



Self-Defence Against Non-State Actors: The Terrorisation by Al-Shabaab in Kenya

by

Francette van Tonder

Submitted in fulfilment of the requirements for the degree

LLM International Law with specialisation in International Humanitarian Law and Human Rights in Military Operations

In the Faculty of Law,
University of Pretoria

October 2015

Supervisor: Prof Dr Erika de Wet



Abstract

The dissertation examines whether Kenya can retaliate in full self-defence against Al-Shabaab on Somali territory. Article 51 UN Charter contains the right to self-defence and is an exception to Article 2(4), which prohibits the use of force. The development of the right to self-defence is illustrated with reference to state practice, ICJ decisions and opinions of legal scholars. An enquiry is made into what the required nature of the military attack should be to be classified as an armed attack. This essentially encompasses the question whether an act by a non-state actor is of a sufficient gravity to trigger the right to self-defence. Furthermore, an enquiry is made into whether non-state actors, of whom attacks cannot be attributed to a state, can nevertheless launch armed attacks and trigger the right to self-defence. The current status of the traditional 'effective control' test of attribution is examined as well as the 'unwilling or unable' test which determines whether it is necessary to make use of full-scale self-defence.



Declaration of originality

Full names of student: **Francette van Tonder (Ms)**

Student number: **29026238**

Declaration

1. I understand what plagiarism is and am aware of the University's policy in this regard.
2. I declare that this **mini-dissertation** is my own original work. Where other people's work has been used (either from a printed source, Internet or any other source), this has been properly acknowledged and referenced in accordance with departmental requirements.
3. I have not used work previously produced by another student or any other person to hand in as my own.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Signature of student:..... of

Signature of supervisor:..... of



Table of Contents

Abstract	2
Declaration of Originality	3
Chapter 1: Introduction	6
1. The Purpose of an Enquiry into Armed Attacks by Non-State Actors, with the Option of Self-Defence in Response Thereto	6
2. Applicable Legal Issues	8
2.1. <i>Introduction</i>	8
2.2. <i>The Effect of Intervention by Invitation</i>	10
2.3. <i>The Ability of Kenya to Retaliate by Relying on the Right to Self-Defence</i>	11
2.3.1. <i>What is the Military Nature of an Armed Attack?</i>	12
2.3.2. <i>Who Can Commit an Armed Attack?</i>	13
3. Course of Enquiry	15
Chapter 2: The Military Nature of an Armed Attack	17
1. Introduction	17
2. Recent Developments: A New ‘Threshold Requirement’?	20
2.1. <i>The ‘Accumulation of Events’ and ‘Proportionate Defensive Measures’ Doctrines</i>	20
2.2. <i>The Temporal Limitation of the Right to Self-Defence in Light of the ‘Accumulation of Events’ Doctrine</i>	22
3. Conclusion	24



Chapter 3: Who Can Commit an Armed Attack?	25
1. Introduction	25
2. The 'Effective Control' Test under Scrutiny	26
3. The Emergence of a Evolution of Self-Defence	28
3.1. <i>Developments in State and ICJ Practice</i>	28
3.2. <i>Benefits and Drawbacks of Self-Defence against Non-State Actors</i>	33
4. Conclusion	37
Chapter 4: Conclusion	38
Bibliography	39



Chapter 1: Introduction

1. The Purpose of an Enquiry into Armed Attacks by Non-State Actors, with the Option of Self-Defence in Response Thereto

From the outset of this study it is of paramount importance to define the meaning of non-state actors, which are: individuals or groups who do not act under the control of, or on behalf of a state.¹ The conduct of non-state actors is therefore not attributable to a state.² Throughout this thesis, the author will refer to Al-Shabaab, a group which is discussed below, as a non-state actor.

In January 1991 the former Somalian President Siad Barre was overthrown during a civil war.³ Since then Somalia was characterised as a state plunged in turmoil with no formal government to ensure its stability.⁴

During 2011, the African Union (AU) deployed the African Union Mission in Somalia (AMISOM) to Somalia.⁵ Herewith Kenya deployed its military forces to the Kenya-Somalia border.⁶ It was these missions which led to Al-Shabaab being driven out of Mogadishu, Baiboa, Afgoye, Merca and Kismayo in October 2012.⁷ The new formal government of Somalia was established under the leadership of President Hassan Sheikh Mohamud during September 2012.⁸ However, Al-Shabaab forces are still in control of the many rural areas in Somalia.⁹ Initially part of the Islamic Courts Union (ICU), Al-Shabaab is the radical and youthful

¹ N Lubell 'Introduction' *Extraterritorial Use of Force Against Non-state Actors* 2010 1 14.

² *Ibid.*; for an extensive guide to determine whether the conduct of individuals or groups are attributable to a state, see 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', International Law Commission, 53rd session (2001) (extract from 'Report of the International Law Commission on the Work of its Fifty-third Session', Official Records of the General Assembly, 56th session, Supplement No. 10 (A/56/10), Chapter IV.E.1, November 2001).

³ 'Somalia Profile' *BBC News Africa* 4 July 2014 available at <http://www.bbc.com/news/world-africa-14094503> (last accessed on 26 June 2014); see 'Mohamed Siad Barre' *Encyclopædia Britannica Online* 2014 available at <http://www.britannica.com/EBchecked/topic/547169/Mohamed-Siad-Barre> (last accessed on 26 June 2014).

⁴ *Ibid.*

⁵ *Ibid.*; see DE Agbibo 'Terrorism without Borders: Somalia's Al-Shabab and the global jihad network' *Journal of Terrorism Research* 2014 5:1 27 at 28.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ 'Who are Somalia's al-Shabaab?' 16 May 2014 *BBC News Africa* available at <http://www.bbc.com/news/world-africa-15336689> (last accessed on 18 June 2014).



descendants thereof.¹⁰ Its approximately 7000-9000 members are mostly Somalian with a number of them also recruited from the West.¹¹

There are numerous incidents of attacks against Kenya by Al-Shabaab forces. For purposes of this study, the author will be focussing on the Westgate attack in Nairobi of 21 September 2013,¹² as well as subsequent attacks which occurred on 15 June 2014 and 24 June 2014 by the Somali border close to the northern coast of Kenya.¹³ A further attack occurred on 2 April 2015 when Al-Shabaab gunmen attacked students' dormitories at the Garissa University College and 147 students were killed.¹⁴

Kenya has already retaliated militarily against Al-Shabaab, in response to the above attacks, on Somali territory. On 22 November 2014, Kenyan troops allegedly attacked Al-Shabaab militants in two of the non-state actor's Somali camps.¹⁵ Kenyan air force jets attacked apparent Al-Shabaab camps on 5 and 6 April 2015 in Gondodowe and Sheikh Ismaili, which are close to the Kenyan border.¹⁶

The world has suffered a great deal under a pattern of attacks by non-state actors, since the well-known 9/11 attacks.¹⁷ Several recent incidents of violent attacks, with some troublesome events occurring closer to home, indicate that attacks by non-state actors have not ceased to be a global threat.

¹⁰ Agbiboa, *supra* note 11, at 28.

¹¹ Agbiboa, *supra* note 11, at 28.

¹² FC Onuoha 'Westgate Attack: Al-Shabaab's Renewed Transnational Jihadism' 10 November 2013 *Al Jazeera Centre for Studies Report* 1 3 available at <http://studies.aljazeera.net/ResourceGallery/media/Documents/2013/11/11/20131111123040955734Kenya.pdf> (last accessed on 8 October 2014).

¹³ 'Key developments in East Africa (mid-June to mid-July 2014)' July 2014 *Africa Conflict Monthly Monitor Monthly Chronicles* 31.

¹⁴ J Hatcher & K Sleff 'Al-Shabab attacks Kenyan university, killing at least 147' 2 April 2015 *The Washington Post* available at http://www.washingtonpost.com/world/africa/70-killed-hundreds-rescued-after-kenya-university-attack-by-al-shabab-militants/2015/04/02/0c554516-d951-11e4-ba28-f2a685dc7f89_story.html (last accessed 9 April 2015).

¹⁵ 'Kenya bus attack: Military 'kills 100 Shabab militants'' 23 November 2014 *BBC Africa* available at <http://www.bbc.com/news/world-africa-30167891> (last accessed 10 May 2015); AFP 'Kenya claims 100 al-Shabaab killed in response to Mandera massacre' 23 November 2014 *The Guardian* available at <http://www.theguardian.com/world/2014/nov/23/kenya-claims-100-al-shabaab-killed-in-response-mandera-massacre> (last accessed 10 May 2015); Al-Shabaab however denied this declaration by Kenyan vice-president, William Ruto, and claimed that none of its members were killed.

¹⁶ W Branigin 'Kenya, avenging college massacre, bombs al-Shabab camps in Somalia' 6 April 2015 *The Washington Post* available at http://www.washingtonpost.com/world/africa/kenya-avenging-college-massacre-bombs-al-shabab-camps-in-somalia/2015/04/06/32931c58-dc53-11e4-acfe-cd057abefa9a_story.html (last accessed 12 May 2015).

¹⁷ JG Dalton 'What is War? Terrorism as War after 9/11' 2006 12 *ILSA Journal of International & Comparative Law* 523 527.



The Baga Massacre where Boko Haram militants carried out a series of mass killings in the Nigerian town of Baga, resulting in 2000 fatalities, was an unsettling event in 2015.¹⁸ This non-state actor has been actively engaging in its violent campaign to overthrow the Nigerian government since 2009 when its riots spread across four states, namely: Bauchi, Kano, Yobe and Borno.¹⁹ According to the New York-based Centre on Foreign Relations, Boko Haram's insurgency has caused an estimated 10 000 deaths and 1.5 million civilians' displacement so far.²⁰ There are theorists who believe that Al-Shabaab is duplicating Boko Haram's means and methods and that Kenya could suffer a similar division of its territory, which would result in the north-east part of the country falling into Al-Shabaab's power and reign.²¹

2. Applicable Legal Issues

2.1. Introduction

International law is traditionally characterised as one which is based on the so-called Westphalian Model, which reportedly owes its existence to the 1648 Peace of Westphalia, and made public international law essentially applicable to sovereign states' relations.²² The use of force in international law is therefore traditionally confined to an inter-state context and the UN Charter came into force within this context, wherein the language of Article 2(4) of the UN Charter makes it undoubtedly clear that the prohibition contained therein is only applicable between states.²³

¹⁸ M Mark 'Boko Haram's 'deadliest massacre': 2,000 feared dead in Nigeria' 10 January 2015 *The Guardian* available at <http://www.theguardian.com/world/2015/jan/09/boko-haram-deadliest-massacre-baga-nigeria> (last accessed 13 April 2015).

¹⁹ A Abimbola 'The Boko Haram Uprising and Islamic Revivalism in Nigeria' 2010 45(2) *Africa Spectrum* 95-98.

²⁰ Al Jazeera and agencies 'Profile: Boko Haram' 18 January 2015 *Al Jazeera* available at <http://www.aljazeera.com/news/africa/2012/01/20121974241393331.html> (last accessed 13 April 2015); see MA Sergie & T Johnson 'Boko Haram' 5 March 2015 *CFR Backgrounders* available at <http://www.cfr.org/nigeria/boko-haram/p25739> (last accessed 13 April 2015).

²¹ M Mutinga 'Are the terrorists of al-Shabaab about to tear Kenya in two?' 4 April 2015 *The Guardian* available at <http://www.theguardian.com/world/2015/apr/04/kenya-university-massacre-shabaab-divisions> (last accessed 13 April 2015).

²² Contradictory views exist as to whether the 'Westphalian Model' was established by the 1648 Peace of Westphalia, however the concept of an inter-state applicability is the nucleus of the traditional international legal order, see C Kress 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force' 2014 1:1 *Journal on the Use of Force and International Law* 11-13.

²³ *Ibid.*, at 11, 40.



The prohibition of the use of force is widely regarded as a *jus cogens* obligation, therefore a primary obligation which states are bound to adhere to, under international law.²⁴ Where a State breaches this obligation, it constitutes a violation of its international obligation; as such a state would be acting contrary to the said obligation, therefore resulting in an internationally wrongful act.²⁵ This obligation is contained in the preamble of the UN Charter,²⁶ as well as under article 2(4) of the UN Charter, which determines that:

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

The central problem which the author will discuss in the thesis is whether if, and under what circumstances, Kenya is entitled to attack Al-Shabaab militarily on Somali territory, under international law. This is a cardinal enquiry as such military action can result in a violation of article 2(4) by Kenya. In order to determine whether such a violation is occurring, since Kenya has already engaged in military attacks against Al-Shabaab on Somali territory, the justifications and exceptions for the violation of article 2(4) will be examined. The author will refer to the impact of intervention by invitation, with reference to the AMISOM mission in Somalia and the AU’s encouragement of states to assist Somalia duly, on the legal position.²⁷ She will furthermore conduct an extensive study, and this will form the largest portion of the dissertation, into whether Kenya can resort to its right to self-defence against Al-

²⁴ Para 1, Commentary of the International Law Commission to Article 50 of its draft Articles on the Law of Treaties, ILC Yearbook, 1966, Volume II, p. 247 as in *Case Concerning Military Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p 14 at para 190; GM Danilenko ‘International *Jus Cogens*: Issues of Law-Making’ 1991 2 *European Journal of International Law* 42; EJ Criddle & E Fox-Decent ‘A Fiduciary Theory of *Jus Cogens*’ 2009 *Yale Journal of International Law* 34 331 368; C Gray ‘The International Court of Justice and the Use of Force’ CJ Tams & J Sloan (eds.) *The Development of International Law by the International Court of Justice* 2013 238 246-247.

²⁵ Article 12 of the Draft Articles, *supra* note 2:

‘There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.’

²⁶ ‘...to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used...’; The ICJ held in the *Nicaragua* case, *supra* note 24, at para 188, that the prohibition of the use of force is regarded as a principle of customary international law.

²⁷ *Communique of the Peace and Security Council*, adopted by the Sixty-Ninth Meeting of the AU Peace and Security Council, 19 January 2007, Addis Ababa, Ethiopia; *Decision on Somalia, Decisions and Declarations*, adopted by the Eight Ordinary Session of the Assembly of the AU, 29-30 January 2007, Addis Ababa, Ethiopia, Assembly/AU/Dec.142(VIII). AMISOM was authorised by United Nations Security Council Resolution 1477 (2007).



Shabaab on Somali territory. This will necessarily encompass the issues of what intensity of violence amounts to an armed attack, and whether a non-state actor can commit an armed attack, as this is a necessity for the right to self-defence to be triggered.²⁸

2.2. *The Effect of Intervention by Invitation*

It is possible that Kenya may have consent from the recognised *de jure* Somalian government to act against Al-Shabaab, which is permissible under article 4(j) of the Constitutive Act of the African Union of 2000.²⁹ This provision allows states to request the AU to intervene in the former's territory and does not in itself regulate bilateral intervention – i.e. intervention by one state into another. However, such bilateral military intervention by invitation is recognised in international law.³⁰

The Assembly of the AU, as well as the Peace and Security Council of the organisation, called upon its member states to provide Somalia with the necessary support with the deployment of AMISOM.³¹ In this case, the former's military intervention would be justified on another basis than that of self-defence, since intervention by invitation constitutes an exception to the prohibition of the use of force.³² For purposes of this study, the author will examine whether Kenya has the right to take military measures against Al-Shabaab where no invitation exists (e.g. where Somalia should withdraw the invitation at a stage, or where the Somali government should lose effective control).

²⁸ Article 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...’

²⁹ Article 4 of the *Constitutive Act of the African Union*, adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government, 11 July 2000, Lome, Togo:

‘The Union shall function in accordance with the following principles:

...

(j) the right of Member States to request intervention from the Union in order to restore peace and security;’

³⁰ ‘Present Problems of the Use of Force in International Law: Military assistance on request’, Resolution adopted by the Tenth Commission of the Institut de Droit International, 8 September 2011, Session de Rhodes.

³¹ *Communique*, *supra* note 27, at paras 7 & 8; *Decision on Somalia*, *supra* note 27, at paras 6, 7 & 9.

³² E de Wet ‘The Modern Practice of Intervention by Invitation in Africa and its Implications for the Prohibition of the Use of Force’ 2 January 2015, forthcoming in the *European Journal of International Law* available at <http://ssrn.com/abstract=2545723> (last accessed 22 April 2015) 3.



2.3. The Ability of Kenya to Retaliate by Relying on the Right to Self-Defence

Article 51 of the UN Charter contains one of the two exceptions to the prohibition of the use of force which are contained in the Charter, namely the right to individual and collective self-defence.³³ State practice and the ICJ have confirmed that the right to self-defence is governed exclusively by article 51 and not by the customary right to self-defence.³⁴

Article 51 provides conditions under which a State is permitted to resort to the threat or use of force; this essentially denotes that when a state falls victim to the unlawful use of force by another state and such force amounts to an armed attack, then the attacked state is entitled to exercise its inherent right to self-defence.³⁵ The ICJ, in the *Case Concerning Military Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*,³⁶ held that the only instance when it is lawful to use force against another state in response to a wrongful act by the latter, is when such a wrongful act was an armed attack.³⁷ This stance was later confirmed in the *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*.³⁸

Two main questions arise from the right to self-defence, namely: when does the violence in question amount to an armed attack, and who can commit an armed attack? The thesis will encompass an investigation into these two enquiries, which are significant to conclude the main problem; i.e. whether Kenya can retaliate militarily against Al-Shabaab on Somali territory by relying on the right of self-defence. These questions will form two separate chapters of the thesis.

³³ The first exception to the use of force is UN Security Council enforcement measures under Chapter VII. G Nolte & A Randelzhofer 'Article 51' B Simma (ed.) *The Charter of the United Nations: A Commentary* (3 ed.) Volume II 2012 1397 1399.

³⁴ *Ibid.*, at 1404.

³⁵ *Ibid.*, at 1401.

³⁶ *Nicaragua case*, *supra* note 24.

³⁷ *Nicaragua case*, *supra* note 24, at para 211; the *Nicaragua case* was the first case, after the *Corfu Channel* case, before the ICJ which dealt with the use of force and is regarded as 'the most important decision by the Court on the substantive law on the use of force, especially on the right of self-defence and the law on intervention', see Gray, *supra* note 24, at 242.

³⁸ *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, ICJ Reports 2003, p. 161 para 51.



2.3.1. *What is the Military Nature of an Armed Attack?*

Various opinions exist as to when an armed attack occurs, however the dominant stance maintains that an armed attack occurs only when the ‘most grave forms of the use of force’ in violation of article 2(4) of the UN Charter are apparent, and distinguished these from ‘other less grave forms’.³⁹ The ICJ, in the *Nicaragua v US* case, created a threshold which applies to determine whether a party’s conduct is of sufficient intensity to constitute an armed attack; whereby the Court held ‘if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident...’.⁴⁰ The Court hereby regarded the ‘armed attack’ concept of article 51 as narrower than the ‘use of force’ concept of article 2(4).⁴¹ The use of force in question must therefore trigger a high intensity of violence in order to be regarded as an armed attack.⁴² The ICJ, in the *Oil Platforms*⁴³ and *DRC v Uganda*⁴⁴ cases, subsequently reaffirmed this principle of the traditional high threshold requirement.⁴⁵

However, more recent state practice reveals that there is a new tendency to recognise the ‘accumulation of events’ doctrine more willingly than before, which entails that a range of smaller incidences over a period of time can amount to an armed attack.⁴⁶ The ICJ created the impression in the *Oil Platforms* case that it accepted this position with its statement ‘even taken cumulatively... these incidents do not seem to the Court to constitute an armed attack on the United States’.⁴⁷ The temporal aspect of self-defence, i.e. the point in time when self-defence can be exercised, links closely with the ‘accumulation of events’ doctrine.⁴⁸ The *locus classicus* case of self-defence, namely the *Caroline* case, held that only when ‘the

³⁹ *Nicaragua case, supra* note 24, at para 191. E de Wet ‘The United Nations Collective Security System in the 21st Century: Increased Decentralization through Regionalization and Reliance on Self-defence’ L Amicorum & R Wolfrum et al (ed.) *Coexistence, Cooperation and Solidarity* (Volume 2) 2012 1553 1565; Y Dinstein ‘The concept of self-defence’ *War, Aggression and Self-Defence* (4th ed) 2005 175 193.

⁴⁰ *Nicaragua case, supra* note 24, at para 195.

⁴¹ ME O’Connell ‘Historical Development and Legal Basis’ D Fleck (ed.) *The Handbook of International Humanitarian Law* (3 ed) 2013 1 6; Nolte & Randelzhofer, *supra* note 33, at 1401.

⁴² AA Yusuf ‘The Notion of “Armed Attack” in the Nicaragua Judgment and Its Influence on Subsequent Case Law’ 2012 24:2 *Leiden Journal of International Law* 461 464.

⁴³ *Oil Platforms case, supra* note 38, at para 51.

⁴⁴ *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, I.C.J. Reports 2005, p. 168 para 147.

⁴⁵ CJ Tams ‘The Use of Force against Terrorists’ 2009 20:2 *The European Journal of International Law* 359 387.

⁴⁶ *Ibid.*, at 388.

⁴⁷ *Oil Platforms case, supra* note 38, at para 64.

⁴⁸ Nolte & Randelzhofer, *supra* note 33, at 1421.



necessity of that self-defence is instant, overwhelming, leaving no choice of means, and no moment for deliberation', will anticipatory self-defence measures be admissible.⁴⁹ The *Caroline* case came about in 1837, more than a century before the UN Charter. Commentators nevertheless still take the stance that it serves as customary law and that it was incorporated in Article 51 of the UN Charter.⁵⁰

Since this position is also averred by commentators,⁵¹ the author will investigate the stance of the evolution of the 'high intensity threshold' requirement. She will conduct this by, firstly, setting the traditional approach afoot and, thereafter, elaborating on the recent developments of the military nature of an armed attack, that being the required intensity of the use of force to constitute an armed attack.

2.3.2. Who Can Commit an Armed Attack?

The ICJ elaborated on the definition of an armed attack in the *Nicaragua v US* case wherein it was held that armed attacks included 'not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups ... 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".⁵² Therefore, traditionally, the operations of non-state actors must be attributable to a state for the former's operations to be classified as an armed attack for purposes of Article 51.⁵³ A state must exercise effective control over the non-state actor's operations before these operations in question can be attributed to the state – this constitutes the so-called *Nicaragua v US* 'effective control' test of attribution.⁵⁴ In the *Advisory Opinion on*

⁴⁹ See Chapter 2 1, 2.2 *infra*; RY Jennings 'The Caroline and McLeod Cases' 1938 32:1 *The American Journal of International Law* 82 89 Nolte & Randelzhofer, *supra* note 33, at 1421-22; These authors were of the opinion that Article 51 UNC encompassed and confirmed the customary right to self-defence, see NM Feder 'Reading the U.N. Charter Connotatively: Toward a New Definition of Armed Attack' 1987 19:2 *New York University Journal of International Law and Politics* 395 403-4; The 'imminence' of an attack depends collectively on factors including the capability of the attacker and the nature of the threat, furthermore a situation of 'irreversible emergency' must be present, see E Wilmshurst 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' 2006 55:4 *International and Comparative Law Quarterly* 963 967.

⁵⁰ Nolte & Randelzhofer, *supra* note 33, at 1422; C Pierson 'Preemptive Self-Defense in an age of Weapons of Mass Destruction: Operation Iraqi Freedom' 2004 33:1 *Denver Journal of International Law and Policy* 150 155.

⁵¹ Nolte & Randelzhofer, *supra* note 33, at 1409.

⁵² *Nicaragua case*, *supra* note 24, at para 195. The ICJ cites Article 3, paragraph (g), of the Definition of Aggression annexed to the United Nations General Assembly Resolution 3314 (XXIX), adopted by the United Nations General Assembly at its 2319th meeting, 14 December 1974.

Nicaragua case, *supra* note 24, at para 109, 115 and 195. De Wet, *supra* note 39, at 1566.

⁵⁴ *Nicaragua case*, *supra* note 24, at para 109 and 115. Tams, *supra* note 45, at 368, 383.



Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,⁵⁵ the ICJ created the assumption that an armed attack should be imputable to a state and thus reaffirmed the *Nicaragua v US* position.⁵⁶

Al-Shabaab is a non-state actor and therefore the author must determine whether it is capable of committing an armed attack and subsequently triggering Kenya's right to individual self-defence. The dissertation will draw attention to recent developments in the *rationae personae* aspect of an armed attack, that being the party who can commit an armed attack.

The US has taken the stance that Al-Qaida is the foreign enemy force with which the US is at war with, even though Al-Qaida is not a traditional single nation state.⁵⁷ This response to Al-Qaida's terrorist attacks of 11 September 2001 has been the starting-point of the debate as to whether a non-state actor can launch an armed attack, even if attribution is not applicable.⁵⁸ United Nations Security Council Resolution 1368 confirmed the right to self-defence but did not elaborate on its meaning, and therefore omitted to state the necessary requirement that the attacker's conduct must be attributable to a state.⁵⁹

The 2005 African Union Non-Aggression and Common Defence Pact,⁶⁰ which entered into force on 18 December 2009, lowered the threshold of the attribution necessary to constitute an armed attack, in that an act of aggression includes the 'support, harbouring or provision of any assistance for the commission of terrorist acts and other violent trans-national organized crimes against a Member State'.⁶¹ The harbouring of terrorists was traditionally a justification for a state to introduce countermeasures against an armed group but it was not a sufficient ground to

⁵⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, p. 136.

⁵⁶ *Ibid.*, at para 139; see O'Connell, *supra* note 41, at 7.

⁵⁷ Remarks by Alberto R. Gonzales, Counsel to the President, Before the American Bar Association Standing Committee on Law and National Security, Washington DC, February 24, 2004 available at http://www.pegc.us/archive/White_House/gonzales_remarks_to_ABA_20040224.pdf (last accessed 19 March 2015) 3.

⁵⁸ O'Connell, *supra* note 41, at 7.

⁵⁹ United Nations Security Council Resolution 1368 (2001), Adopted by the Security Council at its 4370th meeting, S/RES/1368 (2001), 12 September 2001; United Nations Security Council Resolution 1368 (2001) was confirmed by United Nations Security Council Resolution 1373 (2001), see United Nations Security Council Resolution 1373 (2001), Adopted by the Security Council at its 4385th meeting, S/RES/1373 (2001), 28 September 2001.

⁶⁰ *African Union Non-Aggression and Common Defence Pact*, adopted by the Fourth Ordinary Session of the Assembly held at Abuja, Nigeria, 31 January 2005.

⁶¹ Article (1)(c)(xi) *ibid.*; T Maluwa 'Ratification of African Union Treaties by Member States: Law, Policy and Practice' 2012 13 *Melbourne Journal of International Law* 636 681.



retaliate with full self-defence.⁶² As principle, states currently seem to be more prone to accept that they can rely on self-defence against terrorist attacks which are not attributable to another state.⁶³ Even though Kenya has not ratified the AU Non-Aggression and Common Defence Pact, its contents are indicative of strong regional state practice with 20 out of 54 of the Member States' ratifications.⁶⁴ Furthermore, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions regards non-state armed groups as able bodies to launch armed attacks.⁶⁵

One can therefore assume that the nature of the party who is able to conduct an armed attack, might be in a transformative state, and it is with this notion kept in mind that the author will research the more current position hereof. This enquiry will hopefully grant assistance in determining whether Al-Shabaab can commit an armed attack, and whether its use of force in question resulted in an armed attack, therefore entitling Kenya to rely on its right to self-defence against Al-Shabaab on Somali territory. Attention will also be granted to the possibility of Kenya to use low-level, proportionate counterforce against violent attacks by Al-Shabaab, in the case where it is found that Kenya is not able to rely on the self-defence justification.⁶⁶

3. Course of Enquiry

The author will execute desktop research by examining the main sources of international law, as contained in article 38(1) of the ICJ Statute, namely: international conventions (including decisions of international organisations), customary international law (as it is contained in state practice and *opinion juris*), decisions of courts and tribunals, and scholarly opinion.⁶⁷

In Chapter 2 the author will expose the traditional position of essentially which levels of force constitute an 'armed attack', and thereafter requirements of the developments of the *ratione materiae* aspect of self-defence will be stated. Chapter 3 will focus on the *ratione personae* paradigm wherein the central question is

⁶² A Cassese 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' 2001 12:5 *European Journal of International Law* 993 996.

⁶³ Tams, *supra* note 45, at 381.

⁶⁴ The status of ratifications list is available at http://www.au.int/en/sites/default/files/Non%20Aggression%20Pact_0.pdf (last accessed 23 April 2015).

⁶⁵ C Heyns 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' A/HRC/23/47 (2013) paras 81, 88, 98.

⁶⁶ *Oil Platforms* case, *supra* note 38, at para 13.

⁶⁷ Article 38(1) *Statute of the International Court of Justice*, San Francisco, 1945.



whether non-state actors can commit 'armed attacks', whereby the traditional position will be served as well the evolution thereof in an effort to answer the central enquiry. The concluding chapter will encompass the findings of these two chapters in order to determine the main question, i.e. whether Kenya can resort to the right to self-defence against Al-Shabaab on Somali territory.



Chapter 2: The Military Nature of an Armed Attack

1. Introduction

The definition of an ‘armed attack’ is anything but a clear and self-explanatory one, and is rather one with various diverging opinions.⁶⁸ It is trite that it forms the basis of the right to self-defence in terms of Article 51 and that an ‘armed attack’ is only committed when the use of force occurs on a large scale, has a substantial effect and is of certain gravity.⁶⁹ The traditional approach entails that only the gravest violations of the prohibition of the use of force constitute an armed attack, and therefore only such infractions should make the right to self-defence available to the attacked state, as a response.⁷⁰ This position constitutes the so-called ‘threshold requirement’ which must be complied with for a party’s use of force to be regarded as an armed attack,⁷¹ and it is recognised as the prevailing construction of the right to self-defence.⁷² Development of this traditional stance is inevitable in the light of recent practice, and therefore this chapter will discuss arguments in favour of a lower threshold, or alternative requirements for an ‘armed attack’ to occur.

In the *Oil Platforms* case, the ICJ relied on the authority of its judgment in *Nicaragua v US* and affirmed that there must be distinguished between ‘the most grave forms of the use of force’ and ‘other less grave forms’, since only the former constitutes an armed attack.⁷³ The ICJ in *DRC v Uganda* created the impression that international law provides for the exercise of self-defence solely against ‘large-scale attacks’.⁷⁴ Apart from these ICJ rulings, the Eritrea/Ethiopia Claims Commission held in the Partial Awards on the *jus ad bellum* claims of Ethiopia that

⁶⁸ Lubell, *supra* note 1, at 50; Nolte & Randelzhofer, *supra* note 33, at 1407.

⁶⁹ Nolte & Randelzhofer, *supra* note 33, at 1409; The Institut de Droit International states that states should resort to counter-measures or ‘strictly necessary police measures’ in reaction to an attack which does not reach the gravity threshold, *see* Institut de Droit International, *supra* note 30.

⁷⁰ Tams, *supra* note 45, at 369; *Nicaragua case*, *supra* note 24, at para 191.

⁷¹ *See* Chapter 1 at 2.3.1.

⁷² Tams, *supra* note 45, at 369.

⁷³ *Oil Platforms case*, *supra* note 38, at para 51; D Raab ‘‘Armed Attack’ after the *Oil Platforms Case*’ 2004 17:4 *Leiden Journal of International Law* 719 724.

⁷⁴ *Armed Activities in the Territory of the Congo*, *supra* note 44, at para 147. The ICJ, from the first stance, found that the military operations by Uganda in the DRC was not justified for the exercise of self-defence and thus omitted to investigate the issue of self-defence, *see* paras 144-147.



'localized border encounters between small infantry units...do not constitute an armed attack' and as such do not satisfy the requirements of self-defence.⁷⁵

Some authors are of the opinion that the 'threshold requirement', as stipulated by the ICJ in the *Nicaragua v US* case, is only applicable when determining whether a non-state actor's resort to force, thereby considering the 'gravity' of such force, amounts to an armed attack.⁷⁶ It is argued that when the ICJ applied article 3(g) of the UNGA Definition of Aggression,⁷⁷ it had the effect that any use of force by a state's army will constitute an armed attack, whereas only certain acts by non-state actors will amount to an armed attack.⁷⁸ The implication hereof is that in the event that a state is confronted by a violent attack from a non-state armed group, such an attack is frequently not of a sufficient 'gravity' to constitute an armed attack and therefore only results in a lesser breach of article 2(4).⁷⁹ This degenerates into a situation where the state has minimal legal remedies to resort to against the non-state actor, as the right to self-defence is unlawful, since the required threshold is not met.⁸⁰ Equally so, others maintain that operations carried out by a state's regular armed forces must also cross the intensity threshold before it would constitute an armed attack.⁸¹

Surveys regarding state practice of the resort to force, show that states who have been attacked by force which cannot be classified as 'a most grave form of the use of force', have declared a right to reply to such breaches⁸² and the recognition of the 'accumulation of events' doctrine is an establishment hereof.⁸³ This doctrine entails those smaller acts of force, which individually do not amount to an 'armed

⁷⁵ Eritrea/Ethiopia, Partial Award, *Jus Ad Bellum* Ethiopia's Claims 1–8, 19 December 2005, available at <http://www.pca-cpa.org> (last accessed 13 July 2015).

⁷⁶ Raab, *supra* note 73, at 724.

⁷⁷ Article 3(g) of the Definition of Aggression, *supra* note 52:

'Any of the following acts [...] shall [...] qualify as an act of aggression:

[...]

(g) 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 the acts listed above, or its substantial involvement therein.'

See Chapter 1 at n. 48.

⁷⁸ Articles 1 & 2 of the Definition of Aggression, *supra* note 52.

⁷⁹ Tams, *supra* note 45, at 370; Lubell, *supra* note 1, at 51.

⁸⁰ Raab, *supra* note 73, at 725; *Oil Platforms* case, *supra* note 38, separate opinion of Judge Simma, p. 324, para 12.

⁸¹ Lubell, *supra* note 1, at 49.

⁸² Tams, *supra* note 45, at 387; See Chapter 3 at para 3.1 for examples of events.

⁸³ T Ruys 'The 'armed attack' requirement *ratione materiae*' *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* 2010 126 169.



attack', can nevertheless trigger the right to self-defence if they are considered cumulatively.⁸⁴ The doctrine comes into play in situations where the series of attacks form part of a 'continuous, overall plan of attack purposely relying on numerous small raids.'⁸⁵ The ICJ has implied its recognition of the 'accumulation of events' doctrine in the *Oil Platforms, DRC v Uganda* and *Nicaragua v US* judgments.⁸⁶

Apart from the requirements of necessity and proportionality that must be present to utilise self-defence legitimately, which was established by the *Caroline* case, there is a third requirement, namely 'immediacy'.⁸⁷ The threat of attack must be 'imminent', meaning there ought to be a temporal link between the threat and the victim state's reaction thereto.⁸⁸ The 'accumulation of events' doctrine potentially undermines this temporal requirement, and the ambit of its effect will thus be examined to determine whether it is the proper course of law to recognise this paradigm.

A different approach entails that states should be able to take 'proportionate defensive measures' to repel an attack which does not amount to an 'armed attack'.⁸⁹ This approach is however received less favourable in context of the comprehensive ban of force.⁹⁰

In this chapter the author will discuss elements of the *ratione materiae* of the 'armed attack' requirement of the right to self-defence. She will refer to the traditional *de minimus* threshold requirement, the current criticism thereof, recent developments (with particular focus on the 'accumulation of events' doctrine) and how these rather novel arguments for a lower or different threshold can become problematic.

⁸⁴ Nolte & Ranzelzhofer, *supra* note 33, at 1409; These attacks can in certain circumstances justify one larger response by the victim state, in retaliation of the range of smaller attacks. The victim state should not be required to respond to each pin-prick attack with a proportionate pin-prick attack, see B Levenfeld 'Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law' 1982 21:1 *Columbia Journal of Transnational Law* 1 41.

⁸⁵ *Ibid.*, as in Ruys, *supra* note 83, at 168.

⁸⁶ See 2.2. and 3.1 *infra*.

⁸⁷ Dinstein, *supra* note 38, at 209; Jennings, *supra* note 49, at 89.

⁸⁸ J Green 'The Criteria of Necessity and Proportionality' *The International Court of Justice and Self-Defence in International Law* 2009 96 97.

⁸⁹ See 3.1 *infra*.

⁹⁰ Tams, *supra* note 45, at 389; see 3.1 *infra*.



2. Recent Developments: A New ‘Threshold Requirement’?

2.1. *The ‘Accumulation of Events’ and ‘Proportionate Defensive Measures’ Doctrines*

Israel held the view that when a non-state actor’s general strategy consists of ‘continuous pin-prick assaults’, then such acts could be ‘apprais[ed]...in their totality as an armed attack’.⁹¹ The Security Council’s discussions at the time did not accept Israel’s reliance on the ‘accumulation of events’ doctrine as it considered Israel’s actions as ‘disproportionate, illegally pre-emptive and punitive’.⁹² With passage of time however, when the Lebanon-based Hezbollah launched rocket attacks against Israel during July 2006, thereby causing Israel to respond with bombardments and an invasion into Lebanon, a vast number of states acknowledged that Israel has a right to respond with a use of force against non-state actors such as Hamas or Hezbollah, although it questioned the proportionality of Israel’s counter-attacks.⁹³

Jurisprudence of the ICJ contributes to the recognition of the ‘accumulation of events’ doctrine with the stance it took respectively in *Oil Platforms*⁹⁴ and *DRC v Uganda*.⁹⁵ The court held in the latter that even if the range of attacks in question ‘could be regarded as cumulative in character’ there was no evidence to attribute them to the DRC.⁹⁶ Moreover, in *Nicaragua v US* the court considered whether the

⁹¹ Dinstein, *supra* note 38, at 230-31; Levenfeld, *supra* note 85, at 40; The *Nadelstichtaktin* (needle prick) doctrine, as it is also known, states that when incidents are taken as a whole it leads to ‘the intolerable level of an armed attack’ even though every single incident does not constitute an armed attack, *see* Feder, *supra* note 49, at 415.

⁹² This was the position with regards to the events in July 1981 when Israeli jets bombed targets in southern Lebanon and Palestinian non-state armed groups (referred to by Levenfeld as *Fedayeen* gunners) who were positioned in Lebanon, shelled Israeli settlements in the Galilee, for details *see* ; Levenfeld, *supra* note 85, at 18-19; CJ Tams ‘The Use of Force against Terrorists’ 2009 20:2 *The European Journal of International Law* 359 370; Lubell, *supra* note 1, at 51; TM Franck ‘Self-defense against state-sponsored terrorists and infiltrators’ *Recourse to Force: State Action Against Threats and Armed Attacks* 2004 53 57-59.

⁹³ United Nations Security Council, 5489th meeting, S/PV.5489, 14 July 2006; United Nations Security Council, 5488th meeting, S/PV.5488, 13 July 2006; M Hakimi ‘Defensive Force against Non-State Actors: The State of Play’ 2015 91 *U.S. Naval War College International Law Studies* 10; The conflict in question took place over 34 days and was formally called the ‘Second Lebanon War’ by the Israeli cabinet, *see* A Zimmermann ‘The Second Lebanon War: *Jus ad bellum*, *jus in bello* and the Issue of Proportionality’ A von Bogdandy & R Wolfrum (eds) *Max Planck Yearbook of United Nations Law* (Volume 11) 2007:11 99 note 1; Tams, *supra* note 45, at 379, 388; Statement by Ambassador Dan Gillerman, Permanent Representative, During the open debate on ‘The Situation in the Middle East’ United Nations, New York, 8 August 2006 available at <http://www.un.org/webcast/2006b.html> (last accessed 3 August 2015).

⁹⁴ *See* Chapter 1 at 2.3.1; Green, *supra* note 88, at 43.

⁹⁵ *Armed Activities in the Territory of the Congo*, *supra* note 44, at para 146.

⁹⁶ *Ibid.*



Nicaraguan invasion into Honduras and Costa Rica, 'singly or collectively', amounted to an armed attack.⁹⁷

A jurist suggests an alternative approach for acts which cannot be considered to be armed attacks, namely that a state who falls victim to the use of force which does not constitute an 'armed attack' within the meaning of article 51, should be able to resort to 'proportionate defensive measures'.⁹⁸ This approach entails that uses of force classified as 'armed attacks' in terms of article 51 and thus justify full-scale self-defence against the said attacks, must be distinguished from violent acts which fall short of the required threshold to be regarded as an 'armed attack' and therefore in return cannot justify the exercise of collective self-defence.⁹⁹ One can draw a parallel between this stance and the *Nicaragua v US* case, wherein the court found that even though Nicaragua did not commit an armed attack, its acts in and against El Salvador 'could only have justified proportionate counter-measures' by the victim state.¹⁰⁰ The ICJ did not clearly express itself as to whether these 'proportionate counter-measures' involve the use of force.¹⁰¹

These arguments both recognise that the traditional threshold requirement is upheld but falls subject to re-interpretation.¹⁰² They furthermore emphasise the gap between articles 2(4) and 51 UN Charter, which results due to *Nicaragua v US's* narrow construction of self-defence, and criticises this position by implication.¹⁰³ This so-called gap exists subsequent to the interpretation of 'armed attack' (the

⁹⁷ *Nicaragua case, supra* note 24, at para 231; *Nicaragua case, supra* note 24, Separate opinion of Judge Singh, p 151 at 154; *Nicaragua case, supra* note 24, Separate opinion of Judge Jennings, p 528 at 543; Raab, *supra* note 73, at 732; Green, *supra* note 88, at 44.

⁹⁸ *Oil Platforms case, supra* note 38, Separate opinion of Judge Simma, p. 324, para 12.

⁹⁹ *Ibid.*

¹⁰⁰ Only El Salvador, Honduras and Costa Rica could lawfully exercise such 'proportionate counter-measures', see *Nicaragua case, supra* note 24, at para 249:

'While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot...produce any entitlement to take collective countermeasures involving the use of force. The acts of which Nicaragua is accused...could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts...';

Oil Platforms case, supra note 38, Separate opinion of Judge Simma, p. 324, para 12.

¹⁰¹ *Nicaragua case, supra* note 24, at para 249.

¹⁰² Tams, *supra* note 45, at 388; Article 31(3)(b) of the Vienna Convention on the Law of Treaties reflects customary international law and provides for state practice to be taken into account when a provision of a treaty is interpreted, however such re-interpretation must be 'generally accepted' or serve as 'established practice', see Nolte & Ranzelzhofer, *supra* note 33, at 1400-1; Articles 31-33 Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p331, 22 May 1969; N Schrijver & L van den Herik 'Leiden Policy Recommendations on Counter-terrorism and International Law', 1 April 2010, para 28.

¹⁰³ Nolte & Ranzelzhofer, *supra* note 33, at 1401; Tams, *supra* note 45, at 388; J Green 'The Trouble with Armed Attack and the Merged Conceptions of Self-Defence' *The International Court of Justice and Self-Defence in International Law* 2009 111 139 ff.



requirement of self-defence found in article 51) as a narrower concept than ‘threat or use of force’ (found in article 2(4)).¹⁰⁴ The approach of ‘proportionate defensive measures’ is difficult to reconcile with the comprehensive ban on the use of force.¹⁰⁵ Although the ‘accumulation of events’ doctrine is not absolved from critique, as it undermines the temporal aspect of self-defence,¹⁰⁶ it might be considered as the most feasible approach to close the gap.¹⁰⁷ The author will firstly discuss probable far-reaching implications which might be caused due to the application of the ‘accumulation of events’ doctrine, in order to determine whether this approach should be recognised as acceptable state practice.

2.2. The Temporal Limitation of the Right to Self-Defence in Light of the ‘Accumulation of Events’ Doctrine

States and legal scholars have for several years disagreed about the point in time when self-defence measures against an armed attack may be utilised, and has been rather unsuccessful in reaching consensus about this topic.¹⁰⁸ There used to be two arguments until the beginning of the 21st Century: on the one hand, there were those who held the position that anticipatory self-defence was admissible under Article 51 in line with the *Caroline Case*.¹⁰⁹ [On](#) the other hand there was the school of thought who rendered such a broad interpretation of Article 51 as inappropriate and against the object and purpose as well as the wording (‘if an armed attack occurs’) of the provision.¹¹⁰

The US’s reliance on pre-emptive self-defence in its 2002 US National Security Strategy,¹¹¹ which was condemned by the majority of states and

¹⁰⁴ Nolte & Randelzhofer, *supra* note 33, at 1401.

¹⁰⁵ Tams, *supra* note 45, at 389; The ‘proportionate defensive measures’ approach is not supported as Article 50(1)(a) of the ILC Draft Articles on State Responsibility provides that ‘counter-measures shall not affect the obligation to refrain from the threat or use of force as embodied in the Charter’, see Ruys, *supra* note 83, at 146; Nolte & Randelzhofer, *supra* note 33, at 1405.

¹⁰⁶ See 2.2 *infra*.

¹⁰⁷ Tams, *supra* note 45, at 389.

¹⁰⁸ Nolte & Randelzhofer, *supra* note 33, at 1421.

¹⁰⁹ *Ibid.*, at 1421-1422.

¹¹⁰ *Ibid.*, at 1422.

¹¹¹ *The National Security Strategy of the United States of America*, The White House Washington, September 2002 at p. 6, 15.



commentators,¹¹² and its invasion of Iraq in 2003, marked the start of a reassessment of the legal deconstruction of modern day practice.¹¹³ Commentators show a tendency to accept the anticipatory self-defence paradigm (as opposed to pre-emptive self-defence), although consensus has not yet been reached.¹¹⁴

Acceptance of the 'accumulation of events' doctrine together with anticipatory self-defence can be troublesome as a liberal interpretation of both can lead thereto that a response to smaller attacks, i.e. attacks which individually do not meet the requirements of an armed attack, can occur either too late or too early, since it will always satisfy the requirement of immediacy.¹¹⁵ The imminence of an individual action is irrelevant but the relationship between the series of attacks is important; therefore when the first attack of the series is launched, the victim state must show that a future attack will likely take place, and not whether the possible future attacks are imminent.¹¹⁶ This could lead to a wide abuse by states of the right to self-defence as the temporal limitation of self-defence, known by the immediacy requirement, is weakened considerably.¹¹⁷ The United States and United Kingdom conducted *Operation Enduring Freedom (OEF)* since 7 October 2001 and the mission entailed the targeting of Al-Qaida and the Taliban in Afghanistan.¹¹⁸ *OEF* is a clear example of a mission which was based on a wide, but justifiable

¹¹² The United Kingdom's Attorney General took the stance 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 attack against a threat that is more remote', see the Statement in HL Debs, 21 April 2004, Volume 660, Collections 370-371; Koffi Annan also asserted in his *In Larger Freedom* report that Article 51 'covers an imminent attack' but 'where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force...', see United Nations General Assembly 'In larger freedom: towards development, security and human rights for all', 59th session, UN Doc A/59/2005, 21 March 2005; Tams, *supra* note 45, at 389; Wilmschurst, *supra* note 49, at 968; O Schachter 'The Extraterritorial Use of Force against Terrorist Bases' 1989 11 *Houston Journal of International Law* 309 312.

¹¹³ Nolte & Randelzhofer, *supra* note 33, at 1422.

¹¹⁴ Tams, *supra* note 45, at 390; Nolte & Randelzhofer, *supra* note 33, at 1423; M Wood 'The Law on the Use of Force: Current Challenges' 2007 11 *Singapore Year Book of International Law and Contributors* 1 8, 11; Wilmschurst, *supra* note 49, at 964; Feder, *supra* note 49, at 412-3; At the Millennium Summit, the High-level panel on Threats, Challenges and Change stated that 'a threatened State,...can take military action as long as the threatened attack is **imminent**,...', see United Nations General Assembly, 'A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change', 59th session, UN Doc A/59/565, 2 December 2004 at para 188; Schrijver & van den Herik, *supra* note 102, at para 45.

¹¹⁵ Tams, *supra* note 45, at 390.

¹¹⁶ M Schmitt 'Counter-Terrorism and the Use of Force in International Law' The Marshall Center Papers no 5, The George C Marshall European Center for Security Studies, 25 as cited in Lubell, *supra* note 1 at 54.

¹¹⁷ Tams, *supra* note 45, at 390.

¹¹⁸ United Nations Security Council, 'Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council', S/2001/946, 7 October 2001; FJ Hampson 'Afghanistan 2001-2010' E Wilmschurst (ed.) *International Law and the Classification of Conflicts* 2012 242 244.



interpretation of Article 51 and ended up in an on-going military campaign serving a wide range of objectives.¹¹⁹ This operation is regarded as one which overstepped even the widest boundaries of self-defence.¹²⁰

3. Conclusion

Where a non-state actor operates from a foreign state's territory and its actions cannot be attributed to such state, the harbouring state has the primary responsibility to take action against the non-state actor in order to suppress its activities.¹²¹ The heightened threshold requirement originates from this notion, since it is inevitable that a harbouring state will be affected by a military response in self-defence against the non-state actor on its territory; it serves the purpose of avoiding that a harbouring state suffers such consequences due to the response being triggered too soon.¹²²

Two possible alternatives to the traditional threshold requirement were discussed in the above paragraphs, namely the 'accumulation of events' and 'proportionate defensive measures' doctrines.¹²³ The former doctrine appears to be received more favourably by commentators than the latter; however it is not without its own shortfalls, especially in that it might undermine the temporal aspect of the right to self-defence.¹²⁴ The purpose of the 'accumulation of events' doctrine is to enable states to take defensive measures against non-state actors who injured a state, however a liberal interpretation of this doctrine could lead to an extensive and disproportionate use of defensive force.¹²⁵

¹¹⁹ Tams, *supra* note 45, at 390.

¹²⁰ *Ibid.*

¹²¹ Schrijver & van den Herik, *supra* note 102, at para 39.

¹²² *Ibid.*

¹²³ See 3.1 *supra*.

¹²⁴ See 3.1 *supra*.

¹²⁵ See 3.2 *supra*.



Chapter 3: Who Can Commit an Armed Attack?

1. Introduction

Under the traditional construction of an ‘armed attack’, self-defence against non-state actors was only permitted where such acts were attributable to a state.¹²⁶ This is the legal mechanism that was relied on to give effect to the inter-state reading of Article 51, which links to the Article 2(4) prohibition of the use of force ‘against the territorial integrity or political independence of any state’.¹²⁷ Attribution is present where a state organ conducts operations in terms of Article 4 of the Articles on State Responsibility, or where a private party is under direct instruction of a state in terms of Article 8 (i.e. under effective control of the State).¹²⁸

Notably the language of Article 51 of the UN Charter does not require that an armed attack should arise from a state in order to trigger the right to self-defence, but the *Nicaragua v US* judgment had the implication that Article 51’s ‘if an armed attack occurs’ wording should be interpreted as ‘if an armed attack *by another state* occurs’.¹²⁹ Evidently, a reading of ‘armed attack’ which requires strict attribution does not consider more recent occasions of the use of defensive force against non-state actors.¹³⁰ This line of criticism has been thriving, especially since the 9/11 events, and questions which the ICJ nevertheless failed to address in subsequent cases include *inter alia* whether non-state actors can launch an armed attack without any state involvement, or lesser state involvement than required in *Nicaragua v US*, and whether there is a broader right to self-defence against these actors who operate from territories of uninvolved states.¹³¹

The kingpin of the debate concerning whether a victim state can engage in self-defence against a non-state actor on another state’s territory revolves around whether such action is in violation of the prohibition of force against the latter

¹²⁶ See Chapter 1 at 2.3.2; Lubell, *supra* note 1 at 31.

¹²⁷ KN Trapp ‘Can Non-State Actors Mount an Armed Attack?’ M Weller (ed.) *Oxford Handbook on the Use of Force* 2015 679 ff.

¹²⁸ Article 4 & Article 8 of the Draft Articles, *supra* note 2.

¹²⁹ *The Wall* Advisory Opinion, *supra* note 55, Separate opinion of Judge Higgins, p. 207 at para 33; *Nicaragua* case, *supra* note 24, at para 195; International Law Association, Washington Conference, Report on Aggression and the Use of Force, 9 April 2014, 648 661; Lubell, *supra* note 1, at 32; Trapp, *supra* note 127.

¹³⁰ Trapp, *supra* note 127.

¹³¹ Gray, *supra* note 24, at 258.



state.¹³² For this purpose, it is important to draw a distinction between the use of force against a non-state actor and against the harbouring state, however it is still of paramount importance to regard every use of force to fall within the ambit of article 2(4).¹³³

The legal position of occasions where defensive force against non-state actors are either supported by some states or denounced by others, or where they attract no attention whatsoever, remains somewhat unclear.¹³⁴ In this chapter the author will enunciate the traditional ‘effective control’ test, and thereafter she will consider the conduct of states, jurisprudence of the ICJ and commentators’ views of the construction of the *ratione personae* aspect of an ‘armed attack’, with the aim of exhibiting the evolution of this legal doctrine. She concludes that it is increasingly accepted by States that a non-state actor can launch an armed attack and suggests that an alternative approach, which links to the self-defence requirement of necessity rather than that of an armed attack, should be considered to deal with attacks from non-state actors.

2. The ‘Effective Control’ Test under Scrutiny

The ‘effective control’ test has the effect that only where a non-state actor’s attacks are directly instructed by a state, may the victim state respond to such acts under self-defence.¹³⁵ The ICJ constructed the test in *Nicaragua v US* when it had to determine whether the US was responsible for the conduct of the *contras*, and in this regard the Court had to adjudicate on what the required degree of control is for attribution to be present.¹³⁶ It ruled that a high threshold of effective control is required, being that ‘the United States *directed or enforced* the perpetration of the acts contrary to human rights and humanitarian law’ (own emphasis added).¹³⁷

¹³² International Law Association, *supra* note 129, at 662.

¹³³ *Ibid.*; Trapp, *supra* note 127; Even though the argument in support of a ‘gravity threshold’, wherein all acts below this ‘gravity threshold’ fall beyond the scope of article 2(4), is gaining ground, the general view this regard all uses of force to fall within the ambit of article 2(4), see T Ruys ‘The Meaning of ‘Force’ and the Boundaries of the Jus Ad Bellum: Are ‘Minimal Uses of Force Excluded form UN Charter Article 2(4)?’ 2014 108:2 *The American Journal of International Law* 159.

¹³⁴ Trapp, *supra* note 127.

¹³⁵ *Nicaragua case*, *supra* note 24, at para 115; CJ Tams ‘The Use of Force against Terrorists’ 2009 20:2 *The European Journal of International Law* 359 369.

¹³⁶ *Nicaragua case*, *supra* note 24, at para 109, 111 and 115; ILC Commentary to Article 8 of the Draft Articles, *supra* note 2.

¹³⁷ *Nicaragua case*, *supra* note 24, at para 115.



The Appeals Chamber of the International Tribunal for the Former Yugoslavia (ICTY) attempted to evolve this test with regards to groups in the case of *Prosecutor v. Duško Tadić*.¹³⁸ The Tribunal held that if an organised group's conduct was 'under the overall control of a State,...whether or not each of them was specifically imposed, requested or directed by the State' (own emphasis added), then such conduct inevitably falls under the responsibility of that state.¹³⁹ This is a notably lower threshold than that of effective control.¹⁴⁰ The ICTY criticised the effective control test enunciated in the *Nicaragua v US* case based on two grounds.¹⁴¹ Firstly, the purpose of Article 8 of the Articles on State Responsibility is to avoid a situation where states escape international responsibility by making use of private individuals to conduct unlawful practices.¹⁴² The ICTY further noted that a high threshold for control should not strictly be required in every factual situation.¹⁴³ Secondly, the effective control test is contrary to international law adjudication and state practice, since courts have ceased to apply the effective control test where military or paramilitary groups are concerned.¹⁴⁴

The ICJ in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,¹⁴⁵ as well as the ILC Commentary to the Articles on State Responsibility,¹⁴⁶ criticised the ICTY for its flexible degree of control approach in the *Tadić* case and reinforced the effective control test as set out in *Nicaragua v US*.¹⁴⁷ The *Bosnia v Serbia* case stated that the ICTY acted beyond its jurisdiction in the *Tadić* case.¹⁴⁸ Even though the ICJ conceded that the overall control test is suitable to determine whether an armed conflict is international, it still held that it is not

¹³⁸ The ICTY in effect upheld the effective control test for individuals' conduct to be attributable to a state as it ruled that 'it would be necessary to show that the State issued specific instructions...', see *Prosecutor v. Duško Tadić*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A, (1999), ILM, vol. 38, No. 6 (November 1999), p 1518 para 118.

¹³⁹ *Ibid.* at para 122.

¹⁴⁰ *Ibid.* at para 124; A Cassese 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' 2007 18:4 *The European Journal of International Law* 649 657.

¹⁴¹ *Ibid.*, at para 115.

¹⁴² *Ibid.*, at para 117-123.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*, at para 124, 125.

¹⁴⁵ *Case Concerning Application Of The Convention On The Prevention and Punishment Of The Crime Of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 43.

¹⁴⁶ ILC Commentary to Article 8 of the Draft Articles, *supra* note 2.

¹⁴⁷ *Genocide case*, *supra* note 145, at para 401; ILC Commentary to Article 8 of Draft Articles, *supra* note 2;

¹⁴⁸ *Ibid.*, at para 403;



suitable to apply it to State responsibility and that it was thus not applicable in the *Bosnia v Serbia* case.¹⁴⁹ The ICJ, together with the ILC Commentary to the Articles on State Responsibility, held that the ICTY's mandate directed it to adjudicate issues of individual criminal responsibility and not that of State responsibility.¹⁵⁰

~~test was constructed in~~ The effective control test limits the right of self-defence to a state vs. state context and remained generally uncontested for some 50 years.¹⁵¹ More recently, this requirement for attribution has received some criticism as it leads to complicated and fact-dependent questions, since the victim state has the burden to prove that the territorial state is substantially involved in the attacks by the non-state actor.¹⁵² The author however, takes the view that this is not necessarily a point of concern since a high threshold for attribution ensures that abuse of the right to self-defence does not occur. The contrary was the case when the US invaded Iraq on 19 March 2003, after Iraq failed to comply with United Nations Security Council Resolutions 687 (1991) and 1441 (2002).¹⁵³ Commentators hold the view that Iraq did not pose an imminent attack, as required for lawful anticipatory self-defence, but rather a potential one.¹⁵⁴

This notion makes it clear that there is a need to reform and reinterpret the traditional position so that the 'effective control' test should not be applied too constrictively. Possible options in this regard will be discussed in the subsequent paragraphs.

3. The Emergence of a Evolution of Self-Defence

3.1. *Developments in State and ICJ Practice*

¹⁴⁹ *Ibid.*, at para 404, 405 and 406.

¹⁵⁰ *Ibid.*, at para 403; ILC Commentary to Article 8 of the Draft Articles, *supra* note 2.

¹⁵¹ This is due to the international community's condemnation of a broad construction of self-defence, see Tams, *supra* note 45, at 369; *The Wall* Advisory Opinion, *supra* note 55, Separate opinion of Judge Kooijmans, p. 219 at para 35; Kress, *supra* note 22, at 42.

¹⁵² Tams, *supra* note 45, at 368; Judge Jennings indicates that the 'provision of arms' coupled with 'logistical or other support' may very well constitute an armed attack and thereby contradicts the ICJ's notion at para 195, see *Nicaragua* case, *supra* note 24, Dissenting opinion of Judge Jennings, p 518 at 533.

¹⁵³ United Nations Security Council Resolution 687 (1991), Adopted by the Security Council at its 2981st meeting, S/RES/687 (1991), 3 April 1991; United Nations Security Council Resolution 1441 (2002), Adopted by the Security Council at its 4644th meeting, S/RES/1441 (2002), 8 November 2002; MN Schmitt 'Iraq (2003 onwards)' E Wilmshurst (ed.) *International Law and the Classification of Conflicts* 2012 356.

¹⁵⁴ Pierson, *supra* note 50, at 177.



States have been taking extraterritorial forcible measures in self-defence against non-state actors for more than the past two centuries, ever since the *Caroline* case.¹⁵⁵ The incidences discussed below are examples of where attribution through classic effective control was not applicable but where self-defence was nevertheless invoked as justification.

The US bombed the El Shifa pharmaceutical plant in Sudan, together with training facilities Afghanistan supposedly controlled by Osama bin Laden, in response to attacks on US embassies in Kenya and Tanzania on August 7th, 1998.¹⁵⁶ The Clinton Administration was convinced that bin Laden was the ‘terrorist mastermind’ who was responsible for the bombings.¹⁵⁷ The US asserted that the El Shifa plant was producing chemical weapons and that the bin Laden network exercised financial control over it.¹⁵⁸ Salah Idris, a private Sudanese businessman owned the plant, and the US was unsuccessful to prove that he had ties with bin Laden.¹⁵⁹ The Sudanese government therefore exercised no effective control over the El Shifa plant.

Iran used force on numerous occasions against the Mujahedin-e-Khalq Organization (MKO) bases situated on Iraqi territory during the 1990’s.¹⁶⁰ Iran regularly informed the UN Security Council concerning its conduct in Iraq and stated that its operation was performed to cease the cross-border attacks from the MKO into Iranian territory.¹⁶¹ Iran furthermore asserted that Iraq harboured the MKO and called upon the latter’s government to cease its territory from being utilised for harbouring purposes.¹⁶² The MKO’s conduct could therefore not be attributed to Iraq under the ‘effective control’ test.¹⁶³

International Law Association, *supra* note 129, at 661; Tams, *supra* note 45, at 379-380.

¹⁵⁶ J Lobel ‘The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan’ 1999:24 *Yale Journal of International Law* 537.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*, at 544; T Atlas & R Moseley ‘Smoking Gun’ For Sudan Raid Now In Doubt’ *Chicago Tribune* 28 August 1998, available at http://articles.chicagotribune.com/1998-08-28/news/9808280174_1_soil-sample-laden-vx-nerve (last accessed 27 October 2015).

¹⁵⁹ *Ibid.*, at 545.

¹⁶⁰ United Nations Security Council, ‘Letter dated 25 May 1993 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General’, S/25843, 26 May 1993; Lubell, *supra* note 1, at 30; Tams, *supra* note 45, at 380.

¹⁶¹ United Nations Security Council, ‘Letter dated 18 April 2001 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council’, S/2001/381, 19 April 2001; United Nations Security Council, ‘Letter dated 25 May 1993’, *ibid.*; Ruys, *supra* note 83, at 432.

¹⁶² *Ibid.*

¹⁶³ Tams, *supra* note 45, at 380;



Commentators regard the US launched operations in Afghanistan against the Taliban (the de facto government of Afghanistan at the time) and Al-Qaida, in reaction to 9/11, as an awakening to a new era of self-defence against non-state actors.¹⁶⁴ The UK released a document entitled 'Responsibility for the terrorist atrocities in the United States, 11 September 2001' wherein it found that although the Taliban was not directly involved in the 9/11 attacks, it provided its territory to Al-Qaida for operations and as a safe haven.¹⁶⁵ Due to the Taliban's harbouring of Al-Qaida, one can argue that it violated the 'duty of care' principle as held in the ICJ case of *The Corfu Channel Case (UK v Albania)*.¹⁶⁶ This is a 'general and well-recognized principle' in that it is 'every State's obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States'.¹⁶⁷

Russia launched air strikes into the Pankisi Gorge, Georgia, where Chechen rebels, criminals and transnational terrorists sought shelter, after it had been attacked by Chechen rebels in 2007.¹⁶⁸ Georgia proved prior to the attack that it was unwilling and unable to prevent the Chechen rebels from conducting attacks.¹⁶⁹ Furthermore, the US found that Georgia was unable to exercise effective control over the Chechen rebels in the eastern part of its territory.¹⁷⁰

Colombian forces entered Ecuador in 2008 to track the FARC (Revolutionary Armed Forces of Colombia) rebels in retaliation against the non-state armed group's constant drive against Colombia.¹⁷¹ Columbia furthermore held that the Ecuadorian

¹⁶⁴ State practice supported the US's reaction, see United Nations Security Council, 'Letter dated 7 October 2001', *supra* note 118; NATO Press Release 124, 'Statement by the North Atlantic Council', 12 September 2001 available at http://www.nato.int/cps/en/natohq/news_18553.htm?selectedLocale=en (last accessed on 4 August 2015); Organization of American States, The Americas' Response to Terrorism, 'Support for the Measures of Individual and Collective Self-Defense Established in Resolution RC.24/RES. 1/01', OEA/Ser.F/II.24 CS/TIAR/RES. 1/01, 16 October 2001, available at http://www.oas.org/oaspage/crisis/follow_e.htm (last accessed 4 August 2015); Lubell, *supra* note 1, at 29; Ruys, *supra* note 83, at 433.

¹⁶⁵ 'Responsibility for the terrorist atrocities in the United States, 11 September 2001' *UK Press Release, Office of the Prime Minister* 4 October 2001 available at <http://fas.org/irp/news/2001/11/ukreport.html> (last accessed 27 October 2015).

¹⁶⁶ *The Corfu Channel Case (UK v Albania)*, Merits, Judgment, ICJ Reports 1949, p 4.

¹⁶⁷ *Ibid.*, at para 22.

¹⁶⁸ T Reinold 'State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11' 2011:105 *The American Journal of International Law* 244 252-253; United Nations Security Council, 'Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General', S/2002/1012, 12 September 2002.

¹⁶⁹ United Nations Security Council, 'Letter dated 11 September 2002', *ibid.*; Ruys, *supra* note 83, at 465.

¹⁷⁰ United States Department of State 'Eurasia Overview' *Patterns of Global Terrorism 2001*, May 2001 available at <http://www.state.gov/documents/organization/10319.pdf> (last accessed 27 October 2015); Ruys, *supra* note 83, at 466.

¹⁷¹ This was condemned and stipulated as 'a violation of the sovereignty and territorial integrity of Ecuador' by the Organization of American States, see Organization of American States Permanent Council, 'Convocation of



Government were unwilling to eliminate the problem of the non-state armed group.¹⁷² Commentators assert that the FARC's operations cannot be attributed to Ecuador and therefore the traditional 'effective control' test is not applicable.¹⁷³

The US and some Arab states launched bombardment against ISIL (Islamic State in Iraq and the Levant) and the Al-Qaida affiliated Khorasan Group in Syria.¹⁷⁴ The US claimed that Syria is unwilling and unable to prevent ISIL's attacks being launched from its territory.¹⁷⁵ Once again one can comment that the traditional 'direct instruction' or 'effective control' tests of attribution are not invoked.

Article 4(o) of the AU Constitutive Act lists the 'condemnation and rejection of...acts of terrorism and subversive activities' as a principle according to which the AU shall function.¹⁷⁶ The AU Non-Aggression and Common Defence Pact is an instrument to avoid subversive activities in neighbouring states in that it directs states to 'prohibit the use of its territory for the stationing, transit, withdrawal or incursions of irregular armed groups, mercenaries and terrorist organizations operating in the territory of another Member State'.¹⁷⁷ The AU Non-Aggression and Common Defence Pact furthermore contains a broader definition of aggression than that of Article 3(g) of the Definition of Aggression.¹⁷⁸ The former seem to exclude the requirement that the harbouring state should be actively involved, whereas the latter contains such a criterion.¹⁷⁹ The result hereof is that a state may commit an act of aggression where it is incapable to prevent non-state actors, who are operating on or from its territory, to launch attacks.¹⁸⁰ This will thus trigger the right to self-defence against the non-state actor on the harbouring state's territory, even though such

the Meeting of Consultation of Ministers of Foreign Affairs and Appointment of a Commission', CP/RES. 930 (1632/08), 5 March 2008; Reinold, *supra* note 168, at 274; 'Regional crisis following military strike against FARC' 2008 54:3 *Keesing's Record of World Events* 48456.

¹⁷² Reinold, *supra* note 168, at 275.

¹⁷³ *Ibid.*, at 276.

¹⁷⁴ Only the United States expressed the justification of right to individual and collective self-defence for its retaliation against these groups, see United Nations Security Council, 'Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General', S/2014/695, 23 September 2014; R van Steenberghe 'State practice and the evolution of the law of self-defence: clarifying the methodological debate' 2015 2:1 *Journal on the Use of Force and International Law* 81 81-82.

¹⁷⁵ United Nations Security Council, 'Letter dated 23 September 2014', *ibid.*

¹⁷⁶ *Constitutive Act of the African Union*, *supra* note 29.

¹⁷⁷ Article 5(b) of the *African Union Non-Aggression and Common Defence Pact*, *supra* note 60.

¹⁷⁸ See Chapter 1 at 2.3.2 *supra*, Chapter 2 n 77.

¹⁷⁹ See Article 3(g) of the Definition of Aggression, and Article 1 of the *African Union Non-Aggression and Common Defence Pact*; Reinold, *supra* note 168, at 262.

¹⁸⁰ Reinold, *ibid.*



state is unable to cease the non-state actor from conducting operations from its territory.¹⁸¹ Clearly, the AU Non-Aggression and Common Defence Pact shows a reshaping – and possibly a troublesome one - of classic international law doctrines.¹⁸² The AU Non-Aggression and Common Defence Pact does not distinguish between a state that consciously harbours and purposefully tolerates non-state actors on its territory, and a state that is unable to prevent such a situation.¹⁸³

The ICJ stated in its *Palestinian Wall Advisory Opinion* that ‘Article 51...recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.’¹⁸⁴ All did not receive this judgment favourably since commentators, as well as ICJ judges, reprimanded it in their separate opinions and declarations.¹⁸⁵ Two judges of the *Palestinian Wall Advisory Opinion* respectively held in their Declaration and Separate Opinion that the United Nations Security Council did not limit the United Nations Security Council Resolutions 1373 (2001) and 1368 (2001) application ‘to terrorist attacks by State actors only, nor was an assumption to that effect implicit in these resolutions’.¹⁸⁶ Although one should avoid reading these United Nations Security Council Resolutions as suggestive of such a wide application,¹⁸⁷ one can clearly see that development has occurred since the *Palestinian Wall Advisory Opinion*. Furthermore it is noted that ICJ Advisory Opinions do not have binding force, but possess mere persuasive value.¹⁸⁸

In *DRC v Uganda* the ICJ concluded that since it was not proved that the DRC committed an armed attack against Uganda, it was not necessary for the court to determine ‘whether...contemporary international law provides for a right of self-

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *The Wall Advisory Opinion, supra* note 55, at para 139.

¹⁸⁵ *The Wall Advisory Opinion, supra* note 55, Declaration of Judge Buergenthal, p. 240 para 6; *The Wall Advisory Opinion, supra* note 55, Separate Opinion of Judge Kooijmans, p. 219 para 35; Lubell, *supra* note 1, at 32; CJ Tams ‘Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case’ 2006 16:5 *The European Journal of International Law* 964 973; Gray, *supra* note 24, at 258.

¹⁸⁶ *The Wall Advisory Opinion, ibid.*

¹⁸⁷ *Supra* Chapter 1 at 2.3.2.

¹⁸⁸ Article 65(1) of the UN Charter provides:

‘The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.’



defence against large-scale attacks by irregular forces.¹⁸⁹ It is possible that the avoidance of the court to address the question of self-defence against (and solely against) non-state actors, depicts that it considered the question still open for debate.¹⁹⁰ Similar to the outcome of the *Palestinian Wall Advisory Opinion*, judges and authors received the position of the ICJ in *DRC v Uganda* critically and perceived the right to self-defence against non-state actors as a legitimate one.¹⁹¹

In every contentious use of force case which served before the ICJ, the harbouring state was the target of forcible defensive measures.¹⁹² One should not interpret the court's evasion of the heated question of self-defence against non-state actors as an indication that such uses of force are precluded from the definition of self-defence, but it should be interpreted in the relevant contexts of the facts of each case.¹⁹³ The problem that the ICJ had to investigate in *Nicaragua v US* was, amongst others, whether the support of the rebels in El-Salvador, by the state of Nicaragua, amounted to an armed attack and thereby triggered El-Salvador's right to individual and collective self-defence, and that the American supply of aids to the Nicaraguan *contras* thus resulted in the lawful exercise of collective self-defence.¹⁹⁴ This factual stance should be kept in mind when the court's judgment is considered to implicate that an armed attack can only emanate from a state, and not from a non-state actor.¹⁹⁵ Commentators believe the concept of 'armed attack' has changed since 9/11 and regret that the ICJ did not revisit *Nicaragua v US* in the subsequent cases before it, however the court was properly advised not to determine an issue which was not necessary for it to give judgment.¹⁹⁶

3.2. Benefits and Drawbacks of Self-Defence against Non-State Actors

The purpose of the right to self-defence is to enable a victim state to protect itself against attacks which emanate from beyond its borders, and the nature of the

¹⁸⁹ *Armed Activities in the Territory of the Congo*, *supra* note 44, at para 146-147.

¹⁹⁰ Lubell, *supra* note 1, at 33; Trapp, *supra* note 127.

¹⁹¹ *Armed Activities in the Territory of the Congo*, *supra* note 44, Separate Opinion of Judge Kooijmans, p. 306 para 29-30; Gray, *supra* note 24, at 259.

¹⁹² Trapp, *supra* note 127.

¹⁹³ *Ibid.*

¹⁹⁴ *Nicaragua case*, *supra* note 24, at paras 105, 131, 160, 195, 229, 230; Lubell, *supra* note 1, at 32.

¹⁹⁵ *Ibid.*, para 1 and n 3; Trapp, *supra* note 127.

¹⁹⁶ Gray, *supra* note 24, at 260.



attacker should not change this object.¹⁹⁷ Although consensus has not yet been reached, there appears to be growing agreement among states that an ‘armed attack’ need not to be launched by a state in order to trigger the right to self-defence,¹⁹⁸ however it is required that the attack from the non-state actor must take place at a large scale.¹⁹⁹ It is state practice to publicly condemn uses of defensive force via letters to the Security Council (e.g. when the international community disapproved the US’s bombing of the pharmaceutical plant in Sudan)²⁰⁰ which makes it significant that states, especially the League of Arab States and the Non-Aligned Movement, held a muted reaction to the US’s operations in Afghanistan.²⁰¹ On the contrary, states condemned Columbia’s use of force against the FARC training camps situated in Ecuador.²⁰² Commentators take the stance that the latter reaction of states should not be interpreted as a reservation that defensive use of force is limited to inter-state situations, but should rather confirm that the justification of self-defence against non-state actors is not yet settled in practice.²⁰³

The ‘necessity requirement’ forms a cardinal aspect of the law of self-defence, since it serves as a limitation for any conduct which is exercised within the justification of self-defence.²⁰⁴ The requirement of the *Caroline* case resonates here and should be applied as a starting point.²⁰⁵ A state is compelled to determine

¹⁹⁷ International Law Association, *supra* note 129, at 661.

¹⁹⁸ States have over the years been more inclined to accept a wider reading of article 51, as was asserted by Israel and South Africa, and this position was especially supported after 9/11, *see* Tams, *supra* note 185, at 972; Wilmschurst, *supra* note 49, at 969; International Law Association, *supra* note 129, at 661; Schachter, *supra* note 112, at 311; Schrijver & van den Herik, *supra* note 102, at para 38, 42; C Greenwood ‘International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’ 2003 4:7 *San Diego International Law Journal* 7 16; For a list of scholars who refutes this right *see* van Steenberghe, *supra* note 174, at n3.

¹⁹⁹ Wilmschurst, *supra* note 49, at 969; Schrijver & van den Herik, *supra* note 102, at para 39; International Law Association, *supra* note 129, at 662.

²⁰⁰ There was a lack of evidence that the plant was used for non-civilian purposes and the bombing was therefore widely condemned, *see* United Nations Security Council, ‘Letter dated 21 August 1998 from the Permanent Representative of the Sudan to the United Nations addressed to the President of the Security Council’, SC/1998/786, 21 August 1998; United Nations Security Council, ‘Letter dated 21 August 1998 from the Chargé d’Affaires A.I. of the Permanent Mission of Kuwait to the United Nations addressed to the President of the Security Council’, SC/1998/789, 21 August 1998; United Nations Security Council, ‘Letter dated 24 August 1998 from the Chargé d’Affaires A.I. of the Permanent Mission of Kuwait to the United Nations addressed to the President of the Security Council’, SC/1998/800, 24 August 1998; United Nations Security Council, ‘Letter dated 22 September 1998 from the Permanent Representative of the Sudan to the United Nations addressed to the President of the Security Council’, SC/1998/879, 22 September 1998.

²⁰¹ SD Murphy ‘Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter’ 2002 43:1 *Harvard International Law Journal* 49-50; Trapp, *supra* note 127.

²⁰² *Supra* 3.1. and n 16; Schrijver & van den Herik, *supra* note 102, at para 38, 42.

²⁰³ Trapp, *supra* note 127.

²⁰⁴ Nolte & Randelzhofer, *supra* note 33, at 1425.

²⁰⁵ *See* Chapter 1 at 2.3.1 *supra*.



whether there are alternative, more peaceful, mechanisms to turn to before self-defence is invoked.²⁰⁶ It is seminal that the ‘unable or unwilling’ test should be regarded as a component of the necessity requirement, i.e. that self-defence may only be exercised as a last resort after all other measures have been exhausted, and should not be used as a new justification for the prohibition of the use of force.²⁰⁷ Commentators note the following from a study of the ‘unable or unwilling’ test:

‘If the territorial state is willing and able, the victim state may not use force in the territorial state, and the territorial state is expected to take the appropriate steps against the non-state group. If the territorial state is unwilling or unable to take those steps, however, it is lawful for the victim state to use that level of force that is necessary (and proportional) to suppress the threat that the non-state group poses.’²⁰⁸

The responsibility to combat operations of non-state actors lies with the harbouring state in which such groups reside.²⁰⁹ Commentators suggest that states should firstly consider the harbouring state’s effort (whether any) in combatting operations of the non-state actor on its territory, in order to determine whether it is lawful to conduct extraterritorial self-defence against a non-state actor.²¹⁰ The central problem of a liberal interpretation of self-defence against non-state actors is whether such a use of force violates the prohibition of the use of force against the harbouring state.²¹¹ A victim state may not engage in forcible measures against the harbouring state merely because the non-state actor is resident in the harbouring state.²¹² The question that remains problematic is whether, when one accepts that self-defence is allowed against non-state actors, the victim state can forcibly violate the harbouring state’s territorial sovereignty, even though the harbouring state is not guilty of any unlawful act.²¹³ The author holds the stance that this is when a state is unable to prevent non-state actors from utilising its territory for unlawful attacks. Another uncertain situation arises where a harbouring state unlawfully allows non-

²⁰⁶ A Hendriksen ‘*Jus ad bellum* and American Targeted Use of Force to Fight Terrorism Around the World’ 2014 19:2 *Journal of Conflict & Security Law* 211 228.

²⁰⁷ International Law Association, *supra* note 129, at 663; van Steenberghe, *supra* note 174, at 84.

²⁰⁸ AS Deeks ‘Unwilling or Unable’: Toward a Normative Framework for Extraterritorial Self-Defense’ 2012:52 *Virginia Journal of International Law* 483 487-488; Hendriksen, *supra* note 206, at 229.

²⁰⁹ Schrijver & van den Herik, *supra* note 102, at para 38, 42.

²¹⁰ See Chapter 3 at para 3.3.

²¹¹ International Law Association, *supra* note 129, at 662.

²¹² *Ibid.*

²¹³ *Ibid.*, at 661.



state actors to use its territory for operations which is a violation of the 'duty of care' principle.²¹⁴ The harbouring state may *inter alia* be in violation of United Nations Security Council Resolution 1373 (2001), a *jus ad bellum* rule of international law, however traditionally this still does not lead to the victim state's right to self-defence.²¹⁵ Development has taken place in this regard though, firstly due to the AU Non-Aggression and Common Defence Pact's broad definition of aggression,²¹⁶ and secondly due to the stance taken by commentators that self-defence can be triggered where a state is unwilling or unable to prevent non-state actors from utilising its territory.²¹⁷ Commentators take the view that if the unwilling or unable doctrine is applied, then the attribution criteria widens into 'manifestly unable to prevent large-scale attacks'.²¹⁸ This can lead to unwished results and commentators furthermore emphasise that necessity and proportionality must be strictly applied in these circumstances.²¹⁹ The AU Non-Aggression and Common Defence Pact makes this ideal rather challenging, due to its wide definition of aggression. One can simply ponder about what the possible effects upon the necessity requirement would be, and if this requirement becomes too easy to satisfy, various states would engage in a 'free for all' use of force.

The author holds the view that if the right to self-defence can be too easily triggered, then the fragile states would most probably experience constant military attacks upon their territories, as they are usually unable to prevent their territories from being exploited by non-state actors. Nevertheless, when a state falls victim to an armed attack by a non-state actor where no attribution to the harbouring state is present, then the victim state may retaliate in self-defence against the non-state actor, but not against the harbouring state.²²⁰

The author strongly advise that states should follow a strict approach in conformity of more recent state practice which should link to the requirement of necessity.²²¹ In order to determine the legality of defensive extraterritorial force, the

²¹⁴ See 3.1 *supra*.

²¹⁵ United Nations Security Council Resolution 1373 places a duty on states to combat terrorism, see paras 1-3(g) of the United Nations Security Council Resolution 1373 (2001), *supra* note 59; International Law Association, *supra* note 129, at 662.

²¹⁶ See 3.1 *supra*.

²¹⁷ See Heyns, *supra* note 65.

²¹⁸ Nolte & Randelzhofer, *supra* note 33, at 1419.

²¹⁹ *Ibid.*

²²⁰ International Law Association, *supra* note 129, at 662.

²²¹ Trapp, *supra* note 127.



harbouring state's efforts to combat the operations of the non-state actor should be considered, and if it is found that the harbouring state is conducting extensive measures to suppress the non-state armed group, then defensive measures by the victim state would be unnecessary and cooperative arrangements with the harbouring state would be the more feasible approach.²²²

4. Conclusion

The constant increased capacity of non-state actors and the resulting threat that the civilian population is duly exposed to, calls for a reassessment of the 'armed attack' concept.²²³ As the author has indicated above, effective control test of a state is no longer a requirement for a non-state actor to launch an 'armed attack'.²²⁴ Furthermore, the wording of Article 51 of the UN Charter allows for an opportunity to include extraterritorial use of force against a non-state actor.²²⁵

The numerous incidences where states exercised defensive measures extraterritorially shows that a liberal interpretation of the *ratione personae* aspect receives increased recognition.²²⁶ Such incidences which occurred before 11 September 2001 were frequently condemned by the international community, but, interestingly, similar uses of defensive force were more widely acknowledged after this date.²²⁷ This explains commentators' views that self-defence against non-state actors have been recognised in international law since 9/11, while the opposite was true when *Nicaragua v US* was decided.²²⁸

The importance of the necessity requirement, together with its linkage to the 'unwilling or unable' test should not be underestimated. The author is rather sceptical of the possible implications of the AU Non-Aggression and Common Defence Pact and sincerely prays that it won't result in a 'free for all' use of force campaign.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *Supra* 3.4.

²²⁵ Kress, *supra* note 22, at 41.

²²⁶ See 3.1 *supra* for these occasions; Kress, *ibid.*

²²⁷ Kress, *ibid.*

²²⁸ *Ibid.*



Chapter 4: Conclusion

Even though Al-Shabaab has committed several atrocities in Kenya, the author is not convinced that it amounts to an armed attack.²²⁹ She holds that the gravity threshold as stipulated in *Nicaragua v US* is not satisfied, and that even though Al-Shabaab's attacks run over a period of time, these attacks did not occur close enough after each other to trigger the 'accumulation of events' threshold.

The Somali government cooperated with the AMISOM mission whereby the Somali National Armed Forces, together with the AMISOM forces, conducted a joint military offensive in 2014.²³⁰ Al-Shabaab abandoned several towns as a result of this.²³¹ Therefore, Somalia does not effectively control Al-Shabaab and the latter's conduct cannot be attributed to Somalia.

The Somali government is equally adamant, together with the African Union and its member states, to cease Al-Shabaab's attacks and occupation on its territory.²³² The author believes therefore that no 'wilful harbouring' by Somalia occurs and that the state is thus not unwilling to prevent Al-Shabaab from using its territory. However, given the status of the internal affairs in Somalia, the state is unable to cease Al-Shabaab's operations with national policies.

Before Kenya will be entitled to resort to full-scale self-defence against Al-Shabaab on Somali territory, the latter state's combatting measures against the non-state actor must firstly be analysed in order to determine whether it is sufficient to combat Al-Shabaab's activities. If Somalia's efforts did not bear any fruit, then Kenya must obtain consent from Somalia to invade its territory in order to combat the non-state actor in a joint venture and effort.

The analysis in the thesis dealt with the *jus ad bellum* position, i.e. the law applicable during peace time. If Somalia does not give consent to Kenya to retaliate militarily against Al-Shabaab on Somali territory, then there would be a shift to the *jus in bello* legal paradigm, which governs the law of war.

²²⁹ For a summary of these acts, see Chapter 1 at para 1 *supra*.

²³⁰ 'World Report 2015: Somalia' *Human Rights Watch* available at <https://www.hrw.org/world-report/2015/country-chapters/Somalia> (last accessed 25 October 2015).

²³¹ *Ibid.*

²³² 'Al-Shabaab' *National Counterterrorism Center Counterterrorism Guide* available at http://www.nctc.gov/site/groups/al_shabaab.html (last accessed 30 October 2015).



Bibliography

African Union Documents

Constitutive Act of the African Union, adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government, 11 July 2000, Lome, Togo.

African Union Non-Aggression and Common Defence Pact, adopted by the Fourth Ordinary Session of the Assembly held at Abuja, Nigeria, 31 January 2005.

Communique of the Peace and Security Council, Adopted by the Sixty-Ninth Meeting of the AU Peace and Security Council, 19 January 2007, Addis Ababa, Ethiopia.

Decision on Somalia, Decisions and Declarations, adopted by the Eight Ordinary Session of the Assembly of the AU, 29-30 January 2007, Addis Ababa, Ethiopia, Assembly/AU/Dec.142(VIII).

Books

L Amicorum & R Wolfrum et al (ed.) *Coexistence, Cooperation and Solidarity* (Volume 2) 2012 Leiden: Martinus Nijhoff Publishers.

Y Dinstein *War, Aggression and Self-Defence* (4th ed) 2005 Cambridge: Cambridge University Press.

D Fleck (ed.) *The Handbook of International Humanitarian Law* (3 ed) 2013 Oxford: Oxford University Press.

TM Franck *Recourse to Force: State Action Against Threats and Armed Attacks* 2004 Cambridge University Press.



J Green *The International Court of Justice and Self-Defence in International Law* 2009 Portland: Hart Publishing.

M Weller (ed.) *Oxford Handbook on the Use of Force* 2015 Oxford: Oxford University Press.

N Lubell *Extraterritorial Use of Force Against Non-state Actors* 2010 Oxford: Oxford University Press.

T Ruys '*Armed Attack*' and *Article 51 of the UN Charter: Evolutions in Customary Law and Practice* 2010 New York: Cambridge.

B Simma (ed.) *The Charter of the United Nations: A Commentary* (3 ed.) Volume II 2012 Oxford: Oxford University Press.

CJ Tams & J Sloan (eds.) *The Development of International Law by the International Court of Justice* 2013 Oxford: Oxford University Press.

A von Bogdandy & R Wolfrum (eds) *Max Planck Yearbook of United Nations Law* (Volume 11) 2007 Leiden: Martinus Nijhoff Publishers.

E Wilmshurst (ed.) *International Law and the Classification of Conflicts* 2012 Oxford: Oxford University Press.

International Court of Justice (ICJ) Contentious Cases & Advisory Opinions

Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment, I.C.J. Reports 2005, p. 168.

Case Concerning Application Of The Convention On The Prevention and Punishment Of The Crime Of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), I.C.J. Reports 2007, p. 43.



Case Concerning Military Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14.

Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America), Judgment, I.C.J. Reports 2003, p. 16

The Corfu Channel Case (UK v Albania), Merits, Judgment, ICJ Reports 1949, p 4.
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136.

International Tribunal for the Former Yugoslavia (ICTY) Cases

Prosecutor v. Duško Tadić, International Tribunal for the Former Yugoslavia, Case IT-94-1-A, (1999), ILM, vol. 38, No. 6 (November 1999), p 1518.

Journal Articles

DE Agbibo 'Terrorism without Borders: Somalia's Al-Shabab and the global jihad network' 2014 5:1 *Journal of Terrorism Research* 27.

A Cassese 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' 2001 12:5 *European Journal of International Law* 993.

A Cassese 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' 2007 18:4 *The European Journal of International Law* 649.

EJ Criddle & E Fox-Decent 'A Fiduciary Theory of Jus Cogens' 2009 *Yale Journal of International Law* 34 331.

JG Dalton 'What is War? Terrorism as War after 9/11' 2006 12 *ILSA Journal of International & Comparative Law* 523.



GM Danilenko 'International *Jus Cogens*: Issues of Law-Making' 1991 2 *European Journal of International Law* 42.

E de Wet 'The Modern Practice of Intervention by Invitation in Africa and its Implications for the Prohibition of the Use of Force' 2 January 2015, forthcoming in the *European Journal of International Law* available at <http://ssrn.com/abstract=2545723> (last accessed 22 April 2015).

AS Deeks 'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense' 2012:52 *Virginia Journal of International Law* 483.

NM Feder 'Reading the U.N. Charter Connotatively: Toward a New Definition of Armed Attack' 1987 19:2 *New York University Journal of International Law and Politics* 395.

TM Franck 'Terrorism and the Right of Self-Defense' 2001 *The American Journal of International Law* 95 839.

C Greenwood 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' 2003 4:7 *San Diego International Law Journal* 7.

M Hakimi 'Defensive Force against Non-State Actors: The State of Play' 2015 91 *U.S. Naval War College International Law Studies* 10.

A Hendriksen 'Jus ad bellum and American Targeted Use of Force to Fight Terrorism Around the World' 2014 19:2 *Journal of Conflict & Security Law* 211.

RY Jennings 'The Caroline and McLeod Cases' 1938 32:1 *The American Journal of International Law* 82.

C Kress 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force' 2014 1:1 *Journal on the Use of Force and International Law* 11.



B Levenfeld 'Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law' 1982 21:1 *Columbia Journal of Transnational Law* 1.

J Lobel 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan' 1999:24 *Yale Journal of International Law* 537.

T Maluwa 'Ratification of African Union Treaties by Member States: Law, Policy and Practice' 2012 13 *Melbourne Journal of International Law* 636.

SD Murphy 'Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter' 2002 43:1 *Harvard International Law Journal* 49.

C Pierson 'Preemptive Self-Defense in an age of Weapons of Mass Destruction: Operation Iraqi Freedom' 2004 33:1 *Denver Journal of International Law and Policy* 150.

D Raab "'Armed Attack' after the *Oil Platforms Case*' 2004 17:4 *Leiden Journal of International Law* 719.

T Reinold 'State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11' 2011:105 *The American Journal of International Law* 244.

T Ruys 'The Meaning of 'Force' and the Boundaries of the Jus Ad Bellum: Are 'Minimal Uses of Force Excluded from UN Charter Article 2(4)?' 2014 108:2 *The American Journal of International Law* 159.

O Schachter 'The Extraterritorial Use of Force against Terrorist Bases' 1989 11 *Houston Journal of International Law* 309.

CJ Tams 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case' 2006 16:5 *The European Journal of International Law* 964.



CJ Tams 'The Use of Force against Terrorists' 2009 20:2 *The European Journal of International Law* 359.

E Wilmshurst 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' 2006 55:4 *International and Comparative Law Quarterly* 963.

R van Steenberghe 'State practice and the evolution of the law of self-defence: clarifying the methodological debate' 2015 2:1 *Journal on the Use of Force and International Law* 81.

M Wood 'The Law on the Use of Force: Current Challenges' 2007 11 *Singapore Year Book of International Law and Contributors* 1.

AA Yusuf 'The Notion of "Armed Attack" in the Nicaragua Judgment and Its Influence on Subsequent Case Law' 2012 24:2 *Leiden Journal of International Law* 461.

Media Reports

'Al-Shabaab' National Counterterrorism Center Counterterrorism Guide available at http://www.nctc.gov/site/groups/al_shabaab.html (last accessed 30 October 2015).

'Kenya bus attack: Military 'kills 100 Shabab militants'' 23 November 2014 *BBC Africa* available at <http://www.bbc.com/news/world-africa-30167891> (last accessed 10 May 2015).

'Key developments in East Africa (mid-June to mid-July 2014)' July 2014 *Africa Conflict Monthly Monitor Monthly Chronicles* 31.

'Mohamed Siad Barre' *Encyclopædia Britannica Online* 2014 available at <http://www.britannica.com/EBchecked/topic/547169/Mohamed-Siad-Barre> (last accessed on 26 June 2014).



'Responsibility for the terrorist atrocities in the United States, 11 September 2001' *UK Press Release, Office of the Prime Minister* 4 October 2001 available at <http://fas.org/irp/news/2001/11/ukreport.html> (last accessed 27 October 2015).

'Somalia Profile' *BBC News Africa* 4 July 2014 available at <http://www.bbc.com/news/world-africa-14094503> (last accessed on 26 June 2014).

'Who are Somalia's al-Shabaab?' 16 May 2014 *BBC News Africa* available at <http://www.bbc.com/news/world-africa-15336689> (last accessed on 18 June 2014).

'World Report 2015: Somalia' *Human Rights Watch* available at <https://www.hrw.org/world-report/2015/country-chapters/Somalia> (last accessed 25 October 2015).

AFP 'Kenya claims 100 al-Shabaab killed in response to Mandera massacre' 23 November 2014 *The Guardian* available at <http://www.theguardian.com/world/2014/nov/23/kenya-claims-100-al-shabaab-killed-in-response-mandera-massacre> (last accessed 10 May 2015).

T Atlas & R Moseley 'Smoking Gun' For Sudan Raid Now In Doubt' *Chicago Tribune* 28 August 1998, available at http://articles.chicagotribune.com/1998-08-28/news/9808280174_1_soil-sample-laden-vx-nerve (last accessed 27 October 2015).

A Abimbola 'The Boko Haram Uprising and Islamic Revivalism in Nigeria' 2010 45(2) *Africa Spectrum* 95 98.

Al Jazeera and agencies 'Profile: Boko Haram' 18 January 2015 *Al Jazeera* available at <http://www.aljazeera.com/news/africa/2012/01/20121974241393331.html> (last accessed 13 April 2015).

W Branigin 'Kenya, avenging college massacre, bombs al-Shabab camps in Somalia' 6 April 2015 *The Washington Post* available at <http://www.washingtonpost.com/world/africa/kenya-avenging-college-massacre->



bombs-al-shabab-camps-in-somalia/2015/04/06/32931c58-dc53-11e4-acfe-cd057abefa9a_story.html (last accessed 12 May 2015).

J Hatcher & K Sleff 'Al-Shabab attacks Kenyan university, killing at least 147' 2 April 2015 *The Washington Post* available at http://www.washingtonpost.com/world/africa/70-killed-hundreds-rescued-after-kenya-university-attack-by-al-shabab-militants/2015/04/02/0c554516-d951-11e4-ba28-f2a685dc7f89_story.html (last accessed 9 April 2015).

M Mark 'Boko Haram's 'deadliest massacre': 2,000 feared dead in Nigeria' 10 January 2015 *The Guardian* available at <http://www.theguardian.com/world/2015/jan/09/boko-haram-deadliest-massacre-baga-nigeria> (last accessed 13 April 2015).

M Mutinga 'Are the terrorists of al-Shabaab about to tear Kenya in two?' 4 April 2015 *The Guardian* available at <http://www.theguardian.com/world/2015/apr/04/kenya-university-massacre-shabaab-divisions> (last accessed 13 April 2015).

FC Onuoha 'Westgate Attack: Al-Shabaab's Renewed Transnational Jihadism' 10 November 2013 *Al Jazeera Centre for Studies Report 1 3* available at <http://studies.aljazeera.net/ResourceGallery/media/Documents/2013/11/11/2013111123040955734Kenya.pdf> (last accessed on 8 October 2014).

MA Sergie & T Johnson 'Boko Haram' 5 March 2015 *CFR Backgrounders* available at <http://www.cfr.org/nigeria/boko-haram/p25739> (last accessed 13 April 2015).

Other Cases

Eritrea/Ethiopia, Partial Award, *Jus Ad Bellum* Ethiopia's Claims 1–8, 19 December 2005, available at <http://www.pca-cpa.org> (last accessed 13 July 2015).

Other Reports



International Law Association, Washington Conference, Report on Aggression and the Use of Force, 9 April 2014.

The National Security Strategy of the United States of America, The White House Washington, September 2002.

NATO Press Release 124, 'Statement by the North Atlantic Council', 12 September 2001 available at http://www.nato.int/cps/en/natohq/news_18553.htm?selectedLocale=en (last accessed on 4 August 2015).

Organization of American States, The Americas' Response to Terrorism, 'Support for the Measures of Individual and Collective Self-Defense Established in Resolution RC.24/RES. 1/01', OEA/Ser.F/II.24 CS/TIAR/RES. 1/01, 16 October 2001, available at http://www.oas.org/oaspage/crisis/follow_e.htm (last accessed 4 August 2015).

Organization of American States Permanent Council, 'Convocation of the Meeting of Consultation of Ministers of Foreign Affairs and Appointment of a Commission', CP/RES. 930 (1632/08), 5 March 2008.

'Regional crisis following military strike against FARC' 2008 54:3 *Keesing's Record of World Events* 48456.

'Present Problems of the Use of Force in International Law: Military assistance on request', Resolution adopted by the Tenth Commission of the Institut de Droit International, 8 September 2011, Session de Rhodes.

Remarks by Alberto R. Gonzales, Counsel to the President, Before the American Bar Association Standing Committee on Law and National Security, Washington DC, February 24, 2004 available at http://www.pegc.us/archive/White_House/gonzales_remarks_to_ABA_20040224.pdf (last accessed 19 March 2015).



N Schrijver & L van den Herik 'Leiden Policy Recommendations on Counter-terrorism and International Law', 1 April 2010.

M Schmitt 'Counter-Terrorism and the Use of Force in International Law' The Marshall Center Papers no 5, The George C Marshall European Center for Security Studies.

Statement by Ambassador Dan Gillerman, Permanent Representative, During the open debate on 'The Situation in the Middle East' United Nations, New York, 8 August 2006 available at <http://www.un.org/webcast/2006b.html> (last accessed 3 August 2015).

Statement in HL Debs, 21 April 2004, Volume 660, Collections 370.

United States Department of State 'Eurasia Overview' *Patterns of Global Terrorism 2001*, May 2001 available at <http://www.state.gov/documents/organization/10319.pdf> (last accessed 27 October 2015).

Treaties

Charter of the United Nations and *Statute of the International Court of Justice*, San Francisco, 1945.

Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p331, 22 May 1969.

United Nations Documents

United Nations Security Council, 'Letter dated 21 August 1998 from the Permanent Representative of the Sudan to the United Nations addressed to the President of the Security Council', SC/1998/786, 21 August 1998.



United Nations Security Council, 'Letter dated 21 August 1998 from the Chargé d'Affaires A.I. of the Permanent Mission of Kuwait to the United Nations addressed to the President of the Security Council', SC/1998/789, 21 August 1998.

United Nations Security Council, 'Letter dated 24 August 1998 from the Chargé d'Affaires A.I. of the Permanent Mission of Kuwait to the United Nations addressed to the President of the Security Council', SC/1998/800, 24 August 1998.

United Nations Security Council, 'Letter dated 22 September 1998 from the Permanent Representative of the Sudan to the United Nations addressed to the President of the Security Council', SC/1998/879, 22 September 1998.

United Nations Security Council, 'Letter dated 25 May 1993 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General', S/25843, 26 May 1993.

United Nations Security Council, 'Letter dated 18 April 2001 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council', S/2001/381, 19 April 2001.

United Nations Security Council, 'Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council', S/2001/946, 7 October 2001.

United Nations Security Council, 5488th meeting, S/PV.5488, 13 July 2006.

United Nations Security Council, 5489th meeting, S/PV.5489, 14 July 2006.

'Draft Articles on Responsibility of States for Internationally Wrongful Acts', International Law Commission, 53rd session (2001) (extract from 'Report of the International Law Commission on the Work of its Fifty-third Session', Official Records of the General Assembly, 56th session, Supplement No. 10 (A/56/10), Chapter IV.E.1, November 2001).



United Nations Security Council, 'Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General', S/2002/1012, 12 September 2002.

C Heyns 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' A/HRC/23/47 (2013).

United Nations Security Council, 'Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General', S/2014/695, 23 September 2014.

United Nations General Assembly Resolutions

Definition of Aggression annexed to the United Nations General Assembly resolution 3314 (XXIX), adopted by the United Nations General Assembly at its 2319th meeting, 14 December 1974.

United Nations General Assembly, 'A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change', 59th session, UN Doc A/59/565, 2 December 2004.

United Nations General Assembly 'In larger freedom: towards development, security and human rights for all', 59th session, UN Doc A/59/2005, 21 March 2005.

United Nations Security Council Resolutions

United Nations Security Council Resolution 1368 (2001), Adopted by the Security Council at its 4370th meeting, S/RES/1368 (2001), 12 September 2001.

United Nations Security Council Resolution 1373 (2001), Adopted by the Security Council at its 4385th meeting, S/RES/1373 (2001), 28 September 2001.



United Nations Security Council Resolution 687 (1991), Adopted by the Security Council at its 2981st meeting, S/RES/687 (1991), 3 April 1991.

United Nations Security Council Resolution 1441 (2002), Adopted by the Security Council at its 4644th meeting, S/RES/1441 (2002), 8 November 2002.