it was the only practical means available to protect the Albanian Kosovars from further violent abuse' p 167; Franck (n 244 above), In examining the intervention in Kosovo, Franck recognised the illegality of the action but, nevertheless, considered it legitimate and argued that the ends of 'international justice is served better by sometimes breaking the law rather than respecting it'. Hurd considered the view of Franck to be provocative because it sought to advocate a departure from the absolute nature of the rule of law, see Hurd (n 397 above) 301.

<sup>407</sup> Hurd (n 397 above) 302, 305-306.

<sup>408</sup> Annan (n 260 above) 84.



non-interference must have any meaning<sup>409</sup>, and it is ‘clear that sovereignty cannot be used as [a] shield behind which member states conceal their violations’.<sup>410</sup> As Lillich points out, the doctrine of absolute sovereignty does not insulate a state from intervention where human rights violations reach shocking proportions.<sup>411</sup> Arguably, the present trend shows the whittling down of the legal impact of the prohibition in article 2(4) of the Charter. In fact, without a prior UNSC authorisation, Annan urged NATO to consider the option of using force against the Yugoslav government during the reign of Slobodan Milosevic.<sup>412</sup> Like several others, he was apprehensive that any consideration for a resolution in the SC in that regard may be vetoed by Russia.<sup>413</sup> Annan’s view is in tandem with earlier remarks by Boutros Boutros-Ghali, his predecessor in office. He had remarked that, ‘The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality’.<sup>414</sup>

What is important, however, to the discussion in this chapter is whether humanitarian intervention is also captured in the general prohibition of the use of force. It is clear from the literal reading of article 2(4) of the Charter that humanitarian intervention is equally banned, not being one of the exceptions to the use of force. Some commentators have even questioned whether interventions (particularly unilateral interventions) have been pursued in good faith or whether economic and political motives have propelled intervention rather than humanitarian considerations.<sup>415</sup> This study agrees no less with the view that humanitarian intervention short of UNSC authorization is illegal, but no doubt legitimate if such intervention is pursuant to averting or halting human rights violations. In consonance

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<sup>409</sup> Annan (n 260 above) 84-86. While justifying humanitarian intervention during a question and answer session with journalists on Somalia, he stated: ‘What do you do when people are starving, dying, not because there is drought but because people, a group of men, are stopping them from getting food?’ He asked, ‘what do you do? Sit? Negotiate? Or what?’ According to him: ‘the rights of sovereign states to non-interference in the internal affairs could not override the rights of individuals to freedom from gross and systematic abuses of their human rights’, see Annan (n 284 above) 89.

<sup>410</sup> Annan (n 260 above) 335.

<sup>411</sup> RB Lillich ‘Intervention to protect human rights’ (1969) 15 *McGill Law Journal* 210.

<sup>412</sup> Annan (n 260 above) 90.

<sup>413</sup> Annan (n 260 above) 93-94

<sup>414</sup> Boutros-Ghali Report, UN Doc A/47/277 of 17 June 1992, para 17.

<sup>415</sup> TM Franck & NS Rodley ‘After Bangladesh: The law of humanitarian intervention by military force’ (1973) 67 *American Journal of International Law* 278-279. According to them: ‘In theory, no moral person can take exception to a rule, which in the absence of an effective international system to secure human rights, permits disinterested states to intervene surgically to protect severely endangered human rights and lives, wherever the need may arise. A study of interventions in practice, however, reveals that most have occurred in situations where the humanitarian motive is at least balanced, if not outweighed, by a desire to protect alien property or to reinforce socio-political and economic instruments of the status quo’.

with the suggestions of some legal futurologists, this study is not in doubt that humanitarian intervention is gradually being transformed as an acceptable exception to the general ban of the use of force under article 2(4) of the UN Charter.<sup>416</sup> In fact, the legality or otherwise of humanitarian intervention is becoming increasingly debatable.<sup>417</sup>

## 2.7. Conclusion

This chapter as shown that the normative and institutional frameworks have provided a code of behavior for states in relation to the use of force in the territories of one another. In fact, the inherent loopholes in the *jus ad bellum* rules that tolerated forcible measures short of wars prior to the establishment of the UN have been effectively proscribed by article 2(4) of the UN Charter. What remains to be done is for the international organizations and their leaders to muster the relevant ‘political will’ to compel adherence to the UN Charter, resolutions of the GA, SC, judgments of the ICJ and the norms of regional organizations dealing with prohibition of the use of force by states. The devolution of residual powers on regional bodies for the purpose of maintaining peace and security including enforcement actions have placed them strategic enough to attend swiftly to flash points in their regions. For instance, the intervention of the AU in Cote d’Ivoire and ECOWAS in Liberia and Sierra Leone are in furtherance of that mandate. It is, however, important that such regional bodies do not arrogate to themselves primary responsibility of purportedly maintaining world peace and security which is the preserve of the UN. The requirement of SC authorization before the undertaking of enforcement action by regional bodies should be strict and adhered to, instead of the retrospective manner in which the authorization is currently granted.

Given that the prohibition of the use of force under the UN system appears to be total, the Charter itself has provided two main exceptions to the general ban under articles 42 and 51. While article 42 empowers the SC to authorize military-based enforcement actions, article 51 permits individual and collective self-defence by states that are victims of an armed attack without reference to any of the organs of the UN. The next chapter will consider the exceptions to the general ban contained in article 2(4) of the Charter.

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<sup>416</sup> Stanulova (n 393 above) 2.

<sup>417</sup> Corten (n 294 above) 807, where he stated that ‘The fact that certain humanitarian interventions have not been condemned by the Security Council is testament to the legality of this type of intervention, provided that the circumstances are comparable to those of the precedents invoked.’



## Chapter 3

### Established exceptions to the general prohibition of the use of force under Article 2(4) of the UN Charter and under customary law

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### 3.1. Introduction

The maintenance of international peace and security is the major purpose of the UN, and to that extent it has a responsibility to take effective collective measures for the prevention and removal of threats to peace and to ensure the suppression of aggression.<sup>1</sup> International law has therefore developed legal frameworks to outlaw the use of force by states against one

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<sup>1</sup> Art 1(1) of the UN Charter.

another. The last chapter examined the historical evolution of these frameworks up to the 1945 UN Charter. Three exceptions to the general prohibition of the use of force are available, thereby allowing states under strict conditions to employ force either individually or collectively in their relations with one another. This chapter will examine these exceptions in detail. The Charter contains two of these exceptions, which are SC authorised enforcement action under article 42 and self-defence under article 51. A third exception is found under the customary law doctrine of ‘consent’ where a territorial state allows use of force in its territory by foreign forces. They provide the lawful exceptions to the general prohibition of the use of force.

Of these exceptions, self-defence and state consent are the grounds upon which extraterritorial forcible measures are usually carried out against NSAs because, since the inception of the UN up to now, there has been no SC authorised enforcement action against terrorist NSAs.<sup>2</sup> This chapter starts by considering what the extraterritorial use of force entails. This forms the focus of this study. Thereafter the chapter will examine the SC authorised enforcement actions contained in article 42 under its Chapter VII powers, and article 53 under its Chapter VIII powers. From that premise the study proceeds to examine the inherent right of states to individual or collective self-defence with close reference to the requirements of armed attack, necessity, proportionality, attribution, anticipatory and pre-emptive self-defence.. Just as an individual is allowed to employ force to defend his or her life from attack, a state is also entitled to defend its existence.<sup>3</sup> As Bowett puts it, ‘Self-defence is permissible for the purpose of protecting the security of the state and the essential rights, in particular the rights of territorial integrity and political independence, upon which that security depends’.<sup>4</sup>

Finally, the customary law requirement of state consent as an exception to the prohibition of the use of force contained in article 2(4) will be discussed. These three exceptions being considered are intended to permit the use of force to mitigate continuing threats to international peace. If the law of self-defence has been transformed in the face of these

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<sup>2</sup> B Simma et al *The Charter of the United Nations: A Commentary* 3<sup>rd</sup> edn. Vol. 11, (2012) 1399; O Schachter ‘Self-defence and the rule of law’ (1989) 2 *American Journal of International Law* 259.

<sup>3</sup> T Iwanek ‘The 2003 invasion of Iraq: How the system failed’ (2010) 15 *Journal of Conflict & Security Law* 105; Schachter (n 2 above) 259.

<sup>4</sup> D Bowett ‘Reprisals involving recourse to armed conflict’ (1972) 66 *American Journal of International Law* 1.

exceptions, it then means that the existing legal frameworks are inadequate to maintain international peace.

### **3.2. Extraterritorial use of force against non-state actors for acts of terrorism**

Extraterritorial use of force occurs, in the context of this study, when an acting state employs lethal forcible measures against a NSA located in the territory of another state for perpetrating terrorism. Ordinarily, states are forbidden under international law from using force against the territorial integrity of another state without that state's consent,<sup>5</sup> save when the outside state invokes the exceptions to the general ban.<sup>6</sup> Extraterritorial forcible measures range from attacks by airborne systems, kill-capture missions and large scale military operations.<sup>7</sup> Such use of extraterritorial force in the relations of states is not a new or strange phenomenon, as it has become a common practice in contemporary international law.<sup>8</sup> Guiora observed that Israel has been involved in taking forcible measures in self-defence against NSAs by way of targeted killings since June 1967.<sup>9</sup> Apart from employing force against terrorists within the borders of other states, as in the cases of US forcible measures against Al Qaeda and the Taliban in Afghanistan,<sup>10</sup> Israel's use of force in the Occupied Palestinian Territories (OPT) against Hamas, Islamic Jihad and other terrorist groups also falls under the extraterritorial use of force against non-state actors.<sup>11</sup>

Though in most cases terrorists are understood to be independent organised armed groups that operate outside the control of states, there are instances where these organisations have been procured and utilised by states as their agents to carry out cross-borders attacks.<sup>12</sup> State-sponsored terrorist attacks, thus, equally trigger the extraterritorial use of force in self-

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<sup>5</sup> O Schachter 'The extraterritorial use of force against terrorist bases' (1989) 11 *Houston Journal of International Law* 311.

<sup>6</sup> Articles 42 and 51 of the UN Charter.

<sup>7</sup> N Lubell *Extraterritorial use of force against non-state actors* (2010) 3.

<sup>8</sup> Lubell (n 7 above) 3; RY Jennings 'The Caroline and the McLeod Cases' (1938) *American Journal of International Law* 82-99; C Ryngaert 'Extraterritorial use of force against non-state actors by Noam Lubell-Book Review' (2012) 13 *Melbourne Journal of International Law* 9.

<sup>9</sup> A Guiora 'Targeted killing as active self-defence' (2004) 36 *Case Western Reserve Journal of International Law* 319.

<sup>10</sup> A Arnold 'The U.S. use of force in Afghanistan: A study of its legality' (2008) *Journal of politics and International Affairs* 63.

<sup>11</sup> O Ben-Naftali & KR Michaeli 'We must not make a scarecrow of the law: A legal analysis of the Israeli policy of targeted killings' (2003) 36 *O' Cornell International Law Journal* 233-292.

<sup>12</sup> Schachter (n 5 above) 310.

defence against states directly for complicity in acts of terrorism. Libyan alleged involvement in transnational terrorism is an example in this regard.<sup>13</sup>

### 3.3. Established exceptions to the general prohibition of the use of force

This section refers to instances in which force may be lawfully used in the international relations of states. The principle is that a particular use of force which does not find an excuse under a SC authorisation, self-defence or on the basis of consent is illegal.

#### 3.3.1. Security Council authorised enforcement action

Two instances exist in the UN Charter where the SC may authorize the use of force by states, and these situations are contained under Articles 42 and 53. Article 42 gives the SC the power to authorize the use of necessary force to maintain international peace and security including the use of blockade and other operations by air, sea or land forces.<sup>14</sup> The SC also exercises its power to authorise enforcement action is when such authorisation is given to regional organisations in conformity with the provisions of Article 53(1) of the UN Charter.

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<sup>13</sup> Firstly, a Berlin night club that was being frequented by US soldiers was bombed on 4 April 1986 by alleged agents of Libya. While three persons died in the attack, about 229 others were injured. Claiming self-defence against state-sponsored terrorism as its rationale, the US launched *Operation El Dorado Canyon*, which took the form of an aerial attack on Libyan targets at Tripoli and Benghazi. In one of these attacks, Gaddafi's adopted daughter Hanna was killed. The action of the US was condemned by the UN General Assembly. See TM Franck *Recourse to force: State action against threats and armed attacks* (2002) 89-90; Deter (n 5 above), 24; A/RES/ 41/38 of 20 November 1986. Secondly, Libya was alleged to have been involved in the Lockerbie incident of 21 December 1988 in which a Pan Am Flight 103 from London to New York was bombed over Lockerbie in Scotland. The incident killed 259 passengers and crewmembers aboard the plane and 11 others on the ground in Lockerbie.<sup>13</sup> Libyan authorities accepted liability for the incident and agreed to pay \$8 million dollars to the families of each of the victims. The Lockerbie incident remained controversial because allegations have also been made against Iran as being responsible for the bombing in retaliation for the US navy's strike on an Iranian passenger jet. See J Greenpeace 'Remembering the 1988 Lockerbie bombing' *History in the Headlines*, 20 December 2013, <http://www.history.com/news/remembering-the-lockerbie-bombing> (accessed 20/11/2014); I Deter *The Law of war* (2013) 24; G Rayner 'Lockerbie bombing 'was work of Iran, not Libya' says former spy,' *The Telegraph*, 20 November 2014. A former Iranian intelligence officer and defector to Germany, Abolghassen Mesbahi made the allegation implicating Iran; Lockerbie bombing, 'has the truth finally been revealed,' *The Week*, 11 March 2014.

<sup>14</sup> Art 42 provides 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.'



### 3.3.1.1. Security Council authorisation under Article 42 of the Charter

An enforcement action involves the use of coercive military force as is contemplated under Chapter VII of the Charter.<sup>15</sup> A SC authorised enforcement action is a collective forcible measure that comes as a last resort in the series of efforts required to settle international disputes. The first step requires the SC to determine the existence of a threat to the peace, breach of peace or act of aggression based on which it makes recommendations.<sup>16</sup> Secondly, the SC may determine what non-forcible measures may be appropriate to realise its decisions and direct state parties in that regard.<sup>17</sup> Thirdly, it is only where the non-forcible measures under article 41 prove to be inadequate that the SC will be constrained to consider forcible measures against states that cause infractions of international law with the aim of restoring international peace and security.<sup>18</sup> Going through these three steps invariably put the SC in a quasi judicial capacity to make an appropriate determination of the threats.<sup>19</sup> The SC may, however, make the above determinations whether or not such a threat is imminent.<sup>20</sup> According to Weiner, unlike an action in self-defence, neither the prior commission of an armed attack nor the presence of imminence are prerequisites for the SC to authorise measures which also includes the use of force.<sup>21</sup> A mere determination of threats to international peace and security is, thus, sufficient for the SC to authorise an enforcement action.<sup>22</sup> It is also amenable to reason that authorising article 42 measures may depend on the nature and gravity of the security threat, breach of peace or act of aggression.

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<sup>15</sup> Art 42 of the UN Charter; E de Wet 'Regional organisations and arrangements: Authorisation, ratification, or independent action in M Weller (ed.) *The Oxford Handbook of the use of force in international law* (2015) 318; R Jennings 'Advisory Opinion of July 20, 1962' (1962) 11 *International & Comparative Law Quarterly* 1173.

<sup>16</sup> Art 39 of the UN Charter.

<sup>17</sup> Art 41 of the UN Charter.

<sup>18</sup> Art 42 of the UN Charter.

<sup>19</sup> Art 39 of the Charter; Franck (n 13 above) 20, 21; AS Weiner 'The use of force and contemporary security threats: Old medicine for new ills' (2006) *Stanford Law Review* 424; N Blokker 'Is the authorization authorized? Powers and practice of the Security Council to authorize the use of force by 'Coalition of the able and willing'' (2000) 11 *European Journal of International Law* 550; J Allain 'The true challenge to the United Nations system of the use of force: the failures of Kosovo and Iraq and the emergence of the African Union' (2004) 8 *Max Planck UNYB* 224.

<sup>20</sup> Weiner (n 19 above) 425.

<sup>21</sup> Weiner (n 19 above) 425.

<sup>22</sup> Weiner (n 19 above) 425; see also C Greenwood 'International law and the pre-emptive use of force: Afghanistan, Al Qaeda, and Iraq' (2003) 4 *San Diego International Law Journal* 19. According to Greenwood, 'There is no doubt that this power can be used pre-emptively. Indeed, the reference in Article 39 to "threat to the peace" (as distinct from "breach of the peace" and "act of aggression") as one of the three grounds on which the Council could exercise its Chapter VII powers, demonstrates that pre-emptive action was always intended to be a major feature of the regime of collective security created by the Charter. Nor does the Charter limit the pre-emptive power of the Security Council to threats that are

It was the contemplation of the drafters of the Charter in 1945 that, upon the adoption of an enforcement action by the SC, its own standby force, made up of armed forces of member states, would undertake an enforcement action.<sup>23</sup> This was to be based on agreements between the SC and the troop-contributing states.<sup>24</sup> The UN has, however, not been able to establish and maintain such a standby force, but instead relies on an *ad hoc* force outside the contemplation of the Charter.<sup>25</sup> The power of the SC itself to authorize the use of an *ad hoc* force for enforcement action is an implied power, not being expressly stated in the Charter, but nevertheless relevant with regard to the Chapter VII powers of the Council relating to the use of force.<sup>26</sup> According to Blokker, while the SC has power under article 42 to take an enforcement action, the *travaux préparatoires* and the Charter system provide explicit power to undertake such action by its own forces under article 43 of the Charter. In the absence of its own forces, however, there was resort to implied powers to use forces that are not of its own thereby making it difficult for strict control.<sup>27</sup> From their inception to date, the UN enforcement actions have been on an *ad hoc* basis as it relies on the contribution of troops from a ‘coalition of the willing,’ contrary to the provisions of Article 43 aforesaid.<sup>28</sup> As Franck points out, the non implementation of article 43 would have created problems for the UN had the Charter not had the capacity to adapt *ad hoc* measures to fill these gaps.<sup>29</sup>

The SC has the primary responsibility of maintaining international peace and security, and it is empowered to make certain binding decisions.<sup>30</sup> Its resolutions which contain action statements such as ‘the Security Council decides that ...’ are, thus, considered to be *fiats* that command legal binding force on members. The binding resolutions or decisions relate to international disputes, threat to peace, breaches of peace or acts of aggression under its

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"imminent". There is no trace of such a limitation anywhere in the Charter. On the contrary, the historical background against which the Charter was drafted-in particular, the importance of the lack of pre-emptive action against Hitler in the 1930's in contributing to the causes of World War Two-strongly suggests that the pre-emptive power of the Security Council was intended to be much more far-reaching than the power of individual States to take action by way of self-defense against threats of armed attack.’

<sup>23</sup> Art 43 of the UN Charter, para 1 thereof provides that: ‘All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.’

<sup>24</sup> Art 43(3) of the UN Charter.

<sup>25</sup> Art 43 of the Charter; Blokker (n 21 above) 542.

<sup>26</sup> Blokker (n 19 above), 548, 555.

<sup>27</sup> Blokker (n 19 above) 542-543.

<sup>28</sup> Franck (n 13 above), 22.

<sup>29</sup> Franck (n 13 above), 23.

<sup>30</sup> CC Joyner *International law in the 21<sup>st</sup> Century: Rules of global governance* (2005) 91.

Chapter VII powers.<sup>31</sup> That apart, all states agreed to carry out the decisions of the SC.<sup>32</sup> The SC resolutions, which are adopted to authorise enforcement actions, are important decisions founded on its Chapter VII powers which are binding on states.<sup>33</sup> The SC is, therefore, very cautious and careful when such decisions are considered to avoid erroneous or bad faith authorisations of the use of force, and such decisions involve the participation of all states represented in the SC in the determination of the nature of a particular threat.<sup>34</sup> At least nine of the fifteen members, including the concurring votes of all five permanent members, are required to authorise the use of force.<sup>35</sup> In spite of the mode of adopting its resolutions, suspicion sometimes exists that the powerful states, such as the US and Britain, are using the political platform created by the UN to target certain states that are not friendly with them.<sup>36</sup> For instance, controversies trailed the revival and reliance on resolutions 678,<sup>37</sup> 687<sup>38</sup> and 1441<sup>39</sup> by the US, Australia and Britain for the invasion of Iraq in 2003, when they failed to secure a SC authorisation in that regard.<sup>40</sup> In their desire to circumvent the lack of an express UN mandate based on the likelihood of the use of veto by China, Russia or France, the US, UK and Australia relied on contentious justifications to the effect that resolutions 678 and 687 had not been terminated, but were merely suspended and were being revived and activated by resolution 1441.<sup>41</sup> The UN Secretary General,<sup>42</sup> the Arab League, the Non-Aligned Movement (NAM)<sup>43</sup> and several member states, including China, Russia

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<sup>31</sup> Joyner (n 30 above) 91.

<sup>32</sup> Art 25 of the UN Charter.

<sup>33</sup> KE Sams 'IHL obligations of the UN and other International Organisations involved in international missions' in M Odello & R Piotrowicz (eds.) *International military missions and international law* (2011) 51.

<sup>34</sup> Weiner (n 19 above) 428.

<sup>35</sup> Weiner (n 19 above) 429.

<sup>36</sup> C Gray *International law and the use of force* (2008) 364.

<sup>37</sup> S/RES/678 of 29 November 1990, para 2 thereof provides that acting under Chapter VII of the Charter, 'Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before the 15 January fully implements, as set forth in paragraph 1 above, the above resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.'

<sup>38</sup> S/RES/687 of 3 April 1991, para 33 required Iraq to accept the conditions set forth in the resolution and appropriately to inform the Secretary General and Security Council before a formal cease-fire may become effective.

<sup>39</sup> S/RES/1441 of 8 November 2002, paras 1 & 2 are to the effect that Iraq was in material breach of its obligations including resolution 687 (1991) by failing to co-operate with weapons inspectors, and that Iraq was given the final opportunity to comply with its disarmament obligations.

<sup>40</sup> Gray (n 36 above) 348-351, 354-366.

<sup>41</sup> Gray (n 36 above) 361.

<sup>42</sup> P Tyler 'Annan says Iraq war was illegal' *The New York Times*, 16 September 2004; E MacAskill & J Borger 'Iraq war was illegal and breached the UN Charter, says Annan' *BBC News*, 16 September 2004.

<sup>43</sup> Security Council 4726<sup>th</sup> meeting of Wednesday, 26 March 2003, while speaking for the Arab League, Mahmassani condemned the invasion of Iraq as the American/British aggression against Iraq, Mohd Isa (Malaysia) speaking for the Non-Aligned Movement stated that the unilateral military action against Iraq was an illegitimate act of aggression.

and France, considered the reliance on these previous resolutions to invade Iraq as being illegal.<sup>44</sup> Gray points out that there was no justification for relying on resolutions adopted about 12 years previously to invade the territory of Iraq in 2003.<sup>45</sup> This development made certain states argue that the SC was not disposed to take responsibility and accountability for the deployment of military force in Iraq, as the entire action was orchestrated and controlled by the US, supported by the UK and Australia.<sup>46</sup>

The SC has invoked its Chapter VII powers several times to authorise enforcement action. While it has been invoked against states that had breached the peace, it has been sparingly used to enforce the principle of non aggression.<sup>47</sup> Certain SC enforcement resolutions have avoided the use of the phrase ‘aggression’ in describing manifest incidents of aggression, such as was seen in resolution 660 on the Iraqi invasion of Kuwait.<sup>48</sup> Enforcement actions have been authorised for the supervision of compliance with economic sanctions in respect of Southern Rhodesia,<sup>49</sup> the liberation of a country from aggression (Kuwait),<sup>50</sup> the return of power to legitimate authorities (Haiti),<sup>51</sup> the restoration of internal peace and security (Somalia and East Timor)<sup>52</sup> and humanitarian intervention (Responsibility to Protect (R2P) in Libya<sup>53</sup> and Kosovo.<sup>54</sup> Interestingly, the SC has not expressly authorised the use of force against a NSA, even as the law is being transformed to permit the use of force against NSAs with a lowered threshold for attribution.

The very first instance the UN invoked an enforcement action was against North Korea in 1950.<sup>55</sup> This followed a report by the then Secretary-General, Trygve Lie, in respect of the attack on South Korea by North Korea in consonance with the powers of the Secretary-General under article 99 of the Charter.<sup>56</sup> Confronted with a renewed deadlock in the SC

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<sup>44</sup> Gray (n 36 above) 354- 366.

<sup>45</sup> Gray (n 36 above) 361.

<sup>46</sup> Blokker (n 19 above), 544; BH Weston ‘Security Council Resolution 678 and Persian Gulf decision making: Precarious legitimacy’ (1991) 85 *American Journal of International Law* 517; O Schachter ‘The United Nations Law in the Gulf conflict’ (1991) 85 *American Journal of International Law* 452-473.

<sup>47</sup> Allain (n 19 above) 245.

<sup>48</sup> S/RES/660 of 2 August 1990.

<sup>49</sup> S/RES/221 of 9 April 1966 para 5.

<sup>50</sup> S/RES/678 of 24 November 1990.

<sup>51</sup> S/RES/917 of 6 May 1994 paras 16, 18 & 19.

<sup>52</sup> S/RES/733 of 23 January 1992 for Somalia and S/RES/1264 of 15 September 1999 para 3 for East Timor respectively; see also Blokker (n 19 above) 544.

<sup>53</sup> S/RES/1973 of 17 March 2011.

<sup>54</sup> S/RES/1244 of 10 June 1999.

<sup>55</sup> A/RES/377 of 3 November 1950.

<sup>56</sup> CY Pak *Korea and the United Nations* (2000) 100-101; 1950 UNYB 251.

upon the Soviet Union's resumed participation in August 1950 soon after North Korea's aggression against South Korea in June, the US proposed the 'United Action for Peace' as an agenda item.<sup>57</sup> After the SC determined that North Korea's invasion of South Korea amounted to an act of aggression and a breach of the peace, it failed specifically to order an enforcement action owing to the aforesaid deadlock after adopting a series of resolutions.<sup>58</sup> Thereupon, the GA adopted the 'Uniting for Peace' resolution which allows for the discharge of its responsibilities for collective security if the SC is prevented from acting because of the veto of its permanent members.<sup>59</sup> In the absence of a UN standby force contemplated under Article 43 of the Charter, resolution 83 was adopted which requested 'that the Members of the United Nations furnish such assistance to the Republic of South Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.'<sup>60</sup>

Similarly, the SC called upon the Government of Belgium to withdraw its troops from the territory of the Congo and to restore peace and security. The SC created a military and security mission with the aim of providing military assistance to the Congo to meet its tasks.<sup>61</sup> Another authorisation was made in 1990. It was against Iraq and the SC mandated a 'coalition of the willing' to 'use all necessary means' to reverse the Iraqi aggression against Kuwait, thereby liberating Kuwait from foreign aggression.<sup>62</sup> In a fourth instance, the SC again authorised the 'coalition of the willing' to 'use all necessary' means to restore peace in Somalia through the Unified Task Force (UNITAF), thereby employing its Chapter VII powers for the restoration of internal peace and security.<sup>63</sup> In 1994 another unconventional approach to enforcement action was inaugurated when the SC authorised the use of force in Haiti to restore the democratically elected Government of Jean Bertrand Aristide by ousting the military junta of Raul Cedras.<sup>64</sup> Cedras had come to power through a coup and was later removed and exiled to Panama.<sup>65</sup> Finally, relying on the principle of R2P, aimed at averting

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<sup>57</sup> Franck (n 15 above) 33.

<sup>58</sup> SC/RES/82 of 25 June 1950; SC/RES/83 of 27 June 1950; SC/RES/84 of 7 July 1950; SC/RES/85 of 31 July 1950 & SC/RES/88 of 8 November 1950.

<sup>59</sup> A/RES/377 of 3 November 1950

<sup>60</sup> S/RES/83 of 27 June 1950; Franck (n 13 above) 24.

<sup>61</sup> S/RES/143 of 14 July 1960 paras 1 & 2.

<sup>62</sup> S/RES/678 of 29 November 1990; Franck (n 13 above) 25.

<sup>63</sup> S/RES/794 of 3 December 1992.

<sup>64</sup> S/RES/940 of 31 July 1994; Franck (n 13 above), 29.

<sup>65</sup> C Gorry *Caribbean Islands* (2005) Lonely Planet 247; J Kifner 'Not looking back, Cedras flies to Panama exile' *The New York Times*, 14 October 1994.

a humanitarian crisis,<sup>66</sup> the SC adopted resolution 1973 in relation to the crisis in Libya.<sup>67</sup> The resolution intended that all necessary measures be taken to protect civilians, including Benghazi, but no foreign occupation forces were to be allowed on any part of Libya.<sup>68</sup>

### 3.3.1.2. Security Council authorisation under Article 53 of the Charter

Article 53 of the UN Charter empowers the SC to authorize the use of force by regional arrangements.<sup>69</sup> Such power to authorize does not in any way, however, enlarge the powers of the SC as it is in consonance with the powers conferred on it in respect of its primary functions.<sup>70</sup> By authorising regional bodies, it devolves its responsibility of maintaining peace and security and, by extension, its monopoly of employing the use of force through enforcement actions.<sup>71</sup> Effective conflict management and regional peace and security are engendered by decentralisation of the UN burden to police the globe.<sup>72</sup> Permitting the enforcement action by regional organisations, therefore, amounts to an exception to the general ban on the use of force under article 2(4) of the UN Charter. The roles played by regional organisations are complementary to the functions of the SC,<sup>73</sup> but no enforcement action may be undertaken without the authorisation of the SC.<sup>74</sup> According to Paliwal, ‘The weight of scholarly opinion is that regional organisation activity involving the use of force, including peacekeeping measures, would be in violation of article 2(4) absent SC authorisation, and that “enforcement action” includes all such uses of force by regional organisations’.<sup>75</sup> Subjecting enforcement actions of regional organisations to the

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<sup>66</sup> A Garwood-Gowers ‘The Responsibility to Protect and the Arab Spring: Libya as the exception’ Syria as the norm’ (2013) 36 *University of New South Wales Law Journal* 594-595.

<sup>67</sup> S/RES/1973 of 17 March 2011.

<sup>68</sup> S/RES/1973 of 17 March 2011; VP Manda ‘The future under international law of the Responsibility to Protect after Libya and Syria (2013) 21 *Michigan State International Law Review* 12-13.

<sup>69</sup> O’Connell 58; U Villani ‘The Security Council’s authorization of regional organisations’ in JA Frowein & R Wolfrum (eds.) (2002) 6 *Max Planck Yearbook of United Nations Law* 535-557.

<sup>70</sup> Art 24 of the UN Charter.

<sup>71</sup> German Foreign Minister Kinkel had warned that use of force without Security Council authorization would not be condoned while commenting on the NATO’s bombardment of Yugoslavia authorization. He said, ‘The decision of NATO (on air strikes against the FRY) must not become a precedent. As far as the Security Council monopoly on force (*Gewaltmonopol*) is concerned, we must avoid getting on a slippery slope.’

<sup>72</sup> K Cha ‘Humanitarian intervention by regional organisations under the Charter of the United Nations’ (2002) *Seton Hall Journal of Diplomacy and International Relations* 134.

<sup>73</sup> Declaration on the Enforcement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International peace and security- A/RES/49/57 of 9 December 1994; Cha (n 80 above) 135.

<sup>74</sup> Art 53(1) of the UN Charter; De Wet (n 15 above) 318.

<sup>75</sup> S Paliwal ‘The primacy of regional organisations in international peacekeeping: The African example’ (2010) *Virginia Journal of International Law* 193.



requirement of authorisation is to avoid abuse and the misuse of the powers by such organisations.

Accordingly, there is a need for some form of control of enforcement actions by regional organisations by the SC. To that extent, the time of granting authorisation is most appropriate before an enforcement action commences, and not thereafter. This view is in consonance with article 53(1), which provides in part as follows, ‘But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council...’. In practice, however, ratification, admission or retroactive authorisation of enforcement actions of regional organisations are condoned<sup>76</sup> as was the case of the ECOMOG intervention in Liberia<sup>77</sup> and NATO in Kosovo.<sup>78</sup> The danger with retrospective approval or legitimizing actions of regional organisations *a posteriori*, however, is that it will be difficult for the SC to control, moderate or keep an oversight over the conduct of these actions.<sup>79</sup> Arguably, impunity of regional powers may be difficult to check as actions which are not likely to receive authorisation would have wrongfully been undertaken without remedy in the event that the SC denies retrospective authorisation. While the SC may condemn or revoke an unlawful conduct of regional organisations, it may be difficult to remedy the wrong done by an unauthorised action.<sup>80</sup>

The SC authorisation may be conveyed either expressly or implicitly. While express authorisation remains the best mode of conveying authorisation because it avoids ambiguities, implicit authorisation, which shows in absolute certainty the intention of the SC, is said to be sufficient.<sup>81</sup> Mere toleration or inactive posture of the SC towards an unauthorised enforcement action of regional organisations has been also interpreted as

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<sup>76</sup> Paliwal (n 75 above) 187-188.

<sup>77</sup> S/RES/1116 of 27 June 1997; T Franck ‘When, if ever, may states deploy military force without prior Security Council authorisation?’ (2001) 5 *Journal of Law & Policy* 56.

<sup>78</sup> A Orakhelashvili ‘The acts of the Security Council: Meaning and standard of Review’ (2007) 11 *Max Planck Yearbook of the United Nations Law (UNYB)* 161.

<sup>79</sup> JN Moore ‘The role of regional arrangements in the Maintenance of World Order’ in CE Black & RA Falk (eds.) *The future of the international legal order*, Vol. 3 (1971) 122.

<sup>80</sup> Moore (n 79 above) 144; Cha (n 80 above) 136.

<sup>81</sup> A Chayes ‘Law and the quarantine of Cuba’ (1962-1963) 41 *Foreign Affairs* 550, 556; LC Meeker ‘Defensive quarantine and the law’ (1963) 57 *American Journal of International Law* 515, 520; Orakhelashvili (n 78 above) 162.



amounting to ‘authorisation.’<sup>82</sup> For instance, the lack of condemnation of Cuba’s quarantine and NATO’s intervention in Kosovo were interpreted as authorisations.<sup>83</sup>

A meticulous reading of article 53(1) of the Charter reveals two scenarios. While the first limb of the article deals with the SC itself *suo motu* utilizing regional organisations for enforcement actions under its authority, the second situation deals with the SC authorising an enforcement action by regional organisations upon request. Both situations concern military action to be taken by a regional organisation.<sup>84</sup> Not all actions of regional organisations require authorisation, as the critical supervisory role played by the SC over states is to compel compliance with the prohibition on the use of force in their international relations. Enforcement action refers to coercive measures.<sup>85</sup> Villani was, thus, correct when he stated that ‘the enforcement measures which are subordinate to the SC’s authorization are only those involving the use (or the threat) of armed force.’<sup>86</sup> Actions of regional bodies of a political, commercial and economic nature do not require SC authorisation, not being unlawful under the Charter.<sup>87</sup> No regional organisation has so far been authorised to use force against a NSA. The shift in the law to permit the use of force against NSAs has come by way of unilateral actions of states, even though the SC came so close to doing that, in resolutions 1368 and 1373.

### 3.3.2. Self-defence

Self-defence refers to a lawful use of force under conditions prescribed by international law and the concept is engendered and founded on the fundamental right of states to survival.<sup>88</sup> Even the imposition of a legal prohibition on aggression has not, thus, trammelled the inherent right of states to defend themselves through the application of force. This appears

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<sup>82</sup> L Henkin ‘Kosovo and the Law of ‘Humanitarian Intervention’ (1999) 93 *American Journal of International Law* 826.

<sup>83</sup> Cha (n 71 above) 137; B Simma ‘NATO, the UN and the use of force: Legal aspects’ (1999) 10 *European Journal of International Law* 1, 22.

<sup>84</sup> Art 53(1) of the UN Charter; C Walter ‘Security council control over regional action’ in JA Frowein & R Wolfrum (eds.) *Max Planck Yearbook of United Nations Law* Vol. 1-15 (1997) 176; Villani (n 69 above) 537.

<sup>85</sup> Cha (n 71 above) 135.

<sup>86</sup> Villani (n 69 above) 539.

<sup>87</sup> Villani (n 69 above) 539, 540.

<sup>88</sup> Y Dinstein *War, aggression and self-defence* (2011) 187; WC Bradford ‘The duty to defend them: A natural justification for the Bush doctrine of preemptive war’ (2004) 79 *Notre Dame Law Review* 1375; *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* ICJ Reports (1996) 226, para 263, where the ICJ stated ‘Furthermore, the Court cannot lose sight of the fundamental right of every state to survival, and thus its right to resort to self-defence, in accordance with Art 51 of the Charter, when its survival is at stake.’

contrary to Hersch Lauterpacht's guiding principle, which resonates in the writings of Franck and Bradford, that the legal system should be grounded in an absolute rule, 'There shall be no violence' by states.<sup>89</sup> By virtue of Article 51 of the UN Charter, member states are permitted to employ force in individual or collective self-defence if an armed attack occurs against a member state. Attacked states may, therefore, take individual or collective forcible measures to defend themselves until the SC determines and takes measures necessary to maintain international peace and security.<sup>90</sup> In this regard, certain states have previously undertaken forcible self-defence measures following armed attacks from other states and NSAs. The specific instances in which states have relied on self-defence against NSAs are examined in chapter chapter six bellow.

While, by virtue of Article 51 of the Charter, there is no controversy regarding the right of a state to employ self-defence against other states, controversies exist as to whether a similar right of self-defence is available to states against NSAs. The position of international law on this point is the view held by the ICJ in the *Nicaragua case*<sup>91</sup> that an attack from a NSA, independent of state support, cannot trigger a response in extraterritorial self-defence.<sup>92</sup> It was established that only attacks from NSAs that can be imputed to a state or manifest some degree of acquiescence by a state are capable of triggering a response in self-defence. This reasoning remains the majority opinion of the Court, and it has been echoed by certain commentators as sound.<sup>93</sup> The argument was that self-defence is not available to states against NSAs because the NSAs are not considered in relation to the use of force by international law but such consideration applies to sovereign states alone.<sup>94</sup> In this regard however, minority views have also been expressed as shown in the dissenting opinions of Judge Robert Jennings in the *Nicaragua case* and those of Judge Kooijmans and Judge Higgins in the *Palestinian Wall case*. While Jennings held that even if mere provision of arms may not amount to an armed attack, the provision of arms coupled with logistical

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<sup>89</sup> Franck (n 13 above) 1; TM Franck 'The use of force in international law' (2003) 11 *Tulane Journal of International & Comparative Law* 7; Bradford (n 88 above) 1375.

<sup>90</sup> Art 51 of the UN Charter.

<sup>91</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, p 14, para 195.

<sup>92</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* ICJ Reports (2004) paras 136, 194 (139), 195 (142).

<sup>93</sup> Ryngaert (n 8 above) 266.

<sup>94</sup> M Bothe 'Terrorism and the legality of preemptive force' (2003) 14 *European Journal of International Law* 227, 233; E Myjer & N White 'The twin towers attack: An unlimited right to self-defence' (2002) 7 *Journal of Conflict and Security Law* 5; JL Kunz 'Individual and collective self-defence in Art 51 of the Charter of the United Nations' (1947) 41 *American Journal of International Law (Editorial Comment)* 872, 878.

support ought to amount to an armed attack.<sup>95</sup> On their part Kooijmans and Higgins held that nothing in the text of article 51 suggests that self-defence is only available when an armed attack emanates from a state.<sup>96</sup> The post 9/11 state practice has however, shown that NSAs may be attacked on the basis of self-defence even if another state is not effectively controlling its activities.

### 3.3.3. Can states use force in self-defence against non-state actors?

There is a contrary view to the effect that an action in self-defence should also be available to victim states against armed attacks by NSAs without imputing the conduct of such NSAs to a state.<sup>97</sup> Support for this view by commentators increased, and the debate became intensified, following the 9/11 attacks on the US which were deemed to meet the threshold of an armed attack both in scale and effect. Lubell, thus, argued that states could use force in self-defence under the *jus ad bellum* against NSAs such as terrorist groups if an attack from such NSAs attained the threshold of an armed attack, having regards to its scale and effect.<sup>98</sup> He succinctly summarised and qualified his view, saying that the intensity and scale of attacks from NSAs that will qualify as armed attacks require a higher threshold than attacks by states, and also that the use of such force is inevitable where the territorial state is unwilling, or unable, to suppress or stop the attacks from its territory.<sup>99</sup> Apart from the

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<sup>95</sup> Dissenting Opinion of Judge Robert Jennings in the *Nicaragua case*, para 543.

<sup>96</sup> Dissenting Opinions of Judge Kooijmans (para 35) and Judge Higgins in the *Palestinian Wall case*, paras 33-34. While they held that article 51 of the UN Charter did not indicate the author of an armed attack, Higgins added that she did not find it persuasive that uses of force emanating from an occupied territory could not amount to an armed attack. Higgins stated: 'Palestine cannot be sufficiently an international entity to be invited to these proceedings to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attacks on others to be applicable'.

<sup>97</sup> *DRC case*, separate opinion of Judge Kooijmans paras 29-30, where he stated, 'If armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked state the right of self-defence merely because there is no attacker State, and the Charter does not so require.'

<sup>98</sup> Lubell (n 7 above) 81.

<sup>99</sup> Lubell (n 7 above) 81; Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Christof Heyns, Add: Promotion and protection of human rights, human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, UN Doc. A/68/382, para 89 of 13 September 2013; N Schrijver & L Henk 'Leiden Policy Recommendations on Counter-terrorism and International Law' *Grotius Centre for International Legal Studies*, 1 April 2010. Para 39 provides: 'Art 51 does not include a scale requirement for an armed attack, and there is disagreement on the existence and contours of such a requirement in the case of an armed attack by one state on another. In the case of an attack by terrorists that is not attributable to a state, Art 51 should be read to require that the attack be large-scale in order to trigger the right of self-defence; in assessing the scale, account may be taken of a series of attacks emanating from the same territory and the same terrorist group. The heightened threshold stems from the critical role of the state(s) on whose territory terrorists operate and the primary responsibility of such state(s) for the prevention and suppression of such acts. It recognises that such a state or states would be affected by the force used in

gravity of attacks from NSAs as necessitating self-defence, commentators have argued that extraterritorial lethal force may be used against terrorist NSAs because they pose a threat to lives and the option of arrest is normally not operationally feasible.<sup>100</sup>

The propriety of self-defence against NSAs enjoys the support of other commentators,<sup>101</sup> including Schachter who argues that neither customary law nor article 51 of the UN Charter excluded the extraterritorial use of force in self-defence against attacks from terrorists.<sup>102</sup> Schachter's reasoning is akin to the contention that while the UN Charter determined that a response in self-defence could come only from a state that had suffered an armed attack,<sup>103</sup> but clarity on which body can cause an initial armed attack is not contained in the Charter.<sup>104</sup> Other justifications have also been relied upon in support of the use of force against NSAs without the need to attribute their conduct to states. Firstly, recent state practice, particularly from the point of view of a few powerful states, appears to give credence to actions in self-defence against NSAs without necessarily attributing their activities to states.<sup>105</sup> Secondly, self-defence against non-state actors is said to be consistent with the principles of proportionality, necessity, collateral damage, availability or unavailability of peaceful alternatives.<sup>106</sup>

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self-defence and ensures that self-defence and the consequences for that state or states that flow from a military response are not triggered too soon,' see also The Chattam House Principles of International Law on the Use of Force by States in Self-Defence (2005) principle 6.

<sup>100</sup> M Gross 'Assassination & targeted killing: Law enforcement, execution or self-defence?' (2006) 23 *Journal of Applied Philosophy* 327.

<sup>101</sup> Schachter (n 5 above) 311; T Franck 'Editorial comments: Terrorism and the right of self-defence' (2001) 95 *American Journal of International Law* 839-843, where Franck argued that the use of force by the US in Afghanistan against the Taliban and Al Qaeda is not contrary to Art 2(4) of the UN Charter, and that self-defence may be employed against NSAs. He stated, 'Al Qaeda is not a state. Nonetheless, the actions taken against the United States on September 11 were classified by the Security Council Resolution 1368 as 'a threat to international peace and security.' That signifies a decision to take 'measures ... in accordance with Articles 41 and 42 to restore international peace and security.' He stated further 'This intuition is supported by the language of Article 51, which, in authorizing a victim state to act in self-defence, does not limit this 'inherent' right to attacks by another state;' M Shaw *Principles of international law* (2008) 26; J Paust 'Use of force against terrorist in Afghanistan, Iraq and beyond' (2002) 35 *Cornell International Law Journal* 533-4.

<sup>102</sup> Schachter (n 5 above) 311.

<sup>103</sup> *Palestinian Wall Case* (n 92 above) para 139.

<sup>104</sup> Art 51 of the Charter; NA Shah 'Self-defence, anticipatory self-defence and pre-emption: International law's response to terrorism' (2007) 12 *Journal of Conflict & Security Law* 104-105; Schrijver & Henk 'Leiden Policy Recommendations (n 99 above).' Para 38 states that: 'The recognition in Art 51 of the inherent right of individual or collective self-defence in the event of an armed attack makes no reference to the source of the armed attack. It is now well accepted that attacks by non-state actors even when not acting on behalf of a state, can trigger a state's right of individual and collective (upon request of the victim state) self-defence.'

<sup>105</sup> Lubell (n 7 above), 29-30.

<sup>106</sup> Guiora (n 9 above) 324.

Interestingly, in spite of the decision of the ICJ in the *Palestinian Wall case* where it held that an action in self-defence cannot be employed against non-state actors without attributing it to a state, the debate rages on. It is alleged that the debate becomes more intense because of the ICJ's reluctance to provide detailed and convincing reasoning to support its pronouncement.<sup>107</sup> The idea is that the ICJ has not deliberately set out to determine once and for all the propriety or otherwise of the use of force in self-defence against NSAs without attributing attacks from NSAs to a state. For some commentators, evidence in support of the use of force against non-state actors, independent of states, is founded on the series of criticisms against the conservative jurisprudence of the ICJ.<sup>108</sup> But for others, justification for the use of force against NSAs is based on the universal support for the US's *Operation Enduring Freedom* (OEF) and the absence of protest against states employing extraterritorial force against non-state actors such as the US response to Al Qaeda.<sup>109</sup> Furthermore, reliance has been placed on SC resolutions 1368 and 1373 of 2001 which were adopted after the September 11 attacks to suggest that those resolutions permit the use of force in self-defence against NSAs.<sup>110</sup> Gray and Ratner have all argued that these resolutions implicitly affirmed the right of self-defence in response to terrorist attacks from NSAs without another state's acquiescence.<sup>111</sup> This view aptly indicates a transformation of the law of self-defence which this study agrees with.

Similarly, regional organisations, such as NATO<sup>112</sup> and the OAS<sup>113</sup>, expressed in their different statements the right of the US to employ self-defence measures against the

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<sup>107</sup> Lubell (n 7 above) 31.

<sup>108</sup> T Reinold 'State weakness, irregular warfare, and the right to self-defence post-9/11 (2011) 105 *American Journal of International Law* 245, 260, 262, 285; C Focarelli *International law as social construct: The struggle for global justice* (2012) 369.

<sup>109</sup> MP Scharf *Customary international law in times of fundamental change: Recognizing Grotian moments* (2013) 204-205.

<sup>110</sup> S/RES/1368 of 12 September 2001 and S/RES/1373 of 28 September 2001.

<sup>111</sup> Gray (n 36 above) 193; SR Ratner 'Jus ad bellum and jus in bello after September 11' (2002) 96 *American Journal of International Law* 909. (905-921)

<sup>112</sup> Art 5 of the North Atlantic Treaty; Statement by NATO Secretary General, Lord Robertson, on 2 October 2001 which stated, 'On the basis of this briefing, it has been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Art 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all,' <http://www.nato.int/docu/speech/2001/s011002a.htm> (accessed 16/11/2014).

<sup>113</sup> OAS Res. RC.24/RES. 1/01 (21 September 2001). It is not clear in the body of this resolution whether the OAS was responding against states or NSAs alone. The text of the resolution is that the attack on the US was an attack against all American states and in the spirit of the Inter-American Treaty of Reciprocal Assistance, it called on all members to assist the US, (para 1). It also requested members not to harbour such terrorists, but use all legal measures to pursue, capture, extradite, and punish those individuals, (para 2).



terrorists alleged to be responsible for the attack.<sup>114</sup> Arguably, OEF was waged against both the Taliban and Al Qaeda as captured in the speeches of President Bush that there will be no distinction between the NSAs and those that harboured them.<sup>115</sup> Just days after the commencement of the operation, the Taliban Government was overthrown. Thereafter, the manhunt for Al Qaeda elements continued, leading to the death of Bin Laden in Pakistan in 2011.<sup>116</sup> The UN resolutions<sup>117</sup> and the US legislation on the Authorisation for Use of Military Force (AUMF) reflected the resolve to use force against both Al Qaeda and the Taliban.<sup>118</sup> Though it was also pointed out that OEF was not against Al Qaeda, but against the Taliban because there was an attribution of blameworthiness to the Taliban Government by the US.<sup>119</sup> The ramifications mentioned above, coupled with the universal support for US's *Operation Enduring Freedom*<sup>120</sup> and the indifferent attitude of states in the face of such a major episode capable of transforming the law on self-defence, provide the relevant impetus for states to employ self-defence against NSAs in contemporary state practice.<sup>121</sup>

The US, Israel, Turkey, Ethiopia, Kenya and Iran, among other states have relied on self-defence as the single reason for employing force extraterritorially in the territories of other states against terrorist enclaves.<sup>122</sup> For instance, on 24 December 2006, Ethiopia moved into Somalia to dislodge the Union of Islamic Court (UIC), the reason being that the activities of the UIC posed a threat to the stability of Somalia and the safety of the Christian-led government in Ethiopia.<sup>123</sup> The UIC, with origin in clan courts is a NSA which provided effective local-level security in Somalia. It generated money from private contributions, taxes on businesses and militia activities.<sup>124</sup> It failed to convince the Transitional National

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<sup>114</sup> Ratner (n 111 above) 909.

<sup>115</sup> George W. Bush 'Address to Joint Session of Congress following 9/11 attacks', American Rhetoric, at <http://www.americanrhetoric.com/speeches/PDFFiles/George%20W.%20Bush%20-%20Joint%20Session%20Address%20on%20Terrorism-%20> (accessed 25/11/2016).

<sup>116</sup> G Witte 'Afghan war: 2001-2014' Encyclopedia Britannica, at <https://global.britannica.com/event/Afghanistan-war> (accessed 18/11/2016).

<sup>117</sup> S/RES/1368 of 12 September 2001, para 3; S/RES/1373 of 28 September 2001.

<sup>118</sup> Section 2 of the authorisation for Use of Military Force, S.J. Res. 23 of 18 September 2001.

<sup>119</sup> D Tladi 'The use of force in self-defence against non-state actors in international law: Recalling the foundational principles of international law' (2012) *Zanzibar Yearbook of Law* 84.

<sup>120</sup> Ratner (n 111 above) 909-910.

<sup>121</sup> Ratner (n 111 above) 910; see also 'International incidents: the law that counts in world affairs (1988) (WM Reisman & AR Willard eds.)

<sup>122</sup> Lubell (n 7 above), 29-30.

<sup>123</sup> Duke University Talent Identification Program International Affairs Institute, July 2007, 'Seeking peace in the Horn of Africa: Solutions for Somalia' <http://www.africanidea.org/Somalia.pdf> (accessed 15/11/2014).

<sup>124</sup> OG Mwangi 'The Union of Islamic Courts and security governance in Somalia' (2012) 19 *African Security Review* 89.

Government (TNG) cabinet to allow operate as the core of the regular judiciary. The UIC defeated other warlords and took control of security for a while before Al-Shaabab became dominant.<sup>125</sup> Ethiopia claimed that it was acting in self-defence because of the threat from the Islamic militia.<sup>126</sup>

In addition, both Iran<sup>127</sup> and Turkey<sup>128</sup> have employed extraterritorial force in self-defence in the territory of Iraq against the Kurdish Workers Party (PKK) rebels for launching attacks against them from Iraq. Israel's employment of force against NSAs within the OPT is considered by certain commentators as a justifiable use of force in self-defence, but the ICJ held otherwise. In the *Palestinian Wall case* the Court held that Israel cannot rely on self-defence under article 51 of the UN Charter because it is in occupation of the territory, and cannot, therefore, use self-defence against itself.<sup>129</sup>

An action in self-defence is triggered by an armed attack which is described as the gravest form of aggression. 'Armed attack' is not the same as 'aggression' because certain insignificant differences which are sometimes overlooked exist between them.<sup>130</sup> Aggression is a wider concept, and subsumes armed attacks in it because only grave incidents of aggression qualify as armed attacks.<sup>131</sup> These terms could be described as synonyms which explain why, in describing an armed attack, the *Nicaragua case* relied on the definition of aggression under article 3(g) of resolution 3314.<sup>132</sup> States have relied on the definition of aggression under resolution 3314 in the determination of measures that amount to an armed attack.<sup>133</sup> By virtue of article 1 of the annex to the GA resolution 3314 on the Definition of Aggression, which links acts of aggression to conduct of states, it is appropriate

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<sup>125</sup> Nwangi (n 124 above) 90-91.

<sup>126</sup> Lubell (n 7 above), 30; Campaign for Innocent Victims in Conflict, 'Civilian harm in Somalia: Creating an appropriate response' [http://reliefweb.int/sites/reliefweb.int/files/resources/Full\\_Report\\_2845.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_2845.pdf) (accessed 15/11/2014).

<sup>127</sup> Lubell (n 7 above), 30; CJ Tams 'The use of force against terrorists' (2009) 20 *European Journal of International Law* 380; Letter dated 25 May 1993 from the Permanent Representative of the Islamic Republic of Iran to the UN Secretary General, UN Doc. S/25843.

<sup>128</sup> Lubell (n 7 above), 30; Focarelli (n 108 above) 368-369; Scharf (n 109 above) 205; Tams (n 127 above) 379.

<sup>129</sup> *Palestinian Wall Case* (n 92 above) para 194; Scharf (n 109 above) 208.

<sup>130</sup> Simma *et al* (n 2 above) 1407-1408.

<sup>131</sup> Simma *et al* (n 2 above) 1410; *Nicaragua case* (n 91 above) para 195.

<sup>132</sup> *Nicaragua Case* (n 91 above) para 195; Simma *et al* (n 2 above) 1408; Art 3(g) of the Annex to A/RES/3314 (XXIX) of 14 December 1974.

<sup>133</sup> Simma *et al* (n 2 above) 1409; Res. RC/Res. 6 (of 11 June 2010; S Barriga & L Grover 'A historic breakthrough on the crime of aggression' (2011) 105 *American Journal of International Law* 521.



to infer that an armed attack ought to emanate from a state.<sup>134</sup> Arguably, the definition of aggression may have informed the reasoning of the ICJ when it held that the use of force in self-defence is not available to states against non-state actors without attributing the conduct of such NSAs to states. In the face of contemporary state practice and the near consensus of legal scholarship in advocating the use of force against NSAs, however, this study is inclined to think that international law is gradually moving towards establishing or crystallizing the emerging trend of the use of force in self-defence against NSAs.

### 3.4. Legal limitations on the right of self-defence

The above discussion has shown that self-defence against NSAs is available in international law if such conduct can be imputed to a state. Self-defence is available to all sovereign states for warding off external aggression, and no state is bound to secure the approval of the UNSC to exercise this right.<sup>135</sup> The exercise of the right of self-defence by state victims of terrorist attacks is, however, subject to certain parameters if such use of force is to be legitimate or lawful. While some of these parameters or conditions for use of force in self-defence are codified under the UN Charter, others are customary law requirements.<sup>136</sup> Some of the main requirements that must be considered include the principles of armed attack, necessity and proportionality.

#### 3.4.1. Armed attack

A response in self-defence comes about where there is an initial armed attack in the territory of a state by another state.<sup>137</sup> It is the threshold requirement for self-defence and ensures that other violations short of an armed attack may not give rise to self-defence under article 51 of the Charter.<sup>138</sup> The ICJ has described an armed attack as a *sine qua non* for the

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<sup>134</sup> Art 1 of the Annex to resolution 3314 defined aggression thus: ‘Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations, as set out in this definition;’ see also Y Arai-Takahashi ‘Shifting boundaries of self-defence: Appraising the impact of the September 11 attacks on *jus ad bellum*’ (2002) 36 *The International Lawyer* 1087.

<sup>135</sup> TB Hunter ‘Targeted killing: Self-defence, pre-emption, and the war on terrorism’ (2009) 2 *Journal of Strategic Security* 5.

<sup>136</sup> Art 51 of the UN Charter.

<sup>137</sup> Art 51 of the UN Charter.

<sup>138</sup> Dinstein (n 88 above) 193-194; Eritrea/Ethiopia Claims Commission, Partial Award: *Jus ad Bellum-Ethiopia’s Claims*, Reports of the International Arbitral Awards 433.

employment of self-defence.<sup>139</sup> Even the protection of a perceived security interest will not serve as an excuse.<sup>140</sup> An armed attack is an intentional forcible intervention, that is, a military attack in the territory of another state without its consent.<sup>141</sup> The phrase ‘armed attack’ may not have a precise and generally acceptable definition in the UN Charter and in international law because it is considered to be self-evident,<sup>142</sup> but it refers to a form of armed aggression.<sup>143</sup> Commentators have exploited the lack of definition to express varying views as to what amounts to an armed attack. While some argue that a single shot fired across a state’s border into another state’s territory amounts to an armed attack,<sup>144</sup> others contend that such use of force must be serious enough to threaten the inviolability of a state.<sup>145</sup> Invariably, powerful states in particular would individually determine what constitute an armed attack and take action against perpetrators until such a time the SC takes measures necessary to restore peace.<sup>146</sup>

An armed attack involves actions by regular armed forces of states using force across international borders into the territory of other states, as well as the sending of armed bands, groups, irregulars or mercenaries into another state territory on a significant scale.<sup>147</sup> It is required that the operations of such armed bands attain the scale and effect of an armed attack, and not be like a mere frontier incident.<sup>148</sup> This distinction has been criticised because article 51 did not limit itself to large scale attacks alone,<sup>149</sup> and it is felt that this distinction

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<sup>139</sup> *Nicaragua case* (n 91 above) para 211. The ICJ stated: ‘for a State to use force against another, on the ground that that State has committed a wrongful act against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a State to a wrongful act of which it has not itself been a victim is not admitted when this wrongful act is not an armed attack.’ **It said further:** ‘States do not have a right of ‘collective’ armed response to acts which do not constitute an ‘armed attack’, see para 237; see also *Simma et al* (n 2 above) 1404.

<sup>140</sup> *Armed Activities in the Territory of the Congo (Democratic Republic of Congo v Uganda)*, Judgment, ICJ Reports 2005, p 168, paras 223-224.

<sup>141</sup> *Chattam House Principles of International Law on the Use of Force by States in Self-defence*, Rule 2, 6.

<sup>142</sup> I Brownlie *International law and the use of force by states* (1963) 278; J Gardam *Necessity, proportionality and the use of force by states* 142-143; SA Alexandrov *Self-defence against the use of force in international law* (1996) 9.

<sup>143</sup> Art 1 of the Annex to the General Assembly Resolution 3314, A/RES/3314 of 14 December 1974.

<sup>144</sup> G Fitzmaurice ‘The Definition of Aggression’ (1952) 1 *International & Comparative Law Quarterly* 139; Alexandrov (n 142 above) 97.

<sup>145</sup> J Mrazek ‘Prohibition of the use and threat of force: Self-defence and self help in international law (1989) *Canadian Yearbook of International Law* 81, 109.

<sup>146</sup> Alexandrov (n 142 above) 98; Azubuike (n 143 above) 157.

<sup>147</sup> *Nicaragua case* (n 91 above) at 104-04 para 195; *Simma et al* (n 2 above) 1408; Arai-Takahashi (n 134 above), 1084; KN Trapp *State responsibility for international terrorism* (2011) 26; Art 3(g) of the Annex to Resolution 3314 of 14 December 1974.

<sup>148</sup> *Nicaragua case* (n 91 above), para 195; Gray (n 36 above) 177-178.

<sup>149</sup> JL Hargrove ‘The Nicaragua Judgment and future of the law of force and self-defence’ (1987) 81 *American Journal of International Law* 139.

is capable of increasing violence in international politics.<sup>150</sup> The reason for the distinction, which is supported by resolution 3314<sup>151</sup>, is, however, to limit the involvement of third states,<sup>152</sup> since collective self-defence is not possible in the absence of an armed attack. Article 3 of the Annex to resolution 3314 provides a list of actions that may be considered as amounting to an act of aggression, some of which may also constitute an armed attack in inter-state relations.<sup>153</sup>

‘Armed attack’ and ‘aggression’ are synonymous to such extent that Ruys described them as ‘two sides of a coin’ and that a cascading relationship exists between them.<sup>154</sup> In fact, the French version of the UN Charter used the phrase ‘*agression armee*’ instead of the phrase ‘armed attack’ contained under article 51 of the Charter.<sup>155</sup> Furthermore, the definition of aggression by the UNGA resolution 3314 could mean equating the terms ‘armed attack and aggression,’ while self-defence is seen as a repression of aggression.<sup>156</sup> Even the US likened an armed attack to an act of aggression when it stated that the term ‘armed attack’ is used to circumvent the problem of defining aggression in reply to the view expressed by the British to the effect that ‘no one had been able to define aggression in thirty years.’<sup>157</sup> The crime of aggression has however been defined in the revised ICC Statute.<sup>158</sup>

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<sup>150</sup> WM Reisman ‘Allocating competences to use coercion in the post cold-war world, practices, conditions, and prospects’ in Damrosch & Scheffer (eds.) *Law and force in the new international order* (1991)39-40; Gray (n 36 above), 199-180.

<sup>151</sup> Art 2 of Resolution 3314 of 14 December 1974; Gray (n 36 above) 182.

<sup>152</sup> Gray (n 36 above) 181.

<sup>153</sup> Art 3 of Resolution 3314 provides, ‘Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a state of the territory of another state, of any military occupation, however temporary, resulting from such invasion or attack. Or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a state against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions presence in such territory beyond the termination of the agreement; (f) The action of State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third state; (g) The sending by or on behalf of a State of armed hands, groups, irregular or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.’

<sup>154</sup> T Ruys *Armed attack and Article 51 of the UN Charter: Evolutions in customary law and practice* (2010) 127, 139.

<sup>155</sup> Ruys (n 154 above) 127.

<sup>156</sup> Ruys (n 154 above) 129.

<sup>157</sup> Ruys (n 154 above) 129; see also US Department of State, Foreign Relations of the United States, Diplomatic Papers (1945) General: The United Nations (New York, 1967) 676, 692, 700.

<sup>158</sup> Art 8 bis of the revised ICC Statute, 29 November 2010, C.N. 651. 2010.

The above view is in tandem with the postulations of McDougall and Kolesnik. They argue that an armed attack under the Charter contains a narrower meaning than acts of aggression and that, even though both concepts imply the same physical actions of states, an armed attack denotes a single aspect of aggression.<sup>159</sup> While all violations of article 2(4) of the UN Charter may invariably qualify as acts of aggression, on the other hand, not all violations of article 2(4) may be construed as armed attacks.<sup>160</sup> To Kolesnik, an armed attack may be described more precisely because it is limited by article 51 of the Charter, while what amounts to aggression allows for discretionary determination by the SC.<sup>161</sup>

An armed attack could occur within a state's territory including its territorial sea, airspace, embassies,<sup>162</sup> but it does not include economic coercion.<sup>163</sup> The horrific loss of lives and destruction of property occasioned by the bombing of US embassies in Kenya and Tanzania constituted armed attacks by terrorist NSAs which necessitated a response in forcible self-defence.<sup>164</sup> The argument that self-defence be available for the protection of nationals is premised on the fact that statehood extends to the nationals of a state and that the state has a responsibility to protect its citizens.<sup>165</sup> Nevertheless, this position appears to be controversial because construing attacks on nationals abroad as armed attacks triggering a right of self-defence has been rejected by both scholars<sup>166</sup> and the UN.<sup>167</sup> It is more controversial if such attacks are not attributable to a state.

In determining what constitutes an armed attack, there is a distinction between attacks that are grave enough to trigger a response in collective self-defence involving a third state and those attacks that do not cross the gravity threshold and which require only justifiable

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<sup>159</sup> C McDougall *The crime of aggression under the Rome Statute of the International Criminal Court* (2013) 68-69; DN Kolesnik *The development of the right to self-defence in WE Butler (ed.) The non-use of force in international law* (1989) 156.

<sup>160</sup> McDougall (n 159 above) 68-69.

<sup>161</sup> Art 39 of the UN Charter; Kolesnik (n 159 above) 156.

<sup>162</sup> EC Azubike 'Probing the scope of self-defence in international law (2011) XVII *Annual Survey of International & Comparative Law* 159-162.

<sup>163</sup> Chattam House (n 141 above) Rule 2, p 6.

<sup>164</sup> R Wedgwood 'Responding to terrorism: The strikes against bin Laden' (1999)24 *The Yale Journal of International Law* 560.

<sup>165</sup> D Bowett *Self-defence in international law* (1958) 91-94; Dinstein (n 88 above) 218.

<sup>166</sup> T Schweisfurth 'Operations to rescue nationals in third states involving the use of force in relation to the protection of human rights' (1980) 23 *German Yearbook of International Law* 159, 162-5; M Akehurst 'The use of force to protect nationals abroad' (1977) 5 *International Relations* 3.

<sup>167</sup> The interventions of the United Kingdom in the Suez Canal incident in 1956, Israel in Entebbe, Uganda in 1976, USA in Grenada in 1983 and Panama in 1989 on grounds of protection of nationals were condemned by the United Nations, see A/RES/38/7 of 2 November 1983; A/RES/44/240 of 29 December 1989.

proportional counter-measures by the affected state alone.<sup>168</sup> This then means that grave forms of the use of force may qualify as armed attacks necessitating a response in self-defence, while the less grave use of force may not amount to an armed attack.<sup>169</sup> Less grave uses of force are said to include the laying of mines in the territorial waters of another state territory, minor frontier skirmishes and an attack on an individual vessel or aeroplane that do not threaten the existence of a state.<sup>170</sup> The provision of weapons and logistical support to the opposition may not constitute an armed attack, but it, nevertheless, amounts to a ‘threat of the use of force or intervention’ in the internal affairs of other states.<sup>171</sup> This decision has been criticised on the grounds that the provision of weapons is seen as an important step toward strengthening armed groups to launch attacks<sup>172</sup> and that significant logistical support ought to be construed as amounting to an armed attack.<sup>173</sup>

### 3.4.1.1. Accumulation of events

In determining the gravity threshold of an armed attack, an emerging trend seems to show that the accumulation of several small-scale attacks, which may not individually have amounted to an armed attack, could be aggregated to qualify as an armed attack, giving rise to an action in self-defence.<sup>174</sup> This theory appears to have been accepted, albeit implicitly, in the *Oil Platforms case* when the US argued that the requisite threshold of an armed attack may be brought about by the accrual of small-scale uses of force, which would have fallen below the threshold if isolated.<sup>175</sup> In the same way as the ICJ’s jurisprudence is beginning to recognize this theory, commentators are also beginning to accept this postulation as the

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<sup>168</sup> *Nicaragua case* (n 91 above) paras 210-211, 249.

<sup>169</sup> Arai-Takahashi (n 134 above) 1085; N Ochoa-Ruiz & E Salamanca-Aguado ‘Exploring the limits of international law relating to the use of force in self-defence (2005) 16 *European Journal of International Law* 513.

<sup>170</sup> C Antonopoulos ‘The unilateral use of force by states after the end of the cold war, (1999) 4 *Journal of Armed Conflict Law* 223-327, 320-323; Arai-Takahashi (n 134 above) 1085; *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, ICJ Reports 2003, p. 161, paras 161-219.

<sup>171</sup> *Nicaragua case* (n 91) paras 108, 116, 228; Gray (n 36 above) 175.

<sup>172</sup> Dissenting opinion of Judge Jennings in the *Nicaragua case* (n 91 above) para 543.

<sup>173</sup> KH Kaikobad ‘Self-defence, enforcement action and the Gulf Wars, 1980-88 and 1990-91’ (1993) 63 *British Yearbook of International Law* 299, 313; N Rostow ‘Nicaragua and the law of self-defence revisited’ (1987) 11 *Yale Journal of International Law* 437.

<sup>174</sup> *Oil Platforms case* (n 170 above) paras 122-123; Simma *et al* (n 2 above) 1409; see also NM Feder ‘Reading the UN Charter connotatively: Toward a new definition of armed attack’ (1986-1987) 19 *New York University Journal of International Law and Policy* 415. This cumulative theory, which is also known as the Nadelstichtaktik (needle prick) doctrine, states that each specific act of terrorism, or needle prick, though it may not independently qualify as an armed attack, could, taking into consideration the totality of incidents, amount to an armed attack entitling the victim state to respond with armed force.

<sup>175</sup> JA Green *The International Court of Justice and self-defence in international law* (2009) 42.

initial opposition and rejection of the principle appears to be dying down.<sup>176</sup> The accumulation of events theory which some commentators refer to as the ‘pin prick’ theory has been relied upon by Israel,<sup>177</sup> the US, Portugal and South Africa.<sup>178</sup> While the US and Israel<sup>179</sup> are unrelenting advocates of this approach, Tams<sup>180</sup> and Kretzmer have indicated that there appears to be some level of reliance on this doctrine even by states and the ICJ.<sup>181</sup> For instance, in the *Oil Platforms case*, the US argued that it was placing reliance not only on the single attack on the Sea Isle City, but on a combination of a series of other attacks on their facilities. While the *Oil Platforms case* did not accept the claim or submissions of the US, it held that ‘even taken cumulatively’ the individual incidents would not have attained the gravity threshold of an armed attack.<sup>182</sup> That is to say, from the Court’s reasoning it can be inferred that, if the series of attacks the US alluded to collectively attained the relevant scale and effect of an armed attack, it would have held that an armed attack had been established by the accumulation of events.<sup>183</sup> Also in the *DRC case*, the Court again implicitly indicated its preparedness to accept the ‘accumulation of events’ theory when it stated that ‘on the evidence before it, even if the series of deplorable attacks could be regarded as cumulative in character they still remained non-attributable to the DRC’.<sup>184</sup>

This theory has, however, been criticised for being reprisal in nature, which is inconsistent with the purposes of the UN. Reprisals are intended to punish, and their purpose is punitive and not defensive. They are delayed and do not respond to injuries immediately.<sup>185</sup> In addition, a military response to isolated small scale attacks appears to constitute anticipatory self-defence, the intention being to prevent further attacks.<sup>186</sup> Though there is a trend on the part of commentators and the ICJ to accept this emerging principle,<sup>187</sup> the ICJ is yet to make any concrete or express pronouncement on it. On all the four occasions that parties before

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<sup>176</sup> Gray (n 36 above) 155.

<sup>177</sup> Alexandrov (n 142 above) 166.

<sup>178</sup> Gray (n 36 above), 155.

<sup>179</sup> D Kretzmer The inherent right of self-defence and proportionality in *jus ad bellum* (2013) *European Journal of International Law* 236.

<sup>180</sup> Tams (n 127 above) 359.

<sup>181</sup> Kretzmer, (n 179 above) 244, argues that, while the ICJ has not expressly endorsed the accumulation of events doctrine, its language in the Judgment of the *Oil Platforms case* suggests likely acceptance of the doctrine; see also *Oil Platforms case* (n 170 above) para 64; Bowett (n 4 above) 1.

<sup>182</sup> *Oil Platforms case* (n 170 above), para 64.

<sup>183</sup> Green (n 175 above) 42-43.

<sup>184</sup> *DRC case* (n 140 above) para 146; see also *Nicaragua case* (n 91 above) para 231.

<sup>185</sup> Alexandrov (n 142 above) 166-167.

<sup>186</sup> J Brunee ‘The meaning of armed conflict and the *jus ad bellum*’ in ME O’Connell (ed.) *What is war? An investigation in the wake of 9/11* (2012) 37.

<sup>187</sup> Tams (n 127 above), 388.



the ICJ canvassed the ‘accumulation of events’ theory, that is, in the *Oil Platforms case*, *Nicaragua case*, *DRC case* and *Nigeria v Cameroon*,<sup>188</sup> the ICJ failed to apply the theory. As Webb has shown, the ICJ has not taken a clear position on whether a ‘series of minor cross-border incursions, each insufficient to amount to an armed attack may nevertheless taken cumulatively qualify.’<sup>189</sup> Arguably, this study foresees difficulty in assessing the cumulative gravity that is expected of the series of ‘pin or needle prick’ attacks that could give rise to an armed attack. What are the parameters that an independent assessor of all the cumulative events may consider to give an appropriate verdict on the sufficiency of such previous events to amount to an armed attack? Arguably, the ICJ may even find it difficult, in spite of the evidence at its disposal, to determine whether indeed the previous events are weighty enough, when aggregated, to constitute an armed attack. In the face of no reporting requirement of less grave attacks that do not trigger self-defence to the SC, it becomes difficult to rely on the allegation of previous events, some of which may have occurred years back, without notice, to consider the propriety or otherwise of these ‘pin or needle prick’ events. It is, therefore, suggested that, since the pin prick attacks do not constitute an armed attack but nevertheless amount to a breach of article 2(4) of the Charter, the impacted states should explore proportionate counter-measures to the attacks in consonance with the postulations of the ICJ in the *Nicaragua case*.

#### **3.4.1.2. Attacks from non-state actors as armed attacks**

The drafting history of the UN Charter did not define what an armed attack entails, but the Charter was established to regulate inter-state relations and not NSAs. The general ban of the use of force in the Charter is also seen in the context of inter-state relations.<sup>190</sup> Traditionally, the term ‘armed attack’ applied to states only, even though the Charter did not indicate that armed attacks must emanate only from states.<sup>191</sup> Ordinarily, therefore, the Charter provisions relative to the prohibition of use of force ought not to bind NSAs. This reasoning may have informed the international law position that the acts of NSAs do not

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<sup>188</sup> *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* ICJ Reports (1996) para 323.

<sup>189</sup> P Webb *International judicial integration and fragmentation* (2013) 199.

<sup>190</sup> KN Trapp ‘Can non-state actors mount an armed attack?’ in M Weller (ed.) *Oxford handbook on the use of force*, electronic copy available at: <http://ssrn.com/abstract=2407477> (accessed 25/03/2015).

<sup>191</sup> C Stahn ‘Terrorist attacks as ‘armed attacks’: The right to self-defence, Article 51(1/2) of the UN Charter, and international terrorism’ (2003) 27 *The Fletcher Forum of World Affairs* 42, Lubell (n 7 above) 31-32.

give rise to an armed attack, except if they are attributable to a state. This majority opinion in the *DRC case*<sup>192</sup> was opposed by the dissenting opinion of Judge Kooijmans.<sup>193</sup>

The acts of NSAs could, however, qualify as armed attacks, capable of instigating a response in self-defence, if such attacks were serious in scale and effect to the extent that they would have amounted to an armed attack had they emanated from regular armed forces.<sup>194</sup> It was the position that, even if acts of NSAs qualify as armed attacks, they must still be imputed to a state to trigger an action in self-defence.<sup>195</sup> This position is being challenged because of the degree of destructive capabilities of NSAs, as was evidenced by the 9/11 attacks on the US.<sup>196</sup> State practice and the interpretation of self-defence under article 51 by certain commentators suggest that attacks from NSAs can independently trigger a response in self-defence in the absence of attribution to a state, and this remains the contemporary debate.<sup>197</sup> This study, therefore, undertakes to interrogate the view of whether the law of self-defence has indeed been transformed to accommodate independent attacks from NSAs as armed attacks.

The attribution requirement appears to have been largely abandoned as can be discerned from state practice in the aftermath of the September 11 terrorist attacks on the US.<sup>198</sup> As a result of the gravity of the September 11 attacks both in scale and effect, states soft-pedalled on the emphasis of establishing a nexus between the acts of NSAs and any other state. In fact, even when the SC adopted resolutions 1368 and 1373, little regard was given to whether Al Qaeda's activities had had any link with the Taliban Government and consideration of

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<sup>192</sup> *DRC case* (n 141 above) paras 146-147, where the Court held 'It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The armed attacks to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement of these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3(g) of General Assembly resolution 3314 (XXIX) on the Definition of Aggression, adopted on 14 December 1974.'

<sup>193</sup> *DRC Case* (n 141 above), separate opinion of Judge Kooijmans, paras 29-30.

<sup>194</sup> Nicaragua case (n 91 above) para 103; BN Dunlap 'State failure and the use of force in the age of global terror' (2004) 27 *Boston College of International & Comparative Law Review* 465.

<sup>195</sup> Dunlap (n 194 above) 465; M Glennon 'The fog of law: Self-defence, inheritance, and incoherence in Article 51 of the United Nations Charter (2001-2002)' 25 *Harvard Journal of Law & Public Policy* 542-544; S Cenik 'State responsibility and self-defence in international law post 9/11: Has the scope of Article 51 of the United Nations Charter been widened as a result of the US response to 9/11?' (2007) 14 *Australian International Law Journal* 201-202, 204; A Garwood-Gowers 'Self-defence against terrorism in the post 9/11 world' (2004) 4 *Queensland University of Technology Law and Justice Journal* 5.

<sup>196</sup> Cenik (n 195 above) 202.

<sup>197</sup> Lubell (n 7 above) 31.

<sup>198</sup> Stahn (n 191 above) 42.

US's right of defence was in relation to Al Qaeda, a NSA.<sup>199</sup> Worse still, s NATO neither considered whether Al Qaeda's conduct could be imputed to a state nor amounted to an armed attack but only whether the attacks had been launched from abroad. For NATO, attributing the September 11 attacks to the Taliban was not a priority. The concern, rather, was that, if the attack had been directed from abroad, it fell within article 5 of the Washington Treaty, which necessitates a response in collective self-defence.<sup>200</sup> Furthermore, the fact that the strict requirements of attribution of the acts of NSAs to states is being whittled down may be discerned from the Abuja Non-Aggression and Collective Defence Pact which considers acts of NSAs as independently amounting to aggression.<sup>201</sup> The discussion above has shown that an action in self-defence is available against a NSA independent of attribution to another state or the attribution threshold has been lowered to mere toleration of NSAs.

### 3.4.2. Necessity

Necessity means that lethal force may be employed in self-defence only if other non-forcible measures are inadequate or unavailable to halt or avert an imminent attack.<sup>202</sup> Necessity has been established as a customary law component of self-defence which must be used as a last resort where no practically effective alternative avenues of averting or repelling an armed attack exist.<sup>203</sup> Its essence is to limit violence, and, therefore, if alternative peaceful measures of resolving disputes exist, there may not be a need to resort to force.<sup>204</sup> Necessity and

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<sup>199</sup> Lubell (n 7 above) 34.

<sup>200</sup> Art 5 of the North Atlantic Treaty provides: 'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security'; see also Stahn (n 191 above) 42.

<sup>201</sup> Art 1(c) of the African Union Non-Aggression and Common Defence Pact provides: 'Aggression means the use, intentionally and knowingly, of armed force or any other hostile act by a State, a group of States, an organization of States or non-State actor(s) or by any foreign or external entity, against the sovereignty, political independence, territorial integrity and human security of the population of a State Party to this Pact, which are incompatible with the Charter of the United Nations or the Constitutive Act of the African Union'.

<sup>202</sup> Lubell (n 7 above) 44-45; D Bethlehem in E Wilmshurst principles of international law on the use force by states in self-defence, The Royal Institute of International Affairs, Chatham House, (2005) 57-58.

<sup>203</sup> Gardam (n 142 above) 5-6; Chatham House Principles (n 141 above) Rule 3.

<sup>204</sup> Gardam (n 142 above), 29.

proportionality are customary law elements traceable to the Caroline incident<sup>205</sup> and they are used to determine the lawfulness or otherwise of self-defence.<sup>206</sup> The Caroline incident is said to have been condensed into the two customary doctrines of necessity and proportionality, which are not only vital and indispensable pillars<sup>207</sup> but are also *sine qua non* conditions for the exercise of the right of self-defence.<sup>208</sup> While necessity requires that the danger be ‘instant, overwhelming, leaving no choice of means, and no moment for deliberation’, proportionality requires that the means of response to such danger ‘did nothing unreasonable or excessive’ since the act must be limited by the necessity causing it.<sup>209</sup> The advantage in these doctrines lay in limiting or reducing the incessant responses in self-defence to armed attacks.<sup>210</sup> The relevance of necessity in the collective security system is captured even by the UN Charter.<sup>211</sup> Article 42 measures, which are forcible measures, may be ordered as last resort after alternative peaceful measures provided for under article 41 of the UN Charter have been considered and found to be insufficient or unavailable. Then, the SC invokes its article 42 powers, which include forcible action by air, sea or land forces as may be necessary to maintain or restore international peace and security.<sup>212</sup>

It has been argued that, for an action in self-defence to meet the requirements of necessity, force must be used only to halt an on-going attack and not thereafter.<sup>213</sup> If an armed attack is completed, there may be no more need to repel it and self-defence is limited by the on the spot reaction, since immediacy is also a relevant criterion.<sup>214</sup> In the *Oil Platforms case*, Iran contended that, even if it were proved that there was an initial armed attack on the US, it

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<sup>205</sup> Gray (n 36 above) 148-149; Jennings (n 8 above) 89.

<sup>206</sup> *Nicaragua case* (n 91 above) para 103; *Nuclear Weapons case* (n 88 above) para 41; Lubell (n 7 above) 34.

<sup>207</sup> JG Daton ‘The United States National Security Strategy: Yesterday, today and tomorrow’ (2005) 52 *Naval Law Review* 71, U Shoham ‘The Israeli aerial raid upon the Iraqi nuclear reactor and the right of self-defence’ (1985) 109 *Military Law Review* 196; Franck (n 13 above) 98.

<sup>208</sup> *Nicaragua case* (n 91 above) para 194; *DRC case* (n 140 above) para 147; *Oil Platforms Case* (n 170 above) para 43, 161, 198-199; *Nuclear Weapons case* (n 88 above) para 141, 266, 245; Gray (n 36 above) 149-150.

<sup>209</sup> Jennings (n 8 above) 89.

<sup>210</sup> A Hamid ‘The legality of anticipatory self-defence in the 21<sup>st</sup> Century world order: A re-appraisal’ (2007) 54 *Netherlands International Law Review* 461; Gray (n 38 above) 150.

<sup>211</sup> Art 41 of the UN Charter provides that: ‘The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.’

<sup>212</sup> Art 42 of the UN Charter; Gardam (n 142 above) 6.

<sup>213</sup> Simma *et al* (n 2 above) 1406. No legal justification can, therefore, be adduced for the cruise missile attacks on Iraq by the USA on the ground that there was a failed attempt on the life of its former president by Iraqi agents in Kuwait, months thereafter.

<sup>214</sup> *Oil Platforms case* (n 170 above) paras 7, 47.

could not respond in self-defence because both the attack on the Sea Isle City and Samuel B Roberts had terminated before the US employed force. According to Iran, necessity and immediacy are linked together in self-defence. Consequently, the action of the US was not self-defence, but a reprisal attack which is illegal under contemporary international law.<sup>215</sup> As expected and rightly so, the US argued in reply that self-defence does not require a radically immediate response because time is required to investigate and determine who attacked its facilities. It further contended that there were series of attacks on it, not a single attack, and that, therefore, there was a need to employ force in self-defence to terminate future attacks.<sup>216</sup>

While the argument of the US appears to be sound and in consonance with the definition of necessity (force may be used in self-defence only when this is necessary to bring an attack to an end, or to avert an imminent attack), it appears contrary to the literal reading of article 51 of the UN Charter which requires self-defence only as a response to an earlier armed attack, and not an anticipated one.<sup>217</sup> The ICJ, however, dismissed the contentions of the US and held that the response of the US was inconsistent with the doctrine of necessity.<sup>218</sup> It is the opinion of this study that, in many instances of self-defence, there is a delay in response to an earlier armed attack, contrary to the formulations in the *Caroline* incident.<sup>219</sup> Every victim state of an armed attack would need time not only to explore non-forcible alternatives, but also time to prepare for a possible response in self-defence. For instance, in a situation where an asset is attacked abroad, several kilometres from the state borders, as in the *Oil Platforms case* where the attack occurred in the Gulf region, quite far away from the US territory, time would lapse before a response could possibly be taken.

In both the Falkland/Malvinas crisis between Argentina and United Kingdom<sup>220</sup> and the US and Al-Qaeda/Taliban issue following the 9/11 incident,<sup>221</sup> reasonable time passed before a response commenced. It is not amenable to reason that the phrase often quoted from the *Caroline* incident that ‘instant, overwhelming, leaving no choice of means, and no moment

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<sup>215</sup> *Oil Platforms case* (n 170 above) paras 7, 47; Ochoa-Ruiz & Salamanca-Aguado (n 169 above) 518; A/RES/25/2625 of 24 October 1970; see also A/RES/20/2131 of 21 December 1965.

<sup>216</sup> United States Counter-Memorial para 4.41; Salamanca-Aguado (n 169 above) 519.

<sup>217</sup> Art 51 of the UN Charter.

<sup>218</sup> *Oil Platforms case* (n 170 above) para 76.

<sup>219</sup> Jennings (n 8 above) 89. The *Caroline case* requires that a response in self-defence must ‘show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’

<sup>220</sup> Lubell (n 7 above) 44; R Higgins ‘The attitude of western states towards legal aspects of the use of force’ in A Cassese (ed.) *The current legal regulation of the use of force* (1982) 435-452.

<sup>221</sup> Lubell (n 7 above) 45.

for deliberation' should apply wholesale in all instances of self-defence.<sup>222</sup> Granted that the doctrine of immediacy refers to the temporal nature of the relationship between an attack and the response in self-defence and requires such response without delay, the immediacy principle enunciated in the Caroline incident appears to be too stringent.<sup>223</sup> That may be possible only in instances of anticipatory self-defence or declared wars where both sides have their military forces ready and on standby for a possible response. Furthermore, exploring peaceful alternatives as dictated by 'necessity' may be possible only if the initial attack stops temporarily, otherwise a state under un-abating and unceasing attack may have no alternatives to consider, but to defend itself militarily. The scenario is in tandem with the principle of 'leaving no choice of means.'<sup>224</sup>

On exploring peaceful alternatives, Lubell observed that, in an armed attack by a State, diplomatic efforts directly undertaken by the attacker or other members of the international community offer the best options for settlement.<sup>225</sup> According to him, if the attacker is a NSA, then peaceful alternatives by way of settlement should be in phases. Firstly, settlement should be attempted directly with the NSA and, if it fails, then a second level of settlement involving the territorial state hosting the NSA should be attempted.<sup>226</sup>

Furthermore, it has been argued that the customary law doctrines of necessity and proportionality reconcile the law on prohibition of the use of force and the need to respond to armed attacks by terrorist NSAs operating from another territory. Trapp argues that, while necessity considers whether peaceful and other diplomatic measures are insufficient or unavailable, proportionality, on the other hand, considers whether excessive force is not employed to halt or repel an on-going attack.<sup>227</sup> A state's complicity in the use of its territory by terrorists could generate a necessity for use of force.<sup>228</sup>

It is submitted that, as important as these customary law doctrines may appear, state practice does not show radical compliance with the requirements. The question is, how many states cautiously, meticulously and painstakingly explore peaceful alternatives and otherwise find them ineffective, insufficient or unavailable in compliance with the doctrine of necessity,

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<sup>222</sup> Jennings (n 8 above) 89; Hamid (n 210 above) 463.

<sup>223</sup> Franck (n 101 above) 839, 840; Dinstein (n 88 above) 242-243.

<sup>224</sup> Jennings (n 8 above) 89t; Lubell (n 7 above) 45.

<sup>225</sup> Lubell (n 7 above) 46.

<sup>226</sup> Lubell (n 7 above) 46, 47.

<sup>227</sup> Trapp (n 147 above) 146.

<sup>228</sup> Schachter (n 5 above), 314.



before resorting to violence in self-defence? Powerful states hurry into actions in self-defence as domestic confidence building measures for their governments. Arguably, no sufficient time was given between the 9/11 attacks and when the US commenced its response in self-defence on 7 October 2001 for a proper diplomatic shuttle for alternatives. The time allowed for the ultimatum to the Taliban to hand over the terrorists involved in the bombing must be seen as inadequate and unreasonable, particularly when this fact is considered against the background of the denials of culpability by the Taliban in the bombing incident.<sup>229</sup>

### 3.4.3. Proportionality

Proportionality, as is the case of necessity, sets legal limits on the right of the exercise of self-defence.<sup>230</sup> Self-defence must be kept within the limits or scope of what is necessary and proportionate.<sup>231</sup> Even if the action is necessary because its purpose is to repel an armed attack, it must not also be retaliatory or punitive in nature,<sup>232</sup> and it must be proportionate to the gravity and effect of the attack.<sup>233</sup> Proportionality determines the extent or scope of the necessary measure to be taken in reaction to the attack.<sup>234</sup> The need for balancing the response against the attack, so as not to be excessive, is intended to caution victim states and to require them to assess the nature of the attack and all other facts relating to the attack properly before embarking on self-defence.<sup>235</sup> Failure to comply with the principles of necessity and proportionality could, therefore, be interpreted as an act of wrongfulness.<sup>236</sup> The need to repel or stop armed attacks by way of self-defence, and the means by which

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<sup>229</sup> B Roggio 'Afghan Taliban claims it 'had no hand in the 9/11 incident' *The Long War Journal*, 11 September 2012. The Taliban denial was made by its spokesman Zabihullah Mujahid who released the announcement entitled 'Statement of Islamic Emirate on the Eleventh Anniversary of the September,' on 9 September and it was obtained by SITE Intelligence Group. The statement said that the Afghan Taliban had had no hand in the 9/11 incident and described the US and Coalition war as an 'illegal and unjust crusade,' particularly against the background that the US has not provided any legitimate or logical proofs.

<sup>230</sup> Simma *et al* (n 2 above) 1425; TM Franck 'On proportionality of countermeasures in international law' (2008) 102 *American Journal of International Law* 715.

<sup>231</sup> Jennings (n 8 above) 89.

<sup>232</sup> Simma *et al* (n 2 above) 1425; A Cassese *International Law* (2005) 2<sup>nd</sup> edn. 355.

<sup>233</sup> *Nicaragua case* (n 91 above) para 237; *DRC case* (n 140 above) para 147; *Oil Platforms case* (n 170 above) paras 73-77.

<sup>234</sup> Simma *et al* (n 2 above) 1426.

<sup>235</sup> Simma *et al* (n 2 above) 1426.

<sup>236</sup> *Nicaragua case* (n 91 above) 237; Simma *et al* (n 2 above) 1425; Shah (n 104 above) 123.

such attack is to be repelled, creates the relationship between necessity and proportionality.<sup>237</sup>

As Cannizzaro points out, proportionality is measured by a quantitative test in which the response is expected to conform to the quantitative features of the attack, such as the scale of action, the type of weaponry and the magnitude of damage.<sup>238</sup> What is important, however, is that the aim of the response which is to repel attacks be achieved without consequences out of proportion.<sup>239</sup> For instance, it has been argued that it is difficult to accept the proportionality of Israeli reaction in self-defence to attacks from Hezbollah in Lebanon, considering the scale and impact of the attack. In 2006, Hezbollah was involved in some cross-border attacks in which eight Israeli soldiers were killed and two were captured.<sup>240</sup> While Israel was said to have justifiably responded in self-defence to Hezbollah's attacks, it failed to caution itself by assessing the situation properly. Israel's response culminated in the destruction of both civilian and military infrastructure, some of which were located hundreds of miles from the battle zone.<sup>241</sup> Israel's response was said to be a disproportionate use of force in self-defence for failing to distinguish between civilian objects and military objects and also for the scale of destruction.<sup>242</sup> Israel was condemned for not complying with the principle of proportionality which is a useful instrument for measuring legality of self-defence.<sup>243</sup>

Similarly, another manifest instance of the disproportionate use of force in self-defence was the US invasion of Panama in 1989. Necessity for the US invasion was founded on the fact

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<sup>237</sup> Simma *et al* (n 2 above) 1426; E Cannizzaro 'Contextualizing proportionality: *Jus ad bellum and jus in bello* in the Lebanese war' (2006) 88 *International Review of the Red Cross* 782.

<sup>238</sup> Cannizzaro (n 237 above) 783.

<sup>239</sup> Cannizzaro (n 237 above) 784.

<sup>240</sup> Kretzmer (n 179 above) 236.

<sup>241</sup> Cannizzaro (n 238 above) 784.

<sup>242</sup> Cannizzaro (n 238 above) 780.

<sup>243</sup> 5489<sup>th</sup> Meeting of the Security Council of 14 July 2006, SC 8776, in which, apart from the USA, the Security Council blamed Israel for using disproportionate force on civilians, available at <http://unispal.un.org/UNISPAL.NSF/0/9A9F7DBO32EI852571AB006729B5> (accessed 05/03/2015); At the G-8 Summit of 16 July 2006 at St. Petersburg, Hezbollah was blamed for its rocket attacks against Israel. On disproportionate use of force in self-defence, the Summit stated: 'It is critical that Israel, while exercising the right to defend itself, be mindful of the strategic and humanitarian consequences of its actions. We call upon Israel to exercise utmost restraint, seeking to avoid casualties among civilians and damage to civilian infrastructure and to refrain from acts that would destabilize the Lebanese government'; European Union Conclusions on the Middle East, (17 July 2006: Brussels), where the Council stated: 'The EU recognizes Israel's legitimate right to self-defence, but it urges Israel to exercise utmost restraint and not to resort to disproportionate action', available at [http://eu.un.europa.eu/articles/en/article\\_6125\\_en.htm](http://eu.un.europa.eu/articles/en/article_6125_en.htm) (accessed 05/03/2015); see also Cannizzaro (n 237 above), 780.

that Panamanian defence forces killed one American soldier and threatened two others.<sup>244</sup> Using self-defence in the protection of nationals abroad as justification, the US invaded Panama and caused the loss of civilian lives and the destruction of properties. It also deposed the Government of General Noriega<sup>245</sup> which went to show that self-defence was not the only motive for the invasion, but that the motive was rather the hidden agenda for regime change or the institution of democratic norms in Panama.<sup>246</sup> The response by the US in self-defence was adjudged to be disproportionate in scale, having regard to the initial attack that triggered the response. The US was widely condemned in the UN.<sup>247</sup> Furthermore, commentators have condemned the US for the acts of self-defence against the Taliban Government because it was disproportionate.<sup>248</sup> The 9/11 attacks ended in one day, but the response lasted for over 13 years. Even though, the Taliban tolerated Al Qaeda, it was neither in effective or overall control to warrant such gravity of attacks from the US.<sup>249</sup> The goal of the US was to weaken Al Qaeda, and this was arguably achieved in December 2001, yet the operation was sustained for more than a decade thereafter.<sup>250</sup>

The fact that a response in self-defence to an armed attack should be proportional to the initial attack does not, nevertheless, infer that the weapons used to repel the attack must be the same as those used by the attacker.<sup>251</sup> The steps taken in self-defence may be such that require not merely the repelling of the attack, but may also aim at driving the attackers beyond the borders of the victim state.<sup>252</sup> As Gardam observed, commentators differ as to

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<sup>244</sup> MC Alder *The inherent right of self-defence in international law* (2012) 153-154.

<sup>245</sup> Gardam (n 142 above) 166-167.

<sup>246</sup> Gray (n 36 above) 57.

<sup>247</sup> Alder (n 144 above) 153-154; J Quigley *The invasion of Panama and international law* (1990) International Progress Organisation 3.

<sup>248</sup> Glennon (n 195 above) 546. He argues: 'if the United States' action against Nicaragua (attacks on its ports and oil installations) necessarily constituted a disproportionate response to Nicaragua's action against El Salvador (the provision of arms and assistance to anti-government rebels), then an even graver action against Afghanistan (invasion and the overthrow of its government) necessarily constitutes an even more disproportionate response to its lesser delict (passively providing a safe haven for terrorists but not supplying arms or other support). Proportionality by this logic, never permits overthrowing a government merely because it provides safe haven to terrorists'.

<sup>249</sup> SA Shah 'War on terrorism: Self-defence, Operation Enduring Freedom, and the Legality of U.S. drone attacks in Pakistan' (2010) 9 *Washington University Global Studies Law Review* 101-102; see also M Milanovic 'Self-defence and non-state actors: Indeterminacy and the *jus ad bellum*' EJIL Talk, 21 February 2010, at <http://ejiltalk.org/self-defence-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum> (accessed 18/11/2016).

<sup>250</sup> RT Williams 'Dangerous Precedent: America's illegal war in Afghanistan' (2011) *University of Pennsylvania Journal of International Law* 584.

<sup>251</sup> Simma et al (n 2 above) 1426.

<sup>252</sup> Simma et al (n 2 above) 1426; Gardam n 142 above) 164, where she stated: 'The repulsion of an attack, particularly in the sense of expelling the invader, will sometimes warrant the invasion of the territory of the aggressor state.'

the extent to which an aggressor state can be destroyed so as to achieve the purpose of self-defence which is also designed to prevent the occurrence of such an attack in the future.<sup>253</sup> It has been argued that proportionality in relation to halting or repelling an attack does not consist of the equality of weapons used or the scale of force used, as the reaction required to halt or repulse the attack may be greater in scale.<sup>254</sup> This is particularly true when self-defence is employed with the hidden intention of achieving retributive or punitive motives as was the case in the invasion of Panama by the US.<sup>255</sup>

Proportionality is designed to be a legal control of the resort to force, and it requires that the force must not be excessive in relation to the harm expected from the attack.<sup>256</sup> As important as the requirement of proportionality is, however, there is little compliance in practice. The statements in support of the requirement are merely rhetoric, while its application appears to remain a farce.<sup>257</sup> Apart from justifications advanced by states employing self-defence, there has hardly been any independent post-conflict inquiry which has found a state to have complied with the requirement of proportionality.<sup>258</sup> One of the ways of escaping the requirement of proportionality is the ‘cumulative proportionality’ approach which has been evaluated above.<sup>259</sup> This refers to the aggregating of small scale attacks which would not independently amount to an armed attack, and it relies on the cumulative nature to employ massive military force in self-defence.<sup>260</sup> As expected, such military force is more than sufficient to repel an on-going attack, thereby wittingly employing disproportionate force.

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<sup>253</sup> Gardam (n 142 above) 165, she stated that, ‘In extreme cases, it has been argued that the total defeat of the armed forces of the aggressor state would be necessary to achieve this end.’

<sup>254</sup> Gardam (n 142 above) 160- 161.

<sup>255</sup> Simma et al (n 2 above) 1426-1427.

<sup>256</sup> Chattam House (n 141 above) Principle 5.

<sup>257</sup> Gardam (n 142 above) 187.

<sup>258</sup> Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1, UN Doc. A/HRC/3/2, paras 11 & 20. The inquiry came to the conclusion that Israeli had used disproportionate force in self-defence against Hezbollah, and the Israeli offensive left in its wake 1,100 Lebanese civilian deaths, 4,400 injured, 900,000 displaced persons and the destruction of airports, roads, ports and power stations which were hundreds of miles away from the combat zone; *Nicaragua case* (n 101 above) para 237, where the ICJ found USA’s use of force in self-defence disproportionate to the exact scale of the aid received by El Salvadorian opposition from Nicaragua; *DRC Case* (n 140 above), para 147, in which the attacks on airports and towns several hundreds of kilometres away from the Ugandan border was held by the ICJ as disproportionate use of force in self-defence to the trans-border attacks claimed by Uganda; *Oil platforms case* (n 170 above) para 77, where the Court held that the destruction of two Iranian platforms which were part of a robust operation as reaction in self-defence to the mining of a single USA’s warship by unidentified agents which was damaged without loss of life was excessive and disproportionate.

<sup>259</sup> Shah (n 104 above) 123.

<sup>260</sup> Cannizzaro (n 237 above) 785; Shah (n 104 above) 123.

The advocates of this approach contend that the force employed in self-defence should be proportionate to all previous illegal acts involving deaths and the destruction of property.<sup>261</sup>

In conclusion, it is hereby submitted that the determination of what measure of force is approximately proportional to an armed attack will remain problematic among commentators. Bias and emotions blur the objective assessment of proportionality by states involved in use of force, while other uninvolved states allow sympathy or other relationships to affect a dispassionate assessment of proportionality. Kretzmer has captured the dilemma succinctly.<sup>262</sup>

#### 3.4.4. Anticipatory self-defence

The words ‘anticipatory’ and ‘pre-emptive’ self-defence are sometimes conflated and used interchangeably by commentators because they bear a common conjectural characteristic, but in fact they mean different things.<sup>263</sup> While a unilateral action in the exercise of a state’s inherent right of anticipatory self-defence appears to be justified, pre-emptive actions in self-defence are not justified without SC authorisation.<sup>264</sup> Even state practice has shown support for the legal basis of anticipatory self-defence.<sup>265</sup> In fact, the UK Attorney General stated that ‘it has been the consistent position of successive United Kingdom Governments over the many years that the right of self-defence under international law includes the right to use force where an armed attack is imminent.’<sup>266</sup> This study also subscribes to the fact that an

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<sup>261</sup> G Roberts ‘Self-help in combating state-sponsored terrorism: Self-defence and peacetime reprisals’ (1987) 19 *Case Western Reserve Journal of International Law* 234-294 at 281-282.

<sup>262</sup> Kretzmer (n 179 above) 238. ‘The very right of states to use of force in international relations and the parameters of that right are obviously highly loaded matters. States that are themselves faced with armed attacks or threats of such attacks are inevitably going to have a different perspective from that of uninvolved states. The perspective of the latter is likely to change radically once they too are faced with an attack. The bias of involved states is self-evident; that of uninvolved states may be less so. Yet experience tends to show that uninvolved states and outside observers will often be highly selective in deciding whether use of force was both justified and proportionate. When force is used in situations in which they have sympathy for the victim state, and little or no sympathy for the state or group that provoked the use of force by that state, they are not likely to be critical of the force used, provided it is not obviously incompatible with *jus in bello*. When, however, similar force is used by a state to which they are either unsympathetic or outwardly hostile, or when they actually identify with some or all of the goals of the state or group whose actions provoked the use of force, they are likely to condemn that use of force as disproportionate’.

<sup>263</sup> Dinstein (n 88 above) 195.

<sup>264</sup> CJ Dunlap Jr. ‘Anticipatory self-defence and the Israeli-Iranian crisis: Some remarks’ (2013) 19 *ILSA Journal of International and Comparative Law* 325.

<sup>265</sup> Bowett (n 165 above) 191-192.

<sup>266</sup> Lord Goldsmith, Attorney General of the UK, House of Lords, Hansard, col 370, 21 April 2004, at <http://www.publications.parliament.uk/pa/1d200304/1dhansrd/vo040421/text/40421-07.htm> (accessed 25/11/2016); see also Lubell (n 7 above) 58.

imminent threat that appears certain to occur in the foreseeable future should permit a right of self-defence.

Anticipatory self-defence refers to the use of armed coercion by a state to halt an imminent act of armed coercion by another state (or NSA operating from that other state).<sup>267</sup> Van den Hole defined anticipatory self-defence as, ‘the use of force by a state to repel an attacker before an actual attack has taken place, before the army of the enemy has crossed the border, and before the bombs of the enemy fall upon its territory.’<sup>268</sup> Anticipatory self-defence is a customary law doctrine which is traceable to the Caroline incident of 1837.<sup>269</sup> In that incident, the British Government destroyed an American owned steamship, the Caroline, in self-defence, in anticipation of its being used by Canadian rebels to attack British assets.<sup>270</sup>

There appears to be no consensus among states or in legal scholarship as to whether article 51 of the UN Charter retains or excludes the pre-existing customary law right of anticipatory self-defence<sup>271</sup>, and, until the ICJ or the SC makes a pronouncement, its legality or otherwise will remain doubtful and problematic.<sup>272</sup> Firstly, the restrictionists propose a narrow or restricted interpretation of article 51 of the Charter, in which they argue that Article 51 is exhaustive and that the phrase ‘if an armed attack occurs’ excludes every other ground upon which an action in self-defence may be founded because self-defence is contingent upon the existence of an armed attack.<sup>273</sup> According to them, only the occurrence of an armed attack may necessitate a response in self-defence, and that armed attack should not be construed as one of a series of criteria upon which to found self-defence. To them, the UN Charter has jettisoned the customary law right of anticipatory self-defence and replaced it with collective self-defence mechanism of the UNSC.<sup>274</sup> The treaty provision under article 51 did not expressly capture anticipatory self-defence, and the treaty trumps customary law even if it

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<sup>267</sup> S Murphy ‘The doctrine of preemptive self-defence’ (2005) 50 *Villanova Law Review* 699, 703-704; Dunlap (n 263 above) 324-325; SA Barbour & ZA Salzman ‘The entangled web: The right of self-defence against non-state actors in the Armed Activities case (2008) 40 *International Law & Politics* 81.

<sup>268</sup> Van den Hole ‘Anticipatory self-defence under international law’ (2003) 19 *American University International Law Review* 72.

<sup>269</sup> Dunlap (n 264 above) 325.

<sup>270</sup> J Mulcahy & CO Mahony ‘Anticipatory self-defence: A discussion of the international law’ (2006) 2 *Hanse Law Review* 233.

<sup>271</sup> Simma *et al* (n 2 above) 1421.

<sup>272</sup> Mulcahy & Mahony (n 270 above) 233, 235, 239.

<sup>273</sup> Mulcahy & Mahony (n 270 above) 233.

<sup>274</sup> A Cassese *Intentional law* (2005) 57; Gray (n 36 above) 112; Dinstein (n 88 above) 194-196; ME O’Connell *The power and purpose of international law: Insights from the theory and practice of enforcement* (2008) 172-179; L Henkin *How nations behave: Law and foreign policy* (1979) 141-144; Brownlie (n 142 above) 275-276.



existed.<sup>275</sup> The ICJ has not made any authoritative pronouncement on the legality of anticipatory self-defence, having demonstrated its unwillingness to engage with the controversial issue of anticipatory self-defence in a number of cases.<sup>276</sup> Commentators have argued that to think that the occurrence of an armed attack is only one of the circumstances in which self-defence can be triggered diminishes the article 51 regime.<sup>277</sup> Even if anticipatory self-defence existed under customary law before the Charter regime, the treaty which is later in time trumps or prevails over customary law.<sup>278</sup> According to Simma *et al*, article 51 appears exclusively to regulate self-defence.<sup>279</sup> The ICJ has also held that the existence of an armed attack is a *sine qua non* for the exercise of individual or collective self-defence.<sup>280</sup>

The proponents of the restrictive view, furthermore, argue that, if self-defence is not constrained by the requirement of an armed attack, it may open the floodgates of aggression and, on the pretext of deterring states that possess WMD, powerful states may be in constant pursuit of other states, thereby perpetuating instability.<sup>281</sup> The danger, however, is that the assessment as to which countries possess WMD giving rise to an imminent threat is sometimes erroneous and based on faulty grounds. The identification of the ‘axis of evil’ and the alarm raised by the US as to the possession of WMD by these states and for which reason Iraq was attacked was flawed. For instance, the US claims that Iraq was stock-piling chemical or biological weapons and building nuclear weapons were erroneous.<sup>282</sup> In fact the US, supported by the UK and other allies, relied on contentious justifications and invaded Iraq in 2003, and this invasion culminated in a regime change.<sup>283</sup> Iran’s alleged weaponized

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<sup>275</sup> Mulcahy & Mahony (n 270 above) 235.

<sup>276</sup> *Nicaragua case* (n 91 above) para 194; *Palestinian Wall case* (n 92 above) para 139.

<sup>277</sup> Mulcahy & Mahony (n 270 above) 235.

<sup>278</sup> Mulcahy & Mahony (n 270 above) 235.

<sup>279</sup> Simma *et al* (n 2 above) 1404.

<sup>280</sup> *Nicaragua Case* (n 91 above) para 211; *Oil Platforms Case* (n 170 above) para 51.

<sup>281</sup> MC Waxman ‘The use of force against states that might have Weapons of Mass Destruction’ (2009) 31 *Michigan Journal of International Law* 3.

<sup>282</sup> Waxman (n 281 above) 3; D Jehl ‘Bush sets panel on intelligence before Iraq war’ *New York Times*, 7 February 2004.

<sup>283</sup> K Katzman ‘Iraq: Former regime weapons programs and outstanding U.S. issues’ *Congressional Research Service (CRS)* 4-6, available at <http://fas.org/sgp/crs/mideast/RL32379.pdf> (accessed 14/03/2015), where he wrote that *Operation Iraqi Freedom (OIF)* started on 19 March 2003, and, upon the fall of Iraq about 9 March 2003, the Mobile Exploitation Team (MET) and Iraq Survey Group (ISG) were formed to investigate Iraq’s WMD capabilities among other terms of reference. None of these investigative bodies found any authentic evidence to link Iraq with the WMD programmes. The ISG report of 30 September 2004 called ‘The Duelfer Report’ stated that ‘Iraq lacked actual WMD stock-piles;’ G Thielmann ‘The cost of ignoring UN Inspectors: An unnecessary war with Iraq’ *Arms Control Now: The blog of the Arms Control Association*, 5 March 2013, available at <http://armscontrolnow.org/2013/03/05/the-cost-of-ignoring-un-inspectors-an-unnecessary-war-with->

nuclear capability was also erroneous.<sup>284</sup> In addition, according to Waxman, the allegation that North Korea runs a plutonium or uranium programme remains doubtful.<sup>285</sup> Arguably, however, the fact that North Korea runs nuclear programmes may be correct because North Korea itself admitted to running a Highly Enriched Uranium (HEU) programme in 2002.<sup>286</sup> Moreover, its nuclear test in 2006 and further threats of testing its nuclear arsenal have been the subject of UNSC resolutions 1718 and 2094.<sup>287</sup>

Secondly, the counter-restrictionists contend that the phrase ‘Nothing shall impair the inherent right’ in article 51 of the Charter shows that the customary law right which existed prior to the Charter is retained.<sup>288</sup> Conversely, other commentators have interpreted the word ‘inherent’ differently, saying that, under article 51, it means that the right is also vested in non-member states of the UN and that members can assist non members that are victims of attacks.<sup>289</sup> In that regard, Dinstein observed that the right is inherent does not mean that it has its roots in natural law but that it is inherent in the sovereignty of states.<sup>290</sup> Despite the interpretation of ‘inherent right’ in article 51 by Simma and Dinstein, the counter-restrictionists argue that a second ground upon which self-defence may be employed exists in the absence of an armed attack. According to this school of thought, anticipatory self-defence is permissible because the pre-existing customary law survived the Charter regime.<sup>291</sup> Waxman describes this as the majority and better view because there is state

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[iraq/](#) (accessed 14/03/2015). It reported that both the IAEA Director Mohamed ElBaradei and head of the UN Special Commission on Iraq reported to the UN SC that Iraq had no WMD. ElBaradei specifically stated that the IAEA had ‘to date found no evidence or plausible indication of the revival of a nuclear weapons programme in Iraq;’ Similar findings were made also by the US Senate ‘Report of the Select Committee on Intelligence on Post-war Findings about Iraq’s WMD Programs and Links to Terrorism and how they Compare with Pre-war Assessments,’ 17, of 8 September 2006, available at <http://www.intelligence.senate.gov/phaseiiaccuracy.pdf> (accessed 14/03/2015).

<sup>284</sup> Waxman (n 278 above) 16, where he said that, on Iran’s nuclear weapons programme, IAEA Director ElBaradei said, ‘We have yet to see a smoking gun that would convict Iran.’

<sup>285</sup> Waxman (n 281 above) 3.

<sup>286</sup> BE Bechtol ‘The impact of North Korea’s WMD programs on regional security and the ROK-U.S. Alliance’ (2004) *IIX International Journal of Korean Studies* 135-138 (135-156).

<sup>287</sup> S/RES/1718 of 14 October 2006 and S/RES/2094 of 7 March 2013.

<sup>288</sup> L Martinez ‘September 11th, Iraq and the doctrine of anticipated self-defence’ (2003) *72 University of Missouri-Kansas City School of Law Review* 123, at 134; O Schachter ‘International law: The right to use armed force’ (1984) *Modern Law Review* 1620.

<sup>289</sup> Simma *et al* (n 2 above) 1403.

<sup>290</sup> Dinstein (n 88 above) 191-193, in quoting the American Identic notes, stated, ‘There is nothing in the American draft of any antiwar treaty which restricts or impairs in any way the right of self-defence. That right is inherent in every sovereign state and is implicit in every treaty;’ see also J Combacau ‘The exception of self-defence in UN practice’ in A Cassese (ed.) *The current legal regulation of the use of force* 9-38; Schachter (n 2 above) 272-273.

<sup>291</sup> Dunlap (n 264 above) 326; Martinez (n 288 above), 134; Van den hole (n 268 above) 78; Resolutions 1368 and 1373; K Annan, UN Secretary General ‘In larger freedom: Towards development, security and human rights for all’ UN Doc. A/59/2005 (21 March 2005), where Annan stated, ‘Imminent threats are

practice showing the existence of anticipatory self-defence.<sup>292</sup> This school relies on the Caroline incident where the British authorities advanced justification for its use of force in anticipatory self-defence. In that incident, the American Secretary of State, Daniel Webster, objected to the British use of force in anticipatory self-defence and contended that a right of anticipatory self-defence arises only when there is a necessity of self-defence that is ‘instant, overwhelming and leaving no choice of means, and no moment for deliberation’.<sup>293</sup>

Arguments in favour of anticipatory self-defence rely on the fact that the Charter requires members to refrain from not only actual force but also the threat of force, and therefore, to prevent such threats, anticipatory self-defence is permissible.<sup>294</sup> Others disagree with Van den Hole arguing that, while article 2(4) prohibited the threat of force, self-defence under article 51 makes no mention of a response to a threat of force because no threat of force by one state justifies self-defence by another.<sup>295</sup> Counter-restrictionists, furthermore, also contend that the modern forms of terrorism and the proliferation of WMD have made it imperative to interpret the right of self-defence as including anticipatory or pre-emptive self-defence<sup>296</sup> and that international law does not require states to suffer attacks before reacting.<sup>297</sup>

While both schools have advanced weighty arguments, it is difficult to expect a state to wait for a first blow upon being aware of the military preparations of its adversaries, in spite of the fact that article 51 permits a response in self-defence only upon the occurrence of an armed attack. The problem in determining anticipatory self-defence, in my view, is compounded by the absence of an objective criterion to determine imminence. This appears to create problems since victim states rely on their own discretion to determine the existence of an armed attack, thereby leaving room for abuse.<sup>298</sup> Given the fact that today’s adversaries do not manifestly prepare or mobilize for attacks which may notify opponents of impending danger, it is difficult to accept the suggestion that every state should adapt the concept of

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fully covered by Art 51, which safeguards the inherent right of sovereign states to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.’

<sup>292</sup> Waxman (n 281 above) 7.

<sup>293</sup> Jennings (n 8 above) 89; Letter from Daniel Webster, US Secretary of State to Lord Ashburton, (British plenary 6 August 1842) quoted in Waxman (n 281 above) 6.

<sup>294</sup> Van den hole (n 268 above) 85.

<sup>295</sup> Glennon (n 195 above) 546.

<sup>296</sup> Simma *et al* (n 2 above) 1422; National Security Strategy of the United States, 2002.

<sup>297</sup> Simma *et al* (n 2 above) 1422.

<sup>298</sup> Simma *et al* (n 2 above) 1422.

imminence without regard to the capabilities and objectives of its adversaries.<sup>299</sup> The US has argued that: ‘The determination of whether the use of force against US forces is imminent will be based on an assessment of all facts and circumstances known to US forces at the time. For the US, imminence does not necessarily mean immediate or instantaneous.’<sup>300</sup> In support of anticipatory self-defence, the US instructed all its commanders not to absorb the first blow before considering their right of self-defence because, according to its Chairman Joint Chiefs of Staff Standing Rules of Engagement (CJCSSROE), imminence includes hostile intent.<sup>301</sup>

This study is persuaded by the reasoning that anticipatory self-defence should be permissible because of the destructive nature of contemporary weapons of war and the supersonic speed of delivery systems that invariably occasion irreversible impact, but that it should be narrowly circumscribed.<sup>302</sup> There is, therefore, a need to construe the imminent requirement strictly, even though states may take action in the face of imminent threats.<sup>303</sup> The problem with the above reasoning is how to determine whether the anticipated response in self-defence will be proportional to an attack that has not commenced, proportionality being a fundamental condition for weighing the scale and effects of any action in self-defence. Perhaps, these unanswered questions and other difficulties persuaded Waxman to suggest a third view. He suggested ‘the objective reasonable necessity approach’ which argued that the use of force against a state believed to pose a WMD threat should be justified if a reasonable state concludes that a WMD threat is sufficiently likely and severe enough that forcible measures are necessary’.<sup>304</sup>

Dinstein and Waxman contended that mistaken assessment is risky, and false expectation of threats may lead to self-defence against otherwise non-existent threats that will never materialise.<sup>305</sup> Conversely, relaxed attitudes towards these assessments may, in other cases, lead to restraint by states in the face of imminent threats, which the adversary may exploit to make the first devastating attack. Waxman calls these wrong assessments ‘false positives

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<sup>299</sup> Simma *et al* (n 2 above) 1422.

<sup>300</sup> United States Operational Law Handbook (2014) Ch. 5, 82.

<sup>301</sup> United States Operational Law Handbook (2012) 5; United States Operational Law Handbook (2014) Ch. 5, p 6.

<sup>302</sup> Simma *et al* (n 2 above) 1424.

<sup>303</sup> A more Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats Challenges and Change’ (2 December 2004) UN Doc. A/59/565, para 188.

<sup>304</sup> Waxman (n 281 above) 3.

<sup>305</sup> Dinstein (n 88 above) 195; Waxman (n 281 above) 7.

and false negatives'.<sup>306</sup> For the avoidance of these mistakes and faulty conclusions, it has been suggested that assessment and decision-making in this regard be done collectively through international oversights and organisations like the International Atomic Energy Agency (IAEA) to determine the degree of threats.<sup>307</sup> As difficult as it may seem, this study suggests the formulation of some objective criteria by the International Law Commission (ILC) based on which threats that are likely to trigger a response in self-defence may be assessed.

### 3.4.5. Pre-emptive self-defence

Pre-emptive self-defence is used to refer to the use of armed coercion by a state to prevent another state (or non-state actor) from pursuing a particular course of action which is not yet directly threatening, but which, if permitted to continue, could result at some future point in an act of armed coercion against the first state.<sup>308</sup> The September 11 attacks on New York, Washington D.C. and Pennsylvania in particular<sup>309</sup>, and the rise of NSA terrorist threats generally, appear to be largely responsible for calls to permit pre-emptive self-defence under Article 51 of the Charter.<sup>310</sup> The US<sup>311</sup> and Israel<sup>312</sup> are frontline proponents of the pre-emptive use of force in self-defence that has been opposed by several other states.<sup>313</sup> Otherwise known as the 'Bush doctrine,' the US concept of pre-emptive self-defence has expanded the meaning of 'imminent threat' and has interpreted it in relation to the capabilities and objectives of the adversaries of the US. According to Mulcahy and Mahony, the customary law requirement of imminent threat has been diluted by the requirement of mere evidence of emerging threat, hostile intent of adversaries and the mere allegation of developing WMD either by states or NSAs to justify a response in self-defence.<sup>314</sup> Former President Bush argued in support of pre-emptive self-defence, stating that:

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<sup>306</sup> Waxman (n 281 above) 7.

<sup>307</sup> Waxman (n 281 above) 4.

<sup>308</sup> Murphy (n 267 above) 703.

<sup>309</sup> Mulcahy & Mahony (n 270 above) 236.

<sup>310</sup> Barbour & Salzman (n 267 above) 81.

<sup>311</sup> Barbour & Salzman (n 267 above) 81; see also National Security Strategy of the United States, 2002 and 2006.

<sup>312</sup> Statement by PM Benjamin Netanyahu at the Hearing of the US House Reform Committee- 'Preparing for the war on terrorism' *Israel Ministry of Foreign Affairs*, 20 September 2001.

<sup>313</sup> Barbour & Salzman (n 267 above) 81; C Gray 'A crisis of legitimacy for the UN collective security system' (2007) *International & Comparative Law Quarterly* 164. The Netherlands, UK, Egypt, Pakistan, Iran, Cuba, Algeria and Morocco have all opposed pre-emptive self-defence. See also Attorney-General's advice on the Iraq war: Resolution 1441' (2005) 54 *International & Comparative Law Quarterly* 768.

<sup>314</sup> Mulcahy & Mahony (n 270 above) 236.

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. The greater the threat, the greater the risk of inaction, and the more compelling the case for taking action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack.<sup>315</sup>

The emphasis on pre-emptive self-defence contained in the Bush administration's National Security Strategy (NSS) of 2002 and 2006 are, however, absent in the Obama administration's 2010 NSS of the US.<sup>316</sup>

The justifications advanced for the use of pre-emptive self-defence are that NSAs operate from clandestine cells, and their activities are not easily captured by satellite and other surveillance devices, as is the case with large conventional armed forces when they are preparing for hostilities.<sup>317</sup> There is also the possibility of NSAs being in possession of chemical, biological and nuclear weapons and, therefore, the belief that a wider pre-emptive approach is better owing to the destructive nature of those weapons.<sup>318</sup> Chesney argued that the disintegration of the Soviet Union culminated in the unsecured and un-accounted-for dispersal of usable weapons materials, and that preventing terrorists from obtaining nuclear weapons should be considered an unparalleled national security priority.<sup>319</sup> It has also been argued that terrorist attacks are more often than not directed at unprotected civilians, who, when attacked, cannot be defended immediately as some military targets can be. Pre-emptive measures are more suited to avert such dangers.<sup>320</sup> These reasons apart, globalisation and improved technology have increased the potential and capacities of NSA terrorist networks to travel and deliver money and weapons with unrivalled speed and precision.<sup>321</sup> The conventional criminal law enforcement mechanism is, therefore, not effective enough to deal with terrorist threats from states that condone such terrorist activities. Most of these terrorists

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<sup>315</sup> National Security Strategy of the United States, 2006, 15.

<sup>316</sup> National Security Strategy of the United States, 2010, 21, where it stated, 'When force is necessary, we will continue to do so in a way that reflects our values and strengths our legitimacy, and we will seek broad international support, working with such institutions as NATO and the UNSC. The United States must reserve the right to unilaterally if necessary to defend our nation and our interests, yet we will also seek to adhere to standards that govern the use of force. Doing so strengthens those who act in line with international standards, while isolating and weakening those who do not;' see also I Johnstone *The power of deliberation: International law, politics and organisations* (2011) 88.

<sup>317</sup> Lubell (n 7 above) 60.

<sup>318</sup> R Chesney 'National security: Nuclear material availability and the threat of nuclear terrorism' (1997) 20 *Loyola Los Angeles International & Comparative Law Journal* 29-32; C Greenwood 'International law and the pre-emptive use of force: Afghanistan, Al Qaeda, and Iraq' (2003) *San Diego International Law Journal* 16.

<sup>319</sup> Chesney (n 318 above) 32.

<sup>320</sup> Dinstein (n 88 above) 61.

<sup>321</sup> AD Sofaer 'On necessity of preemption' (2003) 14 *European Journal of International Law* 209.



are willing to die, and there is difficulty in establishing state responsibility for the conduct of these NSAs.<sup>322</sup>

In fact, the former Defence Secretary of the United States, William Perry, suggested that the US should design a policy ‘that we will attack the launch sites of any nation that threatens to attack the U.S. with nuclear or biological weapons’.<sup>323</sup> Like Perry, several other prominent leaders of the US and other countries have advocated pre-emptive self-defence in response to remote and non-palpable threats. Proposals have also been made to update the Authorisation for Use of Military Force (AUMF) to accommodate a new blanket framework for the use of military force against as-yet-undetermined future NSAs that may pose threats to the US.<sup>324</sup>

On the other hand, the justifications relied upon by proponents of pre-emptive self-defence, particularly in relation to broadening and adapting it to perceived threats, have been countered by states and commentators.<sup>325</sup> In spite of arguments by the US and Israel, there appears to be no substantial support for their claim that international law has stretched the boundaries of self-defence to accommodate pre-emptive action against a non-imminent threat of an armed attack.<sup>326</sup> Apart from legal scholars,<sup>327</sup> international organisations, including the UN and the Non- Aligned Movement (NAM), have disassociated themselves from the application of the pre-emptive use of force in self-defence.<sup>328</sup> Doing otherwise may,

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<sup>322</sup> Sofaer (n 321 above) 210.

<sup>323</sup> Glennon (n 195 above) 539; The Administration of Missile Defense Program and the ABM Treaty: Hearing Before the Senate Committee on Foreign Relations, 107<sup>th</sup> Congress, 88 (2001) (Statement of U.S. Secretary of Defence William J. Perry).

<sup>324</sup> Chesney (n 318 above), J Goldsmith *et al* ‘A statutory framework for next generation terrorist threats’ 10 (2013), available at <http://media.hoover.org/sites/fault/files/documents/Statutory-Framwork-for-Next-Generation-Terrorist-Threats.pdf> (accessed 21/03/2015), see also J Daskal & SI Vladeck ‘After the AUMF’ (2014) 5 *Harvard National Security Journal* 117; see also J Daskal & SI Vladeck ‘After the AUMF: A response to Chesney, Goldsmith, Waxman & Wittes’ *Lawfare*, 17 March 2013, available at <http://www.lawfareblog.com/2013/03/after-the-aumf/> (accessed 21/03/2015), where they argued against the proposal of Chesney and his colleagues that the AUMF is obsolete and that, therefore, a new open-ended framework is necessary. To Daskal and Vladeck, that suggestion amounts to proposing a solution in search of a problem that does not exist and that proposing sweeping pre-emptive militarization of counterterrorism is deeply misguided and counterproductive at a time the war on terrorism should be winding up.

<sup>325</sup> Bothe (n 94 above) 227; C Gray ‘The U.S. National Security Strategy and the new ‘Bush Doctrine’ on pre-emptive self-defence’ (2002) 1 *Chinese Journal of International Law* 437; 14<sup>th</sup> Summit of Heads of State or Government of the Non-Aligned Movement, Final Document, Havana, 11-16 September 2006, NAM 2006/Doc.1/Rev. 3

<sup>326</sup> Lubell (n 7 above) 63;

<sup>327</sup> Green (n 175 above) 98-100.

<sup>328</sup> UN Doc S/PV. 2281, 21; UN Doc S/PV. 2283, 22; 14<sup>th</sup> Summit of Heads of State or Government of the NON-Aligned Movement; High-Level Panel report, para 188-192; Secretary General, In Larger Freedom, para 122-126.

thus, amount to disregarding the foundational ban on the use of force under article 2(4) of the Charter. If self-defence is not constrained by subjecting it to the requirement of imminence, conflicts may increase,<sup>329</sup> thereby making states go down a dangerous path as they continue to chase obscure threats.<sup>330</sup> Further arguments in opposition to the use of pre-emptive force were to the effect that pre-emption may be employed by way of a pretext for unprovoked aggression, and, therefore, has the potential to be abused.<sup>331</sup> The fear of some western states of the possibility of being struck first may encourage them to abuse pre-emptive self-defence, if this is condoned.<sup>332</sup>

States have been condemned for the application of the use of force in pre-emptive self-defence which remains illegal in international law. To that extent, firstly, the Israeli application of pre-emptive force against other states in the absence of imminent threats has been condemned.<sup>333</sup> Specifically, its use of force in purported self-defence against Iraq's Osiraq reactor was condemned and construed to be an act of aggression because the nuclear plant posed no imminent threat to the survival of Israel.<sup>334</sup> Even the mere possession of WMD does not constitute an infraction of international law since the development or possession of nuclear weapons has not been accepted as constituting an armed attack.<sup>335</sup> Iran argued that in the circumstances where Iraq was weighed down for bearing the burden of sanctions for over twelve years, it posed no threat and, therefore, the unilateral attack by Israel was unlawful.<sup>336</sup> More succinctly put, the Israeli attack on Iraq was illegal because reliance on emerging threats as a basis for self-defence is contrary to both the intention of the UN Charter and customary international law encapsulated in the Caroline incident.<sup>337</sup> Despite these criticisms, Israel's application of pre-emptive force in 1967 was devoid of similar weighty reactions from the international community. Israeli pre-emptive strikes on 6 May 1967, which started the six day war in response to the actual movement of about

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<sup>329</sup> D McGoldrick *From 9/11 to the Iraq War* (2003) 76.

<sup>330</sup> High Level Panel Report, paras 188- 192.

<sup>331</sup> Lubell (n 7 above) 62; Cassese (n 274 above) 361.

<sup>332</sup> Higgins (n 220 above) 442.

<sup>333</sup> S/RES/487 of 19 June 1981; Bothe (n 104 above), 237; Higgins (n 220 above) 443.

<sup>334</sup> A D'Amato 'Israel's air strike against the Osiraq reactor: A retrospective' (1996) 10 *Temple International & Comparative Law Journal* 259, 261; Higgins (n 220 above) 443; Green (n 175 above) 98.

<sup>335</sup> ME O'Connell & RE Molla 'The prohibition on the use of force for arms control: The case of Iran's nuclear program' (2013) *Penn State Journal of Law and International Affairs* 315, 318; *Nuclear Weapons case* (n 88 above), para 49-73.

<sup>336</sup> UN Doc. S/PV. 4726, 33.

<sup>337</sup> A Eckert & M Mofidi 'Doctrine or doctrinaire: The first strike doctrine and pre-emptive self-defence under international law' (2004) 12 *Tulane Journal of International & Comparative Law* 145; Mulcahy & Mahony (n 270 above) 236.

100,000 Syrian troops and military preparations by Egypt in respect of the Straits of Tiran, was not condemned.<sup>338</sup> According to Lubell, unlike the Osiraq attack, Israel had no option other than to defend itself because an attack on it was imminent as could be discerned from the preparations of its adversaries.<sup>339</sup>

In this study's respectful view, the preponderance of legal scholarship appears to weigh in support of the argument that pre-emptive self-defence is unlawful for being at variance with both the UN Charter and customary international law. The argument that international law is created through the consent of sovereign states, and that they 'can do as they choose unless they have consented to a rule restricting their behaviour', including the use of pre-emptive force, cannot be sustained.<sup>340</sup> The Charter provisions of the non use of force have been ascribed a customary character and are binding on all states including non members.<sup>341</sup> Arguably, if the transformation of the law of self-defence which this study interrogates is to be determined from the lawfulness or otherwise of pre-emptive self-defence alone, it could have been argued here and now that the law of self-defence has not been transformed.

#### **3.4.6. Attribution requirement**

It was settled, based on the jurisprudence of the ICJ, that the acts of non-state actors which qualify as armed attacks because of their scale and effect must still be imputed to a state to trigger an action in self-defence.<sup>342</sup> Every internationally wrongful act of a state entails the international responsibility of that state.<sup>343</sup> Any breach of an international obligation or law, such as the violation of article 2(4) of the UN Charter, therefore, triggers international responsibility, particularly in respect of the state against which the wrongful act was committed.<sup>344</sup> The state functions through human elements, and, therefore, the conduct of any state organ can be considered to be an act of such a state under international law.<sup>345</sup> The

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<sup>338</sup> Higgins (n 220 above) 443.

<sup>339</sup> Lubell (n 7 above) 62.

<sup>340</sup> AC Arend 'International law and the pre-emptive use of military force' (2003) 26 *The Washington Quarterly* 93.

<sup>341</sup> Art 2(6) of the UN Charter provides: 'The Organisation shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.'

<sup>342</sup> Dunlap (n 194 above) 465; M Glennon (n 195 above) 543; Cenic (n 195 above) 201-202, 204; Garwood-Gowers (n 195 above) 5.

<sup>343</sup> Art 1 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (DASR), 2001.

<sup>344</sup> Commentary to Art 1 of the DASR (n 343 above).

<sup>345</sup> Art 4(I) of the DASR (n 343 above) provides: 'The conduct of any state organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any

category of persons that can function as state organs may include those who perform legislative, executive, judicial or other functions that may bind the state.<sup>346</sup> Such state organs whose conduct can bind the state must have been so provided in the internal or domestic laws of such a state.<sup>347</sup> While these state organs or representatives who act on behalf of the state could bind the state,<sup>348</sup> the acts of private individuals or NSAs cannot create responsibility for the state.<sup>349</sup> There are instances in which the wrongful conduct of individuals, groups or NSAs may, however, be attributed to a state. For a private actor to be equated with a state organ, it must be shown that such a private actor depends completely on the state or is under the strict control of the state.<sup>350</sup> According to Nielsen, “under this test, the NSAs must be ‘lacking any real autonomy’ and ‘the bond between the state and the NSAs must be shown to be so substantial and pervasive that it is virtually indistinguishable from the legal relationship between a state and its own officials’”.<sup>351</sup>

Firstly, for a conduct of NSAs to be attributed to a state with a view to ascribing responsibility to that state, such a NSA must have acted in accordance with the instructions, direction or control of that state.<sup>352</sup> The acts of individuals or NSAs may be deemed as falling within the effective control of the state only if the state directed or controlled the specific operation complained about, that is the state must be an active participant.<sup>353</sup> Conversely, conduct which is merely incidental or peripheral in relation to the operation and is not under the state’s strict direction or control cannot be attributed to the state.<sup>354</sup> General dependence on a state by NSAs and mere support by a state is, therefore, not sufficient to justify attribution of the conduct of the NSA to the state.<sup>355</sup> The degree of control required to be

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other functions, whatever position it holds in the organisation of the state, and whatever its character as an organ of the Central Government or of a territorial unit of the state’.

<sup>346</sup> Art 4(1) of the DASR (n 343 above).

<sup>347</sup> Art 4(2) of the DASR (n 343 above).

<sup>348</sup> Articles 4 & 7 of the DASR (n 343 above).

<sup>349</sup> J Crawford & S Olleson ‘The nature and forms of international responsibility’ in MD Evans (ed.) *International law* (2010) 453-455.

<sup>350</sup> Art 8 of the DASR (n 343 above); E Nielsen ‘State responsibility for terrorist groups’ (2010) 17 *University of California, Davis* 158.

<sup>351</sup> Nielsen (n 350 above) 159; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia & Herzegovina. v Serbia & Montenegro) Feb. 26, 2007, 46, ILM. 188 (2007) 394.

<sup>352</sup> Art 8 of the DASR provides that: ‘The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct; T Ruys & S Verhoeven ‘Attacks by private actors and the right of self-defence’ (2005) 10 *Journal of Conflict & Security* 300; *Nicaragua case* (n 91 above) para 109, 155.

<sup>353</sup> Cenik (n 195 above) 202.

<sup>354</sup> Commentary on Art 8 of the DASR (n 343 above).

<sup>355</sup> *Nicaragua case* (n 91 above) para 109, 115, where the Court held, ‘All the forms of United States participation mentioned above, and even the general control by the Respondent State over a force with a

exercised to bring the conduct of a NSA within the responsibility of a state is not merely a general control, but effective control.<sup>356</sup>

In the *Tadic* case<sup>357</sup>, however, the tribunal disagreed with the high threshold for attribution, which is effective control, and instead decided that the threshold for attribution varies with the facts of each case.<sup>358</sup> It held that overall control is sufficient to bring the conduct of an organised NSA within the responsibility of a state. This is because the tribunal distinguished between the degree of control required for private individuals and that for organized armed groups that have a command structure.<sup>359</sup> For organised armed groups, it observed that the state's involvement may be limited to financial, logistical, coordination and military assistance, but not to the planning of particular operations, identifying specific targets and giving specific orders. Though there is general alliance with the state, the NSA exercises its autonomy with regard to specific tactics.<sup>360</sup> On the other hand, private individuals are said to require effective control for the conduct to be attributed to a state. The contemporary position of the law, however, remains the 'effective control' standard even for organized non-state armed groups, and this reasoning was confirmed by the ICJ in the *Genocide Convention case*.<sup>361</sup> A state may, therefore, be responsible for the conduct of a NSA if it acts in accordance with its instruction or under its effective control.<sup>362</sup> As far as case law is concerned, the ICJ jurisprudence reflects the law, but that position appears to have lost its potency because state practice has manifested a lowered threshold for attribution. The lowered threshold being that merely hosting a NSA is sufficient to impute its conduct to a

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high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed and enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the Applicant State. Such acts could well be committed by members of the Contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that state had effective control of the military or paramilitary operations in the course of which the violations were committed.'

<sup>356</sup> Commentary on Art 8 of the DASR (n 343 above); *Nicaragua case* (n 91 above) para 109, 115.

<sup>357</sup> *Prosecutor v Dusko Tadic, International Tribunal for the Former Yugoslavia*, Case IT-94-1-A (1999) paras 131, 132 & 137.

<sup>358</sup> Commentary to Art 8 of the DASR (n 343 above).

<sup>359</sup> A Cassese 'Symposium: Genocide, human rights and the ICJ: The Nicaragua and Tadic tests revisited in light of the ICJ Judgment on genocide in Bosnia' (2007) 18 *European Journal of International Law* 649; Cenic (n 195 above) 205-206.

<sup>360</sup> Nielsen (n 350 above) 161; *Tadic case* (n 357 above) 131, 132, 137, 145; *Prosecutor v Delalic et al*, Case No: IT-96-21-A, Judgment, (Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia), 20 February 2001, 42, 47.

<sup>361</sup> *Genocide Convention case*, (n 351 above) 46 I.L.M. 188 (2007) paras 400, 405-407; RL Johnstone 'State responsibility: A concerto for court, council, and committee' (2008) 37 *Denver Journal of International Law & Policy* 63, 64; Nielsen (n 350 above) 161-162.

<sup>362</sup> Nielsen (n 350 above) 161.

state and not effective control, hence the law on self-defence is said to have been transformed.

Cassese has criticised the rejection of the overall control test formulated by him in the *Tadic case*. He is of the view that both the effective control test of the ICJ, which the *Tadic case* did not reject, and the overall control test address different scenarios and are relevant. He stated: ‘I believe that the two tests are admissible on the crucial grounds that both are envisaged (and supported) by case law and practice, which assigns to each test a different scope and purport.’<sup>363</sup> In his view, the flexibility inherent in the overall control test is better for evaluating the standard of assessing state responsibility, particularly in a dangerous world where states provide extensive support to military and paramilitary groups or armed bands fighting abroad or at home.<sup>364</sup> This study considers that Cassese’s opinion is persuasive. If a state provides support to armed groups by financing, equipping, arming and training, knowing that such support will be used in the furtherance of the group’s criminal enterprise, what other additional commitment of the state is required to show that it is in control of such a group? For instance, a good example is the support for the Janjaweed Militias by the Sudanese government which Cassese himself cited.<sup>365</sup> As Cassese has shown, the overall control test is better suited to attribute the conduct of terrorist groups to states because of the difficulty of proving that instructions or directions in consonance with the effective control test were given.<sup>366</sup>

Secondly, apart from the instances indicated above, the private acts of individuals or other NSAs may be attributed to a state if such a state ‘sanctions, acknowledges or adopts’ the conduct of such non-state actors.<sup>367</sup> This happens when a state, which was not in control of

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<sup>363</sup> Cassese (n 359 above) 657-661.

<sup>364</sup> Cassese (n 359 above) 665.

<sup>365</sup> United Nations International Commission of Inquiry Report on Sudan, paras 98-126, 225-418.

<sup>366</sup> Cassese (n 359 above) 666, where he stated: ‘How could one prove that a particular terrorist group has acted upon instructions or directions or under the specific control of a state in such a manner as to imply that the state has specifically directed the perpetration of individual terrorist acts? The hidden nature of those groups, their being divided into small and closely-knit units, the secretive contacts of officials of some specific states with terrorist groups, all this would make it virtually impossible to prove the issuance of instructions or directions relating to each terrorist operation. If one instead relies upon the ‘overall control’ test, it suffices to demonstrate that certain terrorist units or groups are not only armed or financed (or also equipped and trained) by a specific state or benefit from its strong support, but also that such state generally speaking organizes or coordinates or at any rate takes a hand in coordinating or planning its terrorist actions (not necessarily each terrorist operation).’

<sup>367</sup> Art 11(1) of the DASR (n 343 above) provides: ‘Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own’; Ruys & Verhoeven



the activities of NSAs, adopts by its conduct or utterances actions of such non-state actors after the fact. Brown calls such attribution a ‘responsibility by endorsement.’<sup>368</sup> For instance, the diplomatic crisis between the US and Iran fall under such kinds of state responsibility, where Iran was attributed responsibility for the conduct of students who acted under the name of the ‘Muslim Student Followers of the Imam’s Policy.’<sup>369</sup> Iran’s endorsement or adoption of the acts of the students was manifest because both Ayatollah Khomeini and the Iranian Foreign Minister endorsed the conduct of the students. All through the operation in which the students over-ran the US Embassy and which lasted more than three hours, all security personnel were absent from the scene. In addition, no Iranian military official intervened to avert the siege, and, yet, Iran had made efforts in the past and thereafter to halt such attacks.<sup>370</sup>

The previous position of the law which can be discerned from the above is that a state does not bear responsibility for its passive conduct, but must take positive steps to assist a NSA before such conduct by a NSA can be attributed to it. Commentators, therefore, argued that merely condoning or tolerating a NSA in its territory cannot give rise to state responsibility by attributing the conduct of the non-state actor to the state.<sup>371</sup> For instance, the US military operations in Afghanistan against the Taliban were based on the allegation that the Taliban made it possible for the use of its territory by Al Qaeda.<sup>372</sup> Brown describes the passive role of the Taliban as ‘vicarious responsibility’.<sup>373</sup> This passive role which the US touted as justification for self-defence against the Taliban would have been condemned previously

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(n 352 above) 301, 307; Barbour & Salzman (n 267 above) 71; G Travalio & J Attenburg ‘Terrorism, state responsibility and use of military force’ (2003) *Chicago Journal of International Law* 97, 104.

<sup>368</sup> D Brown ‘Use of force against terrorism after September 11<sup>th</sup>: State responsibility, self-defence and other responses’ (2003) 11 *Cardozo Journal of International & Comparative Law* 10.

<sup>369</sup> *United States Diplomatic and Consular Staff in Tehran (United States v Iran)* 1980 1CJ Reports para 74, in which the occupation of the US Embassy and taking hostage of its staff in Tehran by students were attributed to the Islamic Republic of Iran. While the initial invasion of the Embassy was not attributable to Iran, the public approval of the conduct of the students by Ayatollah Khomeini (the Iranian spiritual head), saying that the hostages were prisoners amounted to acknowledging and adopting the conduct of the students as an act of state. To that extent, the Court held that Iran had engaged international responsibility for the subsequent occupation; see also Brown (n 368 above), 10; see also G Dutra & JB Brandao ‘Historical security council topic b: Resolving the Iranian Hostage crisis (1979)’, at [http://salmun2014.weekly.com/uploads/6/4/9/5/6495341/historical\\_iran.pdf](http://salmun2014.weekly.com/uploads/6/4/9/5/6495341/historical_iran.pdf) (accessed 16/03/2016). it was reported that Khomeini supported the seizure of the US embassy through a statement issued on radio that called the hostage crisis ‘the second revolution’ and the US embassy an ‘American spy den in Tehran’.

<sup>370</sup> Brown (n 368 above) 10-11.

<sup>371</sup> Glennon (n 195 above) 543; Dunlap (n 194 above) 465.

<sup>372</sup> Dunlap (n 194 above), 466; Letter from USA’s representative to the UN dated 7 October 2001 to the Security Council.

<sup>373</sup> Brown (n 368 above), 13.

because the settled law requires a state to play an active role in supporting terrorists for international responsibility to be engaged.<sup>374</sup> The requirement of an active role for the purpose of attribution appears to be challenged particularly following the 9/11 attacks, culminating in the attribution of responsibility for passive support to terrorists,<sup>375</sup> thereby showing that the law of self-defence has been transformed. This issue is evaluated in chapter six below.

The question that arises then is whether the Taliban exercised effective control over Al Qaeda by directing its activities<sup>376</sup> or whether the Taliban acknowledged and adopted the conduct of Al Qaeda as its own,<sup>377</sup> which may culminate in international responsibility for the Taliban. Arguably, the Taliban was not in effective control of Al Qaeda and did not also acknowledge and adopt the conduct of Al Qaeda following the 9/11 attacks on the US. The Taliban rather dissociated itself from Al Qaeda and claimed that it did not act as its organ or agent.<sup>378</sup> For the US to allege responsibility on the part of the Taliban for the unconnected conduct of Al Qaeda, in this study's view, appears to be introducing a new element to the law of attribution or self-defence. It can be interpreted to mean that merely harbouring a non-state actor triggers international responsibility,<sup>379</sup> which is a departure from the reasoning of the *Nicaragua case* and the ILC in its DASR of 2001. This study will accordingly argue that indeed state practice has culminated in the transformation of the law of self-defence and the change introduced by the US and Israel has crystallised into a customary norm of international law.

The gist of the above argument is whether overall control was sufficient to attribute the conduct of a NSA to a state as against the effective control standard contained in the jurisprudence of the ICJ to trigger an action in self-defence. This view that the conduct of a

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<sup>374</sup> Cenic (n 195 above) 202.

<sup>375</sup> Cenic (n 195 above) 202.

<sup>376</sup> Art 8 of the DASR (n 343 above).

<sup>377</sup> Art 11(1) of the DASR (n 343 above).

<sup>378</sup> Roggio (n 229 above).

<sup>379</sup> The National Security Strategy of the United States 2002; Section 2 of the Authorization for the Use of Military Force (AUMF), Pub. L. No.107-40, 225 Stat 224 (2001), 'The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.'

NSA be attributable is held sacred by the followers of the ICJ, such as Tladi,<sup>380</sup> Melia<sup>381</sup> and O’Connell.<sup>382</sup> According to Tladi, an armed attack contemplated under article 51 should emanate from a state or be attributed to a state as determined by the ICJ,<sup>383</sup> and that outside that, any use of force against NSAs may find justification under the paradigm of law enforcement which requires the consent of the territorial state and not under self-defence.<sup>384</sup> He submitted:

Given the very clear line of reasoning by the Court that an attack by a non-state actor without attribution to a state cannot justify the use of force against the territory of another state, any assertion that a state can exercise force in self-defence against non-state actors, on the territory of an innocent state without the latter’s consent, must be properly probed.<sup>385</sup>

There is, however, a proposal of a move to depart completely from, or to dispense with, the attribution requirement for the NSA’s conduct to trigger a response in self-defence. The reasoning being that international law has progressed to a contemporary practice where defensive force may sometimes be lawfully employed against NSAs, independent of attribution to another state.<sup>386</sup> This suggestion, if supported, has the capacity to substantially transform the law of self-defence and is represented by Reinold. He contends that the emerging trend is that private acts need not be attributed to states, and that the conservative approach of the ICJ<sup>387</sup> is increasingly becoming out of touch with post 9/11 state practice.<sup>388</sup> While not advocating a complete disregard of the attribution requirement, Hakimi argued, while relying on the use of force against ISIL and Khorasan group in Syria, that the absolute prohibition of the use of force against NSAs is losing ground or legal traction.<sup>389</sup> In balancing the sovereignty interest of the territorial state against the rights of the victim state, Hakimi adopted three grounds upon which the use of force against non-state actors may be permitted.<sup>390</sup> They include: (a) the territorial state actively supports or harbours the non-state actors, or lacks governance authority in the area from which they operate; (b) the territorial

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<sup>380</sup> D Tladi ‘The non-consenting innocent state: The problem with Bethlehem’s Principle 12’ (2013) 107 *American Journal of International Law* 570-576.

<sup>381</sup> MC Melia ‘Terrorism and criminal law: The dream of prevention, the nightmare of the rule of law’ (2011) 14 *New Criminal Law Review* 112.

<sup>382</sup> ME O’Connell ‘Dangerous departures’ (2013) 107 *American Journal of International Law* 380-383.

<sup>383</sup> Tladi (n 380 above) 574; Tladi (n 119 above) 75-76.

<sup>384</sup> Tladi (n 380 above) 576.

<sup>385</sup> Tladi (n 380 above) 572; see also Tladi (n 119 above) 76.

<sup>386</sup> Reinold (n 108 above) 285.

<sup>387</sup> *Palestinian Wall case* (n 91 above) para 139; *DRC case* (n 140 above) para 146.

<sup>388</sup> Reinold (n 108 above) 285.

<sup>389</sup> M Hakimi ‘Defensive use of force against non-state actors: The state of play’ (2015) 91 *International Law Studies* 21, 25 & 30.

<sup>390</sup> Hakimi (n 389 above) 7.

state is unable or unwilling to address the threat that the non-state actors pose; and (c) the threat is located in the territorial state.<sup>391</sup>

### 3.5. Features of the right of self-defence under article 51

The concept of self-defence has certain features that are contained under article 51 of the UN charter and they include, inherent right, individual and collective self-defence, duty to report self-defence and duration of self-defence.

#### 3.5.1. Inherent right

The inherent right of states to self-defence is founded on the basic instinct and man's determination for survival codified under article 51 of the Charter.<sup>392</sup> Its origin is in natural law which recognises self-preservation and protection. This natural right of the individual or state cannot be abrogated even by positive law.<sup>393</sup> The scope and extent of the right is, however, unclear and problematic, and for this reason several interpretations have been given to the inherent right of self-defence.<sup>394</sup> The right is described as inherent because it was considered intrinsic and inviolable to all states and derives from the sovereignty of states.<sup>395</sup> The inherent right has been available to states both before and after the establishment of the UN in 1945, and subject only to the customary law principles of necessity, proportionality and immediacy.<sup>396</sup> 'Nothing in the present Charter impairs' means that no provision, including articles 2(4) and 51, can validly impair the efficacy of the inherent right to self-defence which is customary and predates the UN Charter.<sup>397</sup> To that extent, it was argued that self-defence is activated whenever an armed attack occurs or is imminent and there is a necessity to respond to it.<sup>398</sup> The inherent right of self-defence was first specifically provided for in a multilateral treaty in the UN Charter.<sup>399</sup> Prior to the Charter regime, the inherent right of self-defence was considered intrinsic and implicit, and,

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<sup>391</sup> Hakimi (n 389 above) 7.

<sup>392</sup> Arai-Takahashi (n 134 above) 1083.

<sup>393</sup> Schachter (n 2 above) 259.

<sup>394</sup> G Melling 'Book Review: Murray Colin Alder, *The inherent right of self-defence in international law* (2004) 1 *Journal on the Use of Force and International Law* 198.

<sup>395</sup> MC Alder 'The origin of international law of the inherent right of self-defence and anticipatory self-defence' *The Western Australian Jurist* 108.

<sup>396</sup> Melling (n 394 above) 201.

<sup>397</sup> Hamid (n 210 above) 453.

<sup>398</sup> Melling (n 394 above) 202.

<sup>399</sup> Alder (n 395 above) 108.

therefore, needed not to be specifically provided for in treaties.<sup>400</sup> That reasoning was responsible for the absence of any such provision in the League of Nations Covenant and the Kellogg-Briand Pact,<sup>401</sup> as already indicated in chapter two above.

The interpretations given to the principle of inherent right have made it controversial. Two schools of thought exist. The one school advocates a wide right of self-defence and argues that article 51 of the UN Charter preserves the customary right of self-defence which existed before the Charter regime. The right of self-defence which is 'inherent' is not, therefore, limited to the occurrence of an armed attack.<sup>402</sup> They argue that the customary right of self-defence which existed prior to the UN Charter system has not been extinguished by the Charter, and, therefore, anticipatory self-defence is lawful.<sup>403</sup> The other school argues that, according to article 51, self-defence is activated only upon the occurrence of an armed attack. Consequently the limitations contemplated by article 51 will be meaningless if the wider customary law right of self-defence remains unimpaired.<sup>404</sup> The scope of the customary law right of self-defence, according to this school, is unclear, and, if allowed, may accommodate self-help, thereby expanding the unilateral use of force which the Charter system seeks to curtail.<sup>405</sup> The right being 'inherent' means only that the right of self-defence is also available to non-members of the UN who may be assisted by UN members in the event of an armed attack on them.<sup>406</sup>

They contend further that the 'inherent right' language is irrelevant and a dead natural law principle.<sup>407</sup> The question then is, 'did the drafting history of article 51 support a restricted or a wider interpretation which allows anticipatory self-defence by virtue of the right of self-defence being an inherent one?' When the customary principle of the inherent right of self-defence was qualified by the phrase 'if an armed attack occurs' during of the drafting of the Charter, it was queried by delegates.<sup>408</sup> In response, Governor Harold Stassen, the leader of the American delegation stated, 'this was intentional and sound. We did not want exercised

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<sup>400</sup> Alder (n 395 above) 109. DK Linnan 'Self-defence, necessity and UN collective security: United States and others views' (1991) 51 *Duke Journal of Comparative and International Law* 63-64.

<sup>401</sup> Linnan (n 400 above) 63-64.

<sup>402</sup> Gray (n 38 above) 117.

<sup>403</sup> Gray (n 38 above) 118; SM Schwebel 'Aggression, intervention and self-defence in modern international law, (1992-11) 136 *Recueil des Cours de l'Academie de Droit International (RCADI)* 463.

<sup>404</sup> Gray (n 36 above) 118.

<sup>405</sup> Simma *et al* (n 2 above) 1403.

<sup>406</sup> Simma *et al* (n 2 above) 1403.

<sup>407</sup> Linnan (n 400 above) 69.

<sup>408</sup> Franck (n 13 above) 50.

the right of self-defence before an armed attack had occurred.<sup>409</sup> Franck argued that the qualification which the San Francisco conference adopted was a myopic view because it had no regard for advances in the technology of war and the emergence of surrogate warfare.<sup>410</sup>

### 3.5.2. Individual and collective self-defence

Article 51 of the UN Charter provides for individual or collective self-defence as a right of states, but not as a duty unless such collective defence is rooted in a bilateral or multilateral treaty outside of the Charter.<sup>411</sup> It provides not only for the individual victim state of an armed attack to defend itself, but it also created a right of third friendly states to join the victim state upon request by the victim state to embark collectively on self-defence.<sup>412</sup> The defence being ‘collective’ does not mean that all states in the collective enterprise must have suffered an armed attack, but it merely creates a right of third states to assist an injured state.<sup>413</sup> An intervening state must, however, keep its actions within the limits of those actions the requesting state itself may legally take.<sup>414</sup> An armed attack in terms of article 51 is required to ignite either individual or collective self-defence.<sup>415</sup> The provision of individual and collective self-defence in the Charter was done to infuse the Inter-American system of collective self-defence contained in the Act of Chapultepec which reflected regional arrangements.<sup>416</sup> The right of collective self-defence was to be invoked by states that were bound by regional or specific treaty ties.<sup>417</sup> Similar to article 51 of the UN Charter, constitutive instruments of some regional organisations have provided for collective self-defence against external aggression.<sup>418</sup> State practice has, however, shown that even states without any form of regional affinity could also invoke article 51.<sup>419</sup>

An intervening third state cannot on its own assessment exercise its right of collective self-defence on behalf of an injured state and does not have any responsibility to determine

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<sup>409</sup> Franck (n 13 above) 50.

<sup>410</sup> Franck (n 13 above) 50.

<sup>411</sup> Kunz (n 94 above) 875; Art 5 of the North Atlantic Treaty.

<sup>412</sup> Art 51 of the UN Charter.

<sup>413</sup> Simma *et al* (n 2 above) 1420; R Mushcat ‘Who may wage a war: An examination of an old/new question (1987) 2 *American University Journal of International Law & Policy* 146- 150.

<sup>414</sup> A Orakhelashvili *Collective security* (2011) 280-281.

<sup>415</sup> Green (n 175 above) 51.

<sup>416</sup> Kunz (n 94 above) 872.

<sup>417</sup> Kunz (n 94 above), 874.

<sup>418</sup> Art 5 of the North Atlantic Treaty; Arts IV & V of the Security Treaty between Australia, New Zealand and the United States of America (ANZUS) 1951; Arts 2(e) & 3(h) of the Charter of the Organisation of American States; Art 4(d) of the Constitutive Act of the African Union 2000.

<sup>419</sup> RA Falk *The Vietnam war and international law, Volume 4: The concluding phase* (2015) 137.



whether or not there was an armed attack.<sup>420</sup> But it is incumbent on the victim state which employs self-defence to determine<sup>421</sup> and prove that there was an actual armed attack against its territory.<sup>422</sup> For instance, the ICJ has held that it was not incumbent on the US to determine whether an armed attack occurred against El Salvador, on whose behalf it was involved in collective self-defence against Nicaragua.<sup>423</sup> According to the *Nicaragua case*, El Salvador did not declare itself to be under an armed attack until shortly before the commencement of proceedings in court.<sup>424</sup> Furthermore, the victim of an armed attack must expressly request assistance from other states because it is not appropriate for third states to justify their involvement in collective self-defence by implying a request that is not expressly conveyed to them.<sup>425</sup> The Court, therefore, concluded that the conditions *sine qua non* required for the exercise of collective self-defence, including the US allegation of armed attacks on El Salvador, Honduras and Costa Rica, were absent.<sup>426</sup> The US had earlier alleged that Nicaragua's Sandinista regime channelled arms through its territory to aid the overthrow of the Government of El Salvador. For this reason, the US argued it was entitled to exercise its inherent right of collective self-defence in support of El Salvador.<sup>427</sup>

While controversies exist as to whether a request by a victim state of an armed attack be addressed to specific third states or to all states in the world, the weight of legal scholarship appears to favour the argument that the request to join in collective self-defence be specifically addressed to individual third states.<sup>428</sup> Some scholars, however, have opposed this approach as being too restrictive. They argue that limiting the invitation to specific states, and not addressing it to willing states of the international community as a whole, results in an unnecessary constraint on the inherent right of collective self-defence contemplated under article 51 of the UN Charter.<sup>429</sup> Arguably, limiting the invitation to specific states as may be determined by the victim of an armed attack remains the better

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<sup>420</sup> Z Modabber 'Collective self-defence: Nicaragua v USA' (1988) 10 *Loyola Los Angeles International & Comparative Law Review* 461-462.

<sup>421</sup> Simma *et al* (n 2 above) 1421; Green (n 175 above) 5; Modabber (n 420 above) 460-461.

<sup>422</sup> Simma *et al* (n 2 above) 1406; *Oil Platforms case* (n 170 above) para 57.

<sup>423</sup> *Nicaragua case* (n 91 above) para 195, where it held: 'There is no rule in customary international law permitting another state to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the state for whose benefit this right is used will have declared itself to be the victim of an armed attack.'

<sup>424</sup> *Nicaragua case* (n 91 above) para 233.

<sup>425</sup> Green (n 175 above) 52; *Nicaragua case* (n 91 above) para 199; *DRC case* (n 140 above) para 128.

<sup>426</sup> *Nicaragua case* (n 91 above) para 238; Modabber (n 420 above) 465.

<sup>427</sup> Modabber (n 420 above) 450.

<sup>428</sup> *Nicaragua case* (n 91 above) para 196; Green (n 175 above) 52-53.

<sup>429</sup> *Nicaragua case* (n 91 above), dissenting opinion of Judge Jennings, para 545; also dissenting opinion of Judge Schwebel, para 191.

view because the victim state is cognisant of the capabilities of the states it invites to repel the attack. If the invitation is left open, some states may abuse it by using such an opportunity to settle old scores and may not abide by the principles of proportionality. After all, the third state is not expected to ‘cry louder than the bereaved’, in this instance, the victim state of an armed attack. It does not lie on the lips of a third state to advocate the propriety of its being part of a collective self-defence enterprise.

### 3.5.3. Duty to report self-defence to the Security Council

Article 51 of the Charter requires that the measures taken by a state in self-defence be reported to the SC immediately.<sup>430</sup> Reporting gives the Council an opportunity to scrutinize the measures taken in self-defence with a view either to endorse or condemn an action in self-defence. If self-defence is justified, the Council may also take measures to complement the actions of the reporting state, which measures will mutually reinforce one another until peace is restored.<sup>431</sup> The SC may then determine the measures it will take to restore peace and also to appreciate whether the measures employed by the victim state conform to the requirements of necessity and proportionality.

Since the Nicaragua judgement, states have taken the issue of reporting measures employed in self-defence more seriously.<sup>432</sup> The US, which the *Nicaragua case* condemned, made a formal report to the SC in respect of *Operation Enduring Freedom*.<sup>433</sup> The requirement to report to the SC is not a customary law requirement. Failure to report measures taken in self-defence weakens a state’s genuine claim of self-defence<sup>434</sup> because it may show that the state itself is not convinced that it is acting in good faith.<sup>435</sup> For instance, the Nicaragua decision doubted the genuine involvement of the US in collective self-defence against Nicaragua because it did not notify the SC as required by article 51. This shows that the US itself was not convinced that it was employing self-defence without bad faith.<sup>436</sup> The US failure to report its self-defence against Nicaragua was construed by the ICJ as being in bad faith, but

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<sup>430</sup> Art 51 of the UN Charter; *Nicaragua case* (n 91 above) paras 200, 235.

<sup>431</sup> TD Gill ‘Legal basis of the right of self-defence under the UN Charter and under customary international law’ in T Gill & D Fleck (eds.) *The handbook of the international law of military operations* (2010) 195.

<sup>432</sup> Gray (n 36 above) 122-124; Dinstein (n 88 above) 239; Iwanek (n 3 above) 111.

<sup>433</sup> Letter of John Negroponte to the President of the Security Council, 7 October 2001, available at [http://avalon.law.yale.edu/sept11/un\\_006.asp](http://avalon.law.yale.edu/sept11/un_006.asp) (accessed 01/03/2015).

<sup>434</sup> Gray (n 36 above), 121; Alexandrov (n 142 above) 147-148.

<sup>435</sup> *Nicaragua case* (n 91 above) para 200; Gray (n 36 above) 121; Dinstein (n 88 above) 239-240; Simma et al (n 2 above) 1425.

<sup>436</sup> *Nicaragua case* (n 91 above) para 235; Modabber (n 420 above) 465.

the US subsequently accused Libya of acting in bad faith because of a failure to report its claim of self-defence to the SC.<sup>437</sup> Similarly, both Ethiopia<sup>438</sup> and Uganda<sup>439</sup> have relied on self-defence during incursions into territories of other states, but they failed to report the measures they had taken in self-defence to the SC. While Ethiopia employed self-defence against the UIC in the territory of Somalia, Uganda employed it against NSAs in the territory of the DRC. In Uganda's case, the ICJ construed Uganda's failure to report self-defence as an indication of the unlawful use of force.<sup>440</sup>

Though the failure by a state to report self-defence to the SC does not vitiate or invalidate its lawful claim to self-defence, it creates the impression that the state had acted in bad faith.<sup>441</sup> Generally, there is an obligation to report self-defence,<sup>442</sup> but reporting is only one of the factors relevant for the determination of legitimate self-defence. Failure to report does not, therefore, bar the SC from determining the legitimacy of self-defence.<sup>443</sup> In contemporary international relations between states, self-defence is very often reported by states not only when an action commences, but, in a prolonged self-defence action, states tend to report each episode as different measures are being employed.<sup>444</sup> Reporting each episode may also arise if a new state or new parties are added to the conflict.<sup>445</sup> Article 51 provides in part: 'Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the SC.'<sup>446</sup> Gray justifies the reporting of each episode by arguing that each episode employed in self-defence is expected to comply with the requirements of necessity and proportionality.<sup>447</sup> She contended further that the practice of reporting each episode has the advantage of propaganda with a view to creating a rebuttable

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<sup>437</sup> Following the Gulf of Sirte crisis between the US and Libya, the US contended that Libya had not acted in genuine self-defence, not having reported to the SC.

<sup>438</sup> Gray (n 36 above) 122, 247-248.

<sup>439</sup> *DRC case*(n 140 above) para 145. The ICJ observed that after Uganda had taken out forcible measures against DRC, which it considered as an action in self-defence in 1998, it failed to report such measures to the SC. The implication of Uganda's failure to report to the SC in consonance with Art 51 of the Charter is to the effect that Uganda itself, is not convinced that it was carrying out a genuine action in self-defence; see also Gray (n 36 above) 122.

<sup>440</sup> Gray (n 36 above) 122.

<sup>441</sup> Gray (n 36 above) 122; Alexandrov (n 142 above) 146.

<sup>442</sup> *Nicaragua case* (n 91 above) para 235.

<sup>443</sup> Alexandrov (n 142 above) 147; Dinstein (n 88 above) 241; see also Heyns report (n 99 above) para 93, where Heyns observed that: 'While failure to report will not render unlawful an otherwise lawful action taken in self-defence, 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.'

<sup>444</sup> Arai-Takahashi (n 134 above) 1088; Gray (n 36 above) 123

<sup>445</sup> Heyns report (n 99 above) para 94.

<sup>446</sup> Art 51 of the UN Charter.

<sup>447</sup> Gray (n 36 above) 123; see also Arai-Takahashi (n 134 above) 1088.

presumption that the reporting state is a victim of continuing armed attacks, thereby invariably receiving the sympathy of member states for its actions in self-defence.<sup>448</sup> Secondly, reporting different episodes shows that the acting state relies on self-defence for the justification of its action and not on the laws of war or any other paradigm.<sup>449</sup>

The measures taken by states in self-defence under article 51 are either overt or covert actions. According to Judge Schwebel, covert actions should not be reported so as not to bring them within the public domain. Reporting, in his view, is merely procedural which should not be allowed to displace the substantive right of self-defence.<sup>450</sup> Schwebel's distinction of covert from overt actions and the proposition that the reporting duty is unnecessary has no scholarly support. In his reactions to this view, Dinstein points out that the reporting duty is a blanket one and that distinguishing one from the other will be inconsistent with the provisions of the Charter.<sup>451</sup> On her part, Gray finds the argument of Schwebel in his dissenting opinion misconceived.<sup>452</sup> Relying on the *Nicaragua case*, Orakhelashvili also argued contrary to Schwebel's observation that reporting is a substantive condition of the right of self-defence, and he is of the view that failure to report may preclude a state from invoking self-defence.<sup>453</sup> Arguably, reporting of initial measures (even if not total measures) taken in self-defence may have little or no impact on a genuine action in self-defence because the Charter contemplates the commencement of self-defence before a duty to report arises.<sup>454</sup> This was clear from the reading of article 51 of the Charter and the Letter of the US permanent representative Negroponte to the UN.<sup>455</sup> If self-defence is unlawfully employed, but promptly reported to the SC, such a report will not reverse the illegality. Conversely, failure to report lawful self-defence may not be fatal to the case of a

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<sup>448</sup> Gray (n 36 above) 123-124.

<sup>449</sup> Gray (n 36 above) 124.

<sup>450</sup> Judge Schwebel's dissenting Opinion in the *Nicaragua case* (n 91 above), paras 7, 221-230; Gray (n 36 above) 121; Dinstein (n 88 above) 240.

<sup>451</sup> Article 51 of the UN Charter; Dinstein (n 88 above) 240.

<sup>452</sup> Gray (n 36 above) 121.

<sup>414</sup> Orakhelashvili (n 414 above) 280.

<sup>454</sup> Art 51 of the UN Charter.

<sup>455</sup> John Negroponte's Letter read in part: 'In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. In carrying out these actions, the United States will continue its humanitarian efforts to alleviate the suffering of the people of Afghanistan. We are providing them with food, medicines and supplies.'

victim state, provided other conditions *sine qua non* for the exercise of self-defence, such as ‘armed attack,’ are present.

It has been suggested that, for the avoidance of abuse, states should embark on self-defence only upon bringing before the SC concrete evidence of facts relating to an armed attack.<sup>456</sup> According to Arai-Takahashi, the absence of justifiable evidence that necessary conditions for self-defence are present may cause the SC to initiate coercive measures against the state that is purportedly acting in self-defence.<sup>457</sup> Arguably, the above suggestion by Arai-Takahashi is outside the contemplation of article 51 because an action in self-defence, in this study’s view, is not required to be preceded by reporting or bringing facts necessitating self-defence before the SC. While it is amenable to reason that a victim state relies on the factual evidence of the existence of an armed attack to employ self-defence, a state under intense attacks may immediately take defensive measures. It will be suicidal for such a state to wait and allow missiles to rain on it because of wanting to establish before the SC evidence of attack on its territory. While state practice has shown that reporting is a continuous responsibility for states where the action in self-defence is protracted by various episodes, article 51 requires that a report be made after defensive measures have been commenced.

#### **3.5.4. Duration of self-defence**

A victim state cannot sustain self-defence in another state’s territory *ad infinitum* because there must be an end to self-defence.<sup>458</sup> There appears to be no settled position of the law as to the actual duration of self-defence, but this depends on several factors. Principally, if the reaction of the SC upon receipt of a report of self-defence is swift and prompt and this culminates in the commencement of measures that restore international peace and security, the necessity of continued self-defence is completely removed.<sup>459</sup> In addition, the responsibility of determining sufficiency of measures taken in self-defence lies with the SC because, by virtue of its Chapter VII powers, it can endorse or terminate an on-going action in self-defence.<sup>460</sup> A state that has satisfied itself that its actions in self-defence have removed every imminent threat or repelled attacks that were on-going must discontinue its

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<sup>456</sup> Arai-Takahashi (n 134 above) 1095.

<sup>457</sup> J Kittrich ‘The right of individual self-defence in public international law (2008) *Logos Verlag Berlin GmbH* 93.

<sup>458</sup> TD Gill ‘When does self-defence end?’ in M Weller (ed.) *The Oxford handbook of the use of force in international law* (2015) 737.

<sup>459</sup> Gill (n 458 above) 746-747.

<sup>460</sup> Gill (n 458 above) 747.

self-defence action. The gravity and continuation of attacks or threats of attack may, however, prolong the duration of self-defence.<sup>461</sup> An action in self-defence is required to be an immediate response to an armed attack,<sup>462</sup> but, if the victim state allows an unreasonably long time to lapse, then such action can be taken only upon authorisation by the Security Council.<sup>463</sup>

Questions vary from whether self-defence terminates as soon as a report is lodged with the SC or whether self-defence, being an inherent right, continues until the SC takes adequate and effective steps to the satisfaction of the victim state.<sup>464</sup> Chayes contends that, once self-defence is reported to the SC, the victim state's right to self-defence terminates since the SC is the only body vested with powers by the Charter to take measures to restore peace.<sup>465</sup> Apart from agreeing with Chayes, Franck and Patel added that, in the event that the SC fails to address the problems of the victim state, the right to self-defence is activated again.<sup>466</sup> Secondly, it has been argued that there is concurrent application of measures by both the SC and the victim state because the victim state continues in self-defence until its own measures or those of the SC effectively repel the attack or remove the imminent threat.<sup>467</sup> While Schachter agrees with the contemporaneous nature of self-defence and SC measures, he adds that, although self-defence is an inherent right, it can still be taken away by the SC because, by virtue of article 51, it is not in any way expected to affect the authority and responsibility of the SC.<sup>468</sup>

Furthermore, a state determines without reference to the SC when to commence an action in self-defence and it may also cease its own operations on the grounds of having fulfilled the

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<sup>461</sup> Gill (n 458 above) 741.

<sup>462</sup> *Caroline incident* (n 8 above); Arai-Takahashi (n 134 above) 1089, has stated that: 'Action pursued in the course of self-defence must normally be an immediate response to an attack. An undue time lag may raise doubt as to compliance with the requirements of necessity and proportionality.'

<sup>463</sup> Gill (n 458 above) 746. action taken in the absence of necessity or which is disproportionate in the sense of exceeding what is required to repel an attack and forestall future attack within the proximate future, or which because of undue delay without reasonable grounds thereby extends the exercise of self-defence in temporal terms beyond what is required to repel the attack, loses its validity, and becomes unlawful use of force, irrespective of whether it was legal at the outset.

<sup>464</sup> Shah (n 104 above) 120.

<sup>465</sup> A Chayes 'The use of force in the Persian Gulf' in Damrosch & Scheffer (eds.) *Law and force in the new international order* (1991) 5; T Franck & Patel 'Police action in lieu of war: The old order changeth' (1991) 85 *American Journal of International Law* 63-74.

<sup>466</sup> Franck & Patel (n 465 above) 63-74; Shah (n 104 above) 122.

<sup>467</sup> D Greig 'Self-defence and the Security Council: What does Article 51 require?' (1991) 40 *International & Comparative Law Quarterly* 366-402 at 389; O Schachter 'United Nations in the Gulf conflict' (1991) 85 *American Journal of International Law* 458.

<sup>468</sup> Art 51 of the UN Charter; Schachter (n 467 above) 458; Arai-Takahashi (n 134 above) 1089.



purpose of the self-defence. The right of a state to continue its actions in self-defence or voluntarily terminate such actions is, however, without prejudice to the power of the SC to determine when to terminate self-defence.<sup>469</sup> This is because the SC has the power to determine the necessary measures it would take to maintain international peace and security even when an action in self-defence is on-going.<sup>470</sup> That apart, the UN centralised security system even empowers the SC to determine whether forcible measures in self-defence by a state were rightly taken or not.<sup>471</sup>

It is not amenable to reason that a victim state merely reports self-defence to the SC and suspends self-defence measures when the SC has not manifestly taken control.<sup>472</sup> This is because the anticipated SC measures may be militated by the veto of any of the five permanent members.<sup>473</sup> It has, however, been painfully observed in certain instances that the permanent members appear not to abide by some of these restrictions and continue in self-defence without inhibition from the SC. For instance, there are the sustained actions by the US in self-defence against Al Qaeda and the Taliban in the territory of Afghanistan for over thirteen years. Can the US provide concrete evidence to justify its continued operations, showing either that the attack of September 2001 is continuing or that the threat it posed has not been removed?<sup>474</sup> Arai-Takahashi argued that it is the SC alone that ought to undertake such prolonged operations.<sup>475</sup> Heyns and Knuckey also expressed reservations about the operations of the US when they stated: ‘It is difficult to see in most cases how targeted killings carried out in 2012 can be justified as a self-defence response to the September 11 terrorist attacks in the United States’.<sup>476</sup>

### 3.5. Consent of states

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.<sup>477</sup>

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<sup>469</sup> Azubuike (n 162 above) 149.

<sup>470</sup> Art 51 of the UN Charter; see also Azubuike (n 143 above) 149-150.

<sup>471</sup> Azubuike (n 162 above) 149.

<sup>472</sup> Shah (n 104 above) 122.

<sup>473</sup> Shah (n 104 above) 122.

<sup>474</sup> NATO has stated that *Operation Enduring Freedom* is the most protracted and sustained action of the Organisation since foundation, see Aljazeera, December 2014.

<sup>475</sup> Arai-Takahashi (n 134 above) 1089.

<sup>476</sup> C Heyns & S Knuckey ‘The long-term international law implications of targeted killing practices’ (2013) 54 *Harvard International Law Journal* 107.

<sup>477</sup> Art 20 of the DASR (n 343 above).

Apart from the Charter-based exceptions discussed above, there is also a customary law exception which is based on consent by a territorial state to another state, allowing it to use force legally on its territory.<sup>478</sup> This brings previously uninvolved states to fight opposition groups, although the intervener may not have any personal interest to protect and will not require any SC authorisation.<sup>479</sup> Codification of this customary law doctrine is found in some regional instruments as well.<sup>480</sup> In the African regional context, states may intervene in the territories of other states through a state's request for intervention to restore peace and security.<sup>481</sup> This is in consonance with article 4(j) of the AU Constitutive Act.<sup>482</sup> The right of a state to permit or invite another state to use force in its territory is considered a sovereign right of states which is not limited even by article 2(4) of the Charter.<sup>483</sup> Sovereign consent is important because the rules of international law binding upon states emanate from their own free will.<sup>484</sup> Such consent establishes an exception to the general prohibition of the use of force and absolves the invited state from any wrong doing, provided its conduct remains within the confines of the consent.<sup>485</sup> As Ronzitti points out, for consent to preclude the wrongfulness of the acting state's conduct, it must bear the following essentials: (a) it must be given prior to the intervention; (b) it must be given by the authority which can be said to express the will of the local state; (c) the local state's expression of will must be valid and not vitiated by so-called '*vices de volonte*'; (d) the action by the infringing state must be kept strictly within the limits of the consent given by the local sovereign authority; and (e) the infringing state must not violate an *erga omnes* obligation.<sup>486</sup>

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<sup>478</sup> S/RES/387 of 31 March (1976); J Odle 'Targeted killings in Yemen and Somalia: Can the United States target low-level terrorists?' (2013) 27 *Emory International Law Review* 630; Franck (n 13 above), 155-156; Samuel Doe, former Liberian President invited ECOWAS member states to use force in his territory against rebel forces of Charles Taylor and Yormie Johnson.

<sup>479</sup> E Lieblich *International law and civil war: Intervention and consent* (2013) 10.

<sup>480</sup> Art 4(h) of the Constitutive Act of the African Union, provides for 'the right of member states to request intervention from the Union in order to restore peace and security.'

<sup>481</sup> De Wet (n 15 above) 323.

<sup>482</sup> Art 4(j) of the Constitutive Act of the African Union.

<sup>483</sup> Dinstein (n 88 above) 120; A Abass 'Consent precluding State Responsibility: A critical analysis' (2004) 53 *International & Comparative Law Quarterly* 211-224; *DRC v Uganda* (n 140 above) para 198-199.

<sup>484</sup> AS Deeks 'Consent to the use of force and international law supremacy' (2013) 54 *Harvard International Law Journal* 9; see also L Henkin *International law: Politics and values* (1989) 27.

<sup>485</sup> Art 20 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the ILC, Art 20 provides: 'Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of the act in relation to the former State to the extent that the act remains within the limits of that consent'; Dinstein (n 88 above) 188.

<sup>486</sup> N Ronzitti 'Use of force, *jus cogens* and state consent' in A Cassese (ed.) *The current legal regulation of the use of force* (1986) 148.

Consent may be given to foreign forces for the purpose of restoring internal peace and security where peace is threatened by insurgency or terrorism, that is absent inter-state conflict.<sup>487</sup> Sometimes consent is not given to a foreign government for want of assistance to the territorial government, but it is granted for the safety of such foreign government to fight terrorists in another territory that may be launching attacks against it.<sup>488</sup> That was the case of the US and Afghanistan where the US was alleged to have been granted consent to fight against terrorists within Afghanistan.<sup>489</sup> In the opinion of this study, however, it appears that the US had no prior consent from Afghanistan before embarking on its operations in Afghanistan on 7 October 2001 following the 9/11 attacks on the US. It was long after the US military operations commenced in Afghanistan which were founded on the principle of self-defence under article 51 of the UN Charter, the US and Afghanistan entered into agreements and some memoranda.<sup>490</sup> While the 2003 Status of Forces Agreement (SOFA) addressed the issue of criminal jurisdiction over US military and civilian personnel involved in the operations in Afghanistan,<sup>491</sup> the other agreements generally expressed cooperation between the parties in the fight against Al Qaeda and its affiliates.<sup>492</sup> In spite of the fact that the memoranda were specific on the transfer of US detention facilities and the Afghanisation of special operations, the combined effect of the agreements, in this study's view, is the granting of consent to the US to use force in the territory of Afghanistan against terrorist NSAs.

It is, however, not clear where a territorial state considers itself willing or able to prevent attacks from its territory, but the acting or outside state sees it as being incapable of preventing or stopping attacks. For instance, while, previously, Pakistan denied giving either

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<sup>487</sup> Dinstein (n 88 above) 119.

<sup>488</sup> MN Schmitt 'Counter-terrorism and the use of force in international law (2002) 32 *Israel Yearbook of Human Rights* 53; Dinstein (n 88 above) 120.

<sup>489</sup> There were bilateral agreements subsequently formalised after 2001 between the USA and Afghanistan.

<sup>490</sup> United States-Aghan Status of Forces Agreement (SOFA) (2003); Memorandum of Understanding on the Transfer of U.S. Detention Facilities (2012); Memorandum of Understanding on the Afghanisation of Special Operations (2012); Enduring Strategic Partnership Agreement between the United States of America and the Islamic Republic of Afghanistan (2012); and Security and Defence Cooperation Agreement between the Islamic Republic of Afghanistan and the United States (2014).

<sup>491</sup> C Mason 'Status of Forces Agreement (SOFA): What is it, and how has it been utilised?' *CRS Report for Congress*, 15 March 2012.

<sup>492</sup> Art 2(4) of the Security and Defence Cooperation Agreement between the United States of America and the Islamic Republic of Afghanistan provides 'The Parties acknowledge that U.S. operations to defeat Al Qaeda and its affiliates may be appropriate in the common fight against terrorism. the Parties agree to continue their close cooperation and coordination towards those ends, with the intention of protecting U.S. and Afghan national interests without unilateral U.S. military counterterrorism operations.'

implicit or explicit consent to the US to use force in its territory,<sup>493</sup> it also denied that it was ‘unwilling or unable’ to prevent or stop terrorist attacks emanating from its territory as alleged by the US.<sup>494</sup> On its part, the US inferred Pakistan’s consent based on the CIA’s monthly fax to its Inter-Service Intelligence (ISI) counterpart and on Pakistan’s acceptance of ‘no fly zone’ over tribal areas.<sup>495</sup> Interesting arguments have also been made that the presence of US forces in Pakistan is legal and that the US does not require any separate consent from Pakistan on the grounds that, having ratified the UN Charter, Pakistan had given prior consent.<sup>496</sup> Paust argues that consent may be required in cases of ordinary law enforcement measures, but is not required for the selective use of self-defence which could even come under article 51.<sup>497</sup> Contrary to Paust’s view, however, the US has not founded its operations in Pakistan on self-defence, but rather on consent. While the principles of self-defence and consent complement each other,<sup>498</sup> relying on consent is a better rationale to use force. This is because, unlike self-defence, it is not subject to a rigorous proof of validity, such as its parameters of whether there was an armed attack, necessity or whether self-defence has been extinguished by passage of time.<sup>499</sup> While Gray observed that even SC authorised action requires consent of the host-state for the purpose of giving its cooperation,<sup>500</sup> Heyns considers it desirable that the SC even endorses self-defence.<sup>501</sup> In this study’s view, consent may not be subject to the strenuous proof of whether there was an armed attack, necessity or proportionality because as to whether an action is lawful may be seen from the point of view of the terms, limit or scope of the consent. Scope in this regard

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<sup>493</sup> C Woods ‘Taking stock of drone warfare’ *The Herald*, 14 November 2013; UN Rapporteur Emmerson Hails ‘historic Obama drone vow’ *BBC News Asia*, 24 May 2013, where it was reported that after a trip to Pakistan, Emmerson stated, ‘Pakistan does not consent to the use of drones by the United States on its territory and it considers this to be a violation of Pakistan’s sovereignty and territorial integrity’; O Bowcott ‘US drone strike in Pakistan, carried out without government’s consent’ *The Guardian*, 15 March 2013, available at <http://www.theguardian.com/world/2013/mar/15/us-drones-strikes-pakistan> (accessed 26/02/2015).

<sup>494</sup> DI Ahmed ‘Rethinking anti-drone legal strategies: Questioning Pakistani and Yemeni consent’ 2013 *Yale Journal of International Affairs*.

<sup>495</sup> C Woods ‘Drone strikes in Pakistan: Pakistan categorically rejects claim that it tacitly allows drone strikes’ *The Bureau of Investigative Journalism*, 28 September 2012.

<sup>496</sup> JJ Paust ‘Self-defence targeting of non-state actors and permissibility of US use of drones in Pakistan (2010) 19 *Journal of Transnational Law and Policy* 249, 257; see also Deeks (n 484 above) 9, where he stated ‘Article 24 of the UN Charter provides that Member States ‘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.’

<sup>497</sup> Paust (n 496 above) 249-250.

<sup>498</sup> Deeks (n 484 above) 14.

<sup>499</sup> Deeks (n 484 above) 14.

<sup>500</sup> Gray ‘Case study: Host-State consent and the UN peacekeeping in Yugoslavia’ (1996) 7 *Duke Journal of Comparative & International Law* 242.

<sup>501</sup> Heyns Report, 2013 (n 99 above), Recommendation B.

relates to the duration, geographical area of operation and the individuals or group to be targeted.

### 3.5.1. Who grants and revokes consent?

Only a central government or the highest authority of a state may grant consent for the use of its territory,<sup>502</sup> except where an insurgent armed group attains belligerent status,<sup>503</sup> such as having established control over a territory.<sup>504</sup> According to Corten, the recognition of belligerent status is an old doctrine and not the contemporary position of the law.<sup>505</sup> This is because support for opposition movements, particularly in civil war situations, is unlawful.<sup>506</sup> The particular official of government under whose hand consent may be granted should be a person who has the capacity to bind the state.<sup>507</sup> The authority to grant consent must have regard to different contexts as may be dictated by domestic law because a person who may validly grant consent for the issuing of a resident permit or the search of an embassy may defer from the authority that may grant the establishment of a military base or the deployment of troops.<sup>508</sup> Arguably, domestic laws vary, and it is difficult to say with certainty who can bind the state. It is important, however, that consent should emanate from a competent authority, such as a person or organ on behalf of a state which the state cannot deny. The official acting on behalf of the state need not be a high-ranking one.<sup>509</sup>

Conversely, an invitation in aid of an insurgent group, particularly in civil war situation, is inconsistent with article 2(4) of the Charter.<sup>510</sup> There are, however, exceptional cases in

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<sup>502</sup> O Corten *The law against war: The prohibition on the use of force in contemporary international law* (2010), 259; Odle (n 478 above) 631; Heyns Report (n 99 above) para 82.

<sup>503</sup> Dinstein (n 88 above) 119.

<sup>504</sup> Abass (n 483 above) 216.

<sup>505</sup> Corten (n 502 above) 260.

<sup>506</sup> *Nicaragua case* (n 91 above) para 246, where the Court held that: 'It is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law'.

<sup>507</sup> Deeks (n 484 above) 12; Abass (n 483 above) 215.

<sup>508</sup> Commentary to Art 20 of the DASR (n 343 above) para 6.

<sup>509</sup> Abass (n 483 above) 215.

<sup>510</sup> *Nicaragua case* (n 91 above) paras 110-111, 246, where the Court held: 'It is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already available at the request of the government of a State, were to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law'; see also *DRC Case* (n 140 above), paras 162-165, 345.

which consent has been given not by the government in total control (particularly for peacekeeping operations), but by governments in substantial control and non-governmental parties.<sup>511</sup> For instance, the Somali Government that granted consent to the deployment of United Nations Operations in Somalia (UNOSOM 1) was not in effective control.<sup>512</sup> Similarly, in Mozambique, both the government and Resistencia Nacional Mocambicana (RENAMO) granted consent to the United Nations Operations in Mozambique.<sup>513</sup> Some scholars have, however, questioned why the granting of consent should remain the exclusive preserve of states.<sup>514</sup> But since practice has shown that host-governments more often than not exercise the power to revoke consent, it appears to be the appropriate authority to grant consent.<sup>515</sup> In fact, the continued stay of United Nations Protection Force (UNPROFOR) in Croatia depended on the consent of Croatia, the host state, which, upon agreeing to give its consent afresh, even changed the name of the peace-keeping force from UNPROFOR to United Nations Confidence Restoration Operation in Croatia (UNCRO).<sup>516</sup>

Just as a territorial state grants the initial consent, it has the discretion to revoke or withdraw its consent without being trammelled or constrained by formalities, except where such consent was formalised in a treaty and compliance with its provisions is in issue.<sup>517</sup> Consent of states, thus, remains lawful only to the extent that its operations remain within the geographical confines and objectives of the consent.<sup>518</sup> Operations of foreign forces in the territorial state founded on consent may, therefore, culminate in violation of the prohibition on use of force if the territorial state revokes consent without a corresponding withdrawal of troops by the foreign state.<sup>519</sup> In this regard, Heyns has observed: ‘Once consent to the use of force is withdrawn, the State conducting the targeting operations is bound by international law to refrain from conducting any further operations from that moment.’<sup>520</sup> Arguably, the US continued stay in Pakistan in prosecution of its drone war against Al Qaeda in manifest disregard of the repeated pronouncements of withdrawal of its purported consent amounts

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<sup>511</sup> Gray (n 500 above) 244.

<sup>512</sup> S/RES/775 of 28 August 1992.

<sup>513</sup> S/RES/782 13 October 1992.

<sup>514</sup> Gray (n 500 above) 243.

<sup>515</sup> Gray (n 500 above) 265.

<sup>516</sup> Gray (n 500 above) 265-268.

<sup>517</sup> *DRC case* (n 140 above) paras 47, 197; Odle (n 478 above) 630-631.

<sup>518</sup> *DRC case* (n 140 above) paras 198-199; Art 20 of the DASR (n 343 above); Deeks (n 484 above) 10.

<sup>519</sup> Dinstein (n 88 above) 122.

<sup>520</sup> Heyns Report (n 99 above) 84.



to a violation of international law if such alleged withdrawal emanated from the central authority in Pakistan.

The position, however, is that there is evidence that Pakistan granted consent to the use of its territory for limited airstrikes, as this fact was admitted by its former President Pervez Musharraf during an interview granted to the CNN.<sup>521</sup> Emmerson also stated that there is strong evidence to suggest that, between June 2004 and June 2008, remotely piloted air craft strikes in the Federally Administered Tribal Areas (FATA) were conducted with the consent of the Pakistani military and intelligence service with the acquiescence and active approval of senior government figures.<sup>522</sup> Even if Pakistan granted express or passive consent to the US to use force in its territory, which it initially denied, Pakistan's repeated protests against the continued use of drones in its territory, in my view, effectively terminated the initial consent. Firstly, through the US' Charge d'Affairs, Ambassador Richard Hoagland, the Pakistani Prime Minister protested against the use of drones by the US.<sup>523</sup> Secondly, the Pakistani parliament called for the immediate cessation of drone strikes in Pakistan while adopting guidelines for revised terms of engagement with the US on 12 April 2012.<sup>524</sup> The question then is whether the protests from the Pakistani Parliament, Foreign Minister and former President Musharraf override the initial grant of consent or whether they amount to revoking the consent that existed before. Arguably, a protest at such high levels effectively revokes the consent, even if it existed, in consonance with Emmerson's position.<sup>525</sup>

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<sup>521</sup> N Robertson & G Botelho 'Ex-Pakistani President Musharraf admits secret deal with U.S. on drone strikes' *Cable News Network (CNN)*, 12 April 2013, at <http://edition.cnn.com/2013/04/11/world/asia/pakistan-musharraf-drones/> (accessed 18/07/2015); S Haider 'Strong evidence' Pakistan military approved U.S drone strikes: UN report' *Dawn*, 19 October 2013, at <http://www.dawn.com/news/1050387> (accessed 18/07/2015); J Boone & P Beaumont 'Pervez Musharraf admits permitting 'a few' drone strikes in Pakistan' *The Guardian*, 12 April 2013.

<sup>522</sup> Report of the Special Rapporteur on Promotion and Protection of human rights questions, including alternative approaches for improving fundamental freedoms, Ben Emmerson, Add: Promotion and Protection of human rights and fundamental freedoms while countering terrorism, A/68/389, para 53 of 18 September 2013.

<sup>523</sup> MW Lewis 'Guest Post: Pakistan's official withdrawal of consent for drone strikes' *Opinio Juris*, 11 June 2013, available at <http://opiniojuris.org/2013/06/10/guest-post-pakistan-official-withdrawal-of-consent-for-drone-strikes/> accessed 20/02/2015).

<sup>524</sup> Emmerson Report (n 522 above) para 53.

<sup>525</sup> Emmerson Report (n 522 above) para 54 of 18 September 2013, He stated: 'under the constitutional arrangements in force in Pakistan, the democratically elected Government is the body responsible for the Pakistani international relations and the sole entity able to express the will of the state in its international affairs. Suggestions of continued cooperation at the military or intelligence level do not affect the position in international law. The Special Rapporteur therefore considers that the continued use of remotely piloted aircraft in the Federally Administered Tribal Areas amounts to a violation of Pakistani sovereignty, unless justified under the international law principle of self-defence'.

Whenever foreign forces act outside the scope of their consent, if properly formalised, the available option for the territorial state is to revoke such consent. For instance, Yugoslavia's consent to UNPROFOR was withdrawn by the governments of Croatia and Bosnia when UNPROFOR failed to cooperate with the host government's terms for the operations.<sup>526</sup> Similarly, Egypt withdrew its consent to United Nations Emergency Force (UNEF) to use force in its territory, just as Rwanda also withdrew its consent from United Nations Assistance Mission in Rwanda (UNAMIR). In all cases, these withdrawals marked the end of foreign operations in those territories, as there was compliance with the notice to withdraw on the part of the Secretary-General of the UN.<sup>527</sup> Furthermore, apart from instances of outright withdrawal of consent which was validly given, consent may be vitiated by error, corruption or coercion because consent is expected to be freely given. For instance, the Nuremberg Tribunal denied that Austrian consent was validly secured by *Anschluss*, and, even if it had, it would have been coerced and did not excuse the annexation.<sup>528</sup>

### 3.5.2. Express or *ad hoc* consent

Consent by a territorial state to the forces of a foreign state may be given formally by treaty or on an *ad hoc* basis. Treaties are more conventional methods of granting consent to the use of force by other states.<sup>529</sup> For instance, the treaties between Iran and the Soviet Union of 26 February 1921,<sup>530</sup> and between Cyprus, Greece, Turkey and United Kingdom of 16 August 1960<sup>531</sup> were treaties that granted consent to foreign states to use force in the territorial states.<sup>532</sup> On the other hand, consent could be given informally, that is, orally or through minutes of meetings, which may create binding obligations on the consenting state.<sup>533</sup> Generally, *ad hoc* consent is non-treaty based.<sup>534</sup> Consent is expected to be granted in

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<sup>526</sup> Gray (n 36 above) 298.

<sup>527</sup> Gray (n 36 above), 299.

<sup>528</sup> International Military Tribunal (Nuremberg), Judgment and Sentences of October 1, 1946: Judgment, reprinted in (1974) *American Journal of International Law* 192-194; Commentary to Art 20 of the DASR (n 343 above) paras 4 & 6; see also Heyns Report (n 99 above) para 83.

<sup>529</sup> Ronzitti (n 486 above) 157.

<sup>530</sup> Art 6 states that the Soviet Union has the right to send troops into Iranian territory to carry out military operations for its own defence on the ground that Iran fails to deal with the threat to Soviet Union's security.

<sup>531</sup> Art 4 of the Cyprus Treaty of Guarantee permits these guarantor states either individually or collectively to use force on Cypriot territory to prevent a change in the constitutional representation of the two communities (Greek and Turkish Cypriot).

<sup>532</sup> Ronzitti (n 486 above) 157-158.

<sup>533</sup> Deeks (n 484 above) 19.

<sup>534</sup> Corten (n 502 above) 254.

advance.<sup>535</sup> Consent that is given after the conduct, however, bears the effect of a waiver or acquiescence.<sup>536</sup>

### 3.5.3. Circumvention of consent

Where a state suffers extraterritorial attacks from terrorist NSAs, but where it cannot secure consent from the territorial state, such a victim state circumvents consent by relying on the ‘unwilling or unable’ doctrine.<sup>537</sup> This principle is rooted in the law of neutrality, and it permits a belligerent to employ force in the territory of a neutral state if such a neutral state is unwilling or unable to prevent violations of its neutrality by another belligerent.<sup>538</sup> But before any intervention is made in another state’s territory on the basis that it is unwilling or unable, opportunity be first given to the host-state to prevent or stop the activities of non-state actors in its territory.<sup>539</sup> Williams argued that this principle balances the right of the victim state and that of the host-state. The victim state is allowed to defend itself if the host-state is unwilling or unable to stop terrorist attacks from its territory, otherwise the host-state’s territorial integrity may not be infringed upon.<sup>540</sup> State practice has shown that states have relied on the unwilling or unable doctrine to enter into the territories of other states to use force. For instance, the US relied on this doctrine as justification to enter Pakistani territory to kill Osama bin Laden in 2011.<sup>541</sup>

For the avoidance of abuse of the unwilling or unable doctrine, Deeks has formulated a test for ascertaining whether the host-state is actually unwilling or unable, and whether the acting state’s intervention is justified.<sup>542</sup> The criteria formulated for the test include: (a) Prioritization of consent [Deeks urges that victim states should first explore the possibility of securing the consent of the host-state, which may avoid reliance on the unwilling or

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<sup>535</sup> Commentary to Art 20 of the DASR (n 343 above); Heyns Report (n 99 above) para 83.

<sup>536</sup> Commentary to Art 20 of the DASR (n 343 above) para 3.

<sup>537</sup> AS Deeks ‘Unwilling or unable’: Toward a normative framework for extraterritorial self-defence’ (2012) *Virginia Journal of International Law* 487-488; GD Williams ‘Piercing the shield of sovereignty: An assessment of the legal status of the ‘unwilling or unable’ test’ (2013) 36 *University of New South Wales Law Journal* 625; D Balz ‘Obama says he would take fight to Pakistan’ *Washington Post*, 2 August 2007.

<sup>538</sup> Deeks (n 537 above) 499.

<sup>539</sup> Williams (n 537 above) 625.

<sup>540</sup> Williams (n 537 above) 627.

<sup>541</sup> Williams (n 537 above) 626; N Schmidle ‘Getting Bin Laden: What happened that night in Abbottabad’ *The New Yorker*, 8 August 2011, where it was reported that during the 2008 presidential election debate against John McCain at Belmont University, Nashville, Barak Obama stated in answer to a question that: ‘If we have Osama bin Laden in our sights and the Pakistani government is unable, or unwilling, to take them out, then I think that, we have to act and we will take them out. We will kill bin Laden.’

<sup>542</sup> Deeks (n 537 above) 519-533.

unable doctrine. Working with the consent and cooperation of the host-state avoids complaints]; (b) Nature of threat posed by the NSAs; (c) Request to address the threat and time to respond [The host-state be given opportunity to deal with the threat first]; (d) Reasonable assessment of territorial state's control and capacity; (e) Proposed means to suppress the threat; and (f) Prior interactions with the host-state.<sup>543</sup> This test appears to be appropriate when considered against the background that, even where certain territorial states claim to be willing and able to contain terrorist activities in their territories, victim or acting states doubt their competence. For instance, Pakistan's hard stance against the US drone operations is because it considers itself willing and able to contain insurgency.

### 3.5.4. Failed States and valid consent

Failed states are defined as countries whose governments have been weakened to the point that they can no longer provide public goods such as social infrastructure, physical security, economic services and where they lack territorial integrity.<sup>544</sup> To Rotberg, failed states were tense, deeply conflicted by warring factions, who frequently engage in prolonged battles with the government.<sup>545</sup> Such a state falls into the hands of armed NSAs who appropriate and lay claim to territories within the state, giving it the characteristics of a failed state. A state without an effective central government to control state affairs can neither grant nor revoke consent in respect of the use of force in its territory by other states.<sup>546</sup> Byrne posits that: 'there is a manifest inability of consent to be given by rebels who, by their nature as the opposition to a state's government cannot themselves speak on behalf of that state'.<sup>547</sup> Foreign states exploit the weaknesses of such states and the lack of a central authority from which to secure consent to enter such states to conduct forcible measures against NSAs.<sup>548</sup> Failed states potentially create problems of sovereignty and consent in the international legal order. Apart from being bereft of legitimate authority to grant or revoke consent for the use

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<sup>543</sup> Deeks (n 537 above) 519-533; Williams (n 537 above) 625-627.

<sup>544</sup> Dunlap (n 194 above) 454; J Yoo 'Fixing state failure' (2011) 97 *California Law Review* 100.

<sup>545</sup> RI Rotberg 'The new nature of nation-state failure' (2002) 25 *Washington Quarterly* 85; RI Rotberg 'Failed states in a world of terror' *Foreign Affairs*, July/August 2002.

<sup>546</sup> Art 20 of the DASR, para 6 of the Commentary; *Nicaragua case* (n 91 above) para 246; Dinstein (n 88 above) 123.

<sup>547</sup> M Byrne 'Consent and the use of force: An examination of "intervention by invitation" as a basis for US drone strikes in Pakistan, Somalia and Yemen' (2016) *Journal on the Use of Force and International Law* 11.

<sup>548</sup> Dunlap (n 194 above) 453, armed US commandos entered Somalia on 19 March 2003 and forcibly snatched an alleged Al Qaeda terrorist for questioning; Somalia: Reported US covert actions 2001-2015', *The Bureau for Investigative Journalism* 22 February 2012, which also reported the snatching of Suleiman Abdallah from a hospital in Mogadishu.

of the host-state's territory by foreign forces,<sup>549</sup> they also cannot enter into international treaties, partake in international trade or enforce contracts.<sup>550</sup> Furthermore, while a government in effective control of its territory can grant consent for intervention in its internal affairs,<sup>551</sup> alternatively, consent given by NSAs such as rebel groups, opposition groups or terrorists do not mitigate or preclude the wrongfulness of intervention against the state.<sup>552</sup> This state of affairs, created by the weakness of failed states to police their borders and the lack of a central government, is exploited by powerful states to use force in the territories of failed states, given the slightest opportunity, while relying on fighting terrorist and insurgent non-state actors as their justification.

Recent events have accentuated the fact that the victim or acting states hardly give regard to consent before employing force in the territories of failed states. Firstly, upon the Islamic State of Iraq and the Levant (ISIL) posting a video which depicted the mass beheading of twenty one Egyptian Coptic Christians, Egyptian forces commenced the bombardment of ISIL positions in Libya in retaliation. The Christians had been captured by ISIL in December 2014 in the Libyan city of Sirte.<sup>553</sup> Libya has two main groups battling for power. The internationally recognized government operates from Tobruk and it enjoys Egyptian support.<sup>554</sup> It is not clear whether Egypt obtained consent from any of these groups, neither, being a central government in effective control. The President of Egypt, Abdel-Fattah Sisi, however, called on the UN to adopt a resolution mandating intervention in Libya. He also alluded to an invitation by the Libyan people when he stated, 'There is no other choice, taking into account the agreement of the Libyan people and government, and that they call

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<sup>549</sup> N Forteau 'Rescuing national abroad' in M Weller (ed.) *The Oxford Handbook of the use of force in international law* (2015) 952; RE Brooks 'Failed states, or the state as failure' (2005) 72 *The University of Chicago Law Review* 1162; D Thurer 'The failed state and international law' (1999) 81 *International Review of the Red Cross* 731, 733-736.

<sup>550</sup> Brooks (n 549 above) 1162.

<sup>551</sup> D Wippman 'Pro-democratic intervention' in M Weller (ed.) *The Oxford Handbook of the use of force and international law* 805.

<sup>552</sup> GH Fox 'Intervention by Invitation' in M Weller (ed.) *The Oxford Handbook of the use of force and international law* (2015) 816.

<sup>553</sup> J Malsin & C Stephen 'Libya and Egypt launch air strikes against ISIs after militants post beheading video' *The Guardian*, Monday 16 February 2015, available at <http://www.theguardian.com/world/2015/feb/15/isis-post-video-allegedly-showing-mass-beheading-of-coptic-christian-hostages> (accessed 24/02/2015).

<sup>554</sup> Malsin & Stephen (n 554 above).

us to act.<sup>555</sup> Libya is now a fertile ground for NSAs including ISIL because of the collapse of state security.<sup>556</sup>

In addition, in February 2015, exploiting the civil war in Syria which has created a seemingly weak central government that is struggling for power with rebel groups, Turkish forces entered Syria without Syrian consent. Five hundred and seventy two soldiers conveyed in 39 tanks and 57 armoured vehicles entered Syria to dig up and convey to another site the remains of Suleyman Shah, grandfather of Osman 1, the founder of the Ottoman Empire.<sup>557</sup> As a result of the absence of Syrian consent, Syrian President, Bashar al Assad, described the action of Turkey as ‘flagrant aggression’ and warned that Turkey would be responsible for the results.<sup>558</sup>

Jordan similarly commenced airstrikes (Operation Moath the Martyr) against ISIL training centres, arms and ammunition depots in Syria in retaliation for the burning alive in a cage of Moath al-Kasasbeh, a Jordanian pilot.<sup>559</sup> It is doubtful whether Jordan secured any consent from Syria. Arguably, Syria may not have reacted violently about the incursion into its territory because Jordan is one of the Middle Eastern nations involved in the US-led military coalition against ISIL.<sup>560</sup>

The point to make is that states are quite loath or reluctant to request consent from non-state actors or from a failed state where no single recognized government is in control. That was the dilemma the US faced after the 9/11 terrorist attacks with regard to requesting consent from either the Taliban or the Northern Alliance in Afghanistan.<sup>561</sup> None of the two governments was seen as legitimate, and, for fear of obtaining an illegitimate consent, the US relied on self-defence under article 51 to give legality to its military operations in Afghanistan.<sup>562</sup> Extreme cases exist where the position of international law remains unclear,

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<sup>555</sup> I Black ‘Egyptian President calls for United Nations military action in Libya’ *The Guardian*, 17 February 2015, available at <http://www.theguardian.com/world/2015/feb/17/egyptian-president-sisi-libya-islamic-state-lukewarm-europe-coptic-un> (accessed 24/02/2015).

<sup>556</sup> R Sherlock ‘Islamic State planning to use Libya as gateway to Europe’ *The Telegraph*, 17 February 2015.

<sup>557</sup> L Benedictus ‘Why Turkey invaded Syria to dig up the grave of Suleyman Shah?’ *The Guardian*, Monday 23 February 2015.

<sup>558</sup> A Brown ‘Turkish troops enter Syria to rescue soldiers guarding tomb’ *The Guardian*, Sunday 22 February 2015.

<sup>559</sup> G Botelho & J Karadsheh ‘Jordan unleashes wrath on ISIS: This is just the beginning’ CNN, 6 February 2015, available at <http://edition.cnn.com/2015/world/isis-jordan> (accessed 25/02/2015).

<sup>560</sup> Botelho & J Karadsheh (n 559 above).

<sup>561</sup> M Byers ‘Terrorism, the use of force and international law after September 11’ (2002) *International & Comparative Law Quarterly* 403.

<sup>562</sup> Byers (n 561 above), 404.



where, prior to the actual use of force in a foreign state, the state about to use such force will publicly declare its unpreparedness to seek consent to use force against NSAs in the territory of the host state. It is worrisome when such a state did not even invoke self-defence as the basis for using force in the territory of another state. For instance, while addressing the Canadian parliament on 24 March 2015 on the imperatives of expanding the Canadian military campaign from Iraq to Syria against ISIL, the Canadian Prime Minister, Stephen Harper, indicated his government's 'resolve not to seek the consent' of the Syrian Government before commencing air strikes. According to him:

In expanding our air strikes into Syria, our government has decided that we will not seek the express consent of the Syrian Government. Instead, we will work closely with our American and other allies, who have already been carrying out such operations against ISIL over Syria in recent months.<sup>563</sup>

### 3.6. Conclusion

The SC authorization, self-defence and consent are the established exceptions based upon which extraterritorial force may be used against states or NSAs. It is the finding of this study that, while the SC can authorise the use of lethal force against a NSA under its Chapters VII and VIII powers, it is yet to do so in practice, as it has not done so since the establishment of the UN up till now. The study also found that self-defence against NSAs is available to state victims of an armed attack if certain relevant criteria are fulfilled. This is particularly so because, if an attack from a terrorist NSA attains the gravity threshold of an armed attack and it is attributable to a state, then an action in self-defence lies against such a state. Self defence is limited by the requirements of armed attack, necessity, proportionality and attribution. Any action in self-defence must comply with these limiting factors. This study, however, found that, in practice, states are usually rhetorical about these requirements and rarely comply with them. The absence of objective criteria to determine proportionality leaves the assessment of proportional self-defence to individual states, which creates room for abuse.

Because the strict requirement of attribution expressed in the jurisprudence of the ICJ is gradually being disregarded and whittled down in favour of state practice that shows attacks on NSAs for conduct that cannot be imputed to another state is acceptable. Other

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<sup>563</sup> L Payton 'Iraq mission: Stephen Harper says Canada won't ask Syria's consent for air strikes,' available at <http://www.msn.com/en-ca/news/other/iraq-mission-stephen-harper-says-canada-won't-ask-syria's-consent-for-strikes/ar-AA9UfDQ> (accessed 25/03/2015).

justifications, such as the harbouring of the NSAs or passive conduct of the territorial state, are advanced by states. Owing to the threats posed by the sophistication in the conduct of NSAs whose destructive capabilities are comparable to those of states, the attribution requirement should be discarded. State practice may in the near future completely overshadow this requirement with the argument that other less stringent conditions may become customary law on the basis of sustained practice. It then means that the law of self-defence is gradually being transformed.

In considering the features of self-defence, this study has found no scholarly consensus on the legal purport of an inherent right to self-defence. One of the schools of thought argued that article 51 preserves the customary right of self-defence which invariably allows anticipatory or pre-emptive targeting of NSAs in self-defence. On the other hand, the restrictionists rely on the literal reading of article 51 to advocate a narrow interpretation and argue that any conduct short of an armed attack cannot give rise to a response in self-defence. This point remains unsettled. Furthermore, a state which undertakes self-defence, but fails to report measures taken in that regard, may not be convinced itself that it is employing self-defence in good faith.

The customary law principle of consent is available for states in distress to invite other states to use force in their territories. But such an invitation or revocation of an invitation must be exercised only by the highest authority of a state. Failed states may not be in a position to grant or revoke consent. Where consent is denied to a victim state of an armed attack it may, however, explore other avenues to defend itself. This, it may do by relying on the 'unwilling or unable' doctrine to use force in the territorial state. Having found in this chapter that terrorist NSAs are liable to attack by states that genuinely rely on the exceptions to the prohibition of the use of force, the next chapter examines transnational terrorism as the rationale for the use of force against NSAs.

## Chapter 4

### Transnational terrorism as a rationale for use of force against non-state actors

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All nations of the world must be united in their solidarity with the victims of terrorism and in their determination to take action, both against terrorists themselves and against all those who give them any kind of shelter, assistance or encouragement. Kofi Annan<sup>1</sup>

## 4.1. Introduction

In the previous chapter, this study evaluated the three exceptions to the general ban on the resort to force contained in article 2(4) of the UN Charter. States have assumed a wide range of the exceptions that even the position of the ICJ that states may use force against NSAs only when their conduct can be attributed to another state appears to be vanishing.<sup>2</sup> Certain commentators even contend that article 2(4) dealing with prohibition on use of force and the exceptions under article 51 of the UN Charter do not make the position of the law perfectly clear as it relates to NSAs.<sup>3</sup>

With that background the tone is set for this chapter to proceed to consider transnational terrorism as the rationale for bringing NSAs within the firing lines of states. In contemporary international law, conventional armed conflicts appear to have been whittled down substantially, while asymmetric warfare involving states and NSAs with disparity in strength are now in vogue.<sup>4</sup> Apart from some cases of non-international armed conflicts in which a state engages NSAs within its territory, most others are extraterritorial conflicts involving a state and a terrorist NSA located in the territory of another state. Transnational terrorism is the main reason for armed conflicts between a state and NSAs. The chapter commences with the consideration of what terrorism entails and whether transnational terrorism constitutes an international crime, an act of war and whether it amounts to a violation of human rights.

From that premise, the study proceeds to discuss three terrorist organisations, namely Hamas, Al Qaeda and Boko Haram, the reason being to consider their origins, objectives or ideologies and some of their violent activities which are adjudged to amount to transnational terrorism that may warrant the lawful use of extraterritorial force by states against them. Thereafter, this chapter examines the various roles played by both states and the UN in the fight against

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<sup>1</sup> Statement made during the opening of the fifty-sixth session of the UN General Assembly on 12 September 2001.

<sup>2</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* ICJ Reports (1986) 14 para 195; *Armed Activities in the territory of the Congo (DRC v Uganda)* ICJ (2005) 168 para 146; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* ICJ Reports (2004) para 139.

<sup>3</sup> M Hakimi 'Defensive force against non-state actors: The state of play' (2015) 91 *International Law Studies* 2.

<sup>4</sup> R Ferreira 'Irregular warfare in African conflicts' (2010) 38 *Scientia Militaria, South African Journal of Military Studies* 45-50. (45-67)

terrorism in conformity with the responsibilities vested in them by international law through treaties and resolutions of international organisations. The extraterritorial forcible measures, including targeted killings and full military operations carried out by states against NSAs in response to transnational terrorism, will also be discussed. This chapter will be concluded by the examination of factors that increase the incidents of transnational terrorism, such as religious fundamentalism and radicalisation, the lesser vulnerability of terrorists to sanctions and punishment, globalisation and technological advancement and liberal democracies. This chapter creates a nexus between NSAs and the changing face of international law. The unwholesome activities of these NSAs have indeed caused a transformation of the law of self-defence.

## 4.2. What transnational terrorism entails

Transnational terrorism is one of the contemporary problems that has assumed global proportions and remains a threat to world peace and security.<sup>5</sup> This makes it imperative to transform the the law to cope with the emerging strength of NSAs. Accordingly, terrorism is being criminalised and tackled on all fronts, as international, regional<sup>6</sup> and domestic policy and legal frameworks are being established to deal with the menace.<sup>7</sup> Terrorism is not a novel phenomenon and it has remained prominent on the international security agenda for a long time.<sup>8</sup> The first failed international effort to codify the concept was in 1937 through the League of Nations Convention for the Prevention and Punishment of Terrorism, following the assassination of King Alexander 1 of Yugoslavia in Marseilles.<sup>9</sup> Terrorism in contemporary times is a little different from that of the past because it is more violent, more lethal and seriously motivated by fundamentalist religions.<sup>10</sup> This study's focus is on transnational

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<sup>5</sup> S/RES/1054 of 26 April 1996, preambular para 8; S/RES/1368 of 12 September 2001; S/RES/1377 of 12 November 2001; B Simma *et al* 'The Charter of the United Nations: A commentary 3<sup>rd</sup> edn. Vol. 11 (2012) 1281; R Young 'Defining terrorism: The evolution of the terrorism as a legal concept in international law and its influence on domestic legislation' (2006) *Boston College International & Comparative Law Review* 24; AV Orlova & JW Moore 'Umbrellas' or 'building blocks'? Defining international terrorism and transnational organized crime in international law' (2005) 27 *Houston Journal of International Law* 267.

<sup>6</sup> K Sturman 'The AU Plan on Terrorism: Joining the global war or leading an African Battle?' (2002) 11 *African Security Review* 104.

<sup>7</sup> The 1997 International Convention for the Suppression of Terrorist Bombings; Terrorism Act 2011 & Money Laundering Act 2011 of the Federal Republic of Nigeria.

<sup>8</sup> J Dugard 'Towards the definition of international terrorism' (1973) 67 *American Journal of International Law* 94.

<sup>9</sup> A Cassese *International law* (2005) 465; TM Franck & BB Lockwood 'Preliminary thoughts towards an international convention on terrorism' (1974) 68 *American Journal of International Law* 70.

<sup>10</sup> A Silke 'Holy Worriors: Exploring the psychological processes of jihadi radicalization' (2008) 5 *European Journal of Criminology* 102.

terrorist activities conducted by NSAs which trigger the use of force in self-defence by states, but the manifestations of terrorism world-wide have confirmed the direct or indirect involvement of states in acts of terrorism,<sup>11</sup> particularly Iran<sup>12</sup> and Libya.<sup>13</sup>

As to what conduct amounts to terrorism is not uniformly accepted. This is because what certain states consider to be terrorism or criminal may be construed by others to be political or fighting for freedom. So the saying goes that ‘one person’s terrorist is another person’s freedom fighter.’<sup>14</sup> Thus, Israel and the US describe Hamas and Hezbollah as terrorist organisations, while Syria, Iran, Lebanon and some other states see them as freedom fighters determined to pressure Israel to vacate their occupied territories.<sup>15</sup> Acts of transnational terrorism in that context are seen merely as tools in the hands of weaker states and organised armed groups either overtly or covertly to confront more powerful states without the risk of retribution.<sup>16</sup> International law had previously established the fact that the use of force by national liberation movements in their efforts to emancipate themselves from a racist regime, colonial or alien domination by way of self-determination is not subject to article 2(4) of the UN Charter.<sup>17</sup> There is also support by non-western states for struggles for self-determination by certain NSAs, arguing that terrorist tactics in that regard be exempted from condemnation and prohibition.<sup>18</sup> This explains allegations that Iran and Syria have refused to condemn Hezbollah, but have instead tried to distinguish genuine and legitimate struggles against foreign occupation from acts of transnational terrorism.<sup>19</sup> Specifically, in the discussions leading to the adoption

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<sup>11</sup> A/RES 49/60 (1994) of 9 December 1994.

<sup>12</sup> D Byman ‘Iran, terrorism, and weapons of mass destruction’ (2008) 31 *Studies in Conflict and Terrorism* 169, where Byman stated that Iran has armed, trained, financed, inspired, organised and generally supported transnational terrorist groups.

<sup>13</sup> S/RES/748 of 31 March 1992, Libya was sanctioned for bombing the Pan AM flight over Lockerbie, Scotland in 1988.

<sup>14</sup> RR Ludwikowski ‘Aspects of terrorism: Personal reflections in terrorism’ (1987) 10 *An International Journal* 176; DJ Hickman ‘Terrorism as a violation of the law of nations: Finally overcoming the definitional problem’ (2012) *Winconsin International Law Journal* 453, 458; ER Pollock ‘Terrorism as a tort in violation of international law of nations’ (1982) 6 *Fordham International Law Journal* 238; O Schachter ‘The extraterritorial use of force against terrorist bases’ (1988-1989) 11 *Houston Journal of International Law* 310.

<sup>15</sup> *Journal of Turkish Weekly*, 3 April 2015; D Rusk ‘25<sup>th</sup> UN General Assembly and the use of force’ (1972) 2 *Georgia Journal of International & Comparative Law* 19, 31.

<sup>16</sup> Hickman (n 14 above) 456; see also MC Melia ‘Terrorism and criminal law: The dream of prevention, the nightmare of the rule of law’ (2011) 14 *New Criminal Law Review* 118.

<sup>17</sup> Art 1(4) Protocol 1 Additional to the Geneva Conventions of 12 August 1949 provides that armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes are to be considered international conflicts; JG Gardam *Non-combatant immunity as a Norma of international humanitarian law* (1993) 89.

<sup>18</sup> Hickman (n 14 above) 452; LGB Murphy ‘A proposal on international legal responses to terrorism’ (1991) 2 *Touro Journal of Transnational Law* 82’ 86.

<sup>19</sup> C Gray *International law and the use of force* (2008) 3<sup>rd</sup> edn. 64; T Stephens ‘International criminal law and the response to international terrorism (2004) 27 *University of North South Wales* 459-460.



(*travaux préparatoires*) of resolution 2625, the Syrian delegate, El Attrash, sought a qualification to the resolution.<sup>20</sup> According to him, the Declaration on Friendly Relations should not be used as a pretext to deny Palestinians their legitimate struggle for self-determination with a view to emancipating themselves from foreign occupation.<sup>21</sup> In this regard, Dugard has shown that the rockets fired by Palestinian factions from Gaza must be seen as acts of resistance of an occupied people.<sup>22</sup> Not all uses of force by NSAs amount to terrorist acts, as some are directed at aliens in occupation in furtherance of legitimate struggles for self-determination.<sup>23</sup> Self-determination, as provided for in the UN Charter, is inextricably linked to the desire to achieve friendly relations between states,<sup>24</sup> and it is not a mere political prescription, but a collective right of a people based on its codification.<sup>25</sup>

Arguably, however, a genuine liberation movement must not also bear the characteristics of terrorist acts, such as the acts being directed at non-combatants and also intended to inflict or arouse fear among the innocent population. While this study is not oblivious to the arguments put forward by certain scholars that Israel's unlawful occupation is responsible for the attacks against it, and that it has no justification in the first place to be in occupation, it sees no rationale behind directing attacks against civilians and non military objects.<sup>26</sup> Granted that Israeli withdrawal from the said illegally occupied lands may abate transnational terrorist attacks,<sup>27</sup> the perpetrators of these attacks directed at the civil population and civilian objects are also committing serious infractions of international law.<sup>28</sup>

The Organisation of Islamic Conference (OIC) also argued that international terrorism should not be extended to cover national liberation movements or acts committed in resisting

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<sup>20</sup> A/RES/2625 (XXV) (1970) of 24 October 1970.

<sup>21</sup> 24<sup>th</sup> UN. GAOR 297, UN Doc. A/L. 6/SR. 1160 (1969); Lillich & Paxman 'State responsibility for injuries to aliens occasioned by terrorist activities' (1977) 26 *American University Law Review* 272; Rusk (n 15 above) 19, 31.

<sup>22</sup> J Dugard 'Israel the occupying power instead of the victim' *Business Day Live*, 6 February 2015, at <http://www.bdlive.co.za/opinion/2014/08/04/israel-the-occupying-power-instead-of-the-victim> (accessed 06/02/2015).

<sup>23</sup> Art 1(2) of the UN Charter; A/RES/1514 (XV) of 14 December 1960, para 2; A/RES/2105 (XX) of 20 December 1965, paras 8 & 10; A/RES/59/502 of 6 December 2004, paras 1 & 2, in which the GA specifically reaffirmed the right of the Palestinian people to self-determination including the right to the independent State of Palestine and urged other states to give support in this regard to the Palestinian people.

<sup>24</sup> Simma et al (n 5 above) 315.

<sup>25</sup> Art 1 of the International Covenant on Civil and Political Rights (ICCPR); Art 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>26</sup> S Milne 'This shameful injustice will only end if the cost of it rises' *The Guardian*, 16 July 2014.

<sup>27</sup> P Hain 'Ending the Palestine-Israel impasse: Two states or common state,' *New Statesman*, January 30, 2014, at <http://www.newstatesman.com/politics/2014/01/ending-palestine-israel-impasse-two-state-or-common-state> (accessed 17/06/2015).

<sup>28</sup> Art 50(2) of the Additional Protocol 1 of 1977 to the Geneva Conventions of 1949.

colonialism, hegemony and an aggressor in occupied territories.<sup>29</sup> The OIC proposal was, however, rejected. As Halberstam, thus, points out, the view of the UN members has shifted from a qualified toleration of terrorist acts employed for self-determination to an unequivocal condemnation of terrorism ‘wherever and by whomever’ committed.<sup>30</sup> In resolutions 40/61 (following the seizure of Achille Lauro in 1985) and 49/60, the UN, without any equivocation, indicated its shift from sympathy for liberation movements to condemnation of their employment of terror, not minding the objectives being pursued.<sup>31</sup> These arguments were to a large extent responsible for the international community’s inability to come up with an acceptable framework for the concept of terrorism.<sup>32</sup> In the absence of an acceptable comprehensive framework on terrorism, therefore, several subject matter international treaties or conventions dealing with aircraft, sea vessels, seaports and fixed platforms have been enacted.<sup>33</sup> Conventions for different terrorist incidents are established to provide for cooperation among states in the investigation, combating and elimination of terrorism. These international frameworks contained in conventions impose obligations on states which include: (a) the obligation to refrain from engaging in acts of terrorism; (b) the obligation to prevent and repress terrorism, particularly to prosecute alleged perpetrators; and (c) the right to prosecute and repress the crime of terrorism committed on their territories by nationals and

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<sup>29</sup> Measures to eliminate international terrorism: Report of the Working Group, UN GAOR 6<sup>th</sup> Comm. 56<sup>th</sup> Session, Annex 3, Agenda item 164, at 37-38 UN Doc. A/C/6/55/L.2 (2000) (Measure IV). On behalf of the OIC, Malaysia submitted the proposal; Orlova & Moore (n 5 above) 277.

<sup>30</sup> M Halberstam ‘The evolution of the United Nations position on terrorism: From exempting national liberation movements to criminalizing terrorism wherever and by whomever committed’ (2003) 41 *Columbia Journal of International Law* 573-81; see also The World Summit Outcome 2005, A/60/L. 1 of 15 September 2005, paras 81-91.

<sup>31</sup> A/RES/40/61 of 9 December 1985; Art 3 of the Declaration of Measures to Eliminate International Terrorism - A/RES/49/60 of 17 February 1995.

<sup>32</sup> N Haffrey ‘The UN and international efforts to deal with terrorism’ (1998) *Pew Case Studies in International Affairs*, Case 313: 1.

<sup>33</sup> K Ambos & A Timmermann ‘Terrorism and customary international law’ Research handbook on international law and terrorism, available at SSRN-id2400446.pdf (03/042015); A/RES/49/60 of 9 December 1994. The resolution contains subject matter conventions such as: The 1963 Tokyo Convention on Offences and certain other Acts Committed on Board Aircrafts, the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Montreal Convention for the Suppression for the Unlawful Acts against the Safety of Civil Aviation, the 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, the 1979 Convention on the Physical Protection of Nuclear Material, the 1979 New Convention against the taking of Hostages, the 1988 Protocol for the Unlawful Acts of Violence at Airports Serving International Civil Aviation, the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Identification, the 1997 International Convention for the Suppression of Terrorist Bombing, the 1999 International Convention for the Suppression of the Financing of Terrorism.

foreigners and the corresponding obligation of third states to refrain from objecting to such prosecution and repression against their nationals.<sup>34</sup>

#### 4.2.1. Definition of terrorism

The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed. G Levitt<sup>35</sup>

There is no internationally agreed upon definition of terrorism,<sup>36</sup> but the term was said to have been originally coined to describe state actions, that is the ‘Reign of Terror’ during the revolutionary regime in France from 1789 to 1794.<sup>37</sup> The term was employed to refer to the intimidating practices of the government in power.<sup>38</sup> The root word ‘terror’ derives from the Latin word ‘terrere’ meaning ‘great fear’ or ‘to frighten’<sup>39</sup> and was first used based on the French term ‘terrorisme’ (an intimidating government during the reign of terror) in 1795, which invariably means to ‘spread terror and fear in the population at large.’<sup>40</sup> As indicated above, terrorism is a term that was associated with states’ acts of violence about which developing countries, including Arab and non-aligned states, were apprehensive.<sup>41</sup> For instance, state terror that was precipitated by Israel by way of diverting Lebanese aircraft, the kidnapping of a Korean in Tokyo and the killing of an Arab in Norway were the concerns of some countries.<sup>42</sup> Unlike contemporary international law, previously, terrorist acts by NSAs only constituted a concern if they were carried out for exclusively personal gains, while non personal terrorist acts were condoned as genuine resistance against occupation in furtherance of self-determination.<sup>43</sup>

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<sup>34</sup> K Ambos ‘Judicial creativity at the Special Tribunal for Lebanon: Is there a crime of terrorism under international law’ (2011) 24 *Leiden Journal of International Law* 665.

<sup>35</sup> G Levitt ‘Is ‘terrorism’ worth defining?’ (1986) *Ohio Northern University Law Review* 97.

<sup>36</sup> Ambos (n 34 above) 660; Silke (n 10 above) 100.

<sup>37</sup> Franck & Lockwood (n 9 above) 73.

<sup>38</sup> Franck & Lockwood (n 9 above) 73; D Pokempner ‘Terrorism and human rights: The legal framework’ 22, ‘Contributions at the meeting of independent experts on terrorism and international law: Challenges and responses’ 30 May – 1 June 2002, at <http://www.ihl.org/ihl/Album/terrorism-law.pdf> (02/04/2015).

<sup>39</sup> Young (n 5 above) 27.

<sup>40</sup> Ambos (n 34 above) 661.

<sup>41</sup> Franck & Lockwood (n 9 above) 73.

<sup>42</sup> Franck & Lockwood (n 9 above) 73.

<sup>43</sup> Franck & Lockwood (n 9 above) 73; see also UN Doc. A/AC.160/1, at 36 (1973), Syrian submission to the *Ad hoc* Committee on International Terrorism; UN Doc. A/AC. 160/1/Add.1, at 29 (1973), Yemeni submission to the *Ad hoc* Committee on International Terrorism.

According to Baxter, the term ‘terrorism’ is imprecise, ambiguous and serves no operative legal purpose.<sup>44</sup> Acts of terrorism are in diverse forms and are likened to a chameleon.<sup>45</sup> Features of terrorism range from random attacks in pursuit of the perpetrator’s goals of killing, to wounding or threatening for religious, ideological or political ends.<sup>46</sup> The term terrorism has been variously defined as: (a) a premeditated, politically motivated violence perpetrated against non-combatant groups by a sub-national or clandestine movement<sup>47</sup>; (b) a premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents; (c) the calculated use of unlawful violence or the threat of unlawful violence to inculcate fear; and (d) intended to coerce or intimidate governments or societies in the pursuit of goals that are generally political, religious or ideological.<sup>48</sup> The African Union also provided its own definition of terrorism.<sup>49</sup>

Cassese identified certain key elements in the definitions of terrorism, and they include (a) the act must constitute a criminal offence under most domestic legal systems, such as murder, hostage-taking, bombing and torture; (b) the violent action must be aimed at spreading fear or intimidation directed at a state, a group or the public generally; and (c) it must be politically, religiously or ideologically motivated in pursuit of private ends.<sup>50</sup> States also exploit the ambiguities inherent in the existing definitional literature to expand their manoeuvres against transnational terrorism in terms of targets and methods of using force against terrorists unilaterally, thereby pursuing unrelated goals.<sup>51</sup> Young also underscores the importance of a definition by observing that it “shapes understanding of the problem and delimits states’ lawful or unlawful responses”.<sup>52</sup> Some commentators, thus, construe the lack of definition as the reason for the failure to combat the scourge<sup>53</sup> and claim that it also leads to the abridgement of

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<sup>44</sup> RR Baxter ‘A sceptical look at the concept of terrorism’ (1973-1974) 7 *Akron Law Review* 380.

<sup>45</sup> A Roberts ‘Can we define terrorism’ (2002) 14 *Oxford Today* 18.

<sup>46</sup> A Cassese ‘Terrorism as an international crime’ in A Bianchi & Y Naqvi (eds) *Enforcing international law norms against terrorism* (2004) 219.

<sup>47</sup> J Onuoha & MI Ugwueze ‘United States Security Strategy and the management of Boko Haram crisis in Nigeria (2014) 2 *Global Journal of Arts, Humanities and Social Sciences* 25.

<sup>48</sup> CJ Dunlap Jr ‘International law and terrorism: Some ‘Qs & As’ for operators’ available at <http://people.duke.edu/~pfearer/dunlapterrorism.pdf> (accessed 03/04/2015).

<sup>49</sup> Art 1(3)(a) of the OAU Convention on the Prevention and Combating of Terrorism.

<sup>50</sup> A Cassese (n 46 above) 219.

<sup>51</sup> Orlova & Moore (n 5 above) 268; Office of the United Nations High Commissioner for Human Rights (OHCHR) ‘Human rights, terrorism and counter-terrorism,’ 5, at <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> (accessed 21/05/2015).

<sup>52</sup> Young (n 5 above) 26.

<sup>53</sup> V Nanda ‘The role of international law in combating terrorism’ (2000) 10 *Michigan State University-DCL Journal of International Law* 603, 603; see also Young (n 5 above) 26.

civil rights and inhibits valid political dissent.<sup>54</sup> Orlova and Moore have observed that the US's domestic definitions of terrorism are as varied as there are agencies involved in the counterterrorist campaign.<sup>55</sup> Such definitions avoid itemizing specific terrorist acts, thereby allowing for the inclusion of subsequent crimes as terrorism<sup>56</sup> and leaving the determination of who is a terrorist to the discretion of policy makers.<sup>57</sup>

Though there appears to be scholarly consensus that the 'term' terrorism has no internationally acceptable definition, the 1999 International Convention for the Suppression of the Financing of Terrorism appears to capture the relevant elements and the essence of terrorism.<sup>58</sup> Young has contended that 'by abstracting from the common elements and themes present in the GA and SC resolutions, treaties and protocols, one can discern a core international law definition of terrorism.'<sup>59</sup> Abstracting the elements in the UN instruments, therefore, Young formulated a definition purportedly capturing all elements and themes.<sup>60</sup> In the opinion of this study, Young's definition remains as generally unacceptable as previous definitions because international consensus, which would have recognized any definition of the term, remains absent.

#### 4.2.2. Transnational terrorism as a crime under international law

Transnational terrorism has not been generally accepted as an international crime. Firstly, it has been contended that terrorism has not been assimilated into the *corpus* of international

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<sup>54</sup> Stephens (n 19 above) 455; DF Vagts 'Which courts should try persons accused of terrorism' (2003) 14 *European Journal of International Law* 313, 320; UN Human Rights Commission consideration of Reports submitted by states parties under Art 40 of the Covenant, Concluding observations of the Human Rights Committee, Egypt, 16, UN Doc. CCPR/CO/76.EGY. (28 November 2002).

<sup>55</sup> Orlova & Moore (n 5 above) 287; see also EJ Erickson *Legitimate use of military force against state-sponsored international terrorism* (1989) 20-25.

<sup>56</sup> Orlova & Moore (n 5 above) 289.

<sup>57</sup> S Tiefenbrun 'A seismic approach to a legal definition of terrorism' (2003) 9 *Journal of International & Comparative Law* 370.

<sup>58</sup> Art 2(1) of the International Convention for the Suppression of the Financing of Terrorism; see also I Bantekas 'The international law of terrorist financing' (2003) 97 *American Journal of International Law* 315.

<sup>59</sup> Young (n 5 above) 23.

<sup>60</sup> The serious harming or killing of non-combatant civilians and the damaging of property with a public use causing economic harm done for the purpose of intimidating a group of people or a population or to coerce a government or international organization are proscribed outcomes. The act, which must be independently unlawful, must be intentional, and its consequences must at least be foreseen and desired. No particular motivation is needed to explain the act and none can justify it. Group action or involvement is not a requirement, but the act must be perpetrated by a sub-state actor. The act and/or its effects must be international in character.

crimes.<sup>61</sup> Though loosely considered to be a crime, terrorism does not fall within the ambit of core international crimes that are contained in the Statute of the ICC which created individual criminal responsibility that is binding on individuals.<sup>62</sup> Though it is conceded that in the context of the African Union, ‘terrorism’ has been defined in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.<sup>63</sup> Terrorism is however internationally considered as a treaty-based crime and, therefore, implementation lies with the individual states.<sup>64</sup> As a treaty-based crime under international law, transnational terrorism is regulated by conventions which did not clearly define the specific offences and punishment against those that cause infractions of these crimes, but which create responsibilities for state parties by requesting them to criminalize terrorist conduct.<sup>65</sup> To the extent that the crime of terrorism is treaty-based, it has no binding force on individuals which are not parties to these treaties.<sup>66</sup> This also creates a necessity for a transformation of the law of self-defence, if NSAs are to be held accountable. Though the inclusion of terrorism as a crime against humanity in the Statute of the ICC was discussed and is, therefore, found in the Draft Code, it did not form part of the ICC Statute.<sup>67</sup> According to Cassese, when terrorism manifests itself in the form of murder, extermination, torture and rape, it could amount to a crime against humanity, if the crimes are committed: (a) as part of a wide spread systematic attack on civilians; and (b) when the perpetrators are conscious that their criminal acts are part of general or systematic conduct.<sup>68</sup> He argued that, in spite of the emerging unqualified definition of terrorism, states rejected its inclusion as an international crime on the grounds that: (a) the offence was not well defined; (b) the inclusion of the crime would politicise the Court; (c) some acts of terrorism were not serious enough to warrant prosecution by an

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<sup>61</sup> Ambos & Timmermann (n 33 above) 36; A Bellal ‘The 2009 resolution of the Institute of International Law on Immunity and International Crimes’ (2011) *Journal of International Criminal Justice* 230.

<sup>62</sup> Art 6, 7 & 8 of the Statute of the ICC.

<sup>63</sup> Art 28 G of the Protocol on Amendments to the Protocol on the Statute of the African Court and Human Rights, 2014.

<sup>64</sup> C Kress ‘International criminal law’ in R Wolfrum (ed.) *The Max Planck encyclopedia of public international law* (Online edn. OUP) 2008 10; G Werle *Principles of international criminal law* (2009) 84; R Cryer & E Wilmschurst ‘Introduction: What is international criminal law?’ in Cryer et al (eds.) *An introduction to international criminal law and procedure* (2010) 8.

<sup>65</sup> Stephens (n 19 above) 479- 480; N Boister ‘Transnational criminal law’ (2003) 14 *European Journal International Law* 953, 962-963.

<sup>66</sup> Ambos & Timmermann (n 33 above) 24.

<sup>67</sup> Art 24 of the 1991 Draft Code of Crimes against Peace and Security of Mankind (1991) *Yearbook of the International Law Commission* Vol. 11/2, 97; see also Ambos & Timmermann (n 33 above) 36.

<sup>68</sup> Cassese (n 46 above) 222.



international tribunal; and (d) prosecution and punishment by national courts were considered to be more efficient than those by international tribunals.<sup>69</sup>

In addition, developing countries were apprehensive that terrorism might be lumped together with the genuine struggle of the people against foreign or colonial domination for self-determination or independence.<sup>70</sup> According to Cassese, judicial support for the above view is found in the case of *Tel Oren v Libyan Arab Republic*.<sup>71</sup> In that case, the Court of Appeals of the District of Columbia declined jurisdiction to entertain the above action because there is no agreement on the definition of terrorism as an international crime under customary international law and it, therefore, does not attract universal jurisdiction.<sup>72</sup> Similarly, in a French Court of Cassation where Ghaddafi's complicity for acts of terrorism came up for determination, the Court held that terrorism did not fall within the category of international crimes providing for an exception to immunity from jurisdiction of heads of state.<sup>73</sup>

Given its criminal law dimension, terrorism as an international crime ought to be founded on principles of the rule of law, fairness and legality.<sup>74</sup> This is because, for a particular conduct to give rise to a crime, it must have been clearly prohibited by a written law (*lex scripta*) so as to allow for prosecution upon commission of the offence.<sup>75</sup> In addition, the ingredients or elements of the conduct amounting to an offence must be succinctly stated.<sup>76</sup> For the purpose of interpretation, such a clearly written law containing a definition of offences with their ingredients and punishment has a huge advantage over customary principles of law because ambiguities inherent in unwritten laws are avoided.<sup>77</sup> Under domestic legal systems, criminal liability is founded only on a written law because nobody can be prosecuted on the basis of

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<sup>69</sup> Cassese (n 9 above) 125; A Cassese 'Terrorism is also disrupting some crucial legal categories of international law (2001) 12 *European Journal of International Law* 994; see also Hickman (n 14 above) 460.

<sup>70</sup> Cassese (n 69 above) 994.

<sup>71</sup> 726 F. 2d 774, 233 U.S.App. D.C. Cir. (1984), *Tel Oren v Libyan Arab Republic*. This is an action that was instituted by Israeli citizens, survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel seeking compensatory and punitive damages from Libyan Arab Republic and various Arab organisations for multiple tortuous acts in violation of the law of nations, treaties and criminal laws of the United States, as well as Common Law. On 3 February 1984, the Court of Appeal of the United States confirmed the District Court's dismissal of the action on the grounds of a lack of subject-matter jurisdiction and as barred by the applicable Statute of Limitation.

<sup>72</sup> Cassese (n 69 above) 994;

<sup>73</sup> S Zappala 'Do heads of state in office enjoy immunity from jurisdiction for international crimes? The Ghaddafi Case before the French Court de Cassation' (2001) 12 *European Journal of International Law* 607; Cassese (n 69 above) 994.

<sup>74</sup> Cryer & Wilmhurst (n 64 above) 17; K Ambos *Treatise on international criminal law* (2013) 87-97; Ambos & Timmermann (n 33 above) 22.

<sup>75</sup> Cryer & Wilmhurst (n 64 above) 17.

<sup>76</sup> A Cassese *International criminal law* (2013) 27-28.

<sup>77</sup> Art. 22 & 24 of the Statute of the ICC; Werle (n 64 above) 104.

committing an offence which is not defined with punishment prescribed in a written law thereto.<sup>78</sup>

Conversely, other commentators contend that terrorism amounts to an international crime like other violent acts against civilians, and it is illegal both in customary and codified international law.<sup>79</sup> Schaack and Hickman opined that an international crime prohibiting transnational terrorism has crystallized since 11 September 2001 because of the unequivocal condemnation of transnational terrorism by the international community.<sup>80</sup> While some commentators argue that the *Tel-Oren* decision has become obsolete by virtue of the change in customary international law occasioned by the September 11 attacks,<sup>81</sup> others hold the view that *Tel-Oren* represents a missed opportunity to regulate terrorism by judicial pronouncement.<sup>82</sup> Judicial support for the view that terrorism is an international crime, being a departure from the *Tel-Oren case*, has, however, emerged in the US case of *Almog v Arab Bank*.<sup>83</sup> In that case, the Court determined that the financing of suicide bombers against Israel violated international law as it was contrary to the provisions of the International Convention for the Suppression of Terrorist Bombing and the International Convention for the Suppression of the Financing of Terrorism.<sup>84</sup> The reasoning of the Court is that there is universal condemnation of organized bombings and that terrorism cannot be excused by invoking opposition to colonial, racist, alien, occupying or oppressive regimes. Neither can self-determination be employed to justify illegal methods of violence.<sup>85</sup> Cassese also observed that a transnational,<sup>86</sup> state-sponsored or state-condoned terrorism constitutes an international crime.<sup>87</sup> For him, there is now a clear notion of terrorism as a crime and of its objective and subjective elements,<sup>88</sup> these elements of the crime

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<sup>78</sup> Section 36(12) of the Constitution of the Federal Republic of Nigeria, which provides that ‘Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of the law’; *Aoko v Fagbemi* (1963) L.R. 1; see also I Oregbunam ‘Crime and punishment in Igbo customary law: The challenge of Nigerian criminal jurisprudence’ (2010) 6 *New Journal of African Studies* 53-85.

<sup>79</sup> MB Baker ‘The South American legal response to terrorism’ (1985) 3 *Boston University International Law Journal* 67, 90; Murphy (n 18 above) 68.

<sup>80</sup> BV Schaack ‘Finding the tort of terrorism in international law’ (2008) 28 *Review of Litigation* 381, 410, 468; Hickman (n 14 above) 449.

<sup>81</sup> Hickman (n 14 above) 459.

<sup>82</sup> HH Koh ‘Civil remedies for uncivil wrongs: Combating terrorism through transnational public law litigation’ (1987) 22 *Texas International Law Journal* 174.

<sup>83</sup> 471 F. Supp. 2d. 257, 280 (E.D.N.Y. 2007).

<sup>84</sup> A/RES/52/164 (1997); A/RES/54/109 (1999); Hickman (n 14 above) 464.

<sup>85</sup> Hickman (n 14 above) 454, 464.

<sup>86</sup> Schaack (n 80 above) 381, 410, 468; Hickman (n 14 above) 449.

<sup>87</sup> Cassese (n 69 above) 994; Cassese (n 76 above) 21, 146-152.

<sup>88</sup> Cassese (n 9 above) 463.

being *actus reus* and *mens rea*.<sup>89</sup> It is his view that a definition of terrorism emerged after 1937 but the disagreement was on the exception. Relying on the provisions of the Fourth Geneva Convention of 1949,<sup>90</sup> the Additional Protocol 11 to the Geneva Convention 1977,<sup>91</sup> the General Assembly resolution 54/109 on International Convention for the Suppression of the Financing of Terrorism<sup>92</sup> and General Assembly resolution 49/60,<sup>93</sup> he concluded that there is an unqualified definition of terrorism, which makes it qualify as an international crime.<sup>94</sup>

This study is persuaded to think that the better view that can be distilled from the above arguments is that terrorism does not belong to the category of international crimes, not having been provided for, in the ICC Statute, Nuremberg and Tokyo Charters and the constitutive instruments of other UN *ad hoc* Tribunals.<sup>95</sup> International consensus has, however, grown in the categorisation of terrorism as an international crime<sup>96</sup> to such extent that Ambos describes terrorism as being ‘on the brink of becoming a true international crime.’<sup>97</sup> Terrorism may be so classified as it occupies a higher pedestal, unlike other transnational crimes such as money laundering and drug trafficking, because it has been described as capable of threatening world peace and security.<sup>98</sup> To qualify as an international crime, however, terrorism must possess the criteria determined in the Tadic decision, that is: (a) the respective underlying prohibition (primary norm) must be part of international law; (b) a breach of this prohibition must be particularly serious so as to affect international values; and (c) a breach must give rise to individual criminal responsibility in its own right, independent of any criminalisation in domestic criminal jurisprudence.<sup>99</sup> Ambos may, therefore, have been correct when he stated that terrorism as a treaty-based transnational crime meets two of the above criteria in its

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<sup>89</sup> Cassese (n 9 above) 450.

<sup>90</sup> Art 33(1) of the Fourth Geneva Convention 1949, which provides that ‘collective penalties and likewise all measures of intimidation or of terrorism are prohibited.’

<sup>91</sup> Art 4(2)(d) of the Additional Protocol 2 to the Geneva Conventions 1977, which prohibits acts of terrorism at any time and in any place whatsoever.

<sup>92</sup> Art 2(a) and Art 2(1)(b) of the International Convention for the Suppression of the Financing of Terrorism, A/RES/54/109 (1999).

<sup>93</sup> A/RES/49/60 of 9 December 1994, para 3 of the Annexure provides: ‘Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them’.

<sup>94</sup> Cassese (n 76 above) 120-125.

<sup>95</sup> Zappala (n 73 above) 607.

<sup>96</sup> A/RES 49/60 of 9 Dec. 1996 Declaration on Measures to Eliminate International Terrorism.

<sup>97</sup> Ambos (n 34 above) 675; see also Ambos & Timmermann (n 33 above) 20, 37, where they also describe terrorism as being ‘only on its way to the supreme level of a true international crime but not yet there.’

<sup>98</sup> Ambos (n 34 above) 666.

<sup>99</sup> Prosecutor v Tadic ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No.IT-94-1, 2 October 1995; see also Ambos (n 34 above) 670; Ambos & Timmermann (n 33 above) 26.

formulation, but not the third very important criterion, which makes it bereft of being a true international crime.<sup>100</sup>

#### 4.2.3. Is transnational terrorism an act of war?

As a result of its transnational dimension, some jurisdictions have categorised their counter-terrorism measures as falling under non-international armed conflicts.<sup>101</sup> As a transnational crime under international law, treaties only oblige parties to cooperate to repress the offence.<sup>102</sup> But as to whether the acts of terrorism and the counter-measures thereto could qualify as acts of war appears problematic from the point of view of the position of the US following the 9/11 terrorist attacks. The US considers grave transnational terrorist acts as amounting to acts of war, and, therefore, it describes its counter-terrorism measures as ‘global war on terror’ (GWOT).<sup>103</sup> In his address, Koh stated that: ‘As a matter of international law, the United States is in an armed conflict with al-Qaeda, the Taliban, and associates, in response to the 9/11 attacks’.<sup>104</sup> The above statement has been repeated almost *verbatim* at different forums by both President Obama at the National Defence University and by Brennan at the Woodrow Wilson International Center for Scholars.<sup>105</sup> That apart, when the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Asma Jahangir, raised the issue that the air strikes of the US in Yemen amounted to extrajudicial executions,<sup>106</sup> the US responded that ‘inquiries related to allegations stemming from any military operation conducted during the course of an armed conflict with Al Qaeda do not fall within the mandate of the Special

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<sup>100</sup> Ambos (n 34 above) 670-671.

<sup>101</sup> *Hamdan v Rumsfeld* U.S. 577, 628-631 (2006).

<sup>102</sup> Cassese (n 69 above) 944.

<sup>103</sup> J Odle ‘Targeted killings in Yemen and Somalia: Can the United States target low-level terrorists?’ (2013) 27 *Emory International Law Review* 613-626; HH Koh ‘The Obama administration and international law,’ Speech delivered at the Annual meeting of the American Society of International Law on 25 March 2010, available at Lawfare <http://www.lawfareblog.com/wp-content/uploads> (accessed 20/03/2014).

<sup>104</sup> Koh (n 103 above)

<sup>105</sup> ‘Remarks by the President at the National Defence University’ when he stated ‘Under domestic law and international law, the United States is at war with al-Qaeda, the Taliban, and their associated forces. We are at war with an organisation that right now could kill as many Americans as they could if we did not stop them first. So this is a just war-a war waged proportionally, in last resort, and in self-defence,’ available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defence-university> (accessed 06/04/2015); see also JO Brennan ‘The ethics and efficacy of the President’s counter-terrorism strategy’ where he repeated Koh’s statement exactly at p 3, available at <http://www.lawfareblog.com/2012/04/brennans> (accessed 20/04/2014).

<sup>106</sup> Special Rapporteur on extrajudicial, summary or arbitrary executions, Representative of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Commission on Human Rights, para 39, UN Doc/E/CN.4/2003/3 (January 13, 2003) (by Asma Jahangir); see also Heyns & Knuckey ‘The long-term implications of targeted killing practices (2013) 54 *Harvard International Law Journal* 104.

Rapporteur ... Al Qaeda and related terrorist networks are at war with the United States.’<sup>107</sup> These statements may have drawn inspiration from the US Supreme Court decision which had earlier categorized the war on terrorism as a non-international armed conflict.<sup>108</sup> In addition, the conflict is outside the ambit of an international armed conflict since it involves a group of states and a private NSA.<sup>109</sup> Not being a war in the strict sense, it is not expected to be governed by rules of IHL<sup>110</sup>, and President Bush echoed this view when he said that ‘none of the provisions of Geneva apply to our conflict with Al Qaeda in Afghanistan or elsewhere throughout the world.’<sup>111</sup>

This leaves one wondering whether it is because of the involvement of the Taliban, the Government in Afghanistan at the time of the 9/11 attacks, that made the US describe their counter-measures as a war. In fact, Tladi has argued that the war in Afghanistan may be seen as a kind of attribution of blameworthiness on the government, that is, the Taliban.<sup>112</sup> Flowing from Tladi’s view, it then means that the war in question is being fought against the Afghan government, the concept of attribution having been invoked. The US argues that, for the legitimacy and legality of its action, it relies on provisions of international law and a Congressional mandate distilled from the Authorisation for Use of Military Force (AUMF)<sup>113</sup> to embark on an armed conflict against Al Qaeda, the Taliban and associated forces,<sup>114</sup> including Al Qaeda in the Islamic Maghreb (AQIM) and Al Qaeda in the Arabian Peninsula (AQAP).<sup>115</sup>

The description of the forcible measures as ‘war’ by the US has been described as a misnomer because a war necessitates the use of armed forces by two or more states.<sup>116</sup> Terrorism remains

<sup>107</sup> E/EC.4/2003/G/80. Letter dated April 2003 from the Chief of Section, Political and Specialised Agencies to the United Nations Office at Geneva addressed to the Secretariat of the Commission of Human Rights; see also J Raph *America’s war on terror: The state of the 9/11 exception from Bush to Obama* (2013) OUP 47.

<sup>108</sup> Hamdan v Rumsfeld 548 U.S. 557, 628-631 (2006).

<sup>109</sup> S Borelli ‘Casting light on the legal black hole: International law and detentions abroad in the ‘war on terror’ (2008) 87 *International Review of the Red Cross* 45.

<sup>110</sup> I Okoronye *Terrorism in international law* (2013)76.

<sup>111</sup> GW Bush ‘Memorandum on ‘Humane treatment of Al Qaeda and Taliban detainees,’ at <http://www.american-buddha.com/911.memofrompres2.7.02.htm> (accessed 21/05/2015), see also Y Ginbar *Why not torture terrorists?: Moral, practical and legal aspects of a ‘ticking bomb’ justification for torture* (2008) 230.

<sup>112</sup> D Tladi ‘The non-consenting innocent state: The problem with Bethlehem’s Principle 12’ (2013) 107 *American Journal of International Law* 575; D Tladi ‘The use of force in self-defence against non-state actors in international law’ (2012) 2 *Zanzibar Yearbook of Law* 84.

<sup>113</sup> S.J. Res. 23 of 14 September 2001.

<sup>114</sup> Brennan’s Address (n 105 above) 3; Koh (n 104 above).

<sup>115</sup> Remarks by President Obama (n 105 above); Brennan’s Address (n 105 above) 2.

<sup>116</sup> Cassese (n 69 above) 993; Stephens (n 19 above) 455.

a crime for as long as there is no state involvement, and it requires a domestic law enforcement paradigm.<sup>117</sup> Cassese went further to conjecture about why ‘war’ has been used to refer to conflicts with NSAs when he stated thus:

Admittedly, the use of the term ‘war’ has a huge psychological impact on public opinion. It is intended to emphasize both that the attack is so serious that it can be equated in its evil effects with a state aggression, and also that the necessary response exacts reliance on all resources and energies, as if in a state of war.<sup>118</sup>

Similarly, Statman has indicated that the US defined its campaign against Al Qaeda as war rather than as a police enforcement action because of the gravity of the threat posed by Al Qaeda and the impracticability of coping with this threat by conventional law enforcement institutions and methods.<sup>119</sup> This study also subscribes to the view that the counterterrorism measures taken by certain states do not constitute acts of war in the real sense. The application of the Geneva Convention to the relationship between Israel and Palestine is because of the *sui generis* status of Palestine as an occupied territory.

#### 4.2.4. Human rights implications of transnational terrorism

There is consensus that terrorist activities amount to treaty or domestic crimes, but whether such acts give rise to violations of human rights appears to be unsettled and problematic. This is because different views have been expressed under international law. It has been contended that it is state entities that commit violations of human rights, not NSAs<sup>120</sup> who are, more often than not, associated with acts of terrorism in contemporary international law.<sup>121</sup> The above position is opposed by arguments to the contrary that terrorism violates human rights in international law, the reason being that terrorism infringes on the rights sought to be preserved in international human rights covenants.<sup>122</sup> The right not to be killed, tortured, displaced, subjected to cruel, inhuman and degrading treatment and the right to worship your religion of choice are core human rights which are protected by both treaty and customary international

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<sup>117</sup> Melia (n 16 above); Tladi (n 112 above) 576.

<sup>118</sup> Cassese (n 69 above) 993.

<sup>119</sup> D Statman ‘Targeted killing’ 4, at [http:// www.ucl.ac.uk/-uctyho/StatmanTargetedkilling.html](http://www.ucl.ac.uk/-uctyho/StatmanTargetedkilling.html) (Accessed 23/05/2012); see also S Clark ‘Targeted killings: Justified acts of war or too much power for one government?’ (2012) 3 *Global Security Studies* 15; 22.

<sup>120</sup> D Pokempner (n 38 above)

<sup>121</sup> Pokempner (n 38 above) 22, MA Diez-Bacalso ‘A convention protecting persons from enforced disappearances: An Imperative, at [http://www.afad-online.org/voice/may\\_05/internationallobby.htm](http://www.afad-online.org/voice/may_05/internationallobby.htm) (20 April 2016)

<sup>122</sup> Pollock (n 14 above) 243.



law.<sup>123</sup> Terrorism aims at the violation of these rights with impunity<sup>124</sup> and in recognition of this fact the UNGA resolved that ‘every person regardless of nationality, race, sex, religion or any other distinction has a right to protection from terrorism and terrorist acts’.<sup>125</sup> As the Office of the High Commissioner for Human Rights (OHCHR) points out, the human cost of transnational terrorism has been felt in every corner of the world as neither states nor international organisations such as the UN are spared by terrorist bombings with far reaching consequences on the right to life, liberty and the physical integrity of victims.<sup>126</sup> For instance, in August 2011, the UN office in Abuja was attacked by a suicide bomber killing about 23 people, thereby giving Boko Haram international notoriety.<sup>127</sup>

Other than the rights itemised above, important rights, such as the right to dignity, freedom from violence against women and children and the right to free consent in marriage, are being violated daily with impunity by Al Qaeda, ISIL and Boko Haram. For instance, ISIL, in January 2015, shamelessly published its purported guidelines on how to treat sex slaves (captured young girls and women) in their custody, who they describe as ‘spoils of war’ that the Quaran also sanctions.<sup>128</sup> The impunity with which terrorists violate human rights has been responsible for the condemnation of these groups by international organisations.<sup>129</sup> It has been pointed out that the fact that Amnesty International and other bodies describe these violations as ‘abuses’ or ‘threats’ must not be allowed to whittle down the impact of the underlying acts and the urgent need to address these terrorist practices.<sup>130</sup>

In formulating strategies to counter transnational terrorism, new species of international law that ultimately displace existing human rights norms are being conceptualised. Accordingly, the principles of non-derogation from certain core human rights provisions are being

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<sup>123</sup> Some of the treaties that protect human rights include the International Covenant on Civil and Political Rights (ICCPR), Universal Declaration of Human Rights (UDHR), African Charter on Human and People’s Rights (ACHPR) and the European Convention on Human Rights (ECHR).

<sup>124</sup> D Kretzmer ‘Targeted killing of suspected terrorists: Extra-judicial executions or legitimate means of defence’ (2005) 16 *European Journal of International Law* 175; see also OHCHR (n 50 above).

<sup>125</sup> A/RES/59/195 of 28 March 2005.

<sup>126</sup> OHCHR (n 50 above).

<sup>127</sup> SA Hermon *Terror and insurgency in the Sahara-Sahel region: Corruption, contraband, jihad and the Mali war of 2012-2013* (2014) 164; S Murray & A Nossitter ‘Suicide bomber attacks UN building in Nigeria’ *International New York Times*, 26 August 2011.

<sup>128</sup> ISIL Committee of Research and Fatwas; Fatwas No. 61, 62 & 64-68 of 29 January 2015, at [http://graphics.thomsonreuters.com/doc/slaves\\_fatwa.pdf](http://graphics.thomsonreuters.com/doc/slaves_fatwa.pdf) (accessed 24/03/2016).

<sup>129</sup> The Quito Declaration of 13 September 1995, UN Doc. A/50/425-S/1995/787 of 13 September 1995; UN Economic and Social Council (ECOSOC) Sub-Commission on Human Rights, Consequences for the enjoyment of human rights of acts of violence committed by armed groups that spread terrorism among the population, para 1, Res. 1993/13, UN. ESCOR, 26<sup>th</sup> meeting (1993).

<sup>130</sup> K Bennoune ‘Terror/torture’ (2008) 26 *Berkeley Journal of International Law* 44.

redesigned to permit certain degrees of derogation.<sup>131</sup> Even if the transnational terrorists do not, thus, by their conduct directly curtail the enjoyment of human rights, the response by states does impair the rights of the people, particularly foreigners, resident in a state. For instance, as part of measures to contain terrorist activities, states resort to abridging certain rights with the attendant increase in torture of detainees, detention and surveillance power of law enforcement agencies.<sup>132</sup> The efforts to limit the freedom with which terrorist execute attacks invariably affect the liberties of citizens as governments cannot maximise both security and liberties.<sup>133</sup> In fact, in the aftermath of the 9/11 attacks, some states either enacted new laws on terrorism or reviewed existing laws, with a view to curtailing certain rights that were previously enjoyed by citizens.<sup>134</sup> Worse still, on the pretext of combating terrorism, repressive governments have increased the momentum of their disregard for basic human rights while achieving very little in terms of addressing the underlying causes of transnational terrorism.<sup>135</sup> It is the considered view of this study, therefore, that the acts of transnational terrorists undermine the emphasis on human rights values including the right to life, and, without the preservation of this supreme right, the guarantee of all other rights will be meaningless. Transnational terrorism constitutes violations of human rights.

### **4.3. Terrorist organisations: evolution, ideologies and violence**

The American National Strategy for Combating Terrorism 2003 has identified three levels of terrorist organisations that include those within a country, those that operate regionally and those with transnational or global reach.<sup>136</sup> Transnational terrorist organisations are organised NSAs who are alleged to carry out transnational or international terrorist acts as they engage, fund, plan and launch terrorist attacks that violate both domestic and international law.<sup>137</sup> The foregoing is intended to consider certain specific organisations with regard to their evolutionary history, objectives and the specific acts of violence they commit that have been prohibited by international law. According to Kretzmer, ‘An organisation will be seen as a terrorist group,

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<sup>131</sup> J Fitzpatrick ‘Speaking law to power: The war against terrorism and human rights’ (2003) 14 *European Journal of International Law* 241.

<sup>132</sup> JA Piazza & JI Walsh ‘International terror and human rights’ (2009) 53 *International Studies Quarterly* 125.

<sup>133</sup> Piazza & Walsh (n 132 above) 127.

<sup>134</sup> Piazza & Walsh (n 132 above) 126.

<sup>135</sup> Fitzpatrick (n 131 above) 242.

<sup>136</sup> United States National Strategy for Combating Terrorism, 2003, at [http://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter\\_Terrorism\\_Strategy.pdf](http://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter_Terrorism_Strategy.pdf) (accessed 21/06/2015).

<sup>137</sup> ND Nte ‘The dynamics of global terrorism, multilateralism and counter terrorism efforts: Prospects, challenges and implications for Nigeria’s national security’ (2011) 1 *International Security Journal* 2.

not only if terror is its sole aim or *modus operandi*, but also if it regularly employs terror as a means of achieving its aims. The legitimacy of those aims will be regarded as irrelevant.’<sup>138</sup> While several terrorist organisations threaten both domestic and international security, Hamas, Al Qaeda and Boko Haram will be considered hereunder as possessing the characteristics of terrorist organisations. When considered against that background, it may be easy to appreciate whether they actually fall within the bracket of NSAs whose actions give rise to a response in self-defence if other criteria are fulfilled. That may require a consideration of the gravity of attacks from these terrorist groups to know whether they amount to armed attacks in terms of scale and effect that could trigger an action in self-defence. If these attacks are considered as amounting to self-defence without attributing them to a state, it can then be argued that the law of self-defence is being transformed.

### 4.3.1. Islamic Resistance Movement (Hamas)

#### 4.3.1.1. Origin

Hamas is the Islamic word for ‘zeal’ and the acronym for the Islamic Resistance Movement.<sup>139</sup> It was established in 1987 by Sheik Ahmed Yassin, whose Islamist organisation, Mujama al-Islamiya, established in 1973 was aided by Israel to fight the Palestine Liberation Organisation’s (PLO) influence in the region.<sup>140</sup> Yassin was the head of the Muslim Brotherhood (MB) in Gaza and Hamas which was established as a wing or offshoot of the MB.<sup>141</sup> Hamas, thus, has its roots in the Muslim Brotherhood that was founded in Egypt in 1928<sup>142</sup> and share its beliefs, aspirations and thinking.<sup>143</sup> It derives its thinking, interpretations and views about life and humanity from Islam.<sup>144</sup> Israel thought of making Hamas a counter-weight to PLO.<sup>145</sup> Though Israel aided organisations such as Yassin’s Mujama Al-Islamiya (which Israel officially registered as a charity) and Hamas to fight the secular Palestinian

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<sup>138</sup> Kretzmer (n 124 above) 175.

<sup>139</sup> R Satloff ‘A primer on Hamas: Origins, tactics, strategy, and response’ *The Washington Institute for Near East Policy* 5, at <http://www.washingtoninstitute.org/html/pdf/PF53-satloff.pdf> (accessed 18/05/2015).

<sup>140</sup> M Ghogomu ‘Liberators or terrorists? The origins and history of Israel and Hamas,’ at <http://thehigherlearning.com/2014/08/10/liberators-or-terrorists-the-origins-and-history-of-israel-and-hamas/> (accessed 18/05/2015).

<sup>141</sup> Art 2 of the Hamas Charter (1988); Z Abu-Amr ‘Hamas: A historical and political background’ (1993) XXII *Journal of Palestine Studies* 5, (5-19); Ghogomu (n 140 above); Satloff (n 139 above) 5.

<sup>142</sup> A Higgins ‘How Israel helped to spawn Hamas’ *The Wall Street Journal*, 24 January 2009.

<sup>143</sup> Art 3 & 4 of the Hamas Charter.

<sup>144</sup> Art 1 & 6 of the Hamas Charter.

<sup>145</sup> R Marshall ‘The real reason for Israel’s wars on Gaza and Lebanon’ *Washington Report on Middle-east Affairs*, September/October 2006.

groups, such as the PLO, it denied supporting the growth of Hamas, but attributed the rise of Hamas to the support it enjoys from Iran.<sup>146</sup> Israel dissipated its energy in fighting Fatah, while leaving Hamas to gather momentum and flourish with strength, even in the face of harsh comments against it by Hamas. Israel's mood towards Hamas changed, however, when Hamas killed two Israeli soldiers in its first attack against Israel.<sup>147</sup>

#### 4.3.1.2. Objectives

The principal objective of Hamas is the confrontation and fight against Israel, which it believes has illegally occupied sacred Muslim land.<sup>148</sup> Satloff argues that, without confronting Israel, 'Hamas has no reason to exist; it would simply revert to being the Muslim Brotherhood.'<sup>149</sup> In its determination to confront the Zionist regime, Hamas sees itself as linked with the ideals of their predecessors, Martyr Izzadin al-Qassam and the Muslim Brotherhood, who previously fought against the Zionists in 1936 and 1948 respectively.<sup>150</sup> As can be discerned from its Charter, securing the Palestinian land as it existed prior to 1967 is a priority goal in its agenda. This objective was captured thus: 'discarding the evil, crushing it and defeating it, so that truth may prevail, homelands revert (to their owners), calls for prayer to be heard from their mosques, announcing the restitution of the Muslim State.'<sup>151</sup> Waging jihads against its enemies that set foot on Palestinian land and to protect the lands from expropriation is considered a national duty.<sup>152</sup>

Apart from the provisions in the Hamas Charter, the resolve of Hamas to take a jihad to Israel in pursuit of the return of seized and occupied Palestinian lands is unequivocally resonated in statements by its leader. For instance, Ismail Haniyeh, Hamas leader while calling for another intifada in a speech at Tehran University, Iran on 8 December 2006, stated: 'We will never recognize the usurper Zionist government and will continue our jihad-like movement until the

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<sup>146</sup> Higgins (n 142 above).

<sup>147</sup> Higgins (n 142 above); Ghogomu (n140 above).

<sup>148</sup> Satloff (n139 above) 5.

<sup>149</sup> Satloff (n 139 above) 5.

<sup>150</sup> Art 7 of the Hamas Charter, which provides in part: 'The time will not come until Muslims will fight the Jews (and kill them); until the Jews hide behind rocks and trees, which will cry: O Muslim! There is a Jew hiding behind me, come and kill him.'

<sup>151</sup> Art 9 of the Hamas Charter.

<sup>152</sup> Art 11 & 12 of the Hamas Charter. Art 12 provides in part: 'Nothing is loftier or deeper in nationalism than waging jihad against the enemy and confronting him when he sets foot on the land of the Muslims. And this becomes an individual duty binding on every Muslim man and woman; a woman must go out and fight the enemy even without her husband's authorization, and a slave without his master's permission.'

liberation of Jerusalem.’<sup>153</sup> Similarly, in another speech in Gaza City’s al-Katiba to mark the 24<sup>th</sup> anniversary of the creation of Hamas on 14 December 2011, Haniyeh stated: ‘The Hamas movement will lead intifada after intifada until we liberate – all of Palestine, Allah willing.’<sup>154</sup>

Secondly, Hamas also pursues the long-term goal of broadening its control of the Palestinian society which may ultimately help it put the larger society to use in terms of fighting its wars with Israel.<sup>155</sup> This fact may not be unconnected with the involvement of Hamas in the political struggles in Palestine, leading to its participation in the 2006 legislative elections that saw it defeat its rival Fatah by winning 76 seats out of the 132 seats.<sup>156</sup> The goal of broadening its control is further consolidated through the delivering of social welfare programmes such as setting up clinics and schools.<sup>157</sup> For these reasons, Hamas supporters see it as a legitimate resistance group or a coalition of freedom fighters, while Israel, US, EU, Canada and Japan consider it to be a terrorist organisation for its long duration of attacks against Israel and its refusal to renounce violence.<sup>158</sup>

#### 4.3.1.3. Alleged terrorist acts of Hamas:

In furtherance of its objectives contained in the Hamas Charter, which saw no rationale for peaceful option to the Israeli/Palestinian crisis,<sup>159</sup> Hamas (using its military wing, Izz ad-Din al-Qassam Brigades) has either alone or in concert with Islamic Jihad and Fatah’s Al Aqsa Martyrs Brigades carried out a series of violent attacks against Israel.<sup>160</sup> Except in a few cases, Hamas claimed responsibility for its involvement in all the terrorist attacks and received the

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<sup>153</sup> ‘8 years, 8 quotes by Hamas Leader Ismail Haniyeh’ 19 February 2014, at <https://www.idfblog.com/hamas/2014/19/8-years-8-quotes-hamas-leader-ismail-haniyeh> (accessed 19/05/2015).

<sup>154</sup> Haniyeh (n 153 above).

<sup>155</sup> Satloff (n 139 above) 5.

<sup>156</sup> Ghogomu (n 140 above; Higgins (n 142 above).

<sup>157</sup> ‘Profile: Hamas Palestinian Movement’ *BBC NEWS*, 11 July 2014.

<sup>158</sup> Ghogomu (n 140 above); Profile: Hamas Palestinian Movement (n 157 above).

<sup>159</sup> Art 13 of the Hamas Charter.

<sup>160</sup> ‘Select Hamas terrorist attacks against Israel’ *Anti-Defamation League (ADL)*, 2006, at [http://archive.adl.org/main\\_israel/hamas\\_attack.html](http://archive.adl.org/main_israel/hamas_attack.html) (accessed 19/05/2015), (a) On 31 August 2010, 4 Israelis were killed including a pregnant woman near Kiryat Arba in the West Bank, (b) On 13 January 2005, a double suicide bombing killed 6 and injured 5 Israelis at the Karni Crossing between Israel and the Gaza Strip, (c) On 28 August 2004, 16 people were killed and about 100 others were injured when suicide bombers attacked 2 buses in Beersheba, (d) On 5 January 2003, 22 people were killed and about 120 others injured in a double suicide bombing near the Old Central bus station in Tel Aviv, (e) On 11 June 2003, a suicide bomber dressed as an ultra-orthodox Jew blew up a Jerusalem City bus, killing 16 people and injuring more than 80 others, (f) On 15 October 2003, 3 Americans were killed and one was wounded at Beit Hanoun Junction in the Gaza Strip when a bomber targeted a convoy carrying U.S. diplomats and CIA personnel (both Hamas and Islamic Jihad denied responsibility).

blessings of Hezbollah. According to Byman, from the start of the second intifada to October 2005, Palestinians killed 1,074 Israelis and wounded 7,520 others.<sup>161</sup> Interestingly, just as Hamas is averse to any peaceful resolution of the crisis that is short of securing all their lost lands, Israel has denied peaceful options of bringing suspected terrorists to account.<sup>162</sup> Thus, Israel has employed both targeted killing and full cross-border military operations to destroy the terrorist infrastructure and exterminate Palestinian leaders alleged to be involved in terrorism including Sheik Ahmed Yassin, Salah Shehada, Fathi Shinkaki, Rantisi and Yahya Ayyash.<sup>163</sup> The military operations include *Operation Cast Lead* in December 2008, *Operation Pillar of Defence* in November 2012 and *Operation Protective Edge* in July 2014.<sup>164</sup>

### 4.3.2. Al Qaeda

#### 4.3.2.1. Origin

The name ‘Al Qaeda al-sulbah’ means ‘the solid base’ and it was used by Abdullah al-Azzam, who was killed in 1989 by a remote controlled car bomb in Peshawar, alleged to have been masterminded by Osama bin Laden<sup>165</sup>, to name the organisation.<sup>166</sup> Al Qaeda was formed on 11 August 1988 at a meeting in Peshawar, Pakistan, which was attended by Osama bin Laden, Ayman al-Zawahiri, Sayf al Fadl and Abdullah Yusuf Azzam.<sup>167</sup> The desire to form Al Qaeda was borne out of the need to reform the Sunni clerical establishment.<sup>168</sup> In doing this, al-Zawahiri formulated its ideologies while bin Laden contributed his financial resources and organisational talents.<sup>169</sup> The traditional Sunni establishment was seen largely as conservative by some Muslims who opted to revolutionize the Middle-east because the Sunni establishment was alleged to be working with other Arab regimes and the Americans to maintain the *status quo* in avoidance of a revolution.<sup>170</sup> The 19<sup>th</sup> Century founders of modernist reform in Sunnism are, therefore, the inspirators of the Al Qaeda ideology.<sup>171</sup> These reformers and their intellectual

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<sup>161</sup> D Byman ‘Do targeted killings work’ (2006) 85 *Foreign Affairs* 102.

<sup>162</sup> Byman (n 161 above) 97.

<sup>163</sup> Byman (n 161 above) 95-104.

<sup>164</sup> Profile: Hamas Palestinian Movement (n 157 above).

<sup>165</sup> P Migaux ‘Al Qaeda’ in G Challand & A Blin (eds.) *The history of terrorism from antiquity to Al Qaeda* (2007) 315-316.

<sup>166</sup> Migaux (n 165 above) 314.

<sup>167</sup> A Wander ‘A history of terror: Al Qaeda 1988-2008’ *The Guardian*, 13 July 2008, at <http://www.theguardian.com/world/2008/july/13/history.alqaeda> (accessed 14/04/2015).

<sup>168</sup> C Hezel ‘The origins of Al Qaeda’s ideology: Implications for US strategy’ (2005) 35 *Parameters* 70.

<sup>169</sup> CM Blanchard ‘Al Qaeda: Statements and evolving ideology’ *CRS Report for Congress* 1, 9 July 2007; see also Henzel (n 168 above) 75-76.

<sup>170</sup> Henzel (n 168 above) 69.

<sup>171</sup> Henzel (n 168 above) 70.



descendants in Al Qaeda are the outcasts or non-conformists of the Sunni establishment, and these reformers preached a heterodox and revolutionary ideology.<sup>172</sup> The symbol and centre of Sunni Islamic orthodoxy is Cairo's Al-Azhar, a University and Seminary that remains ideologically opposed to the radical reformists who are partners of Al Qaeda.<sup>173</sup> The traditional Sunni establishment centred on the Al-Azhar became known as the Salafism and strove to sustain uncorrupted and unadulterated Muslims of modern Islam. Rivalry between pro-establishment Salafists and revolutionary Salafists intensified, leading to the alleged involvement of Mohammad Abd al-Salam Faraj and other reformist proponents in the assassination of Anwar Sadat in 1981.<sup>174</sup> The reformists' descendants, such as Al Qaeda, consider the Sunni establishment as 'near or enemies within' and the non-Muslims as 'far enemies.'<sup>175</sup>

Upon foundation, the Al Qaeda fighting force was made up of about 10,000 to 20,000, drawn from the organisational infrastructure of Islamist volunteers who had previously been recruited by Bin Laden and Abdullah al-Azzam to fight in Afghanistan against the Soviet forces.<sup>176</sup> Thereafter, Al Qaeda grew to become a coalition of factions of radical Islamic groups, hitherto operating independently in the Muslim world.<sup>177</sup> Al Qaeda's affiliates include, but are not limited to, Al Qaeda in the Arabian Peninsula (AQAP), North Africa/Sahel-Al Qaeda in the Islamic Maghreb, Al Shabaab and the Islamist Movements in Somalia, Islamic Group and Al Jihad (Egypt), Armed Islamic Group and the Salafist Group for Call and Combat (Algeria), Islamic Movement of Uzbekistan (IMU), Asbat al-Ansar (Lebanon), Jemaah Islamiyah (Indonesia) and Libyan Islamic Fighting Group.<sup>178</sup> Furthermore, the original Al Qaeda, which comprised of veterans from the Afghan insurgency against the Soviet Union, appears not to exist in the same structure because it has been transformed and diffused into a global network of dispersed nodes with varying degrees of independence.<sup>179</sup> Al Qaeda, thus, comprises of semi-autonomous and self-radicalised actors spread over 70 countries who merely sustain a

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<sup>172</sup> Henzel (n 168 above) 70.

<sup>173</sup> Henzel (n 168 above)70.

<sup>174</sup> Henzel (n 168 above)70, 74.

<sup>175</sup> Henzel (n 168 above) 71.

<sup>176</sup> K Katzman 'Al Qaeda: Profile and threat assessment' *CRS Report for Congress 2*, August 17, 2005; J Rollins 'Al Qaeda and affiliates: Historical perspective, global presence, and implications for U.S. policy' *CRS Report for Congress 5*; AM Bennett 'Islamic history & Al Qaeda: A primer to understanding the rise of Islamic movements in the modern world' (2013) 3 *Pace International Law Review Online Companion* 355.

<sup>177</sup> Katzman (n 176 above) 3.

<sup>178</sup> Rollins (n 176 above) 14-24; Katzman (n 176 above) 7-8.

<sup>179</sup> Rollins (n 176 above) preamble.

loose relationship with the core cadre in Pakistan and who coordinate their cells to pose a threat to the US security architecture and other enemies.<sup>180</sup>

#### 4.3.2.2. Objectives

One of the principal objectives for the formation of Al Qaeda was to fight non-Muslim influences in their lives, particularly western influences.<sup>181</sup> The architects of Al Qaeda's formation detested the superiority and dominance of the west as was shown in culture, science and international politics. The dominance was further typified in Napoleon's occupation of Egypt, the French colonisation of North Africa and Britain's overbearing power over Muslims in India and Egypt.<sup>182</sup> The fear of foreign domination also necessitated the declaration of jihad by Bin Laden against the US for its continued retention of troops in the Arabian Peninsula and for being in alliance with Israel.<sup>183</sup> Their objectives, which were formulated by al-Zawahiri, an Egyptian physician, were aimed at achieving the ideological and organisational coherence of the groups they led. This would be followed by fighting against conservative regimes of the Muslim world, and, thereafter, establishing a Muslim State in the Arab world.<sup>184</sup> While some ideological differences exist between Islamist organisations, they appear to share the ideological objective of establishing an Islamic State.<sup>185</sup> The proposed Caliphate, when established, will be governed by Islamic law and be based on Islamic principles of finance and social conduct.<sup>186</sup>

#### 4.3.2.3. Alleged terrorist acts of Al Qaeda

Bin Laden's issuing of a fatwa (religious edict) in 1998 against the US, and the statements made by other leaders of Al Qaeda in justification of terrorist attacks in the US and other countries around the world, point to the fact that Al Qaeda has been involved in terrorism.<sup>187</sup> In consonance with their leaders' statements and promises, Al Qaeda embarked on the most devastating terrorist attack in terms of scale and effect on the 11 September 2001 against certain

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<sup>180</sup> DC Blair, Director of National Intelligence (DNI) 'Annual threat assessment of the Intelligence Community for the Senate Committee on Intelligence,' 2 February 10; Rollins (n 176 above) preamble.

<sup>181</sup> Henzel (n 168 above) 73.

<sup>182</sup> Henzel (n 168 above) 72-73.

<sup>183</sup> Blanchard (n 169 above) 2 & 3.

<sup>184</sup> A al-Zawahiri *Knights under the Prophet's banner* 80; Henzel (n 169 above) 76.

<sup>185</sup> Bennett (n 176 above) 320.

<sup>186</sup> Blanchard (n 169 above) 3.

<sup>187</sup> Blanchard (n 169 above) 4; 'Text of fatwa instigating jihad against Americans' Al Quds Al Arabi (London), 23 February 1998.

locations in the US. Arguably, the 9/11 attacks catalysed the transformation of the law of self-defence. The attack was justified by Al Qaeda and was founded on the following objectives: (a) it was intended to retaliate against the perceived aggression of the US against the Islamic world; (b) it was intended to point to the emergence of a new leadership that was determined to oppose the Zionist-Anglo-Saxon-Protestant coalition for the social and political ills they have brought upon the world'; and (c) the attack was intended to provoke the US to come out of its hole to face Al Qaeda in a war, which might ultimately provoke other Muslims to take arms against the US and its interests.<sup>188</sup> In fact, Al Qaeda remains the biggest threat to US interests, having perceived the US as being symbolic of the West, modernization, capitalism, democracy and multinational corporations.<sup>189</sup>

Celebrating the successes recorded by Al Qaeda's insurgent operations in Iraq in which several innocent people were killed shows the group's insensitivity towards the need to preserve human lives.<sup>190</sup> Among Al Qaeda's involvement in several incidents of terrorism, it is alleged to have carried out the following: (a) 7 August 1998 bombings of U.S. embassies in Nairobi, Kenya and Dar es Salam, Tanzania in which about 300 people were killed and about 4,500 others injured;<sup>191</sup> (b) October 2000 suicide bomb attack on U.S.S. Cole (warship) which was docked at Aden harbour, Yemen, causing damage to the ship and killing 17 people; (c) 1993 bombing of the World Trade Centre in New York, involving bomb maker Ramzi Ahmad Yusuf and Abd al-Rahman for which the latter was convicted; (d) 1995 assassination attempt on Hosni Mubarak in Ethiopia; and (e) aiding the October 1993 killing of 18 US soldiers in Mogadishu, Somalia.<sup>192</sup> Al Qaeda or its affiliates were also responsible for the attack on the British Consulate and Hong Kong and Shenghai Banking Corporation (HSBC) building in Istanbul, Turkey, killing 27 people, the 2001 bombing of the World Trade Organization Twin Towers, killing over 3,000 people,<sup>193</sup> and the 2007 assassination of Pakistani Prime Minister Benazir Bhutto.<sup>194</sup>

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<sup>188</sup> Blanchard (n 169 above) 5.

<sup>189</sup> Nte (n 137 above) 3.

<sup>190</sup> Blanchard (n 169 above) 8.

<sup>191</sup> R Wedgwood 'Responding to terrorism: The strikes against bin Laden' (1999) 24 *Yale Journal of International Law* 560

<sup>192</sup> K Katzman (n 176 above) 4; see also Rollins (n 176 above) 6-7.

<sup>193</sup> Nte (n 137 above) 3, 5.

<sup>194</sup> Bennett (n 176 above) 362.

### 4.3.3. Jama'atu Ahlis sunna Lidda'awati Wal Jihad (Boko Haram)

#### 4.3.3.1 Origin

Boko Haram is officially known as *Jama'atu Ahlis Sunna Lidda'awati Wal Jihad* which means 'people committed to the propagation of the prophet's teachings and jihad.'<sup>195</sup> Varying accounts have been given as to the time of the emergence of Boko Haram. While Sani<sup>196</sup> wrote that it emerged in 1995, Onuoha and Ugwueze said it was in 2002.<sup>197</sup> Boko Haram is an Islamic religious sect which started in Northeast Nigeria in the states of Borno, Yobe and Bauchi with its membership spreading rapidly to almost all northern states. Membership is drawn from drug addicts, almajiris, bankers, the unemployed, university lecturers, the political class, Islamic schools and university undergraduates who abandoned their studies with the determination of fighting for Allah to save Islam from the trappings of western influences.<sup>198</sup> Others were returnees from terrorist training camps in Algeria, the Tuareg rebel camp in Mali and other parts of the Sahel region.<sup>199</sup> Religion propels Islamist terrorism, and its late leader Yusuf was an adherent of the Salafi Jihad movement. In 2002, they declared corruption in Nigeria irredeemable and withdrew to a village called Kanama near the border with the Niger Republic, in a manner they likened to the withdrawal of Prophet Mohammed from Mecca to Medina.<sup>200</sup> The group was largely localized upon foundation, but allegations were made that it was aligning with similar terrorist groups, like Al Qaeda in the Islamic Maghreb,<sup>201</sup> AQAP and al Shabaab.<sup>202</sup> Its concrete moves to partner with other groups that share similar sentiments and ideas with them was, however, in 2015 when Boko Haram expressed its loyalty and resolve to partner with the Islamic State in Iraq and the Levant (ISIL).<sup>203</sup> As expected, ISIL publicly

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<sup>195</sup> Onuoha & Ugwueze (n 47 above) 24.

<sup>196</sup> S Sani 'Boko Haram 'History, ideas and revolt' *News Diary*, 3 August 2011, at [http://newsdiaryonline.com/shehu\\_boko\\_haram.htm](http://newsdiaryonline.com/shehu_boko_haram.htm) (accessed 12/04/2015).

<sup>197</sup> Onuoha & Ugwueze (n 47 above) 22.

<sup>198</sup> Sani (n 196 above); DE Agbiboa '(Sp)oilng domestic terrorism?: Boko Haram and state response' (2013) 25 *Peace Review: A Journal of Social Studies* 433.

<sup>199</sup> A Walker 'What is Boko Haram' Special Report 308' June 2012, *United States Institute for Peace*, at <http://www.usip.org/sites/default/files/SR308.pdf> (accessed 12/04/2015).

<sup>200</sup> Walker (n 199 above).

<sup>201</sup> Hermon (n 127 above) 164-165.

<sup>202</sup> Onuoha & Ugwueze (n 47 above) 23.

<sup>203</sup> A Chandler 'The Islamic State of Boko Haram' *The Atlantic*, 9 March 2015, at <http://www.theatlantic.com/international/archive/2015/03/boko-haram-pledges-allegiance-islamic-state/387235> (accessed 13/04/2015), where Boko Haram's leader Abubakar Shekau pledged loyalty to ISIL thus: 'We announce our allegiance to the Caliphate and will hear and obey in times of difficulty and prosperity;' K Shidler 'Boko Haram Shura Council considers loyalty to Islamic State as media hypes report on IS-Boko Haram differences' at <http://www.centerforsecuritypolicy.org/2015/02/23/boko-haram-shura-council-considers-loyalty-to-islamic-state-as-media-hypes-report> (accessed 13/04/2015).

acknowledged the pledge of loyalty which is in tandem with its goal of expanding its Caliphate.<sup>204</sup>

#### 4.3.3.2. Objectives

Boko Haram, like other fundamentalist movements, aims to maintain and spread its religious beliefs, arguing that non-believers who rule Nigeria should not rule them, and that their sect was determined to establish an Islamic state, including the implementation of the Sharia code.<sup>205</sup> This view is in consonance with the group's official name, which is interpreted to mean 'people committed to the propagation of the Prophet's teachings and jihad.' It also has the objective to run a state-like organisation which was to be nurtured subsequently to replace the actual state. In furtherance thereof, they carried out functions such as providing welfare handouts, job training, moral policing and supporting widows of deceased members.<sup>206</sup> The group's agenda also includes ridding their region or Nigeria of the corrupt and apostate ruling class with a view to instilling religious purity.<sup>207</sup> That movement has a strategic religious agenda to expand religion without regard for national boundaries, and one of their aims was to defeat western powers that inhibit the establishment of a true Islamic state.<sup>208</sup> To them, banking based on shylock's mode of making profit, taxation and jurisprudence were infidel and western education propagated the negative of what Allah has ordained.<sup>209</sup> Removing western influences was, therefore, a strategic goal in their agenda, which aimed to enable them to correct unacceptable western notions, such as the theory that evolutionary trends made monkeys mutate to modern man.<sup>210</sup> Lastly, Boko Haram, which has since metamorphosed into a transnational terrorist organisation, also nurtures the objective of destabilising Nigeria internally.<sup>211</sup>

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<sup>204</sup> 'ISIS leader accepts allegiance of Nigeria's Boko Haram's offer' *Reuters* 12 March 2015, at [http://www.huffingtonpost.com/2015/03/12/isis-boko-haram\\_n\\_6858762](http://www.huffingtonpost.com/2015/03/12/isis-boko-haram_n_6858762) (accessed 13/04/2015).

<sup>205</sup> Onuoha & Ugwueze (n 47 above) 24.

<sup>206</sup> Walker (n 199 above).

<sup>207</sup> Agbibo (n 198 above) 432; Walker (n 199 above).

<sup>208</sup> Silke (n 10 above) 110.

<sup>209</sup> Sani (n 196 above); Onuoha & Ugwueze (n 47 above) 23.

<sup>210</sup> Sani (n 196 above).

<sup>211</sup> A Mezyaev 'Boko Haram's transformation into a transnational corporation' at <http://libya360.wordpress.com/2015/07/06/book-haram-transformation-into-a-transnational-corporation/> (accessed 19/03/2016).

#### 4.3.3.3. Alleged terrorist activities of Boko Haram

Boko Haram's activities appear to portray all the characteristics of terrorism, as are contained in the various definitions of terrorism considered above. Their activities are religious driven, directed sometimes at the non-combatant population and are intended to cause fear in the minds of their targets. Firstly, as terrorists, they embarked on mass killings in civilian populated areas, using sophisticated suicide car bombings which have made people ask whether they are linked to external terrorist groups like Al Qaeda.<sup>212</sup> Apart from bombing the police headquarters and the UN compound in Abuja, the group was responsible for an uncountable number of detonations of bombs and explosives in bus stops and schools. Specifically, on 10 November 2014, a suicide bomber dressed as a student entered the Assembly Hall of the Government Technical College, Pokistum, and detonated a bomb, killing about 50 students and injuring 79 others.<sup>213</sup> Similarly, among its incessant raids on communities, Boko Haram accepted responsibility for the massacre of an estimated 200 civilians in Doro Gowon and Doron Baga towns in a video released on 20 January 2015.<sup>214</sup> Amnesty International (AI) described this incident as the largest and most destructive in which civilian homes, clinics and schools were burnt down.<sup>215</sup> Its leader threatened to kill more, saying that the Baga killings were merely the tip of the iceberg.<sup>216</sup>

Furthermore, kidnapping for ransom or for other criminal purposes is an integral part of the agenda of Boko Haram. Robbing banks, cash-in-transit convoys of an estimated 500 million Naira which they relied on the Quran to justify as spoils of war, and ransom payments from victims and their families contributed a substantial part of the organisation's budget. According to Agbiboa, apart from robberies of the Guarantee Trust Bank (GTB) and the Intercontinental Bank on 10 December 2011, at least 30 other banks have been robbed by the group.<sup>217</sup> The kidnapping of about 250 school girls on 14 April 2014 from Chibok in Borno State, Northeast

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<sup>212</sup> Agbiboa (n 198 above) 435.

<sup>213</sup> M Schiavenza 'Boko Haram's war on Nigerian students' *The Atlantic*, 10 November 2014, at <http://www.theatlantic.com/international/archive/2014/11/Suspected-Boko-Haram-Suicide-Bomber-Kills-50-Students-at-Government-College-Pokistum> (accessed 13/04/2015).

<sup>214</sup> J Rademeyer & E Whitehead 'Flatsheet: What happened in Baga?' *Africa Check*, at [africacheck.org/factsheets/factsheet-what-happened-in-baga/](http://africacheck.org/factsheets/factsheet-what-happened-in-baga/) (accessed 21/06/2015).

<sup>215</sup> T Eniola 'Over 150 died in Baga' *Punch*, January 15, 2015, at [www.punchng.com/news/over-150-died-in-baga-amnesty-international/](http://www.punchng.com/news/over-150-died-in-baga-amnesty-international/) (accessed 21/06/2015).

<sup>216</sup> J Newton 'Boko Haram leader threatens war with Niger, Cameroon, Chad and Nigeria and warns of more massacres in rant-filled video' *Mail Online*, 22 January 2015, at <http://www.dailymail.co.uk/news/article-2921905/boko-haram-leader-threatens-war-with-niger-cameroon-chad-nigeria-threatens-massacres> (accessed 13/04/2015).

<sup>217</sup> Agbiboa (n 198 above) 435.



Nigeria attracted a world-wide outcry.<sup>218</sup> On 5 May 2014, Abubakar Shekau threatened to sell the girls as slaves in Cameroon, Chad and the Central African Republic if members of his sect held in various prisons were not released.<sup>219</sup>

By way of conclusion on this point, it is the view of this study that Hamas, Al Qaeda and Boko Haram are terrorist organisations. This study is not oblivious to the fact that Hamas may be genuinely pursuing statehood for Palestine having regard to its alliance with the Fatah government that secured non-member observer status in the UNGA<sup>220</sup> and its involvement in internal political positions that saw it secure a significant number of legislative seats. The *modus operandi* it adopted to realise self-determination appears, however, to possess all the trappings of terrorism. The same violent conduct was a reason to deny itself the adoption of a SC resolution for Israeli withdrawal in three years which would have paved the way for its statehood.<sup>221</sup> All three organisations have a central goal of establishing a caliphate which will have no regard for existing geographical and political state boundaries, and they all have a common hatred of western values. According to them, such western influences adulterate pure Islam since what western powers propagate is the opposite of what Allah has ordained. To realise these dreams, terrorism appears to be the ready tool because their dreams cannot be realised through constitutional gatherings on the floor of the UN or even in regional organisations. To that extent, their activities of killing, wounding and causing apprehension, bombing western cities, attacking and threatening their assets abroad which are indices of terrorism have brought them within the parameters of terrorist organisations.

#### **4.4. Obligations of states in the fight against terrorism**

##### **4.4.1. Duty to prevent transnational terrorism**

States are imbued with both negative and positive obligations in the fight against transnational terrorism. One of the most remarkable and elaborate formulations of the responsibilities of states in this regard is contained under resolution 1373<sup>222</sup> and has been captured succinctly by

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<sup>218</sup> J Zenn 'Boko Haram and the kidnapping of the Chibok School girls' *Combating Terrorism Center*, 29 May 2014, at <http://www.ctc.usma.edu/posts/boko-haram-and-the-kidnapping-of-the-chibok-schoolgirls> (accessed 13/04/2015).

<sup>219</sup> Zenn (n 218 above).

<sup>220</sup> A/RES/67/19 of 4 December 2012, para 2.

<sup>221</sup> P Beaumont 'US and Israel intervention led UN to reject Palestinian resolution' *The Guardian*, 31 December 2014.

<sup>222</sup> VJ Proulx 'Babysitting terrorists: Should states be strictly liable for failing to prevent trans-border attacks?' (2005) 23 *Berkeley Journal of International Law* 637.

both Nielsen<sup>223</sup> and Johnstone.<sup>224</sup> Resolution 1373 requests that all states prevent the funding of terrorism by criminalizing the provision or collection of funds, freezing existing funds, and prohibiting the donation of funds.<sup>225</sup> States are obliged to refrain from giving any active or passive support to terrorist groups, suppress recruitment and arms transfers to terrorists, cooperate in the exchange of intelligence and share early warnings with other states, deny safe havens to those who finance, plan, support or commit terrorist acts, or provide safe havens and prevent the same from operating or freely moving in their territories, and ensure adequate criminal law and its application against terrorists, their financiers and supporters.<sup>226</sup> The resolution drew a nexus between terrorism and the trafficking of drugs and arms and requested the cooperation of states in matters of criminal justice. States were directed to ratify relevant international conventions with a view to accepting responsibility to cooperate and fight terrorism. The UN established the CTC to monitor the implementation of resolution 1373.<sup>227</sup> The obligation to refrain from promoting, aiding, supporting or acquiescing in terrorist activities is provided for in other UN resolutions and international treaties.<sup>228</sup>

The main source of this obligation on states is article 2(4) of the UN Charter which prohibits the use of force by states in the territories of other states.<sup>229</sup> A state that breaches such a duty may be construed as being involved in acts of terrorism or omitting to prevent terrorism by failure to apprehend, prosecute, punish or extradite such terrorists.<sup>230</sup> Transnational terrorist acts are by their nature violent actions against states<sup>231</sup> and are, therefore, inconsistent with the purposes of the UN.<sup>232</sup> In fact, in contemporary times, the sophistication with which attacks are perpetrated by NSAs is comparable in scale and effect to those carried out by regular armed forces of a state.<sup>233</sup> Injured states, thus, resort to using varying methods including full military operations in a response which some states, particularly the US, describe as a Global War on

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<sup>223</sup> E Nielsen 'State responsibility for terrorist groups' (2010) 17 *University of California Davis* 176.

<sup>224</sup> RL Johnstone 'State responsibility: A concerto for Court, Council and Committee' (2008) 37 *Denver Journal of International Law & Policy* 83-84.

<sup>225</sup> S/RES/1373 of 28 September 2001 para 1.

<sup>226</sup> S/RES/1373 of 28 September 2001 para 2.

<sup>227</sup> S/RES/1373 of 28 September (2001) para 6; Nielsen (n 223 above) 176-177.

<sup>228</sup> A/RES/2625(XXV) of 24 October 1970, Declaration on Friendly Relations; A/RES/49/60 of 9 December 1994 para 4, Declaration on Measures to Eliminate International Terrorism, para 5 (a); S/RES/1367 of 10 September 2001; S/RES/1373 of 28 September 2001; S/RES/883 of 11 November 1993; S/RES/1044 of 31 January 1996; S/RES/1189 13 August 1998; S/RES/1333 of 19 December 2000.

<sup>229</sup> Art 2(4) of the UN Charter.

<sup>230</sup> J Gurule 'Terrorism, territorial sovereignty and the forcible apprehension of international criminals abroad' (1994) 17 *Hastings International & Comparative Law Review* 467.

<sup>231</sup> Art 2 (4) of the UN Charter; S/RES/1373 of 28 September 2001, para 5.

<sup>232</sup> S/RES/1377 of 12 November 2001, preamble.

<sup>233</sup> The 11 September 2001 terrorist attacks against the US and the 1998 terrorist bombings of the U.S. embassies in Kenya and Tanzania.

Terrorism (GWOT) in self-defence.<sup>234</sup> This effort no doubt culminates in the transformation of the law of self-defence. Other countries, like Germany, opposed the framing of terrorist attacks as triggering global war, but opted rather to employ the law enforcement paradigm in the fight against terrorism.<sup>235</sup>

State responsibility is, therefore, engaged, if a state possesses the capacity to prevent terrorism but fails or neglects to do so.<sup>236</sup> International law requires nations to use due diligence to prevent a wrong being done within their territories or domains to another nation with which they are at peace.<sup>237</sup> If this positive obligation of employing due diligence is not met, and harm is done to another state on account of that failure, it may be construed that such a state has failed in its international obligation with regards to preventing its territory from being used to launch attacks.<sup>238</sup> Israel, thus, relied on the alleged failure of the Lebanese Government in its duty to prevent its territory from being used by terrorists groups such as PLO and Hezbollah as a launching pad for cross-border attacks against it.<sup>239</sup> An obligation to prevent the launching of attacks from a state's territory will, however, be decreased if there is significant disparity between the size of the host state's territory and the military capacity relative to the terrorist activities.<sup>240</sup> In circumstances of this nature, an ill-equipped state may be left with no option other than to compromise its sovereignty by allowing foreign forces on invitation to combat the threat within its territory.<sup>241</sup> According to Proulx, obligations of prevention 'are usually construed as best efforts obligations, requiring states to take all reasonable and necessary measures to prevent a given event from occurring, but without warranting that the event will not occur.'<sup>242</sup>

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<sup>234</sup> R Vark 'State responsibility for private armed groups in the context of terrorism' (2006) XI *Juridica International* 184.

<sup>235</sup> S Boyne 'The future of liberal democracies in a time of terror: A comparison of the impact on civil liberties in the Federal Republic of Germany and the United States' (2003) 11 *Tulsa Journal of Comparative & International Law* 112.

<sup>236</sup> Proulx (n 222 above) 661.

<sup>237</sup> JA McCredie 'Contemporary uses of force against terrorism: The United States response to Achille Lauro- Questions of jurisdiction and its exercise' (1986) 16 *Georgia Journal of International & Comparative Law* 453; *Corfu Channels Case (United Kingdom v Albania), Merits*, ICJ Reports 1949, 4, para 24; United States v Arjona 120 U.S. 479 (1887).

<sup>238</sup> R Ago 'Fourth Report on State Responsibility' (1972) 2 *Year Book of International Law Commission* 70, 120, para 135, UN Doc A/CN. 4/264.

<sup>239</sup> Proulx (n 222 above) 632.

<sup>240</sup> D Bowett 'Reprisals involving recourse to armed force (1972) 66 *American Journal of International Law* 20. Bowett argued that the ability of a state to contain the conduct of terrorists must have regard to the political factors, limited military capacity and the size of the territory when juxtaposed against the guerrilla activities; Proulx (n 222 above) 663.

<sup>241</sup> Proulx (n 222 above) 663.

<sup>242</sup> Proulx (n 222 above) 661.

Arguably, a state can fight terrorism only with the arsenals at its disposal and no more. It is the opinion of this study that weak states should not unnecessarily bear the brunt of very powerful victim states on account of a failure to contain terrorism in a manner victim states would expect. Instead, weak states must be enabled to cope with the menace of transnational terrorism through strategic partnerships with powerful states in the areas of improving domestic legislation, technical and investigative assistance, intelligence sharing, law enforcement skills and military training. This is because weak states may have sympathy for counter-terrorism efforts but may lack the capacity and are manifestly too weak to assert control over their territories thereby losing part of their sovereignty to terrorist organisations.<sup>243</sup> The US should make good its promise, as contained in its 2003 National Strategy for Combating Terrorism, by supporting the enhancement of the capacity of weak states, but not bullying them for purportedly hosting and providing safe havens for terrorists.<sup>244</sup>

There is a scholarly consensus that states have been active participants in certain incidents of terrorist activities.<sup>245</sup> Even Article 3(g) of resolution 3314 may be linked to acts of terrorism in the definition of aggression that includes, ‘the sending by or on behalf of a state of armed bands, groups, irregular or mercenaries, which carry out acts of armed force against another state.’<sup>246</sup> This may be construed as banning actual state involvement in terrorism, using irregular forces.<sup>247</sup> Apart from refraining from actual participation in acts of terrorism, states are obligated to refrain from aiding or acquiescing in acts of terrorism. A state is deemed to have acquiesced with wrong doing by terrorists if it remains indifferent to their activities, thereby passively tolerating or condoning acts that are injurious to other states.<sup>248</sup>

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<sup>243</sup> H Borowski ‘Weak states and terrorist organisations: A proposed model of intervention’ (2012) 21 *Minnesota Journal of International Law* 1, 23-25. (1-51)

<sup>244</sup> National Strategy for Combating Terrorism of the United States 2003 (n 136 above) 8.

<sup>245</sup> KN Trapp ‘Holding states responsible for terrorism before the International Court of Justice’ (2012) 3 *Journal of International Dispute Settlement* 279-280, where it stated that there was suspicion of the involvement of Syrian officials in the assassination of former Lebanese Prime Minister Hariri. In addition, Libya’s involvement in the terrorist Lockerbie bombing incident was proven, as Libya, apart from its initial denials, accepted responsibility for the bombing through a letter dated 15 August 2003 to the President of the Security Council. Libya also paid compensation to victims’ families for the terrorist attack. These incidents manifestly indicate the failure of certain states to meet their obligations under international law to refrain from acts of terrorism.

<sup>246</sup> A/RES/2625 (1970)...

<sup>247</sup> Lillich & Paxman (n 21 above) 273.

<sup>248</sup> Lillich & Paxman (n 21 above) 240.

#### 4.4.2. Duty to apprehend, prosecute and punish terrorists

The responsibility of states to apprehend terrorists is not expected to be an isolated or fragmented effort of any single state because the global nature of transnational terrorism requires states to work in concert.<sup>249</sup> Whether a state is directly involved in acts of terrorism or indirectly assists terrorist NSAs, a breach of international law arises.<sup>250</sup> States are under an obligation to prevent and suppress hostile expeditions directed against life or property in a foreign territory, and they bear international responsibility as ‘[accessories] after the fact’ if they fail, refuse or neglect to take steps to apprehend and punish the culprits.<sup>251</sup> International conventions have since codified the duty of states to apprehend, prosecute and punish terrorists and other criminals.<sup>252</sup> For instance, the Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking Convention or Hague Convention),<sup>253</sup> the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention)<sup>254</sup> and International Convention against the Taking of Hostages (Hostages Convention)<sup>255</sup> are to that effect. The duty to extradite such a culprit is subsumed in the duty to apprehend and punish.<sup>256</sup> Extradition is the surrender by one state to another state of an individual accused or convicted of an offence outside its own territory and within the jurisdiction of the other, which, being competent to try and punish him, demands the surrender.<sup>257</sup> Extradition jurisprudence is contained in treaties between states outside of conventional international law rules<sup>258</sup>, and there is a lack of uniformity and consistency in terms of political offence exceptions.<sup>259</sup>

Additionally, commentators argue that a state should also be culpable as an ‘accessory after the fact’ if it permits the free entry or safe passage of terrorists, these acts being manifestations

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<sup>249</sup> JN Carberry ‘Terrorism: A global phenomenon mandating a united international response’ (1999) 6 *Indiana Journal of Global Legal Studies* 687.

<sup>250</sup> Lillich & Paxman (n 21 above) 221.

<sup>251</sup> Lillich & Paxman (n 21 above) 221, 276-280; M Sassoli ‘State responsibility for violations of international humanitarian law (2002) 84 *International Review of the Red Cross* 411.

<sup>252</sup> Gurule (n 230 above) 473.

<sup>253</sup> Art 7 of the Hague Convention (Hijacking Convention), 860 U.N.T.S. 105 of 4 October 1971 provides ‘The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution’.

<sup>254</sup> Art 3 of the Montreal Convention, 27 September 1971, 24 U.S.T. 565, 10 I.L.M. 1151 (1971).

<sup>255</sup> Art 8(1) of the Hostages Convention A/RES/146 (XXXIV) of 17 December 1979. See also Art 2 & 7.

<sup>256</sup> Lillich & Paxman (n 21 above) 221.

<sup>257</sup> Black’s Law Dictionary (6<sup>th</sup> ed. 1990) 585.

<sup>258</sup> RS Phillips ‘The political exception and terrorism: Its place in current extradition schemes and proposals for the future’ (1997) 15 *Dickinson Journal of International Law* 337, 341.

<sup>259</sup> Carberry (n 249 above) 697.

of its failure in its duty to punish or extradite terrorists.<sup>260</sup> Extradition treaties should be properly drafted so as not to create loopholes or gaps for criminals to exploit, failing which the host state may merely be seen to provide safe haven, asylum or sanctuary for such terrorists.<sup>261</sup> Arguably, if an extradition treaty provides that parties to the treaty have unfettered discretion to either extradite terrorist and other criminals or not to extradite them, as canvassed by Alvarez-Machain,<sup>262</sup> in this study's view the essence of the treaty is defeated.<sup>263</sup> Abduction or forcible apprehension of terrorists or other international criminals may culminate in retaliatory abductions and generally violate international law with regard to territorial sovereignty.<sup>264</sup> If the host state is, however, unwilling or unable to apprehend, prosecute and punish terrorists in its territory in violation of its international responsibility, then a victim state of terrorist attacks should be permitted to use extraterritorial force.<sup>265</sup> Arguably, international law should not be construed as having been violated if such forcible apprehension or abduction for possible trial in the victim state is in furtherance of self-defence.<sup>266</sup> Breaches of a state's duty to prosecute and punish terrorists range from no prosecution at all, prosecution followed by release, prosecution with ridiculously light punishment, prosecution, imposition of punishment and then pardon.<sup>267</sup> Furthermore, the duty to punish terrorists is sometimes jeopardized or frustrated by lenient policies adopted by states because of the fear of additional attacks.<sup>268</sup>

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<sup>260</sup> WR Slomanson 'ICJ Damages: Tort remedy for failure to punish or extradite international terrorists' (1974) 5 *California Western International Law Journal* 125.

<sup>261</sup> M Halberstam 'In defence of the Supreme Court decision in Alvarez-Machain' (1992) 86 *American Journal of International Law* 736, 737-738. Halberstam contended that, 'A rule that would prohibit trial whenever the defendant is illegally seized, unless coupled with a rule requiring states to extradite, would put terrorists, drug dealers and others who have no regard for human life on notice that they can perpetrate the most monstrous crimes without fear of punishment as long as they can find a state that condones their conduct, or that will-for whatever reason-never prosecute or extradite.'

<sup>262</sup> *United States v Alvarez-Machain* 112 S. Ct. 2188 (1992); 504 U.S. 655 (1992).

<sup>263</sup> Humberto Alvarez-Machain, a medical doctor and a citizen of Mexico, was abducted to the USA to stand trial for his role in the killing of Camarena-Salzar, a US DEA agent. Alvarez-Machain was alleged to have administered medication to Camarena to revive him and sustain his life for more torture and interrogation. He challenged his abduction on the grounds that it violated the extradition treaty between the USA and Mexico. Art 9(1) of the treaty provides that 'Neither Contracting Party shall deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it is deemed proper to do so,' see Art 9(1) United States-Mexico Extradition Treaty, T.I.A.S. No.9656, 31 U.S.T. 5059.'

<sup>264</sup> A Abramovsky 'Extraterritorial abductions: America's 'Catch and Snatch' policy run amok' (1991) 31 *Virginia Journal of International Law* 150; AF Lowenfield 'Still more on kidnapping' (1991) 85 *American Journal of International Law* 655.

<sup>265</sup> Gurule (n 230 above) 940.

<sup>266</sup> M Ledermen 'The legal basis for the Abu Khattalah capture' *Just Security*, June 19, 2014, at <http://justsecurity.org/11856/legal-basis-abu-khattalah-capture/?print> (accessed 10/09/2015).

<sup>267</sup> *Janes Case (United States v Mexico)*, (1927), Opinion 108, 114, 4 R. Int. Arb. Awards 82, 87 (1927); Lillich & Paxman (n 21 above) 280.

<sup>268</sup> Gurule (n 230 above) 459; Lillich & Paxman (n 21 above) 276.



#### 4.4.3. Duty not to harbour or provide safe haven for terrorist organisations

Safe havens have been defined as ungoverned, under-governed or ill-governed areas of a country and non-physical areas where terrorists are able to organize, plan, raise funds, communicate, recruit, train and operate in relative security because of inadequate governance capacity or political will.<sup>269</sup> A state hosting terrorist NSAs from which attacks emanate has an international responsibility to prevent such attacks.<sup>270</sup> In fact, Proulx compares the duty of a babysitter which entails preventing the baby from causing harm to other neighbours to the duty of a state that is harbouring terrorists. According to him, ‘host-states can be found responsible for wrongful acts, as would the babysitter who fails to prevent the children under his or her guard from burning down the neighbour’s house.’<sup>271</sup> State practice in contemporary international law appears to create responsibilities even for states that passively harbour terrorists without taking any positive steps to aid them.<sup>272</sup> As can be discerned from several instances, there is a gradual transition from direct attribution of responsibility to a model of indirect responsibility to states.<sup>273</sup> Indirect responsibility does not contemplate any causal nexus between the terrorist wrong doer and the state, but the state’s international obligation may be engaged for an omission, either deliberate or innocent, rather than an act.<sup>274</sup> This shift from the previous position has been made popular by the US and Israel in their relations with states that are alleged to be harbouring terrorist NSAs. This shift in the requirement of attribution is fundamental in the momentum towards transformation of the law of self-defence. President George Bush made the position of the US very clear by stating that, ‘it would make no distinction between the terrorists who commit these acts and those who harbour them.’<sup>275</sup> It was in furtherance of this thinking that the US invaded and overthrew the Taliban government, which, in its opinion, provided safe haven in parts of Afghanistan for Al Qaeda to flourish.<sup>276</sup> Arguably, the fact that the Taliban aided Al Qaeda was made clear to the UNSC when the representative of the US reported the initial measures it had taken in self-defence against Al

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<sup>269</sup> T Reinold ‘State weakness, irregular warfare, and the right to self-defence post 9/11’ (2004) 105 *American Journal of International Law* 244.

<sup>270</sup> Proulx (n 222 above) 560; D Brown ‘Use of force against terrorism after September 11<sup>th</sup>: State responsibility, self-defence and other responses’ (2003-2004) 11 *Cardozo Journal of International Law* 4-5, 13-18.

<sup>271</sup> Proulx (n 222 above) 667.

<sup>272</sup> Vark (n 234 above) 184.

<sup>273</sup> Proulx (n 222 above) 666.

<sup>274</sup> Proulx (n 222 above) 624.

<sup>275</sup> Address of President George Bush to the USA on 11 September 2001.

<sup>276</sup> Vark (n 234 above) 191.

Qaeda and the Taliban.<sup>277</sup> Perhaps some inspiration for the US to hold this position may have come from the SC whose resolution 1373 obligated member states to ‘deny safe havens to those who finance, plan, support or commit terrorist acts, or provide safe havens.’<sup>278</sup>

The reasonableness of holding harbouring states accountable is apt only when such states possess the ability to control the activities of such terrorists but nonetheless chose to tolerate or condone them.<sup>279</sup> The mere acquiescence, incompetence, lack of awareness of the threat or passive conduct which Brown described as ‘vicarious liability’<sup>280</sup> is not the toleration of terrorists which the state is expected to prevent, but the state is required to abstain from playing any active role in the furtherance of terrorist activities.<sup>281</sup> Does this then mean that, if a state takes all appropriate steps within its power and disposal to prevent terrorist attacks but the sophistication of the terrorist NSA makes it possible to launch attacks, it may not be reasonable to hold the host state responsible? Arguably, it is not amenable to reason that a state should bear responsibility for acts that are well beyond its control, though state practice seems to show the responsibility of states that innocently host NSAs.<sup>282</sup> The expectation is that states be held to account for culpable acts or omissions.<sup>283</sup> This position as significantly changed the law of self-defence.

#### 4.4.4. Developing or strengthening domestic law in the regulation of terrorism

Most conventions, treaties, and the GA and SC resolutions are established by international bodies, but their implementation and enforcement are left for domestic or national law.<sup>284</sup> This, the various member states of the UN can do by domesticating or incorporating such conventions or resolutions into the *corpus* of domestic jurisprudence because the mere signing or ratification of conventions and UN resolutions may not make much impact. According to Bianchi, the efficacy of the action undertaken at the international level relies, therefore, on the willingness and actual capacity of states to incorporate international standards in their domestic

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<sup>277</sup> U.S. Permanent Representative to the UN, Negroponte’s letter of 7 October 2001 addressed to the President of the SC, UN Doc. S/2001/946 (2001).

<sup>278</sup> S/RES/1373 (2001) of 28 September 2001, para 2(c) & (d); see also Vark (n 236 above) 191-192.

<sup>279</sup> GM Travaglio ‘Terrorism, international law, and the use of military force’ (2000) 18 *Wisconsin International Law Journal* 154.

<sup>280</sup> Brown (n 270 above) 13.

<sup>281</sup> Vark (n 234 above) 192; GA Christenson ‘Attributing acts of omission to the State’ (1991) 12 *Michigan Journal of International Law* 316-317.

<sup>282</sup> Y Dinstein ‘War, aggression and self-defence (2012) 5<sup>th</sup> edn. 269-270; Vark (n 234 above) 192.

<sup>283</sup> Erickson (n 54 above) 100-103.

<sup>284</sup> A Bianchi ‘Security Council’s anti-terror resolutions and their implementation by member states’ (2006) 4 *Journal of International Criminal Justice* 1045.

legal systems for adjudication and enforcement procedures.<sup>285</sup> Furthermore, the other obligations discussed above may not have much meaning if there are no domestic laws to guarantee their realisation. These obligations, therefore, require state parties to develop domestic legal frameworks to criminalize and punish terrorism, and, to that extent, several states, including but not limited to Nigeria,<sup>286</sup> the US,<sup>287</sup> India,<sup>288</sup> Canada,<sup>289</sup> the UK<sup>290</sup> and South Africa<sup>291</sup> have enacted new anti-terrorism laws, particularly after the September 2001 bombings in the US.<sup>292</sup>

Developing legal frameworks by states to proscribe and punish terrorists helps to establish the rule of law and emphasises the criminal nature of terrorist acts.<sup>293</sup> The determination by states to punish terrorists with a view to deterring potential terrorists may, however, be hampered by unnecessary lenient policies of leaders of states, whose states in certain cases concede discretionary powers to them. These lenient policies are adopted by states for fear brought about by threats of additional terrorist attacks.<sup>294</sup> The idea of leniently or sympathetically suspending sentences of convicted terrorists does not strengthen the fight against terrorism through the judicial processes.<sup>295</sup> For instance, French authorities released Abu Daoud, a Palestinian terrorist leader who was alleged to have been involved in the deaths of Israeli Olympics athletes in Munich, in spite of protests from Israel.<sup>296</sup> It has been alleged that of about 150 Palestinian terrorists that had been arrested in Western Europe within five years, all except nine were quietly released with or without trial.<sup>297</sup> Furthermore, states that are manifestly apprehensive of terrorist retaliatory attacks rely on the justification that countries requesting the extradition of terrorists retain the death penalty in their criminal jurisprudence and that they will not extradite foreigners to such countries.

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<sup>285</sup> Bianchi (n 284 above) 1045.

<sup>286</sup> Terrorism (Prevention) Act (Nigeria) No. 10 of 2011

<sup>287</sup> Homeland Security Act (United States of America) 6 USC 101 of 2002.

<sup>288</sup> Prevention of Terrorism Act (India) No. 15 2002, (though this Act was subsequently repealed by the Prevention of Terrorism (Repeal) Act 2004.

<sup>289</sup> Anti Terrorism Act (Canada) (S.C. 2001, C. 41) of 2001.

<sup>290</sup> Prevention of Terrorism Act (United Kingdom) (C. 2) of 2005.

<sup>291</sup> Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2003.

<sup>292</sup> C Lumina 'Counter-terrorism legislation and the protection of human rights: A survey of selected international practice' (2007) 7 *African Human Rights Journal* 36.

<sup>293</sup> DC Findley 'Abducting terrorists overseas for trial in the United States: Issues of international and domestic law (1988) 23 *Tennessee International Law Journal* 1, 50; McCredie (n 237 above) 435, 467.

<sup>294</sup> Lillich & Paxman (n 21 above) 276.

<sup>295</sup> Franck & Lockwood Jr. (n 9 above) 88.

<sup>296</sup> *New York Times*, 12 January 1977, para A, at 1, col.1.

<sup>297</sup> AJ Pierre 'The politics of international terrorism' (1976) 19 *ORBIS* 1251, 1264.

## 4.5. Role of the UN in the fight against transnational terrorism

The UN has powers under its Chapter VII mandate to order the use of force against transnational terrorists if their conduct amounts to a threat to international peace and security.<sup>298</sup> The UN has established non-forcible measures to combat transnational terrorism including legal frameworks and the setting up of counter-terrorism committees. These efforts may have achieved some degree of success, even though some measures appear not to be effective. Cassese has identified the factors militating against the effectiveness of international anti-terrorism measures as (a) inadequate ratifications, (b) lack of effective enforcement mechanisms upon violation of regulatory frameworks by states, and (c) absence of specification that terrorist crimes are not political offences, and as such not exempt from extradition.<sup>299</sup>

### 4.5.1. Developing a legal framework to fight terrorism

The principal role played by the UN so far in the fight against transnational terrorism is in the area of formulating the policy and legal frameworks through resolutions of the GA and the SC. Even though the UN has been involved in the fight against the menace of terrorism for a long time, a compelling impetus to play a leading role arose from the increase in the sophisticated terrorist attacks in the 1990s.<sup>300</sup> Specifically, the magnitude of the September 2001 terrorist attacks on the US, and the attendant horror and devastation the attack left in its wake, turned the perception of the global danger represented by international terrorism. For this reason, the UNSC assumed a pivotal role in the fight against terrorism.<sup>301</sup> In doing this, the SC has, through resolutions under its Chapter VII powers, imposed obligations, even including those of a general character, on states and targeted sanctions on organisations and individuals that are associated with terrorist networks, particularly Al Qaeda.<sup>302</sup>

The implementation or enforcement of these regulatory frameworks is left for domestic enforcement mechanisms, which may be brought about by the willingness of the individual member states to incorporate them into the *corpus* of their domestic laws.<sup>303</sup> Unfortunately, despite these efforts by the UN, there are increasing incidents of devastating terrorist attacks in

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<sup>298</sup> Art 39 of the UN Charter.

<sup>299</sup> A Cassese *Terrorism, politics and law: The Achille Lauro Affair* (1989) 11.

<sup>300</sup> The UN resolutions on terrorism in the 1960s to 1990s include: S/RES/1189 of 13 August 1998 on refraining from organizing, instigating, assisting or participating in terrorist acts; A/RES/54/109 of 25 February 2000 on Suppression of Financing Terrorism etc.

<sup>301</sup> Bianchi (n 284 above) 1045.

<sup>302</sup> S/RES/1373 of 28 September (2001); S/RES/1540 of 28 April 2004; Bianchi (n 284 above) 1045.

<sup>303</sup> Bianchi (n 284 above) 1045.

recent times. This threatening development has made scholars wonder whether there may be a need to create new laws or modify the existing legal order which appears to be inadequate so as to save the security infrastructure from collapsing.<sup>304</sup> This desire led to re-interpreting the UN Charter and also employing forcible measures in a manner that have manifestly changed the face of the law on self-defence. The UN however, argues that the existing frameworks, particularly the UN Charter, are sufficient to address the full range of threats to international peace and security.<sup>305</sup>

The role of the UN extends to imposing sanctions on states and terrorist organisations alike for either harbouring terrorist organisations in their territories or for being engaged in terrorism.<sup>306</sup> Firstly, Libya was sanctioned in 1992 for its role in the blowing up of Pan Am flight 103 over Lockerbie, Scotland in 1988.<sup>307</sup> A sanctions monitoring committee was accordingly set up, and, upon Libya's subsequent acknowledgement and payment of compensation to victims, the sanctions were lifted and the committee was dissolved.<sup>308</sup> By virtue of resolution 1267, the Security Council adopted measures to impose sanctions on the Taliban for harbouring and training terrorists on its territory following the attacks on the US embassies in Kenya and Tanzania. Similar measures were extended to Al Qaeda and its affiliates.<sup>309</sup> These were targeted sanctions which relate to travel ban, arms embargo and freezing of assets, and, because they were targeted sanctions, there was a minimal effect on civil population.<sup>310</sup> Conversely, trade sanctions have an impact on civil society and sometimes not much impact is felt by the targets where alternative trading partners are available.<sup>311</sup>

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<sup>304</sup> BM Jenkins 'International terrorism: A new mode of conflict 9, (California Seminar on arms control and foreign policy research paper, No. 48, 1975).

<sup>305</sup> M Wood 'The law on the use of force: Current challenges' (2007) 11 *Singapore Yearbook of International Law* 5, 13-14; World Summit Outcome, A/RES/60/L. 1 (2005) of 15 September 2005 para 79; Secretary-General's High-Level Report 'A more secure world: Our shared responsibility' (A/59/565), para 185-203; Secretary-General's report 'In larger freedom: Towards development, security and human rights for all' (A/59/2005) paras 122-126.

<sup>306</sup> S/RES/1267 of 15 October 1999.

<sup>307</sup> S/RES/748 of 31 March 1992. The sanctions included: (a) to deny permission to any aircraft destined to Libya to take off from, land, or overfly their territory, (b) to prohibit the supply of any aircraft or aircraft components to Libya, and (c) to prohibit any provision to Libya of arms and ammunitions, technical advice, assistance, or training on military matters.

<sup>308</sup> S/RES/1506 12 September 2003; Cassese (n 9 above) 468.

<sup>309</sup> S/RES/1333 19 December 2000.

<sup>310</sup> Bianchi (n 284 above) 1046.

<sup>311</sup> Trapp (n 245 above) 280.

#### 4.5.2. United Nations Counter-terrorism Committee

The UN established the CTC consisting of all members of the SC to monitor the implementation of resolution 1373.<sup>312</sup> The resolution called upon states to report specific steps taken by them in the implementation of the resolution to the CTC not later than 90 days from the date of adoption of the resolution 1373, and thereafter reporting intervals are to be determined by the Committee.<sup>313</sup> This reporting duty imposed on states was overwhelmingly supported by states.<sup>314</sup> The CTC performed such functions as promoting and monitoring the implementation of resolution 1373, referring areas of difficulty in the implementation of resolution 1373 to the SC, considering initiatives towards improving technical assistance to states and to that extent undertaking visits to states,<sup>315</sup> strengthening coordination between CTC and other UN bodies, intensifying interaction with international, regional and sub-regional organisations and approving the programme of work of the Counter-terrorism Executive Directorate (CTED).<sup>316</sup>

The CTC decisions are by consensus and, if any deadlock arises, such matters are to be referred to the SC. The CTC activities are also subject to SC review after a three month interval<sup>317</sup>, and its approach towards states is that of a non-threatening, non-confrontational and consensus based on such a way that states which fail to keep their obligations under resolution 1373 are not always reported to the SC.<sup>318</sup> The CTC exercises no radical powers of its own to compel states supporting terrorism not to do so apart from reporting such states to the SC for appropriate action.<sup>319</sup> Its role is to employ subtle diplomacy to win the confidence of the states and strengthen the structures that have been erected for the fight against terrorism.

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<sup>312</sup> S/RES/1373 of 28 September 2001, para 6.

<sup>313</sup> S/RES/1373 of 28 September 2001 para 6.

<sup>314</sup> Nielsen (n 223 above) 178; E Rosand 'Current developments: Security Council Resolution 1373, the Counter-Terrorism Committee, and the fight against terrorism' (2003) 97 *American Journal of International Law* 333, 337; see also Johnstone (n 224 above) 85.

<sup>315</sup> Nielsen (n 223 above) 180.

<sup>316</sup> CSR Murthy 'The UN Counter-terrorism Committee: An institutional analysis' Friedrich Ebert Stiftung 5, Briefing Paper 15, September 2007, at <http://library.fes.de/pdf-files/iez/04876.pdf> (accessed 07/06/2015).

<sup>317</sup> Murthy (n 316 above) 4-5.

<sup>318</sup> Nielsen (n 223 above) 180.

<sup>319</sup> Murthy (n 233 above) 6.



### **4.5.3. United Nations Counter-terrorism Committee Executive Directorate (CTED)**

The CTED was established as a political mission to enhance the CTC's ability to monitor the implementation of resolution 1373 and effectively build the capacity of states.<sup>320</sup> This body performs its duties using the guiding principles of cooperation, transparency, even-handedness and consistency. Its priority responsibilities include the provision of an in-depth analysis of the implementation of resolution 1373, providing technical assistance and capacity building, improving communication with states through letters and direct dialogue, reviewing and proposing ways to update the reporting regime, cooperating with other SC subsidiaries and counter-terrorism related committees, enhancing detailed country assessments and visits to states on a flexible and tailored basis. They also compile relevant information on the best practices of entities, international and regional organisations.<sup>321</sup>

### **4.6. Extraterritorial use of force against non-state actors while combating transnational terrorism**

Under certain circumstances, the right of states to use force unilaterally against terrorists operating in the territory of another state is recognized,<sup>322</sup> though such use of force triggers sovereignty crisis that threatens international peace and security particularly where such states are not at war.<sup>323</sup> Hence, article 2(4) placed a ban on all uses of inter-state force. The use of force against terrorists may not, however, constitute an infraction of the sovereignty jurisprudence if (a) the territorial or host state consents, (b) the targeting or outside state is clothed with a right of self-defence under article 51 of the UN Charter because the territorial state is responsible for armed attacks against the victim state or it is unwilling or unable to prevent armed attacks emanating from its territory.<sup>324</sup> The purpose of militarily reacting to terrorist attacks in self-defence is primarily to repel or avert armed attacks, but some states use

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<sup>320</sup> S/RES/1373 of 28 September 2001 para 2.

<sup>321</sup> United Nations Year book of the United Nations, (2005) Vol. 59, *United Nations Publications* (2007) 112; Murthy (n 216 above) 5-5.

<sup>322</sup> CJ Tams 'The necessity and proportionality of anti-terrorist self-defence' in L van den Herik & Schrijver (eds.) *Counter terrorism strategies in a fragmented international legal order* (2013) 373.

<sup>323</sup> Israeli killing of Khalil al-Wazir (Abu Jihad) in Tunisia in April 1988 was condemned as a violation of the sovereignty of Tunisia, see S/RES/611 of 25 April 1988.

<sup>324</sup> P Alston 'The CIA and targeted killings beyond borders (2011) 2 *Harvard National Security Journal* 306.

self-defence to pursue other goals,<sup>325</sup> such as punishing or retaliating against the previous conduct of terrorist NSAs.<sup>326</sup>

Responding militarily against terrorist attacks has been employed by individual states, but not at any time by the UN.<sup>327</sup> According to Schmitt, the UN has not embarked on military operations against any terrorist attacks. In none of the resolutions, not even resolutions 1373<sup>328</sup> or 2170<sup>329</sup> did the SC authorize any state, coalition of the willing or regional organisations to use force pursuant to article 42 of the UN Charter, even though, the Council has the power to do so in the event of a threat to the peace, breach of peace or act of aggression.<sup>330</sup> While the UN has adopted resolutions bordering on the prevention of terrorist activities, including requesting states to refrain from financing and harbouring terrorists and in extreme cases imposing targeted sanctions on state officials and terrorist organisations, it has not adopted specific military measures against terrorists.<sup>331</sup> In carrying out such military campaigns against terrorists, states principally employ targeted killings, kill-capture missions and full-scale military operations which will be discussed in turn hereunder.

#### 4.6.1. Targeted killing

Targeted killing, one of the most relied upon methods in contemporary times to combat terrorist NSAs, does not have a generally agreed upon definition.<sup>332</sup> The term was made popular and brought into common use by Israel in 2000 based on its accepted and self-declared policy of targeted killings, which it employed in killing alleged terrorists in the OPT.<sup>333</sup> Melzer defined targeted killing as ‘the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the

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<sup>325</sup> Security Council’s 5493<sup>rd</sup> Meeting (UN Doc. S/PV. 5493 (2006). Israel had other aims to pursue while embarking on self-defence against Hezbollah. Both Prime Minister Olmert and Foreign Minister Tzipi Livni stressed that ‘once they felt that Hezbollah has been weakened sufficiently not to pose an immediate terror threat to the citizens of Israel, they would welcome a political framework that ensured no return to the *status quo ante* and would facilitate implementation of Security Council resolution 1559 (2004).’

<sup>326</sup> Tams (n 322 above) 400.

<sup>327</sup> MN Schmitt ‘Counter-terrorism and the use of force in international law’ *The George Marshall European Centre for Security Studies* 3, Paper No. 5, at [http://www.au.af.mil/auawcgate/marshall/ma-paper\\_5-en.pdf](http://www.au.af.mil/auawcgate/marshall/ma-paper_5-en.pdf) (accessed 07/06/2015).

<sup>328</sup> Johnstone (n 224 above) 82.

<sup>329</sup> S/RES/2170 of 15 August 2014.

<sup>330</sup> Art 39 of the UN Charter; see also Schmitt (n 343 above) 9.

<sup>331</sup> CJ Tams ‘Use of force against terrorists’ (2009) 20 *European Journal of International Law* 375-378; Tams (n 322 above) 401.

<sup>332</sup> Alston (n 324 above) 295.

<sup>333</sup> A Stahl ‘The evolution of Israeli targeted operations: consequences of the Thabet Thabet operations’ (2010) 33 *Studies in Conflict and Terrorism* 111, 118; see also Alston (n 324 above) 295.

physical custody of those targeting them.<sup>334</sup> Targeted killing uses a variety of methods of killing enemy terrorists, ranging from firing from unmanned aerial vehicles (UAV) or drones, shooting at close range, suffocating enemies,<sup>335</sup> sniper fire,<sup>336</sup> firing missiles from helicopters<sup>337</sup> or gunships, mail or letter bombs,<sup>338</sup> detonating car bombs and poisoning.<sup>339</sup>

Though the concept of targeted killing was publicly acknowledged as state policy in 2000, it is by no means a novel phenomenon because, throughout history, sovereigns or states have resorted to disposing of public enemies by way of targeted killings.<sup>340</sup> These killings are normally conducted by secret service agents or military under-cover units. Targeted killing as a modern method of combating terrorism appears to be gaining ground through state practice because the US, Israel, Russia, the UK, Switzerland and Germany have all embraced and used it against their enemies both in the domestic and international arena.<sup>341</sup> While Guiora, thus, considers targeted killing as a legitimate means of self-defence,<sup>342</sup> Fisher goes further by predicting the emergence of an international norm that may legally permit the use of targeted killing.<sup>343</sup>

Following the 9/11 attacks on the US, the UK Metropolitan Police introduced a ‘shoot to kill’ policy against suspected suicide bombers, and, upon killing its first victim, Menezes, the British

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<sup>334</sup> N Melzer *Targeted killing in international law* (2008) 5; see also Alston (n 338 above) 298.

<sup>335</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Add: Study of targeted killings, A/HRC/14/24/Add. 6 of 28 May 2010, where Alston reported that, on 18 January 2010, Israeli Mossad intelligence agents killed Mahmoud al-Mahboub, a Hamas leader at a Dubai hotel while using a pillow to suffocate him; I Prusher ‘Was Mossad behind Dubai assassination?: Israel Foreign Minister isn’t saying’ *Christian Monitor*, February 17, 2010.

<sup>336</sup> O Ben-Naftali & KR Michaeli ‘We must not make a scarecrow of the law: A legal analysis of Israeli policy of targeted killings’ (2003-2004) 36 *Cornell International Law Journal* 250, Dr. Thabet Thabet was killed by an Israeli sniper.

<sup>337</sup> Ben-Naftali & Michaeli (n 336 above) 250.

<sup>338</sup> N Ben-Yehuda ‘Political assassinations by Jews: A rhetorical device for justice’ (*Albany New York: Sunny Press*, 1993) 304. An Israeli letter bomb killed two Egyptian military officers in-charge of Fedayeen operations.

<sup>339</sup> Alston (n 324 above) 297; D Blair ‘Khaled Meshaal: How Mossad bid to assassinate Hamas leader ended in fiasco’ *The Telegraph*, 7 December 2012. On 25 September 1997, five Israeli Mossad agents, while posing as Canadians, attempted to assassinate Hamas political leader Khaled Meshaal in Amman, Jordan when they sprayed poison into his left ear that caused immediate paralysis. He would have died within 48 hours, but two of the Israeli agents were arrested. As a condition for their release, Israeli Prime Minister Benjamin Netanyahu was compelled to supply the antidote with which Meshaal was resuscitated. Some Jordanian and Hamas prisoners were also released from Israeli prisons; see also A Fetini ‘Mossad misses its target’ *TIME*, 17 February 2010.

<sup>340</sup> Melzer (n 334 above) 9; Heyns & Knuckey (n 106 above) 102.

<sup>341</sup> Melzer (n 334 above) 9-43.

<sup>342</sup> A Guiora ‘Targeted killing as active self-defence’ (2004) 36 *Case Western Reserve Journal of International Law* 319.

<sup>343</sup> WJ Fisher ‘Targeted killing, norms, and international law’ (2007) 45 *Columbia Journal of International Law* 711, 717; see also Alston (n 338 above) 290.

Government publicly accepted its targeted killing policy.<sup>344</sup> The US heralded its involvement in the use of drones for targeted killing by launching a hellfire missile from a predator drone operated by the CIA against Qaed al-Harithi, an Al Qaeda chieftain and five others who were in a car with him in a desert area of Yemen in November 2002.<sup>345</sup> The legality of targeted killing as a method of prosecuting counter measures against transnational terrorism has generated considerable controversy. If targeted killing is, however, employed in furtherance of self-defence under article 51 of the UN Charter, there appears not to be any violation of the territorial state's sovereignty.<sup>346</sup>

#### 4.6.1.1. Unmanned Aerial Vehicles (UAVs) or drones

The unmanned aerial vehicles (UAVs) or remotely piloted aircrafts (RPAs) are commonly referred to as drones.<sup>347</sup> A drone is a powered aerial vehicle that does not carry a human operator and can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or non-lethal payload.<sup>348</sup> Drones were originally used for reconnaissance during the Vietnam War<sup>349</sup> and in the Balkans in the 1990s.<sup>350</sup> Drones are said to perform other dull, dirty and dangerous jobs, such as monitoring conservation, anti-poaching campaigns, detect forest fires, using detective equipment, and for search and rescue operations.<sup>351</sup> The MQ-1 (predators) and MQ-9 (reapers) are the combat drones that are being used for targeting operations.<sup>352</sup> States and NSAs alike, including Pakistan, Georgia, Brazil, China, Iran, Israel and Hamas among several other countries, are believed to be acquiring combat drones.<sup>353</sup>

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<sup>344</sup> Former Metropolitan Police Commissioner, Lord Stevens, while accepting the employment of targeted killing through its 'shoot to kill' policy stated: 'When I was Commissioner of the Met it was my sad duty to end many, many years of police tradition and bring in what's been called a shoot-to-kill policy against suspected suicide bombers. Of course, in reality it is a 'shoot-to-kill-to-protect' policy, to save innocent lives. I introduced it after much soul-searching over a great deal of time. I have no doubt that now, more than ever, the principle is right despite the change, tragically, of error. And it would be a huge mistake for anyone to even consider rescinding it.'

<sup>345</sup> Kretzmer (n 124 above) 171-172; Alston (n 324 above) para 19.

<sup>346</sup> Melzer (n 334 above) 51; Heyns & Knuckey (n 106 above) 106-107; see also KJ Heller 'One hell of a killing machine: Signature strikes and international law' (2013) 11 *Journal of International Criminal Justice* 91-92.

<sup>347</sup> I Henderson & B Cavanagh 'Unmanned aerial vehicles: Do they pose legal challenges' in H Nasu & R McLaughlin (eds.) *New technologies and the law of armed conflict* (2014) 194-195.

<sup>348</sup> ME O'Connell 'Unlawful killing with combat drones: A case study of Pakistan (2004-2009)' in S Bronitt et al (eds.) *Shooting to kill: Socio-legal perspectives on the use of lethal force* (2012) 265; The Department of Defence Dictionary and Associated terms 579, *Joint Publication* 1-02, April 12, 2001.

<sup>349</sup> D Gregory 'From a view to a kill: Drones and late modern war' (2011) 28 *Theory, Culture & Society* 189.

<sup>350</sup> O'Connell (n 348 above) 265.

<sup>351</sup> D Whetman 'Killer drones' (2013) 158 *The Royal United Services Institute for Defence and Security Studies (RUSI) Journal* 22.

<sup>352</sup> O'Connell (n 348 above) 266-267.

<sup>353</sup> O'Connell (n 348 above) 267; Alston (n 335 above) para 27.

Weaponized drones that were employed for killing proliferated enormously from 2001 and 2002. In November 2001, Mohammed Atef, an Al Qaeda leader, was killed in the Afghan city of Jalalabad by a missile launched from a US drone.<sup>354</sup> Similarly, on 3 November 2002, a US drone operated by the CIA from a US airfield in Djibouti killed Seyen al-Harithi and others in Yemen when it fired a laser-guided hellfire missile at their vehicle.<sup>355</sup>

The use of drones in targeted killing operations is justified if such use complies with international law. Its use for self-defence, UNSC authorised action or upon the consent of a territorial state in whose territory it is employed, thus, remains lawful.<sup>356</sup> It has certain advantages relative to other methods of targeted killing and these include effectiveness and the precision of delivery of missiles culminating in avoidance or the reduction of collateral damages, comparatively low cost of procurement or production of predator and reaper drones as against jet fighters, a loath attitude or diminishing appetite of combatants for traditional warfare, they save defence budgets from shrinking, and the tracking and targeting of terrorists is less cumbersome than other methods. Most importantly, the use of drones has insulated the military personnel of the targeting state from the open battlefield, culminating in the avoidance of combatant casualties.<sup>357</sup> Furthermore, drones can be sustained in flight for up to 24 hours and provide intelligence to commanders.<sup>358</sup> They are not prone to the weaknesses associated with humans while in operation, they are not hungry, shocked, scared, emotional or tired and they run on low quantities of fuel.<sup>359</sup>

Conversely, other scholars have argued that the use of drones does not possess some of the perceived advantages indicated above because it is immoral, disrupts negotiation, it is illegal, ineffective and increases the number of terrorists, and there is no limitation in civilian casualties.<sup>360</sup> For instance, wrong intelligence or signature strikes which target groups of men who bear certain characteristic patterns of behaviour or signatures associated with terrorists

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<sup>354</sup> E Schmitt 'Threats and responses: The battlefield; U.S. would use drones to attack Iraqi targets' *The New York Times*, 6 November 2002.

<sup>355</sup> D McManus 'A U.S. license to kill, a new policy permits the CIA to assassinate terrorists, and officials say a Yemen hit went perfectly. Others worry about next time' *Los Angeles Times*, 11 January 2003.

<sup>356</sup> S Cassey-Maslen 'Pandora's box?: Drone strikes under *jus ad bellum*, *jus in bello*, and international human rights' (2012) 94 *International Review of the Red Cross* 597, at 603.

<sup>357</sup> Alston (n 324 above) 286; BJ Strawser 'Moral predators: The duty to employ uninhabited aerial vehicles' (2010) 9 *Journal of Military Ethics* 342-368.

<sup>358</sup> K Somerville 'U.S. drones take combat role' *BBC NEWS*, 5 November 2002.

<sup>359</sup> PW Singer 'Robots at war: The new battlefield' (2009) *Wilkinson Quarterly* 30; O'Connell (n 348 above) 267.

<sup>360</sup> Byman (n 161 above) 95-96; D Kilcullen & AM Exum 'Death from above, outrage bellow' *New York Times*, March 17, 2009.

can lead to mistaken killings.<sup>361</sup> Signature strikes are so faulty and unreliable that, out of about 500 terrorists alleged to have been killed between 2008 and 2010 only eight per cent of them had their identities known and were specifically being looked for. The US is alleged to have killed twice as many wanted terrorists as personality strikes have killed.<sup>362</sup> Even the killing of terrorist leaders is said to have only a short-term impact in terms of generally combating terrorism because every civilian killed represents an alienated family which prepares for revenge and ultimately leads to an increase in suicide bomber recruits.<sup>363</sup> Arguably, however, collateral damages remain high from targeting operations.

#### 4.6.1.2. Kill-capture missions

Kill-capture missions are undertaken in furtherance of the fight against terrorism especially by the NATO led International Security Assistance Force (ISAF) and the US in Afghanistan and by Israel in the OPT and other locations. The ISAF Guidance described kill-capture missions as ‘any offensive operation involving the entry into a compound, residence, building or structure that occurs in the period between nautical twilight and nautical dawn.’<sup>364</sup> These are night raids undertaken under the cover of darkness that involve the invasion of private homes in search of alleged terrorists based on kill-capture lists that have been drawn up by Special Forces.<sup>365</sup> The US refers to such lists as ‘joint integrated prioritized collection lists, joint prioritized effects lists, joint effects lists or kill lists.’<sup>366</sup> According to NATO-led ISAF statistics, an average of 17 night raids were conducted each night in Afghanistan between August and November 2010, totalling 1,572 raids in three months resulting in the killing or capture of 368

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<sup>361</sup> Heyns & Knuckey (n 106 above) 111; Heller (n 346 above) 89-90. There was mistaken targeting on 4 February 2002 when a CIA-operated predator drone spotted three men standing in Zawhar, Kili, Afghanistan. Two of them behaved reverently to the third tall man. Suspecting the tall man to be Bin Laden and feeling that they were legitimate targets, a hellfire missile was fired at them, killing all three. It was found that the men had no links with Al Qaeda or the Taliban.

<sup>362</sup> Columbia Law School Human Rights Clinic ‘The civilian impact of drones: unexamined costs, unanswered questions’ *Centre for Civilians in Conflict* (2012) 9, at [http://civiliansinconflict.org/uploads/files/publications/The\\_Civilian\\_Impact\\_of\\_Drones\\_w\\_cover.pdf](http://civiliansinconflict.org/uploads/files/publications/The_Civilian_Impact_of_Drones_w_cover.pdf) (accessed 27/06/2015).

<sup>363</sup> O’Connell (n 348 above) 264; Kilcullen & Exum (n 376 above); see also Gregory (n 365 above) 189.

<sup>364</sup> International Security Assistance Force, ‘Guidance on Night Raids in Afghanistan,’ March 5, 2010.

<sup>365</sup> Alston (n 324 above) 333-334.

<sup>366</sup> United States Air Force, targeting: Air Force doctrine document 2-1. 9; Alston (n 324 above) 334.



insurgent leaders, the killing of 968 lower-level insurgents and the capture of 2,477.<sup>367</sup> Shanker *et al* captured the frequency, violence and inconvenience of such night raids.<sup>368</sup>

There are also instances where detainees are not accounted for. In a particular case, of about 1,700 alleged insurgents who were detained ‘not many’ remained in detention and the officers were taciturn about their whereabouts.<sup>369</sup> That apart, ISAF troops appear to interpret ‘hostile intent’ broadly, thereby increasing the use of lethal force culminating in the killing of those sleeping near weapons (in consonance with the Afghan life style for self-defence), those running away from intruders<sup>370</sup> or merely stepping out of a compound during night raids.<sup>371</sup> The Afghan perception about these raids is, therefore, that they are to kill, harass, and intimidate civilians and violate the privacy of women by ISAF and US officials with impunity.<sup>372</sup> Even though the primary aim of a kill-capture mission appears to be search and seizure,<sup>373</sup> some night raids are designed specifically to kill rather than capture.<sup>374</sup> This view can be corroborated by the events of 2 May 2011 when Osama bin Laden’s compound in

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<sup>367</sup> T Shanker *et al* ‘Despite gains, night raids split U.S. and Karzai’ *New York Times* November 15, 2010; see also Alston (n 324 above) 339.

<sup>368</sup> Shanker *et al* (n 367 above). He stated: ‘More than a dozen each night, teams of American and allied Special Operations forces and Afghan troops surround houses or compounds across the country. In some cases helicopters hover overhead. Using bullhorns, the Afghans demand occupants to come out or be met with violence. In the majority of cases, about 80 per cent according to NATO statistics, the occupants are captured rather than killed’.

<sup>369</sup> E Graham-Harrison ‘Fact box: Night-time raids in Afghanistan’ *Reuters*, February 26, 2011.

<sup>370</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum: Mission to Afghanistan, A/HRC/11/2/Add.4, of 6 May 2009; AR Rubin ‘Girl 12, killed in NATO raid on wrong Afghan home’ *New York Times*, May 12, 2011.

<sup>371</sup> J Starkey ‘NATO ‘covered up’ botched night raid in Afghanistan that killed five’ *The Times*, March 13, 2011.

<sup>372</sup> Open Society Foundations Regional Initiative on Afghanistan and Pakistan (n 383 above) 3.

<sup>373</sup> Open Society Foundations Regional Initiative on Afghanistan and Pakistan (n 383 above) 21.

<sup>374</sup> J Yoo ‘From Guantanamo to Abbottabad’ *Wall Street Journal*, May 4, 2011; T Mckelvey ‘Inside the killing machine’ *Newsweek*, February 13, 2011.

Abbottabad, Pakistan was raided by the U.S. Navy SEALs,<sup>375</sup> who also had instructions to kill and not to capture.<sup>376</sup>

Furthermore, similar to most other targeted killing operations, night raids are characterised by the killing of innocent people owing to faulty and hazy intelligence on the part of NATO-led ISAF and U.S. forces.<sup>377</sup> Worse still, the special operations forces refused to admit their intelligence flaws, but tried to make up stories or distort the facts and sometimes alleged that the innocent people they killed were armed and thereby constituted a threat, contrary to eyewitness accounts.<sup>378</sup>

#### 4.6.2. Full-scale military operations

In combating transnational terrorism, states have employed full military operations extraterritorially against terrorist enclaves. For instance, Israel called out its armed forces in an offensive against Hezbollah whom it described as a terrorist organisation in 2006. The Israeli-Hezbollah conflict, which lasted for 33 days, was largely considered to be a failure on the part of Israel.<sup>379</sup> Similar military operations were conducted by Israel against Hamas in 2008-2009 and 2014 respectively, leaving in their wake casualties on both sides.<sup>380</sup> Similarly, the US had previously responded to transnational terrorist attacks from NSAs and state-sponsored terrorism. On 7 October 2001, full military operations, involving both air and ground offensives code-named *Operation Enduring Freedom*, was launched following the September 2001

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<sup>375</sup> N Schmidle 'Getting Bin Laden' *The New Yorker*, August 8, 2011. Schmidle wrote that, from the Jalalabad Air field, Afghanistan, 23 Navy SEALs from Team Six known as Naval Special Warfare Development Group (DEVGRU) embarked on a covert mission to kill Osama bin Laden. According to him, 'If all went according to plan, the SEALs would drop from the helicopters into the compound, overpower Bin Laden's guards, shoot and kill him at close range, and then take the corpse back to Afghanistan.' This statement shows no option of capture as the mission was strictly to kill. Schmidle captured the scenario of Osama bin Laden's killing thus: 'A second SEAL stepped into the room and trained the infrared laser of his M4 on Bin Laden's chest; the Al Qaeda chief, who was wearing a tan shalwar kameez and a prayer cap on his head, froze; he was unarmed. 'There was never any question of detaining him or capturing him - it wasn't a split-second decision. No one wanted detainees,' the special-operations officer told me. (The Administration maintains that had Bin Laden immediately surrendered he could have been taken alive). Nine years, seven months, and twenty days after September 11<sup>th</sup> an American was a trigger pull from ending Bin Laden's life. The first round, a 5.56-mm bullet struck Bin Laden in the chest. As he fell backward, the SEAL fired a second round into his head, just above his left eye. On his radio, he reported, 'For God and country - Geronimo, Geronimo, Geronimo.' After a pause, he added, Geronimo E.K.I.A.' - 'enemy killed in action.'

<sup>376</sup> M Scherer 'Official: Bin Laden mission was kill or capture, not just kill' *TIME*, May 2, 2011.

<sup>377</sup> Alston (n 324 above) 335-336.

<sup>378</sup> J Boone 'U.S. troops' killing of Hamid Karzai's cousin brings claim of deep conspiracy' *The Guardian*, March 10, 2010; ISAF Joint Command morning operational update, March 10, 2010, at.....

<sup>379</sup> E Knickmeyer '2006 war called a 'failure' for Israel' *The Washington Post*, January 31, 2008.

<sup>380</sup> J Zanotti et al 'Israel and Hamas conflict in Gaza' (2008-2009)' 4, *CRS Report for Congress*, February 19, 2009; J Rudoren & A Barnard 'Israel military invades Gaza, with insights set on Hamas' *The New York Times*, 17 July 2014.

bombing of the US, alleged to have been carried out by Al Qaeda. This well-orchestrated terrorist attack occurred when terrorists seized four passenger aircrafts and flew two of them into the twin towers of the World Trade Centre in New York. A third was flown into the Pentagon in Washington D.C., while the fourth crashed in Pennsylvania when passengers fought with the hijackers to regain control of the plane.<sup>381</sup> These aggravated attacks were attributed to Al Qaeda and the Taliban which hosted it.<sup>382</sup> Following these attacks the US articulated the Global War on Terrorism (GWOT).<sup>383</sup>

There are several other incidents of military operations by states in response to cross-border terrorism orchestrated by terrorist NSAs. These include Turkish response to cross-border attacks from the Kurdish Workers' Party (PKK), Tajikistan's pursuit of irregular armed groups into the territory of Afghanistan<sup>384</sup> and Senegal's military operations in the territory of Guinea-Bissau in 1992 and 1995 with the aim of striking at terrorist bases from which cross-border attacks had been launched against it.<sup>385</sup> Upon denials by Guinea-Bissau of involvement by way of aiding terrorists, particularly in the 1992 attacks, Senegal apologised for its military expedition into Guinea-Bissau.<sup>386</sup> During the apartheid era, South Africa carried out similar military operations in the territories of neighbouring states such as Zambia, Mozambique, Angola and Botswana on the grounds that these states provided safe havens for terrorist groups, thereby acquiescing in transnational terrorism.<sup>387</sup> Fuller evaluation of some of these extraterritorial forcible measures by states against NSAs, which have unequivocally pointed to the transformation of the law of self-defence is contained in chapter seven below.

#### 4.6.3. Applicable legal regime to extraterritorial military operations

There appears to be no consensus in legal scholarship relating to which legal regime regulates extraterritorial military operations against NSAs.<sup>388</sup> Drawing a clear-cut dichotomy is made problematic owing to the assertion by US and Israel that their military operations against

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<sup>381</sup> Schmitt (n 327 above) 3.

<sup>382</sup> 'Responsibility for the terrorist atrocities in the United States, 11 September 2001: An updated account' United Kingdom Press Release, 10 Downing Street Newsroom, October 4, 2001, paras 21-22, at <http://fas.org/irp/news/2001/11/ukreport.html> (accessed 27/06/2015).

<sup>383</sup> Schmitt (n 327 above) 1.

<sup>384</sup> TM Franck *Recourse to force: State action against threats and armed attacks* (2002) 64; Gray (n 19 above) 140.

<sup>385</sup> Franck (n 384 above) 64; Gray (n 19 above) 140.

<sup>386</sup> Gray (n 19 above) 140.

<sup>387</sup> Gray (n 19 above) 137.

<sup>388</sup> JK Elsea 'Legal issues related to the lethal targeting of U.S. citizens suspected of terrorist activities' *CRS Report for Congress* 2, May 4, 2012.

transnational terrorists, such as Al Qaeda and Palestinian militants, amount to an international armed conflict and are, therefore, subject to the LOAC.<sup>389</sup> The US protested against its extraterritorial military operations being subjected to scrutiny by the UN agencies, the operations being governed by the LOAC. It is, however, incontrovertible that international armed conflicts involve two state parties and, therefore, the conflict being extraterritorial does not transform the NSAs into a state.<sup>390</sup> The classification of conflicts as being either between two states (inter-state) invoking the criteria of Common Article 2 of the Geneva Convention or between a state and non-state armed entity within a state (intra-state) invoking Common Article 3 of the Geneva Conventions or between a state and a terrorist NSA in the territory of another state is important.<sup>391</sup> The importance is underscored by the fact that classifying conflicts provides for the determination of the rights and obligations of the parties to the conflict,<sup>392</sup> particularly as it relates to the determination of the rights or liberties of captured individuals.<sup>393</sup> While these individuals remain legitimate targets if IHL applies, they will nevertheless enjoy combatant immunity if arrested and may not be tried in domestic courts, being Prisoners of War (PoW).

Dinstein points out that extraterritorial military operations against terrorists are governed by the law enforcement paradigm, and may qualify as an armed conflict only if (a) the armed conflict arose from the activities of a state-sponsored terrorist organisation or (b) the conduct of the terrorist organisation that triggered the war can be attributed to a state.<sup>394</sup> Corn challenged the above view that military operations against transnational terrorists not founded on state-centric conflict be treated under extraterritorial law enforcement.<sup>395</sup> While not suggesting generally that all uses of extraterritorial military operations against terrorists should trigger IHL principles, Corn contended that, if the nature of use of such force involves combat power reflecting the existence of an armed conflict, LOAC should be the appropriate legal framework

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<sup>389</sup> Ben-Naftali & Michaeli (n 336 above) 252.

<sup>390</sup> N Lubell *Extraterritorial use of force against non-state actors* (2010) 115.

<sup>391</sup> GS Corn 'Making the case for the bifurcation in Afghanistan: Transnational armed conflict, Al Qaeda and the limits of the associated militia concept' in MN Schmitt (ed.) *The war in Afghanistan: A legal analysis* (2009) Vol 5, 209.

<sup>392</sup> Corn (n 391 above) 209.

<sup>393</sup> GS Corn 'Extraterritorial law enforcement or transnational counterterrorist military operations: The stakes of two legal models' in WC Banks (ed.) *New battlefields/old laws: Critical debates on asymmetric warfare* (2013) 26.

<sup>394</sup> Y Dinstein 'Terrorism and Afghanistan' in MN Schmitt (ed.) *The war in Afghanistan: A legal Analysis* (2009) Vol. 85, 48-49 see also Dinstein (n 282 above) 268-270.

<sup>395</sup> Corn (n 393 above) 24-25.

to regulate the conflict.<sup>396</sup> According to Corn, IHL applies if the use of deadly force as a first resort is employed.<sup>397</sup> For Corn, applying IHL principles to extraterritorial military operations has advantages because these principles are well established and are understood by members of the armed forces. In addition, because of the pervasive use of the regulations, armed forces can conduct operations habitually or intuitively within the framework.<sup>398</sup> On the other hand, organised militaries are not conversant with the law enforcement paradigm, not being so trained to engage the enemy with graduated force rather than deadly combat power from the onset.<sup>399</sup>

Writing on the relevant legal framework that may govern the conflict between Palestinian NSAs and Israel, Ben-Naftali and Michaeli argued that that conflict qualifies as an armed conflict to which the LAOC should apply.<sup>400</sup> According to them, the Palestinian Authority is an organised armed group that also leads the Palestinian people and controls much of its land.<sup>401</sup> The organised military group is under a responsible command, and there is no doubt about the severity of the conflict with high casualties. In addition, the conflict is always in the UN agenda.<sup>402</sup> While Israel rejects any human rights obligation arising from its military operations on Palestinian land on the grounds that the Palestinian Authority has an overwhelming majority of powers and responsibilities in all civil spheres,<sup>403</sup> Ben-Naftali and Michaeli contend that, by being in occupation, Israel owes human rights obligations under the ICCPR.<sup>404</sup> They conclude

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<sup>396</sup> GS Corn & ET Jensen 'Transnational armed conflict: A principled approach to the regulation of counter-terror combat operations' (2009) 42 *Israel Law Review* 46; see also Corn (n 393 above) 25, 42.

<sup>397</sup> Corn (n 393 above) 44.

<sup>398</sup> Corn (n 393 above) 40.

<sup>399</sup> Corn (n 393 above) 40.

<sup>400</sup> Ben-Naftali & Michaeli (n 336 above) 258.

<sup>401</sup> 'Palestinian terrorism,' Amnesty International Report on attacks on civilians by Palestinian armed groups, *Jewish Virtual Library*, at <http://www.virtuallibrary.org/jsource/Peace/amnesty.html> (accessed 06/06/2015); see also Ben-Naftali & Michaeli (n 336 above) 258.

<sup>402</sup> S/RES/1402 of 30 March 2002; S/RES/1322 of 7 October 2000; S/RES/1405 of 19 April 2002.

<sup>403</sup> Israel's Second Periodic Report to the Human Rights Council (HRC) of November 2001 under Art 40 of the Covenant, UN Doc. CCPR/C/ISR/2 (December 4, 2001). Para 8 thereof provides in part: 'In its Concluding Observations on Israel's initial Report, the Committee questioned Israel's position regarding the application of the Covenant to the West Bank and the Gaza Strip. Israel has consistently maintained that the Covenant does not apply to areas that are not subject to its sovereignty and jurisdiction. This position is based on the well-established distinction between human rights and humanitarian law under international law. Accordingly, in Israel's view, the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from the relationship of human rights. Furthermore, pursuant to the Israeli-Palestinian Interim Agreement of 1995, and the consequent documentation and understanding of the Palestinian Liberation Organisation (PLO), the overwhelming majority of powers and responsibilities in all civil spheres (including civil and political rights, as well as a variety of security issues), have been transferred to the Palestinian Council, which in any event is directly responsible and accountable vis-a-vis the entire Palestinian population of the West Bank and the Gaza Strip with regard to such issues. In light of the changing reality, and the jurisdiction of the Palestinian Council in these areas, Israel cannot be internationally responsible for ensuring the rights under the ICCPR in these areas.'

<sup>404</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* ICJ Reports (1996) 226 para 240; see also Ben-Naftali & Michaeli (n 336 above) 264.

by suggesting that both the IHL and IHRL apply in the analysis of the applicable legal regime to regulate extraterritorial military operations against terrorist NSAs.<sup>405</sup> In this study's view, the use of force against terrorism falls under inter-state use of force, except the terrorist acts are committed in the context of an armed conflict or one of the parties to the conflict is an occupying power.

## **4.7. Factors that influence the emergence and increase in transnational terrorism**

### **4.7.1. Religious fundamentalism and radicalisation**

Religious fundamentalism is a belief in an absolute religious ideology with zero tolerance for secular views or differing interpretations, and it contributes to the development of radical opinions.<sup>406</sup> Fundamentalism originated from Salafism, a socio-political movement in Egypt within the Sunni Islam which was conservative and averse to any form of western lifestyle, the reason being to practise pure Islam as practised by the Prophet Mohammed.<sup>407</sup> Though the Sunni establishment was generally peaceful, the Salafist Jihadism opted for violence to cause radical change with the aim of ultimately creating a new Caliphate without room for religious pluralism.<sup>408</sup> Arguably, transnational terrorism, therefore, became the available *modus operandi* to realise this radical change. To that extent, the Islamic religion became a catalyzing factor for transnational terrorism.

Religious fundamentalism, which is associated with variant forms of religious extremism, is found in most of the major religions including Christianity, Hinduism, Judaism and Islam.<sup>409</sup> Nonetheless, terrorism that has been inspired by Islamic modalities of religious fundamentalism has dominated current world affairs.<sup>410</sup> In fact, the Australian Government estimates that transnational extremist Muslim terrorism was responsible for the deaths of 3,985

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<sup>405</sup> Ben-Naftali & Michaeli (n 336 above) 254.

<sup>406</sup> R Koopmans 'Religious Fundamentalism and hostility against out-groups: A comparison of Muslims and Christians in Western Europe' (2014) *Journal of Ethnic and Migration Studies* 33-57. A Orav 'Religious fundamentalism and radicalisation' *European Parliamentary Research Service (EPRS)* 1, March 2015, at [http://www.europa.eu/RegData/etudes/Brie/2015/551342/EPRS\\_BRI\(2015\)551342\\_EN.pdf](http://www.europa.eu/RegData/etudes/Brie/2015/551342/EPRS_BRI(2015)551342_EN.pdf) (accessed 14/06/2015).

<sup>407</sup> Orav (n 406 above) 3; 'Radicalisation processes leading to acts of terrorism,' A concise report prepared by the European Commission's Expert Group on Violent Radicalisation, 6, at [http://www.clingendael.nl/sites/default/files/20080500\\_CSCP\\_report\\_vries.pdf](http://www.clingendael.nl/sites/default/files/20080500_CSCP_report_vries.pdf) (accessed 14/06/2015).

<sup>408</sup> Orav (n 406 above) 3.

<sup>409</sup> D Pratt 'Terrorism and religious fundamentalism: Prospects for a predictive paradigm' (2006) 11 *Marburg Journal of Religion* 1.

<sup>410</sup> Pratt (n 409 above) 1.



people between 1992 and 2004.<sup>411</sup> Religion fans the embers of transnational terrorism because adherents rely on certain portions of either the bible or the Quran to justify attacks on opponents, saying that they are fighting for God or Allah.<sup>412</sup> Terrorism that is inspired by religion is characterised by traits such as (a) the use of religious scriptures carefully culled from verses by perpetrators to justify violent attacks or gain recruits, (b) clerical or religious scholars providing leadership based on their teachings, and (c) perpetrators accepting apocalyptic images of destruction as necessary.<sup>413</sup>

Radicalisation is a phenomenon relating to people who embrace opinions, views and ideas that may be considered as socialisation to extremism that could lead to acts of terrorism.<sup>414</sup> The term ‘violent radicalisation’, which involves embracing extremist ideas that lead to terrorism, originated from European Union (EU) policy circles after the Madrid bombing of 11 March 2004 and it also refers to jihadist violence or jihadist terrorism.<sup>415</sup> The Muslim fundamentalists or those who are radicalised and plan the bombings are not poor peasants or the oppressed, but include those who have travelled and have been exposed to sophisticated technology. They are educated in engineering or information technology (IT) and are sometimes school drop-outs and underachievers who have become notorious for previous criminal conduct.<sup>416</sup> Radicalisation, Islamisation or indoctrination are normally conveyed through online internet and satellite channels, social media (you tube, twitter, face book, instagram), youth clubs, sports activities, mosques, prisons, schools and universities.<sup>417</sup> In fact, the internet is employed for radicalisation, propaganda, financing, planning, training guides, incitement and recruitment, and it is a very dynamic means of communication that makes information available to a limitless audience.<sup>418</sup>

Factors which influence radicalisation that lead to transnational terrorism include, firstly, Western foreign policies and provocative events; Western forces are seen as occupiers in Iraq,

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<sup>411</sup> Australian Government Department of Foreign Affairs and Trade, White Paper: Transnational terrorism: The threat to Australia (2004) 12; see also Stephens (n 19 above) 454.

<sup>412</sup> EOS Odhiambo ‘Religious fundamentalism and terrorism’ (2014) 2 *Journal of Global Peace and Conflict* 189.

<sup>413</sup> Odhiambo (n 412 above) 191-192.

<sup>414</sup> Orav (406 above) 2; European Commission’s Report (n 407 above) 6.

<sup>415</sup> European Commission’s Report (n 407 above) 6.

<sup>416</sup> Pratt (n 409 above) 5; Orav (n 406 above) 3.

<sup>417</sup> Orav (n 406 above) 5.

<sup>418</sup> United Nations Office on Drugs and Crime ‘The use of the internet for terrorist purposes’ *Publishing and Library Section, United Nations Office, Vienna* 2012, at [http://www.unodc.org/documents/frontpage/Use\\_of\\_Internet\\_for\\_Terrorist\\_Purposes.pdf](http://www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf) (accessed 22/06/2015).

Afghanistan, and Pakistan who imprison Muslims in Abu Graib prison and Guantanamo Bay. In addition, the battle zones in Iraq, Algeria, Chechnya, Kashmir, Gaza, Somalia, Sudan and Afghanistan, which are shown on television, convey horrible treatment and injustice to Muslims that trigger anger in NSAs.<sup>419</sup> Secondly, there is Jihad and desire for activism; the main ideology of militant Islamism or violent jihad is that Islam is under threat from western influences and that adherents must fight to save it from the infidels.<sup>420</sup> Thirdly, there is the influence of charismatic persons or spiritual leaders; terrorist ideas are inspired by preachers or other radical persons. In fact, radical preachers, such as Abu Qatada and Abu Hamza in Finsbury Mosque (London),<sup>421</sup> Sheik Omar Bakri Mohammed in Regent Park Mosque (London),<sup>422</sup> Abu Khaled in El-Tawheed (Amsterdam) and Mohammed Hammami in Omar Mosque (Paris), are believed to preach messages that radicalise recruits.<sup>423</sup> These religious leaders and others like them exploit emotional triggers such as hate, revenge, frustration and they lure those who are lonely, bored and are seeking a personal Muslim identity to radicalise them.<sup>424</sup> Apart from these clerics, self-radicalised and domestic groups cultured in the Western world also pose a threat to nations.<sup>425</sup>

It is, thus, safe to say that religion, particularly Islam, is a driving force or facilitating agent of fundamentalism and radicalisation which culminates in transnational terrorism. From the 1980s, religion-driven transnational terrorism has been carried out mainly by bombings and suicide terrorism the goal of which is to destroy the perpetrator and the victims.<sup>426</sup> The terrorists employ suicide bombings to attain higher killing rates and reduce the risk of tactical or organisational secrets falling into the hands of enemies.<sup>427</sup> Recruits, including children<sup>428</sup> who

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<sup>419</sup> T Precht 'Home grown terrorism and Islamist radicalisation in Europe: From conversion to terrorism' Research report funded by the Danish Ministry of Justice 50, (December 2007).

<sup>420</sup> Precht (n 419 above) 52.

<sup>421</sup> Precht (n 419 above) 53, Reid Richard, the shoe bomber was radicalised by Abu Qatada and Abu Hamza of the Finsbury Mosque in London; R Simcox & E Dyer 'The European angle to the U.S. terror threat' *The Henry Jackson Society*, at <http://www.google.co.za/search?q=reid+richard+the+shoe+bomber+was+radicalised+by+abu+qatada+and+abu+hamza+in+finsbury+mosque> (accessed 15/06/2015), while on a flight American Airlines 63 from Paris to Miami, Florida, Reid was arrested for attempting to bomb the plane, the bomb having been hidden inside his shoes.

<sup>422</sup> Sheik Omar Bakri was believed to have radicalised the two UK citizens of Pakistani origin who carried out the 2003 suicide attack in Israel.

<sup>423</sup> Orav (n 406 above) 5.

<sup>424</sup> Precht (n 419 above) 52.

<sup>425</sup> Precht (n 419 above) 9.

<sup>426</sup> European Commission's Report (n 407 above) 7.

<sup>427</sup> European Commission's Report (n 407 above) 7.

<sup>428</sup> 'A boy of 13 years in school uniform blew up himself, also killing 31 Army recruits in north-west Pakistan,' *The Telegraph*, June 18, 2013; Aitezaz Shah, a 15 year old told investigators how he was recruited by extremists in Karachi and that he played the role of a 'back-up bomber' in the assassination of Benazir Bhutto

undertake suicide bombings believe that they will be awarded the garden of paradise and also become martyrs.<sup>429</sup>

#### 4.7.2. Less vulnerability of terrorists to sanctions and punishment

Unlike states that are imbued with international responsibilities and aspirations that propel them to avoid armed conflicts, terrorist organisations, not being parties to the international conventions and other instruments regulating the conduct of international relations, care little about armed conflicts.<sup>430</sup> Owing to their lower vulnerability to internationally established sanctions, punishments and other consequences, certain states, in their pursuit of terrorist activities, sponsor NSAs as their proxies. For instance, it is alleged that Iran effectively mobilised transnational terrorist groups, such as Hezbollah and Islamic Jihad, which worked against the interests of the US, Israel and Iraq without bearing or incurring the consequences that more direct confrontation or involvement would entail.<sup>431</sup> In addition, terrorist NSAs do not sustain a stable and visible economy or publicly declare their annual budget with a view to managing their financial and other assets openly, thereby making it difficult for the UN sanction regime to affect their assets. The lack of an identifiable population, occupied land mass and visible economy has made them less prone to sanctions.<sup>432</sup>

Nevertheless, following the establishment of certain contemporary UN measures, including resolution 1373, targeted sanctions are now imposed on selected terrorist leaders and the assets of their organisations.<sup>433</sup> The UN sanctions regime was established by resolution 1267<sup>434</sup> which effectively created the Al Qaeda and Taliban sanctions regime which also targeted their

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on 27 December 2007; in addition, the family of Rehna Shankat moved their children out of the town of Kohat in Pakistan to Lahore, fearing the influence of Islamic teachers, when they heard their son, Zarak, talk of suicide bombings and paradise, where he said those who carried out attacks on enemies went. at <http://www.irinnews.org/report/76701/pakistan-child-bombers-victims-of-the-most-brutal-exploitation> (accessed 15/06/2015).

<sup>429</sup> Precht (n 419 above) 52.

<sup>430</sup> Wedgwood (n 191 above) 559.

<sup>431</sup> Byman (n 12 above) 169.

<sup>432</sup> Wedgwood (n 191 above) 559.

<sup>433</sup> S/RES/1373 of 28 September 2001 para 1(c); S/RES/1267 of 15 October 1999 para 4(b) directs the freezing of Taliban assets; S/RES/1333 of 19 December 2000 para 5(a) placed an embargo on the supply of arms and related materials of all types including weapons and ammunitions, military vehicles and equipment, paramilitary equipment, and spare parts. In addition, para 8(c) directs the freezing of funds and financial assets of Osama bin Laden, the Al Qaeda organisation and those individuals and entities associated with him; Similarly, S/RES/2170 of 15 August 2014 imposed an asset freeze, travel ban and arms embargo on six individuals associated with Al Qaeda, the Islamic State in Iraq and the Levant (ISIL) and Al Nusrah Front (ANF).

<sup>434</sup> S/RES/1267 of 15 October 1999.

associates.<sup>435</sup> Thereafter, several other UN resolutions have been adopted either to impose further sanctions on transnational terrorists or to remind states of their obligations to sustain the sanctions regime.<sup>436</sup> These sanctions are, however, not without their short-comings. The sanctions are criticised on the grounds of a lack of due process in their application and in terms of the mode of listing and de-listing of terrorists.<sup>437</sup>

#### **4.7.3. Globalisation and technological advancement as catalyzing agents for transnational terrorism**

Globalisation is a consequence of human interaction and integration among the people, companies, and governments of different nations, sharing and cross-fertilizing ideals and experiences, a process driven by international trade and investment and aided by information technology.<sup>438</sup> Information technology is the catalyst for creating the harmonisation of various global markets that constitute globalisation.<sup>439</sup> In this computer age, the internet enhances globalisation because it enables the sharing of knowledge and information instantaneously across the globe.<sup>440</sup> While globalization has brought people closer to one another by connecting them through advanced methods of communication, it has not correspondingly made us safer, as mistrust and intolerance increase.<sup>441</sup> The same tools that are used for the advancement of societies are the same tools used for their destruction. For instance, the telephones and internet services available for development in communications were the same tools employed by Islamic fundamentalists in planning the 9/11 attacks.<sup>442</sup> Similarly, the global financial network aided the transfer of money from terrorist sponsoring countries to realise the destruction, just as did the improved air transport system. The traditional barriers of distance between states have been crumbled by the revolution in the fields of communication and transportation, thereby making it possible for even third world failed states to launch attacks against a western metropolis.<sup>443</sup> According to Lia, the improvement in communication and transportation

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<sup>435</sup> D Tladi & G Taylor 'On the Al Qaeda/Taliban sanctions regime: Due process and sunsets' (2011) 10 *Chinese Journal of International Law* 772.

<sup>436</sup> S/RES/1333 of 19 December 2000, S/RES/1390 of 28 January 2002, S/RES/2161 of 18 December 2014 and S/RES/2170 of 15 August 2014.

<sup>437</sup> Tladi & Taylor (n 435 above) 772-773.

<sup>438</sup> Declaration and programme of action of the World Summit for Social Development, 1995, para 14, [www.unesco.org/education/pdf/COPENHAG.pdf](http://www.unesco.org/education/pdf/COPENHAG.pdf) (accessed 21/06/2015).

<sup>439</sup> BR Lawlor 'The age of globalisation: Impact of information technology on global business strategies' April 2007, at [http://digitalcommons.bryant.edu/cgi/viewcontent.cgi?article=1000&content=honors\\_cis](http://digitalcommons.bryant.edu/cgi/viewcontent.cgi?article=1000&content=honors_cis) (accessed 19/06/2015).

<sup>440</sup> Lawlor (n 435 above).

<sup>441</sup> WJ Hartman 'Globalisation and asymmetrical warfare' a research report submitted to air command and staff collage, Air University 1, at <http://www.au.af.mil/awcgate/acsc/02053.pdf> (accessed 11/06/2015).

<sup>442</sup> Hartman (n 441 above) 4.

<sup>443</sup> B Lia *Globalisation and the future of terrorism: Patterns and predictions* (2007) 1.

provided failed states with the ideological and material basis for the martyrdom-seeking terrorists to acquire the determination to confront the US for its perceived political arrogance, hypocritical foreign policy and its infidel values with regard to individual freedoms and liberal democracy.<sup>444</sup>

Terrorists exploit technologies and globalization to enhance their intercontinental travel and to distribute information using information technology and transnational commerce.<sup>445</sup> International commerce and economic activities which increase the volume of movement of goods in containers across borders may correspondingly increase the smuggling of weapons by transnational terrorists.<sup>446</sup> According to Schaub, in 2003 alone, cargo vessels off-loaded about 18 million 40 feet long cargo containers at American ports. The volume of the movement of cargo, coupled with the growing number of financial transactions, appears to overwhelm law enforcement officers, and this culminates in the trans-border movement of smuggled weapons.<sup>447</sup> Merchant vessels are the means by which a black market in weapons flourishes, and an estimated 15 railcar-sized containers are globally either in transit or in seaports every day because the trade by sea accounts for about 90% of global trade.<sup>448</sup> It is alleged that Al Qaeda has and maintains between 12 and 50 ships that navigate international waters.<sup>449</sup> Quite surprisingly, Schaub's conclusion was that, in spite of the fact that economic globalisation opens state borders for the movement of terrorists and their goods, such a movement does not radically facilitate transnational terrorism; rather it is a partial solution to transnational terrorism.<sup>450</sup> To him, the economic openness triggered by economic globalisation removes the incentives for people to engage in terrorism that would otherwise have been occasioned by desperation and poverty.<sup>451</sup>

Technology has made the proliferation of arms possible, as even WMD are being sourced for, by some NSAs.<sup>452</sup> All states must be discouraged from providing transnational terrorist groups

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<sup>444</sup> Lia (n 443 above) 1, 16.

<sup>445</sup> R Dover et al *Routledge companion to intelligence studies* (2013) 246.

<sup>446</sup> QD Schaub 'Economic globalisation and transnational terrorism: A pooled time-series analysis' (2004) 48 *Journal of Conflict Resolution* 231.

<sup>447</sup> Schaub (n 446 above) 231.

<sup>448</sup> MA Fitzgerald 'Seizing weapons of mass destruction from foreign flagged ships on the high seas under article 51 of the UN Charter' (2008) 49 *Virginia Journal of International Law* 474.

<sup>449</sup> MA Becker 'The shifting public order of the oceans: Freedom of navigation and the interdiction of ships at sea' (2005) 46 *Harvard International Law Journal* 131, 145; see also Fitzgerald (n 448 above) 474.

<sup>450</sup> Schaub (n 446 above) 254.

<sup>451</sup> Schaub (n 446 above) 231.

<sup>452</sup> United States National Strategy for Combating Terrorism 2003.

with chemical, biological, nuclear or radiological weapons.<sup>453</sup> According to Byman, in spite of Iran's support for terrorism and its possession of chemical weapons, it has not transferred unconventional weapons to terrorists.<sup>454</sup> Iran appreciates the fact that some available species of chemical and biological reagents would be difficult for even a skilled NSA to use to inflict casualties.<sup>455</sup> Nevertheless, Stephens has cautioned that the potential of transnational terrorist organisations of deploying WMD should not be ignored.<sup>456</sup> This is more so, in spite of the fact that arms control frameworks and agencies in that regard discourage weapons suppliers from selling precursors and components to questionable elements, as these materials for weapon development are shipped to terrorists by means of false representation.<sup>457</sup> In certain instances, the genuine supply of chemicals, reagents and equipment, which have dual purposes and have been moved through borders, may freely end up being used in factories for purposes different from those for which they were procured. As may be expected, these materials are then converted into the production of canisters, explosives, bombs and other chemical and biological weapons.<sup>458</sup> For instance, medical laboratories, pesticide and pharmaceutical plants are alleged to have been used for the production of destructive weapons. Following the terrorist bombings of the US embassies in Kenya and Tanzania in 1998, the US launched *Operation Infinite Reach* (OIR) which destroyed the al-Shifa pharmaceutical factory in Khartoum, Sudan on 20 August 1998 using Tomahawk cruise missiles.<sup>459</sup> The allegation of the US which was largely faulted, was to the effect that the plant was being used for the manufacture of chemical weapons rather than drugs. The US allegation, which linked the patronage of the El-Shifa pharmaceutical factory to Bin Laden, was also not proved.<sup>460</sup> Furthermore, Wedgwood has observed that Iraq's large-scale biological weapons programme and main chemical weapons plant were located within animal feed and pesticide production factories.<sup>461</sup>

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<sup>453</sup> Byman (n 12 above) 179.

<sup>454</sup> Byman (n 12 above) 169.

<sup>455</sup> Byman (n 12 above) 179.

<sup>456</sup> Stephens (n 19 above) 455

<sup>457</sup> Wedgwood (n 191 above) 559-560.

<sup>458</sup> Wedgwood (n 191 above) 560.

<sup>459</sup> M Barletta 'Chemical weapons in the Sudan: Allegations and evidence' (1998) *The Non-proliferation Review* 115.

<sup>460</sup> J Anstall 'Strike one' *The Guardian*, 2 October 2001; B Slaughter 'The Al-Shifa factory was not making chemical weapons' Interview with technical manager of bombed pharmaceutical factory in Sudan,' 12 September 1998, at <https://www.wsws.org/en/articles/1998/09/sud-s/12.html> (accessed 19/06/2015).

<sup>461</sup> Wedgwood (n 191 above) 569-570.



#### 4.7.4. Liberal democracies as fertile grounds for transnational terrorism

Although there seems to be no scholarly consensus, the preponderance of scholarship supports the argument that liberal democracies are more prone to transnational terrorism than autocracies.<sup>462</sup> A free press, which is absent in repressive regimes, is exploited by terrorists to give publicity to their activities,<sup>463</sup> leading to their gaining sympathisers and supporters and, at other times, inflicting fear and anxiety on society.<sup>464</sup> While analysing the views of other commentators, Quan Li considered both arguments. Firstly, he argued that providing space for democratic participation leads to the reduction in incentives for domestic groups to engage in transnational terrorism because their grievances may be addressed.<sup>465</sup> This makes citizens less likely to place themselves at the disposal of terrorist groups to be recruited. Secondly, he argued that press freedom, which gives extensive coverage to terrorist events, exists in democracies, and the desire for publicity creates greater incentives to be involved in terrorism.<sup>466</sup>

The freedom of movement, organization, religion, association and expression, being hallmarks of liberal democracies, make terrorist recruitment easy and provide a conducive environment for terrorists to organize and galvanize themselves into formidable groups.<sup>467</sup> While the constraints on the government are intended to protect the rights of citizens, they invariably prevent the government from assuming a hard-line to nip unwholesome activities in the bud, and governments are, therefore, pressured to give into demands by terrorists groups. These constraints on the executive or government that allows for political participation and a free press ultimately breed terrorist activities.<sup>468</sup> Even the counter-terrorism laws previously enacted by liberal democratic states, such as the UK and France, had embedded in them liberal

<sup>462</sup> WL Eubank & L Weinberg 'Does Democracy encourage terrorism?' (1994) 6 *Terrorism and Political Violence* 417, (417-443); B Savum & BJ Philips 'Democracy, foreign policy, and terrorism' (2009) 20 *Journal of conflict resolution* 1-2.

<sup>463</sup> R Cohen-Almagor 'Media coverage of acts of terrorism: Troubling episodes and suggested guidelines' (2005) 30 *Canadian Journal of Communication*, at [www.cjc-online.ca/index.php/journal/article/view/1579/1734](http://www.cjc-online.ca/index.php/journal/article/view/1579/1734) (accessed 22/06/2015).

<sup>464</sup> JI Walsh 'Media attention to terrorist attacks' Causes and consequences' Research Brief: Institute for Homeland Security Solutions 2, December 2010, at [www.jamesigoewalsh.com/ihss.pdf](http://www.jamesigoewalsh.com/ihss.pdf) (accessed 26/06/2015).

<sup>465</sup> Q Li 'Does Democracy promote or reduce transnational terrorist incidents?' (2005) 49 *Journal of Conflict Resolution* 281.

<sup>466</sup> Li (n 465 above) 282.

<sup>467</sup> BP Rosendorf & T Sandler 'The political economy of transnational terrorism' (2005) 49 *Journal of Conflict Resolution* 179. (171-182). See also SB Blomberg & BP Rosendorf 'A gravity model of globalisation, democracy and international terrorism' 4, at [https://www.princeton.edu/~pcglobal/conferences/institutionspapers/rosendorf\\_S100.pdf](https://www.princeton.edu/~pcglobal/conferences/institutionspapers/rosendorf_S100.pdf) (accessed 12/06/2015).

<sup>468</sup> Savum & Philips (n 462 above) 2.

democratic customs which are protective of the rights of individuals against state interference.<sup>469</sup> Nonetheless, following the 9/11 attacks in the US, some states, including France, Germany and the UK, have introduced new anti-terrorism laws that appear to curtail some civil liberties.<sup>470</sup>

Democratic states which are involved in international politics contend with the problems of resentment and discontent from abroad while pursuing certain interests and foreign policies.<sup>471</sup> For instance, US foreign policies, such as the invasion of Iraq and CIA backed coups for regime change in Panama, Haiti, and support for Israel, all contribute to resentment abroad.<sup>472</sup> Similarly, the Danish Security and Intelligence Service (PET) is quite apprehensive about likely terrorist attacks on targets in Denmark and Danish targets abroad because of its policy of involving its military in Afghanistan and Iraq.<sup>473</sup> Also, Denmark has become a target of Islamic extremists because of the publication in 2005 of images of Muhammad drawn by a Danish cartoonist Kurt Vertergaard and its involvement in the US-led coalition against ISIL in Iraq and Syria<sup>474</sup> The view that democratic regimes encourage terrorism cannot rightly be faulted.

#### 4.8. Conclusion

The literature on terrorism is fraught with various definitions which show a lack of consensus with regard to its conceptualisation. The lack of an internationally acceptable definition of the term ‘terrorism’ has left the limits of lawful responses to terrorism blurred. It also creates loopholes for terrorists to escape accountability and for states and agencies charged with combating terrorism to define it elastically to suit their purposes. This study has found that the absence of international courts or tribunals to prosecute cases of transnational terrorism has undermined the compelling need to fight the menace. This is more so when it is considered against the background of the reluctant attitude of domestic systems charged with the

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<sup>469</sup> WJ Fisher ‘Targeted killing, norms, and international law’ (2007) 45 *Columbia Journal of Transnational Law* 711, 717.

<sup>470</sup> D Haubrich ‘Anti-terror laws and civil liberties: Britain, France and Germany compared’ (2003) 38 *Government & Opposition* 1.

<sup>471</sup> Savum & Philips (n 462 above) 2, 11.

<sup>472</sup> Savum & Philips (n 462 above) 11.

<sup>473</sup> Precht (n 419 above) 51.

<sup>474</sup> Counter-Extremism Project ‘Denmark: Extremism and Counter-Extremism’, at [http://www.counterextremism.com/sites/default/files/country\\_pdf/DK-04222016.PDF](http://www.counterextremism.com/sites/default/files/country_pdf/DK-04222016.PDF) (accessed 19/11/2016).

responsibility to apprehend, prosecute and punish terrorists or generally implement international treaties and conventions on the grounds of fear of retaliatory terrorist attacks.

This chapter has examined the activities of some terrorist organisations such as Hamas, Al Qaeda and Boko Haram and found that the reason for the use of extraterritorial force against NSAs is transnational terrorism. These attacks fall within the confines of terrorism because they are politically or religiously motivated and are mostly directed at non-combatants with a view to influencing the decisions of the various governments. These attacks generally violate international law, particularly the provisions of the UN Charter.<sup>475</sup> The study then considered measures taken by both the UN, which is charged with the responsibility of maintaining international peace and security, and states which are charged with the implementation of treaties and conventions dealing with transnational terrorism. In addition, forcible measures, including targeted killings and full military operations by victim states in response to transnational terrorism, were considered.

Transnational terrorism, in the opinion of this study, has, among other factors, been increased or otherwise facilitated by the following: (a) religious fundamentalism, radicalisation and extremism which do not allow for religious pluralism and secular views which are found in major religions, such extreme religious views being inspired by the internet, mosques, clubs, prisons, schools and universities; (b) in spite of the fact that the UN has established a sanctions regime against transnational terrorists, their organisations and their sponsors, terrorists do not bear the rigorous responsibilities as states do because they are not parties to most international instruments; (c) globalisation and technological advancement; and (d) NSAs exploit the liberal and relatively friendly political environment created by democratic states with their hallmarks of freedom of movement, association and a free press to carry out their terrorist activities.

The next two chapters will focus on a comparative study of the counter-terrorism regimes of the US and Israel with a view to identifying areas of similarities and differences in their approaches. Though their political statuses differ, Israel being in substantial occupation of Palestinian land, they share common policies and legal frameworks upon which their counter-terrorism crusades are founded. These two states have contributed more than any other state or region in transforming the law of self-defence.

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<sup>475</sup> Art 2(4) of the UN Charter.

## Chapter 5

### Extraterritorial use of force against non-state actors: Israel's perspective

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#### 5.1. Introduction

The previous chapter examined extraterritorial use of force by states in response to NSAs in the context of transnational terrorism. The chapter considered the efforts being made by states and the UN to combat terrorism and the factors responsible for the exponential growth in terrorist networks. From that premise, this chapter will proceed to discuss Israel's counterterrorism approaches with a view to comparing it with the US. The reason for this is to bring to the fore the similarities and differences in their *modus operandi* relating to the use of force. Both states rely on similar international law concepts of self-defence, customary law, and the 'unwilling or unable' doctrine<sup>1</sup> as legal bases for their extraterritorial use of force. Israel is an occupying power in the OPT, with the result that its conflicts are also regulated by the rules of IHL.

Comparing Israel and the US is relevant because, to a great extent, the gamut of the transformation of the law of self-defence is mainly considered against the background of their practices. Their wide interpretation of certain concepts, such as imminence and pre-emption, invariably expand the meaning of these words beyond the international law interpretations,

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<sup>1</sup> MN Schmitt 'Extraterritorial lethal targeting: Deconstructing the logic of international law' (2013) 52 *Columbia Journal of Transnational Law* 86-87.

thereby causing a likely change in the existing law of self-defence. In contemporary international relations, several states are manifestly employing force in the territories of other states, but Israel and US appear to provide near perfectly matching practices. The question then is, ‘has their practices influenced any change in the law of self-defence?’ The answer is ‘yes’. Israel has adopted the policy of targeted killing against Palestinians (particularly in the West Bank and Gaza)<sup>2</sup>, militants in Lebanon, Syria and Jordan. These Arab neighbouring territories and states, some of which share common borders with Israel, substantially bear the brunt of Israel’s extraterritorial forcible measures for purportedly providing sanctuaries for NSAs.<sup>3</sup> Other combat methods such as kill-capture missions and full-scale military operations employed by Israel are also considered. State practice, as can be discerned from Israel’s perspective has contributed substantially to the transformation of the law of self-defence.

## **5.2. Extraterritorial use of force by Israel against non-state actors**

Self-defence (under the UN Charter and customary law), SC authorised enforcement action, the consent of territorial states and the ‘unwilling or unable’ doctrine are the grounds upon which state victims of terrorist attacks have used force in foreign territories. Israel has secured neither SC authorisation nor the consent of any state to intervene in foreign territory against NSAs, but it relies mainly on self-defence and the ‘unwilling or unable’ standard to use extraterritorial force. Israel is an occupying power in the OPT, and, because of the *sui generis* nature of the Palestinian territory, Israel engages peculiar international responsibilities. By virtue of the occupation regime, the conflict between Israel and Palestine is regulated also by rules of IHL. The next few paragraphs will discuss the normative frameworks relevant to an occupied territory.

## **5.3. The Law of Occupation and the Israeli/Palestinian conflict**

Israel became an occupying power of Palestinian lands in 1967 following the ‘six days war’. This is the longest occupation which appears even to be contrary to the period envisioned by the framers of the occupation regime in international law.<sup>4</sup> Israel occupies the Gaza Strip,<sup>5</sup> the

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<sup>2</sup> HCJ 769/02 *The Public Committee Against Torture in Israel v The Government of Israel* para 2.

<sup>3</sup> D Byman ‘Do targeted killings work?’ (2006) 85 *Foreign Affairs* 107.

<sup>4</sup> E Benvenisti *International law of occupation* (2012) 203; see also P Maurer ‘Challenges to international humanitarian law: Israel’s occupation policy’ (2012) 94 *International Review of the Red Cross* 1504

<sup>5</sup> R Eglash ‘Does Israel actually occupy the Gaza Strip’ *The Washington Post*, 2 July 2015. Israel determines what comes in and goes out from Gaza and therefore maintains effective control; see I Scobbie ‘Is Gaza still occupied territory?’, at <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR26/FMR2608.pdf> (accessed

West Bank and East Jerusalem which were formally under Egyptian and Jordanian control respectively.<sup>6</sup> While the Golan Heights and Sinai Peninsula have been assimilated under the sovereignty and control of other states, the West Bank and the Gaza Strip were not under the sovereignty of any state.<sup>7</sup> By being an occupying power, Israel has responsibilities under international law to protect the lives of civilian residents in the territory it occupies.<sup>8</sup> The US has no such obligation. A territory is deemed to be occupied if it is placed under the effective control and authority of hostile foreign armed forces,<sup>9</sup> thereby making the GC of 1949 to be applicable to such a territory.<sup>10</sup> The legal framework applicable to the OPT is, therefore, the law of belligerent occupation as enshrined in the 1907 Hague Regulations, GC IV and customary IHL because there is a military component that leads to foreign occupation. The law of belligerent occupation constitutes part of *jus in bello* which is the *lex specialis* that applies to conflicts between occupying powers and insurgent groups.<sup>11</sup>

The law of occupation was initially geared towards the maintenance of the sovereign rights of the ousted government. But, in contemporary occupation by invading powers, there existed tensions between the occupying power and the local population which necessitated the emphasis on the protection of the local populations in the GC.<sup>12</sup> According to Amnesty International (AI), more than three million Palestinians are being collectively punished by Israel.<sup>13</sup> Collective punishment, which extends punishment to those who commit no crimes and

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22/11/2016). Arguably, notwithstanding the withdrawal from Gaza in August 2005 of Israeli troops and settlers, Israel remains in occupation as it maintains authority over Gaza air space and coast. This study is however not unmindful of scholarly opinion to the contrary, while relying on Art 42 the 1907 Hague Regulations see M Milanovic 'European Court decides that Israel is not occupying Gaza', 17 June 2015, at <http://www.ejktalk.org/european-court-decides-that-israel-is-not-occupying-gaza/> (accessed 22/11/2016).

<sup>6</sup> Benvenisti (n 4 above) 203-204.

<sup>7</sup> Benvenisti (n 4 above) 204; YZ Blum 'The missing reversioner: Reflections on the status of Judea and Samaria' (1968) 3 *Israel Law Review* 289. Blum stated that, under international law, the mere occupation of an enemy territory in the course of war does not make such occupied territory become a territory of the occupying belligerent because such a belligerent does not acquire sovereignty over the territory. Consequently, the attempt by Jordan to declare parts of the West Bank and East Jerusalem as its annexed territories was not generally recognized by the international community, except by three states; see also H Kelsen *Principles of international law* (2<sup>nd</sup> ed. edited by Turner 1967) 139.

<sup>8</sup> *PCATI Case* (n 2 above) see Justice Rivlin's consenting opinion, para 4; O Ben-Naftali & KR Michaeli 'We must not make a scarecrow of the law: A legal analysis of the Israeli policy of targeted killings' (2003) 36 *Cornell International Law Journal* 259-262.

<sup>9</sup> Art 42 of the Hague Regulations.

<sup>10</sup> Common art 2 of the GC of 1949.

<sup>11</sup> A Cassese *International law* (2005) 2<sup>nd</sup> edn. 420; see also *PCATI case* (n 2 above) para 18.

<sup>12</sup> P Spoerri 'The Law of Occupation' in A Clapham & P Gaeta (eds.) *The Oxford handbook of international law and armed conflict* (2014) 183-184.

<sup>13</sup> Amnesty International 'Broken lives: A year of the Intifada: Israel/Occupied Territories/Palestinian Authority' (2001) *Amnesty International Publications* 1, 6, 72.



are not terrorists, in the OPT is contrary to international law.<sup>14</sup> Israel violates this international obligation by demolishing homes, imposing curfews and closures which affect the right to the freedom of movement of Palestinian residents in those areas.<sup>15</sup>

By virtue of the Rome Statute of the ICC, grave breaches of the GC constitute war crimes.<sup>16</sup> This perhaps explains recent efforts by the Palestinian Authority to apply to become a party to the ICC Statute and its threat to drag Israel to the ICC for war crimes.<sup>17</sup> In avoidance of the international responsibilities that are inherent in functioning as an occupying power, however, Israel rejects the wholesale applicability of the GC IV to its conflict with Palestine.<sup>18</sup> Israel's contention is bereft of support, as both the UN<sup>19</sup> and legal commentators<sup>20</sup> have argued that, by being in occupation, Israel acquires international obligations, particularly the responsibility to protect the OPT. Israel used to deny totally the applicability of the Convention, but decided to act *de facto* in accordance with the humanitarian provisions of the Convention.<sup>21</sup> Arguably, since every provision is defined as humanitarian, Israel ought to apply every section of the Convention.<sup>22</sup> The fact that the GC IV applies *in toto* to the Israeli/Palestinian crisis in the OPT has been determined by the ICJ in its Advisory Opinion on the *Palestinian Wall case*.<sup>23</sup> The ICJ has called on Israel to observe the provisions of the GC governing military operations scrupulously.<sup>24</sup>

Israel also engages other international responsibilities arising from its being party to other conventions and membership of the UN.<sup>25</sup> This is because human rights law applies

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<sup>14</sup> Art 33 of the GC IV.

<sup>15</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) para 133; Amnesty International (n 13 above) 45-59.

<sup>16</sup> Art 8 of the Statute of the ICC.

<sup>17</sup> R Tait 'Israel threatens more retaliation against Palestinian Court move after tax freeze' *The Telegraph*, 4 January 2015; N Casey & J Mitnick 'Palestinians sign treaty to join International Criminal Court: Move opens door to possible war-crimes prosecution against Israel' *The Wall Street Journal*, 31 December 2014. *Palestinian Wall case* (n 15 above) paras 90-93; Maurer (n 4 above) 1506.

<sup>18</sup> A/RES/33/113 (A-C) of 18 December 1978, paras 1 & 2; see also S/RES/605 of 22 December 1987, para 3.

<sup>20</sup> Ben-Naftali & Michaeli (n 8 above) 260; Y Dinstein 'The international legal status of the West Bank and the Gaza Strip (1998) 28 *Israel Yearbook on Human Rights* 38.

<sup>21</sup> *Palestinian Wall case* (n 15 above) paras 90-93.

<sup>22</sup> Y Dinstein *War, aggression and self-defence* (2011) 5<sup>th</sup> edn. 38.

<sup>23</sup> *Palestinian Wall case* (n 15 above) paras 95, 99-101.

<sup>24</sup> *Palestinian Wall case* (n 15 above) para 99-101; S/RES/271 of 15 September 1969; S/RES/681 of 20 December 1990; S/RES/799 of 18 December 1992; S/RES/904 of 18 March 1994.

<sup>25</sup> Amnesty International (n 13 above) 8. Israel has obligations to comply with Art 4(1) of the ICCPR; Art 4 of the ICESCR; Convention on the Rights of the Child (CRC); Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

extraterritorially to situations of occupation.<sup>26</sup> The jurisprudence of the ICJ has specifically indicated that, by being a party to the ICCPR and ICESCR and the Convention on the Rights of the Child (CRC), Israel's international human rights obligations are engaged.<sup>27</sup> As an occupying power, Israel has no sovereignty over the OPT but acts merely as an administrator and is expected to protect the human rights of the occupied population.<sup>28</sup> The foreign invasion of a territory does not culminate in the extinction or demise of a state, but the implication is that it suspends the sovereignty of the occupied territory.<sup>29</sup> In the Palestinian issue, thus, Israel may be seen as 'trustee occupant' since the sovereignty over the OPT which is in suspense or abeyance resides in the Palestinian Arabs.<sup>30</sup> Being bereft of any sovereignty, Israel cannot, therefore, cause changes to the intrinsic characteristics of the occupied territory.<sup>31</sup> The construction of the security wall by Israel, therefore, breaches its obligations under the ICCPR, ICESCR and CRC.<sup>32</sup> According to Dugard, the wall has inhibited the freedom of movement of residents in some parts of the OPT because certain communities, such as Qaiqiliya, with a population of 40,000 people, are surrounded by the wall.<sup>33</sup>

Following the 1993 Oslo Accord, Israel withdrew from parts of the OPT but re-enters and re-occupies it at will and imposes curfews, thereby retaining effective control.<sup>34</sup> Arguably, Israel's temporary physical withdrawal appears not to change the *status quo* in terms of the application of forcible measures in the occupied territories. While it was no longer maintaining ground troops at that time to effect arrests upon its withdrawal from Gaza about 2005,<sup>35</sup> it escalated its airborne targeted killing programme. Weizman called this phase 'airborne occupation'.<sup>36</sup> Arguably, Israel's major reason behind temporarily ceding control of parts of the OPT after the Accord was to divest itself of responsibility as an occupying power and to pave the way for a

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<sup>26</sup> N Lubell 'Human rights obligations in military occupations' (2012) 94 *International Review of the Red Cross* 318-319; MJ Dennis 'Application of human rights treaties extraterritorially in times of armed conflict and military occupation' (2005) 99 *American Journal of International Law* 119-121.

<sup>27</sup> *Palestinian Wall case* (n 15 above) paras 103, 106 & 111-113; see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports (1996) para 24.

<sup>28</sup> Lubell (n 26 above) 319.

<sup>29</sup> A Yannis 'The concept of suspended sovereignty in international law and its implications in international politics' (2002) 13 *European Journal of International Law* 1038.

<sup>30</sup> PMR Stirk *The politics of occupation* (2009) 165-166.

<sup>31</sup> Spoerri (n 12 above) 183-184.

<sup>32</sup> Dennis (n 26 above) 119-121.

<sup>33</sup> Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, EC.4/2004/6, 8 September 2003, para 9; see also *Palestinian Wall case* (n 15 above) para 133.

<sup>34</sup> Ben-Naftali & Michaeli (n 8 above) 261; C Jones *A law to kill: The legal violence of targeted killing* 7, at <http://warlawspace.files.wordpress.com/2012/11/a-law-to-kill-cjones.pdf> (accessed 05/07/2015).

<sup>35</sup> N Melzer *Targeted killing in international law* (2008) 30-31.

<sup>36</sup> E Weizman *Hollow Land: Israel's architecture of occupation* (2007) 237.

full-scale military offensive against the OPT which may then have been construed to be a foreign armed adversary. According to Hajjar, ‘Israeli claims that Palestinian areas are “no longer occupied” is the essential element to legitimize them as sites of warfare’.<sup>37</sup> This state of affairs set the tone for the subsequent armed conflict (second Intifada) in which Israel considered the confrontation as a war with a foreign armed adversary. In spite of Israel’s brutality in the prosecution of that conflict, however, it refused to extend the benefits of combatants such as PoW status to Palestinians.<sup>38</sup>

## 5.4. Legal basis for extraterritorial use of force by Israel

### 5.4.1. Self-defence

Firstly, similar to the US position, Israel maintains that, far from engaging in illegal acts of extrajudicial killings as alleged by its opponents, it is merely exercising its legitimate right to self-defence which is guaranteed by international law.<sup>39</sup> It, therefore, relies on provisions of the UN Charter to justify its raids on both Hezbollah and Palestinian armed groups.<sup>40</sup> In this regard, some commentators, mainly of Israeli extraction, have argued that, even as Israel is negotiating with the owners of the land it illegally occupies, it is entitled as an occupying power to use force in self-defence.<sup>41</sup> Self-defence against Hamas rocket fire was a central ground for justifying even the 2014 Israeli attack on Gaza, which was invoked by Prime Minister Netanyahu in reaction to the criticism that Israel had committed war crimes.<sup>42</sup> Israel has also used self-defence as a basis to discredit the ICC’s likely inquiry into war crimes against it,

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<sup>37</sup> L Hajjar ‘Lawfare and armed conflict: Comparing Israeli and the US targeted killing policies and the challenges against them’ (2013) *Issam Fares Institute for Public Policy and International Affairs* 9.

<sup>38</sup> A Moaz ‘War and peace: An Israeli perspective’ (2005) 24 *Constitutional Forum* 35-76.

<sup>39</sup> Ben-Naftali & Michaeli (n 8 above) 240-241; P Alston ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Add: Study of targeted killing, A/HRC/14/24/Add. 6 of 28 May 2010, para 13; ‘Press briefing by Colonel Daniel Reisner, Head of the International Law Branch of the IDF legal Division’ *Israeli Ministry of Foreign Affairs*, 15 November 2000, at <http://mfa.gov.il/MFA/PressRoom/2000/Pages/Press%20Briefing%20by%20Daniel%20Reisner-%20Head%20of.aspx> (accessed 26/07/2015).

<sup>40</sup> Art 51 of the UN Charter.

<sup>41</sup> SR David ‘Israel’s policy of targeted killing’ (2003) 17 *Ethics and International Affairs* 113; D Statman ‘Targeted killing’ 5, at <http://www.ucl.ac.uk/-uctyho/StatmanTargetedKilling.html> (23/05/2012).

<sup>42</sup> JM Leas ‘Attack first, kill thousands, claim self-defence, then campaign to discredit ICC’ 1, at <http://www.nlg.org/sites/default/Attack%20first%20kill%20thousands%20claim%20self-defence%20FINAL.pdf> (accessed 26/07/2015).

based on allegations by Amnesty International (AI),<sup>43</sup> Human Rights Watch (HRW),<sup>44</sup> the United Nations Human Rights Council,<sup>45</sup> National Lawyers Guild<sup>46</sup> and the United Nations Office of the High Commissioner for Human Rights (OHCHR).<sup>47</sup> Its cabinet ministers described the policy as ‘active self-defence’ or ‘interception’ of terrorists before they can carry out attacks,<sup>48</sup> thereby justifying the use of deadly force.<sup>49</sup>

A state’s right of self-defence in response to armed attacks from NSAs requires that the conduct be attributed to the territorial state.<sup>50</sup> Israeli reliance on self-defence in its use of force in the Palestinian territory has been rejected by the ICJ in the *Palestinian Wall case* for lacking in attribution to another state.<sup>51</sup> While reiterating its decisions in the *Nicaragua case*<sup>52</sup> and the *DRC case*, the ICJ found that Israel failed to prove that the attacks against it emanated from outside.<sup>53</sup> That is to say, Palestine is not sufficiently an international entity, outside of Israel, from which armed attacks could emanate.<sup>54</sup> Tams queried the Court’s reasoning about why it considered attacks from Palestinian territory not to be sufficiently international to meet the

<sup>43</sup> Amnesty International Report 2014/15, at <https://www.amnesty.org/en/countries/middle-east-and-north-africa/israel-and-occupied-palestinian-territories/report-israel-and-occupied-palestinian-territories/> (accessed 12/08/2015); M O’Toole ‘Strong evidence of Israeli war crimes in Gaza’ *Aljazeera*, 29 July 2015, at <http://www.aljazeera.com/news/2015/07/evidence-israeli-war-crimes-gaza-interactive-15072810-150728133534137.html> (accessed 12/08/2015).

<sup>44</sup> Human Rights Watch ‘Israel: In-depth look at Gaza school attacks’ 11 September 2014, at <https://www.hrw.org/news/2014/09/11/israel-depth-look-gaza-school-attacks> (accessed 12/08/2015).

<sup>45</sup> United Nations Independent Commission of Inquiry on the 2014 Gaza Conflict, A/HRC/29/52 of 24 June 2015, paras 20-71; M Ginsburg ‘UN Gaza Report: Israel, Hamas may be guilty of war crimes’ *The Times of Israel*, 22 June 2015; P Beaumont ‘UN accuses Israel and Hamas of possible war crimes during the 2014 Gaza conflict’ *The Guardian*, 22 June 2015.

<sup>46</sup> A Shahshahani, President, National Lawyers Guild et al ‘Letter to the ICC Prosecutor: Possible war crimes in Gaza (August 22, 2014)’, at <https://www.nlg.org/sites/default/files/Letter%20to%20ICC%20Prosecutor%20Gaza%20Final.pdf> (accessed 16/04/2016); JM Leas ‘Neither facts nor law support Israel’s self-defence claim regarding its 2014 assault on Gaza’ 60-63, at [http://www.niginternational.org/report/Neither\\_facts\\_nor\\_law\\_support\\_israeli\\_self-defnce\\_submission\\_to\\_ICC.pdf](http://www.niginternational.org/report/Neither_facts_nor_law_support_israeli_self-defnce_submission_to_ICC.pdf) (accessed 16/04/2016).

<sup>47</sup> Office of the High Commissioner for Human Rights ‘UN Gaza inquiry finds credible allegations of war crimes committed in 2014 by both Israel and Palestinian armed groups’, at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16119&LangID=E> (accessed 12/08/2015); see also Netanyahu rejects ICC’s preposterous inquiry into possible war crimes’ *Haaretz*, 17 January 2015.

<sup>48</sup> J Greenberg ‘Israel affirms policy of assassinating militants’ *The New York Times*, 5 July 2001.

<sup>49</sup> Reisner (n 40 above).

<sup>50</sup> B Michael ‘Responding to attacks by non-state actors: The attribution requirement of self-defence’ (2009) *Australian Law Journal* 134.

<sup>51</sup> *Palestinian Wall case* (n 15 above) para 139.

<sup>52</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Reports (1986) para 195.

<sup>53</sup> *Palestinian Wall case* (n 15 above) para 139.

<sup>54</sup> CJ Tams ‘Light treatment of a complex problem: The law of self-defence in the Wall case’ (2006) 16 *European Journal of International Law* 968.

threshold.<sup>55</sup> He, however, concluded by agreeing with the Court that, on the ground of Israel's occupation, it cannot employ self-defence on the OPT.<sup>56</sup>

In spite of the views expressed by Israel and its sympathizers, the conflict between Israel and Palestine in relation to the OPT is not governed by the *jus ad bellum*, but by the *jus in bello*, and, therefore, Israel cannot plead self-defence. Scholarly opinion greatly supports the assertion that, by virtue of the Israeli occupation and also that Palestine is not a state entity, neither article 2(4) nor article 51 of the UN Charter applies to the conflict, and, consequently, Israel cannot qualify its actions as amounting to self-defence. Akande,<sup>57</sup> Corten,<sup>58</sup> Milanovic<sup>59</sup> and Christakis and Bannelier<sup>60</sup>, among several others, advocate this position. While reacting to Geir Ulfstein's assertion that too much attention is given to the *jus in bello* in the Israeli/Palestinian conflict without a corresponding attention to the *jus ad bellum* which also regulate the conflict, Akande argued that Israel's actions in the OPT do not violate the prohibition in article 2(4) of the Charter. Also referring to an earlier view of Marko Milanovic, he contended that, since the ban on use of force is not invoked because Palestine is not a state entity, Israel cannot rely on self-defence which is an exception to the ban.<sup>61</sup> According to them, the prohibition in article 2(4) relates to states exclusively, and, therefore, the use of force by Israel against Palestine, a NSA, cannot invoke article 2(4). Consequently, article 51 which is an exception to the ban created in article 2(4) is not also applicable.<sup>62</sup>

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<sup>55</sup> Tams (n 54 above) 968-969. According to him, throughout the proceedings, the Court emphasized the international character of the Israel-Palestine crisis, stressed the right of Palestine to self-determination, Palestine's right to participate in the proceedings and the fact that IHL governs the conflict. While alluding to the separate opinions of Higgins and Buergethal in the *Palestinian Wall case*, Tams contends that Palestine cannot be sufficiently an international entity to be invited to these proceedings and to benefit from humanitarian law but also not sufficiently an international entity for the prohibition of armed attacks on others to be applicable.

<sup>56</sup> Tams (n 54 above) 970, where he stated, 'In short, it is submitted that Art 51 was inapplicable not because the Israeli-Palestinian relations did not qualify as 'international phenomena', but because the law of belligerent occupation derogated from it'.

<sup>57</sup> D Akande 'Is Israel's use of force in Gaza covered by the *jus ad bellum*?' 22 August 2014, at <http://www.ejiltalk.org/is-israels-use-of-force-in-gaza-covered-by-the-jus-ad-bellum> (accessed 17/02/2016).

<sup>58</sup> O Corten *The law against war: The prohibition on the use of force in contemporary international law* (2010) 126-127.

<sup>59</sup> M Milanovic 'A follow-up on Israel and Gaza' 3 January 2009, at <http://www.ejiltalk.org/a-follow-up-on-israel-and-gaza/> (accessed 21/02/2016).

<sup>60</sup> T Charistakis & K Bannelier 'French military intervention in Mali: It's legal but ... why? Part I' 24 January 2013, at <http://www.ejiltalk.org/french-military-intervention-in-mali-its-legal-but-why-i/more-7483> (accessed 21/02/2016).

<sup>61</sup> Akande (n 57 above).

<sup>62</sup> Akande (n 57 above); Milanovic (n 59 above).



According to Milanovic, ‘Israel could not justify its building of the wall in the occupied Palestinian territories by resorting to article 51, because article 2(4) did not apply in the first place’.<sup>63</sup> An analogy could also be drawn from the arguments of Christakis and Bannelier to the effect that the plea of self-defence by France in support of the Malian Government against terrorists (*Operation Serval*) is also faulty because the terrorists do not constitute a state that is known to international law.<sup>64</sup> Akande argues further that, to the extent that self-defence is unavailable to Israel, the customary law requirements of necessity and proportionality embedded under article 51 are also irrelevant in the Israeli/Palestinian conflict.<sup>65</sup> Ordinarily, a particular recourse to force is to be assessed on the basis of the proportionality of self-defence, whereas individual actions are expected to conform to the requirement of proportionality in the *jus in bello*.<sup>66</sup> The arguments made above, with which this study associates, resonate the conclusion of the ICJ in the *Palestinian Wall case*, and they properly represent (in this study’s view) the position of the law relating to the Israeli/Palestinian conflict.<sup>67</sup> The conclusions this study has drawn above is however, without prejudice to the right of Israel to plead self-defence in relation to its conflict with Hezbollah and other NSAs. Interestingly though, Israel generally relies on self-defence even in relation to its forcible measures against Palestine.

#### 5.4.1.1. Construction of a wall and Israel’s plea of self-defence

The legality or otherwise of the construction of a security wall by Israel in the OPT as a means of self-defence contemplated under article 51 of the UN Charter came up for determination before the ICJ.<sup>68</sup> The erection of a wall by Israel in the OPT has been determined to be a violation of the residents’ right of movement in some parts of the occupied territories.<sup>69</sup> Under the Statute of the ICJ, the Court has the power to give an advisory opinion<sup>70</sup> if requested by any organ of the UN duly authorised by the Charter.<sup>71</sup> By virtue of GA resolution ES-10/14,

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<sup>63</sup> Milanovic (n 59 above).

<sup>64</sup> Charistakis & Bannelier (n 60 above), Relying on the advisory opinion in the *Palestinian Wall case*, para 139 and the *DRC case*, paras 146-147, they argued that there must be an armed attack imputed to another state for self-defence to be triggered. Furthermore, there was no ‘indirect aggression’ of any form and, therefore, the conduct of NSAs (private groups and terrorists) cannot invoke self-defence under art 51, except if there is a third state connection.

<sup>65</sup> Akande (n 57 above).

<sup>66</sup> E Cannizzaro ‘Contextualizing proportionality in the *jus ad bellum* and *jus in bello* in the Lebanese war’ (2006) 88 *International Review of the Red Cross* 779; see also D Kretzmer ‘The inherent right to self-defence and proportionality in *jus ad bellum*’ (2013) 24 *European Journal of International Law* 278.

<sup>67</sup> *Palestinian Wall case* (n 15 above) para 139.

<sup>68</sup> *Palestinian Wall case* (n 15 above) para 136.

<sup>69</sup> *Palestinian Wall case* (n 15 above) para 133.

<sup>70</sup> Art 65, para 1 of the Statute of the International Court of Justice.

<sup>71</sup> Art 96, para 1 of the UN Charter.



an advisory opinion was requested by the GA.<sup>72</sup> While challenging the jurisdiction of the ICJ to entertain the matter, Israel contended that the GA acted *ultra vires* because the SC was actively engaged in the Middle East situation including the Palestinian question.<sup>73</sup> Also, the Court lacked relevant facts and evidence at its disposal, particularly without a hearing where evidence would be ventilated to reach a judicial decision.<sup>74</sup> That apart, Israel invoked the maxim *nullus commodum capere potest de sua injuria propria*, that is, Palestine cannot seek the Court's remedy since the wall is the result of its wrong doing, such as acts of violence against Israel which the wall seeks to address.<sup>75</sup> The Court indicated that the GA has a 'permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy', and that, from the time of the 'Mandates', the Palestinian issue has gone beyond a merely bilateral problem.<sup>76</sup>

Israel has contended that its military operations conducted in parts of the OPT are undertaken in the exercise of its right to self-defence guaranteed under article 51 of the UN Charter.<sup>77</sup> According to Israel, 'the construction of the barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and SC resolutions 1368 (2001) and 1373 (2001)'. Similarly, Israel's permanent representative to the UN also asserted that 'the fence is a measure wholly consistent with the right of states to self-defence enshrined in Article

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<sup>72</sup> A/RES/ES-10/14 of 8 December 2003. The question was: 'What are the legal consequences arising from the construction of the Wall being built by Israel, the occupying power, in the Occupied Palestinian Territory, including East Jerusalem, as described in the report of the Secretary General, considering the rules and principles of international law including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions', see *Palestinian Wall case* (n 15 above) para 66. Though before accepting a request, the ICJ considered the propriety of such a request against the background of the functions performed by such organ; see Peace Treaties with Bulgaria, Hungary and Romania, ICJ Reports 1950; *Nuclear Weapons case* (n 27 above) paras 11 & 12. The GA requested for this opinion under the 'Uniting for Peace' resolution (A/RES/377 1950) on an issue of maintenance of international peace and security because the SC failed to adopt resolutions on Israel by virtue of negative votes by permanent members (S/1997/199 & S/PV.3747, and S/1997/241 & S/PV.3756); see also *Palestinian Wall case* (n 15 above) para 19.

<sup>73</sup> *Palestinian Wall case* (n 15 above) para 24; Art 12 of the UN Charter.

<sup>74</sup> *Palestinian Wall case* (n 15 above) para 55.

<sup>75</sup> *Palestinian Wall case* (n 15 above) para 64.

<sup>76</sup> *Palestinian Wall case* (n 15 above) para 49.

<sup>77</sup> *PCATI case* (n 2 above) para 10, where Israel contended that: 'It is no longer controversial that a state is permitted to respond with military force to a terrorist attack against it. That is pursuant to the right to self-defence determined in article 51 of the Charter of the United Nations, which permits a state to defend itself against an "armed attack". Even if there is disagreement among experts regarding the question what constitutes an "armed attack", there can be no doubt that the assault of terrorism against Israel fits the definition of an armed attack. Thus, Israel is permitted to use military force against the terrorist organizations'; *Palestinian Wall case* (n 15 above) para 138.

51 of the Charter.’ He stated further that ‘the SC resolutions have clearly recognised the right of states to use force in self-defence against terrorist attacks’.<sup>78</sup>

In its ruling the ICJ relied on two reports from the Secretary General and a report each from John Dugard<sup>79</sup> and Jean Ziegler.<sup>80</sup> Dugard argued in his report that what is being witnessed in the ‘West Bank is a visible and clear act of territorial annexation under the guise of security’. He pointed out that beyond the fact that the wall violates the Palestinians’ freedom of movement, restricts their access to education and health facilities, and results in the unlawful taking of Palestinian property, the wall also violates two of the most fundamental principles of international law: the prohibition on the forcible acquisition of territory; and the right to self-determination.<sup>81</sup> Similarly, in the summary of his report, Ziegler described the Israeli security wall as an ‘Apartheid Wall’ because it violated the Palestinian right to food and cuts the Palestinians off from their agricultural land, water wells and other means of subsistence.<sup>82</sup>

Upon due consideration of the wall and its humanitarian and socio-economic impact on the Palestinian population,<sup>83</sup> the ICJ dismissed Israel’s contention. The ICJ found that the Israeli arguments and reliance on self-defence under article 51 of the Charter for the erection of a wall in the OPT was flawed on two main grounds. Firstly, Israel’s plea of self-defence has no support in international law because Israel does not claim that the attacks against it are imputable to a state.<sup>84</sup> Clearly, the Court’s reasoning is in tandem with the attribution threshold it laid down in the earlier *Nicaragua case*.<sup>85</sup> To that extent, even the customary requirements of necessity and proportionality embedded in article 51 are also not applicable to the conflict.<sup>86</sup> Akande’s argument may also be reiterating Corten’s view that article 2(4) prohibits the use of force in international relations, and international relations in this context refers to relations between states.<sup>87</sup> Secondly, the Court noted that Israel exercises control in the OPT and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates from within and not outside that territory. The situation, according to the Court, is

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<sup>78</sup> A/ES-10/PV.21, p 6; see also *Palestinian Wall case* (n 15 above) para 138.

<sup>79</sup> Dugard report (n 33 above).

<sup>80</sup> Report of the Special Rapporteur on the Right to food, Jean Ziegler, Addendum: Mission to the Occupied Palestinian Territories, E/CN.4/2004/10/Add.2 of 31 October 2003.

<sup>81</sup> Dugard report (n 33 above) para 17; see also HCY 7957/04 *Mara’abe v Prime Minister of Israel* para 44.

<sup>82</sup> Ziegler report (n 80 above) paras 11-14; see also *Mara’abe case* (n 81 above) para 45.

<sup>83</sup> *Palestinian Wall case* (n 15 above) para 57.

<sup>84</sup> SD Bachmann ‘Targeted killings: Contemporary challenges, risks and opportunities’ (2013) 18 *Journal of Conflict & Security law* 281-282.

<sup>85</sup> *Nicaragua case* (n 15 above) para 195.

<sup>86</sup> Akande (n 57 above).

<sup>87</sup> Corten (n 58 above) 126-127.

different from that contemplated by SC resolutions 1368 (2001) and 1373 (2001), and, therefore, Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.<sup>88</sup>

While the ICJ took cognizance of the fact that Israel faces numerous indiscriminate and deadly attacks against its civilian population and, therefore, has a right, and indeed a duty, to respond in order to protect its citizens, the measures taken in that regard are bound nonetheless to conform with applicable frameworks of international law.<sup>89</sup> In conclusion, the Court also held Israel's plea of necessity not to be tenable, holding that Israel cannot rely on the doctrine of necessity, since it is not the only option at Israel's disposal to guard its essential interests against a grave and imminent peril.<sup>90</sup> Having evaluated Israel's arguments *vis-a-vis* the relevant legal frameworks in respect of the use of force by states, this study also argues that Israel has no right of self-defence in the OPT. This conclusion remains sound whether Palestine had initiated the hostilities that necessitated the Israeli response or *vice versa*.

#### **5.4.1.2. Israel's use of force in self-defence against Hezbollah**

There is no doubt that Israel has made several forcible incursions into Lebanese territory on account of alleged terrorist attacks launched by Hezbollah. This study, however, examines the 2006 conflict briefly because of the international attention it attracted and the fact that Israel's main justification for being drawn into the conflict was on the basis of self-defence. On 12 July 2006, Hezbollah fired rocket attacks from Lebanese territory across the blue line in the direction of Israel's IDF positions. Thereafter Hezbollah attacked an IDF patrol, captured two soldiers and killed three others. A heavy exchange of fire ensued between IDF and Hezbollah along the blue line and the west of the Sheba'a farms. An IDF tank and its platoon crossed into Lebanon. Four more Israeli soldiers were killed when an explosive device was detonated under the tank, while the eighth soldier died in attempting to retrieve the bodies of the four soldiers. While Hezbollah also targeted some Israeli towns, Israel responded by destroying bridges,

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<sup>88</sup> *Palestinian Wall case* (n 15 above) paras 139 & 142.

<sup>89</sup> *Palestinian Wall case* (n 15 above) para 141.

<sup>90</sup> *Palestinian Wall case* (n 15 above) para 142; see also Art 25 of the Draft Articles on State Responsibility for Internationally Wrongful Acts 2001 which provides: '1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity'.

roads, and the Beirut airport, killing several civilians and enforcing an air and sea blockade over Lebanon. The fighting was so intense that even the United Nations Interim Force in Lebanon (UNIFIL) could not patrol the blue line or enforce a cease-fire, but instead it was confined to bunkers.<sup>91</sup>

Israel justified its response to Hezbollah's attacks as an act of legitimate self-defence guaranteed under article 51 of the UN Charter.<sup>92</sup> Though Israel recognized Hezbollah, a NSA, as being responsible for the attacks against it on 12 July 2006, it attributed the conduct of Hezbollah to Lebanon.<sup>93</sup> Certain commentators have suggested that Israel attributed the conduct of Hezbollah to the Lebanese government because Hezbollah was represented in and participated in that government.<sup>94</sup> In discussing Israel's reliance on self-defence against Hezbollah, the SC and most other states outside of it recognised Israel's right to self-defence, but they criticised its disproportionate use of force.<sup>95</sup> Out of the 15 member SC, Russia, China, Japan, Congo, Greece and Qatar were specific about Israel's disproportionate use of force. While Argentina, UK, Peru, Denmark, Slovakia, Greece and the USA recognised Israel's right of self-defence against Hezbollah, Qatar was emphatic that Israel has no right of self-defence.<sup>96</sup> Some other states were of the opinion that Israel's action had amounted to an act of aggression,<sup>97</sup> just as Qatar and Djibouti held the view that Israel's legitimate plea of self-defence had been vitiated by its excessive and disproportionate use of force.<sup>98</sup> Similarly, human rights organisations and certain commentators concluded that Israel's bombardment, blockade and invasion of Lebanon could not be excused as self-defence, but amounted to acts of aggression or war crimes.<sup>99</sup> It is Kattan's contention that Israel's action cannot be justified as

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<sup>91</sup> Statement of Mr. Jean-Marie Guehemo, Under-Secretary-General for Peacekeeping Operations on 14 July 2006 at the Security Council, S/PV.5489.

<sup>92</sup> Dan Gillerman, Identical Letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/60/937, S/2006/515.

<sup>93</sup> Israeli representative Dan Gillerman stated at the SC on 14 July 2006 that 'Israel's actions were in direct response to an act of war from Lebanon. Although Israel holds the Government of Lebanon responsible, it is concentrating its response carefully, mainly on Hezbollah strongholds, positions and infrastructure', S/PV.5489.

<sup>94</sup> M Hakimi 'Defensive force against non-state actors: The state of play' (2015) 91 *International Law Studies* 1-9; T Reinold 'State weakness, irregular warfare, and the right of self-defence Post 9/11' (2011) 105 *American Journal of International Law* 266.

<sup>95</sup> I Scobbie 'Lebanon 2006' in E Wilmschurst (ed.) *International Law and the classification of conflicts* (2012) 395-396; S/PV.5489.

<sup>96</sup> S/PV.5489, Security Council Meeting (14 July 2006).

<sup>97</sup> S/PV.5493<sup>rd</sup> Security Council Meeting (21 July 2006).

<sup>98</sup> S/PV.5493, Security Council Meeting (21 July 2006).

<sup>99</sup> Amnesty International-AI index: MDE 18/007/2006, Israel/Lebanon-deliberate destruction or collateral damage? Israeli attacks on civilian infrastructure; V Kattan 'Israel, Hezbollah and the conflict in Lebanon: An act of aggression or self-defence?' (2006) 14 *Human Rights Brief* 26.

self-defence because it fell short of the criteria adumbrated by Webster in the Caroline incident,<sup>100</sup> and Hezbollah's initial attack against Israel ought to have been dismissed as a mere frontier incident.<sup>101</sup> While the ICJ jurisprudence has distinguished armed attacks from mere frontier incidents<sup>102</sup>, this study disagrees with Kattan's call to dismiss Hezbollah's attacks as mere frontier incidents. In fact, there is near scholarly consensus that not all frontier incidents fall short of the required gravity to qualify as armed attacks.<sup>103</sup> Consequently, this study argues that the attacks on Israel from Hezbollah that triggered the 2006 conflict in which eight soldiers were killed and two others were captured qualified as armed attacks both in scale and in effect. Clearly, the reliance on self-defence in this confrontation with Hezbollah and the attitude of toleration or out-right support by certain states in the SC is a manifestation of the transformation of the law of self-defence.

#### 5.4.2. Reliance on the 'unwilling or unable' doctrine

Ordinarily, a state from which NSAs conduct cross-border attacks has its sovereignty protected. Such protection may, however, be pierced by victims of the terrorist attacks emanating from such a territory if the territorial state is either 'unwilling or unable' to halt the attacks on other states. The victim state may, in the exercise of its right of self-defence guaranteed under article 51 of the Charter, use force in the territory of such a host state.<sup>104</sup> This doctrine has been relied upon by Israel as a ground to use force in Lebanon against Hezbollah, arguing that the inability or unwillingness on the part of Lebanon to exercise control over its southern borders has given Hezbollah leeway to launch cross-border attacks from its territory.<sup>105</sup> Similar arguments were

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<sup>100</sup> RY Jennings 'The Caroline and McLeod Cases' (1938) 32 *American Journal of International Law* 82; see also Kattan (n 99 above) 26-28.

<sup>101</sup> Kattan (n 99 above) 26-28.

<sup>102</sup> *Nicaragua case* (n 15 above) para 103.

<sup>103</sup> GG Fitzmaurice 'The definition of aggression' (1952) 1 *International & Comparative Law Quarterly (ICLQ)* 139, cited in Dinstein (n 22 above) 210, where Fitzmaurice was quoted as saying that 'there are frontier incidents and frontier incidents. Some are trivial, some may be extremely grave'; JL Kunz 'Individual and collective self-defence in Art 51 of the Charter of the United Nations' (1947) 41 *American Journal of International Law* 878. He remarked 'If armed attack means illegal armed attack it means on, the other hand, any illegal armed attack, even a small border incident'. This view is, however, in contradistinction to the view expressed by the Eritrea/Ethiopia Commission, when it held that 'localised border encounters between small infantry units, even those involving loss of life, do not constitute an armed attack for the purposes of the Charter', see Eritrea-Ethiopia Claims Commission ( Partial Award, Jus ad bellum, Ethiopia's claim 1-8 December 19, 2005) 11, cited in J Kittrich *The right of self-defence in public international law* (2008) 72.

<sup>104</sup> GD Williams 'Piercing the shield of sovereignty: An assessment of the legal status of the "unwilling or unable" test' (2013) 36 *University of New South Wales Law Journal* 619-620.

<sup>105</sup> Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/60/937-S/2006/515 of 12 July 2006. Dan Gillerman stated: 'The ineptitude and inaction of the Government of Lebanon has led to a situation in which it has not exercised jurisdiction over its territory for many years'.

made by Israel to the effect that the Palestinian Liberation Organisation (PLO) is either ‘unwilling or unable’ to halt rocket attacks against Israel from its territory.<sup>106</sup> Arguably, the justification of Israel’s reliance on this doctrine to use force in the OPT as well has been rejected, since Palestine is not a state and the purpose of Israel is for self-defence. If the ultimate intention to use force in the OPT is self-defence, reliance on the ‘unwilling or unable’ doctrine in this study’s view is also immaterial.

### **5.5. Extraterritorial forcible methods employed by Israel against non-state actors**

For the purposes of extraterritorial counterterrorism operations, the Israeli military intelligence (Aman) and foreign intelligence (Mossad) work in concert with the IDF.<sup>107</sup> Mossad is in charge of external security operations, with particular focus on Arab nations, such as Jordan, Lebanon and elsewhere in the Middle East, and pro-Arab organisations. These agencies and the IDF use a mix of ground forces, including intelligence operatives, Special Forces and airborne operations, for combating Islamic militant organisations.<sup>108</sup> The main methods employed by Israel in the execution of its extraterritorial forcible policy are targeted killings, kill-capture missions and full-scale military operations. Though the scope of this study is limited to issues of terrorist NSAs, Israel’s kill-capture missions also target other enemies quite outside the enclaves of terrorists in foreign territories.<sup>109</sup> Israel invented some military techniques and transported the same to the US and other countries through the cross-fertilising of ideas and the teaching of military commanders and lawyers.<sup>110</sup> Israel is generally skilful in TK and other combat operations, and some of its legal concepts, conceived by its International Law Division (ILD) in response to the challenges arising from the second Intifada, are being relied upon by western armies.<sup>111</sup> For instance, the US and Britain learned to shoot the terrorist in the head

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<sup>106</sup> AS Deeks ‘Unwilling or unable’: Toward a normative framework for extraterritorial self-defence’ (2012) 52 *Virginia Journal of International Law* 486.

<sup>107</sup> D Byman *The triumphs and fatalities of Israeli counterterrorism* (2011) 338-343.

<sup>108</sup> Bachmann (n 84 above) 265-266.

<sup>109</sup> Israel had kidnapped Adolf Eichmann in Argentina in 1960-UN Doc/4349 and also abducted Mordechai Vanunu from Rome in 1986 for allegedly publishing qualified information about Israel’s military capabilities.

<sup>110</sup> Jones (n 34 above) 16; O Nir ‘Bush seeks Israeli advice on targeted killings’ *The electronic Intifada*, at <http://electronicintifada.net/content/bush-seeks-israeli-advice-targeted-killings/439> (accessed 10/08/2015).

<sup>111</sup> A Cohen ‘New norms for fighting terrorism’ (Conference 2009); Jones (n 35 above) 17.



instead of in the body because with a body shot the terrorist may still be able to trigger a bomb device.<sup>112</sup>

### 5.5.1. Targeted killings

Targeted killing ‘denotes the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the custody of those targeting them’.<sup>113</sup> Israel has a declared, long-term policy of eliminating terrorists.<sup>114</sup> Long before the targeting of Palestinian terrorists became the centre-piece of Israeli extraterritorial killings, Israel was carrying out covert targeted operations.<sup>115</sup> The term ‘targeted killings’ was first used in 2001 by Elyakim Rubinstein (then Israeli Attorney General) because, according to him, the previously used term ‘elimination’ does an injustice to Israel.<sup>116</sup> The term is used by Israel to describe one of the methods it employs in combat against alleged Palestinian terrorists, Hezbollah and other NSAs who either pose threats or attack Israeli citizens.<sup>117</sup> The principal targets of the Israeli TK policy are members of organisations such as Tanzim/Fatah, Hamas and Islamic Jihad, though other less prominent armed groups, including, but not limited to, the Popular Front for the Liberation of Palestine (PFLP) and Democratic Front for the Liberation of Palestine (DFLP) are also being targeted.<sup>118</sup> Similar to the US

<sup>112</sup> Lord Stevens ‘Shooting to kill saves lives...one tragedy will not change that’ News of the World- Online Edition, 24 July 2005, at [http://eck-blog.blogspot.com/2005/07/news-of-the-world-online-edition\\_112225147054973925.html](http://eck-blog.blogspot.com/2005/07/news-of-the-world-online-edition_112225147054973925.html) (accessed 30/07/2015); G Housworth ‘Aim for the head: In praise of operation Kratos’ 8 May 2005, at <http://spaces.icgpartners.com/apps/discuss.asp?guid=E3559FB7FCD44670B013CA01AEB63FA0> (accessed 30/07/2015); Melzer (n 4 above) 25.

<sup>113</sup> Melzer (n 35 above) 5.

<sup>114</sup> *PCATI case* (n 3 above) para 2; Amnesty International ‘Israel and the occupied territories: State assassination and other unlawful killings’ p 1, at <https://www.amnesty.org/en/documents/MDEI5/005/2001/en/> (accessed 19/02/2016). On 14 February 2001, the Israeli Defence Minister, Ephraim Sneh, declared that, ‘We will continue our policy of liquidating those who plan or carry out attacks, and no one can give us lessons in morality because we have unfortunately one hundred years of fighting terrorism’; see also Melzer (n 35 above) 29.

<sup>115</sup> A Plaw *Targeting terrorists: A license to kill* (2013) 39. He wrote that, apart from the targeting of Bernadote, Israel’s earliest targets were Col. Mustafa Hafez, Egyptian Director of Intelligence in the Gaza, and his subordinate in Jordan, Lt. Col. Salah Mustafa, whom Israel accused of organizing, equipping and directing cross-border attacks against them. While Mustafa Hafez was killed by a letter bomb delivered through Muhammad al-Talalka, one of his men, on 11 July 1956, Salah Mustafa was killed by a package from the American Central Post through his driver on 12 July 1956.

<sup>116</sup> M Salem ‘Israel must limit targeted killings to avoid further violence’ *Al-monitor*, 19 January 2014, at <http://www.al-monitor.com/pulse/originals/2014/01/Hamas%20Israel%20Cooperation%20Shalit%20Deal%20Targeted%20Killings%20Gaza> (13/08/2015).

<sup>117</sup> Ben-Naftali & Michaeli (n 8 above) 235.

<sup>118</sup> Ben-Naftali & Michaeli (n 8 above) 247; Amnesty International ‘Israel/Gaza Operation ‘Cast Lead’: 22 days of death and destruction’ *Amnesty International Publications* 2009, 116. The main groups are: the ‘Izz al-Din al-Qassam Brigades (Qassam Brigades), Hamas’ armed wing; the Sarayat al-Quds Brigades (al-Quds Brigades), Islamic Jihad’s armed wing; the Abu ‘Ali Mustapha Brigades (AAMB), the armed wing of the

practice, TK has become a central component of Israel's security policy, and Israel argues that such a method of the use of force is a consequence of the Palestinian escalation of violence.<sup>119</sup> According to Israel, the policy endures because of failure by the PA to prevent, investigate, arrest and prosecute the perpetrators of crimes.<sup>120</sup> Israeli TK policy, which appears to be one of the oldest and most sophisticated in the world, started about the time of Israel's struggle for independence,<sup>121</sup> leading up to the hunting down of the members of the Palestinian Black September terrorist organisation who killed 11 Israeli athletes during the Munich Olympics.<sup>122</sup> Even though all through 1948 to the period of the first intifada between 1987 and 1993 Israel was involved in isolated cases of targeted killings, it always denied involvement in such a policy.<sup>123</sup> According to Steven David, even if Israel denies a particular targeted killing, it is known by its professionalism, efforts to minimize innocent casualties and the sophistication of weapons used, such as helicopter gunships and F-16 fighters.<sup>124</sup> But it did, however, admit TK as its state policy in 2000<sup>125</sup> and 2001 respectively<sup>126</sup> when it openly pursued the policy during the second Intifada.<sup>127</sup> This policy was challenged as being inconsistent with the principles of international law after Israel had acknowledged the use of TK.<sup>128</sup> In *The Public Committee against Torture in Israel v The Government of Israel* (hereinafter *PCATI case*), the petitioners challenged the Israeli policy of TK for being inconsistent with the principles of international law.<sup>129</sup> The

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Popular Front for the Liberation of Palestine (PFLP), the Nasser Salah al-Din Brigades, the armed wing of the Popular Resistance Committees (PRC), the al-Aqsa Martyrs' Brigades (al-Aqsa Brigades), Fatah's armed wing; and the Democratic Front for the Liberation of Palestine (DFLP).

<sup>119</sup> Ben-Naftali & Michaeli (n 8 above) 241.

<sup>120</sup> P Alston 'The CIA and targeted killing beyond borders' (2011) 2 *Harvard National Security Journal* 407; Amnesty International (n 113 above) 30; JN Kendall 'Israeli counter-terrorism 'targeted killings' under international law (2002) 80 *North Carolina Law Review* 1086; Alston Report (n 39 above) para 13; G Alon & A Harel 'IDF lawyers set "conditions" for selective assassination policy' *Haaretz*, 4 February 2002.

<sup>121</sup> SR David 'Fatal choices: Israeli policy of targeted killing' (2002) No. 5 *Mideast Security and Policy Studies* 2-3.

<sup>122</sup> Melzer (n 35 above) 27; David (n 121 above) 4.

<sup>123</sup> Ben-Naftali & Michaeli (n 8 above), Israeli Defence Forces (IDF) spokesman denied Israeli involvement in the killings when he said, 'There has never been, nor will there ever be, an IDF policy of intentional killing of wanted fugitives. The sanctity of life is a basic IDF value - there has been no change in this principle nor will any change in this matter be ever tolerated;' see Alston report (n 39 above) paras 16-17; S Winer 'Ex-soldier jailed for secret leak, seeks damages' *The Times of Israel*, 4 February 2013.

<sup>124</sup> David (n 121 above) 3.

<sup>125</sup> Melzer (n 35 above) 28-29; Ben-Naftali & Michaeli (n 8 above) 239; Amnesty International (n 113 above) 9; Reisner (n 39 above).

<sup>126</sup> After the assassination of Dr. Thabet Thabet on 31 December 2000, Israeli Deputy Prime Minister Ephraim Sneh also acknowledged the targeted killing policy thus, 'We will continue our policy of liquidating those who plan to carry out attacks, and no one can give us a lesson in morality because we have unfortunately one hundred years of fighting terrorism;' see Amnesty International (n 113 above) 8; SM Shapiro 'Announced Assassinations' *The New Times Magazine*, 9 December 2001, 54; David (n 121 above) 5.

<sup>127</sup> David (n 121 above) 1.

<sup>128</sup> *PCATI case* (n 2 above).

<sup>129</sup> *PCATI case* (n 2 above) paras 5, 6 & 8.

seemingly ambiguous conclusion of the Court was that it could not determine in advance that TK was always illegal, just as it could not determine in advance that it is always legal or permissible.<sup>130</sup> But it, however, said further that TK is lawful if certain conditions are met. In assessing the legal basis for TK, it is important to consider both domestic and international law frameworks.<sup>131</sup>

### 5.5.1.1. International law justification of targeted killings

Under the inter-state use of force, TK is justified where it is conducted in furtherance of self-defence, on the authorisation of the SC or based on the consent of the territorial state.<sup>132</sup> Such force, however, may be used only if the targeting state had suffered an armed attack.<sup>133</sup> If consent is absent, or in addition to it, a targeting state may invoke self-defence to justify the use of force.<sup>134</sup> This study is not aware that there has been any SC authorisation so far, expressly permitting a state to employ targeted killing in the territory of another state. More importantly, neither SC authorisation nor territorial state consent is required if the basis of inter-state use of force is self-defence, the right of self-defence being an inherent one. It has, however, been suggested, a suggestion with which this study agrees, that prior authorisation of the SC is necessary even for an action founded on self-defence, except where the urgency of response in self-defence requires otherwise.<sup>135</sup>

### 5.5.1.2. Domestic law justification of targeted killing

Israel also relies on its domestic case laws and legal opinions as the basis for its TK operations against NSAs. Unlike the US, Israel relies on the determination by its Supreme Court that its TK policy on Palestinian and Lebanese terrorists is lawful.<sup>136</sup> The *PCATI case* was instituted by Israeli and Palestinian human rights groups, seeking court orders to halt the TK policy.<sup>137</sup> The Court held that the policy of TK of Palestinian militants is lawful if certain conditions, which are provided hereunder, are satisfied.<sup>138</sup> These include: (a) information regarding the identity and activity

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<sup>130</sup> *PCATI case* (n 2 above) para 7 of Justice Rivlin's concurring opinion.

<sup>131</sup> GS McNeal 'Targeted killing and accountability' (2014) 102 *The Georgetown Law Journal* 690.

<sup>132</sup> Melzer (n 35 above) 51; Alston report (n 39 above) paras 34-41.

<sup>133</sup> Alston report (n 39 above) para 35.

<sup>134</sup> Alston report (n 39 above) para 39.

<sup>135</sup> O Corten 'A plea against abusive invocation of self-defence as a response to terrorism' July 14, 2016, at <http://www.ejiltalk.org/a-plea-against-the-abusive-invocation-of-self-defence-as-a-response-to-terrorism/more-14440> (accessed 25/11/2016).

<sup>136</sup> Bachman (n 84 above) 266.

<sup>137</sup> *PCATI case* (n 2 above) paras 3-8.

<sup>138</sup> *PCATI case* (n 2 above) para 40.

of such a person providing a legal basis for his or her targeting must be verified; (b) such a target may not be attacked if less lethal measures, such as arrest and trial, are feasible<sup>139</sup>; (c) a retrospective, thorough and independent investigation must be conducted about the precise identity of the target and the circumstances of the attack<sup>140</sup>; and (d) any collateral harm to civilians must meet the IHL requirement of proportionality. It then means that an act of TK that complies with these requirements is lawful. Finally, the Court stated that whether TK is legal or not is dependent on a case by case basis, when it stated:

As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question (of) whether the standards of customary international law regarding international armed conflict allow that preventative strike or not'.<sup>141</sup>

Cassese,<sup>142</sup> Melzer,<sup>143</sup> Alston<sup>144</sup> and Lesh<sup>145</sup> all commended the judgment as a landmark one, capable of breaking new ground as it provided imaginative and deeply thought-out interpretations of legal rules that illuminated hitherto unexplored areas of law. In spite of the commendation of the judgment by eminent scholars, this study has found ambiguities in the conclusion on the main issue for determination, that is, whether 'targeted killing' is lawful or not. The Court did not say unequivocally that targeted killing is lawful, but instead stated that its legality would be dependent on a case by case basis.

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<sup>139</sup> *PCATI case* (n 2 above) para 40; see also *McCann v United Kingdom* 21 EHRR 97 (1995) 148, para 235. In that case, three terrorists of the Irish Republican Army (IRA) were shot dead in the streets of Gibraltar, though the British agents had had the option of arresting them. The European Court of Human Rights held their killing to be illegal for having impinged on their right to life. It held, 'The use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk'.

<sup>140</sup> *PCATI case* (n 2 above) para 40.

<sup>141</sup> *PCATI case* (n 2 above) para 60; also see the concurring opinion of Justice E. Rivlin, para 7.

<sup>142</sup> A Cassese 'On some merits of the Israeli judgment on targeted killing' (2007) *Journal of International Criminal Justice* 339- 340. The Court held that it is institutionally justiciable because: (i) the question brought before the court impinged upon human rights, in particular the right to life; (ii) it was not a question of policy or a military question, but a legal one (for it revolved around whether it was permissible to employ against terrorists a policy of preventive strikes which could also involve killing innocent civilians); (iii) similar questions had already been decided by international courts; (iv) the issue required *ex post* examination of the conduct of the army, and it was best for such examination to be objective and based on judicial standards or guidelines; see *PCATI case* (n 2 above) paras 49-54.

<sup>143</sup> Melzer (n 35 above) 29-30.

<sup>144</sup> Alston (n 120 above) 410.

<sup>145</sup> M Lesh 'Case notes: The Public Committee Against Torture in Israel v The Government of Israel: The High Court of Justice targeted killing decision' (2007) 8 *Melbourne Journal of International Law* 378.

### 5.5.1.3. Legal opinions as justification for targeted killing

Legal opinions given by Attorneys General or legal advisers of the governments of both Israel and the US are relied upon to justify the policy of TK against NSAs. The Israeli army relied on the legal opinion of its Attorney General, Elyakim Rubinstein, in justification of the policy of TK. He stated:

The laws of combat, which are part of international law, permit injuring, during a period of warlike operations, someone who has been positively identified as a person who is working to carry out fatal attacks against Israeli targets, those people are enemies who are fighting against Israel, with all that implies, while committing fatal terror attacks and intending to commit additional attacks—all without any countermeasures by the PA.<sup>146</sup>

Such advice also came from the Military Advocate General who heads the military's legal department. For instance, in February 2002, the then Israeli Military Advocate General of the IDF, Menachem Finkelstein, stated that the extraterritorial TK of terrorists is lawful, and he formulated three criteria to be fulfilled for its lawfulness. The three conditions are: (a) before terrorists are killed the Palestinian Authority must have ignored appeals for their arrest; (b) the Israelis must conclude that they would be unable to arrest the individuals themselves; and (c) the killing must be done to prevent an imminent future terrorist attack, but not for revenge or retribution.<sup>147</sup> Arguably, it remains doubtful whether the Israeli military complies with these criteria of the Advocate General because some of the TK are alleged to be carried out in retaliation for previous terrorist attacks. Israel retaliates for every terrorist attack, at times long after the attacks had ceased, thereby making its response fall outside the tenets of self-defence (even if it were to be applicable) that requires it to halt an ongoing attack.<sup>148</sup>

### 5.5.1.4. Policy of pre-emptive strikes

Similarly to what the US does, the Israeli use of extraterritorial measures in self-defence is most times characterised by pre-emptive strikes against terrorist NSAs. Murphy has defined pre-emptive self-defence as entailing the use of armed coercion by a state to prevent another state or NSAs from pursuing a particular course of action which is not yet directly threatening, but which, if permitted to continue, could result at some future point in an act of armed coercion against the first state.<sup>149</sup> There is a disregard of the requirement of imminence or actual armed

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<sup>146</sup> G Luft 'The Logic of Israel's targeted killing' (2003) 10 *The Middle East Quarterly*, at [http://www.meforum.org/515/the-logic-of-israels-targeted-killing#\\_ftnref6](http://www.meforum.org/515/the-logic-of-israels-targeted-killing#_ftnref6) (accessed 07/09/2015).

<sup>147</sup> David (n 41 above) 115; Alon & Harel (n 120 above).

<sup>148</sup> G Blum & PB Heymann *Laws, outlaws, and terrorists: Lessons from the war on terror* (2010) 88.

<sup>149</sup> S Murphy 'The doctrine of pre-emptive self-defence' (2005) 50 *Villonova Law Review* 703.

attack to take place before defensive force is resorted to, contrary to the literal reading of article 51 of the Charter.<sup>150</sup> The word ‘imminence’ distinguishes pre-emptive from anticipatory self-defence. Some commentators conflate these concepts and sometimes use them interchangeably. Pre-emptive actions are responses to non imminent threats, while anticipatory actions are responses to threats that are imminent. Israel is the first country to employ pre-emptive TK in the world, and it justified the practice by contending that: (a) Palestinian hostilities constitute a war of terror against Israel; (b) the laws of war permit the killing of enemies; (c) terrorists are ticking time bombs who cannot be arrested; and (d) assassinating terrorists is a legitimate form of national defence.<sup>151</sup> As far back as 2001, Israel provided justification for its pre-emptive policy when Benjamin Netanyahu appeared before the US House of Representatives. While testifying before the House of Representatives’ Government Reform Committee after 9/11, he stated that ‘Israel’s policy of pre-emptively striking at those who seek to murder its people is, I believe, better understood today and requires no further elaboration’.<sup>152</sup> While concluding that victory over terrorism is not, at its most fundamental level, a matter of law enforcement or intelligence, but rather direct military action, he advocated the inclusion of terrorism in the Statute of the ICC as a crime against humanity.<sup>153</sup>

In consonance with Netanyahu’s view indicated above, and in furtherance of its alleged acts of self-defence, Israel pre-emptively attacked the Ein Saheb base in Syria which was alleged to be training recruits for Islamic Jihad, Hamas and other terrorist groups on how to assemble bombs, conduct kidnappings, prepare suicide belts, gather intelligence and establish terrorist cells.<sup>154</sup> Israel has also conducted pre-emptive strikes in the OPT. On 3 July 2001, the then Israeli kitchen cabinet, which included Prime Minister Ariel Sharon, Defence Minister Ben-Eliezer and Foreign Minister Peres, gave the Israeli army a broader licence to liquidate terrorists, even if they were not on the verge of committing a major attack (which is purely pre-

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<sup>150</sup> C Antonopoulos ‘Force by armed groups as armed attack and the broadening of self-defence’ (2008) 55 *Netherlands International Law Review* 172.

<sup>151</sup> A Guiora ‘Terrorism on trial: Targeted killing as active self-defence’ (2004) 36 *Case Western Reserve Journal of International Law* 319; Reisner (n 39 above).

<sup>152</sup> ‘Statement by former PM Benjamin Netanyahu at the Hearing of the US House Government Reform Committee - Preparing for the war on terrorism’ *Israel Ministry of Foreign Affairs*, 20 September 2001, at <http://mfa.gov.il/MFA/PressRoom/2001/Pages/Statement%20by%20former%20PM%20Netanyahu%20at%20the%20H.aspx> (accessed 30/07/2015); JN Kendall (n 120 above) 1070.

<sup>153</sup> Statement by former PM Benjamin Netanyahu before the House Committee as above.

<sup>154</sup> Statement of Mr. Dan Gillerman, Permanent Representative of Israel to the United Nations at the 4836<sup>th</sup> Meeting of the Security Council on 3 October 2003, UN Doc. S/PV. 4836 (5 October 2003).



emptive strikes).<sup>155</sup> In an October 2003 report to the GA, the UN Secretary General stated that, ‘A large number of Palestinian civilian casualties had resulted from IDF operations, including incursions, pre-emptive strikes and targeted assassinations of suspected militants in Palestinian areas’.<sup>156</sup> Previously, Israel had, in October 1972, December 1975 and in 1981, responded to no specific terrorist attacks, but pre-emptively raided Palestinian camps and infrastructures in Lebanon.<sup>157</sup> Its pre-emptive strikes and its policy of punishment and deterrence increased about 2007 when Hamas took over control of Gaza from the PLO. These pre-emptive military strikes are targeted at political leaders, terror leaders, terror bases and rocket launching sites in Gaza.<sup>158</sup>

Apart from the use of pre-emptive self-defence against NSAs, there was also an instance in which Israel employed pre-emptive defensive measures against Iraq when it bombed the Iraqi nuclear reactor at Osirak in 1981.<sup>159</sup> Though Israel tried to justify the attack on the Osirak plant as an act of anticipatory self-defence, the SC was almost unanimous in condemning the attack as a premeditated use of force.<sup>160</sup> In spite of the rejection of the principle of pre-emptive self-defence against perceived or remote threats by the UN, states<sup>161</sup> and some legal commentators, Israel and the US remain unrepentant advocates of pre-emptive self-defence.

Actions in pre-emptive self-defence, however, have little or limited support from states, even under contemporary international law. But it has been argued that Israel has few options other than military strategies that emphasise pre-emption and deterrence. This is because Israel has

<sup>155</sup> A Benn & A Harel ‘Kitchen Cabinet okays expansion of liquidation list’ *Ha’aretz*, 17 July 2001, at <http://www.haaretz.com/beta/kitchen-cabinet-okays-expansion-of-liquidation-list-1.64082> (accessed 02/08/015).

<sup>156</sup> Report of the Secretary General, Peaceful Settlement of the Question of Palestine, A/58/416-S/2003/947 of 10 October 2003, para 15; *Yearbook of the United Nations* 2003, Vol. 57 (2005) 496-497.

<sup>157</sup> SA Alexandrov *Self-defence against the use of force in international law* (1996) 176-177; J Ciment *World terrorism: An encyclopedia of political violence from ancient times to the post 9/11 era* (2015) 293-298.

<sup>158</sup> GM Steinberg ‘The evolution of Israeli military strategy: Asymmetry, vulnerability, pre-emption and deterrence’ (2011) *Jewish Virtual Library*, at <http://www.jewishvirtuallibrary.org/jsource/isdf/text/steinberg.html> (accessed 29/07/2015).

<sup>159</sup> Antonopoulos (n 150 above) 175.

<sup>160</sup> S/RES/487 of 19 June 1981. In paras 1 & 2 thereof, the SC condemned Israel for its military attack in clear violation of the Charter of the UN and the norms of international conduct, and called upon Israel to refrain in the future from any such acts or threats thereof. Also, in paras 5 & 6 of the preamble, the resolution remarked that, while Iraq is a party to the Treaty on the Non-Proliferation of Nuclear Weapons and has in that regard complied satisfactorily with the IAEA safeguards, as can be testified to, by the IAEA, Israel, on the other hand, has not adhered to the Non-Proliferation Treaty.

<sup>161</sup> K Annan ‘In Larger Freedom: Towards development, security and human rights for all’ UN Doc. A/59/2005/Add. 3 of 26 May 2005, paras 124-125 where he stated that Art 51 covers imminent attacks, but, where threats are not imminent but latent, the Charter gives full authority to the SC to use military force, including preventively, to preserve international peace and security; ‘A more secure world: Our shared responsibility’ Report of the Secretary General’s High Level Panel on threats, challenges and change, UN Doc A/59/565, 2004, para 188; see also CJ Tams ‘The use of force against terrorists’ (2009) 20 *European Journal of International law* 389.

a small territory with narrow borders which is lacking in the depth that would allow it to absorb a major ground offensive with the possibility of retreating, regrouping and putting-up a counter attack.<sup>162</sup> In spite of the challenges Israel face, necessitated by its geographical battle space or size, the threats posed by terrorist NSAs have not occasioned the widening of self-defence to accommodate pre-emptive self-defence.<sup>163</sup> States are apprehensive that, if condoned, pre-emption may be used as pretext for unprovoked aggression.<sup>164</sup> This is because states would allege obscure and remote future threats, which may perhaps never materialise, to attack adversaries.<sup>165</sup> As with states, international law does not permit pre-emptive self-defence against terrorist NSAs.<sup>166</sup> Arguably, therefore, the proclaimed stance of pre-emption by Israel remains illegal under international law. To that extent, if the alleged transformation of the law of self-defence is to be considered against the background of pre-emptive self-defence, the only reasonable conclusion would be that there has been no transformation in the law of self-defence. This is so because pre-emptive self-defence has not been accepted as forming part of the *corpus* of international law. According to Antonopoulos, even the devastating 9/11 attacks of 2001 have not given rise to the emergence of a customary right of pre-emptive self-defence.<sup>167</sup>

#### 5.5.1.5. Drones as weapons of choice for targeting operations

In carrying out TK, Israel employs a mix of drones, sniper fire and helicopter gunships among other methods, but the use of drones appears to be preferred because of the convenience and the near precision with which targets are killed. Drones, otherwise called remotely piloted aircrafts (RPA), are weapons of choice for both Israel and the US in the extraterritorial pursuit of terrorist NSAs. The legality or otherwise of their use has even been examined by the UN Special Rapporteurs.<sup>168</sup> According to Heyns, drones are not illegal weapons *per se*, but what

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<sup>162</sup> Steinberg (n 158 above) 11.

<sup>163</sup> N Lubell *Extraterritorial use of force against non-state actors* (2010) 61.

<sup>164</sup> R Higgins 'The attitude of western states towards legal aspects of the use of force' in A Cassese (ed.) *The current regulation of the use of force* (1986) 442; Lubell (n 163 above) 62.

<sup>165</sup> Report of the High-level Panel (n 161 above) paras 188-192; Lubell (n 163 above) 62.

<sup>166</sup> Lubell (n 163 above) 63; see also UK Attorney General Goldsmith 'Hansard, House of Lords debate' 21 April 2004, Vol. 660, col. 370, at <http://hansard.millbanksystems.com/lords/2004/apr/21/international-self-defence> (accessed 1/07/2015).

<sup>167</sup> Antonopoulos (n 150 above) 179.

<sup>168</sup> Special Rapporteur on extrajudicial, summary or arbitrary executions, Representative of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/68/382 of 13 September 2013 (by Christof Heyns); Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Representative of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/68/389 of 18 September 2013 (by Ben Emmerson).

appears worrisome is their proliferation which is likely to compromise the normative standards.<sup>169</sup> It is Heyns's view that their use must comply with the requirements of the particular legal frameworks, in this case the rules of inter-state use of force.<sup>170</sup> Also in answering Emmerson's question of whether a state can conduct non-consensual drone operations against NSAs in the territory of a state even when the NSA has no operational links to the host state, Schmitt responded that the *jus ad bellum* rules allow a victim state of terrorist attacks to do so, that is, in the inter-state use of force paradigm.<sup>171</sup> This study associates itself with the views of the eminent scholars above, but, nevertheless, the issue of the massive loss of innocent lives or collateral damage arising from its use remains a problem for policy makers to tackle.

### 5.5.2. Kill-capture missions

Israeli intelligence agents have captured and eliminated scores of major terrorists in their hideouts and strongholds in foreign territories, such as Beirut, Damascus, Baghdad, Tunis, Paris, Rome, Athens and Cyprus.<sup>172</sup> To prevent suicide bombings, Israel has pursued intelligence-driven kill or capture of terror suspects by ground forces.<sup>173</sup> These operations became intensified and more frequent following the suicide bombing that killed 30 and wounded over 140 Israelis at a Passover Seder in Netanya on 27 March 2002.<sup>174</sup> In carrying out these missions, contrary to the US practice, but quite similarly to what Israel accuses Palestinian terrorists of doing, Israeli undercover agents perfidiously disguise themselves as Arabs or women to effect the secret killings.<sup>175</sup> In its targeting policy, it is expected that Israel would target military leaders who are responsible for the planning, recruiting, training, arming and dispatching of terrorists, but, contrary to its own court's rulings and public

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<sup>169</sup> Heyns report (n 168 above) paras 13 & 17.

<sup>170</sup> Heyns report (n 168 above) paras 24, 80-81.

<sup>171</sup> MN Schmitt 'Drone law: A reply to UN Special Rapporteur Emmerson' (2014) 55 *Virginia Journal of International Law Digest* 15-16.

<sup>172</sup> M Bar-Zoher & N Mishal 'The great operations of Israel's secret service' (2012), at <http://archive.org/stream/pdfy-loduN00ktPu10/Mossad%20The%20Greatest%20Missions%20Of%20The%20Israel%20Secret%20Service> (accessed 10/11/2015).

<sup>173</sup> EH Kaplan et al 'What happened to suicide bombings in Israel: Insights from a terror stock model' (2005) 28 *Studies in Conflict & Terrorism* 227.

<sup>174</sup> Kaplan (n 173 above) 227.

<sup>175</sup> Hajjar (n 37 above) 11; Luft (n 145 above), Barak Ehud who led Israeli commandos to assassinate Yasser Arafat's deputy Yusuf Najjar and Fatah spokesman Kamal Nasir in Beirut in April 1973 wore women clothing and false breasts.

pronouncements, Israel has been targeting senior political leaders.<sup>176</sup> Granted that targeting senior leaders with specialized knowledge and skills of terrorist organisations has the effect of weakening the capabilities of the organisation, it ignites corresponding motivation for retaliation.<sup>177</sup> Zussman and Zussman argue that the assassination of senior Palestinian political leaders even has an impact on the stock market as investors in the capital market react to such assassinations.<sup>178</sup> Arguably, targeting political leaders who play no active part in transnational terrorism contradicts the essence of the use of force against terrorists, which international law permits because the presumption is that attacks be directed at persons whose conduct bears a direct nexus with terrorist attacks.

### 5.5.3. Full-scale military operations

In the previous chapter, a cursory reference was made to Israel's use of full military operations in the fight against terrorism when it calls out all the various formations of its armed forces such as the army, navy and air force. Such heavy and comprehensive military incursions have been made several times on the OPT, and also on a few occasions against Hezbollah in Lebanon. Among a series of military operations against terrorist enclaves in the OPT, Israel embarked on Operation Defensive Shield in 2002, Operation Summer Rain and Operation Autumn Cloud in 2005 (following the capture of an Israeli soldier, Corporal Gilad Shalit, on 25 June 2005),<sup>179</sup> Operation Cast Lead 2008-2009 (launched on 27 December 2008 to end rocket attacks into Israel by Palestinian armed groups),<sup>180</sup> Operation Pillar of Defence in 2012<sup>181</sup>, and Operation Protective Edge in 2014. It is the claim of Israel that these operations

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<sup>176</sup> A Zussman & N Zussman 'Assassinations: Evaluating the effectiveness of an Israeli counter-terrorism policy using the Stock Market Data (2006) 200 *Journal of Economic Perspectives* 193, 197, 198 & 204; Luft (n 146 above); Alston (n 120 above) 12; A Kober 'Targeted killing during the Second Intifada: The quest for effectiveness (2007) 27 *Journal of Conflict Studies* 88; N Gazit & RJ Brym 'State-directed assassinations in Israel: A political hypothesis' (2011) 26 *International Sociology* 862, 863.

<sup>177</sup> Zussman & Zussman (n 176 above) 196.

<sup>178</sup> Zussman & Zussman (n 176 above) 200.

<sup>179</sup> Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard, Add: Implementation of General Assembly Resolution 60/251 of 15 March 2006, entitled 'Human Rights', A/HRC/4/17 of 29 January 2007, para 8.

<sup>180</sup> J Zanotti et al 'Israel and Hamas conflict in Gaza' (2008-2009)' 4, *CRS Report for Congress*, February 19 2009; Amnesty International (n 118 above).

<sup>181</sup> B'Tselem 'Human rights violations during Operation Pillar of Defence 14-21 November 2012' pp 3-5, at [http://www.btselem.org/download/2013/05\\_pillar\\_of\\_defence\\_operation\\_eng.pdf](http://www.btselem.org/download/2013/05_pillar_of_defence_operation_eng.pdf) (16/08/2015). The eight days military confrontation was heralded by the killing of Ahmed Jabari, the Commander of Hamas armed wing, though tensions had built-up between the parties before then. What was significant about this conflict was that the capacity of Hamas to threaten even the central part of Tel Aviv, deep into Israel, became manifest, as one of its rockets exploded on a city bus in Tel Aviv on 21 November 2012. Upon the cease-fire coming to effect on 21 November 2012, Israel had recorded six deaths including four civilians as against 167 Palestinians that were killed including 32 minors; see also B Hartman '2012 story of the year: Operation Pillar of Defence' *The Jerusalem Post*, 1 February 2013, at

became imperative to restore Israeli deterrence, weaken the Hamas military infrastructure and diminish security threats to Israel by ending rocket attacks into Israel by Palestinian militant groups.<sup>182</sup> What was a characteristic of all these operations was the massive destruction of homes, schools, mosques, hospitals, public buildings, bridges, water pipelines, transformers, power plants, sewage networks and the killing of hundreds of Palestinians in the OPT including innocent women and children. The destruction resulting from these attacks was described by UN rapporteurs as wanton<sup>183</sup>, and it was of such a proportion that even UN facilities and refugee camps were not spared.<sup>184</sup> To shield or insulate these massive violations of human rights from scrutiny by the international community, Israel denied the recognition of a UN rapporteur's mandate<sup>185</sup> and also denied access into Israel and the OPT of a Human Rights Council (HRC) mandated mission led by Archbishop Desmond Tutu in the aftermath of Operation Summer Rain and Operation Autumn Cloud.<sup>186</sup>

Similar comprehensive military operations have also been taken against Palestinian groups and Hezbollah by Israel in the territory of Lebanon. Israel launched the *Litani Operation* in 1978 against PLO positions in Lebanon, *Operation Peace for Galilee* also against Palestinian positions in Lebanon in 1982 (which witnessed the retaliatory bombing of the Beirut airport and the expulsion of PLO from Lebanon), the *Accountability Operation* in 1993 and the *Grapes of Wrath Operation* in 1996, all against Hezbollah in Lebanon.<sup>187</sup> One of the most serious military operations was the 2006 conflict between Israel and Hezbollah which saw Israeli retaliation not limited to Hezbollah positions alone, but against the entire Lebanese infrastructure. The toleration of these operations against NSAs by the international community confirm the momentum of international law towards accepting the use of force in self-defence by states directly against NSAs, contrary to the jurisprudence of the ICJ.

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[http://www.jpost.com/features/In\\_Thespotlight/2012-story-of-the-year-operation-pillar-of-defence](http://www.jpost.com/features/In_Thespotlight/2012-story-of-the-year-operation-pillar-of-defence) (accessed 16/08/2015).

<sup>182</sup> J Zanotti et al (n 180 above) 7; Amnesty International (n 118 above)

<sup>183</sup> Dugard report (n 179 above) paras 8-13; Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Makarim Wibisono, Add: Human rights situation in Palestine and other Arab territories, A/HRC/28/78 of January 2015, paras 12-14.

<sup>184</sup> Amnesty International (n 118 above) 27. Amnesty International reported that on 10 January 2008 Israel used white phosphorous against residents in the Jabalia refugee camp. Israel dispatched this incendiary weapon with 155mm artillery shells which impacted lives, homes, health facilities and UN buildings.

<sup>185</sup> Dugard report (n 179 above) para 3.

<sup>186</sup> Dugard report (n 179 above) para 11.

<sup>187</sup> PK Kumaraswamy *The A-Z of the Arab –Israeli conflict* (2009) 154-155.

## 5.6. Policy of first demanding arrest of terrorists

In consonance with the legal requirement of necessity which permits killing as a last resort where non forcible measures are inadequate or unavailable, Israel claims to explore the option of arresting perceived terrorists in certain instances before employing lethal force to kill them if the option fails.<sup>188</sup> It is, however, doubtful as to what extent Israel stands by these assurances in practice, as intergovernmental institutions have expressed concern about Israel's TK policy in relation to complying with international law.<sup>189</sup> Israel sometimes submitted lists of terrorists to be apprehended for prosecution to Arafat, but, on one particular occasion, the Palestinian Authority similarly gave a list of 50 settlers and others to Israel for arrest for their roles in attacks against Palestinians. Also, following the bombings in Tel Aviv on 4 March 1996 which were suspected to have emanated from Ramallah, Shimon Peres demanded that Arafat outlaw the terror groups and arrest leaders of the military wings of Hamas and Islamic Jihad. Even when Palestine arrests terrorists because of Israeli pressure, they are alleged to have been released within hours or days and, mostly, without interrogation or trial.<sup>190</sup> When Israel frowns at the Palestinian policy of releasing terrorists shortly after arrest, Palestinian officials respond by saying that they cannot safely imprison militants when Israeli forces are bombing the security compounds where the prisoners are held.<sup>191</sup>

Israel believes that apprehending and interrogating suspects may enable them learn about future plots and additional operatives who may also be arrested.<sup>192</sup> Sometimes Israeli arrests are frequent and indiscriminate, including stone-throwing children, and, at other times, they are arbitrary, contrary to international norms.<sup>193</sup> When apprehended, Palestinians are sometimes held incommunicado without access to lawyers, while torture methods, ranging from sleep deprivation, to intensive interrogation in painful positions, tightened handcuffs, squatting and exposure to extreme cold, are used on detainees.<sup>194</sup>

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<sup>188</sup> Byman (n 5 above) 95.

<sup>189</sup> UNHRC, Concluding Observations of the Human Rights Committee: Israel, 21 August 2003 (CCPR/CO/78/ISR), para 15; see also Melzer (n 4 above) 31.

<sup>190</sup> Amnesty International (n 118 above) 31.

<sup>191</sup> J Bennett 'Israeli woman stabbed to death in a wave of violence' *The New York Times*, 9 February 2002.

<sup>192</sup> Byman (n 5 above) 98-99.

<sup>193</sup> Arts 9(1) & 10(1) of the ICCPR.

<sup>194</sup> Amnesty International (n 118 above) 35.



## 5.7. How effective are the Israeli extraterritorial operations in pursuit of non-state actors?

There is no settled scholarly opinion as to whether the aim of using extraterritorial force, particularly TK, to curb terrorism has been achieved. In fact, Byman indicated how difficult it is for anyone to say that TK has solved more problems than it has caused.<sup>195</sup> It is no less difficult for this study to say with finality that TK is an effective tool, or not, for fighting terrorism. Arguably, however, TK, which is the commonly employed method in the fight against terrorism, has not brought significant positive results, except to the extent that it has decapitated some terrorist networks and insulated Israeli soldiers from the horrors of the battlefield. Targeted killing may, therefore, be an effective means of achieving short-term tactical goals but not in the long run, and this fact is supported by the available literature.<sup>196</sup> David contended that terrorist organisations are quite decentralised, and those willing to be enlisted as suicide bombers are limitless, which makes it difficult for TK to be effective in the long-run.<sup>197</sup> Generally, the ineffectiveness of extraterritorial forcible measures could be discerned from the fact that terrorism has not been stopped which is the essence of the forcible counterterrorism policies.

The advantages derivable from TK, therefore, are as follows: Firstly, targeted operations successfully exterminated experienced planners of terrorist attacks such as bomb makers, recruiters and trainers. No matter for how temporary a period, such killings are capable of removing an external threat.<sup>198</sup> Where this happens, the terrorist organisation may be left to grope without skilled leadership if no capable hands are on standby as replacements, which ultimately brings relief to the Israeli public.<sup>199</sup> Secondly, when TK is intensified, the ratings or public perception about the security priorities and consciousness of the government are higher. Thirdly, Targeted killings compel terrorists and their leaders to go into hiding, thereby making

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<sup>195</sup> Byman (n 5 above) 98.

<sup>196</sup> Bachman (n 84 above) 259, 262; David (n 41 above) 118; see also MM Hafez & JM Hatfield 'Do targeted assassinations work?: A multivariate analysis of Israeli counter-terrorism effectiveness during Al Aqsa uprising', at <http://www-personal.umich.edu/~satran/PoliSci%2006/Wk2012-1%20Hamas&20Hafez.pdf> (accessed 16/02/2016). According to Hafez & Hatfield, TK has no significant impact on rates of Palestinian attacks. 'Targeted assassinations do not decrease the rates of Palestinian violence, nor do they increase them, whether in the short or long-run. Targeted assassination may be useful as a political tool to signal a state's determination to punish terrorists and to placate any angry public, but there is little evidence that they actually impact the course of an insurgency'.

<sup>197</sup> David (n 41 above) 118.

<sup>198</sup> S Clark 'Targeted killings: Justified acts of war or too much power for one government' (2012) 3 *Global Security Studies* 15, at 29.

<sup>199</sup> Byman (n 5 above) 103-104; Luft (n 146 above) 3-13; W Nordan Jr. 'The best defence is a good offence: The necessity of targeted killing' *Small War Journal* 6, August 24, 2010.

it difficult for them to plan further terrorist attacks because planning their personal safety now occupies the front burner in their priority list, which dampens the morale of the followership. Rantisi, the Hamas leader, was killed when he came out of hiding to visit his family.<sup>200</sup> Extraterritorial forcible measures generally appear to be ineffective having regards to the potential of the Palestinian groups to sustain the fight against Israel coupled with the unceasing territorial expansionist Jihadi movement of ISIL sweeping through parts of Iraq and Syria in the face of unrelenting TK.

The disadvantages inherent in the TK policy have largely contributed to the ineffectiveness of the extraterritorial use of force against NSAs. These include, firstly, targeted killings breed retaliation by way of further deadly terrorist attacks. For instance, most of the successful targeted killing operations against Hamas or Hezbollah by Israel result in the suicide bombing of more Israeli facilities and towns.<sup>201</sup> Secondly, targeted killings create diplomatic crises between states that are otherwise not part of the conflict with parties to the conflict. For instance, Israeli relations with Morocco and Norway became problematic when Israeli intelligence agents killed one Ahmed Bouchiki, an innocent Moroccan waiter, in Norway while mistaking him for a member of the Black September group.<sup>202</sup> Similarly, tensions characterised the relations between Israel and Jordan and also between Israel and Canada in 1997. This followed the poisoning of Hamas leader, Khaled Meshal in Amman, Jordan, by Mossad. The Israeli agents, who were arrested and kept in custody on the orders of Jordanian King Hussein, regained their freedom only upon the production of an antidote by Benjamin Netanyahu to revive Meshal, among other conditions which culminated in the release of some prisoners from Israeli jails. The Israeli agents had used fake Canadian passports.<sup>203</sup> Thirdly, targeted killing creates martyrs out of terrorists and gives encouragement to would-be suicide bombers.<sup>204</sup> Fourthly, there is also the loss of eminent negotiating partners as political leaders are not spared by Israeli targeting. The killing of Hamas leaders denies Israel of opponents who are mature enough that would have conceded certain grounds or Palestinian conditions in exchange for peace.<sup>205</sup> No doubt, there is a leadership vacuum created by the targeting of Palestinian

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<sup>200</sup> Byman (n 5 above) 104.

<sup>201</sup> Byman (n 5 above) 96 & 99. Byman stated that Hamas vowed to fight in revenge for the targeted killing of its leader Salah Shehadeh until 'Jews see their own body parts in every restaurant, every park, every bus and every street'. Similarly, it has been alleged that the bombing in 1992 and 1994 of Jewish and Israeli targets in Argentina were retaliatory strikes designed by Hezbollah for the targeted killing of its leader Musawi and the kidnapping of Mustafa Dirani by Israel.

<sup>202</sup> Byman (n 5 above) 97.

<sup>203</sup> David (n 121 above) 5; Byman (n 5 above) 98.

<sup>204</sup> Byman (n 5 above) 100; David (n 121 above) 8; Clark (n 198 above) 16.

<sup>205</sup> David (n 121 above) 9-10; Byman (n 5 above) 100; David (n 42 above) 118.

politicians. Finally, collateral damages or innocent deaths arising from TK pose a huge problem for territorial states in which targeting operations are being conducted. For instance, it is difficult to convince the opponents of TK that it is proportional to kill 14 innocent people, including children, and injuring over 100 others on account of wanting to kill Salah Shehadeh in Gaza on 22 July 2002.<sup>206</sup> The question which begs an answer is what number of innocent civilian deaths is proportional to the targeting of one high value target?

## 5.8. Conclusion

Israeli extraterritorial forcible measures are governed by the rules of inter-state use of force, except in the context of the OPT where the rules of IHL apply. Owing to its international status as an occupying power, Israel bears enormous responsibilities not only to keep its military incursions into the territories of other states within specified confines of international law, but cannot successfully justify its claim of self-defence against terrorists in the OPT. Its counterterrorism methods range from TK, kill-capture missions to full-scale military operations. In doing this, Israel has conducted punitive military operations against terrorists in different countries pre-emptively and disproportionately, thereby leaving in their wake the massive destruction of property and loss of human lives.

The study has found that, in justification of these military operations against terrorists, Israel relies heavily on aspects of international and domestic legal frameworks. The extraterritorial forcible methods, including TK, are aimed at halting terrorist attacks by NSAs and, therefore, whether these methods are effective was considered against the background of their ability to eliminate all terrorist attacks or to reduce them to the barest minimum. The study found that these methods to be effective in the fight against terrorism, though it is conceded that they have exterminated some elements of the terrorists hierarchy and, therefore, removed certain hitherto palpable threats to Israel. We cannot celebrate the deterrent effect of TK yet because for every single terrorist that is killed through TK retaliatory attacks wait in the wings. There has been an increase in suicide bomber volunteers in the face of these TK operations and a corresponding increase in incidents of terrorist attacks. The chapter found that Israel disregarded international law to a large extent by relying on contentious interpretations of international norms. This development leaves commentators wondering whether the law relative to self-defence, as it is contained in the Charter of the UN and in the jurisprudence of the ICJ, has been transformed.

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<sup>206</sup> S Weil 'The targeted killing of Salah Shehadeh: From Gaza to Madrid' (2009) 7 *Journal of International Criminal Justice* 617-631; Byman (n 5 above) 95-96.

The next chapter turns to examine extraterritorial counter-terrorism methods employed by the US.

## Chapter 6

### Extraterritorial use of force against non-state actors: United States of America's perspective

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#### 6.1. Introduction

The last chapter examined the extraterritorial counter-terrorism approaches of Israel and found that Israel explores a wide range of forcible options in tackling NSAs including targeted killings, kill-capture missions and full-scale military operations. Owing to its persistent use of force against NSAs without imputing their conduct to other states and the international community's toleration of some of these operations, the study found that the law of self-defence has indeed been transformed. By way of comparison, this chapter examines the counter-terrorism methods of the US against NSAs.

Like Israel, the US relies on international law concepts of self-defence, customary law, and the 'unwilling or unable' doctrine<sup>1</sup> as legal bases for the extraterritorial use of force. In contrast, however, practice has shown that the US relies additionally on the 'consent' of territorial states. They also face similar growing discontent and resentment owing to their foreign policies and other security challenges from terrorist enclaves located in certain countries in the Middle East and other parts of the world. Above all, these two countries appear to be the most friendly in the world, and this has been manifested by the use of its veto by the US to protect Israel at all cost. Other than military support, between 1972 and 2004, 'the US ha[d] cast its veto a total of

<sup>1</sup> MN Schmitt 'Extraterritorial lethal targeting: Deconstructing the logic of international law' (2013) 52 *Columbia Journal of Transnational Law* 86-87.

39 times to shield Israel from SC draft resolutions that condemned, deplored, denounced, demanded, affirmed, endorsed, called on and urged Israel to obey the world body'.<sup>2</sup>

Similar to Israel, though less expressly, the US has also commenced a targeted killing programme against Al Qaeda and the Taliban in the border areas of Pakistan and Afghanistan.<sup>3</sup> It has since expanded these extraterritorial forcible measures to terrorist enclaves in Yemen, Somalia, Iraq and Libya. The US's fight against terrorism is, thus, sustained against enemies located thousands of kilometres away from the US homeland itself, contrary to the situation in Israel, where greater percentage of its extraterritorial forcible measures are against neighbouring territories and states.<sup>4</sup> Apart from interpreting existing norms in a manner that gives itself a wider latitude to use force against NSAs, the US has also employed a mix of TK, kill-capture missions and full-scale military operations as the main components of its fight against terrorism.

## 6.2. Extraterritorial use of force against non-state actors by the United States

Unlike Israel, which is an occupying power in the OPT, the US is not in occupation of the territories where it employs force. By virtue of the occupation, Israel may have little or no constraints in terms of violating Palestinian sovereignty (though Palestinian sovereignty may only be in abeyance during the occupation regime but not ceded to Israel), but the US requires the cooperation of the governments from which territories NSAs are operating to fight the growing terrorist threats effectively.<sup>5</sup> The US alleges that its military operations in foreign

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<sup>2</sup> D Neff 'Criticism by the UN Security Council' *Washington Report on Middle East Affairs*, May/June 2005, at <http://www.wrmea.org/2005-may/june/an-updated-list-of-vetoes-cast-by-the-united-states-to-shield-israel-from-criticism>. (accessed 30/03/2016); see also JJ Mearsheimer & S Walt 'The Israel lobby and the U.S. foreign policy' (2006) XIII *Middle East Policy* 30. According to them, between 1982 and 2006 the US vetoed 33 UNSC resolutions that were critical of Israel and blocked the efforts of Arab states to put Israel's nuclear arsenal on the IAEA agenda.

<sup>3</sup> N Melzer *Targeted killing in international law* (2008) 442-444; R Murphy & J Radsan 'Due process and targeted killing of terrorists' (2009) 31 *Cardozo Law Review* 406-407.

<sup>4</sup> D Byman 'Do targeted killings work?' (2006) 85 *Foreign Affairs* 107.

<sup>5</sup> Byman (n 4 above) 107-108; Speech of HH Koh 'The Obama Administration and International Law', 25 March 2010, at <http://lawfare@blog.com/wp-content/uploads> (accessed 20/03/2014). Koh stated: 'Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses'; Remarks of JO Brennan 'The ethics and efficacy of the President's counterterrorism strategy' *Lawfare*, 30 April 2012, at <http://www.lawfareblog.com/2012/04/brennans> (accessed 20/03/2014). According to him, 'Finally, when considering lethal force we are of course mindful that there are important checks on our ability to act unilaterally in foreign territories. We do not use force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose constraints'.



territories are consistent with international law including the requirement of consent.<sup>6</sup> As President Obama himself indicated, in his remarks at the National Defence University on 23 May 2013, the US cannot conduct strikes wherever they choose because their operations are bound by consultations with partners and respect for state sovereignty.<sup>7</sup> This study is, however, aware of the remarks of some commentators that the presence of US forces in Afghanistan amounts to an ‘occupation’.<sup>8</sup> A territory is occupied if invading forces control it.<sup>9</sup> Scholarship on the status of the US in relation to the Afghan war appears not to be settled because other commentators argue that the US was merely in partial occupation.<sup>10</sup> Accordingly, this study will not refer to, or treat, the US as an occupying power.

### 6.2.1. Legal basis for the extraterritorial use of force by the United States

In justification of its extraterritorial forcible operations against NSAs, the US has relied on self-defence under the UN Charter, customary international law, consent of the territorial states and the ‘unwilling or unable’ doctrine. That is not to say that the US has not argued that its war on terror against Al Qaeda, the Taliban and their associates is regulated by rules of IHL, being armed conflicts. This is because the US justifies its extraterritorial use of force outside even the war theatres of Iraq, Afghanistan and Pakistan against NSAs as falling under general international law and IHL.<sup>11</sup> The US opts that its conflict with NSAs be governed by the *jus in bello* so that it may have a wider latitude to use force aggressively,<sup>12</sup> and, arguably, to escape the constraints inherent in inter-state use of force or law enforcement.

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<sup>6</sup> AB Lorca ‘Rules for the “global war on terror”: Implying consent and presuming conditions for intervention’ (2012) 45 *International Law & Politics* 5.

<sup>7</sup> President Obama ‘Remarks at the National Defence University’ 23 May 2013, at <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defence-university> (10/08/2015), when he stated: ‘And even then, the cost to our relationship with Pakistan and the backlash among Pakistani public over encroachment on their territory was so severe that we are just now beginning to rebuild this important partnership’.

<sup>8</sup> C Bassiouni *International Extradition: United States Law and practice* (2014) 338; J Meher *Afghanistan, Dynamics of survival* (2008) 17; JJ Paust ‘Post 9/11 overreaction and fallacies regarding war and defense, Guantanamo, the status of persons, treatment, judicial review of detention, and due process in military commissions’ (2004) 79 *Notre Dame Law Review* 1363-1364.

<sup>9</sup> D Weissbrodt & A Bergquist ‘Extraordinary rendition and the humanitarian law of war and occupation’ (2007) 47 *Virginia Journal of International Law* 303.

<sup>10</sup> M Henn *Under the color of law: The Bush administration subversion of US constitutional and international law in the war on terror* (2012) 68.

<sup>11</sup> J Odle ‘Targeted killings in Yemen and Somalia: Can the United States target low-level terrorists?’ (2013) 27 *Emory International Law Review* 607.

<sup>12</sup> Odle (n 11 above) 639.

### 6.2.1.1. Self-defence

Under international law, the inherent right of the US to take action in self-defence against an armed attack is guaranteed.<sup>13</sup> The US, thus, claims that its counterterrorism measures, including *Operation Enduring Freedom*, are taken against NSAs in self-defence under article 51 of the UN Charter.<sup>14</sup> Self-defence could be seen as a dual right on the grounds that it is a right derivable from article 51 of the Charter and also, under customary law, the pre-existing inherent right of self-defence not having been extinguished by the Charter.<sup>15</sup> The US has been involved in a series of conflicts with terrorist NSAs, in which it has relied on self-defence as justification, including, but not limited to, the conflicts involving Al Qaeda and the Taliban in Afghanistan and Pakistan, AQAP in Yemen and Al Shaabab in Somalia.

### 6.2.1.2. Consent of the territorial states

It is important to make the point at the outset that consent is dispensed with if a particular use of extraterritorial force is anchored on self-defence because self-defence is an inherent right available to the threatened or injured. In its fight against terrorists located in foreign territories, unlike Israel, the US relies on the customary law requirement of the consent of the territorial states. So far, Israel has not been granted consent by any territory to conduct military operations against terrorists in its territory. Consent serves as an exception to the general prohibition of the use of force contained in article 2(4) of the UN Charter.<sup>16</sup> Consent may be granted by a territorial state to individual states or a group of states acting as a regional organisation for the purpose of using force.<sup>17</sup> For instance, Pakistan,<sup>18</sup> Yemen<sup>19</sup> and Iraq are believed to have

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<sup>13</sup> Art 51 of the UN Charter; The United States Department of Justice ‘Attorney General Eric Holder speaks at North-western University School of Law’ *Justice News*, 5 March 2012, at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> (accessed 08/08/2015).

<sup>14</sup> BA Feinstein ‘Operation Enduring Freedom: Legal dimensions of an infinitely just operation’ (2002) 11 *Journal of Transnational Law & Policy* 203, 276; Brennan’s Remarks (n 189 above).

<sup>15</sup> L Van de hole ‘Anticipatory self-defence under international law’ (2003) 19 *American University International Law Review* 69-75.

<sup>16</sup> Art 3(e) of the Definition of Aggression; Art 20 of the Draft Articles of State Responsibility for Internationally Wrongful Acts 2001(DASR); Art 20 of the Draft Articles on the Responsibility of International Organisations 2011 (DARIO); D Wipman ‘Military intervention, regional organisations, and host-state consent’ (1996) 7 *Duke Journal of Comparative & International Law* 209.

<sup>17</sup> Wipman (n 16 above) 224-230, Liberian President Samuel Doe consented to military intervention by ECOWAS when the legitimacy of his government was threatened by factions loyal to Charles Taylor and Prince Yormie Johnson; see also E Lieblich ‘Intervention in civil wars: Intervention and consent’ (Unpublished) PhD thesis, Columbia University 2012, 12.

<sup>18</sup> AS Deeks ‘Consent to the use of force and international law supremacy’ (2013) 54 *Harvard International Law Journal* 1, 30.

<sup>19</sup> S Shane ‘Yemen’s leader praises US drone strikes’ *New York Times*, 29 September 2012.

consented to the use of force by the US in their territories. The alleged consent granted by Pakistan to the US was a little controversial because of Pakistani protests over US drone operations, but it has since been confirmed that such consent was contained in secret documents.<sup>20</sup> The consent of these states was granted to the US to fight against Al Qaeda and the Taliban in Pakistan, AQAP in Yemen and ISIL in Iraq. The US was granted consent by the Iraqi government to conduct airstrikes in its territory against ISIL with a view to stopping ISIL's territorial ambition that saw the jihadi movement capture large parts of Iraq and Syria.<sup>21</sup> Where consent or the other exceptions to the general prohibition of the use of force contained in the UN Charter are absent, any use of force in the territory of another state amounts to a violation of international law. This explains the unwelcome mood of Syria towards the US when the latter was alleged to have cultivated plans to commence airstrikes in Syria against ISIL. The Syrian Minister of National Reconciliation, Ali Haidar, made Syria's position very clear when he stated that, 'any action of any kind without the consent of Syria is an attack on Syria'.<sup>22</sup> Consent may appropriately be granted in advance, but may also have retrospective effect. It could be granted expressly or implicitly. What is important is the fact that the intervener was so invited is established.<sup>23</sup> Heyns *et al* have, however, remarked that consent cannot be implied for as serious a matter as the use of force.<sup>24</sup> A state that has armed itself with the consent of a territorial state may even be allowed the use of remotely piloted aircrafts (RPAs) called drones.<sup>25</sup> The use of such drones must, however, adhere to the rules regulating inter-state use of force which exist to primarily protect the sovereignty and other legal rights of states.<sup>26</sup>

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<sup>20</sup> G Miller & B Woodward 'Secret memos reveal explicit nature of US, Pakistan agreement on drones' *Washington Post*, 24 October 2013; see also M Hakimi 'Defensive force against non-state actors: The state of play' (2015) 91 *International Law Studies* 10.

<sup>21</sup> P Baker & E Schmitt 'Many missteps in assessment of ISIS threat' *New York Times*, 29 September 2014.

<sup>22</sup> I Black & D Roberts 'ISIS airstrikes: Obama's plan condemned by Syria, Russia and Iran' *Guardian* (London), 12 September 2014.

<sup>23</sup> R Ago 'Eighth Report on State Responsibility' (1979) 2 *Yearbook of International Law Commission* 335, 336, cited in D Wipman 'Military intervention, regional organisations and host-state consent' (1976) 7 *Duke Journal of Comparative & International Law* 209, n 1. In footnote 1 thereof, Ago was quoted to have observed that 'consent may be "expressed or tacit, explicit or implicit, provided that it is clearly established" and is not vitiated by defects such as error, fraud, corruption or violence'.

<sup>24</sup> Heyns *et al* 'The right to life and the international law framework regulating the use of armed drones' 40, at [data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-uk-government-policy-on-the-use-of-drones-for-targeted-killing/written/25641.pdf](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-uk-government-policy-on-the-use-of-drones-for-targeted-killing/written/25641.pdf) (accessed 06/02/2016).

<sup>25</sup> Chattam House 'International law and the use of drones: Summary of the International Law Discussion Group meeting held at Chattam House on Thursday, 21 October 2010, at <http://www.chattamhouse.org/sites/files/chattamhouse/public/Research/International%20Law/i1211010drones.pdf> (accessed 06/02/2016).

<sup>26</sup> Heyns *et al* (n 24 above) 37.

### 6.2.1.3. Reliance on the ‘unwilling or unable’ doctrine

The US has also relied on the ‘unwilling or unable’ standard to use force in the territories of other states.<sup>27</sup> The unwilling or unable standard provided the impetus for the US to use force in Syria against ISIL, Al Qaeda elements and the Khorasan Group because, in the assessment of the US, Syria was not willing or able to use force against these rampaging terrorist organisations.<sup>28</sup> It was the standard that was earlier applied by the US when its Navy Seals killed Osama bin Laden in Pakistan in fulfilment of President Obama’s earlier promise to go after Bin Laden and his colleagues if Pakistan was ‘unwilling or unable’ to track down Bin Laden.<sup>29</sup>

## 6.3. Extraterritorial forcible methods employed by the United States against non-state actors

### 6.3.1. Targeted killings

Similarly to the Israeli policy, the US employs TK as one of its most coercive counterterrorism tactics and it has acknowledged this since 2002, following the targeting of Al-Harithi and five others in a desert area in Yemen. While Israel has pursued TK throughout its history,<sup>30</sup> having carried out operations in Europe, the Middle-east and Africa, the US is a relatively new entrant.<sup>31</sup> The US, however, appears to be the world’s top user of extraterritorial TK in contemporary times.<sup>32</sup> Its policy makers have adopted Israeli strategies of counter-terrorism.<sup>33</sup> The US is always encouraged to draw lessons on legal and policy frameworks on TK from Israel<sup>34</sup> because both countries have adopted TK as an essential component of their wars on

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<sup>27</sup> AS Deeks ‘Unwilling or unable’ Toward a normative framework for extraterritorial self-defence’ (2012) 52 *Virginia Journal of International Law* 483, app 1; WM Reisman & A Armstrong ‘The past and future of the claim of pre-emptive self-defence’ (2006) 100 *American Journal of International Law* 525, 540; Hakimi (n 20 above) 13.

<sup>28</sup> Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695 (23 September 2014).

<sup>29</sup> D Balz ‘Obama says he would take fight to Pakistan’ *Washington Post*, 2 August 2007; see also Deeks (n 27 above) 485.

<sup>30</sup> Melzer (n 3 above) 27; SR David ‘Fatal choices: Israeli policy of targeted killing’ (2002) No. 5 *Mideast Security and Policy Studies* 5.

<sup>31</sup> A Plaw *Targeting terrorists: A licence to kill* (2013) 29.

<sup>32</sup> SD Bachmann ‘Targeted killings: Contemporary challenges, risks and opportunities’ (2013) 18 *Journal of Conflict & Security law* 264.

<sup>33</sup> B Gellman ‘CIA weighs ‘targeted killing missions’ *The Washington Post*, 28 October 2001.

<sup>34</sup> P Alston ‘The CIA and targeted killing beyond borders (2011) 2 *Harvard National Security Journal* 406; A Guiora ‘License to kill: When I advised the Israel Defence Forces, here is how we decided if targeted killing were legal or not’ *Foreign Policy*, 13 July 2009; A Dworkin ‘Israel’s High Court on targeted killings: A model for the war on terror’ *Crimes of war project*, 15 December 2006. At

terrorism.<sup>35</sup> Alston is, however, sceptical that drawing lessons may be problematic because the Israeli policy is much more institutionalised than that of the US, as can be discerned from the fact that, while the Israeli Court has determined the specific criteria for lawful TK, the American Courts have not.<sup>36</sup>

In addition, as the Israeli Supreme Court that situated the conflict within the paradigm of armed conflict, the administration of George Bush argued that NSAs are ‘unlawful combatants’ because the war on terror falls under the paradigm of an armed conflict.<sup>37</sup> They contend that targeting terrorists is lawful because it is the same as targeting an enemy in the battlefield.<sup>38</sup> The US maintains that its counterterrorism measures against Al Qaeda fall within the ambit of the law of war regardless of whether the battle is fought on a conventional battlefield in Afghanistan or quite outside such battlefields in Pakistan or Yemen.<sup>39</sup> Arguably, the above view of the US does not enjoy support from the international law interpretation of what ‘war’ entails, as it contemplates an armed conflict involving two states. As with Israel, the US relies on both international and domestic law in justification of its TK policy.

#### **6.3.1.1. International law justification of targeted killings**

As with Israel, the US justifies its TK on the basis of international law. Under the inter-state use of force, TK is justified if it is employed pursuant to self-defence, SC authorized action and/or based on the consent of the territorial state.<sup>40</sup>

#### **6.3.1.2. The Constitution of the United States justification of targeted killing**

Unlike Israel, the US relies also on the provisions of its Constitution to justify TK. The US claims to possess both constitutional and legislative powers to employ TK against terrorist NSAs in the territories of other states. As Commander-in-Chief, the constitutional framework vests the authority on the President to order the conduct of extraterritorial forcible measures

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<http://www.crimesofwar.org/onnews/news-highcourt.html> (accessed 10/07/2015; Byman (n 5 above) 110-111.

<sup>35</sup> G Blum & P Heymann ‘Law and policy of targeted killings’ (2010) 1 *Harvard National Security Journal* 149; Alston (n 34 above) 409.

<sup>36</sup> HCJ 769/02 *The Public Committee Against Torture in Israel v The Government of Israel* paras 31-40, 60; Alston (n 34 above) 409.

<sup>37</sup> Blum & Heymann (n 35 above) 156.

<sup>38</sup> Blum & Heymann (n 35 above) 156.

<sup>39</sup> Blum & Heymann (n 35 above) 157.

<sup>40</sup> Melzer (n 3 above) 51.

against terrorists.<sup>41</sup> Although the President's executive power is assisted by the Congress to raise and support the military, the branch that is most connected to the people for the purpose of checking the tyrannical power of the executive.<sup>42</sup> So far, Congress has been performing this constitutional duty upon request from the President which shows the synergy that exists between the President and the Congress in terms of engaging the armed forces in armed conflict. Nevertheless, the President's constitutional power to approve a TK operation is exercisable even without congressional mandate.<sup>43</sup>

Unlike Israel, the US President's authority to direct the conduct of TK as extraterritorial measures could also be derived from US customary national law.<sup>44</sup> Commentators have indicated that an executive practice relating to national security may crystallise into a customary law if there is congressional acquiescence in such an act. This view has been given credence by case law.<sup>45</sup>

### 6.3.1.3. Authorization for Use of Military Force (AUMF)

By virtue of the enactment of the Authorization for Use of Military Force, the US Congress authorised the President to use all necessary and appropriate force against nations, organisations or persons, whom he determines were responsible for terrorist attacks against the US.<sup>46</sup> Consequently, on September 18, 2001, one week after the deadliest terrorist attacks in US history, President George Bush signed into law the Authorization for Use of Military Force.<sup>47</sup> It authorized the President:

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>48</sup>

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<sup>41</sup> Art 11, Sec 2(1) of the Constitution of the USA; see also WC Banks & P Raven-Hansen Targeted killing and assassinations: The U.S. legal framework' (2003) 37 *University of Richmond Law Review* 3.

<sup>42</sup> H Gautney 'The 2015 Authorisation of Military Force (AUMF) and America's military kings' *Huffington Post*, 25 April 2015, at <http://www.huffingtonpost.com/heather-gautney/th-2015-authorisation-of-b-6717266> (accessed 11/08/2015).

<sup>43</sup> GS McNeal 'Targeted killing and accountability' (2014) 102 *The Georgetown Law Journal* 691.

<sup>44</sup> Banks & Raven-Hansen (n 41 above) 8-9.

<sup>45</sup> Banks & Raven-Hansen (n 41 above) 8, While quoting Justice Felix Frankfurter in the *Youngstown Sheet & Tube Co. v Sawyer*, they stated: 'A systematic unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, ... making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive power vested in the President'; see *Youngstown Sheet & Tube Co v Sawyer*, 343 U.S. 579, 610 (1952).

<sup>46</sup> Sec 2 of the Authorisation of the Use of Military Force (AUMF), S.J. Res. 23 of 18 September 2001.

<sup>47</sup> J Daskal & SI Vladeck 'After the AUMF' (2014) 5 *Harvard National Security Journal* 115.

<sup>48</sup> Authorisation for Use of Military Force, S.J. Res. 23 of 18 September 2001.



The AUMF remains in force up to the present as the principal domestic legal authority relied upon by the US for its extraterritorial TK operations against terrorist NSAs in Afghanistan, Pakistan, Yemen and Somalia.<sup>49</sup> As can be seen from the wording of the text of the AUMF, the president was authorized to go after only those who were linked to the 9/11 attacks.<sup>50</sup> Those alleged to have been linked to the 9/11 attacks include Al Qaeda, the Taliban and associates. It is the claim of the US that going after them was to prevent them from committing future acts of terrorism against the United States.<sup>51</sup> Although the AUMF remains as it was enacted without any amendment, the US relies on that piece of legislation and, quite contrary to what it contemplated, to pursue terrorists that are not members of Al Qaeda, the Taliban or associates and are quite outside the battlefields in Afghanistan.<sup>52</sup> It is for this reason that Banks and Raven-Hansen cautioned that the sweeping nature of AUMF made it ‘an authorisation for targeted killing [and this] should not blind us to its predicate: involvement in the September 11 attacks or harbouring those who were involved’.<sup>53</sup> This is worrisome because the US itself has acknowledged that the groups which carried out the 9/11 attacks no more pose threats, and most of the masterminds are dead, including Osama Bin Laden. President Obama has stated time and time again that the core members of Al Qaeda in Afghanistan and Pakistan are being defeated and that the attacks in Benghazi and Boston were not directed by them, as the remaining operatives spend more time thinking of their own safety rather than plotting attacks against the US.<sup>54</sup> According to him, they have not carried out any successful attack since 9/11 on the US homeland, and the threat has shifted from them.<sup>55</sup> This assertion by President Obama appears to have merit to the extent that the structure of Al Qaeda that existed at the time of the attack exists no more since the organization has declined into largely independent and isolated cells and nodes spread all over the world.<sup>56</sup> Arguably, the US conducts its extraterritorial forcible measures in some situations outside the scope of the domestic law that empowered it.

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<sup>49</sup> C Savage, Secret U.S. memo made legal case to kill citizens’ *New York Times*, 8 October 2011.

<sup>50</sup> Authorisation for Use of Military Force, S.J. Res. 23 of 18 September 2001.

<sup>51</sup> Daskal & Vladeck (n 47 above) 116; D Abramowitz ‘The President, the congress, and use of force: legal and political considerations in authorizing use of force against int. Terrorism’ (2002) 43 *Harvard International Law Journal* 71, 73-75.

<sup>52</sup> Daskal & Vladeck (n 47 above) 116.

<sup>53</sup> Banks & Raven-Hansen (n 41 above) 38-39.

<sup>54</sup> President Obama’s Remarks (n 7 above).

<sup>55</sup> President Obama’s Remarks (n 7 above).

<sup>56</sup> Daskal & Vladeck (n 47 above) 116-117; L Panetta ‘The fight against Al Qaeda: Today and tomorrow’, 20 Nov 2012, at <http://archive.defense.gov/speech.aspx?speechid=1737> (accessed 14/09/2015); Brennan’s Remarks (n 5 above): ‘it is harder than ever for the Al Qaeda core in Pakistan to plan and execute large scale, potentially catastrophic attacks against our homeland. Today, it is increasingly clear that compared to 9/11 – the core Al Qaeda leadership is a shadow of its former self. Al Qaeda has been left with just a handful of capable leaders and operatives, and with continued pressure is on the path to its destination. And for the first

Given the fact that other self-radicalised individuals and groups also pose threats to the US, in spite of the comatose status or near non-existent disposition of the core Al Qaeda, there have been proposals for an expanded AUMF or a new statutory framework to cope with threats from the next generation of terrorist NSAs.<sup>57</sup> There is no consensus about the proposal to expand the scope of AUMF or to formalise a new legal framework fashioned after the AUMF on account of the new threats, because the President of the US has indicated that he is loath to support any such development.<sup>58</sup> Similarly, certain commentators disagree with the above proposals and argue instead that, given the sophistication of American law enforcement, intelligence tools and the availability of the right of self-defence under international law, calls for the renewal of the authorisation of the use of military force should be a last resort. For them, the focus should be on why the available frameworks are inadequate.<sup>59</sup> They argue that such calls are unnecessary, provocative and counterproductive, and, if adhered to, may perpetuate war instead of seeking to end it. In the extreme situation where it becomes relevant that Congress must consider further authorisation as a last resort, however, it must be done only after public debate and extensive deliberation, carefully calibrated to the specific threat posed by an identifiable group and limited in scope and duration.<sup>60</sup> Interestingly, quite contrary to the President's initially expressed loath disposition to sign any instrument that may seek an enlargement of the mandate contained in the AUMF, President Obama requested Congress to authorise another AUMF against ISIL on 12 February 2015.<sup>61</sup>

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time since this flight began, we can look ahead and envision a world in which the al Qaeda core is simply no longer relevant'; President Barak Obama 'State of the Union Address' 12 February 2012, at... where he stated that: 'Al Qaeda core is a shadow of its former self'; see also JR Clapper (DNI) 'Worldwide threat assessment of the U.S. Intelligence Community: Statement before the Senate Select Committee on intelligence' 4, 2013, at <http://www.dni.gov/index.php/newsroom/testimonies/217-congressional-testimonies-2016/1313-statement-for-the-record-worldwide> (accessed 20/02/2016).

<sup>57</sup> R Chesney et al 'Hoover Institute: A statutory framework for next generation of terrorist threats' 10(2013) at <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-Next-Generation-Terrorist-Threats.pdf> (accessed 19/02/2016); Statement of Senator McCain "Hearing before the senate committee on Armed Services: The law of armed conflict and the use of military force" 13<sup>th</sup> Congress 2013 – He calls for update of the AUMF to cope with today's realities; see also Vaskal & Vladeck (n 47 above) 117-118.

<sup>58</sup> President Obama's Remarks (n 7 above). He stated: 'So I look forward to engaging the Congress and the American people in efforts to refine, and ultimately repeal the AUMF mandate. And I will not sign laws designed to expand this mandate further'; GS Corn 'Statement regarding the 2001 AUMF', at <http://genius.com/lieutenant-colonel-geoffrey-s-corn-statement-regarding-the-2001-aumf-annotated> (accessed 11/08/2015).

<sup>59</sup> Vaskal & Vladeck (n 47 above) 118-119, 126-128.

<sup>60</sup> Vaskal & Vladeck (n 47 above) 119.

<sup>61</sup> Letter from the President 'Authorisation for the use of United States armed forces in connection with the Islamic State of Iraq and the Levant to the Congress of the United States' 11 February 2015, at <http://www.whitehouse.gov/the-press-office-2015/02/11/letter-president-authrisation-use-united-states-armed-forces-connection> (accessed 10/08/2015); J Lin 'AUMF 2015 and the war on ISIL: What it means for Obama's legacy in the Middle East' *Berkeley Political Review*, 14 April 2015, at <http://bpr.berkeley.edu/2015/04/aumf-2015-and-the-war-on-isil/> (accessed 10/08/2015).

Apart from the AUMF, there are other US instruments, such as the National Security Act of 1947 and the Al Qaeda Network Executive Order of 2003 that permit the use of TK by US forces. Firstly, the National Security Act empowers the President of the US to authorise covert operations.<sup>62</sup> By virtue of the amendment of this law in 2006, the President or the Director of National Intelligence may order a covert action.<sup>63</sup> Secondly, the Al Qaeda Network Executive Order of 2003 permits the Joint Special Operations Command (JSOC) to track down Al Qaeda operatives in certain countries of the world without any further authorisation.<sup>64</sup>

#### 6.3.1.4. Legal opinions as justification for targeted killing

Both Israel and the US rely on legal opinions in the justification of their employment of TK against terrorist NSAs. Just as Israel relied on the Advocate General's guidelines which justified its use of TK, the US administrations, particularly from the time of President George Bush, rely on the legal opinion of W. Hays Parks, Special Assistant for Law of War Matters to the Judge Advocate General of the Army.<sup>65</sup> In a Memorandum of Law, issued in December 1989, from Parks to the Judge Advocate General, Parks justified the use of TK and argued that the prohibitions on assassinations do not pertain to lawful TK of groups and individuals who pose a direct threat to the US.<sup>66</sup> In distinguishing TK from assassinations, he stated that unilateral acts of individuals or agencies against selected foreign public officials by way of assassination constitute murder and are prohibited because the US does not permit assassination as an instrument of national policy.<sup>67</sup> But the use of overt military force against a guerrilla force or terrorist NSAs, whose actions pose a threat to the security of the US, as may be determined by a competent authority, would not constitute assassination.<sup>68</sup> Similarly, Abraham Sofaer,<sup>69</sup> Jeh Johnson, Harold Koh and John Brennan have justified the application

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<sup>62</sup> Section 102(d) of the National Security Act of 1947.

<sup>63</sup> National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended at 50 U.S.C. S. 1541 (2006), cited in GS McNeal (n 43 above) 690.

<sup>64</sup> E Schmitt & M Mazzetti 'Secret Order lets US raid Al Qaeda' *International New York Times*, 9 November 2008.

<sup>65</sup> Blum & Heymann (n 35 above) 155.

<sup>66</sup> WH Parks 'Memorandum of Law: Executive Order 12333 and Assassination' *The Army Lawyer*, 4 & 8, December 1989, at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/12-1989.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/12-1989.pdf)

<sup>67</sup> Both the 1977 President Gerald R. Ford's Executive Order 11905 and President Ronald Reagan's Executive Order 12333 provided that: 'No employee of the United States Government shall engage in, or conspire to engage in, political assassination'.

<sup>68</sup> Parks Memorandum (n 66 above); see also Banks & Raven-Hansen (n 41 above) 29.

<sup>69</sup> AD Sofaer 'Sixth Annual Waldemar A. Solf Lecture in international law: Terrorism, the law, and the national defence' (1989) 126 *Military Law Review* 119.

of TK in the course of self-defence against terrorists or their sponsors who attack Americans as lawful.<sup>70</sup>

### 6.3.1.5. Policy of pre-emptive strikes

While it has been indicated above that Israel is the first state to employ pre-emptive self-defence in its relationship with NSAs, the US has expanded the frontiers of pre-emptive self-defence by virtue of its elaborate interpretation of the concept. Contrary to the contemplation of article 51 of the UN Charter, which requires an armed attack to trigger a response in self-defence, the US argues that whether a terrorist attack is imminent must be evaluated against the background of the capabilities and objectives of their enemies.<sup>71</sup> The US expressed such a view in its determination to cause a change in the existing law of self-defence. In an address to the National Association of Home Builders on 6 June 2002, Vice President Cheney advocated the need for US forces to pre-empt grave threats before they materialise.<sup>72</sup> This thinking of the US government was expatiated upon by President Bush's 2002 National Security Strategy, otherwise known as the 'Bush Doctrine'.<sup>73</sup> The purport of the doctrine is that it justifies US response to unforeseen future attacks while lacking clear evidence that such an attack may definitely occur.<sup>74</sup> This policy, which remains illegal under international law, has been evaluated with some reference to the US in chapter three above.

### 6.3.1.6. Drones as weapons of choice for targeting operations

Drones have become weapons of choice for both the US and Israel because of the alleged precision of their attacks and the possibility of insulating soldiers from the risks associated with the conventional battlefield. Drones are employed for TK operations against Afghan Taliban, Pakistani Taliban and Al Qaeda linked armed groups in Afghanistan, Pakistan, Iraq, Libya,

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<sup>70</sup> Odle (n 1 above) 613-619.

<sup>71</sup> National Security Strategy of the United States 2002, 15, at <http://www.state.gov/documents/organisation/63562.pdf> (accessed 20/09/2015).

<sup>72</sup> Remarks of Vice President Dick Cheney before the National Association of Home Builders, 6 June 2002, at <http://georgewbush-whitehouse-archives.gov/vicepresident/news-speeches/speeches/vp20020606.html> (accessed 18/02/2016).

<sup>73</sup> National Security Strategy of the United States 2002, 15.

<sup>74</sup> J Kirton 'The only game in town, but it is illegal: American drone strikes and international law' (2015) 1 *Plymouth Law and Criminal Justice Review* 89-90.

Somalia and Yemen.<sup>75</sup> The US drone programme has certain characteristics which has distinguished it from the Israeli use of drones or airborne systems.

Firstly, the US TK programme is not as transparent as the Israeli programme as it remains shrouded in secrecy. This is because neither the CIA, which is the main operator of the drone programme, nor the officials of the White House are disposed to talk to the press or human rights organisations about their *modus operandi*.<sup>76</sup>

Secondly, the US drone programme differs significantly from that of Israel in the sense that the US also employs ‘signature strikes’. The signature strikes are designed to kill victims whose name or identity is unknown, but where the behaviour of such a person is suspicious on the basis of a US security assessment.<sup>77</sup> In signature strikes, the US considers all military-age males in certain combat zones as targetable, unless intelligence posthumously proves them innocent. The phrase ‘military-age males’ is used to designate individuals to be guilty, not based on evidence but rather on demography, that is, fighting age males.<sup>78</sup> This description denies individuals the presumption of civilian status for all non-combatants, thereby allowing for the direct and disproportionate targeting of civilians.<sup>79</sup> The US has, however, denied the use of signature strikes.<sup>80</sup> UN officials have described some of these drone strikes as clear cases of extrajudicial killings.<sup>81</sup> As expected, the US contends that the airstrikes it conducts in pursuit of obliterating terrorists and their enclaves are done in furtherance of an armed conflict which falls outside the mandate of the UN Special Rapporteur to investigate.<sup>82</sup>

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<sup>75</sup> Amnesty International ‘Will I be next? US drone strikes in Pakistan’ *Amnesty International Publications*, 2013, 14; DL Byman ‘Why drones work: The case for Washington’s weapons of choice’ *Brookings*, July/August 2013, at <http://www.brookings.edu/research/articles/2013/06/17-drones-obama-weapon-choice-us-counterterrorism-byman> (accessed 30/08/2015).

<sup>76</sup> Amnesty International (n 75 above) 11.

<sup>77</sup> Amnesty International (n 75 above) 12; J Mayer ‘The predator war: What are the risks of the C.I.A.’s covert drone program?’ *The New Yorker*, 26 October 2009.

<sup>78</sup> M Zenko ‘Targeted killing and signature strikes’ *Council on Foreign Relations*, 16 July 2012.

<sup>79</sup> Amnesty International (n 75 above) 27-28.

<sup>80</sup> D Greenfield ‘The case against drone strikes on people who only ‘act’ like terrorists’ *The Atlantic*, 19 August 2013, at <http://www.theatlantic.com/international/archive/2013/08/the-case-against-drone-strikes-on-people-who-only-act-like-terrorists...> (accessed 30/08/2015).

<sup>81</sup> Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, Asma Jahangir, Commission on Human Rights, UN Doc. E/CN.4/2003/3, paras 37-39 (13 January 2003).

<sup>82</sup> UN Doc. E/CN.4/2003/G/80, of 22 April 2003. A letter dated 14 April 2003 from the Chief of Section, Political and Specialised Agencies of the Permanent Mission of the United States to the United Nations Office, Geneva.

### 6.3.2. Kill-capture missions

Kill-capture missions are major components of the US counterterrorism campaign and are similar to the Israeli policy in this regard. They are pursued by clandestine security agencies such as the CIA and the Joint Special Operations Command (JSOC) either to capture or hunt down terrorists,<sup>83</sup> particularly Al Qaeda operatives who are far from the traditional battle fields in Afghanistan.<sup>84</sup> Like Israel, therefore, the US missions are not embarked upon only in particular designated battlefields, but all over the world where enemies can be captured. In the event that logistical concerns, however, inhibit the option of capture because of the remoteness of the location of the suspected terrorist, or, if there is the likelihood of a threat to US forces, then killing the suspect becomes an option. Dictated by the wide geographical scope of its killing operations, the US has two drone programmes. The military version operates in the battlefields of Afghanistan, while the CIA operations target terrorists all over the world.<sup>85</sup> The CIA is the equivalent of the Israeli Mossad.

The intriguing question commentators have often asked relates to why the US is more inclined to killing suspected terrorists with drones outright rather than capturing them to secure vital and crucial intelligence from them.<sup>86</sup> This is in spite of the fact the US claims to comply with an avowed policy of capturing suspects in preference to targeting them,<sup>87</sup> as shown in the capture of Mohanad Mahmoud Al Farekh in Pakistan even though it was alleged that the US drones spotted him several times in early 2013.<sup>88</sup> Nevertheless, only few capture operations compared to TK operations have been embarked upon by the US Special forces.<sup>89</sup> The most

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<sup>83</sup> D Priest 'U.S. military teams, intelligence deeply involved in aiding Yemen on strikes' *Washington Post*, 27 January 2010.

<sup>84</sup> J Risen & D Johnston 'Bush has widened authority of CIA to kill terrorists' *The New York Times*, 15 December 2002.

<sup>85</sup> Mayer (n 77 above).

<sup>86</sup> M Zenko 'Kill-capture: The Obama administration's explicit policy is to capture suspected terrorists, not drone them. So why is there so much droning and so little capture' 14 April 2015, at <http://foreignpolicy.com/2015/04/14/kill-capture-obama-drone-pakistan-cia-policy-special-operations/> (accessed 25/08/2015).

<sup>87</sup> J Brennan's speech at Harvard Law School 'Strengthening our security and adhering to our values and laws', where he stated: 'I want to be very clear - whenever it is possible to capture a suspected terrorist, it is the unqualified preference of the Administration to take custody of that individual so we can obtain information that is vital to the safety and security of the American people...it is the clear and unambiguous policy of this Administration'; President Obama's Remarks (n 7 above). He stated: 'Much of our best counterterrorism cooperation results in the getting and sharing of intelligence, the arrest and prosecution of terrorists ... but despite our strong preference for detention and prosecution of terrorists, sometimes this approach is foreclosed. Al Qaeda and its affiliates try to gain foothold in some of the most distant and unforgiving places on earth'.

<sup>88</sup> Zenko (n 86 above).

<sup>89</sup> Zenko (n 86 above).



outstanding of the US kill-capture missions was code-named Operation Neptune Spear (ONP), embarked upon by the navy seals on 2 May 2011. It killed America's number one enemy, Osama bin Laden.<sup>90</sup>

Even the *jus in bello* rules prohibit the killing of an enemy in certain circumstances, particularly where capture is equally effective and does not endanger the attacking party's armed forces.<sup>91</sup> This requirement is stricter under the inter-state use of force or law enforcement. Although a combatant is lawfully subject to lethal force, the unnecessary killing of a combatant or a defenceless combatant who holds himself at the mercy of enemy forces is prohibited (*hors de combat*).<sup>92</sup> It is now a largely accepted maxim that:

if enemy combatants can be put out of action by capturing them, they should not be injured; if they can be put out of action by injury, they should not be killed; and if they can be put out of action by light injury, grave injury should be avoided.<sup>93</sup>

The Obama administration was in fact criticised for not even attempting to arrest Bin Laden and Anwar al-Aulaqi, an Al Qaeda leader in the AQAP, but rather opted to kill them.<sup>94</sup> Although the US still condones capital punishment by jury, death by executive *fiat* is unconstitutional under US domestic law, and it is also illegal under international law.<sup>95</sup> It is alleged that, in practical terms, President Obama signs out killing missions in Yemen, Somalia and other terrorist enclaves, while the capture policy remains theoretical.<sup>96</sup>

Such capture or killings are based on a secretly compiled 'high-value target list' or 'joint integrated prioritized target list' which is reviewed and updated at intervals by the White House, Justice Department, State Department, Pentagon and the CIA, apart from notifying

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<sup>90</sup> KH Govern 'Operation Neptune Spear: Was killing Bin Laden a legitimate military objective?' in C Finklestein et al (eds.) *Targeted killings: Law and morality in an asymmetrical world* (2012) 348-349; Bachmann (n 32 above) 260-261.

<sup>91</sup> R Goodman 'The power to kill or capture enemy combatants' (2013) 24 *European Journal of International Law* 853.

<sup>92</sup> Arts 35 & 41 of API.

<sup>93</sup> Art 77 of the ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL (2009); Goodman (n 91 above) 819-820; JD Ohlin 'Duty to capture' (2013) 97 *Minnesota Law Review* 1268; G Blum 'The dispensable lives of soldiers' (2010) 2 *Journal of Legal Analysis* 69; Taylor 'The capture versus kill debate: Is the principle of humanity now part of the targeting analysis when attacking civilians who are directly participating in hostilities' (2011) *The Army Lawyer* 103.

<sup>94</sup> Ohlin (n 93 above) 1268-1269.

<sup>95</sup> *Tennessee v Garner* 471 U.S. 1, 2 (1985), where the Court applied the Fourth Amendment with regard to police law enforcement that lethal force may be an alternative to arrest only if the police reasonably believe that such force is required to stop a fleeing felon that poses an immediate threat to others; see also Ohlin (n 93 above) 1269, 1306, 1325; T Junod 'The lethal presidency of Barak Obama' *Esquire Mag*, August 2012, at 100.

<sup>96</sup> D Klaidman 'Drones: How Obama learned to kill' *Daily Beast*, 28 May 2012; see also Hajjar (n 169 above) 16.

relevant Congressional committees.<sup>97</sup> This process that precedes an action in TK is a painstaking bureaucratic process designed for the selection of targets. The proper listing of targets is done so as not to kill the wrong person.<sup>98</sup> In formulating the kill lists, the CIA and the JSOC work together.<sup>99</sup> Apart from the above-mentioned institutions that are concerned with listing of terrorists, the US National Counterterrorism Center also maintains a data base of targets, while also vetting and coordinating targeting decisions.<sup>100</sup> In fact the approval of the President is required for the killing of high value targets whose killing may attract diplomatic concerns or may occasion high collateral damages.<sup>101</sup> Legal authority was earlier given to such listing by a presidential finding issued by President Bush to the CIA to hunt down and kill terrorists that are so listed without seeking further approval, though the criteria for listing a person as a terrorist remained secret.<sup>102</sup> Following the approval, through a ‘secret U.S. memo’, to kill Anwar Aulaqi,<sup>103</sup> the authority of the President to list American citizens for targeting was, however, challenged by Aulaqi’s father in court for the listing of his son for targeting. Similarly, commentators also challenged such listing and requested the President to declassify, and release to Congress, press and the public, documents that set forth the detailed constitutional and statutory basis he relies upon to target and kill American citizens.<sup>104</sup>

While the US extraterritorial forcible measures are modelled after the Israeli policy, differences exist. Firstly, Israel goes through a strenuous process of listing terrorists for kill or capture missions. The process involves military lawyers and military specialists in Arab culture who must convince themselves that a named terrorist who poses as a threat to national security cannot be captured and killing him will do more good than harm.<sup>105</sup> According to Byman, intelligence officials suggest the targets, and these are reviewed by military officials before senior military leaders, the minister of defence or even the prime minister may authorize the

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<sup>97</sup> Risen & Johnston (n 84 above).

<sup>98</sup> McNeal (n 43 above) 701.

<sup>99</sup> RM Chesney ‘Military intelligence convergence and the law of the Title 10/Title 50 debate’ (2012) 5 *Journal of National Security Law & Policy* 578. ‘In many operational contexts, the CIA and the military in fact are highly cooperative. In pursuit of the same counterterrorism goals, they share information, and both construct and execute operations jointly...’; see also JD Kibbe ‘Conducting shadow wars’ (2012) 5 *Journal of National Security Law & Policy* 386.

<sup>100</sup> L Hajjar ‘Lawfare and armed conflict: Comparing Israeli and the US targeted killing policies and the challenges against them’ (2013) *Issam Fares Institute for Public Policy and International Affairs* 16.

<sup>101</sup> B Webster ‘The process behind targeted killing’ *Washington Post*, 23 October 2012; see also McNeal (n 43 above) 708.

<sup>102</sup> Melzer (n 3 above) 40; Risen & Johnston (n 84 above).

<sup>103</sup> P Finn ‘Secret U.S. memo sanctioned killing of Aulaqi’ *Washington Post*, 30 September 2011.

<sup>104</sup> V Divoll ‘Who says you can kill Americans, Mr. President?’ *The New York Times*, 16 January 2013.

<sup>105</sup> Mayer (n 77 above).

action. For high profile targets, the cabinet is also briefed.<sup>106</sup> On the other hand, the US places names on its list if two verifiable human sources and additional evidence point to the target as an enemy.<sup>107</sup> Secondly, unlike Israel, the US includes in its target list not only known terrorists that pose immediate threat to its security, but also the names of drug lords that are alleged to give financial support to the Taliban.<sup>108</sup> For instance, Mayer reported that about 50 narcotics traffickers were included in the Joint Integrated Prioritised List (Pentagon's roaster).<sup>109</sup> Thirdly, in certain instances, Israel informs those listed to give themselves up for arrest or requests the PA to arrest named persons, and only upon failure to secure arrest, is the killing option employed. Conversely, the US officials avoid such notices for fear that by the time such an individual is located, arrested and extradited the terrorist plot would be too advanced or may already have occurred.<sup>110</sup> Thirdly, unlike Israel, the US insulates the human toll arising from its kill-capture missions because its victims remain faceless owing to the refusal of access to journalists. It shows no videos or photographs of the aftermath of predator drone strikes. On the other hand, the TK conducted by Israel in Gaza are properly documented.<sup>111</sup>

### 6.3.3. Full-scale military operations

While the US has been involved in full-scale military operations against terrorist NSAs in some countries, the Afghan offensive against Al Qaeda and the Taliban, code-named *Operation Enduring Freedom* (OEF), is outstanding. In the aftermath of the September 11 terrorist attacks of 2001 against the US, the US commenced an unprecedented war on terror against Al Qaeda and the Taliban locations in Afghanistan and Pakistan.<sup>112</sup> The US asserted that OEF, which commenced on 7 October 2001, was in furtherance of its right of self-defence under article 51 of the Charter, and the operation was intended to prevent and deter future attacks.<sup>113</sup> Being self-defence (as alleged by the US) against a NSA in itself shows the shift in the law of self-defence which is a state-centric concept to affect NSAs. The operation was alleged to have been directed at the destruction of the Al Qaeda training facilities, pressure the Taliban to hand

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<sup>106</sup> Byman (n 4 above) 110.

<sup>107</sup> Mayer (n 77 above).

<sup>108</sup> United States Foreign Relations Committee, Afghanistan's narco war: Breaking the link between drug traffickers and insurgents: Report to the Senate Committee on Foreign Relations, S. Rep. No 111-129, at 16 (2009), cited in P Alston 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Add: Study of targeted killing, A/HRC/14/24/Add. 6 of 28 May 2010, para 21.

<sup>109</sup> Mayer (n 77 above).

<sup>110</sup> Blum & Heymann (n 35 above) 145.

<sup>111</sup> Mayer (n 77 above).

<sup>112</sup> H Duffy *The "war on terror" and the framework of international law* (2015) 292-293.

<sup>113</sup> Letter dated 7 October 2001 from the Permanent Representative of the United States, John Negreponete to the United Nations addressed to the President of the Security Council.

over Al Qaeda suspects and to cause a regime change in Afghanistan.<sup>114</sup> This operation was the most elaborate and protracted confrontation between states and terrorist NSAs with about 40 states participating by way of contributing troops or giving logistical support. These allies include, but are not limited to, Britain, Turkey, Germany, Italy, Netherlands, Canada, Australia, France, New Zealand, Japan, South Korea, Poland and NATO (leading the ISAF).<sup>115</sup>

The legal basis that provided the impetus for the operation are the UN Charter and UN resolutions 1368 and 1373 which recognised the US's right of self-defence and AUMF, although the SC did not specifically authorise the use of force against Al Qaeda and the Taliban.<sup>116</sup> The enormity of OEF is not assessed from the standpoint of the protracted nature of the campaign leading to a change in the Taliban government alone,<sup>117</sup> but also from the loss of lives, large scale destruction of homes, hospitals, mosques and the creation of refugees. Similarly to the Israeli raids against the Palestinian militants, the weight of scholarly opinion points to the fact that OEF was a disproportionate response in self-defence because its impact far outweighed the initial attacks. On the other hand, however, Feinstein argued that OEF was not disproportionate because the intention of the US and her allies was the complete destruction of all the military and economic infrastructures of the terrorist organisations.<sup>118</sup> Similarly, though not in relation to OEF, Schachter has argued that it does not seem unreasonable, as a rule, to allow a state to retaliate beyond the immediate area of attack, when the state has sufficient reason to expect a continuation of attacks with substantial military weapons from the same source.<sup>119</sup>

Unlike Israeli military operations which last for only a comparatively brief period, OEF, which was claimed as an action in self-defence, lasted 13 years, alleging that Al Qaeda continued to pose palpable threats. The likelihood of a protracted campaign against terrorists was indicated in President Bush's address to the Congress when he stated, 'Our war on terror begins with Al Qaeda, but it does not end until every terrorist group of global reach has been found, stopped

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<sup>114</sup> Duffy (n 112 above) 294 & 301; V Lowe 'The Iraqi crisis: What now' (2003) 52 *International & Comparative Law Quarterly* 860.

<sup>115</sup> CNN 'Operation Enduring Freedom fast facts' 21 April 2015, at <http://edition.cnn.com/2013/10/28/world/operation-enduring-freedom-fast-facts/> (accessed 04/09/2015).

<sup>116</sup> A Arnold 'Use of force in Afghanistan: A study of its legality' (2008) *Journal of Politics & International Affairs* 63-64.

<sup>117</sup> GT Harris 'The era of multilateral occupation' (2006) 24 *Berkeley Journal of International Law* 1, 49-51.

<sup>118</sup> Feinstein (n 14 above) 290.

<sup>119</sup> O Schachter 'The right of states to use armed force' (1984) 82 *Michigan Law Review* 1638.

and defeated'.<sup>120</sup> While there is no settled position of the law on the duration of self-defence, as discussed in chapter three above, scholarly opinion is to the effect that self-defence cannot continue *ad infinitum*.<sup>121</sup> An action in self-defence continues only until the SC has taken measures to restore international peace and security. Consequently, Shah argued that the establishment of the large multilateral force, ISAF<sup>122</sup>, by the UN through resolution 1386 satisfies the requirement of the need for the SC to take measures to restore international peace and security and, therefore, self-defence by the US ought to have been terminated at that point.<sup>123</sup> The US, however, announced a formal end to full military operations in Afghanistan only on 28 December 2014 with a US casualty assessment at 2,200 American troops.<sup>124</sup>

Some commentators have queried whether indeed the US could take any legitimate action in self-defence against the Taliban, the Afghan government, at the material time of the US invasion. This is more so when the complicity of the Taliban had not been established before the invasion and even the control (if any) purportedly exercised over Al Qaeda by the Taliban fell short of the 'effective control' threshold.<sup>125</sup> Duffy argues that, if the Taliban could be held accountable for attacks it did not commit or failed to prevent, then several other states, including the US and the UK, in whose territories terrorist cells are located may also be held accountable.<sup>126</sup> This is more so when it has been established that the planning of the 9/11 attacks took place in some of these countries including the US and Germany.<sup>127</sup>

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<sup>120</sup> President G Bush 'Address to a Joint Session of Congress and the American people' 20 September 2001, at <http://georgebush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> (accessed 04/09/2015).

<sup>121</sup> TD Gill 'When does self-defence end?' in M Weller (ed.) *The Oxford handbook of the use of force in international law* (2015) 737; see also C Heyns & S Knuckey 'The long-term international law implications of targeted killing practices' (2013) 54 *Harvard International Law Journal* 107.

<sup>122</sup> S/RES/1386 (2001) of 20 December 2001, para 1; see also Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions (Bonn Agreement) (S/2001/1154) of 5 December 2001, Annex 1, para 3.

<sup>123</sup> S/RES/1386 of 20 December 2001, para 1; see also SA Shah 'War on terrorism: Self-defence, Operation Enduring Freedom, and the legality of US drone strikes in Pakistan' (2010) 9 *Washington University Global Studies Review* 113.

<sup>124</sup> U.S. Department of Defense 'Obama, Hagel mark end of Operation Enduring Freedom' at <http://www.defense.gov/News-Article-View/Article/603860/obama-hagel-mark-end-of-operation-enduring-freedom> (accessed 04/09/2015).

<sup>125</sup> Duffy (n 112 above) 300.

<sup>126</sup> Duffy (n 112 above) 300-301. She argues, 'If a state need not be responsible for an attack, must it have otherwise failed in its duties to prevent terrorists operating out of its territory in order to be vulnerable to attack pursuant to the right of self-defence? What of a weak, failed or other state that did take all reasonable steps to prevent terrorism but was unable to do so? If a mere territorial link between a state and a responsible organisation were to be sufficient to justify use of force against that state, might the states of "North America, South America, Europe, Africa, the Middle East and across Asia" which, according to reports, have terrorist cells operating in their territories, be susceptible to attack.'

<sup>127</sup> Duffy (n 112 above) 301-303.

As is the case with Israel, the US has been accused of a disproportionate use of force in self-defence. An action taken in self-defence is required to comply with the customary law principles of necessity and proportionality. Self-defence, therefore, must not be punitive or retaliatory, since the essence of self-defence is to halt or repel an armed attack.<sup>128</sup> An action could be construed as retaliatory<sup>129</sup> or a reprisal in nature if it continues after an armed attack has ceased, thereby violating article 2(4) of the Charter.

#### **6.4. Policy of first demanding arrest of terrorists**

Unlike Israel which operates a policy of drawing-up a comprehensive list of terrorists with a request for the PA to arrest and detain them or hand them over to Israeli authorities for possible prosecution, the US had made only specific and isolated demands for some terrorist suspects. Contrary to the US practice, Israel directly makes requests of suspected terrorists to surrender or give themselves up for arrest before subsequently employing TK. In September 2001, shortly after the 9/11 attacks, the US made a specific request to the Taliban government in Afghanistan to arrest and unconditionally handover Bin Laden and 14 of his lieutenants, but the request was rejected by Mullah Omar.<sup>130</sup> Owing to US pressure, and as a result of the bombardments by US and its allied forces, the Taliban agreed about-mid October 2001 to hand Bin Laden over conditionally. The Taliban Prime Minister, Haji Abdul Kabir, enumerated the conditions for the handover to include: (a) that they were prepared to hand Bin Laden over to a neutral third country that would not be pressured by the US; (b) that the US should furnish the Taliban government with evidence of Bin Laden's guilt or culpability in respect of the 9/11 attacks; and (c) that the US stopped its bombing of sites in Afghanistan. As expected, the US rejected these conditions.<sup>131</sup> That apart, even in the event that terrorists are arrested by the US or handed over to it by other countries, they have at times been sent to other countries outside the US for possible torture and interrogation. The US runs a rendition programme and sends terrorists to Egypt, Syria, Qatar, Thailand, Iraq, Pakistan, Afghanistan and Guantanamo Bay in

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<sup>128</sup> A Randelzhofer 'Article 51' in Bruno Simma (ed.) *The Charter of the United Nations: A commentary*, Vol. 1 (2002) 3<sup>rd</sup> edn. 805; C Gray *International law and the use of force* (2008) 150; Heyns et al (n 24 above) 41-42.

<sup>129</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ Reports (2003), Dissenting opinion of Judge Elaraby para 1. 2.

<sup>130</sup> BS Torreon 'U.S. periods of war and dates of recent conflicts' *CRS Report* 6, 27 February 2015; RL Grenier 'What if America had never invaded Afghanistan?' *The Atlantic*, 1 February 2015, at <http://www.theatlantic.com/international/archive/2015/02/what-if-america-had-never-invaded-afghanistan/385026/> (accessed 29/08/2015).

<sup>131</sup> Bush rejects Taliban offer to hand Bin Laden over' *The Guardian*, 14 October 2001.



Cuba and, in some of these countries, the US maintains secret detention facilities.<sup>132</sup> This study is, however, not unmindful of the fact that the US opts that high profile terrorist NSAs be tried in the US. But, generally, US policy is in contrast to the Israeli practice where all Palestinian terrorists in their custody, either because Israel arrested them on the battlefield or because they gave up themselves, are kept in Israeli prisons.

## **6.5. How effective are the United States extraterritorial forcible operations in pursuit of non-state actors?**

Some of the reasons for ineffective extraterritorial counter-terrorism that were discussed in relation to Israel in chapter five above, apply also to the US. It is the view that more terrorists have taken the stage and more cells and networks have been established between 2002 when the US commenced its TK policy (Qaed Salim Sinan al-Harethi was the first person to be targeted by US drones in Yemen) and now.<sup>133</sup> Commentators hold the view that violence in Pakistan and Afghanistan has risen sharply since TK was introduced by the US.<sup>134</sup>

The sustenance of these forcible measures have neither removed terrorist threats completely nor reduced the attacks significantly. This view is held by this study with regard to the assertion by the US that Al Qaeda, as it was constituted prior to the 9/11 attacks, no longer exists and to that extent its homeland is free from serious terrorist threats. The US itself, however, concedes the fact that AQAP still poses a significant threat and appears to possess the capacity to conduct terrorist strikes of grave magnitude. Of all the Al Qaeda affiliates, AQAP is the most formidable and the most likely organisation that may successfully carry out an attack in the US homeland as is evidenced in some of their attempted attacks including the failed bomb attack against the Northwest Airlines Flight 253 on Christmas day in 2009.<sup>135</sup> The threats of AQAP in 2013 forced the US State Department to close its embassies in the Middle- East and North Africa, and it remains the biggest threat to the US. With the expansion of ISIL beyond Iraq and Syria to Algeria, Egypt, Libya, Saudi Arabia and Yemen, however, it also threatens US facilities and nationals both in the Middle-East and in the US.<sup>136</sup> It is against this backdrop that

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<sup>132</sup> J Mayer 'Outsourcing torture: The secret history of America's 'extraordinary rendition program' *The New Yorker*, 14 February 2005.

<sup>133</sup> Kibbe (n 99 above) 374.

<sup>134</sup> J Masters 'Targeted killings' 23 May 2013, at <http://www.cfr.org/counterterrorism/targetedkilling/p9627> (accessed 04/06/2013).

<sup>135</sup> KE Boon et al *Global stability and US national security* (2012) 490.

<sup>136</sup> Hearing before the Senate Select Committee on Intelligence: 'Current terrorist threat to the United States', Testimony of Nicholas J Rasmussen (Director, Counterterrorism Center) on 12 February 2015, at [http://www.nctc.gov/docs/Current\\_terrorist\\_threat\\_to\\_the\\_United\\_States.pdf](http://www.nctc.gov/docs/Current_terrorist_threat_to_the_United_States.pdf) (accessed 15/02/2016); see also C Boucek's Congressional testimony, 'Terrorist threat to the US Homeland-Al Qaeda in the Arabian

it becomes difficult to assert that the TK programmes of Israel and the US have been effective. The correctness of the above statement lies in the fact that recent events have shown the potential of the Palestinian groups to sustain the fight against Israel coupled with the unceasing territorial expansionist Jihadi movement of ISIL sweeping through parts of Iraq and Syria in the face of unrelenting TK.

Furthermore, the killing of Bin Laden in Pakistan and the US drone strikes on 17 March 2011 that culminated in massive protests compelled the CIA to make concessions, such as providing Pakistani leaders with advanced notice of targeting operations and also the temporary suspension of operations.<sup>137</sup> The US extraterritorial targeted killing operations lack transparency and accountability, being shrouded in secrecy, thereby denying the public of relevant information relating to the criteria for listing targets. This creates room for the abuse of the process since there is also no Congressional oversight.<sup>138</sup> It is difficult to come to terms with incidental deaths arising from targeting operations. In August 2009, Baitullah Mehsud, a Taliban leader, was targeted in Pakistan in which 12 others, including his wife, parents-in-law and assistants also died, though Mehsud was the only legitimate target.<sup>139</sup>

## 6.6. Conclusion

The US has relied mainly on self-defence and the consent of territorial states in implementing its counter-terrorism policies. While its invasion of Afghanistan is on the basis of self-defence, it pleaded consent in justification of its presence in Pakistan, Yemen and Iraq in while pursuing NSAs. The US extraterritorial forcible measures are generally governed by the rules of interstate use of force *jus ad bellum*. In conducting these measures, the US employs targeted killings, kill-capture missions and punitive military operations against terrorists in different countries pre-emptively and disproportionately with attendant collateral damages. For instance, some commentators have argued that OEF was a disproportionate use of force. While both states profess to adhere to international standards of conducting hostilities, it becomes difficult

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Peninsula (AQAP)' *Carnegie Endowment for International Peace*, at <https://homeland.house.gov/files/Testimony%20Boucak.pdf> (accessed 15/02/2016). Boucek stated that 'the Yemen based al-Qaeda in the Arabian Peninsula (AQAP) has eclipsed "core al-Qaeda" as the primary threat to US national security'.

<sup>137</sup> A Entous *et al* 'US tightens drone rules' *The Wall Street Journal*, 4 November 2011.

<sup>138</sup> A Entous & G Siobhan 'Tensions rising over drone secrecy' *The Wall Street Journal*, 30 December 2011.

<sup>139</sup> Mayer (n 77 above).

to accept their views about compliance with international law in the face of the gravity of their responses in self-defence.

The study found that these methods, particularly TK, have not been very effective in the fight against terrorism, though certain level of short-term benefits are achieved because it removes certain palpable threats to the US in particular and the rest of the world. Though the US has given contentious interpretations of international concepts such as ‘imminence’ with a view to giving itself wider latitude to target NSAs, the multilateral support it counter-terrorism crusade enjoys, is what has shifted the frontiers of the law of self-defence. Thus, the law relative to self-defence, as it is contained in the Charter of the UN and also in the jurisprudence of the ICJ, has been transformed. The next chapter turns to answering the question, ‘whether the law on self-defence has indeed been transformed’.

## Chapter 7

### Has the law of self-defence been transformed?: A contemporary debate

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A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.  
T Jefferson<sup>1</sup>

## 7.1. Introduction

The last chapter provided a comparative study by evaluating the various approaches of the US and Israel to countering terrorism which are designed to use force extraterritorially against terrorist NSAs in the territories of other states. The last chapter found the US has done more than any other state in employing strategies that have transformed the existing law of self-defence.

Proceeding from that premise, this chapter examines the issue of whether the law of self-defence has indeed been transformed from its position. This, the study will do that by evaluating the justifications or reasons for calls by states and commentators to change the law of self-defence. The main reasons this study has identified for advocating the transformation of the law of self-defence are threats from the proliferation of WMD, growth in NSA networks and failed states. The study then examines corresponding calls to reform the UN to cope with the aforementioned three major threats to international peace and security. The role of the US, supported by Israel, in leading a revolution to transform the law of self-defence is also examined to know whether the hegemonic platform the US occupies in world affairs has placed it strategically to change international norms unilaterally. The argument follows the view that foreign policy options or the conduct of superpowers when imitated by less powerful states is capable of changing international law.<sup>2</sup> It has been remarked that ‘norms stem not only from moral considerations, but also from the interest of great powers’.<sup>3</sup>

Some sources of law, such as case law, customary law, writings of the most qualified publicists/commentators and the works of the ILC, will be referred to in the analysis of whether the law of self-defence has changed particularly since the 9/11 attacks to date. The Bush doctrine and resolutions 1368 and 1373 will be evaluated to know whether the requirement of an armed attack under article 51 and the requirement of attribution to trigger a response in self-

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<sup>1</sup> T Jefferson ‘Letter to John B. Colvin, September 20, 1810’ in PL Ford (ed.) *The writings of Thomas Jefferson* (1998) 297.

<sup>2</sup> Y Xuetong ‘International leadership and norm evolution’ (2011) 4 *Chinese Journal of International Law* 234-235.

<sup>3</sup> SR David ‘Israel’s policy of targeted killing’ (2003) 17 *Ethics and International Affairs* 115.

defence against NSAs have completely been dispensed with or whether the required threshold of attribution is merely lowered.

## 7.2. Rationalising the suggestions for a transformation of the law of self-defence

The *jus ad bellum* has been described as a static system from 1945 except to the extent that the UN Charter accommodates self-defence, SC authorization and consent as exceptions to the general prohibition of the use force.<sup>4</sup> The international security system allows no other exception, be it for the purposes of rescuing nationals abroad, saving aliens from human rights abuses, or acting pre-emptively against unforeseen threats.<sup>5</sup> The proliferation of WMD, the growth in transnational terrorism, state failure, regional conflicts and organised crimes have been identified as key threats to contemporary international peace and security<sup>6</sup> that may necessitate a change to the *jus ad bellum* rules from what they were in 1945. This view is in agreement with the Protean *jus ad bellum* which is to the effect that while the static view was previously appropriate, contemporary challenges to the international security architecture have made it imperative for corresponding changes in the practical application of the *jus ad bellum* to these challenges even without a normative re-codification of the relevant norms.<sup>7</sup>

Also rationalising the need to change the existing *jus ad bellum*, President Bush argued that the cold war doctrines of deterrence and containment upon which it previously relied may not be relevant in most cases, particularly against shadowy terrorist networks and unbalanced dictators in possession of WMD. According to him, these new threats require new thinking.<sup>8</sup> The contemporary challenges this study will consider include the proliferation of WMD, grave threats from transnational terrorist organisations and threats posed by failed states.<sup>9</sup> These

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<sup>4</sup> SD Murphy 'Protean *jus ad bellum*' (2009) 27 *Berkeley Journal of International Law* 22.

<sup>5</sup> Murphy (n 4 above) 22.

<sup>6</sup> C Gray *International law and the use of force* (2008) 214-215; A secure Europe in a better world: European Security Strategy 2003, at <http://www.consilium.europa.eu/uedocs/cmspload/78367.pdf> (accessed 01/10/2015).

<sup>7</sup> Murphy (n 4 above) 23, 26.

<sup>8</sup> President Bush 'Commencement address at the United States Military Academy at West Point' *The New York Times*, 1 June 2002.

<sup>9</sup> Murphy (n 4 above) 23, where he stated that: (1) the emergence of weapons of mass destruction of various types potentially controllable by states and non-state actors; (2) the rise of global terrorism as a mechanism for projecting violence against states by non-state actors; (3) the elevation of the person to a central place in the realm of international law, both in terms of being protected and in terms of being held accountable for misconduct; (4) the inability of all states to accept the Security Council as a disinterested arbiter willing and capable of acting to address all threats to international peace and security as they arise; and (5) the continuing erosion of the sanctity of the sovereign state, resulting from exposure to myriad effects of globalization, including intrusive transnational rule of law programs, election monitoring, incessant and extensive media



threats are all linked to NSAs because it is feared that they may acquire and use these WMD, and they may also use the failed states as launching pads for cross-border terrorist attacks. The response to these fears by states has largely been responsible for a change in the law of self-defence.

### 7.2.1. Proliferation of weapons of mass destruction

The proliferation of WMD has been described as potentially the greatest threat to international security, and the need to stop their spread remains a priority in the collective security agenda.<sup>10</sup> This is why the SC called on all states to refrain from supporting NSAs in the development, acquisition, manufacture and transportation of WMD.<sup>11</sup> While suggestions have been made to widen the latitude for states to use force with a view to stemming these threats, commentators have argued that international law does not permit the use of force without SC authorisation in dealing with arms control, whether to prevent nuclear or a chemical weapons programme or the shipment of arms.<sup>12</sup> Even a weapon making capacity does not give rise to an imminent threat that may necessitate the use of force.<sup>13</sup> Nevertheless, the truth remains that the advancement in technology and biological sciences has increased the likelihood of attacks with nuclear, chemical, biological and radiological weapons by rogue states and terrorist groups. In this regard, President Bush stated:

The gravest danger to freedom lies at the perilous crossroads of radicalism and technology. When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology, occurs even weaker states and small groups could attain a catastrophic power to strike great nations.<sup>14</sup>

States are, therefore, genuinely apprehensive that, in the event of acquisition of these weapons by terrorists, coupled with the spread of missile technology, there is the possibility of large-scale violence that may pose a challenge to the international security architecture.<sup>15</sup> The existing law on the use of force is being challenged because of improved technology culminating in the production of WMD. Hence it is argued that there is a corresponding need to transform the character of the international norms and institutions to provide a standard of

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coverage, powerful transnational corporations and nongovernmental organizations, and relatively unrestricted movement of capital, goods, and persons across borders.

<sup>10</sup> A more secure world: Our shared responsibility, Report of the High-level Panel on threats, Challenges and Change, UN Doc. A/59/565, para 107.

<sup>11</sup> S/RES/1540 of 28 April 2004.

<sup>12</sup> ME O'Connell & R El Molla 'The prohibition on the use of force for arms control: The case of Iran's nuclear program' (2013) 2 *Penn State Journal of Law & International Affairs* 315.

<sup>13</sup> Gray (n 6 above) 212.

<sup>14</sup> President Bush 'Commencement address at West Point' (n 8 above).

<sup>15</sup> European Security Strategy 2003, (n 6 above) 3-4.

behaviour for the relations of states.<sup>16</sup> Justifications and serious concerns have been expressed regarding the need to formulate new rules to address the issue of weapons proliferation. Kofi Annan has remarked that, ‘On the Korean Peninsula and elsewhere, the threat of nuclear proliferation casts an ominous shadow across the landscape’.<sup>17</sup> North Korea is alleged to be one of the greatest proliferating states with potential recipients that include Iran, Syria and even NSAs.<sup>18</sup> Annan also identified a combination of new forms of terrorism and the proliferation of WMD as the new threats faced by the international community. To him, these are threats that affect every nation, but the problem is how to respond to these threats. He recognizes dealing with such threats by containment and deterrence based on the collective security system and self-defence under article 51 of the Charter. But some commentators and states have argued that since an armed attack with WMD could be launched at any time, without warning, or by a clandestine group, states should exercise the right and obligation to use force pre-emptively even in the territories of other states rather than wait for armed attacks.<sup>19</sup> According to Annan, if adopted, this reasoning ‘would set precedents that resulted in a proliferation of the unilateral and lawless use of force, with or without justification’.<sup>20</sup> Arguably, while there is consensus in terms of identification of these threats to international security and the need to contain them, states and commentators have relied on different approaches to these threats. In fact the views of President Bush and Kofi Annan represent the opposing views.

Furthermore, the Secretary General’s High-level Panel has considered the stopping of the proliferation of nuclear weapons and their use by states and NSAs as an urgent priority for the collective security.<sup>21</sup> The Panel expressed the fear that states, while being parties to the Treaty on Non-proliferation of Nuclear Weapons, covertly acquire materials and expertise to develop WMD, and, when they are ready for ‘weaponization’, they withdraw from the treaty to avoid legal constraints.<sup>22</sup> The report found that there are stockpiles of about 1,300 kilograms of highly enriched uranium (HEU) in 27 countries and there have been 200 incidents of illicit trafficking

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<sup>16</sup> DH Joyner ‘*Jus ad bellum* in the age of WMD proliferation’ (2008) 40 *George Washington International Law Review* 233.

<sup>17</sup> UN GAOR, 58<sup>th</sup> Session, 7<sup>th</sup> Meeting at 2, UN Doc. A/58/PV.7 of 23 September 2003.

<sup>18</sup> M Byers ‘Policing the high seas: The Proliferation Security Initiative’ (2004) 98 *American Journal of International Law* 527.

<sup>19</sup> President Bush ‘Commencement address at West Point’ (n 8 above), where he argued that America must take the battle to the enemy, disrupt his plans and confront the worst threats before they emerge, and he urged the military to be ready for pre-emptive action.

<sup>20</sup> UN GAOR, 58<sup>th</sup> Session, 7<sup>th</sup> Meeting at 3, UN Doc. A/58/PV.7 of 23 September 2003.

<sup>21</sup> Report of the High-level Panel, (n 10 above) para 107.

<sup>22</sup> Report of the High-level Panel, (n 10 above) paras 108-109.

in nuclear materials.<sup>23</sup> There is, thus, the possibility of the acquisition of nuclear weapons even by NSAs.

There is the general understanding that during the cold war era the possession of nuclear weapons by the Soviet Union and the US brought about a nuclear deterrence that culminated in some form of peaceful co-existence between the world powers, but their proliferation may result in unimaginable risks.<sup>24</sup> Nuclear deterrence results in some degree of stability because all nuclear powers are cognizant of the fact that they cannot call into use such weapons without also invoking corresponding danger on themselves.<sup>25</sup> But, according to Glennon, the more states that acquire nuclear weapons, the more the likelihood of their rational and irrational use,<sup>26</sup> particularly in an era where even NSAs are also bracing up for acquisition of these WMD, unlike the situation when there was great-power peace for 65 years when the Soviet Union and US alone had these weapons in their arsenals.<sup>27</sup>

Even before the 9/11 attacks, proactive unilateral and coalition based counter-proliferation efforts were being made to deny certain states and NSAs from obtaining WMD or related materials and technologies.<sup>28</sup> Apart from unilateral efforts being made particularly by the US to check proliferation of WMD by way of entering into bilateral agreements with other states to accord each other the right to board, search, or detain and seize missiles of WMD cargo,<sup>29</sup> there are, thus, also certain multilateral efforts in that regard. For instance, the Treaty on Non-proliferation of Nuclear Weapons (NPT) with a membership of about 190 states entered into force on 5 March 1970, and it remains the foremost multilateral instrument with the objective of preventing the spread of nuclear weapons and weapons technology.<sup>30</sup> Several states have formed the Proliferation Security Initiative (PSI) with the intention of collaborating to intercept

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<sup>23</sup> Report of the High-level Panel, (n 10 above) para 112.

<sup>24</sup> MJ Glennon 'Pre-empting proliferation: International law, morality and nuclear weapons' (2013) 24 *European Journal of International Law* 109-110.

<sup>25</sup> J Joffe & JW Davis 'Less than Zero: Bursting the new disarmament bubble' (2011) 90 *Foreign Affairs* 10.

<sup>26</sup> Glennon (n 24 above) 110.

<sup>27</sup> Joffe & Davis (n 25 above) 11.

<sup>28</sup> Joyner (n 16 above) 237.

<sup>29</sup> Art 3 of the Agreement between the Government of the United State of America and the Government of the Republic of Liberia Concerning the Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea, 2004; Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, 2004; see also National Strategy to Combat Weapons of Mass Destruction 2002, at <http://www.state.gov/documents/organisation/16092.pdf> (accessed 10/10/2015); National Security Strategy of the United States 2006.

<sup>30</sup> Arts 1 & 2 of the Treaty on the Non-proliferation of Nuclear Weapons 1968.

or stop the movement or shipment of WMD, related items or technologies from one point or country to another.<sup>31</sup> The collaboration of states under the auspices of the PSI to stop, search and, if necessary, seize vessels and aircraft believed to be transporting WMD appears to be paying-off. For instance, in December 2002 a North Korean freighter *So San* which was crossing the Arabian Sea was intercepted by Spanish officials.<sup>32</sup> In addition, a successful seizure of a German freighter, the *BBC China* destined for Libya while transporting parts of gas centrifuges for uranium enrichment was done at an Italian port, which incident may also have persuaded Libya to abandon its WMD programme.<sup>33</sup>

While there are some feasible successes in the collaboration of states to interdict the movement of weapons, certain nuclear power aspiring states, like India, Pakistan and North Korea, have shown reluctance to cooperate with the PSI.<sup>34</sup> In fact North Korea described the activities of the PSI as ‘a brigandish naval blockade’.<sup>35</sup> The uncooperative attitude is brought about by the feeling of some states that the manufacturing and exporting of weapons attach to the sovereign rights of a state.<sup>36</sup> The desire for greater latitude by certain states to interdict, board and search foreign shipping to curb trafficking in weapons must, thus, be done cautiously and must comply with the legal regimes on the right of navigation. This caution is important because the resolve by some states to deny at all costs the illegal boarding of their vessels to protect their sovereignty on the high seas has accounted for armed conflicts.<sup>37</sup> The call for caution becomes even more compelling when regard is given to the calls by both the US and commentators that article 51 of the UN Charter can be invoked to intercept foreign-flagged ships suspected of conveying WMD to NSAs.<sup>38</sup>

That apart, the ‘Global Zero’ organisation has since called for the phased verified elimination of all nuclear weapons worldwide with a view to terminating nuclear threats through

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<sup>31</sup> Byers (n 18 above) 526; Joyner (n 16 above) 238-239.

<sup>32</sup> Byers (n 18 above) 526, The North Korean freighter *So San* was intercepted on the request of the US and searched. It was carrying 15 Scud missiles that were hidden under the bags of cement listed in the manifest which were destined for Yemen. Yemen accepted that they were being delivered to it.

<sup>33</sup> Byers (n 18 above) 529; see also R Wright ‘Ship incident may have swayed Libya, centrifuges intercepted in September’ *Washington Post*, 1 January 2004, at A18; E Sanger ‘After ending arms program, Libya receives surprise’ *New York Times*, 29 May 2004, at A6.

<sup>34</sup> MR Shulman ‘The Proliferation Security Initiative and the evolution of the law on self-defence’ (2006) 28 *Houston Journal of International Law* 804.

<sup>35</sup> Shulman (n 34 above) 804.

<sup>36</sup> SE Logan ‘The Proliferation Security Initiative: Navigating the legal challenges’ (2005) 14 *Journal of Transnational Law & Policy* 253, 268.

<sup>37</sup> Articles 92 & 110 of the UN Convention on the Law of the Sea (UNCLOS); Shulman (n 34 above) 771, 803-804; see also MA Fitzgerald ‘Seizing weapons of mass destruction from foreign-flagged ships on the high seas under article 51 of the UN Charter’ (2009) 49 *Virginia Journal of International Law* 474-475.

<sup>38</sup> Byers (n 18 above) 526, 545; see also Fitzgerald (n 37 above) 476-477, 481.

proliferation and nuclear terrorism.<sup>39</sup> Other prevention methods of proliferation of WMD (employed mainly by Israel and the US), although they remain controversial, include the interdiction of transfers of sensitive items and the pre-emptive use of force against actual and potential possessors of WMD.<sup>40</sup> Accordingly, the forcible measures the US and her allies brought to bear on Iraq also contributed to the suspension of weaponisation by Libya and Iran in 2003.<sup>41</sup> The coordinators of the Global Zero movement, Blair, Brown and Burt, have argued that, although force may be relevant in the fight against proliferation, it is not an effective way of stopping the spread of nuclear weapons because ‘the US nuclear bombing of Japan in 1945, accelerated, rather than discouraged, the Soviet Union’s lagging nuclear weapons program.’<sup>42</sup> Nevertheless, it is this study’s view that just as the attack on Iraq in 2003, though erroneous, deterred both Libya and Iran from accelerating their own nuclear programmes, the use of force, if authorised by the SC, remains one of the best options in the fight against weapons proliferation. States in violation of non-proliferation regimes may be dealt with upon invoking the Chapter VII powers of the SC which has repeatedly advocated non-proliferation and affirmed that proliferation constitutes a threat to international peace and security.<sup>43</sup> It was the apprehension over perceived development and proliferation of WMD that the US 2002 NSS referred to Iran, Iraq and North Korea as the ‘axis of evil’ and the subsequent employment of pre-emptive force against Iraq in 2003 over non-existent WMD.<sup>44</sup> In purportedly controlling development and shipment, Israel also employed military force against Iraq in 1981, Sudan in 2009 and Syria in 2007 and 2013 respectively.<sup>45</sup> The fact that Iraq possessed no WMD was confirmed both by the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) and the International Atomic Energy Agency (IAEA).<sup>46</sup> The IAEA is a global

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<sup>39</sup> Joffe & Davis (n 25 above) 7.

<sup>40</sup> JD Ellis ‘The best defence: Counterproliferation and the US National Security’ (2003) *Washington Quarterly* 115-117; RS Litwak ‘The new calculus of pre-emption’ (2002) 44 *Survival* 53, 54; Joyner ‘The proliferation security initiative: Non-proliferation, counter-proliferation, and international law’ (2005) 30 *Yale Journal of International Law* 507, 520.

<sup>41</sup> Joffe & Davis (n 25 above) 9.

<sup>42</sup> B Blair et al ‘Can disarmament work? Debating the benefits of nuclear weapons’ (2011) 90 *Foreign Affairs* 174.

<sup>43</sup> S/RES/687 of 8 April 1991; S/RES/1172 of 6 June 1998, paras 7 & 8; S/RES/1373 of 28 September 2001 and S/RES/1540 of 28 April 2004.

<sup>44</sup> Gray (n 6 above) 210; C Gray ‘The Bush doctrine revisited: The 2006 National Security Strategy of the USA’ (2006) 5 *Chinese Journal of International Law* 561.

<sup>45</sup> O’Connell & El Molla (n 12 above) 321.

<sup>46</sup> ‘Hans Blix’s briefing to the Security Council’ *The Guardian*, 14 February 2003. A combination of UNMOVIC and IAEA inspectors numbering over 250 persons from 60 countries worked for 11 weeks and conducted about 400 inspections in more than 300 sites. Hans Blix reported thus: ‘The results to date have been consistent with Iraq’s declarations.’ Blix asked the question, ‘How much, if any, is left of Iraq’s weapons of mass destruction and related proscribed items and programmes?’ He answered thus: ‘So far, UNMOVIC has not found any such weapons, only a small number of empty chemical munitions, which

platform for nuclear security with duties ranging from norm formulation, raising awareness and verifying countries that are diverting nuclear materials from peaceful activities to nuclear weapons.<sup>47</sup> Unfortunately, these prevention strategies have not succeeded in curbing the proliferation of WMD, hence the calls for the transformation of the law on self-defence to permit novel measures, including pre-emptive force against NSAs.

### 7.2.2. Grave threats from transnational terrorist organisations

The incidents of transnational terrorism have increased in recent times owing to religious extremism, pressures of modernisation, political differences and the alienation of young persons living in developed foreign societies.<sup>48</sup> The growing number of terrorist cells and networks, such as Al Qaeda, ISIL, AQAP, Al-Nusrah Front (ANF), al-Shaabab, Boko Haram and others, poses serious challenge to the international security system. Devastating trans-border terrorist activities have been conducted by these groups in several countries. Among the most prominent of these activities were the 9/11 attacks on the US in 2001 and the US embassy attacks in Kenya and Tanzania in 1998. Also, on 11 March 2004, a series of bombs exploded within minutes of each other on four commuter trains in Madrid, Spain, killing 198 people and injuring 1,400 others.<sup>49</sup> Similar commercial train attacks were carried out on 7 July 2005 when bombs targeting the London underground train stations and a bus exploded killing 56 people and injuring 700 others.<sup>50</sup> Although it was apparent that transnational terrorist organisations possessed the capacity to carry out cross-border attacks against states, the 9/11 attacks raised such awareness to an unanticipated level, particularly when regard is given to the casualties from that single attack.<sup>51</sup> Furthermore, apart from the apprehension that WMD may be acquired by the transnational terrorist organisations necessitating the establishment of the Convention

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should have been declared and destroyed'; see also SA Squassoni 'Iraq: U.N. inspections for weapons of mass destruction' CRS Report for Congress 13-17, October 7, 2003, where it was stated that both Hans Blix (Chairman of UNMOVIC) and Mohammed ElBaradei (Director-General of the IAEA) have reported to the Security Council that the inspectors had found no evidence of ongoing prohibited nuclear or nuclear related activities in Iraq.

<sup>47</sup> Speech of Director-General Yukiya Amano 'Challenges in nuclear verification: The IAEA's on the Iranian nuclear issue' 31 October 2014, at <http://www.iaea.org/newscenter/statements/challenges-nuclear-verification-iaea%E2%80%99s-role-iranian-issue> (accessed 05/11/2015); T Findley 'Discussion paper: The IAEA's nuclear security role' June 2013, at [http://www.nti.org/media/pdfs/IAEA\\_Nuclear\\_Security\\_Role\\_3.pdf](http://www.nti.org/media/pdfs/IAEA_Nuclear_Security_Role_3.pdf) (accessed 05/11/2015).

<sup>48</sup> European Security Strategy 2003, (n 6 above) 3.

<sup>49</sup> C Vitzthum & K Johnson 'Train bombings kill at least 198 in Spain' *The Wall Street Journal* 12 March 2004.

<sup>50</sup> Report of the Official Account of the bombings in London on 7<sup>th</sup> July 2005, 2, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228837/1087.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228837/1087.pdf) (accessed 23/10/2015).

<sup>51</sup> Murphy (n 4 above) 34.



on Nuclear Terrorism,<sup>52</sup> there is also the fear that they may concoct biological weapons with bacteria, viruses and toxins capable of disseminating infectious diseases that previously existed only naturally or have never existed at all.<sup>53</sup> While singling out Al Qaeda, the High-level Panel found terrorism to be an affront to the values that lay at the heart of the UN Charter because it violates human rights, the rule of law, the protection of civilians and the peaceful modalities of conflict resolution.<sup>54</sup> According to the Panel, the urgency of tackling the new threats posed by terrorism is underscored by the attacks on UN member states by Al Qaeda and its continuing threat to the UN.<sup>55</sup>

The threat to international peace and security by terrorism appears to be more of a concern now than it was at the time of the 9/11 attacks. The little relief that states witnessed as a result of weakening the central command of Al Qaeda in Afghanistan seems to have evaporated. The ISIL, a splinter group of the original Al Qaeda which metamorphosed from the Iraqi branch of the organisation, poses a greater threat than Al Qaeda with its desire to replace certain regimes in the Middle East with an Islamic Caliphate to be administered according to the Sharia Code.<sup>56</sup> The ISIL appears to be much more formidable in its terrorist activities, having regard to its expansionist goals, culminating in the massacre of Iraqi and Syrian soldiers and civilians along ethnic and religious lines, the control of financial and natural resources, the control of refineries, the destruction and smuggling of antiquities, the capturing of cities and the surge by volunteer Islamic fighters to join ISIL forces in Iraq and Syria.<sup>57</sup> The SC has, by virtue of resolution 2170, condemned the activities of ISIL and the ANF in Iraq and Syria and, by Annex 1 of the resolution, imposed sanctions on some members of these groups.<sup>58</sup> The threats from these NSAs have made a transformation of the law of self-defence imperative, so as to allow for the use of force against these NSAs with diminished attribution of their conduct to other states.

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<sup>52</sup> International Convention for the Suppression of Acts of Nuclear Terrorism, A/RES/59/290 of 13 April 2005.

<sup>53</sup> Murphy (n 4 above) 36.

<sup>54</sup> Report of the High-level Panel (n 10 above) para 145.

<sup>55</sup> Report of the High-level Panel (n 10 above) para 146.

<sup>56</sup> M Doran 'The pragmatic fanaticism of Al Qaeda: An anatomy of extremism in the Middle East politics' (2002) 117 *Political Science Quarterly* 177; E Benvenisti 'The US and the use of force: Double-edged hegemony and the management of global emergencies' (2004) *European Journal of International Law* 679-680.

<sup>57</sup> C Cirlig 'The international coalition to counter ISIL/Da'esh (the "Islamic State")' *European Parliamentary Research Service (EPRS)*, 2, March 17, 2015.

<sup>58</sup> S/RES/2170 of 15 August 2014.

### 7.2.3. Failed States

State failure, which is brought about by bad governance, abuse of power, corruption, weak institutions and a lack of accountability which was discussed in chapter 3 above, invariably leads to an increase in terrorism. This is because failed states provide the enabling environment, such as safe havens, sanctuary or ungoverned territories, for terrorist groups to use as bases from which to launch cross-border attacks.<sup>59</sup> Owing to the ineffective control of territorial borders by the failed states, NSAs may exploit the porous borders to traffic in nuclear material and technology.<sup>60</sup> The state failure phenomenon has nothing to do with the unwillingness of the failed state to prevent attacks from its territory, but the state is incapable of preventing terrorist NSAs from using its territory.<sup>61</sup>

Although there may exist no functional government in a failed state to whom the conduct of terrorists may be imputed in consonance with the law of attribution to warrant a response in self-defence, it is argued that self-defence ought to be used against NSAs in failed states. This is because such failed states may provide safe havens for terrorist groups if their victim states are barred from exercising any right of self-defence. For instance, Ethiopia relied on a similar argument to strike at the Union of Islamic Court's (UIC) bases in Somalia (a failed state), just as Israel also invoked the incapacity of Lebanon to prevent terrorist attacks from the ungoverned parts of its territory. Furthermore, Turkey, Rwanda, Iran and several other countries have invoked the inability of their neighbouring countries to prevent terrorist attacks from their territories as their justification to attack failed states.<sup>62</sup> Ruys and Verhoeven have, however, argued that attacks against failed states cannot serve as legal precedents because most of the aforementioned invasions were condemned by the SC<sup>63</sup>, and failed states remain sovereign states protected by the Charter prohibition of the use of force. The incapacity to govern parts of a state's territory effectively does not mean loss of sovereignty.<sup>64</sup>

Arguably, it appears difficult to support the contention that no action should be taken against failed states because there is no functional government upon whose shoulders attribution of the conduct of NSAs may be placed. If such reasoning is accepted, terrorist activities from such

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<sup>59</sup> European Security Strategy 2003, (n 6 above) 4.

<sup>60</sup> Report of the High-level Panel, (n 10 above) paras 20-21.

<sup>61</sup> T Ruys & S Verhoeven 'Attacks by private actors and the right of self-defence' (2005) 10 *Journal of Conflict & Security Law* 317.

<sup>62</sup> Ruys & Verhoeven (n 61 above) 317.

<sup>63</sup> S/RES/474 of 17 June 1980; S/RES/483 of 17 December 1980.

<sup>64</sup> Ruys & Verhoeven (n 61 above) 318.

failed states may be limitless because armed groups will rely on the sovereignty of the failed state as protection to flourish. This study suggests that in the absence of a functioning government upon which to attribute a lowered threshold of harbouring NSAs, prior authorisation of the SC be secured in addition to the reliance on self-defence before attacks on such ungoverned territories. This may avoid opening the flood-gates of unwarranted raids in purported self-defence by powerful states, where motives could even be the desire to control natural resources in such territories.

The three criteria this study has identified above<sup>65</sup> as reasons for the call for a change to the law of self-defence are not the only reasons. Some commentators have instead found justification for forcible intervention in the territory of another state on the basis of humanitarian catastrophes to defend foreign populations that are the targets of aggression.<sup>66</sup> In the face of these threats, however, all members of the international community, particularly Israel and the US, must come to terms with the fact that the essence of the Charter regime is to reduce or eliminate individual state discretion to determine and respond to security threats, except in limited instances of self-defence which itself is contingent upon the occurrence of an armed attack. This explains the rationale behind assigning discretionary powers to the SC.<sup>67</sup>

In responding to any of the aforesaid threats if they become imminent, the High-Level Panel does not rule out the use of force, but argues that such employment of the use of force must be based on long established principles of international law such as necessity, proportionality and imminence.<sup>68</sup> The Panel enjoined decision-makers generally to consider the following criteria before use of military action. These include: (a) seriousness of the threat of harm to the state or human security; (b) proper purpose of the intended military action which must be to halt or avert the threat in question; (c) it must be employed only as last resort after non-military options have been explored without success; (d) the scale, duration and intensity of the proposed military action must be proportional to the threat in question; and (e) there must be a balance of consequences, that is, whether there is a reasonable chance of the military action being successful.<sup>69</sup> While the Panel saw no justification for a unilateral response to non imminent or non palpable threats, it, however, advised states with a good reason to employ force pre-

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<sup>65</sup> Gray (n 6 above) 214-215.

<sup>66</sup> Benvenisti (n 56 above) 686.

<sup>67</sup> Benvenisti (n 56 above) 687.

<sup>68</sup> Report of the High-level Panel, (n 10 above) para 188.

<sup>69</sup> Report of the High-level Panel, (n 10 above) para 106.

emptively to bring such proposals before the SC for due consideration.<sup>70</sup> The Charter provides powerful nations with permanent membership of the SC and the cautious use of the veto for the common good and expects these powers to promote and obey international law.<sup>71</sup>

### **7.3. Proposals to reform the United Nations to cope with the new threats to international peace and security**

The rise in transnational terrorism, the proliferation of WMD and the increased number of failed states, being threats to international peace and security, have led to calls for the reformation of the UN, the body charged with the responsibility of maintaining international peace and security. The proponents of reforms have proposed a reformation of both the institutional framework (touching on the political organs) and the normative framework (touching on the UN constitutive instrument). Commentators have argued that the UN security system, as it is presently constituted, has loopholes in the traditional rules regulating the use of force<sup>72</sup> and the traditional military components for the deterrence of these threats are inadequate.<sup>73</sup> As far back as 1992, proposals for institutional reforms in the UN were made by Germany and Japan when they proposed their inclusion as permanent members of a proposed reformed SC, just as similar calls for reforms were made by the 118 member Non-aligned Movement (NAM).<sup>74</sup> The NAM and other bodies advocating the enlargement of the SC believe that the Council's membership will be more representative, if reformed, so that the development of the UN will be in accordance not only with the views of those powers that created it in 1945. Another imperative for reform, argued the proponents, is that transformations have occurred in several areas of human endeavour, and, if the UN resists change in a changing world, it could either die or be relegated to the margins of international life, thereby giving states, bracing up for change, the opportunity to turn away in frustration.<sup>75</sup>

As indicated above, the reformists propose normative changes to the security system as well, arguing that these new security threats and challenges were not contemplated when the rules

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<sup>70</sup> Report of the High-level Panel, (n 10 above) para 190.

<sup>71</sup> Report of the High-level Panel, (n 10 above) para 4, while quoting Harry Truman (former US President) stated: 'we all have to recognize-no matter how great our strength-that we must deny ourselves the licence to do always as we please.'

<sup>72</sup> M Wood 'The Law on the Use of Force: Current Challenges' (2007) 11 *Singapore Year Book of International Law* 4.

<sup>73</sup> J Preece 'The elephant in the room: Anticipatory force and the North Atlantic Treaty Organisation' 1, <http://www.community.org/app/webroot/files/articlepdf/Preece.pdf> (accessed 26/10/2014).

<sup>74</sup> H Strydom 'Chronicles of United Nations reform' (2006) 31 *South African Yearbook of International Law* 124.

<sup>75</sup> D Bourantonis *The history and politics of the UN Security Council reform* (2005) Routledge 7.

on the prohibition of force were formulated. They, therefore, call for some degree of flexibility for states to adopt strategies to deal with these challenges and stressed the need to increase the use of force to cope with the evolving security threats. Weiner,<sup>76</sup> Turner,<sup>77</sup> and Wedgwood<sup>78</sup> are all proponents of the thinking that the contemporary legal regime is obsolete and, therefore, ill-suited to contain security threats from terrorist suicide bombers and WMD. Glennon puts it more bluntly when he contends that member states of the UN have changed their intent on the Charter rules, and, therefore, the rules have no more binding effect, member states having been engaged in over 100 inter-state wars.<sup>79</sup> To him, the question is no longer whether the Charter's use of force regime has failed, but why it has failed, what legal consequences obtain, and whether the fact that some policy-makers or regions honour existing rules is immaterial.<sup>80</sup> The contention is that the grand attempt and all the efforts geared towards subjecting the use of force to the rule of law have crumbled because the legalist institution has been subdued by geopolitical forces.<sup>81</sup> In consonance with this thinking, which lacked broad support, Glennon has even canvassed for the by-passing of the SC by those states seeking authorisation to use force, and instead argues that 'NATO and the new rules on the use of force had replaced the UN system for peace and security.'<sup>82</sup> The desuetude in Glennon's view is brought about by the disregard and breach of existing international rules, thereby causing a new rule to emerge.<sup>83</sup>

It is difficult to agree with Glennon that the UN security system, which is founded on the Charter, has collapsed because its provisions are disregarded by certain states or because such states continue to engage in inter-state wars. His arguments would have been in agreement with the views of other commentators if he had also called for an amendment of the Charter or reforms. Arguably, the fact that certain states, such as the US and Israel, disregard some of the Charter provisions cannot be interpreted as meaning that other states are not restrained by the

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<sup>76</sup> A Slaughter & W Burke-White 'An international constitutional moment' (2002) 43 *Harvard International Law Journal* 1, 2.

<sup>77</sup> R Turner 'Operation Iraqi Freedom: Legal and Policy Considerations' (2004) 27 *Harvard Journal of Law and Public Policy* 765, 793.

<sup>78</sup> R Wedgwood 'The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defence' (2003) 97 *American Journal of International Law* 576, 793.

<sup>79</sup> MJ Glennon 'How war left the law behind' *New York Times*, 21 November 2002, A33; MJ Glennon 'Preempting terrorism: The case for anticipatory self-defence,' *Weekly Standard*, 24, January 28 2002.

<sup>80</sup> MJ Glennon 'Pre-empting proliferation: International law, morality and nuclear weapons' (2013) 24 *European Journal of International Law* 111, 114.

<sup>81</sup> MJ Glennon 'Why the Security Council Failed' (2003) 82 *Foreign Affairs* 16; see also Strydom (n 73 above) 120.

<sup>82</sup> MJ Glennon 'The new interventionism: The search for a just international law' (1999) 78 *Foreign Affairs* 2.

<sup>83</sup> MJ Glennon 'How international rules die' (2005) 93 *Georgetown Law Journal* 939, 940-942. Glennon stated: 'My theory is that excessive violation of a rule, whether embodied in custom or treaty, causes the rule to be replaced by another rule that permits unrestricted freedom of action'.

Charter prohibition on the use of force. Even the US and Israel, though failing in certain instances to keep their international obligations, have not out-rightly argued that they are not bound by the Charter. Rather, they seek to defend their unlawful conduct by appealing to exceptions or justifications contained in the Charter.<sup>84</sup> This explains why they almost always rely on resolutions of the SC, as was the case in the OIF, and on self-defence under article 51 of the Charter. According to the decision in the *Nicaragua case*, (though not in this regard) to know whether a particular rule is established, it is sufficient that the conduct of states should, in general, be consistent with such a rule because compliance with the rules need not be perfect or total.<sup>85</sup>

Conversely, other commentators and UN bodies have contended that the international law rules as they exist today, particularly the UN Charter, are flexible enough to cope with the emerging new threats in the world.<sup>86</sup> Given that loopholes existed in earlier treaties (Covenant of the League of Nations and the Kellogg Briand Pact) and an absolute ban was not contemplated in their formulation, the UN Charter in its present form is believed to be adequate to meet the challenges to World peace and security.<sup>87</sup> The argument is that the international legal system will survive and cope with terrorism and breaches of international law by powerful states.<sup>88</sup> What is required, however, is the political will of member states to enforce the norms prohibiting the use of force.<sup>89</sup> In fact, the UN General Assembly also confirmed in similar vein the adequacy of the existing normative framework to cope with the new security challenges.<sup>90</sup>

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<sup>84</sup> A von Bogdandy & R Wolfrum 'The attack of September 11, 2001, the wars against the Taliban and Iraq: Is there a need to reconsider international law on the recourse to force and the rules in armed conflict?' (2003) 7 *Max Planck Yearbook of United Nations Law* 3-4.

<sup>85</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, I.C.J. Reports 1986, 14, para 186, where the Court held that: 'If a State acts in a way prima facie incompatible with a recognised rule, but defends its conduct by appealing to the exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.'

<sup>86</sup> Report of the High-level Panel (n 10 above) para 192 stated that: 'We do not favour the rewriting or reinterpretation of Article 51'; Secretary-General's report 'In larger freedom: towards development, security and human rights for all' UN Doc. (A/59/2005), Kofi Annan stated in para 123 '... I believe the Charter of our Organization, as it stands, offers a good basis for the understanding that we need'; 2005 World Summit Outcome Document, (A/RES/60/L.1) of 24 October 2005, para 79 thereof provides: 'We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter'.

<sup>87</sup> World Summit Outcome Document (n 86 above) para 79; Report of the High-Level Panel (n 10 above) paras 185-203; Report of the Secretary-General (n 86 above) paras 122-126.

<sup>88</sup> D McGoldrick 'From '9-11' to the 'Iraq war 2003': *International law in an age of complexity*' (2004) 22 - 23; V Lowe 'The Iraq crisis: What now' (2003) 52 *International and Comparative Law Quarterly* 864.

<sup>89</sup> Wood (n 72 above) 4-5; AS Weiner 'The use of force and contemporary security threats: Old medicine for new ills?' (2006) 59 *Stanford Law Review* 420.

<sup>90</sup> World Summit Outcome Document (n 85 above) para 79.



It was stated, however, that what the international community needs are not new rules, but the political will or consensus on the part of member states, the SC and potential troop-contributing states to tackle these problems, even in the extreme circumstances of resorting to the use of force. Wood argues that the international system is capable of responding to current and future threats from overwhelming humanitarian catastrophes, rogue States, transnational terrorist groups and WMD.<sup>91</sup>

Under the auspices of the UN, specific efforts have been made in response to calls for the reformation of the UN with a view to assessing the propriety or otherwise of such calls for reformation. Firstly, the High-Level Panel set up by then Secretary-General, Kofi Annan, reached the conclusion that the Charter rules are adequate to cope with any threat to international peace and security and it, therefore, saw no rationale for altering the rules regulating the use of force. The Panel stated: ‘We do not favour the rewriting or reinterpretation of Article 51’.<sup>92</sup> Secondly, in his report to the General Assembly on 21 March 2005 entitled ‘In larger freedom: towards development, security and human rights for all’, Kofi Annan also stated that there need not be an alteration of the Charter rules. He stated ‘... I believe the Charter of our Organisation, as it stands, offers a good basis for the understanding that we need’.<sup>93</sup> Thirdly, in a World Summit of Heads of State and Government held in New York from 14 to 16 September 2005, the Summit reaffirmed the sufficiency of the Charter to tackle the full range of threats to international peace and security. The Summit further reaffirmed the importance of an effective multilateral system in accordance with international law and abiding by the Charter to address multifaceted and interconnected threats and challenges, thereby showing abhorrence of the unilateral use of force.<sup>94</sup> The Summit resolved to enhance the relevance, effectiveness, efficiency, accountability and credibility of the UN system.<sup>95</sup>

## **7.4. United States and the transformation of the law of self-defence**

### **7.4.1. United States hegemony and the transformation of the law of self-defence**

The disappearance of the bi-polar world consequent upon the collapse of the Union of Soviet Socialist Republic (USSR) in the 1990s has undoubtedly witnessed the emergence of a uni-

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<sup>91</sup> Wood (n 71 above) 5, 13-14.

<sup>92</sup> Report of the High-Level Panel, (n 10 above) para 192.

<sup>93</sup> Report of the Secretary-General (n 86 above) para 123.

<sup>94</sup> World Summit Outcome Document (n 86 above) paras 6-7, 77-78.

<sup>95</sup> World Summit Outcome Document (n 86 above) para 15.

polar era in which the US is the single super-power and dominant player in world affairs. This development witnessed the resultant erosion of mutual deterrence which the US and the USSR hitherto exercised over their allies and client states thereby creating the impression that the US alone and perhaps the ‘coalition of the willing’ are saddled with the responsibility of tackling international security threats.<sup>96</sup> The US feels that it has responsibility as the only super-power to fight for itself and all peace-loving countries and abhors any competition from other nations, meaning that others must not do what it does. President Bush, thus, indicated that, ‘America has and intends to keep military strengths beyond challenge. Thereby making the destabilising arms races of other eras pointless and limiting rivalries to trade and other pursuits of peace’.<sup>97</sup>

The US hegemony, which allows it to wield unrivalled power, in its opinion comes with a moral responsibility to intervene in foreign countries to prevent mass atrocities and also to fight transnational terrorism.<sup>98</sup> To cope with these responsibilities, which the US considers itself obliged to manage, it finds it difficult to adhere to the traditional requirements of the *jus ad bellum*, thereby seeking to stretch existing normative limits with the Bush doctrine and re-interpretation of international norms.<sup>99</sup> In doing this, the US sometimes responds to flash points unilaterally and proactively without even waiting for SC authorisation, being afraid of compromising the protection of its interests and global interests. The US considers itself less bound by multilateral or negotiated actions for the purpose of policing the globe than it once was.<sup>100</sup> This, it argues is because reactive strategies may be too risky in a world where the idea of deterrence, which is the purport of an article 51 action, may not be able to contain the emerging modes of terrorism and the threat of WMD.<sup>101</sup> This argument is in tandem with the suggestion by some commentators that powerful states like the US should be allowed unfettered discretion to define ‘armed attack’ broadly to permit proactive self-defence instead of tolerating the danger from rogue states.<sup>102</sup> It is understandable then that the liberty enjoyed by powerful states to define ‘armed attack’ as they like enabled the US ambassador to the UN

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<sup>96</sup> Benvenisti (n 56 above) 678.

<sup>97</sup> President Bush ‘Commencement address at West Point’ (n 8 above).

<sup>98</sup> The National Security Strategy of the United States of America, 2002, 1, at <http://www.state.gov/documents/organisation/63562.pdf> (accessed 19/11/2016). On page 1 thereof, the Strategy states that: ‘The United States possesses unprecedented and unrivalled strength and influence in the world. Sustained by faith in the principles of liberty, and the value of a free society, this position comes with unparalleled responsibilities, obligations, and opportunity. The great strength of this nation must be used to promote a balance of power that favours freedom’; Benvenisti (n 56 above) 678.

<sup>99</sup> Benvenisti (n 56 above) 678.

<sup>100</sup> SC Jarratt ‘George Bush, Graduation Speech at West Point’ (2006) 1 *Voices of Democracy* 87-88. (83-103).

<sup>101</sup> GJ Ikenberry ‘America’s imperial ambition’ (2002) *Foreign Affairs* 44, at 51; Benvenisti (n 56 above) 684.

<sup>102</sup> SG Baker ‘Comparing the 1993 US airstrikes on Iraq to the bombing of Libya: Interpretation of article 51’ (1994) 24 *Georgia Journal of International & Comparative Law* 99, 107-108.

to suggest, following the failed attempt to assassinate GW Bush, that an armed attack could include a criminal plot that is yet to be brought to fruition.<sup>103</sup>

On the other hand, however, Benvenisti has queried why the US should claim exclusive authority over the assessment of threats using the Bush doctrine, and questions whether the international legal system can accept this unequal allocation of power to itself.<sup>104</sup> Similar arguments have been made by others that it is impossible to design international law mechanisms for only a section of states.<sup>105</sup> Since the US hegemony has made it set standards for others to follow, if the US uses force outside the *jus ad bellum* it would have set a precedent for others to emulate.<sup>106</sup> The feeling of powerful states of not being bound by international norms portends danger for international peace and security. Cassese came to this conclusion in his consideration of the illegality of the use of force by NATO in Yugoslavia without SC authorisation.<sup>107</sup> In the view of this study, this state of affairs may culminate in the collapse of the international security architecture because the basic restrictions on the use of force contained in the Charter would have been rendered meaningless.

On the other hand, however, it has been suggested that, while sovereign equality of states is guaranteed by the UN Charter,<sup>108</sup> the international community should come to terms with the reality and give up the fantasy of a world order in which all states are purportedly equal and the law is applied equally to all.<sup>109</sup> Zemanek has argued that the US applies international law if it suits its interests and ignores these norms if they appear to restrict its policy preferences to such an extent that the traditional corpus of international law which flows from the consent of states based on the equality of such states now co-exists side by side with the imperial tendency

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<sup>103</sup> Baker (n 102 above) 112; see also Fitzgerald (n 37 above) 497.

<sup>104</sup> Benvenisti (n 56 above) 694.

<sup>105</sup> Bogdandy & Wolfrum (n 83 above) 34.

<sup>106</sup> Benvenisti (n 56 above) 694; see also Kofi Annan 'The Secretary-General address to the General Assembly, New York, 23 September 2003, at <http://www.un.org/webcast/ga/58/statements/sg2eng030923.htm> (accessed 18/04/2016), where he said that: 'If it were to be adopted, it could set precedents that resulted in the proliferation of the unilateral and lawless use of force, with or without justification'.

<sup>107</sup> A Cassese 'Ex iniuria ius oritur: Are moving towards international legitimization of forcible humanitarian countermeasures in the world community?' (1999) 10 *European Journal of International Law* 25. Cassese stated: 'Once a group of powerful states has realised that it can freely escape the strictures of the UN Charter and resort to force without any censure, except for that of public opinion, a Pandora's Box may be opened. What will restrain those states or other groups of states from behaving likewise when faced with a similar situation or at any event, with a situation that in their opinion warrants resort to armed violence?'

<sup>108</sup> Art 2(1) of the UN Charter.

<sup>109</sup> K Zemanek 'Is the nature of the international legal system changing' (2003) 8 *Australian Review of international and European Law* 3; A Peters 'The growth of international law between globalisation and the great power' (2003) 8 *Australian Review of international and European Law* 109.

of the US.<sup>110</sup> Can it then be argued that the US may, by virtue of its hegemonic power, disregard certain international norms with a view to modifying the existing customary principles of non-use of force, since it has been re-interpreting international norms to meet its security interest? Given that the US appears to be leading a revolution by asserting a right of ‘pre-emptive’ self-defence and interpreting the mere ‘harbouring of terrorist’ NSAs as amounting to an armed attack which triggers a right in self-defence, it remains doubtful whether it has effected a significant change to the international law of self-defence. Arguably, whether the revolution of the US has altered the law of self-defence is not to be assessed from the practice of the US alone, but it remains to be seen from the practice of many other states, since, according to Oliver, state practice is the ‘real world test of international law’ and the ‘leading edge of international law and the key to demonstrating any customary norm’.<sup>111</sup> Writing in 2002, and with the alleged possession of WMD by Iraq in mind, Gray has argued that, as to whether the Bush doctrine of pre-emptive self-defence was rhetoric to pressure Iraq to abandon its weapons programme or a sincere intention of the US to re-write international law, depended on the reaction of the international community.<sup>112</sup> This study argues, in consonance with the views held by some commentators, that the reluctance of the US to be bound by certain norms has not established a new international legal order of pre-emptive self-defence.<sup>113</sup>

Although it has been remarked upon that, in certain instances, international law develops and progresses through the violation of its norms because a conduct that appears to be forbidden today may subsequently be acceptable by states, particularly when such conduct becomes a practice of other states as well.<sup>114</sup> For instance, Israel’s continued violations of international

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<sup>110</sup> *S.S. Lotus (France v Turkey)* (1927) PCIJ (series. A) No. 10 (27 September 1927), para 44 held that: ‘International law governs relations between States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between the co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed’; Zamanek (n 109 above) 3.

<sup>111</sup> JT Oliver ‘Freedom of navigation, rights of passage, international security and the law of the sea’ (Unpublished thesis, University of Virginia School of Law, 23 April 1993) 85, cited in Fitzgerald (n 37 above) 489.

<sup>112</sup> C Gray ‘The US National Security Strategy and the new Bush doctrine on pre-emptive self-defence’ (2002) *Chinese Journal of International Law* 437; see also Gray (n 44 above) 560.

<sup>113</sup> Peters (n 109 above) 118-121.

<sup>114</sup> Y Feldman & U Brau ‘Consent and advice’ Haaretz, 29 January 2009; see also L Hajjar ‘A sociological intervention on drones and targeted killing’ in BJ Strawser et al (eds.) *Opposing perspectives on the drone debate* (2014) Palgrave Macmillan 96, where Daniel Reiner was quoted as saying that: ‘What we are seeing now is a revision of international law...If you do something for long enough, the world will accept it. The whole of international law is now based on the notion that an act that is forbidden today becomes permissible if executed by enough countries...International law progresses through violations. We invented the targeted assassination thesis and we had to push it. At first there were protrusions that made it hard to insert easily into the legal moulds. Eight years later it is in the center of the bounds of legitimacy’.

law by the use of pre-emptive targeted strikes against Palestinian militants about which the US was very critical, became a preferred policy of the US as well after the 9//11 attacks.<sup>115</sup> The US is now the world's greatest advocate and employer of the policy of targeted killings. Can it then be argued that the defiance of existing norms by the US, Israel and a few other states, though appearing to be in violation of international law, may subsequently become an acceptable practice? This study reasons that the alleged transformation of the law of self-defence remains to be seen from state practice.

#### **7.4.2. Multilateral endorsement of unilateral actions by the United States against terrorism**

The attitude of the international community to unilateral responses to terrorist violence may be discerned from the condemnations of such actions by the SC, GA and other regional organisation. A unilateral forcible action which does not attract any UN condemnation is, thus, generally deemed not to be illegal.<sup>116</sup> The absence of serious condemnation by the international community of OEF embarked upon by the US and its allies since 7 October 2001 has thus, been interpreted as justification for the US's departure from the existing international norms that regulate the use of force by states against NSAs to a new set of international laws. The SC's unanimous recognition of the right of self-defence at the disposal of the US through resolutions 1368 and 1373, Australia's invocation of the Security Treaty between Australia, New Zealand and the United States of America (ANZUS),<sup>117</sup> the decisions by NATO, OAS and other states to support the self-defence efforts through the provision of troops, funds and logistics have been advanced as a fundamental show of support for OEF.<sup>118</sup> In fact, as a result of the international support for OEF, the US is tempted to argue that the operation is not a unilateral one, but a coalition against terror.<sup>119</sup> The search for the legitimacy of OEF has pushed the SC, perhaps upon US's instrumentality, to refer specifically to the need for ISAF to work

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<sup>115</sup> J Greenberg 'Israel affirms policy of assassinating militants' *The New York Times*, 5 July 2001. Martin S Indyk, the United States Ambassador to Israel was quoted as saying that: 'The United States government is very clear on the record as against targeted assassinations', he said. 'They are extrajudicial killings, and we do not support that'; see also SR David 'Fatal choices: Israel's policy of targeted killing' (2002) *Mideast Security and Policy Studies* 11.

<sup>116</sup> L Henkin 'Kosovo and the law of humanitarian intervention' (1999) 93 *American Journal of International Law* 824, at 827; Benvenisti (n 56 above) 689.

<sup>117</sup> Arts IV & V of the Security Treaty between Australia, New Zealand and the United States of America (ANZUS) 1951. Arts IV & V are to the effect that parties recognize that an armed attack in the pacific area on any of the parties would be dangerous to the peace of the others and resolved to treat the attack on any of them as an attack on all of them.

<sup>118</sup> A Arnold 'The U.S. use of force in Afghanistan: A study of its legality' (2008) *Journal of Politics & International Affairs* 64-64.

<sup>119</sup> Gray (n 6 above) 206.

with OEF by way of a coalition in the realisation of its mandate.<sup>120</sup> Arnold argues that, in the face of the massive international support for the US led OEF; it would be difficult to consider the action of the US as being illegal, even though the Taliban support for Al Qaeda (as discussed in chapter three above) fell short of the required threshold of attribution enunciated in the *Nicaragua case*.<sup>121</sup>

That reasoning is, however, not generally accepted because others have equally contended that the seeming multilateral endorsement of the US invasion of Afghanistan post 9/11 is not because of the legality of the action or acceptance of US military policies,<sup>122</sup> but for several other reasons. According to Gray, although there appears to be no manifest challenge by states to OEF, there is no sign that states are disposed to abandoning the fact that self-defence is permissible only upon the occurrence of an armed attack or when an armed attack is imminent.<sup>123</sup> It is her contention that it remains unclear whether the events of 9/11 and the universal acceptance of the response of the US brought about a lasting transformation of the law on self-defence or whether it was a temporary, one-off response.<sup>124</sup> As indicated above, Gray has found support for this view in the fact that even states that initially appeared to say that there was a shift of the law of self-defence rejected the argument upon the pre-emptive attack on Iraq in 2003 by the US and its allies.<sup>125</sup> Some of the reasons why the unilateral actions of the US, particularly OEF, appear to be tolerated by the international community are indicated below.

Firstly, the acceptance of US actions in Afghanistan is based on sympathy for the US which suffered grave terrorist attacks on 11 September<sup>126</sup> and for geo-political reasons, thereby making it difficult for other states to oppose its retaliatory invasion directly. It is on record that Iraq alone directly challenged the legality of OEF.<sup>127</sup> Secondly, the US continues to flout existing norms without condemnation in its employment of force against NSAs because it uses

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<sup>120</sup> S/RES/1510 of 13 October 2003; S/RES/1563 of 17 September 2004; S/RES/1623 of 13 September 2005; S/RES/1659 of 15 February 2006, S/RES/1662 of 23 March 2006 and S/RES/1707 of 12 September 2006.

<sup>121</sup> Arnold (n 118 above) 76.

<sup>122</sup> Gray (n 6 above) 198.

<sup>123</sup> Gray (n 6 above) 212.

<sup>124</sup> Gray (n 6 above) 194, where she stated: 'It is not yet clear whether these events have brought about a radical and lasting transformation of the law of self-defence or whether their significance should be narrowly construed in that *Operation Enduring Freedom* was essentially a one-off, a response to a particular incident based on Security Council affirmation and (almost) universal acceptance by states'.

<sup>125</sup> Gray (n 6 above) 194.

<sup>126</sup> S/RES/1368 of 12 September 2001.

<sup>127</sup> Gray (n 6 above) 193; Shah 'War on terrorism: Self-defence, Operation Enduring Freedom, and the legality of US drone attacks in Pakistan' (2010) 9 *Washington University Global Studies Law Review* 87.



the threat of veto as a permanent member and as the most powerful state.<sup>128</sup> Thirdly, even where less powerful states are condemned for conduct that is similar to that of the US, the US escapes condemnation because other states are apprehensive of the likelihood of loss of privileges and assistance from the US or punishment by way of sanctions.<sup>129</sup> Fourthly, support for the US may also be attributed to the fact that none of the permanent members of the SC recognized the Taliban Government, just as they do not have huge financial or other economic interests to protect in Afghanistan.<sup>130</sup> Fifthly, the US intervention in Afghanistan appears to receive widespread international support because the armed attacks occurred on the US territory, but not upon its facilities or nationals abroad as in some previous occasions.<sup>131</sup> Also, the magnitude of the attacks, both in scale and effect, were severe enough to amount to an armed attack, capable of triggering a response in self-defence.<sup>132</sup> There was also substantial evidence to support the fact that Al Qaeda was responsible for the attacks and that the Taliban whose territory was compromised for the terrorist attack did not heed earlier warnings.<sup>133</sup> The almost incontrovertible evidence gave credence to OEF, thereby distinguishing it from previous allegations of aggression by the US against Libya in respect of the implication of Libya with the West Berlin discotheque bombing which lacked concrete evidence.<sup>134</sup> Credible evidence relating to the existence of an armed attack and the identity of the attacker is suggested as relevant to invoke a right of self-defence.<sup>135</sup> Arguably, international criticism of self-defence is sometimes premised on the absence of such evidence as against the categorical rejection of the applicability of the right of self-defence.<sup>136</sup>

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<sup>128</sup> A Cassese *International law* (2005) 473.

<sup>129</sup> Shah (n 127 above) 97.

<sup>130</sup> A Rowell 'Route to Riches' *The Guardian*, 24 October 2001; see also Arnold (n 118 above) 72.

<sup>131</sup> C Stahn 'Terrorist acts as armed attack: The right to self-defence, Art 51(1/2) of the UN Charter, and international terrorism' (2003) 27 *Fletcher Forum of World Affairs* 36.

<sup>132</sup> JM Beard 'Military action against terrorists under international law: America's war on terror' (2002) 25 *Harvard Journal of Law and Public Policy* 575-576.

<sup>133</sup> Letter from the Permanent Representative of the United States of America, to the United Nations, addressed to the President of the Security Council dated 7 October 2001; WK Lietzau 'Old laws, new wars, jus ad bellum in an age of terrorism' in AV Bogdandy, R Wolfrum & CE Phillip (eds.) *Max Planck Yearbook of United Nations Law* (Vol. 8, 2004) 416-417; A Garwood-Gowers 'Self-defence against terrorism in the post 9/11 world' (2004) 4 *Queensland University of Technology Law and Justice Journal* 10-11.

<sup>134</sup> JM Beard (n 132 above) 564, 575-576.

<sup>135</sup> *Nicaragua case* (n 85 above), paras 230 – 234, 248 – 249; Franck 'Terrorism and the right of self-defence' (2001) 95 *American Journal of International Law* 480, 482; NA Shah 'Self-defence, anticipatory self-defence and pre-emption: International law's response to terrorism' (2007) 12 *Journal of Conflict & Security Law* 106; JI Charney 'Editorial Comment: The use of force against terrorism and international law (2001) 95 *American Journal of International Law* 836; Garwood-Gowers (n 132 above) 11.

<sup>136</sup> Stahn (n 131 above) 36.

The lack of condemnation of the US and the seeming multilateral endorsement of OEF can, at best, be treated as an exception because states (including the US) that subsequently used force pre-emptively or against states for merely harbouring terrorists were condemned by a majority of the states.<sup>137</sup> For instance, Operation Iraqi Freedom (OIF) which was a pre-emptive action led by the US in 2003 and Israel's attack on terrorist bases in Syria on the grounds of their providing safe havens for terrorists also in 2003 were both condemned.<sup>138</sup> In fact, in condemning OIF even before hostilities began on 19 March 2003, the UN Secretary General Kofi Annan argued that an attack on Iraq without the imprimatur of a SC mandate would violate the Charter,<sup>139</sup> just as France and Germany also opposed OIF.<sup>140</sup>

## **7.5. Consistency of the ICJ jurisprudence on what amounts to an armed attack and attribution**

What armed attack and attribution entail have been discussed in chapter 3 above where this study argued that, for a particular conduct of a terrorist NSA to qualify as an armed attack necessitating a response in self-defence, such conduct must meet the threshold of an armed attack and be attributed to another state. The jurisprudence of the ICJ has succinctly and consistently laid down the requirement of attribution in a number of decisions both prior to and post the 9/11 attacks.<sup>141</sup> Case law is one of the sources of international law, and, if the law on self-defence has changed as alleged by some commentators, a consideration of a change in the pronouncements of the ICJ may be relevant to determine the contemporary position of the law of self-defence. The decisions of the ICJ, like those of other international tribunals, though in theory have their binding effect limited to the parties in the particular case before the tribunal, are also widely considered as assisting the emergence of international law over time.<sup>142</sup> Prior to the 9/11 attacks, the principle of attribution required that the international responsibility of a state may be engaged if it is imputed to it that it sponsors terrorism and exercises effective control over NSAs that commit armed attacks. In such a situation, defensive measures may be used against such a host state. If such a host state merely provides safe harbour to terrorists or

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<sup>137</sup> Shah (n 135 above) 98.

<sup>138</sup> Gray (n 6 above) 212, 236, 241; S/RES/64/1860 of 8 January 2009.

<sup>139</sup> PE Tyler & F Barringer 'Annan says U.S. will violate Charter if it acts without approval' *New York Times*, 11 March 2003.

<sup>140</sup> MN Schmitt 'The legality of Operation Iraqi Freedom under international law' in TM Sparks & GM Sulmacy (eds.) *International law challenges: Homeland security and combating terrorism* (2006) International Studies 368.

<sup>141</sup> AG Hamid & KM Sein 'Terrorism and the right of self-defence: Rethinking of legal and policy issues' (2010) 22-26, at [http://works.bepress.com/abdulghafur\\_hamid/1](http://works.bepress.com/abdulghafur_hamid/1) (accessed 20/10/2015).

<sup>142</sup> Art 59 of the Statute of the ICJ; Murphy (n 4 above) 24.

it is unaware or unable to control the activities of the terrorist NSAs, therefore, only countermeasures short of self-defence may be used against it.<sup>143</sup> Certain commentators have, however, challenged this position, arguing that the mere provision of sanctuary, support and acquiescence are sufficient to attribute the conduct of the NSAs to the host state, the threshold of attribution having been lowered.<sup>144</sup> This study now turns to examine the jurisprudence of the ICJ with close reference to the *Nicaragua case*, the *Palestinian Wall case* and the *DRC case* to know whether indeed the law on self-defence has been transformed, owing to a shift in the reasoning of the ICJ.

### **7.5.1. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, I.C.J. Reports 1986, 14**

In this case, the US pleaded collective self-defence to claims by Nicaragua that it had violated its sovereignty by mining its ports and attacking bases and installations in its territory while supporting the Contras. In rejecting the plea of the US, the ICJ held that an armed attack which triggers self-defence will include ‘not merely actions by regular armed forces across an international border, but also the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to’ (inter alia) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein’.<sup>145</sup> Such attacks, according to the Court, are not mere frontier incidents if they are comparable to armed attacks carried out by regular armed forces.<sup>146</sup>

The Court did not believe that assistance to rebels by way of provision of weapons or logistical or other support amounts to an armed attack, but it may, nevertheless, constitute a threat or use of force or intervention in the internal or external affairs of other states.<sup>147</sup> It held that the conduct of a NSA must be imputed to a state to give rise to a response in self-defence. But attribution of the conduct of such a NSA to a state depended on whether such a state was in effective control of the activities of the NSA. Accordingly, the ICJ held that: ‘For this conduct to give rise to legal responsibility of the US, it would in principle have to be proved that that

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<sup>143</sup> MD Kielsgard ‘National self-defence in the age of terrorism: Immediacy and state attribution’ in A Masferrer (ed.) *Post 9/11 and the state of permanent legal emergency: Security and human rights in countering terrorism* (2012) Springer Science & Business Media 328.

<sup>144</sup> B Michael ‘Responding to attacks by non-state actors: The attribution requirement of self-defence’ (2009) 16 *Australian International Law Journal* 133-136; V Proulx ‘Babysitting terrorists: Should states be strictly held liable for failing to prevent transborder attacks?’ (2005) 23 *Berkeley Journal of International Law* 624-625, 630-639.

<sup>145</sup> *Nicaragua case* (n 85 above) para 195.

<sup>146</sup> *Nicaragua case* (n 85 above) para 195.

<sup>147</sup> *Nicaragua case* (n 85 above) paras 195 & 230.

State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed'.<sup>148</sup>

**7.5.2. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p 136***

In the above case, Israel maintained that the construction of a security wall on Palestinian land was in furtherance of self-defence which is guaranteed by article 51 of the UN Charter. Israel also relied on SC resolutions 1368 and 1373 to argue that states have the right of self-defence against international terrorism, and the construction of the wall is done in exercise of its right of self-defence in response to armed attacks from Palestinian terrorists.<sup>149</sup> Consistent with its jurisprudence which had been established in previous cases, the ICJ succinctly determined that attacks emanating from a non-state entity, like the Palestinian terrorists, cannot qualify as armed attacks, except where such attacks can be attributed to a state. The reasoning of the Court was informed by the fact that the attacks were not transnational in nature since Israel itself had alluded to the fact that the said terrorist attacks were from within the occupied territory.<sup>150</sup> It held:

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside that territory.<sup>151</sup>

The decision shows the state-centric nature of self-defence which establishes the fact that some form of nexus with a state must be established before self-defence can lawfully be applied. Arguably, the attribution requirement of self-defence remains relevant because, apart from the fact that article 2(4) of the Charter seeks to prohibit armed attacks from one state against another state, the entire UN Charter is fashioned in a manner that should regulate the relations of states, but not those of NSAs.<sup>152</sup>

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<sup>148</sup> *Nicaragua case* (n 85 above) para 115.

<sup>149</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p 136, para 139.*

<sup>150</sup> Murphy (n 4 above) 35.

<sup>151</sup> *Palestinian Wall case* (n 149 above) para 139.

<sup>152</sup> Murphy (n 4 above) 34-35.

**7.5.3. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, I.C.J. Reports 2005, p 168**

On the 23 June 1999, the DRC instituted proceedings in the ICJ against Uganda concerning acts of armed aggression perpetrated by Uganda in violation of the Charters of the UN and the OAU (now AU).<sup>153</sup> The DRC contended that, by virtue of the aforesaid acts of aggression, Uganda was in violation of the principle of non-use of force, violation of its obligation to settle international disputes by pacific means, and also in violation of the sovereignty of the DRC.<sup>154</sup> While Uganda placed reliance on self-defence, it made no reference whatsoever to armed attacks against Uganda at the hands of the DRC or by persons whose conduct could be imputed to the DRC. Rather Uganda indicated that the presence of the Ugandan Peoples' Defence Forces (UPDF) in the DRC was to secure Uganda's legitimate security interests.<sup>155</sup> Accordingly, the Court held:

It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. The Court has found ... that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.<sup>156</sup>

The Court concluded that the factual and legal basis for the exercise of the right of self-defence encapsulated under article 51 of the Charter were absent in the contentions of Uganda.<sup>157</sup> The ICJ jurisprudence as may be distilled from the above cases has unequivocally shown that self-defence against the activities of NSAs, no matter how grave, may trigger an action in self-defence only if it is attributable to a state. Nevertheless, whether there has been some form of change in the requirement of attribution may not be seen from the ICJ jurisprudence alone which binds only the parties involved in specific matters, but from state practice and scholarly works of publicists and commentators as well. This study, thus, proceeds to evaluate the legal purport of the Bush Doctrine, resolutions 1368 and 1373 of 2001 and state practice prior and

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<sup>153</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, I.C.J. Reports 2005, p 168, para 1.

<sup>154</sup> *DRC case* (n 153 above) para 24.

<sup>155</sup> *DRC case* (n 153 above) para 143.

<sup>156</sup> *DRC case* (n 153 above) para 146.

<sup>157</sup> *DRC case* (n 153 above) para 147.

post 9/11 to determine whether these developments have been able to cause a shift in the law of self-defence.

## 7.6. Security Council resolutions 1368 and 1373 of 2001

These SC resolutions, 1368 and 1373<sup>158</sup>, which were adopted in the aftermath of the 9/11 attacks, are important for the on-going debate on whether the law of self-defence has been transformed or not. It appears that these resolutions even heralded the debate because some scholars argue that, for the first time, the SC departed from the fact that self-defence lies only against state actors to include NSAs in these resolutions. The resolutions have been interpreted as authorizing the US to employ self-defence against the terrorists that attacked its territory without attributing the activities of these NSAs to another state.<sup>159</sup> Commentators who argue in support of the transformation of the law of self-defence are, thus, of the view that the above SC resolutions bear the legal purport of transforming the law of self-defence.

Contrary to the above view, this study holds the opinion that resolutions 1368 and 1373 did not expressly authorize the use of force by states against terrorist NSAs. This view is shared by many legal scholars.<sup>160</sup> Arguably, however, the SC merely reaffirmed and re-emphasised the existence of the general right of self-defence available to all states by virtue of article 51 of the Charter in the event that the relevant criteria for such resort to self-defence are present.<sup>161</sup> When resolution 1368 was passed, only a day after the 9/11 attacks, it did not appear clear to the SC which entity was responsible for the attacks, whether it was an act of a state or that of a terrorist NSA. The SC mentioned no names, but merely called on states to work together to bring justice to the perpetrators, organizers and sponsors of the terrorist attacks and those who ordered, supported or harboured the perpetrators.<sup>162</sup> This view is further corroborated by the fact that

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<sup>158</sup> S/RES/1368 of 12 September 2001 and S/RES/1373 of 28 September 2001.

<sup>159</sup> S/RES/1368 of 12 September 2001, para 3 of the preamble recognised the inherent right of individual or collective self-defence in accordance with the Charter; S/RES/1373 of 28 September 2001, para 4 of the preamble also reaffirmed the inherent right of individual or collective self-defence as recognised by the Charter of the United Nations as reiterated in resolution 1368.

<sup>160</sup> D Tladi 'The use of force in self-defence against non-state actors in international law: Recalling the foundational principles of international law' (2012) *Zanzibar Yearbook of Law* 85; M Byers 'Terrorism, the use of force and international law after 11 September' (2002) 51 *International and Comparative Law Quarterly* 401.

<sup>161</sup> M Byers 'International law and the angry super-power' (2003) 3 *Anuario Mexicano De Derecho Internacional*, at <http://biblio.juridicas.unam.mx/revista/DerechoInternacional/numero/3/art/art3.htm> (accessed 30/10/2015).

<sup>162</sup> S/RES/1368 of 12 September 2001 para 3.



President Bush could not also identify any entity responsible for the attacks when he addressed the people of the US on the evening of 11 September 2001.<sup>163</sup>

Commentators have also contended that these resolutions did not expressly authorize the use of force against non-state actors on the grounds that resolutions 1368 and 1373 are ambiguously drafted.<sup>164</sup> Firstly, while both resolutions recognized the right of collective and individual self-defence, they identify the terrorist acts as amounting to a threat to international peace and security, instead of as amounting to armed attacks.<sup>165</sup> In spite of the undoubtedly sufficient gravity of the attacks in terms of the scale and effect, the SC was silent as to the possibility of the invocation of self-defence by describing the attacks as a threat to international peace and security.<sup>166</sup> If they had qualified as armed attacks, it would have warranted a response in self-defence contemplated under the Charter.<sup>167</sup> Secondly, it was argued that the reference to self-defence is expressed only in the preamble and not in the operative part of the resolution.<sup>168</sup> Conversely, it has been argued that the reference to self-defence in the preamble of resolutions 1368 and 1373 is of greater significance because the SC does not usually expressly refer to self-defence in its resolutions.<sup>169</sup> This latter view is also amenable to reason because, from the establishment of the UN to date, it has been quite cautious and has discouraged authorizing enforcement actions against NSAs because the crime of terrorism was seen as falling within the confines of national and regional criminal law mechanisms.<sup>170</sup>

Even if it is conceded that resolution 1368 and 1373 did not authorize the use of force by the SC, it may, nevertheless, be argued that the SC came very close to authorizing the use of force

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<sup>163</sup> George W. Bush '9/11 address to the nation' *American Rhetoric.com* <http://www.americanrhetoric.com/speeches/PDFFiles/George%20W.%20Bush%20-%2020911%20Address%20to%20the%20Nation.pdf> (accessed 07/10/2015). Para 4 stated 'The search is underway for those who were behind these evil attacks. I have directed the full resources of our intelligence and law enforcement communities to find those responsible and to bring them to justice. We will make no distinction between the terrorists and who committed these acts and those who harbour them'.

<sup>164</sup> Ruys & Verhoeven (n 61 above) 311-312.

<sup>165</sup> S/Res/1368 of 12 September 2001, para 2 of the preamble & para 1 of the operative part of the resolution; see also Ruys & Verhoeven (n 61 above) 312; A Goppel *Killing terrorists: A moral and legal analysis* (2013) Walter de Gryter 95-96; ME O'Connell 'Lawful self-defence to terrorism' (2002) 63 *University of Pittsburgh Law Review* 892.

<sup>166</sup> Ruys & Verhoeven (n 61 above) 312.

<sup>167</sup> Art 51 of the UN Charter.

<sup>168</sup> Ruys & Verhoeven (n 61 above) 311-312.

<sup>169</sup> Gray (n 6 above) 199.

<sup>170</sup> In a recent Security Council meeting, the Egyptian Foreign Affairs Minister, Sameh Shoukry, maintained that fighting terrorism was primarily a regional responsibility. That apart, even where the Security Council expressed deep outrage at the Islamic State of Iraq and the Levant (ISIL) in its 7271<sup>st</sup> Meeting of 19 September 2014 and urged expanded support for the new Iraqi Government to defeat ISIL, it was short of an outright authorisation.

against NSAs as can be inferred from the wording of subsequent resolutions. Arguably, resolution 1662 may be given such interpretation as it appears to empower OEF coalition and ISAF to use force against Al Qaeda in collective self-defence on behalf of the US.<sup>171</sup>

## 7.7. The Bush Doctrine

The 'Bush doctrine' is a phrase used to describe various related foreign policy principles of President Bush, which were contained in his speeches upon the 9/11 attacks to the people of the US, the joint session of the US Congress and as contained in the National Security strategies of the United States of 2002 and 2006. The policy principles that are relevant to the study include (a) the US policy of attributing the activities of NSAs to states for merely harbouring terrorists (non distinction of terrorists from host states), and (b) the US policy of pre-emptive strikes against NSAs and states that represent potential threats to the US.<sup>172</sup> Undoubtedly, the events of 9/11 had a huge impact on the law of self-defence because they made states and commentators to seek an expanded interpretation of the concept. President Bush described the terrorist attacks not as mere acts of terrorism but as acts of war.<sup>173</sup> In fact, the impact necessitated the US and other allied forces involved in OEF to attempt to redefine self-defence, thereby finding justification in the doctrine of pre-emptive self-defence which appears to be one of the reasons for the argument that the law of self-defence has been transformed.<sup>174</sup> While some commentators refer to the Bush doctrine as meaning his re-definition of pre-emptive self-defence and the resolve of the US to act pre-emptively against perceived non-palpable threats of terrorist attacks, others refer to the Bush doctrine as the policy framework of taking out self-defence against both terrorists and their host states without distinction.<sup>175</sup> In the analysis of whether or not the law of self-defence has been transformed, the study will consider both foreign policy principles as comprising the Bush doctrine.

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<sup>171</sup> S/RES/1662 of 23 March 2006, para 18 stated that the SC: 'Calls upon the Afghan Government, with the assistance of the international community, including the Operation Enduring Freedom coalition and the International Security Assistance Force, in accordance with their respective designated responsibilities as they evolve, to continue to address the threat to the security and stability of Afghanistan posed by the Taliban, Al Qaeda and other extremist groups and criminal activities'.

<sup>172</sup> M Medzmariashvili 'Pre-emptive self-defence against states harbouring terrorists' (2011) Riga Graduate School of Law (RGSL) Research Papers, No 4, 52, at [www.rgsl.edu.lv/images/stories/publications/4\\_medzmariashvili\\_final.pdf](http://www.rgsl.edu.lv/images/stories/publications/4_medzmariashvili_final.pdf) (accessed 30/09/2015).

<sup>173</sup> E Mylonaki & K Khedri 'Re-assessing the use of force against terrorism under international law' (2013) 78 *Jura A Peci Tudomanyegyetem Allam-es Karanak tudomanyos lapja* 78; KQ Seelye & E Bumiller 'After the attacks: The President Bush labels aerial attacks 'acts of war' *New York Times*, 13 September 2001.

<sup>174</sup> Mylonaki & Khedri (n 173 above) 78.

<sup>175</sup> B Langille 'it's 'instant custom': How the Bush doctrine became law after the terrorist attacks of September 11, 2001' (2003) 26 *Boston College International and Comparative Law Review* 145.

Arguably, it was in furtherance of these principles constituting the Bush doctrine that the US and its allies prosecuted the wars in Afghanistan from 2001 to 2014 and in Iraq in 2003. While the war against Afghanistan may fit in properly as a war waged against a terrorist host state, the invasion of Iraq may be interpreted as pre-emptive self-defence against a state. The US erroneously assessed Iraq to be in possession of WMD which represented a potential threat to its security interests, though there was no palpable or imminent threat.<sup>176</sup>

### **7.7.1. The Bush doctrine of pre-emptive self-defence**

The general principle of pre-emptive self-defence has been evaluated in chapter three and reference was also made to it in chapter five while comparing the Israeli and US policies. The reference to pre-emptive self-defence herein is, thus, in relation to the Bush doctrine which the US applied in an attempt to change the law of self-defence. The Bush administration felt constrained to adopt pre-emptive self-defence to make it cope with the changing trends in international relations brought about by the proliferation of WMD, the rise in international terrorism and the increase in failed states. Failed states have become safe havens from which terrorists launch attacks.<sup>177</sup> The US policy thrust is to target its enemies pre-emptively. In September 2002, President Bush stated:

It is an enduring American principle that this duty obligates the government to anticipate and counter threats using all elements of national power, before the threats can do grave damage. The greater the threat, the greater is the risk of inaction and the more compelling the case for taking anticipated action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack.<sup>178</sup>

Part of the above statement was repeated *verbatim* in the 2006 National Security Strategy of the United States<sup>179</sup>, and it shows the adoption of the policy by the US, which a few other states have also adopted.

### **7.7.2. The Bush doctrine of non-distinction of harbouring states from terrorist NSAs**

Under the traditional view, passive support given to terrorists does not give rise to forcible measures in the territory of another state, but permits only proportional non-forcible

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<sup>176</sup> Medzmariashvili (n 172 above) 52-53.

<sup>177</sup> J Rosenwasser 'The Bush administration's doctrine of pre-emption (and prevention): When, how, where?' *Council on Foreign Relations*, 1 February 2004.

<sup>178</sup> The National Security Strategy of the United States of America 2002 (n 98 above) 15.

<sup>179</sup> The National Security Strategy of the United States of America 2006 (n 29 above) 18.

countermeasures.<sup>180</sup> The standard for attributing the conduct of NSAs to states has been laid down in the jurisprudence of the ICJ,<sup>181</sup> ICTY,<sup>182</sup> and it is also contained in the ILC Draft Articles on State Responsibility<sup>183</sup> and the UN Definition of Aggression.<sup>184</sup> Specifically, the traditional standard of attribution requires that the activities of NSAs may be imputed to a state only if (a) the NSA is sent by or on behalf of a state, (b) the NSA is acting on the instructions of a state or under its effective control, and (c) the territorial state acknowledges and adopts the conduct of the NSA as its own.<sup>185</sup> Contrary to this settled position of the law of attribution appertaining to self-defence, the US and some other states appear to be employing force against host states of NSAs for the passive support given to terrorist groups merely by hosting them. For instance, even prior to the 9/11 attacks the US did not claim that either Afghanistan or Sudan was in effective control of Al Qaeda or that they had given active support or had adopted Al Qaeda's activities in respect of the US embassy bombings in Kenya and Tanzania.<sup>186</sup> The US attacked Afghanistan and Sudan for failing to shut down terrorist facilities and for allegedly acquiescing in Bin Laden's terrorist conduct.<sup>187</sup> In giving credence to this new approach, which is largely a departure from the law of attribution, the Bush doctrine was formulated by the United States.

The Bush doctrine states that the nations that harbour terrorists will not be spared in the US response in self-defence to the attacks because such states are as guilty as the terrorists themselves and, therefore, there will be no distinction.<sup>188</sup> On 11 September 2001, Bush stated that: 'We will make no distinction between the terrorists who committed these acts and those who harbour them'.<sup>189</sup> Also, before the Congress, he stated thus:

And we will pursue nations that provide aid or safe haven to terrorism. Every nation in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any

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<sup>180</sup> C Henderson 'The persistent advocate and the use of force: The impact of the United States upon the *jus ad bellum* in the post cold war era' (2013) 150.

<sup>181</sup> *Nicaragua case* (n 85 above) para 195.

<sup>182</sup> *Prosecutor v Dusko Tadic, Case No: IT-94-IAR72, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), 2 October 1995, (Appeals Chamber) paras 131-132 & 137.*

<sup>183</sup> Art 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001.

<sup>184</sup> A/RES/3314 (xxix) of 14 December 1974, Annex 3(g).

<sup>185</sup> Henderson (n 180 above) 141.

<sup>186</sup> UN Doc. S/1998/ 780. Letter from the Permanent Representative of the United States of America to the United Nations, addressed to the President of the Security Council dated 20 August 1998.

<sup>187</sup> K Trapp 'Back to basics: Necessity, proportionality, and the right of self-defence against non-state terrorist actors' (2007) 56 *International and Comparative Law Quarterly* 141.

<sup>188</sup> Langille (n 175 above) 145; E Bumiller 'Bush chides some members of coalition for inaction in war against terrorism' *New York Times*, 10 November 2001, at B4.

<sup>189</sup> 'George W Bush: 9/11 address to the nation' (n 162 above).

nation that continues to harbour or support terrorism will be regarded by the United States as a hostile regime.<sup>190</sup>

Accordingly, in responding to the 9/11 attacks on the US, it did not claim that the Taliban or the government of Afghanistan sent Al Qaeda terrorists, directly controlled them or acknowledged or adopted the conduct of Al Qaeda or actively participated in any other form. It contended only that the attacks of September 11 had been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by a terrorist organisation (Al Qaeda) as a base of operation.<sup>191</sup> The attack against the Taliban which played no active role in the 9/11 attacks as envisioned by the traditional criteria for attribution, thus, shows the resolve of the US to introduce another interpretation to the law on attribution and, by extension, the law of self-defence. In every sense, the attacks against the Taliban are inconsistent with the settled law on self-defence. But they are, however, consistent with the reinterpretation of attribution by the US.<sup>192</sup> There is, therefore, a manifest departure from the traditional requirement of relying on active support to passive support for NSAs as a ground for self-defence against host states.<sup>193</sup>

The Bush doctrine is not without its disciples who argue in justification of the doctrine, which explains the existence of a debate. Some commentators take the extreme position that the Bush doctrine has, in the aftermath of the 9/11 attacks, crystallized into a new customary law.<sup>194</sup> Others simply contend that, while it is true that mere toleration, acquiescence or indifferent attitude of host states towards the presence of terrorists on their territories may not trigger a response in self-defence from a victim state, it is amenable to reason that the territorial state upon whose shoulders territorial sovereignty is thrust has a corollary duty. The sovereign host state has the corresponding obligation within its state to protect the rights of other states to

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<sup>190</sup> George W. Bush: Address to a Joint Session of Congress on the 9/11 attacks' American Rhetoric.com, 4, at <http://www.americanrhetoric.com/speeches/PDFFiles/George%20W.%20Bush%20-%20Joint%20Session%20Address%20on%20Terrorist%20Attacks.pdf> (accessed 22/09/2015).

<sup>191</sup> UN Doc. S/2001/946, Letter 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council. While para 2 provides in part that, 'Since 11 September, my Government has obtained clear and compelling information that the Al Qaeda organisation which is supported by the Taliban regime in Afghanistan, had a central role in the attacks', para 3 provides in part that, 'The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation'.

<sup>192</sup> Sec 2 of the Authorisation for Use Military Force; NSS of 2002 (n 98 above); President Bush 'Address to the Nation on terrorist attacks' 11 September 2001; RS Ratner '*Jus ad bellum and jus in bello* after September 11' (2002) 96 *American Journal of International Law* 905, 906.

<sup>193</sup> Henderson (n 180 above) 153-154.

<sup>194</sup> Langille (n 175 above) 145-146.

integrity, inviolability and peace.<sup>195</sup> This duty, relating to the concept of sovereignty, is the basis of state responsibility under contemporary international law, although these responsibilities appear to be reduced because states may disregard them.<sup>196</sup> Ikenberry has taken a step further by arguing that ‘countries that harbour terrorists, either by consent or because they are unable to enforce their laws within their territory, effectively forfeit their rights of sovereignty’. It is his view that a sovereign government is not expected to massacre its own people or support terrorism, but, where it fails to keep these obligations, it then forfeits its sovereign right to be left alone inside its own territory. This may permit other states, including the US, to intervene, even if pre-emptively.<sup>197</sup>

### 7.7.3. Rejection of the Bush doctrine of pre-emptive by some international reports

While most states and institutions appear to have accepted one limb of the Bush doctrine in respect of a change in the attribution threshold, the concept of pre-emptive self-defence has been rejected. Firstly, the ‘Secretary General’s High-Level Panel on threats, challenges and change’ rejected the Bush doctrine which advocates pre-emptive strikes in self-defence.<sup>198</sup> The Panel, which was responding to the challenges faced by the international security system, concluded that pre-emptive strikes remain unlawful in the absence of imminent threats, and that a state possessing any good reason for preventive action should present such complaints before the SC, but not embark on unilateral actions of self-defence.<sup>199</sup> The Panel agreed that, in consonance with long-established international law, a threatened state can resort to a proportional action to deflect an imminent threat but not for the perceived hostile intent of weapon-making capability. According to the Panel, preventive action, if allowed in a world full of perceived potential threats, may constitute a risk to the global order. The Panel concluded with a warning that article 51 should neither be re-written nor re-interpreted.<sup>200</sup>

Secondly, while also rejecting the Bush doctrine in his report to the UNGA entitled ‘In larger freedom: Towards development, security and human rights for all’, then Secretary-General,

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<sup>195</sup> Benvenisti (n 56 above) 692; NJ Wheeler ‘The Bush doctrine: American exceptionalism in a revolutionary age’ (2003) 27 *Asian Perspective* 183; *Island of Palmas (or Miangas)*, Arbitral Award of 4 April 1929 (1928) 22 *American Journal of International Law* 867, at 876; WM Reisman ‘International legal responses to terrorism’ (22 *Houston Journal of International Law* 3, at 51.

<sup>196</sup> Benvenisti (n 56 above) 692.

<sup>197</sup> Ikenberry (n 101 above) 52.

<sup>198</sup> Report of the High-level Panel (n 10 above); C Gray ‘The use of force and the international legal order’ in M Evans (ed.) *International law* (2010) 631-632.

<sup>199</sup> Report of the High-level Panel (n 10 above) paras 189-190.

<sup>200</sup> Report of the High-level Panel (n 10 above) paras 188-192.



Kofi Annan, indicated that article 51 of the Charter covers imminent threats because it avails sovereign states the right to defend themselves against armed attacks that have already occurred or that are imminent. But where threats are latent, the Charter gives power to the SC to use military force, even if preventively, to preserve international peace and security.<sup>201</sup> The report shows a clear abhorrence of a unilateral pre-emptive self-defence to non-palpable and remote threats.

Thirdly, pre-emptive self-defence has also been rejected by the Non-Aligned Movement (NAM).<sup>202</sup> The NAM, which is made up of about 118 developing or third world countries, in their 2006 summit in Havana, Cuba, resolved that it is not acceptable that powerful countries invoke the Chapter VII powers of the Charter to address issues that do not in any way pose threats to international peace and security.<sup>203</sup> While specifically calling on the international community not to re-write or re-interpret article 51 of the Charter, the Movement condemned the conduct of powerful states for bullying members of the NAM pre-emptively having categorised some countries as good or evil using unilateral and unjustifiable criteria. The Declaration specifically opposed and condemned the pre-emptive use of force.<sup>204</sup>

While these reports accepted anticipatory self-defence, they were unanimous in the rejection of the US policy of pre-emptive self-defence. They instead opted for actions not founded on an actual armed attack which has already occurred or an imminent threat of armed attack to be brought before the SC.<sup>205</sup> Arguably therefore, the transformation being examined in the study cannot result from the acceptance or application of pre-emptive self-defence, but from the lowered threshold of the requirement of attribution of the conduct of NSAs to states.

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<sup>201</sup> Report of the Secretary-General (n 85 above) paras 124-125.

<sup>202</sup> 2006 Havana Declaration, UN Doc S/2006/780, of 29 September 2006, para 20, 22.5; Gray (n 6 above) 213; C Focarelli 'Self-defence in Cyberspace' in N Tsagourias & R Buchan (eds.) *Research handbook on international law and Cyberspace* (2015) 271.

<sup>203</sup> Havana Declaration (n 202 above) para 20.2 states that: 'Resorting to Chapter VII of the Charter as an umbrella for addressing issues that do not pose a threat to international peace and security must be avoided and in this regard, the Council should fully utilize the relevant Charter provisions, where appropriate, including Chapters VI and VIII. In addition and consistent with the practice of the UN and international law pronounced by the ICJ, Art 51 of the UN Charter is restrictive and that it should not be re-written or re-interpreted'.

<sup>204</sup> Havana Declaration (n 202 above) para 22.5.

<sup>205</sup> Gray (n 6 above) 212.

## 7.7. Has state practice crystallized into a new customary norm of self-defence?

If the international law on self-defence has been transformed as alleged by certain commentators, it then means that the change may have been brought about by one of the traditional sources of international law or by the possible amendment of the UN Charter. The traditional sources include international conventions (treaties), international custom as evidence of general practice accepted as law, general principles of law recognized by civilized nations, judicial decisions and teachings of the most highly qualified publicists.<sup>206</sup> Works or writings of highly qualified publicists, jurists and commentators serve as a subsidiary means of the determination of international law.<sup>207</sup>

By virtue of article 13(1)(a) of the Charter, new norms of international law may be brought about by the codification of principles of customary law, and so the GA established the ILC to develop new principles progressively and codify existing norms of international law.<sup>208</sup> In consonance thereof, the ILC, at its sixty-fourth session in 2012 and sixty-fifth session in 2013, included the topic ‘Formulation and evidence of customary international law’ in its agenda for deliberation, and Michael Wood was appointed as Special Rapporteur for the topic.<sup>209</sup>

The contemporary law on self-defence is contained in article 51 of the UN Charter. There has been no manifest re-codification of article 51 between the events of 9/11 and today when the debate in respect of likely transformation of the law on self-defence has gathered momentum. Similarly, this study is not aware of any pronouncements of courts on self-defence that can be construed as necessitating a radical departure from the contents of article 51 of the Charter. If, therefore, there is any change in the law of self-defence, attention may be turned to the practices of states from the events of 9/11 and the works of publicists, jurists and commentators to know whether any new customary norm could be distilled from them. Though the practices of states may not outrightly amend the UN Charter, practices of parties will nevertheless, be taken into

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<sup>206</sup> Art 38(1) of the Statute of the ICJ.

<sup>207</sup> *The Paquete Habana* (1900) 175 US 677, at 700, where the US Supreme Court held that: ‘where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labour, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is’.

<sup>208</sup> Art 13(1)(a) of the UN Charter.

<sup>209</sup> ‘New topics on the agenda of International Law Commission: An overview’, at <http://www.aalco.int/ILC2012.pdf> (accessed 14/11/2015); ‘International Law Commission’, at <http://legal.un.org/ilc/sessions/65/> (accessed 14/11/2015).

account for the purpose of interpretation.<sup>210</sup> Arguably, the interpretation of the Charter through practice manifests the momentum towards a change in the Charter rules, even if its content or text remain unchanged. In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*,<sup>211</sup> it was held that the practices of an organization which has been generally accepted by members can be used to interpret and apply the rules of the organization. Specifically, while article 27, paragraph 3 of the Charter requires nine out of 15 votes including those of the five permanent members in the SC to adopt a resolution, a practice that an abstention of a permanent member could not block the adoption of a resolution emerged.<sup>212</sup> Arguably, the legal purport is that the Charter was modified. Similarly, in post 9/11 era, self-defence under article 51 of the Charter appears to be extended to NSAs which is a manifest modification of the Charter. There are two different approaches to the emergence of customary law, and they are the traditional and the modern approaches.

#### 7.7.1. Traditional approach to the emergence of customary law

Traditionally, customary law emerges through uniform and consistent practice of states of a particular conduct for a long period of time and *opinio juris sive necessitatis* (feeling of legal obligation to be bound by such practice).<sup>213</sup> The long practice is considered by states as relevant to engage its legal obligation for *opinio juris* to exist.<sup>214</sup> Customary international law which derives from state practice other than from treaties is an important issue. The issues of customary laws are, thus, being handled by the ILC as shown in its agenda of 2012 and 2013.<sup>215</sup> Under this traditional approach, customary international law rules are unwritten and they evolve over time through processes that are unconscious, based on the accumulation of

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<sup>210</sup> J Liang 'Modifying the UN Charter through subsequent practice: Prospects for the Charter's revitalisation' (2012) 81 *Nordic Journal of International Law* 1-20, at 5.

<sup>211</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*<sup>211</sup> (Advisory Opinion) (1971) ICJ Reports 16, para 22.

<sup>212</sup> NJ Schrijver 'The future of the Charter of the United Nations' (2006) 10 *Max Planck Yearbook of United Nations* 13.

<sup>213</sup> Art 38(1)(b) of the Statute of the ICJ; *North Continental Shelf Cases (Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands)* ICJ Reports (1969) paras 74, 77; *Nicaragua case* (n 85 above) para 183.

<sup>214</sup> RB Baker 'Customary international law in the 21<sup>st</sup> Century: Old challenges and new debates' (2010) 21 *European Journal of International Law* 174.

<sup>215</sup> M Zalneiriute 'An international constitutional law moment for data privacy in the times of mass-surveillance' (2015) 23 *International Journal of Law and Information Technology* 107.

instances and bilateral exchanges, but not influenced by an established forum.<sup>216</sup> Since the establishment of customary law was principally based on the protracted practice of states for a long period of time and *opinio juris*, it depended on the consent of states to be so bound. States, therefore, that do not consider themselves bound by a particular practice were specifically expected to object to such practice<sup>217</sup> and sustain such a rejection.<sup>218</sup> A persistent objector to an emerging customary rule is not bound by such practice.<sup>219</sup> A group of states not willing to be bound by a particular practice may, thus, specifically formalize an agreement of non-applicability of such a practice on them, except new states that are created after the crystallization of such a customary international norm.<sup>220</sup> For instance, it has been determined that a custom that existed between Latin-American states was not applicable to Peru because it persistently resisted it.<sup>221</sup> Similarly, the custom of ‘closing lines in bays to a length of ten miles’ was held not to apply to Norway, a persistent objector of the rule in spite of the insistence of the UK.<sup>222</sup> Nevertheless, persistent objection by certain states cannot generally prevent the emergence of the rule and its binding effect on non-objecting states because states that keep quiet become bound.<sup>223</sup>

The literature on the emergence of customary international law has, however, shown that rather than relying on protracted state practice and *opinio juris* alone as bases for the birth of a new customary law, multilateral treaties that have been ratified by several countries with the aim of establishing binding human rights obligations may also herald a new customary international law. This is because such treaties may command binding force on non-parties to the treaties as well and may safely be described as having a customary law flavour.<sup>224</sup> For instance, such international treaties, having a customary law flavour, with binding force on non-parties include the UN Charter,<sup>225</sup> ICCPR,<sup>226</sup> UN Convention on the Prevention and Punishment of

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<sup>216</sup> Zalneiriute (n 215 above) 109; T Stein ‘Discussing custom and treaties’ in A Cassese & JHH Weller (eds.) *Change and stability in international law-making* (1988) 12.

<sup>217</sup> Fisheries case (UK v Norway) ICJ Reports (1951) para 116.

<sup>218</sup> LK Arnett ‘Death at an early age: International law arguments against the death penalty for juveniles’ (1988) 57 *University of Cincinnati Law Review* 245, 260.

<sup>219</sup> *S v Petane* 1988 (3) SA 51 (C) at 64 A-B; J Dugard *International law: A South African perspective* (2011) 28-29.

<sup>220</sup> Baker (n 214 above) 176-177.

<sup>221</sup> *Colombian-Peruvian assylum case (Colombia v Peru)*, Judgment of November 20<sup>th</sup>, 1950: ICJ Reports (1950) p. 276.

<sup>222</sup> Fisheries case (n 217 above) para 131.

<sup>223</sup> LB Sohn ‘Generally accepted’ international rules’ (1986) 61 *Washington Law Review* 1074-1075.

<sup>224</sup> Baker (n 214 above) 174; Sohn (n 223 above) 1078; MP Scharf ‘Accelerated formation of customary law’ (2014) 20 *ILSA Journal of International & Comparative Law* 324-328.

<sup>225</sup> Art 2 para 6 of the UN Charter.

<sup>226</sup> 999 U.N.T.S. 171 of 19 December 1966.

the Crime of Genocide<sup>227</sup> and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>228</sup> International treaties possess the capacity to codify existing law, cause a new law to crystallize, and they can initiate the progressive development of a new law.<sup>229</sup> Furthermore, commentators have indicated that a new customary law may also emerge from decisions of international tribunals such as the International Criminal Tribunal for Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the ICC.<sup>230</sup> According to Scharf, “General Assembly resolutions and judgments of international tribunals often play a heightened role in ‘crystallizing’ the newly emergent rule”.<sup>231</sup>

This traditional customary law-making process has been criticized: (a) that the process is undemocratic because, unlike customary law arising from treaties which involve the consent of several states, the practice of only a few states may ultimately give birth to a new customary law;<sup>232</sup> and (b) the process is protracted and too slow to keep pace with the changing relations of states.<sup>233</sup> Arguably, it may be too slow in contemporary times to react to even relations between states and NSAs. Thirdly, the process gives no regard to the proper articulation of the human rights of individuals since the heterogeneous composition of the international community does not allow it to consider the welfare of the individual.<sup>234</sup> In an effort to cultivate a path out of these weighty criticisms, legal scholars have argued, on the one hand, that there should be a reduced importance of *opinio juris* because prolonged practice alone is sufficient to generate a customary principle of law.<sup>235</sup> Proponents of the modernist approach, on the other hand, have proposed a complete disregard for prolonged state practice in preference for the *opinio juris* component which comes about by pronouncements in the international fora.<sup>236</sup>

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<sup>227</sup> 78 U.N.T.S. 277 of 9 December 1948.

<sup>228</sup> 1465 U.N.T.S. 85 of 9 December 1975.

<sup>229</sup> North Continental Shelf Cases (n 213 above) 37-38; JI Charney ‘International agreements and the development of customary international law’ (1986) 61 *Washington Law Review* 971.

<sup>230</sup> Baker (n 214 above) 180-181.

<sup>231</sup> Scharf (n 224 above) 306, 324-328.

<sup>232</sup> WS Dodge ‘Customary international law and the question of legitimacy’ (2007) *Harvard Law Review Forum* 19, 26; Zalneiriute (n 215 above) 110.

<sup>233</sup> Zalneiriute (n 215 above) 109.

<sup>234</sup> JO McGinnis ‘The comparative advantage of customary international law’ (2006) 30 *Harvard Journal of Law and Public Policy* 7, 11-12.

<sup>235</sup> A D’Amato ‘Customary international law: A reformulation’ (1998) 4 *International Legal Theory* 3-6.

<sup>236</sup> B Cheng ‘United Nations resolutions on Outer Space: Instant international customary law?’ (1965) 5 *Indian Journal of International Law* 23, 37; AT Guzman ‘Saving customary international law’ (2005) 27 *Michigan Journal of International Law* 115, 153; Zalneiriute (n 215 above) 111.

### 7.7.2. The modern approach to the emergence of customary law

In contemporary international law, the idea that customary law emerges from the long practice of states has been challenged<sup>237</sup> by saying that a practice of states can instantaneously give rise to a new customary law.<sup>238</sup> A resolution of an international organization which is adopted by consensus is said to generally signify acceptance of such a rule, and therefore it commands an obligatory character.<sup>239</sup> The universality of the practice of a particular rule is not mandatory. What is however relevant is the general recognition among states that the particular practice is obligatory.<sup>240</sup> Sohn posits further that what is material is that a reasonable number of states from different political, economic and ideological backgrounds expressly accept the new rule and there is acquiescence by other states.<sup>241</sup> To that extent, unlike customary law which evolves through protracted years of state practices, conventional norms through treaty obligations agreed upon by many states may gravitate to customary law instantaneously because the period required need not be a long time.<sup>242</sup> To Akehurst, the factors to consider whether a given conventional treaty norm could instantly metamorphose to a customary law are whether there existed a contrary state practice regarding the norm and whether the new norm overturned existing rules.<sup>243</sup> Furthermore, the possibility of the instant transformation of a conventional rule by widespread representative adoption also applies to resolutions of the UN General Assembly.<sup>244</sup>

Contrary to scholarship on the instant crystallization of the customary law principle, adherents to the traditionalist approach have argued that customary law ought to emerge from state practice and not from completely normative sources.<sup>245</sup> The modern approach has been criticized thus: (a) that a custom bereft of practice by states lack legitimacy;<sup>246</sup> (b) that the modernist approach which seek to disregard practice with a view to establishing customary law

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<sup>237</sup> Baker (n 214 above) 173-174.

<sup>238</sup> Langille (n 175 above) 145.

<sup>239</sup> Sohn (n 223 above) 1074.

<sup>240</sup> Sohn (n 223 above) 1074.

<sup>241</sup> Sohn (n 223 above) 1074.

<sup>242</sup> *North Continental Shelf case* (n 213 above) para 34; Akehurst 'Custom as a source of international law' (1977) 47 *British Yearbook of International Law* 1, 18-19.

<sup>243</sup> Akehurst (n 242 above) 18-19.

<sup>244</sup> A D'Amato 'The concept of human rights in international law' (1982) 82 *Columbia Law Review* 1128; Sohn (n 220 above) 1073; Baker (n 214 above) 181.

<sup>245</sup> GJH van Hoof *Rethinking the sources of international law* (1983) 107-108.

<sup>246</sup> M Weisburd 'Customary international law: The problem of treaties' (1988) 21 *Vanderbilt Journal of Transnational Law* 1.



instantaneously undermines the authority and persuasiveness of customary law,<sup>247</sup> and, in the absence of state practice, customary law could be lacking in the consent of states and may project authoritarianism;<sup>248</sup> (c) that even the voting of resolutions by states in the UN are mere expressions of aspirational goals, but not intended to create new norms of customary international law.<sup>249</sup> Also reacting to arguments that customary law's emergence is too slow in comparison with treaty law, Scharf argues that in certain instances customary law evolves more quickly than treaty law. According to him, the negotiations for the Law of the Sea Convention lasted between 1973 and 1982 and entered into force in 1994. Similarly, negotiations for the Vienna Convention on Law of Treaties lasted between 1949 and 1969 and entered into force in 1980. Also, the ILC's process of enacting the Statute of the ICC lasted between 1949 and 2002.<sup>250</sup>

Arguably, it may be distilled from the above positions that customary law may emerge as having been established from the long practice of a particular conduct by states and may also be established instantaneously through a treaty ratified by several states. Having evaluated the contours of how a customary law evolves, the study will now turn to considering whether the Bush doctrine or other concepts have been accepted following state practice immediately after the events of 9/11 which could be interpreted as having significantly altered the legal constraints on self-defence.

## 7.8. The practice of states

State practice is a very important factor in the determination of changes in treaties or other norms because the meaning of a particular treaty at the time of establishment could subsequently change through the practice of states. Consistent practice may allow for interpretation and reinterpretation with a view to altering the meaning.<sup>251</sup>

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<sup>247</sup> S Estreicher 'Rethinking the binding effect of customary international law' (2003) 44 *Virginia Journal of International Law* 15.

<sup>248</sup> Report of the Special Rapporteur Michael Wood p 54, para 99.

<sup>249</sup> Baker (n 214 above) 183-184; B Simma & P Alston 'The sources of human rights law: Custom, jus cogens, and general principles' (1988-1989) 12 *Australian Yearbook of International Law* 89-90.

<sup>250</sup> Scharf (n 224 above) 309-310.

<sup>251</sup> Art 31(3)(b) of the Vienna Convention on the Law of Treaties 1969 provides: There shall be taken into account, together with the context: Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding the interpretation; Murphy (n 4 above) 24.

### 7.8.1. The law of self-defence and state practice prior to the terrorist attacks of 9/11

In justifying the military response to terrorist attacks by NSAs, state practice has, more often than not, shown the need always to establish a link between the attackers with another state. This has been done by invoking either active support or passive support or a state's incapacity to prevent attacks from its territory.<sup>252</sup> Even the US invoked the passive support provided by the Taliban for Al Qaeda in relation to OEF.<sup>253</sup> Before the 9/11 attacks not many states relied on article 51 of the Charter to justify responses to armed attacks by NSAs<sup>254</sup> because states that claimed to have suffered armed attacks had the responsibility to demonstrate that another state was responsible.<sup>255</sup> Such a state to which the conduct of NSAs might have been attributed should have been an active participant in such an attack or might have been in effective control of the NSA.<sup>256</sup> States that engaged in self-defence against NSAs without establishing an active nexus between the NSA and a state were, thus, condemned.<sup>257</sup> In addition, attempts by some states to proffer a robust interpretation of existing norms regulating the use of force and the exceptions thereto with a view to permitting their use of force directly against NSAs without imputing to another state were stiffly condemned. In this regard, the US, Israel and Apartheid South Africa were in certain instances condemned for the use of unilateral force against NSAs without attribution to other states, although the US had also relied on its veto in the SC to block such condemnations.<sup>258</sup>

Israel's raid in 1985 on the PLO headquarters in Tunis, which it justified as self-defence and in response to Tunisia's toleration of the PLO in its territory from which terrorist attacks were carried out against Israel, was condemned by the SC. Israel's conception of self-defence was described as being at variance with international law and, at best, amounted to an act of armed aggression and a violation of the Charter.<sup>259</sup> Israel had offered two major arguments since the 1970s for its attacks on other states on the basis of terrorism without establishing an active

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<sup>252</sup> Ruys & Verhoeven (n 61 above) 312.

<sup>253</sup> Tladi (n 160 above) 84.

<sup>254</sup> S Cenic 'State responsibility and self-defence in international law post 9/11: Has the scope of Article 51 of the United Nations Charter been widened as a result of the US response to 9/11?' (2007) 14 *Australian International Law Journal* 201-202; WV O'Brien 'Reprisals, deterrence and self-defence in counter-terror operations' (1989-1990) 30 *Virginia Journal of International Law* 421.

<sup>255</sup> G Travalio & J Attenburg 'Terrorism, state responsibility, and the use of military force' (2003) 4 *Chicago Journal of International Law* 97, 102.

<sup>256</sup> *Nicaragua case* (n 85 above) para 115.

<sup>257</sup> Cenic (n 254 above) 202, Gray (n 6 above) 199.

<sup>258</sup> Garwood-Gowers (n 133 above) 8.

<sup>259</sup> S/RES/573 of 4 October 1985; S/RES/508 of 5 June 1982; S/RES/509 of 6 June 1982: see also Gray (n 6 above) 196.

nexus between the state and the NSA. Firstly, it argued that merely consenting to the presence of terrorists in a state's territory was enough reason to construe the state as an accomplice of attacks from the NSA. Secondly, the inability of a state to prevent attacks from its territory also effectively held the host state to be an accomplice.<sup>260</sup> In the 1970s and 1980s Israel relied on these interpretations to raid bases in Lebanon<sup>261</sup> and even for its rescue of Israeli nationals from Entebbe, Uganda.<sup>262</sup> Earlier in 1968, Israel had attacked the Beirut airport on the ground that Lebanon had allowed terrorists to build bases in its territory, thus encouraging warfare by terror against Israel, but the Israeli action was unanimously condemned by the SC.<sup>263</sup> The Entebbe airport attack in 1976 to rescue passengers and crew, most of whom were Israeli citizens, without the consent of Uganda had the tacit approval from most states.<sup>264</sup> On the other hand, Israel's pre-emptive attack on the Iraqi Osirak plant in 1981 was condemned by the international community.<sup>265</sup>

The US bombing of targets in Tripoli, Libya in 1986 in response to terrorist attacks on a Berlin discotheque which was frequently attended by US service personnel was condemned.<sup>266</sup> This condemnation of the US action as being unnecessary and disproportionate was in spite of US claims that the Libyan government was directly involved in the planning of the attacks on the discotheque.<sup>267</sup> While France and the UK joined the US in vetoing an outright condemnation, there was consensus among all other states for the condemnation of the US both in the SC<sup>268</sup> and in the GA.<sup>269</sup> In 1998 the US bombed a Sudanese pharmaceutical complex and terrorist training bases in Afghanistan following the terrorist attacks on US embassies in Kenya and Tanzania. While the US pleaded self-defence and relied on the need pre-emptively to deter future attacks, the international community was collectively mute.<sup>270</sup> Although there was no formal condemnation from the SC or the GA, the Arab States, NAM, Russia and Pakistan condemned the US.<sup>271</sup> According to Gray, the failure of other states to condemn the US is not evidence of the acceptance of a new legal doctrine, but a show of sympathy and

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<sup>260</sup> Ruys & Verhoeven (n 61 above) 292-293.

<sup>261</sup> Gray (n 6 above) 195.

<sup>262</sup> Ruys & Verhoeven (n 61 above) 292-293.

<sup>263</sup> S/RES/262 of 31 December 1968; Gray (n 6 above) 195.

<sup>264</sup> Byers (n 161 above).

<sup>265</sup> S/RES/487 of 19 June 1981.

<sup>266</sup> A/RES/41/38 of 20 November 1986, para 1.

<sup>267</sup> Garwood-Gowers (n 133 above) 8; Byers (n 161 above).

<sup>268</sup> Beard (n 132 above) 562; Gray (n 6 above) 196.

<sup>269</sup> A/RES/41/38 of 20 November 1986.

<sup>270</sup> Gray (n 6 above) 198.

<sup>271</sup> Garwood-Gowers (n 133 above) 9.

understanding.<sup>272</sup> She further points out that the actions of the US and Israel are more akin to reprisals than self-defence upon which they carefully relied, cognizant of the fact that reprisal is illegal in international law.<sup>273</sup>

Similarly, South Africa's purported hot pursuit of terrorist NSAs into the territories of neighbouring states was condemned. It had in some instances abandoned its reliance on state complicity in acts of terrorism as the justification thereof, but founded its actions on the doctrine of hot pursuit.<sup>274</sup> Some scholars and the UN have considered the reliance on the doctrine of hot pursuit to terrorize and destabilize neighbouring states as inappropriate.<sup>275</sup> It was nevertheless condemned by the SC for its acts of aggression against Angola and Botswana because those acts were said to amount to a violation of the territorial integrity and sovereignty of those states.<sup>276</sup> According to Tams, about 20 years ago, the majority of states considered the views of the US, Israel and South Africa on the unilateral use of force by states against NSAs as a way of inviting abuse and they were accordingly rejected.<sup>277</sup> The settled position prior to 9/11 which commentators had long held onto was, therefore, that grave breaches of peace or invasion by armed NSAs may trigger an article 51 right only if they were in furtherance of the orders of a state.<sup>278</sup>

The view expressed above has support in case law. The *Nicaragua case* identified two scenarios in which the right to invoke article 51 may arise. Firstly, an attack must be sufficiently grave, and, secondly, it must be attributable to a state if it is carried out by a NSA for such activities to trigger a right of self-defence.<sup>279</sup> The ICJ raised the threshold of gravity so that states may not rely on mere frontier incidents to attack opponents in purported exercise of self-defence.<sup>280</sup> Furthermore, Garwood-Gowers argues that, if this threshold is lowered, thereby allowing less grave attacks to qualify as armed attacks capable of triggering self-defence, it

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<sup>272</sup> Gray (n 6 above) 197-198.

<sup>273</sup> Gray (n 6 above) 198; see also S/RES/188 of 9 April 1964; A/res/2625(XXV) of 24 October 1970, Annex 1.

<sup>274</sup> Gray (n 6 above) 137.

<sup>275</sup> Gray (n 6 above) 137; Dugard (n 219 above) 505, where he argued that it is an unfortunate misuse of the term 'hot pursuit' which is a doctrine used under the law of the sea to describe the pursuit of guilty sea vessels, and, therefore, cannot be appropriately used in this context of fighting cross-border terrorism on land. Hot pursuit permits a war ship to pursue and arrest a ship that violates the laws applicable to the maritime zones of the coastal state on the high seas; see also S/RES/568 (1985); see also Art 23 of the 1958 Geneva Convention on the High Seas and Art 111 of the 1982 United Nations Law of the Sea.

<sup>276</sup> S/RES/546 of 4 January 1984 paras 1-2; and S/RES/568 of 21 June 1985 paras 1-2.

<sup>277</sup> CJ Tams 'The use of force against terrorists' (2009) 20 *European Journal of International Law* 373.

<sup>278</sup> I Brownlie 'International law and the activities of armed bands' (1958) 7(4) *International and Comparative Law Quarterly* 712, at 731.

<sup>279</sup> *Nicaragua case* (n 85 above) para 195; Cenic (n 254 above) 204.

<sup>280</sup> *Nicaragua case* (n 85 above) para 191.

may amount to the broadening of the scope of self-defence and a concomitant weakening on the general prohibition of the use of force contained in article 2(4) of the Charter.<sup>281</sup> In fact, there is an emerging trend that the threshold required for attacks from a NSA to amount to an armed attack which triggers a response in self-defence is higher than an attack from a state.<sup>282</sup> To that extent, while a frontier incident in certain instances may give rise to a response by a state in self-defence if the attacker is a state, a higher gravity is required from a NSA to trigger a response in self-defence.<sup>283</sup> The contention that a mere frontier incident could trigger an action in self-defence is controversial. This is because the decisions of both the *Nicaragua case* and the Eritrea/Ethiopia Claims Commission have distinguished armed attacks from mere frontier incidents.<sup>284</sup> They have held that mere frontier incidents lack the relevant scale and effect of an armed attack necessary to trigger a response in self-defence. In fact, the Claims Commission held further that even the loss of life resulting from a localised border encounter cannot constitute an armed attack.<sup>285</sup> On the other hand, legal commentators, such as Dinstein,<sup>286</sup> Fitzmaurice<sup>287</sup> and Kunz<sup>288</sup>, have argued that extremely grave frontier incidents may amount to an armed attack.

That apart, it had been the position before 9/11 that actions of states may give rise to self-defence if they are responsible for the sending of armed bands, groups, irregulars or mercenaries across the borders into another state to conduct such acts with the required gravity that may amount to an armed attack.<sup>289</sup> The above evaluation has undoubtedly shown that, before 9/11, the positive involvement of a state in the activities of NSAs was a prerequisite for self-defence to be triggered.

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<sup>281</sup> A Garwood-Gowers 'Case Concerning Oil Platforms (*Islamic Republic of Iran v United States of America*): Did the ICJ miss the boat on the law on the use of force' (2004) 5 *Melbourne Journal of International Law* 249.

<sup>282</sup> M Hakimi 'Defensive force against non-state actors: The state of play' (2015) 91 *International Law Studies* 17; see also Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, UN Doc. A/68/382 of 13 September 2013, para 89.

<sup>283</sup> Y Dinstein *War, aggression and self-defence* (2012) 210-214.

<sup>284</sup> *Nicaragua case* (n 85 above) para 103; Eritrea/Ethiopia Claims Commission - Partial Award: *Jus Ad Bellum* – Ethiopia's claims 1-8, Reports of International Arbitral Awards 2005 paras 11-12.

<sup>285</sup> Eritrea/Ethiopia Claims Commission (n 284 above) paras 11-12.

<sup>286</sup> Dinstein (n 283 above) 210-214.

<sup>287</sup> GG Fitzmaurice 'The Definition of Aggression' (1952) 1 *International & Comparative Law Quarterly* 137, 139.

<sup>288</sup> JL Kunz 'Individual and collective self-defence in Article 51 of the Charter of the United Nations' (1947) *American Journal of International Law* 878, where he stated that: 'If "armed attack" means illegal armed attack it means, on the other hand, any illegal armed attack, even a small border incident'.

<sup>289</sup> *Nicaragua case* (n 85 above) para 195; A/RES/3314 (XXIX) of 14 December 1974, Annex 3(g).

### 7.8.2. State practice after the terrorist attacks of 9/11

Firstly, on 11 September 2001, 19 Al Qaeda operatives simultaneously hijacked four US passenger planes, three of which struck their targets, while the fourth crashed on a field in Pennsylvania. The attack killed an estimated 3,000 people from 57 countries.<sup>290</sup> In response, the US and her allies commenced full-scale military operations on 7 October 2001 against Al Qaeda and the Taliban. The primary goals of OEF include: (a) the removal of the Taliban from power, (b) the destruction of terrorist bases operated by Al Qaeda in Afghanistan and other countries, and (c) the capture or killing of Osama bin Laden and his lieutenants. The international community's attitude to the massive use of force by the US against Al Qaeda was one of toleration. Certain commentators also justify the use of force by arguing that OEF was necessary and proportionate because the operation was not intended to merely respond to the 9/11 attacks, but against Al Qaeda's continuing threats.<sup>291</sup> A careful reading of SC resolutions 1510 and 1707 reveal (in this study's view) that there was unprecedented international support for the use of force against NSAs.<sup>292</sup> Thus, OEF launched by the US and the toleration of the international community of that operation for several years, could safely be construed that self-defence has been transformed to allow states to respond to attacks by terrorists with decreased condemnation.<sup>293</sup>

Secondly, Israel had, in 2003 and 2006, bombarded perceived terrorist bases in Syria (without imputing the terrorist activities to Syria) and Lebanon, even though the Israeli representative to the UN made reference to the toleration of the terrorist activities of Hezbollah by Lebanon during the debates in the SC. Duffy remarked that Israel actually made certain assertions that could be interpreted as imputing the conduct of Hezbollah to Lebanon.<sup>294</sup> The reaction of the international community to these attacks by Israel was mixed because, while some states considered the response as legitimate self-defence, others described the attacks as acts of aggression and disproportionate.<sup>295</sup> Although Israel claimed to have responded in self-defence to Hezbollah's attacks with a view to weakening its military infrastructure, it ended up

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<sup>290</sup> A Taylor '9/11: The day of the attacks' *The Atlantic*, 8 September 2011.

<sup>291</sup> L Moir *Reappraising the resort to force: International law, jus ad bellum and the war on terror* (2010) 68-71.

<sup>292</sup> S/RES/1510 of 13 October 2003, para1; S/RES/1707 of 12 September 2006, para 4. The SC called on ISAF to work in concert with OEF to accomplish its mandate, the mandate of OEF being to use force against Al Qaeda (a NSA) and the Taliban.

<sup>293</sup> Tams (n 277 above) 378.

<sup>294</sup> H Duffy *The war on terror and the framework of international law* (2015) 298.

<sup>295</sup> Tams (n 277 above) 379; A Zimmermann 'The second Lebanon war: *Jus ad bellum, jus in bello* and the issue of proportionality' (2007) 11 *Max Planck Yearbook of United Nations Law* 99.



attacking Lebanon as a whole. While the SC expressed its concern about the escalation of violence in the region, it did not blame Israel specifically, but rather welcomed Lebanese efforts to extend control of its territory to the southern borders.<sup>296</sup> The Arab League expressed dissatisfaction with the terms of the cease-fire which were skewed in favour of Israel without regard to the genuine concerns of the Lebanese people.<sup>297</sup>

Thirdly, in 2000, 2004 and 2007, Russia had conducted extraterritorial strikes against Chechen terrorist bases in Georgia. Russia blamed Georgia for failure to exercise control over parts of its territory, either because it is unable or unwilling to do so, and therefore makes it difficult to combat terrorism.<sup>298</sup> Russia's claim of self-defence against the Chechen terrorist attacks, without attributing these activities to the state of Georgia, was met with mixed reactions from the international community.<sup>299</sup> While blaming Russia for its use of excessive force, there was a show of sympathy as well, particularly after the 9/11 attacks.

Fourthly, Turkey's raid against PKK bases in northern Iraq in 2007 equally met with mixed reactions. The Turkish-PKK conflict dates back to the 1990s and relates to the PKK's struggle for self-determination.<sup>300</sup> On 7 October 2007, members of the PKK ambushed a Turkish Commando in Sinak Province of South-eastern Turkey and killed 13 soldiers. Apart from generally escalating cross-border incursions, twelve other Turkish soldiers were also killed days after this, causing Turkey to launch military operations, code-named *Operation Sun*, into northern Iraq.<sup>301</sup> On 21 February 2008, a major offensive was launched against the PKK involving the use of aircraft and artillery, apart from the initial small commando operations and aerial bombardment.<sup>302</sup> The *Operation Sun* was mainly a ground offensive involving thousands of Turkish troops<sup>303</sup>, and it killed several Kurdish rebels.<sup>304</sup> While only the US openly justified Turkey's right of self-defence in the manner it was executed, some other states condemned the invasion for being a disproportionate use of force.<sup>305</sup> While only few states may have approved

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<sup>296</sup> S/RES/1701 of 11 August 2006.

<sup>297</sup> S/RES/1701 of 11 August 2006, para 4 of the preamble.

<sup>298</sup> UN Doc. S/2002/1012 of 11 September 2002, Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary General;

<sup>299</sup> UN Doc. S/2002/1012 of 11 September 2002; Gray (n 6 above) 230; Tams (n 277 above) 380.

<sup>300</sup> KT Szabo 'Anticipatory action in self-defence: Essence and limits under international law (2011) 237-239.

<sup>301</sup> Tams (n 277 above) 379; T Ruys 'Quo vadit jus ad bellum: A legal analysis of Turkey's military operations against the PKK in northern Iraq' (2008) 9 *Melbourne Journal of International Law* 334-335.

<sup>302</sup> Ruys (n 301 above) 335.

<sup>303</sup> Tams (n 277 above) 379.

<sup>304</sup> Turkey kills 150 Kurdish rebels' *BBC NEWS*, May 3, 2008.

<sup>305</sup> Ruys 3-10; Tams (n 269 above) 379.

Turkey's incursion into Iraq, fewer states may have condemned it.<sup>306</sup> Arguably, the condemnation was not in respect of the illegality of the action, but on Turkey's failure to keep within the confines of proportionality. No resolution was, however, formally adopted by either the SC or the GA in condemnation of the attacks by Turkey.<sup>307</sup>

Fifthly, the 2008 invasion of terrorist bases in Ecuador in pursuit of the Revolutionary Armed Forces of Colombia (FARC) members by Colombia was condemned by the OAS as amounting to a violation of Ecuador's sovereignty.<sup>308</sup> Colombia considers the FARC to be terrorists while some other governments see them as revolutionaries. In spite of the condemnation of the Colombian action by other countries in the region and the severing of diplomatic relations with Colombia by Nicaragua, neither the SC nor the GA condemned Colombia for the show of aggression.<sup>309</sup>

Sixthly, on 22 September 2014 the US-led coalition commenced military operations by way of airstrikes against positions of ISIL and the Khorasan Group in Syria similar to earlier strikes that had been carried out against ISIL in August 2013. The attacks against these NSAs have not in any way been attributed to any state.<sup>310</sup> The positive international reaction against ISIL, with a coalition of the US, Australia, Belgium, UK, Canada, France, Netherlands, Denmark, Bahrain, Jordan, Saudi Arabia, Qatar and United Arab Emirates, in Iraq and Syria have made Hakimi to argue that, 'the claim that international law absolutely prohibits such use of force is losing ground'.<sup>311</sup> Although there is no doubt that the coalition is fighting against a NSA in the territories of Iraq and Syria, it is important to note that there is no consensus among states in respect of the legal mandate or standard of the operation.<sup>312</sup> No state, apart from Turkey has specifically stated that the operations amount to a self-defence. While it can be inferred from the US statements that they are in a form of collective self-defence to rescue Iraq, they rely, on the other hand, on flushing out terrorists from the ungoverned spaces of Syria.<sup>313</sup> Russia's involvement in the Syrian crisis is based on an invitation from Syria in 2015, and Russian President Vladimir Putin in turn secured authorization from its upper house of parliament.<sup>314</sup>

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<sup>306</sup> RV Steenberghe 'Self-defence in response to attacks by non-state actors in light of recent practice: A step forward' (2010) 23 *Leiden Journal of International Law* 193.

<sup>307</sup> Murphy (n 4 above) 39- 40.

<sup>308</sup> OAS CP/RES 930 (1632/80) of 5 March 2008.

<sup>309</sup> Murphy (n 4 above) 41.

<sup>310</sup> Hakimi (n 282 above) 2, 20-25.

<sup>311</sup> Hakimi (n 282 above) 20-22.

<sup>312</sup> Hakimi (n 282 above) 25-26.

<sup>313</sup> Hakimi (n 282 above) 25-26.

<sup>314</sup> TI Ocampos 'The legal basis for foreign military intervention in Syria' *Middle-East Eye*, 29 July 2016.

Turkey holds the view that international military action against ISIL has bolstered its main adversaries like the PKK and its affiliates.<sup>315</sup> While it may be in a kind of self-defence because it claims to be targeted, the aim is to defuse potential domestic tensions.<sup>316</sup>

Based on the instances enumerated above, Tams concludes that the international community can no longer deny states the right to use force in self-defence against NSAs, but what remains debatable, however, is whether such use of force complies with the principles of necessity and proportionality.<sup>317</sup> Some other commentators have gone even further by suggesting the extreme view that the need for attribution contained in the Nicaragua decision in response to attacks by NSAs has been dispensed with since the 9/11 attacks.<sup>318</sup> The better view, according to Tams, is that the traditional rules regulating self-defence have been modified. To him ‘contemporary practice suggests that a territorial state has to accept anti-terrorist measures of self-defence directed against its territory where it is responsible for complicity in the activities of terrorists based on its territory, either because of its support below the level of direction and control or because it has provided a safe haven for terrorists.’<sup>319</sup> This view, which he described as the lenient standard of attribution, appears to suggest that ‘aiding and abetting’ are sufficient for the purpose of attribution.<sup>320</sup>

## 7.9. Has the law on self-defence been transformed?

This study appreciates the complex nature of this debate and the difficulty of zeroing-in on any side of the divide, just as it has been remarked by some eminent commentators that it appears premature to say conclusively whether or not the law of self-defence has been transformed. Rather they opt for some future state practice to determine where the pendulum swings to.<sup>321</sup>

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<sup>315</sup> Al Jazeera ‘Analysis: Why Turkey matters in anti-ISIL war’ at <http://www.aljazeera.com/news/middleeast/2014/09/analysis-why-turkey-matters-anti-isil-war-20149296425459249.html> (accessed 20/11/2016).

<sup>316</sup> C Lauer ‘Turkey has joined the coalition force on its own terms’ *The National Opinion*, 6 October 2014.

<sup>317</sup> Tams (n 277 above) 381.

<sup>318</sup> C Greenwood ‘International law and the pre-emptive use of force: Afghanistan, Al Qaeda, and Iraq’ (2004) 4 *San Diego International Law Journal* 17; SD Murphy ‘Self-defence and the Israeli Wall Opinion-An ipse dixit from the Court’ (2005) 99 *American Journal of International Law* 62.

<sup>319</sup> Tams (n 277 above) 385.

<sup>320</sup> Tams (n 277 above) 386.

<sup>321</sup> A Cassese ‘Terrorism is also disrupting some crucial legal categories of international law’ (2001) 12 *European Journal of International Law* 993 where he stated: ‘I shall leave here in abeyance the question whether one can speak of “instant custom” that is of the instantaneous formation of a customary rule widening the scope of self-defence as laid down in Article 51 of the UN Charter and in the corresponding rule of customary law. It is too early to take a stand on this difficult matter’; Steenberghe (n 289 above) 183-184. He stated: ‘It is no doubt too early to draw any firm conclusion from this practice, future practice will be decisive’; Hakimi (n 282 above) 3.

Nevertheless, between when Cassese and Steenberghe wrote their views in 2001 and 2010 and now, some significant developments in that regard, particularly the events in Iraq and Syria, may have stretched the law beyond what it used to be. This study will, thus, brave the odds by pointing out its understanding of the law as to whether the law of self-defence has indeed been transformed.

The strict interpretation of self-defence as contained in article 51 of the Charter by the ICJ in the *Nicaragua case*, *Palestinian Wall case* and the *DRC case* and some GA resolutions that firmly constrain the use of force,<sup>322</sup> made powerful states feel that the drafters of the Charter (cornerstone of the international security infrastructure) have placed too many limitations on the use of force.<sup>323</sup> These limitations have, therefore, made it extremely difficult for victim states of terrorist attacks to respond unilaterally without inhibition. Although no consensus has, thus, been reached by the powerful states with regard to wriggling out of the comprehensive ban on the use of force, some of them have unilaterally resorted to re-interpreting the Charter provisions with a view to escaping or circumventing the trappings of the Charter.<sup>324</sup> It is on the basis of the re-interpretations that some form of rationale was drummed up by Russia to invade Georgia, Australia to plan an attack against terrorist bases in neighbouring states pre-emptively, and Rwanda's deployment of troops against Hutu militias in the DRC.<sup>325</sup> Following the Bali bombing in 2002 in which over 80 Australian tourists were killed, the Australian Prime Minister suggested an amendmend of the Charter rules on self-defence to cope with security threats. He indicated his country's preparedness to attack terrorist groups and bases in neighbouring countries if there is credible evidence of planned attacks against Australia.<sup>326</sup> Circumventing or reinterpreting the Charter too has not been easy. For instance, even the interpretation of article 2(4) by certain commentators that the use of force not directed against the territorial integrity or political independence of another state is not contrary to the Charter prohibition was rejected.<sup>327</sup> The law of the Charter, therefore, remains that all uses of force and threats, including those directed at terrorist enclaves, cells and networks, in the territories of other states are prohibited.<sup>328</sup> This is because the intention of the drafters of the Charter was a

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<sup>322</sup> A/RES/2625(XXV) of 24 October 1970 & A/RES/3314(XXIX) of 14 December 1974.

<sup>323</sup> Tams (n 269 above) 363.

<sup>324</sup> A Cassese 'Return to Westphalia?' in A Cassese (ed.) *The current regulation of the use of force* (1986) 513.

<sup>325</sup> Ruys & Verhoeven (n 61 above) 290.

<sup>326</sup> T Ruys 'Armed attack' and article 51 of the UN Charter: *Evolutions in customary law and practice* (2010) Cambridge University Press 330.

<sup>327</sup> Tams (n 277 above) 364.

<sup>328</sup> O Schachter 'The lawful use of force by a state against terrorists in another country' (1989) 19 *Israel Yearbook on Human Rights* 209, at 213-214.

comprehensive ban, and it appears that no interpretation would be allowed to restrict or abridge the scope of the ban.<sup>329</sup>

This study's view is that, whether the law of self-defence has been transformed or not may be seen from the perspectives of the Bush doctrines, multilateral support for forcible measures in self-defence against NSAs, SC resolutions 1368 and 1373, views of legal commentators and general practice of states. The questions, whether pre-emptive self-defence has crystallised into customary international law or whether the requirement of attribution of the conduct of NSAs to states is no longer relevant or has been lowered to warrant the interpretation of the law of self-defence as having been transformed, will be considered below.

### **7.9.1. Whether pre-emptive self-defence has crystallised into a new norm of international law**

Article 51 is the grundnorm in the determination of when an action in self-defence can lawfully be taken against another state. The restrictive interpretation of article 51, which is to the effect that self-defence may be triggered only upon the occurrence of an armed attack, remains the contemporary position of the law, and it remains the better view.<sup>330</sup> Any wider interpretation of self-defence with a view to accommodating pre-emptive self-defence will be incompatible with the wording of article 51 which aims at limiting self-defence to responses against attacks that meet the gravity threshold in terms of scale and effect of an armed attack.<sup>331</sup> Arguably, there appears to be no sufficient support for pre-emptive self-defence to warrant interpreting it as having caused a shift in the law of self-defence. Even the opposition by states to OIF goes to corroborate the fact that pre-emptive self-defence remains unacceptable and does not in any way form part of the *corpus* of international norms regulating the use of force.<sup>332</sup> Firstly, the ICJ has not expressed any intention as shown in the series of its decisions, both pre- and post-9/11 to expand the notion of self-defence beyond the literal meaning of article 51 of the Charter.<sup>333</sup> It, therefore, remains difficult to confirm that state practice has unequivocally manifested a crystallisation of a new norm of pre-emptive self-defence that would necessitate the interpretation of self-defence against NSAs as having been transformed. In fact,

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<sup>329</sup> TM Franck *Recourse to force: State action against threats and armed attacks* (2002) 12; Report of the High-level Panel (n 10 above) paras 188-192.

<sup>330</sup> Article 51 of the UN Charter; Brownlie (n 278 above) 270-280.

<sup>331</sup> Garwood-Gowers (n 133 above) 3.

<sup>332</sup> Gray (n 6 above) 354-358.

<sup>333</sup> *Nicaragua case* (n 85 above) para 115; *Palestinian Wall case* (n 149 above) para 139 and *DRC case* (n 153 above) para 146.

Medzmariashvili argues that the cautious and prudent attitude of states not to adopt pre-emptive self-defence or the Bush doctrine hastily is for wanting to avoid abuse by powerful states which may exploit pre-emptive self-defence as a legal weapon to invade weaker states based on unfounded and unsubstantiated allegations of threats.<sup>334</sup>

Secondly, some important international reports, such as the Report of the High-level Panel on threats, challenges and change, the Secretary-General's report 'In larger freedom: towards development, security and human rights for all' and the Havana Declaration of the Non-aligned Movement, have also dissociated themselves from the principle of pre-emptive self-defence as formulated by President Bush in his 2002 and 2006 NSS of the US (Bush doctrine). The views in these reports are fundamental because they represent the thinking of several states that share common interests or emanate from committees that were set up by the UN. As already indicated above, these reports have rejected the Bush doctrine as it relates to pre-emptive self-defence, arguing that pre-emptive strikes remain illegal even in the face of the new threats to world peace and security and that Article 51 should not be re-written or re-interpreted.<sup>335</sup>

Thirdly, apart from the international organisations which have rejected the concept of pre-emptive self-defence, most states have also independently argued in rejection of the Bush doctrine. Several states, including but not limited to the Netherlands, Egypt, Pakistan, Algeria, Iran, Cuba, Morocco, Chile and Vietnam, have all unequivocally rejected the Bush doctrine of pre-emptive self-defence. They contended that adopting such a concept which is manifestly inconsistent with the wording of article 51 may mean resolving to shake the Charter's basic legal and moral foundations, thereby legitimizing unilateral actions to be leveraged upon by a few powerful states.<sup>336</sup> Interestingly, even the US closest ally, the UK, has not adopted the concept of pre-emptive self-defence wholesale.<sup>337</sup> In a statement before the British Parliament on 21 April 2004, Attorney-General Lord Goldsmith stated that: 'It is therefore the

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<sup>334</sup> Mezmariashvili (n 172 above) 58.

<sup>335</sup> Report of the High-level Panel (n 10 above) para 192, Annex (1) recommendations at para 53; Report of the Secretary-General (n 86 above) paras 122-126; Havana Declaration (n 202 above) para 22.5, World Summit Outcome Document (n 86 above) paras 15 & 79.

<sup>336</sup> C Gray 'A crisis of legitimacy for the UN collective security system' (2007) 56 *International and Comparative Law Quarterly* 164.

<sup>337</sup> Letter of UK Attorney-General Lord Goldsmith to Geoffrey Hoon dated 28 March 2002, at <http://www.iraqinquiry.org.uk/media/42845/goldsmith-hoon-letter.pdf> (accessed 18/04/2016). In his advice to Geoffrey Hoon (Secretary of Defence) who granted an interview to Jonathan Dimbleby, Goldsmith reacted by rejecting the use of pre-emptive force when he stated: 'I see considerable difficulties in being satisfied that military action would be justified on the basis of self-defence. In particular I am not aware of the existence of material indicating the existence of an imminent threat from Iraq of the sort which would justify military action without support of a Security Council Chapter VII authorisation'.



Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote'.<sup>338</sup> When the legal opinion of the UK Attorney-General was sought on the legitimacy or legality of the Iraqi war, particularly relying on resolution 1441 by the SC to resurrect previous decisions on Iraq, he used the opportunity to re-emphasise the illegality of pre-emptive self-defence.<sup>339</sup> Nevertheless, the US may still count on the support of a few unwavering allies who also advocate pre-emptive self-defence, such as Australia<sup>340</sup> and Israel.<sup>341</sup> Some other states, including China, France, Russia, India, Iran, North Korea and Taiwan, are also favourably considering the option of pre-emptive self-defence because of discomfort with threats from some states, but some of them disagree with the approach of the US.<sup>342</sup>

Fourthly, there is near consensus in legal scholarship that pre-emptive strikes in self-defence advocated by the US and Israel remain forbidden even in the post 9/11 international law. Pre-emptive self-defence has not crystallised into a new norm because no general *opinion juris* has emerged and states have sustained resistance to its adoption as a principle of international law.<sup>343</sup> This view is shared by Bothe,<sup>344</sup> Ruys<sup>345</sup> and others. Although the threshold requirement of attribution has been lowered in consonance with the second limb of the Bush doctrine, an action against host states in self-defence applies only where there has been an armed attack and not otherwise.<sup>346</sup> The better view, according to commentators, is that the Bush doctrine of pre-

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<sup>338</sup> Attorney-General Lord Goldsmith's statement before the Parliament on 21 April 2004, Column 370, at <http://www.publications.parliament.uk/pa/Id200304/Idhansrd/vo040421/text/40421-07.htm> (accessed 05/11/2015).

<sup>339</sup> Attorney-General's Advice on the Iraq war: Resolution 1441' (2005) 54 *International and Comparative Law Quarterly* 768, para 3 thereof stated in part: 'I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future. If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not the doctrine which, in my opinion exists or is recognised in international law.'

<sup>340</sup> WM Reisman & A Armstrong 'Claims to pre-emptive uses of force: Some trends and projections and their implications for world order' in M Schmitt & J Pejic (eds.) *International Law and armed conflict: Exploring the faultlines: Essays in honour of Yoram Dinstein* (2007) 102; L Moir *Reappraising the resort to force: International law, jus ad bellum and the war on terror* (2010) 110.

<sup>341</sup> 'Israel threatens militants abroad' *New York Times*, 9 September 2003.

<sup>342</sup> WM Reisman & A Armstrong 'The past and the future of the claim of pre-emptive self-defence' (2006) 100 *American Journal of International Law* 44-46.

<sup>343</sup> Peters (n 109 above) 125.

<sup>344</sup> M Bothe 'Terrorism and the legality of pre-emptive force' (2003) 14 *European Journal of International Law* 232.

<sup>345</sup> Ruys (n 326 above) 322-233.

<sup>346</sup> Garwood-Gowers (n 133 above) 14-15; A Garwood-Gowers 'Pre-emptive self-defence: A necessary development or a road to international anarchy?' (2004) 23 *Australian Yearbook of International Law* 53-56.

emptive self-defence has not crystallised into a new norm of customary international law since its applicability is constantly resisted and rejected by a majority of states.<sup>347</sup>

Interestingly, even the proponent of pre-emptive self-defence, the US is apprehensive and wary about setting a dangerous precedent with the pre-emptive doctrine. It is not disposed to seeing Russia employ similar force in the territory of Georgia against Chechen militants.<sup>348</sup> The attitude of US officials has also indicated that pre-emptive self-defence may not represent an attempt to transform the law of self-defence radically.<sup>349</sup> O'Connell argues that it is as a result of such a fear that President Bush stated that the, 'United States can make choices unavailable to others'. She queries why the US carved a different status for itself when it is just a sovereign state like any other state.<sup>350</sup> Consequently, the legal justifications relied upon by the US may similarly avail Russia of the right to attack Georgia, just as North Korea may attack South Korea and Pakistan may invade India, etc.<sup>351</sup>

It can safely be argued that, even in the face of the perceived inadequacies of the Charter provisions in terms of coping with the security challenges arising from the threats from emerging international terrorist networks, the proliferation of WMD and the rise in the number of failed and collapsed states, the international community appears to be reluctant to adopt pre-emptive self-defence to cause a formal change of its rules.<sup>352</sup>

### **7.9.2. Whether the requirement of attribution of the conduct of NSAs to states is no longer relevant**

The requirement of attributing an armed attack by a NSA to a state, in consonance with the jurisprudence of the ICJ and the GA resolution as contained in Annex 3g thereof, is retained in

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<sup>347</sup> Peters (n 109 above) 25.

<sup>348</sup> Gray (n 6 above) 230-231.

<sup>349</sup> Dr Condoleezza Rice discusses President's security strategy' Winston Lecture, New York, 1 October 2002, at <http://georgebush-whitehouse.archives.gov/news/releases/2002/10/20021001-6.html> (accessed 06/11/2015) where she stated that: 'The number of cases in which it might be justified will always be small. It does not give a green light-to the United States or any other nation-to act first without exhausting other means, including diplomacy. Pre-emptive action does not come at the beginning of a long chain of efforts. The threat must be very grave. And the risks of waiting must far outweigh the risks of action'; see also WH Taft IV 'The legal basis for pre-emption' Memorandum to American Society of International Law (ASIL)-Council on Foreign Relations (CFR) Roundtable, 18 November 2002, at <http://www.cfr.org/international-law/legal-basis-preemption/p5250> (accessed 06/11/2015).

<sup>350</sup> ME O'Connell 'The myth of pre-emptive self-defence' (2002) *American Society of International Law* 19.

<sup>351</sup> O'Connell (n 329 above) 19; see also C Heyns & S Knuckey 'The long term international law implications of targeted killing practices' (2013) 54 *Harvard International Law Journal* 108, where they stated: 'if one government is allowed to use force whenever it is of the opinion that there is some perceived danger that may be realised at some point in the future, with no transparency and accountability, there is no basis on which to hold others back from doing the same'.

<sup>352</sup> Report of the High-level Panel (n 10 above) Annex (1) recommendations at para 53.

the determination of a lawful self-defence.<sup>353</sup> Nevertheless, it is the view of this study that the threshold for attribution which previously entailed a state's active support by way of effective control or adoption of the conduct of a NSA has been lowered. This view is largely brought about by post 9/11 state practice. Contrary views to this position have also been expressed by other commentators. It has been argued that it will be unlawful to attack an innocent state on the basis of self-defence if such a state had not given any financial or logistical support to NSAs and had neither knowledge of the hostile acts nor endorsed such acts, particularly if it had met the due diligence obligation to prevent international harm to other states.<sup>354</sup>

According to Tladi, though state practice in the determination of a shift in the law is important as an aid to interpretation, it cannot be seen as determinative of article 51.<sup>355</sup> He argues that self-defence is merely an exception to the general rule on the prohibition of the use of force and should not be interpreted to overwhelm the substantive rule. It should be construed strictly within the context of other principles, such as territorial integrity, sovereign equality and the use of force.<sup>356</sup> Self-defence may offend these foundational principles if it is without consent of the territorial state. Tladi considered the attack of Iraq by Turkey and the reactions thereto as an illustration of what should be seen as an established position because of the criticisms of the violation of Iraq's sovereignty by Javier Solana, Ban Kin Moon and Stephen Smith.<sup>357</sup> To Tladi, even Israel's attack on Lebanon could not be used as a yardstick to conclude the toleration of the use of force against NSAs, based on reactions from Russia, Ghana, Qatar and China.<sup>358</sup> Furthermore, on whether the US invasion of Afghanistan can serve as a basis for the acceptance of a new norm to the effect that states can embark on self-defence against NSAs, Tladi argues that the invasion was not against Al Qaeda but against the Taliban because there was an attribution of blameworthiness to the Taliban government by the US.<sup>359</sup>

While Tladi's weighty contentions have gone a long way to illuminating this contemporary debate and the law of self-defence, it appears that he arrived at those conclusions by relying on the jurisprudence of the ICJ as enunciated in the *Nicaragua case* and the customary law

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<sup>353</sup> A/RES/3314 (XXIX) of 14 December 1974, Annex 3(g).

<sup>354</sup> AB Lorca 'Rules for the "global war on terror": Implying consent and presuming conditions for intervention' (2012) 45 *International Law and Politics* 34; see also JJ Paust 'Use of armed force against terrorists in Afghanistan, Iraq and beyond' (2002) 35 *Cornell International Law Journal* 540.

<sup>355</sup> Tladi (n 160 above) 80.

<sup>356</sup> Tladi (n 160 above) 80.

<sup>357</sup> Javier Solana was EU High Representative for Foreign Affairs and Security Policy, Ban Kin Moon is UN Secretary-General and Stephen Smith was Australia's Foreign Minister, see Tladi (n 160 above) 82.

<sup>358</sup> Tladi (n 160 above) 83.

<sup>359</sup> Tladi (n 160 above) 84.

principle of consent. Though Tladi also made reference to state practice prior to 9/11 and post 9/11, he arrived at the conclusion that state practice is insufficient to provide evidence of any acceptance of the use of force without attribution to a state. Given that case law may be relied upon in the determination of international law, much weight cannot be ascribed to it because its binding effect is between the parties in that case only.<sup>360</sup> Subsequent practice of states is more likely to elucidate the provisions of the Charter than decisions of the ICJ.<sup>361</sup> In fact state practice is the ‘real world test’ and ‘leading edge’ of international law.<sup>362</sup> This study’s humble view is not that attribution has been discarded completely but that the threshold requirement of attribution has been lowered. That is to say, the international community now tolerates attacks in self-defence against a state that merely harbours terrorist NSAs. As Duffy points out, ‘While there is still controversy, and room for alternative interpretations of practice, the weight of commentary supports the view that clear cut attribution is no longer a pre-requisite to trigger resort to self-defence’.<sup>363</sup>

This study considers this view to be the better one because it has been given credence by some UN resolutions, state practice post 9/11, commentators, and the African Union. In fact the African Union provided, in its 2005 African Union Non-Aggression and Common Defence Pact, that an act of aggression includes the harbouring of terrorists.<sup>364</sup> As was indicated in chapter four above, there need not be any causal nexus between the terrorist wrong doer and a state because the responsibility of the harbouring state is engaged also for omissions, whether such omissions are deliberate or innocent, rather than an act.<sup>365</sup> Thus, it appears sufficient if a state merely harbours or tolerates terrorist NSAs to attribute the conduct of such NSAs to it, thereby giving rise to a lawful action in self-defence.<sup>366</sup> This study draws such a conclusion based on the following grounds:

(a) The SC has requested states not only to refrain from active support to terrorist groups, but also to refrain from any passive support to terrorists by way of acquiescing in the conduct of

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<sup>360</sup> Art 38 of the Statute of the ICJ.

<sup>361</sup> Art 3(3)(b) of the Vienna Convention on the Law of Treaties. It provides ‘There shall be taken into account, together with the context: “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding the interpretation”’.

<sup>362</sup> Oliver (n 111 above) 85, cited in Fitzgerald 489.

<sup>363</sup> Duffy (n 294 above) 298.

<sup>364</sup> Art 1(c)(xi) of the African Union Non-Aggression and Common Defence Pact of 2005 defined aggression to include: ‘the encouragement, support, harbouring or provision of any assistance for the commission of terrorist acts and other violent trans-national organised crimes against a Member State’.

<sup>365</sup> Proulx (n 144 above) 624.

<sup>366</sup> Garwood-Gowers (n 133 above) 2

NSAs or aiding and abetting them. Innocently, or merely, providing safe haven for terrorists without anything more, therefore, engages the international responsibility of such host states and they may be held accountable.<sup>367</sup> In both resolutions 1368 and 1373 the resolve of the SC to hold states that merely harbour terrorist NSAs to account resonated. In fact, by virtue of paragraphs 2(a) and (b) of resolution 1373, the SC requested states to refrain from both passive or active support to terrorists and to take all necessary steps to prevent the commission of terrorist acts.

(b) The near unanimous international support given to the US through the adoption of the resolutions and the involvement of several countries in the US-led coalition against the Taliban and Al Qaeda in the prosecution of OEF can be construed as recognition, legitimisation or legalisation of an action in self-defence against a state for merely harbouring or acquiescing in the conduct of NSAs. This is in consonance with the second limb of the Bush doctrine which advocated the non-distinction of terrorists from their host states, even if such states played no active role in their activities or are not in effective control of the NSAs. The broad support for OEF was shown by the pledge of the European Union<sup>368</sup> and the invocation of relevant provisions of the NATO Treaty,<sup>369</sup> OAS Treaty<sup>370</sup> and the ANZUS Treaty.<sup>371</sup> Similarly, many states, including (but not limited to) Canada, UK, Japan, Australia, Russia, Pakistan and Liberia, offered to join the coalition in support of the US.<sup>372</sup> This massive support has made some commentators conclude that an action in self-defence could lie against a NSA, independent of any attribution to a state,<sup>373</sup> while others contend that the Bush doctrine has

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<sup>367</sup> S/RES/1368 of 12 September 2001 para 3; S/RES/1373 of 28 September 2001 para 2(a); S/RES/2129 of 17 December 2013 para 13; S/RES/2133 of 27 January 2014 and S/RES/2170 of 15 August 2014, para 11.

<sup>368</sup> America strikes back: Allies' *Denver Post*, 9 October 2001, at A8.

<sup>369</sup> Article V of the 1949 Washington Treaty by NATO.

<sup>370</sup> Art 3(1) of the Inter-American Treaty of Reciprocal Assistance; see OAS Doc. RC.24/Res1/01 of 21 September 2001.

<sup>371</sup> Art 4 of the Security Treaty between Australia, New Zealand and the United States of America (ANZUS) 1952. It provides that: 'Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes'. Art 4 is reinforced by Art 5 of the treaty. While expressing the shock of the people of Australia on the attacks on the US, the Prime Minister of Australia invoked the ANZUS Treaty for the first time since its enactment in 1952 on 14 September 2001 to confront a common danger. See J Howard (Prime Minister) 'Application of ANZUS Treaty to terrorist attacks on the United States', Media Release, 14 September 2001, at <http://parlinfo.aph.org.au/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FYFY46%22> (accessed 24/03/2016).

<sup>372</sup> Garwood-Gowers (n 133 above) 9-10.

<sup>373</sup> Cassese (n 321 above) 996-997. He stated: 'It would thus seem that in a matter of a few days, practically all states (all members of the Security Council plus members of NATO other than those sitting on the Security Council, plus all states that have not objected to resort to Article 51) have come to assimilate a terrorist attack by a terrorist organisation to an armed aggression by a state, entitling the victim state to resort to individual self-defence and third states to act in collective self-defence (at the request of the former state)'.

instantly crystallised into a new customary law.<sup>374</sup> Apart from the overwhelming support for OEF, it has been argued that the greatest manifestation of the emergence of a new customary law of self-defence is the absence of any serious opposition or objection to the US's sustained reliance on harbouring of terrorists as a ground necessitating an action in self-defence.<sup>375</sup> Granted that there were some initial objections, particularly from Iran and a few others, including Malaysia, Cuba, Iraq, Sudan and North Korea, they were not sustained or strong enough to cause a rethink of the US policy. Ratner argued that, in the face of the massive support by the US allies in NATO and the Asian region, other states abstained from criticising the US action.<sup>376</sup> Even Iraq, the most vocal opposition to the action, was more inclined to question the absence of evidence linking the Taliban or Al Qaeda to the 9/11 attacks rather than the legality of such an action against a state for merely harbouring terrorist NSAs.<sup>377</sup> According to Ratner, even international organisations, including the OIC, AU and Association of South-East Asian Nations (ASEAN), refrained from criticising the action.<sup>378</sup>

(c) There is, to a large extent, *consensus ad idem* among publicists, jurists and commentators that passive support, perhaps with some element of aiding and abetting of a NSA by a harbouring state, gives rise to international responsibility. Although the NSA may be the author of an act of aggression, it has been argued that the violation of the sovereignty of the host state is legally justified for aiding and abetting terrorism or for breaching an international duty.<sup>379</sup> According to Cassese, aiding and abetting international terrorism is equated with an armed attack in the consideration of the propriety of self-defence.<sup>380</sup> While also supporting the argument of Takahashi that the response of the international community in the aftermath of 9/11 has crystallised to a new principle of customary international law that permits a response in self-defence to armed attacks by terrorist NSAs, Garwood-Gowers suggested a better view (in his opinion). The view is that, 'the attribution requirement remains part of the concept of "armed attack", but the threshold for attribution has been lowered to mere hosting or toleration

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<sup>374</sup> Langille (n 175 above) 145; Y Arai-Takahashi 'Shifting boundaries of the right of self-defence: Appraising the impact of the September 11 attacks on *jus ad bellum*' (2002) 36 *International Lawyer* 1095.

<sup>375</sup> Travaglio & Attenburg (n 255 above) 108-109; Ratner (n 192 above) 509-510.

<sup>376</sup> Ratner (n 192 above) 509-510.

<sup>377</sup> Ratner (n 192 above) 509-510.

<sup>378</sup> Ratner (n 192 above) 510.

<sup>379</sup> Cassese (n 321 above) 997; A/RES/2625/XXV of 24 October 1970; S/RES/1189 of 13 August 1998 & S/RES/1373 of 28 September 2001.

<sup>380</sup> Cassese (n 321 above) 997.



of NSAs'.<sup>381</sup> Several other commentators, including but not limited to Wolfrum,<sup>382</sup> Byers,<sup>383</sup> Wilmschurst,<sup>384</sup> Beard<sup>385</sup> Ruys and Verhoeven,<sup>386</sup> Travalio and Attenburg<sup>387</sup>, have argued in favour of the fact that the threshold for attribution of the conduct of terrorist NSAs to states has been lowered. Wolfrum has put it succinctly while making reference to the ILC Articles on State Responsibility that:

an accomplice to an international wrongful act is internationally responsible in the same way as the person who committed that act, if aid or assistance was given with the knowledge of the circumstances of the internationally wrongful act and if that act would have been wrongful if committed by the person rendering the assistance.<sup>388</sup>

It has also been argued by Cenic that the 'effective control' standard laid down in the *Nicaragua case* appears to be too restrictive because a certain degree of flexibility is required to cope with the new threats, but it should not be concluded that merely hosting terrorists is enough to attribute the acts of NSAs to a state.<sup>389</sup> Cenic has instead suggested, while adopting the dissenting views of Judges Schwebel and Jennings in the *Nicaragua case*, that the provision of arms, finances and logistics should be interpreted and equated with armed attack, necessitating attribution to such state.<sup>390</sup> The idea is that whoever supports terrorists with arms, finances and logistics invariably knows what the terrorists will do with such support.<sup>391</sup> This view appears to suggest that it will be too punitive to attack a state for merely hosting NSAs, and it may be quite difficult to attack all host nations, instead of dealing with a few states that provide arms, finances and logistics.<sup>392</sup> To corroborate this argument, Cenic alluded to a dialogue between President Bush and his CIA Director. When Bush vowed to take his war to all states harbouring terrorist NSAs, the Director reminded him that over 60 countries are hosting terrorists, but only

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<sup>381</sup> Garwood-Gowers (n (n 133 above) 11-12.

<sup>382</sup> R Wolfrum 'The attack of September 11, 2001, the wars against the Taliban and Iraq: Is there a need to reconsider international law on the recourse to force and the rules in armed conflict' (2003) 7 *Max Planck Yearbook of United Nations Law* 37-38. He wrote: 'Therefore a given action of a non-states actor is attributable to the respective subject of international law supporting the non-state actor, if that subject of international law deliberately created a situation which was a necessary precondition for a later event, provided the happening of that event was not beyond reasonable probability and constituted a breach of international law'.

<sup>383</sup> M Byers 'Terrorism, the use of force in international law after 11 September' (2002) 51 *International and Comparative Law Quarterly* 409-410.

<sup>384</sup> ES Wilmschurst 'Anticipatory self-defence against terrorists' in L Herik & N Schrijver (eds.) *Counter-terrorism strategies in a fragmented international legal order: Meeting the challenges* (2013) 358.

<sup>385</sup> Beard (n 132 above) 578-579.

<sup>386</sup> Ruys & Verhoeven (n 61 above) 311.

<sup>387</sup> Travalio & Attenburg (n 255 above) 105.

<sup>388</sup> Wolfrum (n 382 above) 37.

<sup>389</sup> Cenic (n 254 above) 213.

<sup>390</sup> Cenic (n 254 above) 214.

<sup>391</sup> Cenic (n 254 above) 214.

<sup>392</sup> Cenic (n 254 above) 214.

a few states, such as Syria and Iran, provide arms, finances and logistics.<sup>393</sup> The wisdom of reducing his battles dawned on President Bush. Similarly, Cassese wonders whether such employment of self-defence against all host states in the globe will not culminate in another world conflict.<sup>394</sup> Furthermore, relying on the non-condemnatory attitude of the international community of the OEF, coupled with the recognition by some states of Israel's right to respond to rocket attacks from Lebanon and Gaza, and the refraining from condemning Turkish invasion of Northern Iraq, indicate that states may respond in self-defence to attacks from NSAs independent of another state's involvement.<sup>395</sup>

Similarly, under paragraph 38 of the Leiden Policy Recommendations, the international law experts point out that, 'It is now well accepted that attacks by non-state actors, even when not on behalf of a state, can trigger a state's right of individual and collective (upon request of the victim state) self-defence'.<sup>396</sup> It was the further recommendation of the experts that, 'In the case of an attack by terrorists that is not attributable to a state, Article 51 should be read to require that the attack be large-scale in order to trigger the right of self-defence; in assessing the scale, account may be taken of a series of attacks emanating from the same territory and the same terrorist group'.<sup>397</sup> According to them, the inherent nature of self-defence to repel or avert an armed attack does not require attributability to a territorial state under the rules of state responsibility.<sup>398</sup>

Legal scholarship and resolutions of the SC have generally shown that merely harbouring or tolerating the activities of NSAs could engage the responsibilities of states because they have been requested to refrain from both active and passive support. It is the position that states have the duty to refrain from organizing, instigating or generally acquiescing in acts of terrorism or to allow its territory knowingly to carry out activities that are injurious to other states.<sup>399</sup> But a distinction has to be made between states that possess the capacity to exercise control over their territory and those that lack relevant capacity to control their territory. The better view, in the opinion of this study, is that states that are able to exercise control over their territories, but,

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<sup>393</sup> Cenic (n 254 above) 214.

<sup>394</sup> Cassese (n 321 above) 1000.

<sup>395</sup> Steenberghe (n 289 above) 206-207.

<sup>396</sup> Leiden Policy Recommendations on Counter-terrorism and International Law, 2010 para 38, at <http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf>.

<sup>397</sup> Leiden Policy Recommendations (n 396 above) para 39.

<sup>398</sup> Leiden Policy Recommendations (n 396 above) para 42.

<sup>399</sup> *Corfu Channel (United Kingdom v Albania) Merits*, ICJ Reports (1949) 4, para 22; A/RES/2625(XXV) of 24 October 1970, Annex, Section 1.

nevertheless, harbour or tolerate the presence and activities of NSAs should incur the wrath of victim states of terrorist attacks by way of self-defence.<sup>400</sup>

Given that the emerging principle of a lowered threshold for attribution is gaining ground, it is, however, suggested that an action in self-defence be limited to attacks against NSAs and their objects alone if effective control by the state over the NSA is not established. This is because, if the conduct of individuals or groups within the territorial state threatens or causes immediate danger to the political independence of another state, the innocent territorial state ought not to be seen as having breached any international obligation if it acts with due diligence and fails to prevent the attacks from its territory. In this circumstance, the right of self-defence available to the victim state should be directed strictly at the NSAs, their objects and infrastructures, but both the military and civilian objects of the territorial state should be spared from attack.<sup>401</sup> In support of the above argument, Bowett alluded to the *Caroline* and *McLeod* Cases where the US arrested Mr. McLeod for his role in attacking the American steamship, the *Caroline*, and charged him for murder and arson. Though Britain rested its defence of McLeod on an act of state in which McLeod had participated, the US sought to hold the human elements behind the attack on the *Caroline* responsible, while not forcibly contesting the operation.<sup>402</sup> This study advocates that there should be a distinction between state objects and terrorist infrastructure if the grounds for self-defence are merely hosting or tolerating NSAs. This study concludes that the law on self-defence has been transformed. Also arriving at similar conclusion, Heyns stated that, though the claim of self-defence against NSAs before 9/11 was not acceptable, post 9/11 state practice permits the use of force against NSAs.<sup>403</sup>

## 7.10. Conclusion

This chapter has evaluated the transformation of the law of self-defence from various perspectives which include the Bush doctrines, Sc resolutions 1368 and 1373, scholarly works, multilateral support for the use of by states against NSAs and state practice. The study has found that, firstly, the concept of pre-emptive self-defence is inconsistent with article 51 of the

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<sup>400</sup> GM Travaglio 'Terrorism, international law, and the use of military force' (2000) 18 *Wisconsin International Law Journal* 154; R Vark 'Terrorism, state responsibility and the use of armed force' (2011) 14 ENDC Proceedings 90.

<sup>401</sup> DW Bowett *Self-defence in international law* (2009) 55-56; see also Para 43 of the Leiden Policy Recommendations (n 396 above).

<sup>402</sup> Bowett (n 401 above) 59.

<sup>403</sup> Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, Christof Heyns, UN Doc. A/68/382 of 13 September 2013.

UN Charter and it has not crystallized through state practice into a new customary international law norm. This conclusion is drawn because the principle of pre-emptive self-defence, which advocates the use of force even without an armed attack or imminent threats was rejected by the ICJ, international organisations, states, committee reports and a broad spectrum of legal commentators. The ICJ jurisprudence, as can be discerned from the *Nicaragua case*, *Palestinian Wall case* and the *DRC case*, is to the effect that self-defence may be ignited only by an armed attack, thereby ruling out pre-emptive self-defence. Furthermore, this chapter also evaluated state practice pre and post 9/11 and found that even the US allies have not adopted pre-emptive self-defence particularly following the 2003 pre-emptive attacks against Iraq. Pre-emptive self-defence, therefore, remains unlawful in international law.

Secondly, in examining the attribution requirement relating to self-defence against NSAs, the study came to the conclusion that, while the requirement of attributing the conduct of a NSA to a state for the purpose of giving rise to self-defence in consonance with the jurisprudence of the ICJ and the ILC Draft Articles on Responsibility of States remains, the threshold for attribution has been lowered. It was the law prior to the 9/11 attacks that, for the conduct of a NSA to trigger a response in self-defence, such a NSA must have been under the effective control of a state necessitating the imputation of the NSA's conduct to a state. State practice from 2001 to date, has shown that merely harbouring terrorist NSAs could engage the responsibilities of a state, thereby exposing it to attacks in self-defence from victims of armed attacks from NSAs. That is to say, this limb of the Bush doctrine appears to have crystallized into new customary international law.

The massive international support enjoyed by OEF, SC resolutions 1368 and 1373, general state practice and the views of majority of legal commentators have all pointed towards the acceptance of the transformation of the law of self-defence in this regard. It is safe to conclude therefore that law of self-defence has been transformed in the context of the use of force by states against NSAs. The next chapter concludes the thesis with a consideration of the chapter summaries, findings, recommendations and a final conclusion.

## Chapter 8

### Summary, recommendations and conclusion

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### 8.1. Summary

#### 8.1.1. Chapter 1: Summary

Chapter 1 provides the introduction to the study and sets out the various items for discussion. This was done with reference to the thesis statement, research questions, methodology, literature review, significance of the study, definition of core terminologies used in the study, scope and limitation of the study and an overview of chapters.

#### 8.1.2. Chapter 2: Summary/Findings

Using the descriptive and the analytical tools of legal research, chapter 2 discussed the historical evolution of the prohibition of the use of force. The imperatives of regulating the resort to force were contained in the writings of Aristotle, Cicero, Augustine, Aquinas, Vitoria, and Grotius among several others. According to them, the recourse to force should be for a just cause, on the direction of the sovereign, for the right intention, self-defence and must be geared towards protecting the good as against the evil.

The study found that the major multilateral efforts by modern states to regulate the use force started with the Hague Conventions of 1899 and 1907. These Conventions did not proscribe the use of force in absolute terms, but rather they encouraged states to explore the option of arbitration, culminating in the establishment of the first International Court of Arbitration for pacific settlement of disputes in 1907 (para 2.4.1).

In 1919, at the close of the 1<sup>st</sup> World War, the League of Nations was established as another multilateral effort to avert the scourge of war. Here again, the League Covenant did not outlaw the use of force completely, but merely provided procedural requirements to be fulfilled by states before opting to use force. There also existed manifest tension between article 10 of the Covenant, which sought to ban the use of force, and articles 12, 13 and 15, which created loopholes that would permit the resort to force upon compliance by states with certain safeguards. Interestingly, however, in most cases parties disregarded the loopholes and instead relied on provisions of the Covenant to restrain themselves from resorting to force. There was the presumption that the Covenant commanded binding force because states that violated the Covenant did not plead its inefficacy, but rather they offered justifications under self-defence. The resort to force remained permissible if (a) a state failed to implement an award, judicial decision or a unanimous report of the Council, (b) the Council failed to arrive at a unanimous report, and (c) the plea of domestic jurisdiction was upheld. Though the League did not stop further wars in perpetuity, it no doubt created an avenue for states to ventilate grievances that averted certain palpable threats to international peace and security.

The diplomatic intercourse between France and the US gave birth to the Kellogg-Briand Pact on 27 August 1928 as a manifestation of unceasing efforts to constrain the use of force in the relations of states. Like the League Covenant before it, the Pact sought to prohibit wars as instruments of national policy, but left other lesser uses of force unhindered. What was significant about the Pact was that some major powers were parties to the treaty. The Pact had no comprehensive sanctions regime to deter would-be treaty violators which was one of its weaknesses, and, to that extent, it failed to stop inter-state conflicts.

In 1945, the UN was inaugurated in San Francisco, with article 2(4) of its Charter becoming the corner stone of the international security infrastructure by comprehensively banning the use or threat of force. Unlike previous treaties, the Charter lowered the threshold from the prohibition of 'resort to war' to 'prohibition of resort to all kinds of force'. While the customary nature of the Charter, as expressed in article 2(6), extends the ban to non-state parties, the Charter distinguished itself from its predecessor instruments by creating exceptions by way of self-defence under article 51 and for SC enforcement action under article 42. The prohibition contemplates the use of armed force involving the armed forces of a state or force from non-state actors that is procured by a state, but not economic, political or ideological force. Though the primary responsibility to maintain international peace and security vests with the SC, it is



not exclusive because subsidiary responsibility is vested in the other organs to maintain peace and security. In fact, while the ICJ has exercised both advisory and contentious jurisdictions on issues of use of force, the GA reserves residual powers through the ‘Uniting for Peace Resolution’ to take decisions on the use of force including the convocation of peace-keeping operations, particularly where the SC is bogged down by the use of veto by the five permanent members.

Pursuant to the fulfilment of the UN mandate, regional arrangements are created under Chapter VIII of the Charter. Article 53 of the Charter empowers regional organisations to carry out enforcement actions upon authorisation by the SC, though the requirement of authorisation may be dispensed with if the action borders on collective self-defence. In stretching the Charter mandate, regional blocs, such as NATO, OAS, ECOWAS and the AU, even impose arms and other forms of embargo on their erring members. In strengthening the prohibition contained in article 2(4), regional organisations have enacted legal frameworks that also prohibit the use of force by one state against another.

Finally, chapter 2 also evaluated humanitarian intervention and found that such interventions are illegal if they are not backed by prior SC authorisation, but are, nevertheless, legitimate if there is a genuine motive to avert or halt human right violations in a territorial state.

### **8.1.3. Chapter 3: Summary /Findings**

In chapter three, the study examined three exceptions to the legal constraints on the use of force discussed in chapter two, and these are SC authorised enforcement actions under articles 42 and 53, self-defence under article 51 of the UN Charter, and a third exception of consent is found in customary law. These exceptions permit the use of force under certain strict conditions. The framers of the UN Charter created these exceptions because they appreciated the fact that it remains impossible for states to abstain absolutely from using force in their relations.

Firstly, the SC is empowered to authorise the use of force by member states (coalition of the willing) or by regional organisations against states that are in violation of the prohibition of the use of force. Secondly, an article 51 right of either individual or collective self-defence is available to states in their international relations without any recourse to the SC for approval if a state can establish that it has suffered an armed attack. An attack which is capable of giving

rise to a response in self-defence must meet the threshold of an armed attack because self-defence is triggered only if an armed attack occurs. Other violations of article 2(4), short of an armed attack, will not ignite a response in self-defence. For the avoidance of abuse, self-defence is also subjected to other limitations including the customary law doctrines of necessity and proportionality. While necessity requires that lethal force in self-defence may be employed only if other non-violent measures have been found to be unavailable or inadequate to halt an on-going attack or avert an imminent attack, proportionality requires that, even where lethal force is necessary, its application must not be unreasonable or excessive in relation to the initial armed attack. Additionally, an attack from NSAs may not qualify as an armed attack even if it meets the required gravity threshold in terms of scale and effect, except where it is attributable to a state. The strict requirement of attribution which has been expressed in the jurisprudence of the ICJ in the *Nicaragua case*, the *DRC case* and the *Palestinian Wall case* is being challenged, and recent state practice has shown the resolve of some states to carry out actions directly in purported self-defence against NSAs. The question that comes to mind is ‘whether the law of self-defence has been transformed by dispensing with or lowering of the attribution requirement’ which is the question this study has tried to answer. This study concludes that the law on self-defence in the context of NSAs have been transformed.

While this study found that anticipatory self-defence is lawful because it is a reaction to an imminent threat or danger which appears certain to occur, pre-emptive self-defence is found to be illegal because it is intended as a response to remote and non-palpable threats which may perhaps never materialise. Pre-emptive self-defence is being made popular by Israel and the US, which has since formalised its preference for pre-emptive self-defence in its NSS for 2002 and 2006 respectively. If allowed, powerful states may abuse the right of self-defence by alluding to non-existent threats with a view to bullying weaker states, and this has the potential of radically transforming the law of self-defence which this study set out to interrogate.

Self-defence also has peculiar features such as inherent right, individual or collective, duty to report and duration. Self-defence could be an individual response to an armed attack by an injured state or may involve a collection of states in sympathy with the injured state. Article 51 of the UN Charter also requires that measures taken in self-defence by a state must be reported to the SC, immediately following the commencement of such an action in self-defence. Failure to report measures taken in self-defence may not weaken genuine measures in self-defence, but it may create the impression that the state claiming self-defence is itself not convinced that it

is acting in good faith. Finally, the study found that there is no specific duration of self-defence, but it is expected that it terminates when the SC commences measures to restore peace and security. This study, thus, found it unacceptable that OEF, commenced by the US and her allies on 7 October 2001 and thereafter continued for 13 years, could be justified as remaining within the duration of self-defence, the more so because this was several years after the SC had taken measures to address the crisis necessitating the self-defence by setting up the ISAF.

Thirdly, consent granted by a territorial state to foreign forces to use force in its territory against terrorist NSAs is lawful and this, therefore, serves as an exception to the general ban on the use of force. The point to note is that self-defence is an inherent right and does not require the consent of a state. Such consent must, however, be granted and withdrawn when necessary by a legitimate and recognised authority of the state. A valid consent precludes the wrongfulness of the intervening state, and it must be granted prior to the intervention, must not be obtained by fraud or under duress, and the intervener must keep its actions within the terms and scope of the consent. The practice of the SC has shown that consent could also be authorised retrospectively.

#### **8.1.4. Chapter 4: Summary/Findings**

It was in 1937 that the first international efforts, though futile, were made to codify the crime of terrorism via the League of Nations Convention for the Prevention and Punishment of Terrorism. Terrorism is, thus, not a novel idea and has remained on the agenda of international policy experts for a considerable period of time, though terrorism is now more violent and lethal with the motivation by fundamentalist religions. Terrorism has no generally acceptable definition, but several subject-matter conventions dealing with different aspects of terrorism, such as attacks on aircraft, sea vessels, seaports and fixed platforms, have been formulated. The sympathy groups hitherto enjoyed on the basis that terrorists were fighting for freedom or self-determination has been removed by ‘The World Summit Outcome’ and, therefore, no motive for terrorist conduct may be tolerated, ‘wherever and by whomever’ committed. This study argues that a genuine struggle for freedom or self-determination must not bear the characteristics of terrorist conduct, such as bombings, maiming, killings and generally inflicting fear on the civilian population.

Though the study has found that there is lack of uniform conceptualisation of the term ‘terrorism’ as an international crime, as it has not been contained in the ICC Statute, Nuremberg

and Tokyo Charters or constitutive instruments of other international *ad hoc* tribunals and with offences specifically defined and punishment prescribed thereto, the crime of terrorism, as Ambos points out, is ‘on the brink of becoming an international crime’. For terrorism to be a crime, properly so called, and not just a treaty crime, it must create individual criminal responsibility in its own right, independent of criminalisation under domestic legal systems.

Given that terrorism leaves a huge impact in its aftermath and the US intends to arouse psychological impact on public opinion in its argument, the fight against Al Qaeda and the Taliban is not a war. Furthermore, in considering the activities of Hamas, Al Qaeda and Boko Haram, the study has found that the activities of NSAs violate both IHRL and IHL by depriving victims of their rights to life, liberty, dignity and freedom of worship which are protected by international treaties that include the ICCPR, UDHR, ACHPR, CRC and the ECHR. The study has also found that the three terrorist organisations that were examined have some common aspirations that include the establishment of a Caliphate to be administered according to the Sharia code, disgust for western values, and the desire to return to pure Islam.

The UN and states have shared responsibilities to fight the scourge of terrorism by developing policy and legal frameworks. By resolution 1373, states are obligated to prevent terrorist activities in their territories by apprehending, prosecuting and punishing terrorists and their sponsors. Principally, states have the obligation not to provide safe havens or sanctuaries for terrorist NSAs. The study has found that transnational terrorism is the main reason why states employ extraterritorial force against NSAs. International law allows the use of such force against NSAs if the legal frameworks relating to the prohibition of the use of force and the exceptions thereto are complied with. It was found that the methods employed in cross-border uses of force include targeted killings, kill-capture missions and full-scale military operations. Finally, the study found that several factors contribute either to the emergence or spread and sustenance of transnational terrorism. These factors include: (a) religious fundamentalism, extremism or radicalisation; (b) less vulnerability of terrorists to sanctions and punishment; (c) globalisation and technological advancement; and (d) the liberal disposition of democratic states.

### **8.1.5. Chapter 5 & 6: Summary/Findings**

The study did a brief comparative study on the counterterrorism approaches of Israel and the US. In doing this, the study found that the international responsibilities that these two countries

bear are a little different because of the status of Israel *vis-a-vis* Palestine where the majority of Israel's extraterritorial forcible measures are carried out. Israel is an occupying power in the Palestinian territory, for which reason its conflict is governed by the rules of IHL, unlike the US extraterritorial forcible measures against NSAs that are governed by the rules of the interstate use of force. Israel, thus, bears the responsibility of maintaining the security of the OPT in addition to its conventional human rights obligations which apply to the OPT extraterritorially. The study also found that, while Israel uses force mainly against militant groups located in neighbouring territories such as Palestine, Lebanon and, in some instances, in Syria and Jordan, the US employs force against NSAs in states that are located thousands of kilometres away from its homeland, such as Afghanistan, Pakistan, Yemen, Somalia and Libya.

Israel and the US place reliance on self-defence and the inability of states to prevent attacks from their territories as grounds for the extraterritorial use of force against NSAs within such states. Additionally, the US has relied on the consent of Yemen, Pakistan (controversially) and Iraq. While arguing that Lebanon was 'unwilling and unable' to prevent Hezbollah from launching attacks against it, Israel conducted actions in self-defence against Hezbollah, but the same was not true of its conflict with Palestine. Israel's justification of its actions in self-defence against Hamas was rejected by the ICJ and commentators alike. The position gleaned from the decision of the ICJ is that Israel cannot avail itself of self-defence because it failed to attribute the conduct of Hamas to another state, and even more because Israel itself stated that the attacks or threats were from within. The Court reasoned that Israel could not embark on self-defence against itself since it is in occupation of Palestine and in-charge of security over it. While even the erection of the security wall as an act of self-defence was flawed, so also are resolutions 1368 and 1373 inapplicable. This thinking of the Court resonates in the arguments of Akande, Corten and Milanovic which persuaded this study that the conflict between Israel and Palestine does not invoke either articles 2(4) or 51 of the UN Charter which are intended to regulate the behaviour of states and not non-state entities like Palestine. To them, since article 2(4), the substantive prohibition on the use of force, is inapplicable, so too is the exception to the ban under article 51 inapplicable.

The study found that both Israel and the US employ a mix of TK, kill-capture missions and full-scale military operations as methods of warfare against terrorist NSAs extraterritorially. Targeted killing is the central component of their security policies, and, unlike Israel which invented TK, legal concepts and other combat techniques based on its experiences from the

second intifada, the US is a relatively new entrant to the use of TK. In their justification for the use of TK, both states relied on international law as well as domestic laws. While they rely on legal opinions from their Military Advocates General or legal officers, Israel also draws inspiration from its Supreme Court decision in *The Public Committee Against Torture in Israel v The Government of Israel*, just as the US additionally relies on pieces of legislation, particularly the Authorisation for Use of Military Force.

Another area of similarity between these states is that they both embrace pre-emptive strikes which are considered illegal in contemporary international law. Though introduced by Israel, the US quickly adopted and made the policy popular through its ‘United States National Security Strategies’ of 2002 and 2006 respectively which is now referred to as the ‘Bush Doctrine’. The ‘Bush Doctrine’ advocates the use of self-defence even where there is the absence of an armed attack or an imminent threat. The Bush Doctrine remains one of the most radical changes that have been proposed to the *corpus* of international law, but its doctrine, in the context of pre-emptive self-defence has not been accepted as part of our law, except by Israel, the US and a few other states. The part of the doctrine that has been accepted, which culminated in the transformation of the law of self-defence is the aspect dealing with the lowered threshold of attribution.

In contrast, however, while the US drone strikes are also characterised by ‘signature strikes’, the same is not the case with Israel. Secondly, the Israeli targeting programme is much more transparent because, apart from at times notifying listed terrorists of impending strikes if they fail to give themselves up for arrest to Israel or the Palestinian Authority, the process of listing targets is alleged to be more strenuous. On the other hand, the US fears that notifying would-be targets would compromise their security strategies. Finally, this study found that the advantages derivable from the targeted killing programmes of both states are only short-term because retaliatory attacks from terrorist groups and the issue of heavy collateral damages overshadow or outweigh the advantages. Targeted killings are considered to be ineffective because they have not halted terrorist attacks or substantially deterred would-be terrorist NSAs.

#### **8.1.6. Chapter 7: Summary/Findings**

The proliferation of WMD, growing levels of transnational terrorism and an increase in the number of failed states which provide conducive environments for terrorism to thrive have been responsible for calls to increase the latitude for states to use force against NSAs. International



organisations, states and policy makers are apprehensive because the above factors, particularly the proliferation of WMD and the likelihood of their being procured by terrorist NSAs, pose the greatest threat to the international security infrastructure. Multilateral efforts are, however, being made through the NPT, PSI and the Global Zero Organisation, among several other frameworks, to monitor the manufacture of WMD and, where possible, to interdict the movement of these weapons in the high seas. To cope with these threats, therefore, certain states have introduced pre-emptive self-defence against NSAs and have also called for the disregarding of the requirement of attribution of armed attacks by NSAs to states as one of the conditions required for self-defence. The use of pre-emptive self-defence and the direct attacks against NSAs without attributing their conduct to states are among the perspectives from which this study investigates whether the law of self-defence has indeed been transformed.

The absence of an appropriate military component in the UN system to deter armed groups has aggravated the threats to peace, hence the calls for transformation of the law on self-defence intensified. Similar calls were also made to reformulate the Charter rules which some commentators allege to be obsolete. The calls have not been heeded by UN committees such as the World Summit Outcome and the High-level Panel on threats, challenges and change.

It is the view of this study that even the call for the adoption of pre-emptive self-defence, a limb of the Bush doctrine, has been rejected by international organisations and several states. It therefore, remains illegal under international law. The High-level Panel, the Secretary-General's report 'In larger freedom: Towards development, security and human rights for all', the 2006 Havana Declaration of the NAM, the Netherlands, Egypt, Pakistan, Algeria and many other states have rejected pre-emptive self-defence, just as the ICJ also maintains in its jurisprudence that an armed attack is *sine qua non* to give rise to an action in self-defence. From the point of view of pre-emptive self-defence, therefore, it can conveniently be submitted that the law of self-defence has not been transformed.

On the other hand, this study has found that the practice of states has shown a departure from the strict requirement of attributing the conduct of NSAs to states to give rise to an action in self-defence. While the requirement of attribution has not been completely dispensed with, its threshold has been lowered to permit the use of force against a territorial state for merely harbouring terrorist NSAs without any active participation in their terrorist conduct. This conclusion is reached after due consideration of state practice after the 9/11 attacks, where there is a toleration of states that use force against NSAs without attributing the conduct of

such NSAs to any state. Similarly, some of the post 9/11 SC resolutions have indicated that the international responsibility of a territorial state is engaged for merely harbouring NSAs in their territories. This is in tandem with the Bush doctrine which advocated the use of force against states that innocently harboured NSAs without playing any active role. This study, thus, holds the view that the law of self-defence has been transformed in relation to the requirement of attribution since the threshold has been lowered from the strict need for an active role of the state to a merely passive role of innocently harbouring the NSAs.

## **8.2. Recommendations**

### **8.2.1. The need to amend existing rules on state responsibility to reflect the lowered threshold of attribution of the conduct of non-state actors to states in consonance with state practice**

The study has shown that the requirement of strictly attributing the activities of NSAs to states to trigger a right of self-defence in consonance with the jurisprudence of the ICJ is no longer tenable. In the *Nicaragua case*, the *DRC case* and *Palestinian Wall case*, the ICJ has consistently held that the conduct of NSAs must be attributed to a state to give rise to a response in self-defence by a state victim of terrorist armed attacks. This reasoning is also reflected in the GA resolution 2625 where, in defining what amounts to an act of aggression, the GA stated, in annex 3(g), that an act of aggression involves the sending by a state of armed bands and irregulars into another state.

State practice has, however, pointed to the fact that self-defence is available to victims of armed attacks from NSAs without attributing such conduct to a state. For instance, post 9/11 state practice has revealed that actions in self-defence by Turkey against the PKK, Colombia against FARC, Israel against Hezbollah, US against Al Qaeda, and the ongoing coalition forces led by the US against ISIL and the Khorasan group in Iraq and Syria without attributing the conduct of these terrorist groups to the territorial states has been tolerated by the UN. Given that the US may be using force against NSAs in Iraq based on its invitation and that it relies on the ‘unwilling and unable’ standard to use force in Syria, it is not the same in other cases. It is doubtful whether states will ever return to comply with the requirement of attribution before embarking on actions in self-defence against NSAs, especially in the face of the improved sophistication of, and increase in, terrorist attacks. The overwhelming support, given by states to the US-led OEF against Al Qaeda and the Taliban in Afghanistan points to the transformation of the law of self-defence in this regard.

The fact that the active involvement or attribution requirement has been lowered has been shown by resolutions of the SC and arguments by states and legal commentators. In fact, in paragraph 38 of the Leiden Policy Recommendations on Counter-terrorism and International Law of April 2010, this group of experts pointed out that, ‘It is now well accepted that attacks by non-state actors, even when not acting on behalf of a state, can trigger a state’s right of individual and collective (upon request of the victim state) self-defence’. These experts added that the inherent nature of self-defence to repel or avert an armed attack does not require attributability to a territorial state under the rules of state responsibility, but such armed attacks must be of a larger scale to trigger the right of self-defence if it is from a NSA. Accordingly, this study recommends the use of force against NSAs by states without strictly imputing the conduct of such NSAs to the active involvement of other states provided the attacks in question could amount to an armed attack in terms of scale and effect. It is further recommended, however, that, if the reason for self-defence against a state is merely for harbouring NSAs without active participation in the terrorist activities, the response should be limited to the terrorist group and not the armed forces or facilities of the territorial state.

### **8.2.2. The need to reject the application of pre-emptive self-defence in the relations of states or against non-state actors**

This study has come to the conclusion that pre-emptive self-defence is not part of international law in spite of the dubious justifications of its use by powerful states against seemingly weaker states. It is, thus, recommended that pre-emptive self-defence should not be accepted as forming part of the *corpus* of international law because it may be easily abused by aggressor states that are seeking excuses to attack adversaries even where threats are remote or non-existent. Pre-emptive self-defence is intended to dispense with the mandatory requirement of an armed attack under article 51 of the Charter to give rise to an action in genuine self-defence. In the view of this study, the idea of wanting to wriggle out of the unambiguous meaning of article 51 by interpreting it in a manner that would permit self-defence against NSAs for non-existent threats by alluding to customary international law right stems, in itself, from the disregard by powerful states of international norms.

### **8.2.3. The need to include transnational terrorism as one of the egregious crimes of greatest concern to the international community under the jurisdiction of the Rome statute of the International Criminal Court**

This study recommends an amendment of the Statute of the ICC, in consonance with the recommendations of the diplomatic conference that led to the establishment of the Court, in

respect of a consideration of the inclusion of the crime of terrorism in a subsequent review conference. The jurisdiction of the Court is contained under article 5 of the Statute which provides that the grave international crimes of concern are the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The absence of the crime of transnational terrorism in the Statute as it is presently enacted is not a mistake or an omission because the propriety of its inclusion in the jurisdiction of the Court was considered during the formulation of the *travaux préparatoires* in Rome by the Diplomatic Conference of Plenipotentiaries. The rationale for the rejection of terrorism as one of the greatest crimes of concern under article 5 of the Statute was that: (a) there was lack of an internationally acceptable definition or conceptualisation of transnational terrorism; (b) transnational terrorism does not rise to the level of other crimes of international concern that were created under article 5 of the Statute; (c) its inclusion would overburden the Court since it may increase the workload of the Court; (d) its inclusion may impede acceptance of the Court; (e) it has already been provided for, as a treaty crime with a responsibility on states to prosecute it in domestic courts; and (f) it may politicise the Court which is a judicial institution because of the political nature of terrorism particularly where the complicity of a state party is established.

If the above reasons were weighty enough for its rejection several years ago, the same may not be true today because of the catastrophic dimension transnational terrorism has assumed. Transnational terrorists are now being described as *hostis humani generis*. Unfortunately, the 2010 Statute of the ICC Review Conference held in Kampala, Uganda also did not deem it appropriate to cause an amendment of article 5 of the Statute with a view to including this egregious crime in the jurisdiction of the ICC. In fact, terrorism does not even form part of the agenda items for the Kampala Conference (ICC Provisional Agenda, Doc. RC/1, May 11, 2010). It is important to mention that some other groups also do not see the relevance of creating the offence of terrorism in the Statute of the ICC. For instance, under paragraph 8 of the Leiden Policy Recommendations on Counter-terrorism and International Law of April, 2010, that body of experts posited that it was undesirable to amend the Statute for the inclusion of terrorism because the definitions contained in some regional instruments on counter-terrorism have provided a sufficient legal basis for domestic prosecution.

For the following reasons, this study recommends the prosecution of the crime of transnational terrorism in an international forum, even if terrorism is not included in the Statute of the ICC. Firstly, some state governments are quite apprehensive about dealing with issues relating to

terrorism because of the likelihood of exposing their institutions to attacks by terrorist NSAs. These states lack the means, including the security infrastructure and other logistics, to cope with terrorist threats to disrupt proceedings in domestic courts. In contrast, international tribunals or courts possess the capacity to secure their institutions more effectively. These are among the reasons that made Italy release Ocalan, the PKK leader, from its custody and the refusal by Germany and other states to accept his transfer to their countries. That apart, domestic prosecution may be characterised by an unnecessary and unwarranted show of leniency by certain states, an example of which was the release by Sudan of the Black September terrorists soon after conviction for fear of attacks. This recommendation does not in any way suggest the wholesale removal of the crime of terrorism from the jurisdiction of domestic legal systems since the principle of complementarity is also embedded in the ICC practice. Secondly, the problem of allegations of partiality would be avoided since the panel would be constituted by several nationals and, therefore, considerations of linguistic, religious and ethnic affinities which are capable of derailing judicial processes may be absent. Thirdly, certain political considerations that necessitate the interference of the executive in the independence of the judiciary may be avoided. Fourthly, due process guarantees and the rights of suspects may not be abridged even in emergencies. There may not be any compelling need to derogate from the norms of international law. Finally, the controversies relating to which state has jurisdiction to entertain or prosecute particular suspects will not arise, irrespective of which part of the globe the crime was committed. This is because, if extradition treaties are either absent or not clear to the forum to try such terrorists, this may hinder the smooth investigation and prosecution of the crime.

#### **8.2.4. The need for the conceptualisation of an acceptable framework for the crime of transnational terrorism**

The importance of formulating an internationally acceptable definition of ‘transnational terrorism’, one which clearly spells out the elements of the offence and succinctly prescribes the punishment for it, cannot be overemphasised. Conceptualising a legal framework for the crime of terrorism is important because the lack of definition creates loopholes for terrorists to escape accountability, just as states exploit the ambiguities in the existing definitional literature to expand what terrorism entails with a view to targeting political adversaries. An acceptable definition of the term will delimit the lawful instances that will be available to states to use force. An acceptable definition has so far eluded mankind because of disagreement over state acts of terrorism and whether armed opposition to foreign occupation or violent measures taken

to realise self-determination could be excused from being prohibited as acts of terrorism. Though various aspects of terrorism have been contained in some of the international counter-terrorism conventions, there is still a need for a single comprehensive definition, and this study recommends this definitional problem to be addressed. It could be recalled that one of the reasons for not including the crime of terrorism in the Rome Statute of the ICC was its lack of proper conceptualisation.

#### **8.2.5. The need for cooperation among states in the prevention and prosecution of international terrorism.**

States must cooperate in the investigation, prosecution and enforcement of actions against terrorist NSAs. This can be done only if the security agencies in different countries can work together in the area of intelligence sharing and ensure joint border patrols. States have a huge responsibility to prosecute the treaty-based crime of transnational terrorism, and their cooperation is key if the international and regional legal frameworks are to be implemented effectively. The importance of domestic prosecution and cooperation between states is accentuated by the absence of an international forum to prosecute terrorism. Additionally, for a successful fight against the scourge of terrorism, states must, firstly, ratify or accede to international and regional treaties that seek to punish terrorism. Secondly, states must criminalise transnational terrorism in their domestic legal frameworks and be prepared to establish extradition regimes with other countries for the easy transfer of terrorists to the appropriate jurisdiction for prosecution. It is also incumbent on states to deny terrorists funding in consonance with the Convention on the Suppression of the Financing of Terrorism and SC resolutions 1267 and 1373 if victory is to be achieved over transnational terrorism.

#### **8.2.6. The need for greater synergy between states and key international organisations in the drive towards effective regulation of the manufacture and traffic in weapons of mass destruction**

The proliferation of WMD and the likelihood of their procurement and use by terrorist NSAs is one of the greatest threats confronting international peace and security. To control the proliferation of weapons as well as precursors, reagents and other materials for their development effectively, therefore, there is compelling need, more than ever before, for states to collaborate by pooling intelligence and their resources to deny terrorists access to WMD. States must also be encouraged to participate in multilateral efforts by ratifying treaties that aim at regulating weapons transfer and must comply with their enforcement procedures. In fact, SC resolution 1540 obligates all states to refrain from aiding NSAs that are involved in



weapons proliferation and it requested that NSAs be banned from acquiring, manufacturing and trafficking of nuclear weapons. Its effectiveness, however, remains to be seen because of the disregard of international norms by states. Aspiring nuclear powers, like Iran, North Korea and Pakistan, must be encouraged to partner with other states to deny terrorists the opportunity to acquire nuclear weapons, and this they must do by being party to international treaties in that regard. To achieve concrete goals, greater cooperation and effort are required to police the movement of vessels in the high seas because about 90 per cent of international trade is done through shipment by sea.

#### **8.2.7. The need for institutional reform of the United Nations to reflect present day realities and in order to build confidence in the less powerful state parties**

There have been several calls by institutions and groups for both normative and institutional reforms of the UN. This study is, however, disposed to make recommendations on institutional reforms in relation to the composition of the SC because this study is satisfied with the UN Charter rules as they are presently formulated. This study recommends the reform of the UN, being conscious of the GA resolution 53/30 of 1 December 1998, where the GA indicated that it would not take any decision on the question of equitable representation and an increase in the membership of the SC and related matters without an affirmative vote of two thirds of the members of the GA. The failures or lapses, if any, in relation to coping with security threats cannot, in the opinion of this study, be attributed to inadequacies in the Charter rules or in general international law, but may be occasioned by the human elements operating the system. In addition, this study is satisfied with the arguments against any form of re-writing of the Charter rules, particularly article 51 thereof. There appears to be consensus among non permanent members in their calls for the enlargement of the SC with a view to creating international political space for more state parties. Since 1963, when the GA increased the membership of the SC from 11 to the present 15 member status, it has remained static. From 1992, renewed calls for the reform of the SC gained momentum as Germany, Japan and the NAM proposed changes in the composition of the SC. These calls led to the establishment of the Open-Ended Working Group which was imbued with the responsibility of considering the propriety of these calls for reform and to report back to the GA. It appears that the Working Group has not made substantial progress because of the problem of determining how to bring about equitable representation in the SC and also other matters related therewith.

The reasons for recommending the reform of the SC are as follows. Firstly, an enlargement of the SC and a corresponding increase in the permanent membership may address the issues of proper representation with regard to geographical spread since involvement in debates of members from geographical areas from which threats emanate may be vital for decision making. For instance, a situation where no African state is represented among the permanent five with the power to veto certain crucial decisions pertaining to the use of force on African soil appears to be unacceptable. Secondly, the reform of the SC to allow weaker states to participate in the decision-making process at the highest level of the UN may bring about confidence in the activities of the organisation. This may disabuse the thinking of African and Asians states that the development of the UN is in accordance only with the views of the founding powers of the organisation, especially since most of the developing countries were absent when the rules of the organisation were formulated in 1945. Thirdly, while this study is cognizant of the fact that the decision-making process in a large body may not be swift, an enlargement of the SC may bring about the effectiveness of the organisation with regard to its quasi-legislative role because of the spread in representation.

It is the view of this study that, even if the use of veto is not completely abolished, its use should be regulated to some extent. In the event that an enlargement of the permanent seats in the SC results, it is suggested that a veto exercised by one state should not be allowed to block or thwart the decisions of the world body. Rather, it is suggested that a combination of the exercise of vetoes by not fewer than three of the permanent members should effectively allow or block a decision. A situation where America blocks the organisation from condemning it for infractions of international law or keeps Israel blameless for all the alleged atrocities it commits in the OPT because of the power of US veto is unacceptable.

#### **8.2.8. The need for compliance by states with international norms, ICJ decisions and resolutions of both the SC and the GA**

One of the challenges to achieving global peace is the disregard of international law by powerful states. If the desired international peace is to be achieved, there must be adherence by states to international norms because a reluctance to obey global agreements has posed problems for efforts made to fight international terrorism. According to Cassese, 'Once a group of powerful states has realised that it can freely escape the strictures of the UN Charter and resort to force without any censure, except for that of public opinion, a Pandora's Box may be opened'. These powerful states are merely condemned even when they disregard international

law because they use their threat of veto to escape, and less powerful states are wary of condemning them for fear of loss of privileges such as aid and also the possible imposition of sanctions. The disregard for, and lack of compliance with, international norms by the powerful states have set a dangerous precedent that may culminate in a threat to international peace and security because the restraint on less powerful nations would have also been removed. States have been alleged to have disobeyed international norms when their national interest is at stake. For instance, the US and the UK (permanent members of the SC) invaded Iraq in 2003, contrary to the ban on the unilateral use of force, to protect their national interests. It is recommended that states should adhere to the agreements they have ratified and to their enforcement procedures.

#### **8.2.9. The need to grant independence to territories that have fulfilled the requirements for statehood**

The denial of groups or territories the right of self-determination with the attendant suppression and repression by powerful states or majority ethnic groups has also been responsible for the emergence of terrorist organisations. Groups such as the PKK and the PLO or Hamas have little alternative other than to resort to guerrilla warfare when their powerful neighbours relentlessly block all efforts made by such territories to attain statehood. For instance, Palestine would have attained statehood, had it not been for the pressure on the international community from Israel and the US who work in concert to deny Palestinian membership even in the UN. In contemporary international law, being a member of the UN appears like having fulfilled the requirements of statehood, especially as some of these territories have since fulfilled the criteria contained in the Montevideo Convention. Article 1 of the 1933 Montevideo Convention established the criteria for international personality to include permanent population, defined territory, government and the capacity to enter into relations with other states. Powerful states are quick to label those ethnic groups to whom they deny self rule as terrorists. The unflinching US support for Israel militarily, and by vetoing over 39 UN draft resolutions that were critical of Israel within a space of 32 years, has also not helped the search for peace in the Middle East. In fact, owing to the difficulty of criticising Israel in the SC, the bulk of Israeli criticisms and condemnations come from the GA where no state wields the power of veto. There, every state has one vote each.

As Mearsheimer and Walt point out, if tables in the Middle East should turn and Israeli territory were to be occupied by Palestine, Israel could have emerged as the worst of terrorists. As

succinctly put by Mearsheimer and Walt, Israel used terrorism against its British occupiers, and terrorism was one of the components of its struggle, particularly with regard to the Zionist terrorist organisation's bombings. In addition, Israel assassinated Count Folke Bernadotte in 1948 for proposing the internationalisation of Jerusalem. They quoted former Israeli Prime Minister, Barak, as saying that he 'would have joined a terrorist organisation' if he has been born a Palestinian. It has been suggested that, without the illegal occupation of Palestinian lands by Israel, perhaps Palestinians would not have resorted to this scale of violence. If Israel expects the Palestinian authority to explore peaceful alternatives, it must also be prepared to end its unlawful occupation. How can we possibly justify the series of land, air and sea blockades that Israel, a smaller territory in comparative terms, has enforced over Palestinian territory, culminating in hunger, disease and death for the Palestinians. One of such unwarranted blockade in 2010 resulted in the Gaza Flotilla incident in which Israeli commandos climbed down from a helicopter on to six ships bringing essential aid to Palestine by a Turkish charity and killed ten Turkish activists. The Palestinian question should be considered dispassionately with a view to granting Palestinians the state they rightly deserve, as they have waited too long under dehumanizing circumstances for freedom.

### **8.3. Final conclusion**

Originally, states were the only entities considered to be subjects of international law, but a shift in this position to accommodate both groups and individuals appears to be imperative in contemporary international law because the margins of international law have been broadened to affect the internal affairs of states. In addition, the activities of NSAs are transnational in nature, that is, the conduct of terrorists in their host state generates an impact in the territory of another state. This explains why international law has become relevant in issues of trans-border terrorism. It is settled that states can employ force in self-defence against NSAs only if the conduct of such NSAs can be attributed to another state because a NSA is deemed to be under the control of a territorial state, and its capacity to carry out massive destruction was considered to be milder than that of a state. In recent times, however, states have been using extraterritorial force against NSAs without imputing their conduct to other states, and this they have conveniently done without a change in the content of international law. That was the reason for which this study was undertaken to interrogate whether the law of self-defence has been transformed.

With reference to available legal literature this thesis has reflected on the departure of states from the settled position by resorting to force against NSAs on the basis of self-defence without establishing a nexus between the NSA and another state. The argument that there is now a shift in the law stems largely from the post 9/11 state practice which accommodates military responses by states to the catastrophic terrorist attacks in recent times. The destructive capacity of NSAs was found to be comparable to that of states and, therefore, the need to react to them directly became vogue. Also, it is the interpretation of commentators that the SC resolutions 1368 and 1373 manifestly recognised the right of states to use force in self-defence directly against NSAs, without attribution to a state. Most importantly, the overwhelming support the international community gave to the US by joining its counter-terrorism campaign against Al Qaeda and the Taliban in Afghanistan leaves scholars with the conclusion that, indeed, actions in self-defence against NSAs without attribution or diminished attribution to another state are legitimate. It could be argued from this point of view that the law of self-defence has been transformed.

It can be discerned from the study that the standard of attribution has been lowered, even though it still remained a requirement for self-defence. The requirement of active involvement of a state in the conduct of a NSA to give rise to an action in self-defence seems no longer to be relevant, as merely providing safe haven for terrorists is considered sufficient to trigger an action in self-defence.

## List of Instruments

### Statutes/Instruments

Additional Protocol I of 1977 to the Geneva Conventions of 1949

Additional Protocol II of 1977 to the Geneva Conventions of 1949

Agreement between the Government of the United State of America and the Government of the Republic of Liberia Concerning the Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea, 2004

Authorisation for Use of Military Force (United States) SJ Res 23 of 2001

African Union Non-Aggression and Common Defence Pact 2005, adopted in Abuja Nigeria on 31 January 2005, and entered into force on 18 December 2009

African Charter on Human and People's Rights, adopted in Nairobi on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 1982, and entered into force on 21 October 1986

Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Bonn Agreement) (S/2001/1154) of 5 December 2001

Al Qaeda Network Executive Order 2003

Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement between the Government of the United States and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, 2004

American Convention on Human Rights 1969, adopted at the Inter-American Specialised Conference on Human Rights, 'Pact of San Jose' Costa Rica on 22 November 1969 and entered into force on 18 July 1978

American National Strategy for Combating Terrorism 2003

Anti Terrorism Act 2001 (S.C. 2001, c. 41) (Canada)

Association of South East Asian Nations Convention on Counterterrorism, 27 January 2011

ASEAN Convention on Counter-terrorism 2007, adopted and signed on 13 January 2007 in Cebu, Philippines by the Heads of State/Government of the ten Members

Act of Chapultepec 1945, adopted on 6 March 1945 and entered into force on 8 March 1945

Bonn Summit-Statement on Air Hijacking, 17 July 1978

Charter of Hamas, issued on 18 August 1988



Charter of the Organisation of American States 1948, adopted at Bogota on 30 April 1948 and entered into force on 13 December 1951

Charter of the Organisation of African Unity, adopted on 25 May 1963 at Addis Ababa, Ethiopia and entered into force on 13 September 1963

Charter of the United Nations 1945, adopted on 26 June 1945 and entered into force on 24 October 1945

Conference on Security and Co-operation in Europe, Helsinki Final Act, adopted on 1 August 1975

Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24 of 1999

Constitution of the United States of America, 21 June 1788

Constitutive Act of the African Union, adopted in Lome, Togo on 11 July 2000 and entered into force on 26 May 2001

Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 and entered into force on 12 January 1951

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984

Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation (Montreal Convention), signed on 27 December 1972 and entered into force on 26 January 1973

Convention (I) for the Pacific Settlement of International Disputes (Hague I), signed on 29 July 1899 and entered into force on 4 September 1900

Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (Hague II), signed at The Hague on 18 October 1907 and entered into force on 26 January 1910, 36 Stat. 2241, Treaty Series 537

Convention Relative to the Opening of Hostilities (Hague III), signed at The Hague on 18 October 1907 and entered into force on 26 January 1910

Covenant of the League of Nations, adopted at Paris on 29 April 1919 and entered into force on 10 January 1920, (1919) UKTS 4 (Cmd.153)/(1920) ATS 1/(1920) ATS 3

Declaration on the Enforcement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International peace and security-A/RES/49/57 of 9 December 1994

Declaration and programme of action of the World Summit for Social Development, 1995, para 14, [www.unesco.org/education/pdf/COPENHAG.pdf](http://www.unesco.org/education/pdf/COPENHAG.pdf) (accessed 21/06/2015).

Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001

Draft Articles on the Responsibility of International Organisations 2011

Economic Community of West African States (ECOWAS) Treaty, adopted in Lagos on 28 May 1975

Enduring Strategic Partnership Agreement between the United States of America and the Islamic Republic of Afghanistan (2012)

European Convention on Human Rights 1950, adopted on 4 November 1950 and entered into force on 3 September 1953

European Security Strategy (A Secure Europe in a better world), adopted by the European Council at Brussels on 12 December 2003

Framework Establishing ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, adopted in Abuja, Nigeria on 31 October 1998

General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), signed at Paris on 27 January 1928 and entered into force on 24 July 1929, 94 L.N.T.S. 57

Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 14 August 1949

Havana Declaration<sup>14<sup>th</sup></sup> Summit of Heads of State or Government of the Non-Aligned Movement, 2006 Final Document, Havana, Cuba NAM 2006/Doc.1/Rev. 3, of 16 September 2006

Homeland Security Act (United States) 6 USC 101 of 2002

ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL (2009)

International Security Assistance Force Guidance on Night Raids in Afghanistan' 5 March 2010.

Inter-American Treaty of Reciprocal Assistance (Rio Pact) 1947, adopted on 2 September 1947 at Rio de Janeiro, Brazil and entered into force on 12 March 1948

International Convention against the Taking of Hostages (Hostages Convention), adopted by the General Assembly of the United Nations on 17 December 1979

International Convention for the Suppression of Terrorist Bombing, adopted in New York on 15 December 1997

International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations in resolution 54/109 on 9 December 1999

International Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention)

International Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking Convention), 860 U.N.T.S. 105 of 4 October 1971

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