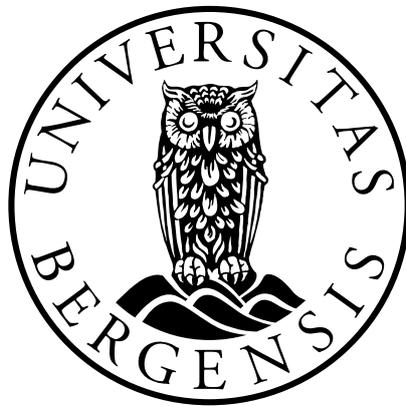


# Extraterritorial Self-defense against Non-state Actors

- With focus on the “unwilling or unable” doctrine

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## Contents

1. <u>INTRODUCTION</u>	p.4
1.1 <u>The scope and structure of the thesis</u>	p.4
1.2 <u>Terminology and delimitations</u>	p.6
2. <u>HISTORICAL CONTEXT AND DEVELOPMENTS</u>	p.7
2.1 <u>Regulation of the use of force prior to 1945</u>	p.7
2.2 <u>The Nuremberg and Tokyo Tribunals</u>	p.8
2.3 <u>The creation of the Charter of the United Nations</u>	p.10
2.4 <u>Efforts related to determine use of force and its exceptions under the UN Charter</u>	p.11
3. <u>METHODOLOGY</u>	p.12
3.1 <u>Introduction</u>	p.12
3.2 <u>Interpretation of treaties</u>	p.12
3.3 <u>The basic principles for establishing customary international law</u>	p.14
4. <u>THE SCOPE OF SELF-DEFENSE AGAINST NON-STATE ACTORS</u>	p.14
4.1 <u>The UN Charter</u>	p.14
4.1.1 <u>Introduction</u>	p.14
4.1.2 <u>The prohibition of the use of force in Article 2 (4) of the UN Charter</u>	p.15
4.1.3 <u>The right to self-defense in Article 51 of the UN Charter</u>	p.15
4.1.3.1 <u>What may constitute an “armed attack”?</u>	p.16
4.1.3.1.1 <u>Who must have committed the “armed attack”?</u>	p.16
4.1.3.1.2 <u>What scale of an “armed attack” is required?</u>	p.19
4.1.3.1.3 <u>How do the different interpretations of an “armed attack” effect the “unwilling or unable” doctrine?</u>	p.21
4.1.3.2 <u>What falls within the meaning of “self-defense”?</u>	p.21
4.1.3.2.1 <u>How does the “self-defense” criteria effect the “unwilling or unable” doctrine?</u>	p.23
4.1.3.3 <u>To what degree does the wording “if an armed attack occurs” limit the right to self-defense?</u>	p.25
4.1.3.3.1 <u>How do the different interpretations of “if an armed attack occurs” effect the “unwilling or unable” doctrine?</u>	p.26
4.1.3.4 <u>Does the use of “inherent” right of self-defense suggest a wider right of self-defense?</u>	p.26

4.1.3.4.1	<u>How do the different interpretations of “inherent” right of self-defense effect the “unwilling – or unable” doctrine?</u>	p.28
4.1.4	<u>Conclusion: Does article 51 cover self-defense against non-state actors?</u>	p.28
4.2	<u>Customary International Law</u>	p.29
4.2.1	<u>Self-defense against non-state actors part of customary international law?</u>	p.29
4.2.1.1	<u>Introduction</u>	p.29
4.2.1.2	<u>UN Security Council Resolutions</u>	p.31
4.2.1.3	<u>Treaties</u>	p.34
4.2.1.4	<u>State Practice</u>	p.35
4.2.1.5	<u>Decisions of international tribunals</u>	p.36
4.2.2	<u>Conclusion with respect to customary international law</u>	p.36
5.	<u>ACCOUNTABILITY FOR ILLEGAL USE OF FORCE AGAINST NON-STATE ACTORS</u>	p.38
5.1	<u>Introduction</u>	p.38
5.2	<u>State responsibility for the unlawful use of force</u>	p.38
5.3	<u>Individual responsibility for the unlawful use of force</u>	p.38
6.	<u>CONCLUSIONS</u>	p.39
6.1	<u>Lex lata assessment</u>	p.39
6.2	<u>Lex Ferenda considerations</u>	p.40

## 1. Introduction

### 1.1 The scope and structure of the thesis

The question this thesis aims to answer is whether or not a state has a right to use force on the territory of another state to protect itself from a possible armed attack by non-state actors.

This question did not originate as a product of 9/11, but has been asked several times at different points in history. The Caroline Case from 1837, which involved Britain boarding a ship with Canadian rebels on US territory, shows the long-standing relevance of this question that is yet to have a concrete answer. Since the Second World War the question of self-defense against non-state actors on the territory of another state has been actualized by the reactions of several states.

In a Norwegian context, the “unwilling or unable” doctrine was discussed in relation to Norway sending troops to Jordan to train servicemen that would fight against ISIL on Syrian territory. The Norwegian State Department concluded that the doctrine probably had a basis in international law, and that Norwegian contribution to the use of force on Syrian territory with the purpose of collectively defending Iraq, thus would be legal.<sup>1</sup>

The “unwilling or unable” doctrine has been cited as a legal basis for the right to intervene against non-state actors. Those who invokes the doctrine claims that when a state is either unwilling or unable to address a threat posed by a private person or group operating within their territory, the state that is threatened can use force on the territory of the other state without consent, in order to defend itself.<sup>2</sup>

A hypothetical example is if the private group “Legion of Doom”, based within the territory of “Utopia”, commits an armed attack against “Atlantis”. As a consequence, Atlantis attacks the Legion of Doom with the purpose of self-defense, and at the same time breaks the sovereignty of Utopia, which does not consent to the use of force on its territory. Or indeed, if the Legion of Doom by attacking Atlantis, states that this is meant as an attack on the way of life of all states with similar values as Atlantis, “Neverland” therefore also feels threatened by that same attack, and takes self-defense measures against the Legion of Doom.

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<sup>1</sup> The Norwegian Ministry of Foreign Affairs: *Det norske styrkebidraget til bekjempelse av ISIL i Syria – Notat om folkeretten* (29.04.16), and *Kampen mot ISIL. Folkerettslig grunnlag for militær maktbruk mot ikke-statlige aktører i Syria* (29.01.2016).

<sup>2</sup> Ashley Deeks, “Unwilling or unable: Toward a normative framework for extraterritorial self-defense, Virginia Journal of international law vol. 52 no. 3, 2013, pp. 483-550, at 487.

The doctrine in itself is just a theory; it is therefore necessary to examine if any of the acknowledged legal sources in international law gives the “unwilling or unable” doctrine actual applicability. Is the doctrine part of current international law *lex lata*?

In international law, there are three possible legal grounds for the use of force on another state’s territory. Article 51 of the Charter of the United Nations (UN Charter) is an exception to the prohibition of force in article 2 (4). If the conditions in article 51 are fulfilled, the state has a right to use force on the territory of another state. The other two possible legal bases, customary international law, and consent by the territorial state, are however more debated.

Customary international law (CIL) is by most commentators recognized as a complementary legal basis for the use of force, others question if there is room for emphasizing such practice outside the parameters of article 51.<sup>3</sup>

Consent of the state where the use of force is to be implemented, is debated as a relevant legal basis, because there can be a question of the legitimacy of the consent that has been given. For instance, if there is a civil war going on or if the regime in question is a dictatorship. Consent will not be part of the analysis in this thesis. Since the doctrine is only relevant in those cases where the state is either unwilling or unable to do something with the threat posed by private actors within their territory, it therefore follows that consent is not given in these cases.

Therefore, this thesis will primarily consider whether or not article 51 or CIL can be used as the legal basis for the purpose of concluding if the doctrine can be considered as current international law (*lex lata*).

Before the analysis of current international law in Chapter 4, a short run-through of the historical context of the right to use force for the purpose of protection will be presented (Chapter 2), as this can be of relevance both for the interpretation of article 51 and of ascertaining the content of CIL. Chapter 3 will review some methodological aspects. Before the final conclusions in Chapter 6, some of the consequences for the illegal use of force against non-state actors will be shortly examined in Chapter 5. Firstly, however, some terms and concepts that will be consistently used throughout the thesis will be defined.

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<sup>3</sup> See further below Chapter 4.2, on customary international law.

## 1.2 Terminology and delimitations

Only questions relating to the lawfulness of the use of force will be considered (*Ius ad Bellum*), not the lawfulness of the conduct of the parties whilst within an armed conflict (*Ius in Bello*).<sup>4</sup>

The legal framework that will be analyzed is based on situations where a state takes action to defend itself against a non-state actor. This defense action is based on the fact that an armed attack by a non-state actor already has occurred against your own state, or against someone else, but the nature and motive of the attack gives the state that has not been attacked, reason to feel exposed for an armed attack themselves. In addition to the armed attack, the state must fear that they are subjected to (further) attacks, for the state's action to qualify as self-defense.

The actions that will be examined are those taking place outside the recognized borders of the intervening state, and within the territory of another state without the consent of that state, so that the principle of state sovereignty becomes an issue. The nationality of the non-state actors is of no concern.

Only intervention that includes use of force will be considered. The focus will be on the use of force with the purpose of protection against an armed attack by a non-state actor. Since the doctrine relates itself to self-defense, humanitarian intervention<sup>5</sup> is also outside the perimeter of this thesis.

An armed attack is defined in this thesis as a violent forcible measure.<sup>6</sup>

For the purpose of this thesis a non-state actor is defined as an individual or a group who are not acting on behalf of a state. They are seen as non-state actors as long as the state does not exercise direct control over them.<sup>7</sup>

The focus in legal terms will be on the threatening or violent actions taken by the non-state actors, not how the actors are characterized in political terms. Only the *actions* taken by the non-state actors are of relevance for ascertaining if the attacked state has a right to use force

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<sup>4</sup> See Noam Lubell, *Extraterritorial use of force against non-state actors*, Oxford 2010 p. 9. It is important to note that this distinction is not always as clear in practice. However, since this thesis is of a theoretical nature and deals with a different legal issue, the distinction between *Ius ad Bellum* and *Ius in Bello* will not be problematized any further.

<sup>5</sup> Humanitarian intervention is outside the perimeter of this thesis since a humanitarian intervention *de facto* is defense of someone else, and not one self (self-defense).

<sup>6</sup> «Armed attack» is thoroughly analyzed in section 4.1.3.1.

<sup>7</sup> Lubell has a similar definition, except that he does not specify «direct» control, see Lubell 2010, *supra* note 4, p. 15.

on another state's territory, not whether or not a particular state or the international community at large deems them to be "terrorists". Lubell has taken a similar standpoint in his book, whilst the majority of other theorists on the area consistently analyses the subject under headings such as "self-defense against terrorism".<sup>8</sup>

Although non-state actors posing a threat to another state may often satisfy some definition of terrorism, this is not necessarily the case. The main point, however, is that such a characterization may distract from the legal issue. The mere existence of a terrorist group within the territory of a state does not in itself justify any armed attack on that state by another state. In other words, it is the action undertaken by the group that needs to be considered under international law with respect to our subject matter.

## **2. HISTORICAL CONTEXT AND DEVELOPMENTS**

### 2.1 Regulation of the use of force prior to 1945

Seen in a historic perspective, the regulation of the use of force has been exceptional the last 70 years. This section will present a short run-through of the most important events in regards to the regulation of the use of force prior to 1945.

St. Augustine of Hippo has been accredited with the birth of the "just war" doctrine, which dates back to the 4<sup>th</sup> century. In this context, St. Augustine's "just war" was used to legitimize not only self-defense, but also to seek expansion of territory in the name of Christianity. Biblical texts were typically the weightiest argument to justify the use of force. Similar concepts can also be found in the other world religions.<sup>9</sup>

As early as the Middle Ages several philosophers had ideas for regulating the use of force between states, but the ideas seldom led to the development of hard law.<sup>10</sup> The principle of sovereignty grew stronger after the peace in Westphalia in 1648. One of the motives behind strengthening the national state was to deter the number and level of conflicts seen in the past,

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<sup>8</sup> Authors have taken different approaches to this question. Many use the term "terrorists", for instance Christine Gray and Stanimir Alexandrov, whilst Noam Lubell consistently use the term "non-state actors" to refer to the same situations. See Noam Lubell, *Extraterritorial use of force against non-state actors*, Oxford 2010 p. 20; Christine Gray, *International law and the use of force*, 2<sup>nd</sup> edition, Oxford 2004 p. 159; Stanimir Alexandrov, *Self-defense against the use of force in International law*, The Hague 1996 p. 182

<sup>9</sup> Belinda Helmke, *Under Attack – Challenges to the rules governing the international use of force*, Surrey 2010 p. 19.

<sup>10</sup> Nikolas Sturchler, *The threat of force in international law*, Cambridge 2007, p. 8

but at the same time the use of force was seen as a legitimate way for the national state to resolve conflicts.<sup>11</sup>

As a consequence of the Napoleonic Wars of 1792-1815 several peace societies emerged and lead to the first World Peace Congress in London 1843. There was an interest to minimize the scope for the legality of use of force.<sup>12</sup>

The First World War led to some changes, one of the most significant, the League of Nations Covenant of 1919. The League declared all threat of war and war to be within their competence, and that the parties were obliged not to resort to war until the League had taken the matter into consideration and decided upon a solution.<sup>13</sup>

The Covenant never got any real traction. The language was vague and states were unwilling to commit to it, and gradually important members left the agreement. The League was powerless in conflicts such as the Spanish Civil War.<sup>14</sup> The final death stab of the Covenant and other peace treaties of this time was given by the outbreak of the Second World War.

However, when the war neared its end there was a will to look at viable solutions where one could improve the tools used in the past.

## 2.2 The Nuremberg and Tokyo Tribunals

The allied occupying powers of Germany, confirmed their intention to prosecute the major war criminals of the Axis-powers in the London Four Powers Agreement shortly after Germany's surrender of 7 May 1945.<sup>15</sup>

The statutes of both the Nuremberg and Tokyo Tribunals identically declared that: “the following acts (...) are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the

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<sup>11</sup> Helmke 2010, *supra* note 9, p. 15.

<sup>12</sup> *Ibid*, p. 21.

<sup>13</sup> The Covenant of the League of Nations, article 10 and 11 especially.

<sup>14</sup> Sturchler 2007, *supra* note 10, p. 12

<sup>15</sup> *Ibid*, p. 25.

accomplishment of any of the foregoing”.<sup>16</sup> Such a wide-reaching formulation was unparalleled through history.

It is worth taking a closer look at the part of the Nuremberg judgment where the invasion of Norway is considered. The question before the court was if the German attack on Norway was a crime of aggression or could be classified as an act of self-defense.

During the trial the defendants claimed preemptive self-defense in the case of the attack on Norway, based on an anticipated future attack on Germany by Great Britain.<sup>17</sup>

The judges referred to Moore’s Digest of International Law II page 435 and quotes: “It must be remembered that preventive action in foreign territory is justified only in case of an instant and overwhelming necessity for self-defence, leaving no choice of means, and no moment of deliberation”.<sup>18</sup>

The judges concluded that the invasion of Norway could not be considered “forestalling an imminent Allied landing”, since there were no concrete evidence suggesting so. The correspondence within the Nazi-regime, put forward as evidence during the trial rather suggested that Germany wanted to better their position for a possible future attack on the United Kingdom.<sup>19</sup>

This judgment shows us that self-defense at Nuremberg focused on the principle of instant necessity as a requirement to deem an act of aggression legal as self-defense.

The question of a possible right to self-defense on another state’s territory (Norway) to defend oneself against another party (the United Kingdom), is however not directly challenged in the Nuremberg Judgment.

A parallel to self-defense against non-state actors can be drawn. The Germans attacked another state’s territory to protect itself against another party. In the case of self-defense against non-state actors the intervening state also attacks another state’s territory to protect itself against another (non-state) actor.

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<sup>16</sup> Article 6 Charter of the International Military Tribunal, 39 Am. JIL Supp. 258-64 (8. Aug. 1945), and Article 5 Charter of the International Military Tribunal for the Far East, see <http://www.yale.edu/lawweb/avalon> (19 jan. 1946).

<sup>17</sup> International Criminal Tribunal, Judgment of October 1946, p. 41.

[http://crimeofaggression.info/documents/6/1946\\_Nuremberg\\_Judgement.pdf](http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf)

<sup>18</sup> *Ibid* p. 41

<sup>19</sup> *Ibid* p. 42

In the Nuremberg Judgment self-defense was rejected on the basis that the attack from the United Kingdom against Germany could not be considered “imminent”. However, the judgment does not reject self-defense based on the fact that attacking another state’s territory to protect oneself against another party is illegal.

That might imply that breaking the sovereignty of another state to protect oneself against another actor is not principally unlawful. However, it might also mean that the judgment did not position itself in relation to this question since the invasion of Germany regardless could not be considered as self-defense based on the fact that the “imminent” requirement was not fulfilled. Nevertheless, since the Nuremberg tribunal required that the preventive action undertaken would have to be clearly necessary, thus in effect introducing a proportionality test, it seems logical to conclude that the Nuremberg Tribunal accepted that the use of force in foreign territory against a non-attacking state in some cases might constitute lawful self-defense under international law.

### 2.3 The creation of the Charter of the United Nations

The UN Charter was signed on 26 June 1945 in San Francisco. The preamble starts with stating the purpose: “to save succeeding generations from the scourge of war”.<sup>20</sup>

In article 2(4) the prohibition against the use of force is specified as “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purpose of the United Nations”.

Article 51 is constructed as an exception to article 2(4): “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security”. This right is limited by Chapter VII of the UN Charter which gives the Security Council authority to take military action to restore international peace and security.<sup>21</sup>

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<sup>20</sup> See Charter of the United Nations, San Francisco 1945, Preamble.

<sup>21</sup> Articles 2(4) and 51 of the UN Charter will be thoroughly interpreted as part of the legal analysis in Chapter 4.

A challenge concerning the UN Charter of 1945 was that vital concepts were not defined, among them “armed attack”, was one of the important concepts lacking any specification.

#### 2.4 Efforts related to determine unlawful use of force and its exceptions under the UN Charter

After working towards a general definition of aggression since the Second World War, the UN General Assembly in 1974 were able to agree on a definition in Resolution 3314.

In article 3 “an act of aggression” is defined as an “attack by the armed forces of a State of the territory of another State”, including bombardment and blockades on the land, sea or air forces, or marine and air fleets of another State. An act of aggression also includes the sending “by or on behalf of a State” of armed bands, which carry out acts of armed force against another State of such gravity as to amount to the acts covered by the definition.<sup>22</sup>

The preamble of Resolution 3314 makes clear that “aggression is the most serious and dangerous form of the illegal use of force”.<sup>23</sup> Aggression is therefore seen as a particularly grave sub-category of unlawful use of force within the meaning of article 2(4) in the UN Charter.<sup>24</sup>

The International Law Commission suggested another definition of aggression that included “threat” of aggression, but this definition was never adopted as several states were unsatisfied with it.<sup>25</sup>

The meaning of unlawful use of force and aggression became an issue also when the Rome Statute of 1998 established the International Criminal Court (ICC). The result was article 5(2) of the Rome Statute which postponed the jurisdiction of the court, when it comes to the crime of aggression, until a definition “consistent with the relevant provisions of the Charter of the United Nations” is determined and adopted by the state parties”.<sup>26</sup>

In the new article 8bis paragraph 2 of the Rome Statute, an “act of aggression” is defined as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the

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<sup>22</sup> Resolution 3314 Definition of Aggression (14 Dec 1974).

<sup>23</sup> *Ibid*, the preamble.

<sup>24</sup> Benjamin Ferencz, *Defining International Aggression*, vol., 2 p. 29.

<sup>25</sup> Sturchler 2007, *supra* note 10, pp. 30-32

<sup>26</sup> *Ibid*, p. 33, and Article 5(2) of the Rome Statute of the International Criminal Court, 2187 UNTS 90 (20 Nov 1998).

United Nations”. Article 8bis was the product of the 2010 review conference in Kampala, but jurisdiction with a view to a possible conviction for this crime is yet to be activated.<sup>27</sup>

The meaning of the term use of force and aggression will be analyzed further in section 4.1.3.1.

### **3. METHODOLOGY**

#### 3.1 Introduction

The main intention in writing this thesis is to clarify the *lex lata* situation with regard to the right to self-defense against non-state actors.

Methodological challenges in answering this question is that the legal sources in international law often give a rather fragmented picture of the *lex lata* situation.

As part of the analysis, article 51 of the UN Charter will be interpreted in chapter 4.1, and customary international law in chapter 4.2. Therefore, the principles for interpreting treaties, and the requirements for the existence of CIL, will be described in the following chapters.

#### 3.2 Interpretation of treaties

The Vienna Convention of 23 May 1969 is the central source, which expresses how to interpret international conventions and treaties. It follows from article 31 (1) that “A treaty shall be interpreted (...) in accordance with the ordinary meaning”. The International Court of Justice (ICJ) has expressed that “Interpretation must be based above all upon the text of the treaty”.<sup>28</sup> The official language has to be used for interpretation purposes.

It is generally considered that one has to understand the meaning of the words as they were understood when the treaty was enacted.<sup>29</sup>

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<sup>27</sup> The Kampala amendment on aggression has by 1 December 2016 been ratified by 33 states. This means that the said jurisdiction might be activated at the Assembly of States Parties session in New York December 2017.

<sup>28</sup> Legality of the Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports 2004, para. 100.

<sup>29</sup> See *Island of Palmas-case (Netherlands v. USA)* 04.04.1928 volume II p. 829-871, on p. 845.

The ICJ has however made an exception to this rule in the Namibia-case (1971) where it was held that a dynamic interpretation could be utilized on The League of Nations Covenant:

*“Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intention of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in article 22 of the Covenant – “the strenuous conditions of the modern world” and “the well-being and development” of the people concerned – were not static, but were by definition evolutionary, as also, therefore, was the concept of the “sacred trust”. The parties to the Covenant must consequently be deemed to have accepted them as such”.*<sup>30</sup>

A dynamic interpretation was also used in the Costa Rica/Nicaragua case from 2009, where it was remarked that one might take into consideration “developments in international law”.<sup>31</sup>

But the text shall also be interpreted contextually; the text shall be understood “in their context and in the light of its object and purpose”.<sup>32</sup>

According to article 31 (2), in addition to the text, “including its preamble and annexes”, succeeding agreements and practice between the parties may also impact on the interpretation.

Article 32 of the Vienna Convention also gives a supplementary point of interpretation, to be used if the interpretation of a treaty is still unclear or produces unreasonable outcomes. In such cases, one can for example take into consideration the legal preparatory work for the treaty.

The rules of the Vienna Convention on interpretation of treaties are today considered also to be a part of customary international law by the ICJ.<sup>33</sup>

Because it is often necessary or practical to use rather general or ambiguous terms in a treaty, recourse to supplementary means of interpretation is not uncommon in the legal act of treaty interpretation. In conclusion, treaty interpretation may take the form of a holistic enterprise not too different from interpretation of statutes in domestic law.

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<sup>30</sup> See The South West Africa v. Namibia dispute, ICJ Reports 1971 p. 16, on p. 31 para. 53.

<sup>31</sup> See Case concerning the dispute regarding navigational and related rights (Costa Rica vs. Nicaragua), ICJ Judgment 13 July 2009, para. 64.

<sup>32</sup> See Article 31 (1) of the Vienna Convention.

<sup>33</sup> See e.g. Morten Ruud and Geir Ulfstein, *Innføring i folkerett*, fourth edition, Oslo 2011 p. 89, referring to Arbitral Award of 31 July 1989 (Guinea-Bissau vs. Senegal), ICJ rep. 1991, p. 53 on p. 70.

### 3.3 The basic principles for establishing customary international law

According to article 38 paragraph 1, letter b, of the International Court of Justice Statute, there has to be “evidence of a general practice accepted as law” in order for a certain practice to be recognized as a customary international rule.

A text-based analysis suggests that article 38 (1) requires both a widespread and uniform practice, and that state authorities consider that they are legally obliged to follow this practice (*opinio juris*), in order for that practice to be accepted as international customary law.

Case law has further specified that a customary rule must be “in accordance with a constant and uniform usage practiced by the states in question”.<sup>34</sup>

The International Law Commission listed as evidence of customary international law in 2015: Primarily the practice of states and in certain cases the practice of international organizations, in the form of resolutions, treaties, tribunals etc. They further conclude that the relevant practice must be general, “meaning it must be sufficiently widespread and representative, as well as consistent”. However, if the practice is general, “no particular duration is required”.<sup>35</sup>

## **4. THE SCOPE OF SELF-DEFENSE AGAINST NON-STATE ACTORS**

### **4.1 The UN Charter**

#### **4.1.1 Introduction**

In this section, the UN Charter article 2(4) and article 51, will be analyzed with the intent to conclude whether or not a right to self-defense against non-state actors is covered by article 51. Before analyzing the scope of article 51, the content of article 2(4) of the UN Charter will be introduced.

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<sup>34</sup> Colombian-Peruvian asylum case, Judgment of November 20th 1950, Rep. 1950, p. 276.

<sup>35</sup> Sean Murphy, *The Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission*, George Washington University Law School 2015, pp. 2-3.  
[http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2411&context=faculty\\_publications](http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2411&context=faculty_publications)

#### 4.1.2 The prohibition of the use of force in article 2 (4)

At the San Francisco conference in 1945 the member states of the UN drew up a general prohibition against the use of force:

“All members shall refrain in their national relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”.<sup>36</sup>

The motivation for the establishment of a general prohibition against the use of force is clearly based on the two World Wars that dominated the thirty years leading up to the San Francisco conference and the creation of the Charter of the United Nations.<sup>37</sup>

Sturchler points out that based on the transcripts of the San Francisco Conference, the threat of force clause passed through without much deliberation. The parties were not that occupied by the main rule in article 2(4), but rather the exceptions to the rule.<sup>38</sup> This will also be the focus in this thesis, starting with the exception to the prohibition of the use of force in article 51.

#### 4.1.3 The right to self-defense in article 51

Article 51 consists of several much-debated requirements, and the final draft ended up as the following:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security”.<sup>39</sup>

In order to determine whether self-defense against non-state actors is covered by article 51 the contents of the article will first be analyzed based on the requirements given in the text itself.

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<sup>36</sup> See The Charter of the United Nations, 26 June 1945 San Francisco, article 2 (4).

<sup>37</sup> See the Preamble, *ibid.* It starts with stating the purpose “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”.

<sup>38</sup> Sturchler 2007, *supra* note 10, p. 23

<sup>39</sup> See The Charter of the United Nations, article 51.

#### 4.1.3.1 What may constitute an “armed attack”?

The first question that must be answered is what constitutes an “armed attack” within the meaning of article 51. In the first section, it will be considered if there are any requirements related to who must have committed the “armed attack”, whilst the second section will focus on if there are requirements connected to the scale of the “armed attack”.

##### 4.1.3.1.1 Who must have committed the “armed attack”?

When trying to ascertain whether or not there is a right for a state in some instances to intervene against non-state actors on the territory of another state, it is important to find out if it is legally decisive who have committed the “armed attack”.

Article 51 does not specify who must have committed the armed attack, just that the armed attack must be directed against a “member of the United Nations”. A text-based analysis of article 51 therefore suggests that, the attack must be directed against a state, but there is no clear requirement that the attacker must be a state-entity.

This has however been understood differently by the International Court of Justice.

The case of Nicaragua v. USA (the Nicaragua-case) concerned US military and paramilitary activities in and against Nicaragua.<sup>40</sup> The Court decided that the US had acted in breach of its obligation under customary international law not to intervene in the affairs of another State.

In the Nicaragua-case the use of force by individuals only constituted an “armed attack” when they were a “sending by or on behalf of a state”. This interpretation of article 51 is based on article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314, where the same phrase is used. In the Courts opinion, the definition may be taken to reflect customary international law.<sup>41</sup> The Nicaragua-case therefore opens up for the possibility for self-defense against non-state actors, but only when the territorial state has control over them.

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<sup>40</sup> Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America) ICJ Reports 1986, p. 14.

<sup>41</sup> *Ibid*, at para. 195.

In ICJ's Advisory Opinion on the construction of the wall in the occupied Palestinian territory, the Court stated that "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence is available only when an armed attack is made by a state".<sup>42</sup>

Judge Buergenthal, in a Separate Opinion, however, stated that the language used in article 51 do not explicitly require the attacker to be a state, and that the attacks on Israel from the Palestinian territory should qualify as an "armed attack".<sup>43</sup> Judge Higgins expressed the same point of view in her Separate Opinion in the Wall case.<sup>44</sup>

Judge Koojimans agreed that article 51 should not be interpreted as to have a requirement about the attacker being a state, but agreed that article 51 was not relevant in this instance since the attacks seem to come from within Israel's own territory. Koojiman stressed that the text of article 51 has no requirement concerning the attacker, and that even though the Court in the Nicaragua-case was of the opinion that the attacker had to be a state, this position should be reconsidered. Koojimans referred to Security Council Resolution 1368 and 1373 in this connection.<sup>45</sup>

In Koojimans' opinion, Resolution 1368 and 1373, created as a result of 9/11 (both from 2001), recognizes the right to self-defense against international terrorism without making any sort of reference to an armed attack by a state.<sup>46</sup> An in-depth analysis of the resolutions will be conducted in section 4.2 concerning customary international law.

In the case of the Democratic Republic of Congo v. Uganda (the DRC-case)<sup>47</sup> the Court found that Uganda had no right to self-defense, since the armed attacks could not be attributed to the DRC, but rather to the private group, the ADF<sup>48</sup>. They based this conclusion upon the definition of aggression in article 3 g of the General Assembly Resolution 3314 from 1974, limiting the right to self-defense to attacks by private individuals or organizations who have been sent "by or on behalf" of a state.<sup>49</sup>

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<sup>42</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136, para. 139.

<sup>43</sup> *Ibid*, Separate Opinion of Judge Buergenthal, para. 6.

<sup>44</sup> *Ibid*, Separate Opinion of Judge Higgins para. 33.

<sup>45</sup> *Ibid*, Separate Opinion of Judge Koojimans, para. 35 and 36.

<sup>46</sup> *Ibid*, para. 35.

<sup>47</sup> Armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda) ICJ Reports 2005 p. 168.

<sup>48</sup> *Ibid*, para. 146-147.

<sup>49</sup> *Ibid*, para. 146

Judge Koojimans once again had a different understanding of the right to self-defense than the majority. His position was now that “It would be unreasonable to deny the attacked state the right to self-defence merely because there is no attacker state, and the Charter does not so require”.<sup>50</sup> Koojimans pointed out that article 51 has no requirement when it comes to the subject who commits the “armed attack”.

Judge Simma concluded in the same way as judge Koojimans, and commented that the Court dodges important questions because they are uncomfortable answering them.<sup>51</sup> Judge Kateka also criticized that the Court once again, as in the Nicaragua-case, fell back on a limited interpretation of article 3 g of General Assembly Resolution 3314 in understanding “armed attack” within the terms of article 51 of the UN Charter.<sup>52</sup>

A text-based analysis of article 51 is of great importance. When reading article 51 no requirements in regard to who the attacker must be, can be found. However, since the article was created with the Second World War as a backdrop it is probable that one imagined the attacker to be a state, and one did not think of specifying in regards to this point.

The purpose behind the exception in article 51 is that one should be able to defend oneself when others break the prohibition against the use of force. This argument suggests that the right to self-defense should be applicable regardless of who the attacker is.<sup>53</sup>

On the other hand, when a non-state actor is situated in another state, defending oneself against this non-state actor one will also break the sovereignty of the territorial state. This may lead to more conflicts which does not adhere and support the purpose of the UN Charter “to save succeeding generations from the scourge of war”.<sup>54</sup>

In the new article 8bis paragraph 2 of the Rome Statute, an “act of aggression” is defined as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”.<sup>55</sup>

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<sup>50</sup> *Ibid*, Separate opinion of Judge Koojimans, para. 30.

<sup>51</sup> *Ibid*, Separate opinion of Judge Simma, para. 7-15.

<sup>52</sup> *Ibid*, Separate opinion of Judge Kateka, para. 34.

<sup>53</sup> The purpose of the rule is an accepted factor in the interpretation of treaties, cf. article 31(1) of the 1969 Vienna Convention.

<sup>54</sup> Charter of the United Nations 1945, Preamble.

<sup>55</sup> See Rome Statute of the International Criminal Court, 20 November 1998.

An act of aggression is defined as “the use of armed force by a state”. A text-based analysis suggests that an individual at the top level of a state therefore only can be criminally liable for an armed attack if there has been an act of aggression by that state.

The different legal sources therefore pull the understanding of “armed attack” in different directions. In the last part of this section we will see how these different interpretations of “armed attack” effects the “unwilling or unable” doctrine.

#### 4.1.3.1.2 What scale of an “armed attack” is required?

Secondly, we must ask if the scale of the “armed attack” has any relevance for the right to self-defense.

Article 51 itself do not mention any requirements related to the scale of the armed attack.

The wording “armed attack” gives some guidance. “Armed” suggests that the attack must be of a violent character, and “attack” suggests that self-defense does not cover mere protection of a state’s general interests, but only incidents where the state is exposed to concrete danger.

In the Nicaragua-case the Court seems to take into account the scale of the armed attack, in such a way that not all armed attacks reach the threshold of the requirement “armed attack” in article 51:

*“The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States”.*<sup>56</sup>

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<sup>56</sup> Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America) ICJ Reports 1986, p. 14, para. 195.

Based on this statement it seems that the question of whether or not the requirement is met regarding the scale of the attack is only depending on the actual extent of the attack, not on who committed the attack.

In paragraph 191 of the Nicaragua-case it is further expressed that “it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms”.<sup>57</sup>

From this statement, it might be inferred that not all use of force constitutes an armed attack.

Another insight into the interpretation of article 51 is the fact that the article is an exception to the prohibition against the use of force in article 2(4). This makes it relevant to interpret “armed attack” in the context of “use of force”.

The natural understanding of “use of force” and “armed attack” suggests that there is a gap between the two stipulations.<sup>58</sup>

As previously mentioned, the preamble of resolution 3314 specifies that “aggression is the most serious and dangerous form of the illegal use of force”.<sup>59</sup> Aggression can therefore be seen as a sub-category of the prohibition against the use of force in article 2(4) in the UN Charter.<sup>60</sup>

This suggests that one may have the right to self-defense against an “armed attack” of a smaller scale than what constitutes “aggression”.

In the new article 8bis paragraph 2 of the Rome Statute, an “act of aggression” is defined as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”.<sup>61</sup>

In conclusion, the definition in the Rome Statute seems to understand “an act of aggression” and “use of force” as the same thing, while a “crime” of aggression requires more.<sup>62</sup>

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<sup>57</sup> *Ibid*, para. 191.

<sup>58</sup> See Yoram Dinstein, *War, aggression and self-defense*, fifth edition, 2011 Cambridge, p. 207.

<sup>59</sup> Article 1 A/RES/3314 Definition of Aggression (14 Dec 1974) preamble.

<sup>60</sup> Benjamin Ferencz, *supra* note 24, p. 29

<sup>61</sup> Rome Statute of the International Criminal Court, 20 November 1998.

<sup>62</sup> To fulfill the requirement for a “crime of aggression”, there must be a “manifest violation” of the Charter of the United Nations, see article 8bis of the Rome Statute.

#### 4.1.3.1.3 How do the different interpretations of “armed attack” effect the “unwilling or unable” doctrine?

It is of great importance for the legality of the “unwilling or unable” doctrine whether or not one interpret “armed attack” as having a requirement as to the subjects responsible for the “armed attack”. A purely text-based analysis does not close the doors for the existence of the doctrine, while ICJ’s interpretation suggests that there is no room for the “unwilling or unable” legal framework.

However, it seems that the ICJ no longer is as unison concerning the understanding of “armed attack” as they were in 1986 when giving their judgment in the Nicaragua-case. In both the Wall Advisory Opinion and the DRC-case, several judges had dissenting opinions regarding the understanding of “armed attack” with respect to independent attacks by non-state actors. And it must be noted that these interpretations seem more in sync with the text in article 51 itself.

However, the ICJ still do not recognize non-state actors as covered by article 51.

Dinstein has argued that the concept of an “armed attack” also has covered armed attacks committed by non-state actors. In his latest edition of “War, aggression and self-defense” he concluded that the reactions from the world community after 9/11 “should have dispelled all lingering doubts concerning the application of article 51 to non-state actors”.<sup>63</sup>

My own conclusion is reserved until all relevant requirements in article 51 have been interpreted, as some of the other requirements listed in the article may affect the conclusion regarding the applicability of the right to self-defense against non-state actors.

#### 4.1.3.2 What falls within the meaning of “self-defense”?

Article 51 further stipulates that the prohibition against the use of force do not effect a state’s right to “self-defense”.

The term “self-defense” is not defined in article 51. But a text-based analysis suggests that the use of force must contribute to stopping an ongoing or attempted attack, or to prevent further attacks.

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<sup>63</sup> See Dinstein 2011, *supra* note 58, p. 227.

The principles of necessity and proportionality are part of international customary law,<sup>64</sup> and limit the means and scale even with respect to acts of “self-defense”. The two requirements of necessity and proportionality were reaffirmed in the Oil Platform-case<sup>65</sup> and the Armed Activities-case<sup>66</sup>.

The principle of necessity requires that the use of force claimed to be taken in self-defense must deter and prevent future attacks.<sup>67</sup> Studies of the Caroline incident from 1837<sup>68</sup> has led to the so-called Caroline-formula, describing necessity of self-defense as “instant, overwhelming, leaving no choice of means, and no moment of deliberation”.<sup>69</sup> The same position was expressed in the Nuremberg Judgement.<sup>70</sup>

The principle of proportionality is a bit vaguer. According to Lubell it relates generally to the fact that for it to be a right to self-defense there must be an ongoing danger that the self-defense action is aimed at ending.<sup>71</sup> However, proportionality is more often seen as requiring that the actions taken in self-defense be measured in proportion to the threat or armed attack that has taken place.<sup>72</sup> Gardam understand proportionality as depending on the circumstances, the requirements can thus for instance be somewhat different if an armed attack has actually taken place, as compared to just an anticipatory form of self-defense.<sup>73</sup>

The Nicaragua Judgment does not really contribute to answering this question as the majority found that no armed attack had taken place that could justify the response. This made the proportionality assessment irrelevant.<sup>74</sup> The majority in the Nuclear Weapons Advisory Opinion also did not further specify the content of the proportionality requirement.<sup>75</sup>

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<sup>64</sup> Advisory Opinion on the legality of the threat or use of nuclear weapons, ICJ Reports 8 July 1996, para. 41.

<sup>65</sup> Oil Platforms (Islamic Republic of Iran v. United States of America), ICJ Reports 2003, p. 161, para. 43.

<sup>66</sup> Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Reports 2005, p. 168, para. 147

<sup>67</sup> See Gray 2004,, *supra* note 8, p. 167.

<sup>68</sup> The Caroline Case involved Britain claiming self-defense in response to Canadian Rebels whom were receiving supplies and support from private US citizens. Britain boarded the ship Caroline with armed force on US territory, consequently setting it on fire and sending it over the Niagara Falls. Two US citizens were killed in the process. See Lubell 2010, *supra* note 4, p. 35.

<sup>69</sup> Judith Gardam, *Necessity, proportionality and the use of force by states*, Cambridge 2004, p. 149.

<sup>70</sup> International Criminal Tribunal, Judgment of October 1946, p. 41.

[http://crimeofaggression.info/documents/6/1946\\_Nuremberg\\_Judgement.pdf](http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf)

<sup>71</sup> Lubell 2010, *supra* note 4 p. 65.

<sup>72</sup> *Ibid*, p. 64

<sup>73</sup> Gardam 2004, *supra* note 69, pp. 156-186.

<sup>74</sup> *Ibid*, p. 158, and Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986, p. 14, para. 176.

<sup>75</sup> Advisory Opinion on the legality of the threat or use of nuclear weapons advisory opinion, ICJ Reports 1996, p. 226, para. 5.

Judge Higgins did however illuminate the issue in her dissenting opinion in the Nuclear Weapons Advisory Opinion. She is of the view that one should not focus on the nature of the attack itself and question what is proportionate in response, but rather ask what is necessary to halt or repulse a future attack.<sup>76</sup>

Bowett has commented that “self-defense” is a challenging legal requirement because the difference between reprisals and defense are the punitive character and the protective argument. The distinction between punitive and protective is based on motive, and therefore difficult to distinguish.<sup>77</sup>

It is fair to conclude that the exact content of the proportionality requirement remains unresolved. The majority of the ICJ has chosen not to conduct an in-depth analysis of the requirement when the possibility has been put before them, maybe because it is challenging to define the condition in general terms that would be a good rule in different circumstances, although this seems to be the situation now.

#### 4.1.3.2.1 How does the “self-defense” criteria effect the “unwilling or unable” doctrine?

When interpreting “self-defense” with the purpose of finding out if the term entails self-defense against non-state actors, the principles of necessity and proportionality brings with it even more challenges.

It can be more difficult to ascertain whether or not the use of force actually prevents or deter armed attacks when the attackers are non-state actors. The ranks and roles of the perpetrators are more ambiguous than the military operating on behalf of the government. The question of necessity thus remains unanswered in many of these cases, since what one has achieved by the self-defense action might be unclear even after the attack has taken place.

With respect to proportionality, it can be difficult to target only “legitimate” targets, without killing or harming innocent civilians as well. The structures in armed groups are often not as firm and bureaucratically formed as a state entity. When the attacker is a state one can use force with the purpose of self-defense against military targets. However, when it comes to non-state actors behind armed attacks, they can operate from schools and villages with no

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<sup>76</sup> Dissenting opinion of Judge Higgins, Legality of the threat or use of nuclear weapons, ICJ Reports 8 July 1996, para. 5.

<sup>77</sup> Lubell 2010, *supra* note 4, p. 52.

clear, at least not for the outsider, boundaries between combatants and civilians. The question of proportionality is really put to the test when the danger of killing civilians increases.

Uncertainty regarding the armed attack itself, who the perpetrators of the attack are, and indeed if the territorial state is effectively addressing the issue, have also been put forward by some authors as major challenges in the self-defense against non-state actors.<sup>78</sup>

Gardam argues that part of the explanation for a more frequent condemnation of what is claimed to be self-defense against non-state actors are the methods that typically are adopted by states when assessing what is a proportionate response. The United States and Israel, for example, argue that the proportionality requirement should be measured based on the accumulation of events and not on the individual action.<sup>79</sup>

Deeks comments that when it comes to the examination of the necessity requirement, there are two extra points of consideration in relation to an aggressor that is a non-state actor. A victim state must consider if the attack is necessary in relation to the non-state actor, but the victim state must also consider the situation in relation to the territorial state from where the group launched the attacks. An assessment must be made whether the territorial state is prepared to defeat the threat. If the territorial state is in fact both willing and able to handle the threat that the non-state actor constitutes, the intervening state cannot claim that the use of force is necessary.<sup>80</sup>

#### 4.1.3.3 To what degree does the wording “if an armed attack occurs” limit the right to self-defense?

A text-based analysis of “if an armed attack occurs” suggests that a state only has a right to self-defense where they have already been attacked.

This understanding of the text also seems to be the intent at the time of the drafting of article 51. At the San Francisco Conference, governor Stassen (a leader of the US team) declared: “We did not want exercised the right of self-defense before an armed attack had occurred”.<sup>81</sup>

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<sup>78</sup> Ahmed Dawood, *Defending weak states against the “unwilling or unable” doctrine of self-defense*, Journal of international law and international relations (Toronto), 2013, p. 24.

<sup>79</sup> Gardam 2004, *supra* note 69, p. 181.

<sup>80</sup> Deeks 2012, *supra* note 2, p. 495.

<sup>81</sup> Lubell 2010, *supra* note 4, p. 56.

Legal theorists are however today deeply divided about the reach of article 51 when it comes to anticipatory self-defense.

Lubell argues that there has been a shift in international law, opening up for self-defense before an armed attack has occurred. This right is however limited to those cases where the attack is imminent and cannot be stopped without the use of force.<sup>82</sup>

According to Kunz, Brownlie, Randelzhofer, and Dinstein, anticipatory self-defense is not covered by article 51, as they understand “if an armed attack occurs” literally.<sup>83</sup>

Bowett however, believes that article 51 does not exclude action taken against an imminent danger, even though an armed attack is yet to occur. His argument is that such an understanding of article 51 is more in sync with article 2(4) which forbids both force and threat of force, and that one must bear in mind real life situations where one cannot expect a state to wait for an initial attack before they start defending themselves. Many other theorists are of the same view as Bowett.<sup>84</sup>

Lubell also comments that states currently seem to have accepted anticipatory self-defense.<sup>85</sup>

#### 4.1.3.3.1 How do the different interpretations of “if an armed attack occurs” effect the “unwilling or unable” doctrine?

The fact that non-state actors typically does not declare war is of interest to the question of how “if an armed attack occurs” should be interpreted.

It seems that the world community has been more inclined to accept self-defense against a non-state actor in those cases where an armed attack already has occurred, and indeed where the armed attack has been of a large scale.<sup>86</sup>

So, even if anticipatory self-defense can be seen as acceptable in state to state armed attack, it is no secure legal basis for claiming self-defense against a non-state actor that is yet to attack.

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<sup>82</sup> *Ibid*, p. 63.

<sup>83</sup> *Ibid*, p. 57.

<sup>84</sup> *Ibid*, where Lubell lists Jennings and Watts, Higgins, Lietzau, Bethlehem, Greenwood, Lowe, Roberts, Sands and Wood.

<sup>85</sup> *Ibid*. He mentions that most states did not criticize Israel’s use of anticipatory self-defense in 1967.

<sup>86</sup> Security Council Resolution 1368 (2001). Adopted by the Security Council at its 4370th meeting, on 12 September 2001. Security Council Resolution 1373 (2001). Adopted by the Security Council at its 4385th meeting, on 28 September 2001. General Assembly Resolution 56/1.

#### 4.1.3.4 Does the use of “inherent” right to self-defense suggest a wider right of self-defense?

The question is, if the phrasing “inherent”, can give a wider right to self-defense than the rest of the text in article 51 suggests.

The word “inherent” seems to propose that a state would have a right to self-defense even if article 51 had not existed.

In the French version of article 51 “droit naturel” is used. The direct translation would be “natural right”. This gives a link to natural law, which suggests that self-defense is a fundamental rule that cannot be removed by treaties.

However, even if one understands “inherent” as self-defense being a natural right, that does not close the window for a more narrow or wider understanding of the concept.

Ultimately the understanding of “inherent” depends upon if one recognizes article 51 as codification of current law at the time, or as a development of that law.

A pure codification keeps the content of the current law at the time of the codification, whilst a development can alter the current law.

Gray shows how different authors have taken opposing positions in relation to the meaning of “inherent”.

The first group of legal theorists thinks that “inherent” refers to an earlier wider right to self-defense as it was in customary international law, before the UN Charter. Their position is that the Charter does not limit the right to self-defense, which in their opinion was wider than article 51 suggests.<sup>87</sup>

The other group argues that the limitations in article 51 would have no meaning if a wider customary right to self-defense still existed in addition. Contextually, it also makes sense to interpret article 51 narrowly, because of the prohibition of the use of force in article 2(4). They are also of the opinion that the customary right to self-defense at the time was quite narrow anyway.<sup>88</sup>

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<sup>87</sup> See Gray 2004, *supra* note 8, pp. 98-99. Gray lists Bowett, Schwebel, McDougal and Feliciano as members of this group.

<sup>88</sup> *Ibid.* Gray lists Brownlie and Rifaat as supporters of this stance.

Dinstein also argues that a restrictive reading of article 51 is necessary. In his opinion any other interpretation of the article would be “counter-textual, counter-factual and counter-logical”.<sup>89</sup>

Dinstein thinks that the allegation that the right to self-defense is inherent based on the sovereignty of states to such an extent that no treaty can derogate from it, cannot be accepted. Consequently, Dinstein is also of the opinion that it is not clear that the right of self-defense can be classified as *jus cogens*.<sup>90</sup>

In the 1984 Nicaragua-case the judges read “inherent right” as a reference to customary international law when considering the Courts jurisdiction over the dispute: “Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated”.<sup>91</sup>

The majority here accepts the right to self-defense as a customary international rule. As the scope of self-defense was unclear before the existence of the UN Charter, one might argue that despite this statement the right to self-defense has been rightfully specified in article 51. It is important to observe that in this statement in the 1984 Nicaragua-case the judges are not considering the limitations on the right to self-defense, but jurisdictional issues related to agreements in treaties.

#### 4.1.3.4.1 How do the different interpretations of “inherent” right of self-defense effect the “unwilling or unable” doctrine?

A wide interpretation of “inherent” typically opens up for article 51 also covering self-defense against non-state actors, as the right to self-defense generally is considered wider before 1945 than after.

However, a narrow interpretation of “inherent” does not necessarily close the possibility for self-defense against non-state actors. However, in such cases there is more often a question of

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<sup>89</sup> See Dinstein 2011, *supra* note 58, p. 196.

<sup>90</sup> *Ibid*, pp. 192-193.

<sup>91</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392, para. 73.

anticipatory self-defense, where an armed attack is yet to occur. That fact can limit the possibility for self-defense in relation to the understanding of “inherent”.

#### 4.1.4 Conclusion: Does article 51 cover self-defense against non-state actors?

The text itself does not close the door on self-defense against non-state actors. However, it seems that the drafters envisioned self-defense against other states, since the UN Charter was very much a product of The Second World War which was a state-war. On the other hand, based on the text itself, it must be possible to interpret article 51 dynamically, fitting the realities of a world consisting of powerful non-state actors.

However, one must consider the effects of article 51 being interpreted to include self-defense against non-state actors. Such a right would also lead to an armed attack on the territorial state in which the individual or group is located. Would not this give the territorial state a right to self-defense against the state which is defending itself against the non-state actor? In that case, such a right could lead to a vicious circle of continuing armed attacks.

Even though article 51 does not close the door on self-defense against non-state actors, there is no mention on what additional requirements should be satisfied to in fact attack the territory of another state which has not attacked your territory (when the non-state actor cannot be considered to act on behalf of the territorial state).

It is necessary to contemplate that the ICJ have had ample possibility through several cases to open up for self-defense against non-state actors, even after 9/11, and yet they have not. An increasing number of judges have taken the opposite stance, but so far, they are still the minority.<sup>92</sup>

As shown, the understanding of “inherent” is also understood differently by authors, and the text itself gives little guidance in regards to the limits of self-defense.

Lubell concludes that “armed attack” in article 51 includes attacks by non-state actors, but that such attacks may require a higher threshold than attacks by states. He emphasizes that all the requirements must be fulfilled, and that additionally one must consider if the territorial

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<sup>92</sup> Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America) ICJ Reports 1986 p. 14. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136. Armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda) ICJ Reports 2005, p. 168.

state is not taking effective measures against the non-state actor, either based on a lack of willingness or ability.<sup>93</sup>

In my opinion, there are on balance weightier legal sources that indicate that self-defense against non-state actors is not covered by article 51. Article 51 is written in such a way that it is difficult to apply it to these situations without additional requirements, such as the conditions of “unwilling or unable”. Even though Article 51 does not specifically exclude such an understanding, it neither explicitly include self-defense against non-state actors.

One must also put considerable weight on the ICJ’s understanding of article 51 in this regard. As long as the majority keeps dismissing the possibility for self-defense against non-state actors, there would have to be an overwhelming amount of other legal sources which pointed clearly in the other direction to conclude differently. The fact is that the whole field of available legal sources and arguments on the area is quite fragmented. Therefore, I must conclude that at this point, self-defense against non-state actors, by means of an armed attack on the territory of another state, is not covered by article 51 of the UN Charter.

## **4.2 Customary International Law**

### **4.2.1 Self-defense against non-state actors part of customary international law?**

#### **4.2.1.1 Introduction**

The question now is if the “unwilling or unable” doctrine can be covered by customary international law (CIL).

To be able to ascertain if self-defense against non-state actors is CIL, it is necessary to analyze actions which has been claimed as self-defense, and the response from the international community.

In the Corfu Channel Case of 1949 the Court stated that every state is under an obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States”.<sup>94</sup>

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<sup>93</sup> See Lubell 2010, *supra* note 4, p. 81.

<sup>94</sup> Corfu Channel case 1949: ICJ Reports 1949, p. 4.

This statement can be used as an argument for the “unwilling or unable” doctrine. The Norwegian State Department is one of those who have pointed to this possibility, but at the same time commented that it is heavily disputed how far one can stretch such a principle.<sup>95</sup>

Christine Gray has reviewed many earlier situations of self-defense against non-state actors in her book, “International law and the use of force”.<sup>96</sup>

Gray concluded in 2004 that the right to use force in self-defense against non-state actors was controversial before 9/11.<sup>97</sup> This conclusion is based on the reactions by the world community to the Israeli air force attack on Beirut airport in December 1968, Israel’s attack on Tunis in 1985, The United States bombing of Libya in 1986 and the US missile attack on Bagdad June 26th 1993. These actions that were claimed as self-defense, were all unanimously or by a great number of states condemned in different UN resolutions.<sup>98</sup>

The question is if what happened the 11<sup>th</sup> of September 2001 and in the time to follow altered customary international law.

Four commercial passenger flights were boarded by 19 non-US nationals and crashed into the World Trade Center, the Pentagon and the Pennsylvania countryside on September 11<sup>th</sup> 2001. The US presented evidence that the perpetrators were connected to Al-Qaeda, headed by former Saudi citizen, Osama Bin Laden located in Afghanistan. The US demanded that the Taliban government handed over Al-Qaeda leaders, and closed terrorist training camps and gave the US access to affirm that this was done. After the Taliban refused to do so, the United States informed the U.N. Security Council that it was exercising its "inherent right of individual and collective self-defense" by actions "against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. The US and the UK started their attack in Afghanistan the same day.<sup>99</sup>

Gray points out that it is uncertain whether or not the action taken against Al-Qaeda can be seen as self-defense against an independent non-state actor. The US expressed conflicting positions, on the one hand that Afghanistan harbored terrorists, and on the other hand that

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<sup>95</sup> The Norwegian Ministry of Foreign Affairs: *Kampen mot ISIL. Folkerettslig grunnlag for militær maktbruk mot ikke-statlige aktører i Syria*, 29.01.2016, p. 6

<sup>96</sup> Gray 2004, *supra* note 8, pp. 159-194.

<sup>97</sup> *Ibid*, p. 164.

<sup>98</sup> *Ibid*, pp. 161-164

<sup>99</sup> Sean D. Murphy, *Terrorism and the concept of «armed attack» in article 51 of the UN Charter*, Harvard International Law Journal vol. 43 number 1 winter 2002, p. 41.

they actually facilitated Al-Qaeda's existence. The UK considered the terrorist group as something between a traditional terrorist organization and a state.<sup>100</sup>

If Al-Qaeda is seen as an independent non-state actor, it is more likely to conclude that international customary law was affected by the reactions of the international community post 9/11. Even if the Taliban regime did nothing to stop Al-Qaeda, there is no evidence which proves they had complete effective control over them. Using the formulation from the Nicaragua-case, it is not likely that they operated "on behalf" of the Taliban-government<sup>101</sup>. Rather it seems more likely that the government did little or nothing to stop Al-Qaeda's own agenda.<sup>102</sup> Hence, the organization operated as an independent non-state actor, and this situation thus provides us with a case in point for our analysis.

#### 4.2.1.2 UN Security Council Resolutions

The unanimous reaction from the international community post 9/11 was groundbreaking. The Security Council and the General Assembly passed undivided resolutions condemning the attack on the US,<sup>103</sup> while NATO and the OAS invoked their self-defense articles and several states gave support to military action. Iraq was the only state that explicitly challenged the legality of a military response.<sup>104</sup>

In Security Council Resolution 1368 it is determined that the attack is considered a "threat to international peace and security", and that "those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable". Lastly, they express their readiness to "take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations".<sup>105</sup>

Security Council Resolution 1373, in addition to stating the same as in Resolution 1368, also states that "Acting under Chapter VII of the United Nations Charter" they decide that all

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<sup>100</sup> Gray 2004, *supra* note 8, pp. 165-166.

<sup>101</sup> Military and paramilitary activities in and against Nicaragua) ICJ Reports 1986, p. 14, para. 195.

<sup>102</sup> Dinstein 2011, *supra* note 58, p. 228

<sup>103</sup> Security Council Resolution 1368 (2001). Adopted by the Security Council at its 4370th meeting, on 12 September 2001. Security Council Resolution 1373 (2001). Adopted by the Security Council at its 4385th meeting, on 28 September 2001. General Assembly Resolution 56/1.

<sup>104</sup> Gray 2004, *supra* note 8, p. 159.

<sup>105</sup> Security Council Resolution 1368 (2001). Adopted by the Security Council at its 4370th meeting, on 12 September 2001.

states shall take certain measures. It is stated that all states shall “Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens” and that all state shall also “Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens”.<sup>106</sup>

In Murphy’s opinion, the two Security Council resolutions did not authorize states to use force against Afghanistan. However, he is of the belief that both resolutions affirmed the inherent right of self-defense against the threats to international peace and security caused by terrorist acts.<sup>107</sup> It is difficult to understand Murphy’s statement in this instance, as a right to self-defense against Al-Qaeda without also attacking Afghanistan would be meaningless, since the organization had its headquarters on Afghani soil.

Gray however, concluded more clearly that “Security Council Resolution 1368 affirmed the right of self-defense in response to terrorist attacks for the first time”.<sup>108</sup>

In my opinion, when specifically invoking chapter VII of the UN Charter, which includes article 51, as is done in Resolution 1373,<sup>109</sup> it must be seen as condoning the use of force in self-defense. I do not think that this explicit reference to chapter VII is done without consideration. Security Council Resolution 1373 therefore could be seen as a de facto authorization of the right to self-defense against non-state actors.

The question is if this practice has continued after 9/11, as there has to be evidence of a “general practice” for fulfilling the requirement of being customary international law.<sup>110</sup>

Israel has claimed self-defense several times against non-state actors in the Middle East post 9/11. These claims have usually not been met with the same reactions of accept by the international community. In October 2003, for instance, Israel responded to a Palestinian suicide bombing in Haifa with an air strike on Syrian territory. The majority of states in the Security Council condemned the action as a breach of international law. Gray concluded that

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<sup>106</sup> Security Council Resolution 1373 (2001). Adopted by the Security Council at its 4385<sup>th</sup> meeting, on 28 September 2001.

<sup>107</sup> Murphy 2002, *supra* note 100, pp. 44 and 48. Extract from page 44: “While the Security Council passed two resolutions prior to the U.S. military action against Afghanistan, in neither resolution did the Security Council authorize states to use force against Afghanistan”.

<sup>108</sup> Gray 2004, *supra* note 8, p 159.

<sup>109</sup> Security Council Resolution 1373 (2001). Adopted by the Security Council at its 4385<sup>th</sup> meeting, on 28 September 2001. As expressed on the previous page, the exact wording in the resolution was: “Acting under Chapter VII of the United Nations Charter”.

<sup>110</sup> Statute of the International Court of Justice, article 38 (1) letter b.

“no general support was expressed for a wide right to use force against terrorist camps in a third state”.<sup>111</sup>

Several other attacks by non-state actors has taken place in the years following 2001. Yet, a broader international response has not involved use of force before the current situation in Syria. These earlier acts have been deemed threats to international peace and security, but there has not been any explicit reference to Chapter VII of the UN Charter. Gray mentions Resolution 1440 condemning the hostage taking in Moscow, Resolution 1465 on a bomb attack in Colombia, and Resolution 1516 on the bomb attacks in Istanbul.<sup>112</sup>

The situation related to attacks committed by ISIL has made the question of self-defense against non-state actors even more relevant.

The UN Security Council adopted Resolution 2249 in 2015 where they condemned attacks perpetrated by ISIL which took place on 26 June 2015 in Sousse, on 10 October 2015 in Ankara, on 31 October 2015 over Sinai, on 12 November 2015 in Beirut and on 13 November 2015 in Paris, and all other attacks perpetrated by ISIL, including hostage-taking and killing. The Resolution also concludes that ISIL has the capability and intention to carry out further attacks.<sup>113</sup>

The Security Council specifically calls upon states to “take all necessary measures, in compliance with international law, in particular with the United Nations Charter, (...) on the territory under the control of ISIL also known as Da’esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL (...) and entities associated with Al Qaeda, and other terrorist groups, (...) and to eradicate the safe haven they have established over significant parts of Iraq and Syria”.<sup>114</sup>

The Resolution do not refer to the UN Charter chapter VII, and can therefore not be equated with Resolution 1373 discussed above.

However, the Norwegian State Department is of the opinion that the wording that states should “take all necessary measures, in compliance with international law, in particular with

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<sup>111</sup> Gray 2004, *supra* note 8, p. 175.

<sup>112</sup> *Ibid*, pp. 186-187.

<sup>113</sup> Security Council Resolution 2249 (2015). Adopted by the Security Council at its 7565th meeting, on 20 November 2015, page 2, point 1.

<sup>114</sup> Security Council Resolution 2249 (2015). Adopted by the Security Council at its 7565th meeting, on 20 November 2015, page 2, point 5.

the United Nations Charter” seems to assume that there is a legal basis for acts of self-defense against non-state actors.<sup>115</sup>

On the other hand, it is difficult to imagine that the Security Council forgot to specifically refer to Chapter VII of the UN Charter, and rather “hints” that the use of force is legal in this instance.

#### 4.2.1.3 Treaties

Article 17 (1a), Issues of admissibility, in the Rome Statute states that the International Criminal Court (ICC) can determine that a case is inadmissible where “The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”.<sup>116</sup>

It follows that where a state is either “unwilling or unable” to investigate or prosecute an alleged crime (which is covered by the Rome Statute), the Court can take jurisdiction of it. The Rome Statute has 139 signatories and 124 ratifications.<sup>117</sup>

The principle being expressed in article 17 is that states cannot dodge their responsibility, and if a state is “unwilling or unable” to implement its obligations, the ICC will do it for them. In my opinion, it is interesting to consider if the principle expressed in article 17 can be used as an analogy for situations where a state is “unwilling or unable” to deal with non-state actors which constitutes a threat to another state.

A state has sovereignty over its territory and is generally obliged not to use force against another state.<sup>118</sup> In the Corfu Channel Case of 1949 the ICJ also stated that every state is under an obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States”.<sup>119</sup> So, when a state is “unwilling or unable” to fulfil this commitment, one could argue that the principle expressed in article 17 of the Rome Statute, ratified by 124 states, indicates that the attacked state can overtake the responsibility of self-defense, when the state in question is “unwilling or unable” to do so themselves.

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<sup>115</sup> The Norwegian Ministry of Foreign Affairs 2016, *supra* note 96.

<sup>116</sup> The Rome Statute of the International Criminal Court, 20 November 1998.

<sup>117</sup> ICC website: <http://www.iccnw.org/?mod=romeratification> (November 2016).

<sup>118</sup> UN Charter article 2(4).

<sup>119</sup> Corfu Channel case, Judgment of April 9<sup>th</sup> 1949: ICJ Reports 1949, p. 4.

Of course, this type of reasoning and interpretation of the Rome Statute can be met with many counterarguments. Firstly, that article 17 applies to an entirely different area. Secondly, that self-defense already is a law regulated area. Thirdly, that principles given in the Rome Statute is limited to the crimes agreed upon and listed in the Rome Statute itself, and therefore the principles are not well suited for analogy.

The African Union have in the “Abuja non-aggression and common defense pact” specified in article 1 letter c that “aggression” also includes armed force or any other hostile act by “non-state actor(s)”.<sup>120</sup> Of the members in the African Union, 44 states have signed, and 20 have ratified the treaty.<sup>121</sup>

These states seem to understand the right to self-defense to include self-defense against non-state actors.

A text-based analysis of the Rome Statute article 8 bis paragraph 2 suggests that it is only for the use of armed force “by a state” which the leadership of the state can be individually criminally liable for, not for the same action taken by a non-state actor. However, in the same provision letter g, the active use of a non-state actor for the purpose of armed force against another state constitutes an act of aggression as well. In that case the organization is not acting independently from the territorial state. Hence, the situation falls outside the scope of this analysis.

#### 4.2.1.4 State practice

In modern time, only a few states have specifically invoked the “unwilling or unable” doctrine. The United States being the most frequent user of the doctrine, but also states such as Israel, Russia and Norway. However, the number of states which have used force against a non-state actor on the territory of another state, is much higher. Among them the United Kingdom, France, Portugal, Turkey, Iran, Colombia, Pakistan, South-Africa, Uganda, Rwanda, Senegal, and Kenya.<sup>122</sup>

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<sup>120</sup> African Union non-aggression and common defence pact, Abuja 31.01.2005.

<sup>121</sup> List of countries which have signed, ratified/acceded to the African Union non-aggression and common defence pact, 01.04.2016: [http://www.au.int/en/sites/default/files/treaties/7788-sl-african\\_union\\_non-aggression\\_and\\_common\\_defence\\_pact\\_6.pdf](http://www.au.int/en/sites/default/files/treaties/7788-sl-african_union_non-aggression_and_common_defence_pact_6.pdf) (November 2016).

<sup>122</sup> Lubell 2010, *supra* note 4, p. 34; Deeks 2012, *supra* note 2, p. 549; Dawood 2013, *supra* note 77, pp. 22-23.

In the first 40 years of the UN Charter, so called victim states were generally condemned in their use of force in territorial states that did not effectively handle non-state actors. After the Cold War the Security Council has not been as active in condemning these actions, and some states have even given their support in instances of self-defense against non-state actors. Even though, Ruys and Verhoeven conclude that the use of force against non-state actors on the territory of another state without substantial involvement of that state, is still not universally accepted.<sup>123</sup>

Gray points out that the vast majority of cases regarding the use of force are not debated, and no UN Resolutions are adopted. Therefore, Gray argues that our perception is distorted by exceptional and controversial cases, often where the US or Israel are participants and there are far reaching claims of the right to self-defense.<sup>124</sup>

#### 4.2.1.5 Decisions of international tribunals

In the ICJ, as the analysis of article 51 shows, the majority of judges, have since the Nicaragua-case, interpreted “armed attack” in article 51 not to include non-state actors as long as they are not operating “on behalf” of a state entity. However, the judgments are not as unison as they used to on this question. And the dissenting opinions might be used as an argument to back up the existence of a broader customary rule of a right to self-defense against non-state actors, even if article 51 should not give such a right.

#### 4.2.2 Conclusion with respect to customary international law

Keeping in mind the requirement of “a general practice accepted as law” for something to constitute an international customary rule, the different legal sources will now be assessed to conclude if they together constitute a right to self-defense against a non-state actor where the territorial state is unwilling or unable to address the threat.

Only one Security Council Resolution has explicitly referred to Chapter VII of the UN Charter. Whilst other Resolutions have pointed to the threat that different violent non-state

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<sup>123</sup> Dawood, 2013, *supra* note 77, p. 14, referring also to the work of Tom Ruys and Sten Verhoeven, *Attacks by private actors and the right to self-defense*, 2005 pp. 289, 296, and 319-320

<sup>124</sup> Gray 2004, *supra* note 8, p. 97.

actors are to international peace and security, use of force has not been sanctioned specifically.

It can be argued that article 17 (1a) of the Rome Statute expresses a principle that if the state itself is unwilling or unable to take responsibility for its commitments, another party can do so. The “Abuja non-aggression and common defense pact” understand “aggression” to also include armed attacks by “non-state actor(s)”.

On the other hand, article 8bis of the Rome Statute, focuses on armed attacks committed by a state (with the exception of active use of a non-state organization, see its letter g).

State practice has been quite variable, but it is clear that only a few states have specifically invoked the “unwilling or unable doctrine”.

The majority in the ICJ has consistently dismissed the right to self-defense against non-state actors. However, it is interesting to see the increase of dissenting opinions regarding this question.

Additionally, a rule of law must have a certain degree of a foreseeable and specified content to function as a legal rule under international law.

The doctrine itself provides two requirements, (1) that the non-state actors must be located on the territory of a state, which (2) is either “unwilling or unable” to prevent an armed attack towards another state.

Deeks has sought to reformulate the current “unwilling or unable test”, which in her opinion currently is more a legal “standard”, and suggested a more detailed rule consisting of several factors that need to be considered.<sup>125</sup> She too concludes, however, that the doctrine “currently lacks sufficient content to serve as a restrictive international norm”.<sup>126</sup>

In conclusion, state practice and opinion juris does not seem to be sufficiently general and consistent. Hence, in my opinion the fairly strict requirement of a “general practice” is not satisfied. However, the “unwilling or unable” doctrine may be emerging as a customary international rule in the near future.

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<sup>125</sup> Deeks 2012, *supra* note 2, pp. 506-548.

<sup>126</sup> *Ibid*, p. 546.

## **5. ACCOUNTABILITY FOR ILLEGAL USE OF FORCE AGAINST NON-STATE ACTORS**

### 5.1 Introduction

Out of consideration for the broad context, this chapter will very briefly consider the possible legal consequences of illegal use of force against non-state actors. Two ways of accountability will be considered, state – and individual accountability.

### 5.2 State responsibility for the unlawful use of force

If an act of claimed self-defense against non-state actors is not covered by any of the exceptions to the prohibition of the use of force in the UN Charter article 2(4), it is unlawful. The question is if a state can be held responsible for such an offense.

An armed attack is a violation of the prohibition of the use of force in article 2(4). To be able to process such a case in front of the International Court of Justice (ICJ) both states have to recognize the jurisdiction of the Court. According to the Court's Statutes, article 36(1), jurisdiction can be based on type-based pre-jurisdiction<sup>127</sup> or a specific agreement.

The Courts jurisdiction can also be based on the optional clause in article 36(2) of the Statute, which is based on the states giving unilateral declarations to the UN Secretary General that it accepts the Courts jurisdiction in relation to other states that have given an equivalent declaration. About a third, 66 states, of the UN member states have given such a declaration.<sup>128</sup>

### 5.3 Individual responsibility for the unlawful use of force

In the new article 8bis paragraph 2 of the Rome Statute, an “act of aggression” is defined as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the

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<sup>127</sup>An example is the Convention on the Prevention and Punishment of the Crime of Genocide. Adopted by the General Assembly of the United Nations on 9 December 1948, article IX. This was used as the jurisdictional basis by Bosnia Herzegovina in the Genocide case of 1992. Serbia could therefore not resist ICJ giving a judgment in the case. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43.

<sup>128</sup> Report of the International Court of Justice, 1 August 2009-31 July 2010, p. 1.

United Nations”.<sup>129</sup> Article 8bis was the product of the 2010 review conference in Kampala, but is yet to be activated.

Where a state claims self-defense against a non-state actor, but it is not seen as self-defense because the self-defense act is aimed towards a non-state actor, it is not directly covered by the Rome Statute. Article 8bis only covers the use of armed force by “a state” against “another state”. One can of course argue that the state has used armed force against the territorial state in which the non-state actors are situated, and therefore state officials of a high rank can be held accountable on this basis.

The threshold in the Rome Statute article 8 (1) is also higher than the prohibition in the UN Charter article 51, as a “manifest violation” of the Charter of the United Nations is required to constitute “a crime of aggression”.

It is still uncertain when the ICC will be able to judge cases in regards to the crime of aggression<sup>130</sup>. Even if the Kampala-amendment were activated, the ICC may have to accept a UN Security Council decision as to whether a state has committed an act of aggression.<sup>131</sup>

A possibility is using domestic courts to prosecute individuals for the crime of aggression.<sup>132</sup>

However, this can be met with many counter-arguments. The state must have a legal basis for prosecuting aggression as well as the political will to do so. Since the crime of aggression normally is committed by state officials, a sufficient political and judicial will is usually not present unless there has been a shift in government.<sup>133</sup> Currently, it is not likely that domestic courts will function satisfactorily in the prosecution of individuals for the crime of aggression.

## 6. CONCLUSIONS

### 6. 1 Lex lata assessment

As I have concluded in Chapter 4.1.4 and 4.2.2, the current legal situation does not sufficiently support the “unwilling or unable” doctrine as applicable international law.

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<sup>129</sup> Rome Statute of the International Criminal Court, 1998, (1998) UNJY 294.

<sup>130</sup> The Kampala amendment on aggression has by 1 December 2016 been ratified by 33 states. This means that the said jurisdiction might be activated at the Assembly of States Parties session in New York December 2017.

<sup>131</sup> Kampala Amendments, *supra* note 10, art. 15 bis.

<sup>132</sup> Jocelyn Ketzenbaum, *Closing Impunity Gaps for the Crime of Aggression*, Chicago Journal of International Law Volume 17 Number 1, 2016, p. 55.

<sup>133</sup> *Ibid*, p. 65.

In the last section of this thesis I would like to look at the positive and negative factors in relation to the “unwilling or unable” doctrine, as well as consider alternatives to the current legal situation.

## 6.2 Lex Ferenda considerations

The “unwilling or unable” doctrine has been criticized by many, but few have introduced alternatives on how to handle these situations in a better way.

Dawood thinks that some regime is necessary to regulate the use of force against non-state actors in another state. He argues that even though the “unwilling or unable” doctrine can be abused by strong states it is not a good argument for avoiding having rules.<sup>134</sup>

The right to self-defense in general can be abused, but that does not lead to the conclusion that one should not have a right to self-defense.<sup>135</sup>

The problem with the “unwilling or unable” doctrine is that it lacks clarity. The central question is when the territorial state can be considered to be “unwilling or unable” to address the threat from a non-state actor. The answer is subjective, can be easily manipulated by the attacked state and is open to self-serving interpretations. It is important to keep in mind that it is the attacked state that is the one who concludes whether or not the territorial state is “unwilling or unable”.<sup>136</sup>

Dawood points to Pakistan and the US as an example. The US claimed Pakistan was ineffective in dealing with the threat posed by Bin Laden and Al-Qaeda, whilst Pakistan denied this. As expected, the attacked state and the territorial state rarely agree in relation to this question.<sup>137</sup>

The title of Dawood’s article is “Defending weak states against the “unwilling or unable” doctrine of self-defense. The point is that it is typically a weak, or even failing state, which has the problem of non-state actors controlling an area for their own agenda. Therefore, the

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<sup>134</sup> Dawood 2013, *supra* note 2, p. 16.

<sup>135</sup> Rosalyn Higgins, *Problems and process: International law and how we use it*, Oxford 1995, p. 247.

<sup>136</sup> Dawood 2013, *supra* note 2, p. 18.

<sup>137</sup> *Ibid*, p. 19.

claim of self-defense based on the “unwilling or unable” doctrine will always be enacted towards a weak state, or at least weaker than the attacked state.<sup>138</sup>

However, there are also major challenges by concluding that the “unwilling or unable” doctrine is not applicable international law. The question then is, if article 51 and customary international law does not regulate self-defense against non-state actors, what does?

The easy answer is of course, that if these situations are not covered by article 51 and customary international law, they are unlawful.

However, it is a fact that non-state actors who commits armed attacks towards other states exists. Should a state then have no means of defending themselves against these attacks?

One possibility is to strengthen the “unwilling or unable” doctrine by making it more based on objective elements and external actors (not just the attacked state’s considerations). Another possibility is to draft a new legal rule that addresses the question of self-defense against non-state actors.

In his article, Dawood suggests how the “unwilling or unable” doctrine could be strengthened. The Security Council is proposed as an appropriate body for arranging a fact-finding mission. A state that invokes the “unwilling or unable” doctrine would in such an instance have to give reasons for why they consider the territorial state to be ineffective in addressing the problem.<sup>139</sup>

This can be seen as a fairly easy solution since The Security Council already is authorized to “maintain international peace and security” and since they also have investigatory powers.<sup>140</sup>

Of course, such an arrangement would likely be vetoed, if the state that invokes the “unwilling or unable” doctrine were one of the five permanent members in the Security Council. However, the rest of the UN-system also suffers under these constraints.

Another solution is to create a completely new legal rule and procedure where one includes more concretely the different requirements needed for limiting self-defense against non-state actors to situations where there is no other choice than to break the sovereignty of the

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<sup>138</sup> *Ibid*, pp. 22-24.

<sup>139</sup> *Ibid*, p. 30

<sup>140</sup> See UN Charter, Chapter VII, and article 34.

territorial state. In such a case one could also include some sort of global enforcement authority.

However, to succeed in getting every single state to agree to a new treaty about the right to self-defense, seems unlikely. The UN Charter was drafted based on a very special backdrop, where states all over the world were more inclined to cooperate, so that they might avoid the massive devastations they had already seen in the span of a lifetime.

The best possibility left is to improve the “unwilling or unable” doctrine, so that it becomes more difficult to abuse by powerful states, but at the same time makes it possible to defend effectively within a clear rule of law framework against criminal non-state actors.

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List of countries which have signed, ratified/acceded to the African Union non-aggression and common defence pact: [http://www.au.int/en/sites/default/files/treaties/7788-sl-african union non-aggression and common defence pact 6.pdf](http://www.au.int/en/sites/default/files/treaties/7788-sl-african%20union%20non-aggression%20and%20common%20defence%20pact%206.pdf)

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