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The Non-State Actor Threat

**An Examination into the Legitimate Actions
Available to a '*Victim State*' Threatened by a Non-
State Actor Operating From a Foreign Territory**

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Abbreviations

ADF	Allied Democratic Forces
CSCAP	Council for Security Cooperation in Asia Pacific
DRC	Democratic Republic of Congo
ICESR	International Convention on Economic and Social Rights
ICCPR	International Convention on Civil and Political Rights
ICJ	International Court of Justice
ICC	International Criminal Court
ICTY	International Criminal Tribunal of the former Yugoslavia
ILC	International Law Commission
IMO	International Maritime Organization
INGO	Intergovernmental Organization
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
MNE	Multinational Enterprises
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea

Comment Regarding the Reference Format of this Thesis

To any reader of this thesis who is unfamiliar with the reference format used in this thesis. The format used is in accordance with the rules required by the department of law, University of Iceland on the structure of MA thesis, dated September 30th, 2008.

Short Abstract

Terrorism at the beginning of the 21st century has prompted the international legal community to revise its position on non-state actors and the use of force in international law. The state-centric nature of the international community has in recent years been faced with non-state actors on such a scale as to demand a response from states and forcing them to take defensive measures against the non-state actors which otherwise ought to be dealt with under the domestic legal system of the state from which they operate.

Non-state actors are a new threat to international peace and security which can take various forms such as rebel groups, terrorist groups and even pirates. Although the actors are not new *per se* their threat level is of a new proportion.

As the traditional measures against non-state actors are domestic measures, certain requirements must be met in order for a state to take international measures in defence of a non-state attacker. These requirements establish the classification of a 'victim state' which allows for the state to resort to either non-forceful or forceful measures under international law.

The non-forceful measures ought always to be resorted to first, in accordance with basic principles of international law for maintaining peace and security in the international community and that of a general prohibition of force. As the nature of non-state actors can influence the available peaceful options to a 'victim state' as well as the fact that the peaceful measures are often time consuming, the question of legitimacy of forceful measures against non-state actors frequently becomes crucial.

Whether or not forceful measures can be used against non-state actors is dependent on various factors. These measures are exceptions under international law and must be considered in that respect, but international law does allow them under certain circumstances, such as with UN Security Council authorization as well as when it is justified by self-defence. While the UN Security Council authorization for use of force against a non-state actor is primarily dependent on whether this actor poses a threat to international peace and security, the question of self-defence is a more complex one.

The prerequisites of self-defence are that an armed attack has occurred, and this thesis proposes that this prerequisite can be fulfilled by a non-state attacker without any attribution to another state. This is supported by interpreting relevant provisions of the UN Charter as well as examining recent state actions and judgements of the International Court of Justice relating to this issue. The fact is that a distinction needs to be made on the issue of identifying

the occurrence of an *armed attack* and that of the subsequent exercise of self-defence. While an *armed attack* needs no attribution or connection to a state and can be executed fully by a non-state actor, a state may not exercise self-defence against the non-state actor in a foreign territory unless certain preconditions are met. For example, a connection between the non-state actor and the state from which the actor operates or the inability (thus resulting in a necessity argument) of such a state to prevent its territory to be used as a basis for the planning or execution of an armed attack against a 'victim state'.

As recent events are examined and in order to comprehensively address the issues of non-state actors as threats and the available legitimate actions a 'victim state' has, it seems that international law needs to clarify these issues through co-operative measures and reach a consensus on the legal issues of non-state actors. In the absence of clear information, international law is left with rules which essentially were created for inter-state relations but need to be applied to non-state and state interactions because of pure necessity, since the threat of non-state actors in the 21st century has reached a level which the domestic legal system mostly cannot deal with.

Acknowledgements

The goal of this thesis is to shed some light on the status of non-state actors as threats to states and to international peace and security and the methods international law allows states to use to defend themselves when threatened by non-state actors. Obviously, one of the triggers behind this thesis is the controversy behind the international community's response to the so-called 9/11 terrorist attacks on the United States in 2001. That controversy has not been completely resolved and despite a couple of opportunities for the International Court of Justice to clarify or address some of the issues, there still exists uncertainty regarding the status of non-state actors as threats to international peace and security. Now that several years have passed it is an exciting research opportunity to examine and analyze how modern international law addresses this new situation. In addition to the 9/11 attack, my interest in this topic was raised when I participated in the 2008 Shearman & Sterling International Rounds of the *Philip C. Jessup International Moot Court Competition* where the concept of a non-state actor intrigued me and led me to focus on this aspect of international law.

I am fortunate enough to have received a good foundation in international law through participation in courses on the subject at the University of Iceland as well as through my participation in the above mentioned competition. This foundation has been important for my research which included various books and articles on international law in general but also more specifically on the subject matter, not to forget the basic sources of international law such as international judicial decisions, treaties and resolutions and documents from the United Nations. Furthermore, I was privileged to be able to use the library at Stetson University, School of Law, in St. Petersburg, Florida and I am very grateful to the university for allowing me to access their facilities which have been of great resource in my research.

I also want to thank my supervisor, Pétur Dam Leifsson, for his guidance, comments and suggestions throughout the writing of this thesis.

Finally, it goes without saying that I couldn't have done this without the love and support of my wife Fjóla Dögg Halldórsdóttir.

Introduction

At the beginning of the 21st century the international legal community was faced with an unprecedented threat to the peace and security of its members. The terrorist attacks on the territory of the United States, aimed at the World Trade Centre in New York City, Pentagon and the White House in Washington D.C. on September 11th 2001,¹ have been identified as making terrorism the most serious threat to international order and global human rights in the 21st century.² Terrorism is by no means an unknown concept. The events that captured the world's attention at the beginning of the century were, however, on a scale that the international community had not witnessed before. These attacks and the subsequent actions taken have awoken controversy and many questions among scholars regarding the legal regime in international law and whether or not the events that took place that day changed the international legal system with regard to rules on issues such as self-defence, use of force (*jus ad bellum*) especially when non-state actors are involved.³

In the opinion of the author of this thesis, it is the nature of the actors that committed the horrible terrorist acts at the beginning of this century, which is the reason behind the controversy of the forceful actions that followed the attacks on United States territory. The terrorists were not acting in the capacity or on behalf of any state, they were not a part of a state's military nor were the atrocities committed by a state which later took credit for the attacks. They were acting as non-state actors but their actions were carried out on a scale that traditionally only states could have acted on. Despite recent developments in international law, during the late 20th century and early 21st century,⁴ where international law has become more open to the notion of non-state actor's influence within the international community, having certain rights and obligations under international law, it seems that the community was unequipped to handle situations, such as the *9/11 attacks*, where the actions of the aggressive non-state actors were more similar to those of an aggressor state than of a mere criminal.

This lack of the international legal system to adequately deal with this issue is related to the fact that although non-state actors have existed and been influential within the international community for some time, they have not been given a very large formal role,

¹ From here on *9/11 attacks*.

² Javaid Rehman: *International Human Rights. A practical Approach*, p. 437.

³ Antonin Cassese: "Terrorism is also Disrupting some Crucial Legal Categories of International Law, p. 993; Dominic McGoldrick: *From '9-11' to the Iraq War 2003*, p.8; Rebecca M.M. Wallace: *International Law*, pp. 276, 305; Carsten Stahn: "Terrorist Acts as "Armed Attack": The Right to Self-Defence, Article 51 (1/2) of the UN Charter, and International Terrorism, p. 35-36.

⁴ In Chapter 1 and Chapter 2 of this essay, these developments will be analysed.

with greater emphasis being put on interstate rules and relationships.⁵ Modern international law is therefore faced with the fact that threats to the security of states cannot be categorized into only two parts where on the one hand there may exist a domestic threat originating purely from within a state, taking the form of rebel groups or civil war, and on the other hand threats posed by other states, such as that of an invasion.⁶ Rather the international community is now faced with a situation that adds a new dimension to the international legal system, a third category which to some extent combines the two more traditional security threats. It is the threat of a non-state actor operating from outside the territory of the threatened state and acting on a scale which is comparable to the use of force by other states, which is the most serious threat to international order and global human rights in the 21st century.

The goal of this thesis is therefore to examine and analyze what actions international law, as it exists today, suggests that a state, a *'victim state'*, faced with a security threat from a non-state actor such as a terrorist, is allowed to legitimately resort to in order to protect the lives of its citizens and the security of the state. The question this thesis proposes can be set up as a scenario that includes three factors.

- Firstly, that a **state** is a victim of an attack or threatened with an attack amounting to the use of force, from a **non-state actor**.
- Secondly, that the non-state actor is operating from **outside the 'victim state's' borders**, giving the situation an international element.
- And thirdly, that there exists a **need** for the 'victim state' to respond to the attacks or threats of the attacks in order to maintain its security. The thesis will therefore especially emphasize and examine the nature of non-state attackers, the rules regarding conflict resolution and management and rules regarding threat or use of force under international law.

The first chapter of the thesis will give an introduction into the nature of international law and its historical development from a purely interstate system into a system which, although still state-centric, does presume and accept the existence and influence of non-state actors.⁷ In chapter two, emphasis will be put on the nature of non-state actors and their characteristics which may have influence on their status with regard to their relationship and interactions with other actors, specifically with states, in the international sphere. Chapter three will deal with the topic of when a state can be considered a *'victim state'* because of the **need** to

⁵ Shirley V. Scott: *International Law in World Politics. An introduction*, pp. 73-82.

⁶ Peter Wallensteen: *Understanding Conflict Resolution. War, Peace and the Global System*, pp. 17-23.

⁷ Shirley V. Scott: *International Law in World Politics. An introduction*, pp. 81-82.

respond and defend itself when confronted with a threat from a non-state actor. Chapter four will examine and analyze the legitimate actions that *do not* amount to the use of force, *jus ad bellum*, and that may be available to a ‘victim state’ when confronted with a non-state actor threat or attack. In chapter five, detailed analysis will be done on the issue of self-defence in international relations and an attempt will be done to answer the question of legitimacy when using force against non-state actors acting from outside the ‘victim state’s’ territory. Finally, a conclusion will be given to the questions which the before mentioned scenario proposes, regarding the legitimate actions available to a ‘victim state’ when faced with a threat or attack from a non-state actor. This thesis is therefore as much a study of the nature and threat posed by non-state actors as it is a study on the topic of countermeasures and of self-defence.

Throughout this thesis references will be made to international judicial decisions, treaty conventions, the writings of scholars and other sources of law generally accepted in international law,⁸ in order to comprehensively address the issue at hand.

1. The Nature of International Law and its Historical Development

“Law can only exist in a society, and there can be no society without a system of law to regulate the relations of its members with one another.”⁹

1.1 General Introduction to the Nature and Characteristics of International Law

Conflicts are and have been the subject of law wherever it has been found, whether in the domestic legal system of Iceland or within the modern international legal system. Simply stated, the role of law is twofold: to prevent conflicts and to manage and resolve conflicts whenever they occur. This role can be derived from the object of law which has been said to be: ensuring the continuing co-existence of people in society.¹⁰ With regard to the above mentioned, international law does not differ from traditional municipal law; rather international law aims for the same thing that municipal law does, ensuring peace within the community in which the law exists. International law therefore exists to ensure the continuing co-existence of the nations which make up the international community, ensuring that a

⁸ Ian Brownlie: *Principles of Public International Law*, pp. 4-29; Rebecca M.M. Wallace: *International Law*, pp. 7-8; With special regard given to the sources of law mentioned in article 38 of the Statute of International Court of Justice.

⁹ David J. Harris: *Cases and Materials on International Law*, p. 1.

¹⁰ David J. Harris: *Cases and Materials on International Law*, pp. 1-5; Rebecca M.M. Wallace: *International Law*, p. 5; *Oppenheim’s international Law. Volume I*, p. 333.

society of nations, the international community, can exist;¹¹ international law's role, to prevent and resolve conflicts, becomes increasingly important as the world becomes *smaller and more crowded* and the likelihood of clashes within the community increases.

Although the international legal system shares the same basic role and purpose with the domestic legal system, its method of fulfilling and enforcing it is very different from that of the municipal system. The structure of the international legal system is a horizontal one and is very different when compared to the structure of the municipal legal system which in almost all societies is hierarchical where authority is vertical.¹² Therefore international law is often identified as having certain special characteristics which clearly distinguish international law from municipal law.¹³

The distinguishing characteristics, described below, of international law have sparked numerous debates among scholars of jurisprudence, as to for example, whether or not international law can be considered law in a somewhat philosophical sense. One of these debates is sometimes referred to as *the Austinian Handicap*.¹⁴ That reference is largely because of John Austin (1790-1859), an English jurist who, in the nineteenth century, defined laws as commands and positive law as the commands of a sovereign which according to Austin was a person who received the habitual obedience of the members of an independent political society and who in turn did not owe such obedience to any other.¹⁵ As the rules of international law are not created and commanded by a sovereign individual or entity, the rules fail to qualify as positive law according to Austin's definition. This does not automatically imply that international law cannot be considered *law*; rather it means that its nature and structure has created problems for jurists when trying to grasp the general concept of *law* and wanting to do so for both domestic and international law at the same time. Another test on the question and concept of law has been put forward by Sir Frederick Pollock (1845-1937) who wrote that the only essential condition for the existence of law is the existence of a political community, and the recognition by its members of settled rules binding upon them.¹⁶ This proposed condition is more readily satisfied by international law than the *Austinian* one. Since no one seems to have managed to put forward a concept or test of law to fully distinguished between what is law and what not, in a way that has fully satisfied the legal community, and

¹¹ *Oppenheim's international Law. Volume I*, p. 333; Stephen C. Neff: "A Short History of International Law", p. 31.

¹² Antonin Cassese: *International Law*, p. 5; Malcolm N. Shaw: *International Law*, p. 6.

¹³ Rebecca M.M. Wallace: *International Law*, pp. 3-5.

¹⁴ David J. Harris: *Cases and Materials on International Law*, p. 6; Rebecca M.M. Wallace: *International Law*, pp. 5-6.

¹⁵ David J. Harris: *Cases and Materials on International Law*, p. 6.

¹⁶ Frederick Pollock: *A First Book of Jurisprudence*, p. 28.

manages to include both domestic law and international law; and since an endless amount of other proposed definitions and tests on this issue exists, the concept of law, will not be discussed further. Without belittling the complex nature of the concept of law, it can be stated fairly confidently that certain aspects, the nature and characteristics of the rules of international law make this debate a very complicated one, and not one that this thesis aims to address, but international law's nature and characteristics which has sparked the above mentioned debates is of interest to the subject matter of this thesis.

The international community is namely very different from domestic communities as it has no centralized international legislature, no compulsory international court and no centralized enforcement mechanism. In addition to that and because of certain basic principles within the international community, such as that of equal sovereignty, states may sometimes have the freedom and opportunity to decide whether or not to be bound by certain rules within the community and generally not be coerced in matters which are primarily political.¹⁷

These characteristics of international law become very evident when the method of which international law is created is studied, which is primarily one of two ways, either through the practice of states, creating customary international law, or through agreements entered into by two or more states, bilateral or multilateral treaties.¹⁸ These methods of creating international law also represent the primary sources of international law as stipulated in article 38 of the Statute of the International Court of Justice. It is because of the principle of sovereign equality and the fact that there is no international legislature that international law is created in this way, and for that same reason rules can generally not be imposed on any state.¹⁹ Although there exist various international judicial organs such as the ICJ, as well as arbitration courts where states have an opportunity to present disputes for resolution, there doesn't exist any international court which all the members of the international community are compelled to submit to.²⁰ And in the same way as with the creation of law, the jurisdiction of these international courts cannot be imposed on any state. Therefore these courts have jurisdiction on the basis of a treaty provision, special agreement or other explicit consent.²¹ Finally, even in instances where a state has agreed to be bound by international rules and the jurisdiction of an international court, the fact that there exists no centralized active

¹⁷ Antonin Cassese: *International Law*, pp. 5-6; Rebecca M.M. Wallace: *International Law*, pp. 2-3.

¹⁸ Antonin Cassese: *International Law*, p. 6. Rebecca M.M. Wallace: *International Law*, pp. 3-4.

¹⁹ Malcolm N. Shaw: *International Law*, p. 9; Rebecca M.M. Wallace: *International Law*, pp. 3-4.

²⁰ Rebecca M.M. Wallace: *International Law*, p. 4.

²¹ Malcolm N. Shaw: *International Law*, pp. 8-9; Rebecca M.M. Wallace: *International Law*, pp. 3-4.

enforcement mechanism, weakens the international legal system compared to that of the domestic system²²

This community of nations, which has not always been a peaceful one,²³ evidently differs in many crucial issues from the traditional domestic legal system and therefore needs to utilize different methods compared to the domestic system when resolving or managing disputes and maintaining peace. In the typical domestic legal system an individual who is attacked, robbed or in other ways subjected to an illegal act can, and is to, be assisted by a centralized enforcement entity, in most cases a police, which object is to uphold the law, set by a centralized legislator, such as a parliament, and protect individuals and other legal entities from individuals who break the rules set by the legislator. Furthermore the individual has the right to seek justice before a domestic local court of law, and have a binding enforceable ruling on the issue adjudicated. In international law all these steps are not automatically available to a state as there exists no international surveillance body or police nor is there an international Supreme Court or an international legislator. Some developments have though been made to create an enforcement entity within the community, such as the UN Security Council, which can be viewed as an enforcement mechanism, as well the ICJ which could resemble a Supreme Court and finally the UN General Assembly which has been compared to an international legislator, but these organs' capabilities are not without limitation.²⁴

Because of the before mentioned characteristics of the legal system in the international community, the same options which are available to an individual in a domestic legal system are not *per se* available to a state or another international personality in the international legal system even though the above mentioned UN organs do exist. If a state were to have similar options as an individual in a domestic legal system, certain conditions need to be met. A state may in some cases on grounds of a treaty, agreement or other explicit consent, such as after having declared acceptance to the ICJ's jurisdiction,²⁵ have an option to bring a dispute before that international court. But even in those circumstances an undisputed authority to enforce compliance with the court's ruling is not always available nor does such an organ which is fully competent to enforce the court's ruling always exist. So when the international society is confronted with apparently unlawful actions taken by states or other entities it is often more

²² Antonin Cassese: *International Law*, pp. 5-6; Rebecca M.M. Wallace: *International Law*, pp. 2-5.

²³ Antonin Cassese: *International Law*, pp. 22-45.

²⁴ Shirley V. Scott: *International Law in World Politics, an Introduction*, pp. 2-7, 10-14.

²⁵ In accordance with article 36 of the Statute of the International Court of Justice.

complicated than in the domestic system to resolve that situation in a peaceful and a legitimate manner.

This in turn becomes even more complicated and at times can become problematic when rapid developments are occurring within the legal system and when new rules quickly emerge through new agreements between states or when customary international law quickly develops, as tends to happen once in awhile in the international legal system.²⁶

To better understand the mechanisms, which international law is equipped with, to prevent, manage and resolve disputes, one needs to examine and revisit the history and development of international law.

1.2 The Early History of International Law

International law gradually emerged in the sixteenth and early seventeenth century among a few nations in Western Europe that had a common religious and cultural background.²⁷ This small but multi state society had occasional clashes amongst themselves which led to customs emerging regarding the resolution of disputes and proper conduct between the states in times of disputes.²⁸ Various treaties were also created, many of which were aimed at establishing and maintaining peace in a particular region via peace treaties.²⁹ These customary rules and treaty rules lay the ground for the further development of modern international law. The first rules which emerged during these early years of international law were connected with diplomatic immunity and laws of war, *jus in bello*, mainly emphasizing proper and acceptable conduct when in war; these rules quickly spread to nearby communities of independent states and continued to develop.³⁰ As the community *grew* with the acquisition of new territory, through colonialism, more rules were created, more treaties were written and customary law continued to develop, all largely out of necessity, out of the need of states to co-exist.³¹ These rules that emerged in the early stages of international law shared a commonality, *a principle*, which formed then and forms today a basis for peaceful communication between states.³²

²⁶ An example of that would be instant customary law such as the doctrine of the continental shelf precipitated by President Truman's Proclamation in 1945, and the development of the Exclusive Economic Zone in the 1970's. Rebecca M.M. Wallace: *International Law*, p. 18.

²⁷ Antonin Cassese: *International Law*, p. 22; Rebecca M.M. Wallace: *International Law*, pp. 5-6.

²⁸ Gerhard von Glahn & James Larry Taulbee: *Law Among Nations. An Introduction to Public International Law*, pp. 46-48.

²⁹ Antonin Cassese: *International Law*, pp. 22-25; Gerhard von Glahn & James Larry Taulbee: *Law Among Nations. An Introduction to Public International Law*, pp. 46-48.

³⁰ Rebecca M.M. Wallace: *International Law*, p. 5.

³¹ Rebecca M.M. Wallace: *International Law*, pp. 5-6.

³² Christopher C. Joyner: *International Law in the 21st Century. Rules for Global Governance*, p. 17-18; Malcolm N. Shaw: *International Law*, pp. 192-193.

Today it is the primary basis for peaceful and efficient international co-operation and co-existence and is called the principle of sovereignty.³³

This very important principle within international law which essentially emerged out of necessity is as important today as it was 400 years ago when the peace treaties of Westphalia were signed in 1648.³⁴ This principle which governs international relations is often portrait as the principle of *sovereign equality of States*, entailing that a state has the sole power to wield authority over all the individuals living within the territory occupied by the state and that all states in the international community are to be considered on the same footing.³⁵ As an essential rule for the future peaceful development of modern international law it has been upheld by international courts³⁶ and tribunals and in international treaties.³⁷ Generally and more importantly this principle has been observed and obeyed by the international community most of the time.³⁸ This is likely due to the interests that states have in honouring their obligations and this principle under international law thus expecting same respect from other states.

A state's behaviour is interconnected with its own interest of protecting its own sovereign equality with regard to other states and this can be seen both in theory as well as in practice.³⁹ Furthermore this observed behaviour is motivated by the characterizing fact that the international community is missing a centralized enforcement mechanism, thus demanding respect for the rules and obligations which exists within the legal system.

Although the rules of the international system were generally respected, the principle of sovereignty, which to some extent excluded the existence of an enforcement mechanisms, characterized the few remedies that were available to states, especially in the early ages of the development of international law, when faced with a breach of international law. The decentralized nature of the international legal system inevitably led to the fact that *self-help* was the available option to most states when faced and affected by a breach of international law.⁴⁰ Although *self-help* still applies today in modern international law, *self-help* is not necessarily the only option a state has when faced with a breach of international law or a

³³ Ian Brownlie: *Principles of Public International Law*, p. 287.

³⁴ Antonin Cassese: *International Law*, p. 22.

³⁵ Antonin Cassese: *International Law*, pp. 48-49.

³⁶ In the *Corfu Channel Case* before the ICJ the Court stated "*Between independent States, respect for territorial sovereignty is an essential foundation of international relations*". *Corfu Channel Case, judgement of April 9th, 1949. I.C.J. Reports*, p. 4, 35. [Corfu Channel Case]

³⁷ Article 2(1) of the UN Charter states: "*The Organization is based on the principle of sovereign equality of all its members.*"

³⁸ Malcolm N. Shaw: *International Law*, p. 6.

³⁹ David J. Harris: *Cases and Materials on International Law*, pp. 8-13.

⁴⁰ David J. Harris: *Cases and Materials on International Law*, p. 11.

threat. International law, today, includes many treaties where states have subjected themselves to the jurisdiction of international courts, thus allowing for a breach of international law to be dealt with in a peaceful and structured manner within the confinement of that court.⁴¹ Also international law has various other options available to states such as arbitration, self-defence and collective measures via organs of the United Nations.⁴²

Among other emerging features in the early stages of the development of international law was the emphasis and focus on states as the subjects of international law. In the 1905 edition of *Oppenheim's International Law* it was stated that “*States solely and exclusively are the subjects of International Law*”⁴³ and other doctrines as well were explicit in the affirmation that only states are subjects of international law.⁴⁴ Although it is less clear that in practice this position was always maintained,⁴⁵ this feature of international law is natural when the aim of the first rules of this legal system are examined. The rules were aimed at regulating the behaviour of states, not that of individuals, which more or less was the subject and focus of the domestic systems which, due to the rule of sovereign equality, was not of any importance or interest to other states, let alone the international community.⁴⁶ Thus states are naturally the principal actors on the international scene and have throughout the ages been the exclusive actors within this community of nations.⁴⁷

Slowly but surely the international community has grown as more nations and states were formed and recognized through independence struggles of colonies and other measures and finally joined in a community with other states through various multinational treaties.⁴⁸ Thus the international community has developed from that small society of western European countries to the almost 200 nation states which the international community observes today.⁴⁹

With the further development of international law in the 20th century certain international organizations were created; the *League of Nations* following the First World

⁴¹ Ian Brownlie: *Principles of Public International Law*, pp. 675-678.

⁴² Ian Brownlie: *Principles of Public International Law*, pp 671-673; 697-698.

⁴³ David J. Harris: *Cases and Materials on International Law*, p. 13.

⁴⁴ Malcolm N. Shaw: *International Law*, p. 232.

⁴⁵ Malcolm N. Shaw: *International Law*, p. 232.

⁴⁶ Evidence of this emphasis is found in article 2(7) of the UN Charter which states: “*Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII*”.

⁴⁷ Christopher C. Joyner: *International Law in the 21st Century. Rules for Global Governance*, p. 24; Shirley V. Scott: *International Law in World Politics: An Introduction*, pp. 21-22, 73, 81-82.

⁴⁸ Malcolm N. Shaw: *International Law*, pp. 38-41

⁴⁹ David J. Harris: *Cases and Materials on International Law*, pp. 9-13.

War in 1919⁵⁰ and later after the Second World War the United Nations in 1945.⁵¹ These organizations have contributed a lot to minimize the need for *self-help* as they *inter alia* regulate the available response options a state has when faced with a breach of international law or a threat.⁵² Both of these international institutions aimed at maintaining peace and security in the world and although the League of Nations failed to avert the Second World War the conviction that only by some form of general organization of states could future scourge of war be avoided, was shared by many.⁵³ The result of this conviction was the creation of the United Nations which was based upon the two principles which have actually been mentioned earlier, that of maintaining international peace and security and the principle of sovereign equality of all states.⁵⁴

Today the international community continues to evolve and develop new rules, as it has constantly been doing for almost half a millennia and as it is continuously faced with new situations the current legal regime is continuously challenged and international law develops.

2. The Concept of Non-State Actors

The international society has in recent decades been confronted with situations where states have taken direct actions against non-state actors, often affecting the sovereignty of other independent states in the process and raising important legal questions concerning the legitimacy of these actions⁵⁵. The issue of legitimacy of these actions, taken against non state attackers is a highly debated one in the international community but it is an increasingly important issue in a world community where non-state actors are becoming more visible and more influential.

Threats to international peace and security, which historically mostly came from interstate disputes, suddenly have started to emerge from within states but planned, financed and fully executed by non-state actors, not affiliated with the state from which they operate. In such situations a state which is being threatened must be able to react in some ways to protect itself and its citizens. Interestingly enough in over 110 armed conflicts since 1989,

⁵⁰ U.K.T.S. 4 (1919) Cmd.153.

⁵¹ Antonin Cassese: *International Law*, pp. 34-44; Charter of the United Nations, 26 June 1945.

⁵² See the first sentence of the Covenant of the League of Nations (1919) "*The High Contracting Parties, In order to promote international co-operation and to achieve international peace and security...*" see also articles 1(1) and 2(3)(4) of the UN Charter.

⁵³ Philippe Sands and Pierre Klein: *Bowett's Law of International Institutions*, p. 23.

⁵⁴ Philippe Sands and Pierre Klein: *Bowett's Law of International Institutions*, pp. 23-24; see articles 1(1) and 2(1) of the UN Charter.

⁵⁵ Such as the 1998 bombings by the United States on the territory of Sudan and Afghanistan and the 2001 response of the United States and its allies to the 9/11 attacks

which the Uppsala Conflict Data Project has observed and studied, states were only one of the parties in most of the conflicts, meaning that most of the armed conflicts were not purely interstate conflicts but rather included non-state actors.⁵⁶ This makes the study and definition of non-state actors very relevant to international law.

2.1 The Non-State Actor in General

The term ‘non-state actor’ is a very self-explanatory concept. It literally means and refers to an actor in the international community that is not a state. Non-state actors may furthermore be described as essentially all actors on the international level which are not states or intergovernmental organizations (INGO’s).⁵⁷ This concept thus includes international non-governmental organizations (NGO’s) which can be categorized as issue-oriented private groups and enterprises that operate on an international scale, multinational corporations and individuals.⁵⁸ Examples of NGO’s include the International Red Cross, The Roman Catholic Church, Amnesty International and Greenpeace International.⁵⁹ Examples of Multinational Enterprises (MNE’s) include large oil companies such as Shell and ExxonMobil.⁶⁰ In addition to organizations and companies which can sometimes possess considerable influence because of their political and economical size,⁶¹ individuals can also bear certain rights and obligations under international law making them accountable, not only to their own government but to the international community.⁶² This accountability was very evident in the Nuremberg Trials following the Second World War, where individuals were tried before this international tribunal because of their offences against humanity.⁶³ In addition the International Criminal Court (ICC) was established in 2002 when the Rome Statute entered into force after ratification from 60 countries. This court is a permanent international court that has jurisdiction over individuals in an international capacity.⁶⁴ All of these organizations, companies and individuals therefore fall under the category of being non-state actors under international law.

⁵⁶ Peter Wallensteen: *Understanding Conflict Resolution. War, Peace and the Global System*, p. 68.

⁵⁷ Christopher C. Joyner: *International Law in the 21st Century. Rules for Global Governance*, pp. 24, 27.

⁵⁸ Christopher C. Joyner: *International Law in the 21st Century. Rules for Global Governance*, p. 27; Shirley V. Scott: *International Law in World Politics. An Introduction*, p 73.

⁵⁹ Christopher C. Joyner: *International Law in the 21st Century. Rules for Global Governance*, p. 27.

⁶⁰ Shirley V. Scott: *International Law in World Politics. An Introduction*, p. 73.

⁶¹ Shirley V. Scott: *International Law in World Politics. An Introduction*, p. 73.

⁶² Christopher C. Joyner: *International Law in the 21st Century. Rules for Global Governance*, p. 28; Shirley V. Scott: *International Law in World Politics. An Introduction*, pp. 78-81.

⁶³ Shirley V. Scott: *International Law in World Politics. An Introduction*, pp. 79-80.

⁶⁴ The website of the International Criminal Court, <http://www.icc-cpi.int>.

Since the examples mentioned above are normally not of a threatening nature, especially with regard to the security of states, this thesis will not focus on the above mentioned non-state actors *per se*. Rather this thesis focuses on those who would qualify as combatants in the broadest sense of the word or could be considered to be of an aggressive or threatening nature. Non-state actors can namely range from the before mentioned organizations to politically motivated organizations fighting against a certain government, terrorists and even to pirates.⁶⁵

The term *non-state actor* can and is therefore also applied to non-governmental groups who directly or indirectly engage in support of non-governmental combatants or are combatants themselves.⁶⁶ These groups can engage in non-international and purely internal conflicts,⁶⁷ or be involved in an international conflict such as that which international terrorist organizations have been known to be involved in, in recent years.⁶⁸

While the term *non-state actor* is very self-explanatory, the attributes they exhibit may not be as transparent, much less the attributes they conceal. Revealing these attributes and the nature of these subjects is of great importance. Thus it is imperative that the nature of non-state actors is explained and thus we return to the history of development in international law.

2.2 From an Interstate Era to an Era which Accepts the Non-State Actor

In order to understand the nature of non-state actors and the approach to which international law has taken on issues relating to these actors in the international community we turn to the recent development of international law, especially that of which relates to rules regarding conflict resolution and management.

As a conflict resolution mechanism, international law has many different ways of resolving conflicts and disputes between two or more states which are in disagreement. The UN Charter contains many provisions⁶⁹ on the subject and most available conflict management options aim at a resolution without the use of force by either party of the conflict. Nevertheless, some situations, where all other means have failed, do come up and when faced with such a situation there does exist, in some very limited situations, an

⁶⁵ Julie A. Mertus and Jeffrey W. Helsing: *Toward a More Integrated Approach*, pp. 520-521.

⁶⁶ M. Cherif Bassiouni: "The New War and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors", p. 715.

⁶⁷ M. Cherif Bassiouni: "The New War and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors", p. 715.

⁶⁸ S.V. Scott: *International Law in World Politics. An Introduction*, p. 82; Christopher C. Joyner. *International Law in the 21st Century. Rules for Global Governance*, p. 27.

⁶⁹ See for example, articles 1, 2, 11, 52, 99 and Chapters V, VI, VII and XIV of the UN Charter.

authorization for states to utilize force in order to resolve the conflict or avert a threat which the conflict creates.⁷⁰

However when dealing with a conflict or a dispute between a state and an armed or an aggressive non-state actor, international law does not possess in the same way, codified rules regarding the resolution or management of such disputes. This is partly because there is a lack or a void in the existence of conventions, treaties and customary law on this subject as an international problem. This is not to say that international law is completely silent on the subject of state and non-state actor relationship. Quite the contrary, international law has in many areas provisions on such a relationship, although most of them have emerged fairly recently. By 1949, international humanitarian law had begun to recognize the increasing relevance of non-state actors.⁷¹ At that point there seems to have been a shift in the focus of the law from a predominantly interstate structure mentioned in chapter 1.2., to another that recognizes the accumulation and exercise of power by non-state actors. An example of this shift is found in the Hague Conventions of 1899 and 1907 which provisions applied only to interstate conflicts, article 2 of the Fourth Hague Convention, entered into force 1910, stated that “*The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention*”⁷². The fact that International Criminal Tribunal of Yugoslavia (ICTY) later held in the *Tadic Appeal Decision* that these conventions have since evolved through customary law to apply equally to non-international conflicts,⁷³ shows there is a clear shift in the standards set forth in the Hague Conventions compared to, for example article 3 of the 1949 Geneva Conventions which expressly bind non-state actors to the same degree as state actors. This shift in the structure of the international legal system, from an interstate structure embracing states as the almost exclusive subjects of international law and individuals as mere objects of the law; to a system that recognizes non-state actors as a part of the international legal system with rights and responsibility, is not only evident within international humanitarian law but also other areas, such as in the area of human rights.⁷⁴ International human rights law and its rapid integration into the international community is a

⁷⁰ I. Brownlie: *Principles of Public International Law*, pp. 697-698.

⁷¹ Julie A. Mertus and Jeffrey W. Helsing. *Introduction. Exploring the Intersection between Human Rights and Conflict*, p. 15; John Cerone. *Holding Military and Paramilitary Forces Accountable*, p. 225.

⁷² John Cerone. *Holding Military and Paramilitary Forces Accountable*, p. 225, 233, 236; The Hague, October 18, 1907; T.S. 9 (1910).

⁷³ *Prosecutor v. Tadic*, Case IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction. 2 October 1995. Para. 86-93 [Tadic Appeal Decision].

⁷⁴ David P. Stewart: *Human Rights, Terrorism, and Efforts to Combat Terrorism. Commentary*, pp. 267-268; John Cerone: “Holding Military and Paramilitary Forces Accountable”, p. 224.

clear marker of the capability international law possesses to develop in response to evolving values of the international community. This community decided shortly after the Second World War to recognize that the protection of human dignity was a proper concern of international law, and in doing so created the 1948 Universal Declaration of Human Rights⁷⁵ (UDHR) and later instruments on various human rights issues for the protection of all individuals, thus turning the focus a little more in the direction of non-state actors. This new focus of international law represented a new era in which concern and attention was not only given to mere interstate relations but also to certain areas whereas domestic situation within the states that make up the international community was of interest to other, not because of state interest, but rather because of the interest of non-state actors.⁷⁶ In doing so it has added to the recognition of non-state actors in this dynamic system of law.

Although much progress has been made towards taking notice of the influence, presence and interests of non-state actors in international law, voids regarding rules relating to non-state actors are still identifiable in the legal system. An example of this is actually found in the progress of human rights law and its development. Although the emergence of human rights law turned the eyes of the international community towards issues which had not been given much weight in the community at the time, that of human rights, it did so in a state centric way, focusing on the need to protect individuals from abuse by governments and *state actors*.⁷⁷ While the threat of states committing gross human rights violations was of the greatest concern to the international community, recent developments have in the last decades has created realization of the fact that non-state actors *inter alia* terrorist groups, can also be responsible for these gross violations of the law. The international community responded to this fact, naturally, by considering that the state's inadequacy in protecting its citizens could result in a human rights violation in and of itself.⁷⁸ Such a response might in some instances be a solution; however it doesn't necessarily provide an adequate solution to non-state actors violating international law in all situations. The recent emergence of non-state actors which are of such scale and power that they overwhelm governmental authorities and are not affected by the *normal* criminal process of a domestic justice system is an example of a new

⁷⁵ UN Doc. A/810 (1948).

⁷⁶ David P. Stewart: *Human Rights, Terrorism, and Efforts to Combat Terrorism. Commentary*, pp. 267-268; John Cerone: *Holding Military and Paramilitary Forces Accountable*, p. 224.

⁷⁷ David P. Stewart: *Human Rights, Terrorism, and Efforts to Combat Terrorism. Commentary*, pp. 267-268.

⁷⁸ See as an example: ECHR *Osman v. United Kingdom*, Judgement of 28 October 1998; ECHR *McCann and Others v. United Kingdom*, Judgement of 27 September 1995.

situation which the international legal community needs to deal with, that of deciding appropriate actions available to states faced with such a dilemma.⁷⁹

2.2.1 Two Main Reasons Behind a Void in International Law Regarding Non-State Actors

The reason for the above mentioned void in international law is most likely based on two things. First of all it is related to the history of international law, discussed in chapter 1.2, which has primarily focused on interstate relationships, leaving most other issues to be classified as domestic issues irrelevant to international law, this view is still, and naturally so, the predominant view in international law.⁸⁰ Secondly, the very nature of non-state actors creates certain difficulties in codifying binding enforceable rules regarding the relationship, communication and conflict resolution and management between a state and a non-state actor.

Pertaining to the first reason for the void that of the historical emphasis on interstate interaction some developments have been made to close this gap; recent developments in international law have turned the international community from an era where interstate relationship were the primary and almost only area of international law, to an era where what happens inside states is regulated and monitored to a continuously larger extent by international law. The example mentioned above, that of human rights law is a very powerful one to depict this. After the UDHR was created various human rights conventions such as the 1966 International Convention on Civil and Political Rights (ICCPR)⁸¹ and the 1966 International Convention on Economic and Social Rights (ICESR)⁸² gave states a certain baseline to work within when dealing with individuals and groups within their territory as to ensure that basic human rights which all people should have would be granted to all. With the establishment of more international organizations founded by state consensus, such as the United Nations⁸³ and it's many organs, and the establishment of other international organizations such as the International Red Cross which work within many different states the once interstate community has slowly but surely accepted other subjects within its community. In some cases these organizations can bear rights and responsibilities under

⁷⁹ David P. Stewart: *Human Rights, Terrorism, and Efforts to Combat Terrorism. Commentary*, pp. 267-268.

⁸⁰ Antonin Cassese: *International Law*, p. 3-4.

⁸¹ Adopted at New York, 16 December, 1966. entered into force 23 March 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966).

⁸² Adopted at New York, 16 December, 1966. Entered into force 3 January 1976. GA Res 2200A (XXI) UN Doc. A/6316 (1966).

⁸³ Which would be classified as an intergovernmental organization rather than a non-state actor, but is mentioned for the purpose of showing the shift from a interstate community to a community that accepts other entities which are not literally a state; C. C. Joyner. *International Law in the 21st Century. Rules for Global Governance*, pp. 25-26.

international law and are subjected and bound by international law in a similar way states are.⁸⁴ And many of the bigger and more established organizations have a very specific structure and a tight relationship with other states, as they are not necessarily non-state actors as such, but rather government established organs. Nonetheless this void which is referred to is one that may be filling up, slowly but surely, as the above mentioned examples show.

The second reason for the apparent void in international law connects with the nature of non-state actors and pertains more or less to the non-state actors which are not in any way established or governed partly or otherwise by states. Here the situations gets complicated as some of the non-state actors do not necessarily have a certain structure allowing for diplomatic relations or other normal dispute management and resolution methods if conflicts arise, and sometimes even these non-state actor groups' motivation for certain acts or demands is unknown, allowing for very limited options for resolving the situation peacefully.

These non-state actors, such as groups of combatant, pirates and terrorists organizations generally pursue their goals, which are usually not legitimate, through unjustifiable illegal actions. In recent years this group of non-state actors has posed an increasing threat not only to the territory from which they operate, but also to other states.⁸⁵

Of course these non-state actors should follow and obey international law, such as international humanitarian law, human rights law and rules regarding the use of force, as well as applicable domestic law. But since that is not the case with the actions of violent groups, and because these groups can be very unpredictable, the international community now needs to view its structure and methods for resolving problems that are essentially connected with non-state actors from a new perspective. These non-state actors, which violate international law by means of aggressive and violent behaviour, need to be viewed as real threats to not only to the state from which they operate but to international peace and security in the world.

2.3 The Dilemma Concerning Threats Originating from Non-State Actors

As has been mentioned threats to the security of states have always existed, and they have historically either been of an interstate nature, where the threat originated from another state, an action such as an invasion, or a threat was of a purely internal nature only concerning the state in which the threat originated in, such as violent rebel groups opposing a government. In the modern international community a new type of threat has become increasingly more common. This is a threat originating from a non-state actor located in foreign territory. This

⁸⁴ Philippe Sands & Pierre Klein: *Bowett's Law of International Institutions*, p. 441.

⁸⁵ Ian Brownlie: *Principles of Public International Law*, pp. 713-714.

means that the threat is not a purely internal matter of the 'victim state' to which the threat is aimed at, but it isn't either a threat originating from an official action of another state.

These types of threats from non-state actors contain an international element, but because of the historical emphasis on interstate relations and state behaviour the void regarding rules on peaceful communications between non-state actors and states can create problems. The threats, demands and attacks from non-state actors can be aimed against one or more state in the international community, and if the attacker is located on foreign territory he might, to some degree and indirectly, be protected from the 'victim states' countermeasures by the rule of state sovereignty, which the state which he is located in, enjoys under the principle of sovereign equality. This becomes increasingly more complex in the modern world where an attack can be launched against a 'victim state' without the attacker ever having to be physically present in the state in which the attack occurs in. Such an attack does not even have to be of a typical military nature but can be as simple as an attack executed via a computer.⁸⁶ Such an attack could be aimed at the defence system of a state or some important internal structures of the state as well as merely targeting private corporations or groups.⁸⁷ Some scholars have even suggested that such an attack could constitute an armed attack in accordance with article 51 of the Statute of the United Nations if the results of such an attack would result in the death of persons.⁸⁸ Non-state actors can therefore be considered to pose a threat to the security of states which they have never set foot upon.

2.4 The Question of Attribution

Many examples exist of non-state actors which have threatened or attacked a state.⁸⁹ In addition there are also incidents of where non-state actors' actions are attributable directly or indirectly to a state. Here an important distinction has to be made between non-state actors acting on behalf of or with the acquiescence of a state and non-state actors acting independently. The methods available for a 'victim state' to respond to such threats from non-state actors may differ depending on whether or not the actions are attributable to a state. Thus rules governing the resolution of such a situation where attribution is obvious would usually follow the basic rules governing interstate relations but depending on the connection

⁸⁶ Yoram Dinstein: "Computer Network Attacks and Self-Defense", p. 99; Yoram Dinstein: *War Agreesion and Self-defence*, p. 196.

⁸⁷ Yoram Dinstein: "Computer Network Attacks and Self-Defense", p. 106.

⁸⁸ Yoram Dinstein: "Computer Network Attacks and Self-Defense", p. 105; Yoram Dinstein: *War Agreesion and Self-defence*, p. 196.

⁸⁹ Such as the 1988 bombing of Pan Am Flight over United Kingdom, 1998 attacks on the United States embassies and the atrocities of 9/11.

between a non-state actor and a state, different rules may apply. The question of state attribution of a non-state actor's attack will be addressed in more detail in Chapter 5.4. Future references to non-state actors will refer to non-state actors whose actions are generally non-attributable to a state, unless otherwise specifically mentioned.

2.5 Examples of Non-State Actors which may Constitute a Security Risk

The non-state actor that attacks a state or threatens its security is usually a non-state armed group or a group which constitutes irregulars or includes combatants. These groups could in some cases be identified as a terrorist group, rebel group, group of pirates and in some cases even classify themselves as freedom fighters.⁹⁰

Most of these groups include individuals who could be classified as combatants. These groups can take variety of forms and can be classified on basis of formation and structure, motives, actions etc. it has been proposed that most non-state actors may be classified into the one of the following five groups:

- Regularly constituted groups of combatants with military command structure and a political structure.
- Non-regularly constituted groups of combatants with or without a command structure and with or without a political hierarchical structure:
- Spontaneously gathered groups who engage in combat or who engage in sporadic acts of collective violence with or without a command structure and with or without political leadership;
- Mercenaries acting as an autonomous group or as part of other groups of combatants; and
- Expatriate volunteers who engage for a period of time in combat or in support of combat operations, either as a separate units or as part of duly constituted or ad hoc units.⁹¹

This is not an exclusive list and many other variations may be out there, but this list is a comprehensive one and gives a rough idea about what types of non-state actor groups exist. In addition to the groups above it should be born in mind that some parts of the group identified as a non-state actor attacker is not necessarily directly connected to participation in violence. A non-state actor may be involved in the financing or supporting an above mentioned group

⁹⁰ Antonin Cassese: *International Law*, p. 449.

⁹¹ M. Cherif Bassiouni: "The New War and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors", pp. 715-716.

in one way or another without actually being a combatant and still be considered a non-state actor aggressor under international law.⁹²

As can be identified from the list, non-state actors can be of many sorts and naturally their structure, size and location *inter alia* will influence what available counteractions a state can respond with when faced with a threat.

Three examples will be given of non-state actor groups which have been known to affect the security of states outside their territory of main operation, and the suggested categorization of the groups will be applied to the examples.

2.5.1 Example A: Allied Democratic Forces

Between 1997 and 2003 there was considerable instability in the eastern part of the Democratic Republic of Congo (DRC), which *inter alia* borders Uganda.⁹³ This instability in the region was due to many reasons for example, bad transportation infrastructure and long distances from the main areas of the country, making the control of the region difficult for the government of DRC.⁹⁴ Thus various armed groups used this region as a base camp and sanctuary, these groups, opposition groups, not only fought the government of DRC, but also those of neighbouring countries such as Uganda.⁹⁵ The attacks and the situation surrounding them were the basis of a case before the ICJ.⁹⁶ One of these groups, which the court deemed to have committed certain attacks on Ugandan territory, was the so-called Allied Democratic Forces (ADF). The ADF was a group which the DRC claimed to be responsible for several attacks on Ugandan territory and it is a good example of a non-state actor which poses a security threat to another state, as the ADF allegedly did pose a security threat to Uganda. The ADF would most likely fall under the first group, being a regularly constituted group of combatants with a military structure and a political structure. This alliance was estimated to have around 40.000 troops available, many of whom had received military training and it had a highly political aim to overthrow the Mobutu government in the DRC, it however was dissolved April 1999.⁹⁷

⁹² UN Doc. S/RES/1373 (2001).

⁹³ Jörg Kammerhofer: "The *Armed Activities* Case and Non-state Actors in Self-Defence Law", pp. 90-91.

⁹⁴ Jörg Kammerhofer: "The *Armed Activities* Case and Non-state Actors in Self-Defence Law", pp. 91.

⁹⁵ Jörg Kammerhofer: "The *Armed Activities* Case and Non-state Actors in Self-Defence Law", pp. 91.

⁹⁶ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, 19 Dec 2005, <www.icj-cij.org> [*DRC v Uganda*]. The judgement regarding the issue of self-defence against non-state actors will be examined in chapter 5 of this essay.

⁹⁷ Uppsala Conflict Data Project Website, <http://www.pcr.uu.se/gpdatabase/search.php>

2.5.2 Example 2: Somali piracy

Another example of a non-state actor posing threat to the security of a state, one which has recently gained a new status is pirating. Although pirates are usually not considered to threaten a state or the national security of states, recent developments of the coast of Somalia have resulted in a UN Security Council resolution 1816(2008)⁹⁸ determining the pirate activities a threat to the international peace and security, confirming that threats from non-state actors can be of such proportion to constitute a security risk to the international community even though it generally is considered a mere criminal act on the high seas. The pirates operating around the waters in Somalia are though, contrary to the first example of the ADF, not considered to be operating as one structured group or organization. Rather the pirates share more commonality with “common thugs” who make use of weaponry and boats to kidnap individuals and rob ships. Pirates may be classified as belonging to the third category mentioned earlier, that of being a spontaneously gathered group that engages in occasional acts of collective violence without a command structure and without political leadership.

2.5.3 Example 3: Terrorism – Al Qa’ida

In today’s society terrorism is considered to be one of the greatest threats to international peace and security in the world.⁹⁹ One of these groups, which are accountable for terrorist activities, is an international terrorist organization or network known as Al Qa’ida, sometimes also referred to as Al Qaeda or Al Qaida.¹⁰⁰ This is a formally organized group¹⁰¹ of approximately 3000 individuals thought to be operating in over 60 countries of the world and is led by Usama bin Laden.¹⁰² The group, which was founded in 1988, has today a main aim of expelling western ideas from the Middle East, and it does do by committing violent acts and threatening western countries with emphasis on the United States as some sort of enemy.¹⁰³ Although it has been thought that the terrorist network has been receiving financial support from the governments of Sudan, Afghanistan and Iran, analysts say that the group has

⁹⁸ UN Doc. S/RES/1816(2008).

⁹⁹ Javaid Rehman: *International Human Rights. A practical Approach*, p. 437.

¹⁰⁰ Uppsala Conflict Data Project webpage, <http://www.pcr.uu.se/gpdatabase/search.php>; Global Security, <http://www.globalsecurity.org/>.

¹⁰¹ Although it has been thought that the group is becoming increasingly decentralized in the aftermath of 9/11 attacks on the United States.

¹⁰² Uppsala Conflict Data Project webpage, <http://www.pcr.uu.se/gpdatabase/search.php>; Christopher C. Joyner: *International Law in the 21st Century, Rules for Global Governance*, p. 27.

¹⁰³ Uppsala Conflict Data Project webpage, <http://www.pcr.uu.se/gpdatabase/search.php>; Global Security, <http://www.globalsecurity.org/>.

mainly relied on non-state organization funding.¹⁰⁴ Al Qa'ida is the terrorist network that has been found to be responsible for several incidents of terrorist activities and attacks, most famously the 1998 bombings on United States embassies, and the *9/11 attacks* on the United States.¹⁰⁵ It does therefore not come as a surprise that this group has been labelled a terrorist organization by the UN Security Council, NATO's Secretary General and governments.¹⁰⁶ As the group is thought to have some inner structure and even training facilities, it is not unreasonable to put it in the same or similar category as the ADF group mentioned earlier, that of being a regularly constituted groups of combatants with military command structure and a political structure, although some part of this organization, might today, because of decentralization be of a slightly different nature.

2.5.4 Non-State Actor – Almost Any Structure

As these examples show a non-state actor can be of almost any structure. In this thesis, special attention will be given to non state actor groups classified as terrorist groups and pirate groups, which have been identified as a fairly recent security risk to the international community in the 21st Century.

2.6 Terrorism in the 21st Century

Probably the most easily identifiable and most used example of a non-state actor threat today is the terrorist group or terrorist cell. In an increasingly tighter international community, which allows for very open travels, terrorism has risen to the international level, and to such a level that terrorism is in many instances considered a threat to international peace and security, and has been so determined that by the UN Security Council.¹⁰⁷ The Council has numerous times urged its member states to take action against terrorism, emphasizing the reality of this threat to the international community.¹⁰⁸

Terrorism is by no means a new concept in terms of law, however it is a complex one as no consensus has yet been reached regarding its definition under international law.¹⁰⁹ The

¹⁰⁴ Uppsala Conflict Data Project webpage: <http://www.pcr.uu.se/gpdatabase/search.php>.

¹⁰⁵ Christopher Greenwood: "International Law and the 'war against terrorism'", p. 303; Yoram Dinstein: *War, Aggression and Self-Defence*. p. 31.

¹⁰⁶ See the following: UN Doc. S/RES/1822 (2008); The NATO website, "Press Conference": <http://www.nato.int> 22 November 2001 (accessed 24th of April 2009); The US Department of State webpage, "Foreign Terrorist Organizations" <http://www.state.gov>; Australian National Security Website, "Listing of Terrorist Organizations", <http://www.nationalsecurity.gov.au/>.

¹⁰⁷ UN Doc. S/RES/1373(2001) ; UN Doc. S/RES/1566 (2004).

¹⁰⁸ UN Doc. S/RES/1189(1998) ; UN Doc. S/RES/1373(2001).

¹⁰⁹ Antonin Cassese: *International Law*, p. 449; Malcolm N. Shaw: *International Law*, pp. 1048-1049.

most popular definitions of terrorism regards it as violent acts aimed against a state and/or that in some way threatens the security of a state most often with a politically motivated purpose. Thus one of the earliest and most prominent definitions of terrorism was advanced through the 1937 Convention for the Prevention and Punishment of Terrorism.¹¹⁰ That convention concluded in Article 1(2) that acts of terrorism meant “*criminal acts directed against a State intended or calculated to create a state of terror in the mind of particular persons, or a group of persons or the general public.*” Although over a 100 definitions of terrorism have been proposed since 1937,¹¹¹ this definition does in many aspects capture the essence of terrorism in the regard that it is most often aimed against a state, and if not against a state it most certainly does harm or threaten to harm the general security of the state as it can be intended to create a state of terror in the minds of the general public. It is important to realize that international law does not contain one definition which is universally agreed upon; the concept is therefore essentially a contested one, although the main characteristics of terrorism are usually agreed upon.¹¹² One of the reasons why there exists a disagreement of what the term terrorism entails is that some groups claim it has been used as a political label to de-legitimize one’s opponents.¹¹³ Israel has been referenced in this aspect where Israel’s labelling of Palestinians who bomb civilian targets as terrorists is criticized, although certain organizations within Israel might by the Palestinians likewise be considered and proclaimed to be terrorists groups.¹¹⁴ Not focusing on the specifics of this disagreement there are a few elements of the definition of terrorism which are important to note and are, as stated above, usually agreed upon.¹¹⁵

1. Terrorism is politically motivated violence
2. It is conducted by non-state actors
3. It achieves its aims by creating fear in society.¹¹⁶

These elements are important to have in mind for our purposes because they clarify that terrorists do pose a threat and a security risk to a state as they commit violence and try to create fear in society with political means, referring to the fact that the attacks, although they might be aimed at non-combatants and civilians, are in essence targeted against the state,

¹¹⁰ Javaid Rehman: *International Human Rights Law. A Practical Approach*, p. 441.

¹¹¹ Javaid Rehman: *International Human Rights Law. A Practical Approach*, p. 441.

¹¹² Antonin Cassese: *International Law*, pp. 449-450, 463.

¹¹³ Alex J. Bellamy: “Is the War on Terror Just?”, p. 283.

¹¹⁴ Alex J. Bellamy: “Is the War on Terror Just?”, p. 283.

¹¹⁵ Alex J. Bellamy: “Is the War on Terror Just?”, pp. 283-284; Antonin Cassese: *International Law*, pp. 449-450, 463.

¹¹⁶ Alex J. Bellamy: “Is the War on Terror Just?”, p. 283-284.

sometimes in a political way, pressuring the government. Also, very importantly, terrorists are non-state actors, meaning that they do not in and of themselves represent a sovereign state. Thus the very nature of terrorism and terrorist acts leads to the fact that they are not automatically attributable to any state.

This in turn is consistent with what is sometimes referred to as UN's acceptable definition of terrorism which was laid down by the UN General Assembly in its resolution 49/60 1994.¹¹⁷ In paragraph 3 of that resolution it is stated that: *Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.*¹¹⁸ This provision according to Antonio Cassese sets out an acceptable definition of terrorism.¹¹⁹ This is furthermore the working definition which the UN Security Council recalls in paragraph 3 of its resolution 1566 (2004)¹²⁰ regarding threats to international peace and security caused by terrorist acts. Finally, this definition agrees to the three elements of terrorism described above.

Many groups such as the Hamas in Palestinian, the Northern Irish Catholics and the Tamil Tigers have been identified as terrorists in accordance with the above mentioned definitions, without these groups necessarily affecting the international community *per se*, because these groups work mostly within the state in which they exist, posing limited or no threat to other states.¹²¹ Although terrorism, according to this definition is a serious crime, it does not necessarily constitute a crime which affects the international community *per se* and is usually considered to be a criminal offence which ought to be dealt with by national courts of law.¹²² Therefore, there needs to be made a distinction between domestic terrorism and international terrorism, sometimes called modern terrorism.¹²³ While international law addresses both forms of terrorism, it seeks to regulate directly only international terrorism, but in the absence of a clear definition; it is hard to draw boundaries between the two types.¹²⁴ To complicate things, certain types of terrorism may be classified as a hybrid form, where the actions are taken domestically, while receiving financial support via foreign channels.¹²⁵ In

¹¹⁷ UN Doc. A/RES/49/60 (1996).

¹¹⁸ UN Doc. A/RES/49/60 (1996).

¹¹⁹ Antonin Cassese: *International Law*, p. 449.

¹²⁰ UN Doc. S/RES/1566 (2004).

¹²¹ Javaid Rehman: *International Human Rights Law. A Practical Approach*, p. 440.

¹²² Geir Ulfstein: "Terrorism and the Use of Force", p. 153.

¹²³ "Counter-Terrorism Strategies, Human Rights and International Law: Meeting the Challenges", p. 573.

¹²⁴ "Counter-Terrorism Strategies, Human Rights and International Law: Meeting the Challenges", p. 573.

¹²⁵ "Counter-Terrorism Strategies, Human Rights and International Law: Meeting the Challenges", p. 573.

any case, it has to be born in mind that even though some form of terrorism would be considered domestic terrorism it can still be considered to be a threat to international peace and security, thus allowing for certain actions to take place under UN Security Council observations or other international measures.¹²⁶

Terrorism is categorized as an international crime; here a clear distinction has to be made between the term *international crime* and the concept of *international terrorism*.¹²⁷ The categorization of *international crime* doesn't in any way negate the above mentioned fact that, in general, the national courts of a state should be the presiding body to deal with terrorism; the classification is rather presented to appropriate correct judicial jurisdiction over the criminal aspect of terrorism, meaning that more than one state can usually claim judicial jurisdiction over a crime of terrorism. This classification further puts terrorism under the same definition as war crimes, crimes against humanity, genocide, torture and aggression, underlining that it is a very serious international crime.¹²⁸ This comes from the fact that terrorist acts are essentially a violation of customary law or treaty rules.¹²⁹ Although there doesn't exist a universal treaty covering all kinds of terrorist acts, many attempts have been made to reach a consensus and a number of multilateral treaties covering specific types of terrorist acts do exist.¹³⁰ These rules, in addition to numerous resolutions which the UN General Assembly and the UN Security Council have passed on this issue,¹³¹ confirm that terrorism is correctly categorized as an international crime. The legal affect of this categorization is primarily found in the fact that captured terrorists may be subjected to universal jurisdiction, meaning that the alleged individual may be prosecuted and punished by any state, regardless of the perpetrator's or victim's.¹³²

There exist numerous multilateral treaties targeting specific terrorist acts such as the 1970 Hague Convention on the suppression of unlawful seizure of aircraft,¹³³ regarding the hijacking of aircrafts; the 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents,¹³⁴ regarding attacks on internationally protected persons; the 1979 Convention against taking hostages;¹³⁵

¹²⁶ "Counter-Terrorism Strategies, Human Rights and International Law: Meeting the Challenges", p. 573.

¹²⁷ Antonin Cassese: *International Law*, pp. 436, 463.

¹²⁸ Antonin Cassese: *International Law*, p. 436.

¹²⁹ Antonin Cassese: *International Law*, p. 436.

¹³⁰ Antonin Cassese: *International Law*, p. 465.

¹³¹ UN Doc. A/RES/3034(XXVII) ; UN Doc. A/RES/49/60 (1996) ; UN Doc. A/RES/1373 (2001).

¹³² Antonin Cassese: *International Law*, p. 436; Rebecca M.M. Wallace: *International Law*, p. 121.

¹³³ 10 I.L.M. 133 (1971).

¹³⁴ 13 I.L.M. 41 (1974).

¹³⁵ 18 I.L.M. 1456 (1979).

the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, of 10 March 1988, with a Protocol on the safety of fixed platforms located on the continental shelf, regarding hijacking of ships;¹³⁶ the 1998 International Convention for the suppression of terrorist bombings and the Convention on terrorist bombings, of 15 December 1997,¹³⁷ regarding the delivering, placing, discharging or detonating of an explosive or other lethal device; and finally the International Convention for the Suppression of the Financing of Terrorism, of 9 December 1999, regarding the financing of terrorism.¹³⁸ All these treaties aim at international co-operation in regard to the suppression of terrorist activities and in what ways states should respond to terrorist acts or threats. In addition to these treaties, many other treaties exist which address the subject of terrorism and states response to it, such as bilateral treaties on extradition and co-operation between judiciaries, as well as treaties regulating the conduct of armed conflicts, such as the Fourth Geneva Convention of 1949 and the two 1977 Additional Geneva Protocols¹³⁹ which contain provisions protecting civilians and banning terrorist attacks.¹⁴⁰ Although these treaties contain some provisions on how states should respond to terrorist activities, they mainly aim at co-coordinating national judicial measures, to ensure that terrorist are brought to justice somewhere so that states cannot just allow them to go scot-free.¹⁴¹

In the recent years, a slow but steady increase in awareness of ‘international terrorism’ has emerged reaching a high in the tragic *9/11 attacks* against the territory of the United States in the year 2001.

According to estimates from 2004, at least 350 transnational terrorist groups and individuals were thought to be operating in the United States, among them 36 groups were designated as foreign terrorist organizations.¹⁴² The probably best known terrorist group operating today is the Al-Qa’ida which was shortly mentioned in Chapter 2.5.3 and consists of a global network of trained militants who are established in at least seventy six states.¹⁴³ These numbers establish the fact that terrorism has truly reached an international level where the threat from a terrorist group must be taken seriously. When account is taken of the numerous Security Council resolutions which exist on the topic of terrorism, there is no doubt

¹³⁶ 1678 U.N.T.S. p. 221.

¹³⁷ UN Doc. A/52/164.

¹³⁸ Antonin Cassese: *International Law*, p. 466.

¹³⁹ 75 U.N.T.S. p. 31; 1125 U.N.T.S. p. 3; 1125 U.N.T.S. p. 609

¹⁴⁰ Antonin Cassese: *International Law*, p. 466.

¹⁴¹ Antonin Cassese: *International Law*, p. 466.

¹⁴² Christopher C. Joyner: *International Law in the 21st Century. Rules for Global Governance*, p. 27.

¹⁴³ Christopher C. Joyner: *International Law in the 21st Century. Rules for Global Governance*, p. 27.

that the act of terrorism committed by non-state actors indeed can be and is considered to be a threat to international peace and security.

2.7 Piracy and Maritime Terrorism in the 21st Century

Terrorism on the sea, often referred to as Maritime Terrorism,¹⁴⁴ and piracy are two separate distinguishable crimes within the legal community in a sense that Maritime Terrorism is conducted in order to pursue or achieve political ends while piracy is conducted to achieve private ends.¹⁴⁵ Both however pose considerable risk towards the international community and have been addressed by international conventions. While Piracy has been defined more readily in international convention, attempts have been made to define Maritime Terrorism as well. The Council for Security Cooperation in the Asia Pacific's (CSCAP) working group has offered a definition for Maritime Terrorism: “...*the undertaking of terrorist acts and activities within the maritime environment, using or against vessels or fixed platforms at sea or in port, or against any one of their passengers or personnel, against coastal facilities or settlements, including tourist resorts, port areas and port towns or cities*”¹⁴⁶ as Chapter 2.6 describes, the term terrorism has not yet reached a status of universal acceptance within the international community, thus this proposed definition of maritime terrorism does not attempt to define the acts of terrorism themselves.

On the other hand piracy does have an accepted definition found in article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which states that:

- (a) “any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i.) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii.) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b).”¹⁴⁷

The definition of piracy is a general definition under public international law and applies to acts committed by individuals for private ends against a private ship or aircraft.¹⁴⁸ The act is not limited to participation in piracy but extends to inciting or intentionally facilitating such

¹⁴⁴ Javaid Rehman: *International Human Rights Law. A Practical Approach*, p. 459.

¹⁴⁵ Javaid Rehman: *International Human Rights Law. A Practical Approach*, p. 459.

¹⁴⁶ Maritime Terrorism Research Center, <http://www.maritimeterrorism.com/definitions/>.

¹⁴⁷ Art. 101 of the 1982 Convention on the Law of the Sea.

¹⁴⁸ *United Nations Convention on the Law of the Sea 1982, A Commentary. Volume III*, p. 196-197.

acts.¹⁴⁹ The definition closely follows and is consistent with older definitions of piracy such as article 39 in the 1956 International Law Committee's (ILC's) draft articles on the law of the sea and article 15 of the 1958 Convention on the High Seas.¹⁵⁰ A pirate can according to this general definition be known as a *hostis humani generis*, i.e. an enemy of all mankind.¹⁵¹ This in turn, justifies the reason for the universal jurisdiction states are given when faced with acts of piracy as well as why the international community is concerned with eradicating piracy in the world.

Pirates are, according to this definition, non-state actors. This is established by the fact that these actors, first of all, commit their acts for private ends or private gain. This is important as to establishing the fact that their acts are in no way committed for the gain of a certain state, not even for a political motive, leading to the fact that there is no connection between a certain act and a state. Secondly, piracy is committed by a crew or passengers of a *private ship or a private aircraft*. This provides for the fact that piracy cannot be committed by a crew of a government ship or aircraft or a warship thus there is no connection to be found between the pirate actors and a state. There exists however an exception to this rule found in article 102 of UNCLOS which states:

The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.¹⁵²

This article provides therefore for the possibility that a warship or government ship or aircraft can be subject to seizure under article 105 of UNCLOS without the immunities acknowledged by articles 95 and 96 of UNCLOS to shield it from article 105.¹⁵³ The wording *taken control* is highly important, to distinguish between the vessel being controlled by a state or a government, thus being allowed certain immunities under international law as the vessel is carrying out the tasks of the state, and that of a vessel being controlled by individuals, crew members that have mutinied and *taken control* of the vessel, thus the vessel is no longer carrying out the will of the state and its actions are non-attributable to the state. In situations that article 102 describes it must be considered, although the vessel is a warship, that any piracy act committed by the crew of such a ship is to be deemed an act by a non-state actor.

¹⁴⁹ *United Nations Convention on the Law of the Sea 1982, A Commentary. Volume III*, p. 197.

¹⁵⁰ *United Nations Convention on the Law of the Sea 1982, A Commentary. Volume III*, p. 197-198; 45; U.N.T.S. 82 (1958).

¹⁵¹ Ian Brownlie: *Principles of Public International Law*, p. 229.

¹⁵² Article 102 of the 1982 Convention.

¹⁵³ *United Nations Convention on the Law of the Sea 1982, A Commentary. Volume III*, p. 205.

The definition found in UNCLOS includes three very important distinguishing factors between acts of terrorism, such as maritime terrorism, and acts of piracy. The first important factor is that piracy needs to take place on the high seas, not within the territorial sea of a state which otherwise would have the jurisdiction over crimes committed within that area. Maritime terrorism does not have any such limitation, because terrorism is not limited to an act taking place outside or inside any specific area. This definition of the pirate acts, that they need to take place on the high seas, does not preclude piracy within internal waters or the territorial sea of states, but it merely distinguishes between piracy which concerns the international community and allows the international community to intervene according to UNCLOS, and acts of piracy that only affect the internal matters of a state. Nonetheless, on the high seas piracy can, as will be discussed in Chapter 5.2.1 affect international security and the security of particular states if, for instances, a particular flag state is continually the victim of pirate attacks.

The second limitation is the fact that piracy is always committed for private ends, not for a political end or as a political statement, as is usually one of the defining factors when examining acts which may be categorized as terrorism. Although both of these acts are committed for private ends in the sense that neither terrorism nor piracy is committed for the benefit of a particular state or government, the act of piracy is done for the personal gain of those committing it, usually for the purpose of gaining monetary value. Terrorism, however, although it is usually committed for the gain of a particular group, is by its popular definition politically motivated, thus not motivated as such for monetary gain of the individuals committing the offence.

Lastly, a pirate attack needs to be aimed at another ship or an aircraft or the persons or property on board it. Although different treaties that address the issue of terrorism may be limited in scope to a specific target or a specific area, the general definition of terrorism is not bound by restraints such as these. In addition, these distinguishing traits, which need to be fulfilled in order for an attack to conform to the definition of piracy, require that at least two vessels engage, a pirate vessel and a victim vessel. This also explains why the *Santa Maria in 1961* and *Achille Laura in 1985* incidents were not acts of piracy but rather hijacking as these were attempts by passengers to gain control of the vessels.¹⁵⁴ The latter incident, *Achille Lauro* prompted the international community to take concrete actions as regards the formulating binding standards for the protection of ships from terrorists, leading to the

¹⁵⁴ R.R. Churchill and A.V. Lowe: *The Law of the Sea*, p. 210.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted in Rome in 1988.¹⁵⁵

Although this distinction between maritime terrorism and piracy can be made, both of these grave crimes have been addressed by the international community as a serious threat to the security of states. In addition, both of these crimes need to be, by their own definition, committed by non-state actors. While terrorism seems wider spread than piracy, piracy is a very serious problem which seems to be more common in certain areas of the world such as south-east Asia, South America and Africa, and in the Mediterranean and the Indian Ocean, and is under constant consideration by the International Maritime Organization (IMO).¹⁵⁶ While piracy has, in the 20th century, not been found to be a very common threat to the security interests of many states, recent events in the 21st century, which will be discussed further in Chapter 5.2.1, suggest that the international community views these acts as an increasingly more dangerous threat to states than ever before.

2.8 Special Circumstances of State Sponsored Terrorism

The concept of state sponsored terrorism is very interesting but at the same time difficult and needs to be addressed in a thesis regarding non-state actors. Since terrorism is generally considered to be a non-state actor act, how does the nature of terrorism change when it is state sponsored? Does it become an official act of a state, invoking rules regarding the use of force? Another question, also important to address is, when does terrorism become state sponsored? Is it when a state supports terrorist groups directly via financial and logistical means or is simple acquiescence of terrorist operations within the state borders sufficient?

In order to approach this subject it becomes necessary to look towards incidents which have generally been categorized as state sponsored terrorist acts. Thence, an attempt will be made to answer the above mentioned questions especially with regard to determining whether this concept changes in any way the basic non-state nature of the crime of terrorism, to an extent that will affect the outcome of this study. It should be noted that all of the incidents addressed in this section will be examined in greater detail in Chapters 4 and 5.

As the concept of state sponsored terrorism itself entails, it deals with terrorism, which by its nature is not committed by state actors. The concept includes the description of a state being a sponsor, not a direct participant but a sponsor of the terrorism. This does correspond with the discussion presented earlier in this section of the thesis, pertaining to the non-state

¹⁵⁵ Javid Rehman: *International Human Rights Law. A Practical Approach*, p. 459.

¹⁵⁶ R.R. Churchill and A.V. Lowe: *The Law of the Sea*, p. 209.

actor nature of terrorism. If terrorism would be committed by military officials in official capacity it would cease to be classified as terrorism. To better understand this concept of state sponsoring, treaty law needs to be referred to as it gives some evidence as to situations which may amount to state sponsoring of illegal activities, without those same activities being directly performed by state actors. In the UN General Assembly's Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations from 1970,¹⁵⁷ a consensus was reached regarding the legal interpretation given to the principles enunciated in the UN Charter, especially with regard to the prohibition on the use of force.¹⁵⁸ This non binding resolution has addresses certain situations where a state can be found to have illegally used force without actually sending its own military personnel over an international border. The Declaration includes the following examples where it is proclaimed that every state has the duty to refrain from:

...encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts involve a threat or use of force.¹⁵⁹

These statements shed light on the fact that although a state may not itself be the attacker, it can be found equally guilty of using force if it is involved through secondary means of supporting the acts. In addition, UN Security Council resolutions have addressed this issue of state sponsoring or providing safe haven to terrorists and urged states to not take part in such unlawful activities.¹⁶⁰

State sponsoring of terrorism opens up the issue of attribution, which will be addressed in Chapter 5.5 of this thesis. But this attribution becomes very important as to the question of against whom countermeasures and remedies, which a 'victim state' needs to resort to, should be aimed.

3. When does a State become a 'Victim State'?

Referring to a 'victim state' or a 'state victim' is by no means a new concept, and is fairly self-explanatory. However, in the context of this thesis the concept 'victim state' should be

¹⁵⁷ UN Doc. A/RES/2625 (XXV).

¹⁵⁸ Rebecca M.M. Wallace: *International Law*, p. 279.

¹⁵⁹ Article 1 in UN Doc. A/RES/2625 (XXV).

¹⁶⁰ UN Doc. S/RES/1373 (2001).

defined and addressed. It is a state that has a need to defend itself, take defensive measures or utilize other international remedies against a non-state actor after suffering an attack or a threat of an attack against its citizens, sovereignty or in other ways the security of the state.

A critical factor in determining what legitimate actions a state which is threatened or attacked by a non-state actor can resort to, is to identify under which circumstances such a state can be considered a 'victim state'. For the purpose of this study, it is necessary to establish a guideline, or a definition, to decide when an attack or a threat of an attack from a non-state actor is of such scale or of such nature as to preclude the threatened state from resorting to purely domestic actions in protecting its security, thus making it a 'victim state' within the international community. The aim of this chapter is therefore to establish under which circumstances a state under such a threat is to be considered a 'victim state' and needs to resort to actions of an international nature to defend itself. There are of course infinite possibilities of scenarios which could allow for a state to be considered a 'victim state' to a non-state actor. Guidelines will, however, be given to describe a minimum baseline. The baseline presented in this chapter is not, as such, the only requirement needed to be fulfilled in order for a state to resort to the right of self-defence, as there are specific requirements that should be fulfilled in order for a state to be allowed to claim self-defence. Those requirements will be dealt with specifically in Chapter 5 of this thesis. In a similar way, very special circumstances may result in a state being classified as a 'victim state' without necessarily fulfilling the proposed requirements laid out in this thesis. This chapter will be giving a non-case specific prerequisite that, if fulfilled, will give the indication that a state is to be considered a 'victim state' in a conflict of an international character with a non-state actor.

3.1 The Four Prerequisites of a 'Victim State'

The recent developments in international law which this thesis examines are the shift in the international community with respect to the entity that poses a threat to the security of a state, from being that of a foreign state to originating from a non-state actor. Since it is generally an action itself, rather than the entity which carries out the action that determines whether or not someone or something has become a victim, the same or at least similar test should be applied when defining when a state can be classified as a 'victim state' whether the attacker is a state or a non-state actor. For such a situation to arise, the first requirement is that there has been a breach of international law. The second is that this breach of international law affects or threatens the security of a particular state or states and its citizens. Thirdly, the threat or attack

must originate from a non-state actor. Finally, that the attacks and/or the attacker is of an international character.

3.1.1 Breach of International Law - Aggression

Historically, states have been fairly quick to recognize at what point they can be considered 'victim states', and some instances are clear examples of that, such as an invasion, while others may not be as clear. Before modern technology was invented, conflicts between states or aggression between states was fairly obvious, as usually it related to the use of force by one state on the sovereign territory of the 'victim state'. In today's modern society situations may arise where things become more unclear, as technology has allowed for various threats to emerge which were non-existent in the early stages of international law. An example of this would be that of long-ranging missiles.¹⁶¹ If a state is threatened with a long-ranging missile, already launched against it, many would consider that state a 'victim state', even though the missile may not have reached its destination.¹⁶² Even computer attacks against a state may be of such a scale and nature that the state could be considered a 'victim state'.¹⁶³

Looking at the general rules regarding international law, there exists an area of rules regarding international wrongful acts and state responsibility.¹⁶⁴ The rules regarding state responsibility merely explain when a state can be considered responsible for an internationally wrongful act. However, the rules regarding internationally wrongful acts would, in our case, help decide whether or not a state can be considered a 'victim state' of a non-state actor.

The concept of international wrongful acts is in its most general form a reference to any act of a state where the state has violated an obligation imposed on it by an international rule.¹⁶⁵ Whether the rule is derived from customary international law or treaty law does not matter, only that an international obligation exists. In those instances a state which has been affected or injured is entitled to resort to certain actions in order to remedy the wrong, impel the delinquent or penalize the state.¹⁶⁶ These remedies can take the form of non-forcible measures under customary international law or they can be specific under a treaty. In addition forcible measures are sometimes available, such as in the cases of armed attacks under article 51 of the UN Charter.

¹⁶¹ Yoram Dinstein: *War, Aggression and Self-Defence*, pp. 188-190.

¹⁶² Yoram Dinstein: *War, Aggression and Self-Defence*, pp. 188-190.

¹⁶³ Yoram Dinstein: *War, Aggression and Self-Defence*, p.196.

¹⁶⁴ UN Doc. A/56/10 (2001).

¹⁶⁵ Antonin Cassese: *International Law*, pp. 241-243.

¹⁶⁶ Antonin Cassese: *International Law*, p. 242.

One example of an internationally wrongful act is the use of force which is prohibited both in treaty law as well as in customary international law.¹⁶⁷ Sometimes though using force may be justifiable under the principle of self-defence, and this applies equally to other actions which generally would be considered an internationally wrongful act. They may be justified under another principle of international law.¹⁶⁸ In those circumstances the state has not committed an internationally wrongful act and should incur no penalty of any sort because of that action.¹⁶⁹ Therefore, one of the requirements of an internationally wrongful act is that no justification exists under international law concerning the actions taken by the wrongdoer.

But can other entities besides states do wrong under international law? Yes, there are areas where for example individuals have been held liable under international law. Among these are those who commit piracy, war crimes, grave breaches of humanitarian law, and even aggression.¹⁷⁰ Under the Statute of the ICC,¹⁷¹ individuals can today generally be considered responsible as criminals for certain breaches of international rules. Another example is that of international humanitarian law which not only obligates states to honour international humanitarian law but also non-state actors which are a part of the conflict.¹⁷² In addition, with reference to the development of non-state actors under international law, it has to be considered that non-state actors can violate obligations imposed by international rules, and must therefore, in those instances be open to face the consequences, which most often will comprise of criminal proceedings within the country where the violation occurred, or before an international tribunal such as happened in the Nüremberg Trials¹⁷³ or the trials before the International Criminal Tribunal for the Former Yugoslavia.

Regardless of whether such a situation is dealt with locally or internationally,¹⁷⁴ it cannot be concluded merely from this that a state has become a 'victim state' as to enable it to defend itself under international law against the non-state actor. This is because a state generally needs not *defend itself* against an individual under international law. The question is therefore wide open as to the actions which would create a need for a state to defend itself against a non-state actor on an international scale.

¹⁶⁷ Antonin Cassese: *International Law*, pp. 55-57.

¹⁶⁸ Antonin Cassese: *International Law*, pp. 253-258.

¹⁶⁹ Antonin Cassese: *International Law*, pp. 253-258.

¹⁷⁰ Antonin Cassese: *International Law*, pp. 243, 447-448.

¹⁷¹ Article 1 of the Statute of the International Criminal Court; UN Doc. A/CONF.183/9 (1998).

¹⁷² See chapter 2.2

¹⁷³ Gerhard von Glahn & James Larry Taulbee: *Law Among Nations. An Introduction to Public international Law*, pp. 670-674.

¹⁷⁴ Antonin Cassese: *International Law*, p. 435.

The actions described in this chapter are examples which would generally allow for the 'victim state' to be classified as such. These are generally actions which are comparable to acts of aggression and the threat or use of force. Whether the non-state actors' actions are later imputable to a state is not of concern in the initial analysis of a situation, which is only to examine the state's right and need to defend itself.

Observant readers may have realized that both the act of aggression as well as the threat or use of force are normally considered to be actions carried out by states, and thus cannot be carried out by non-state actors, unless their actions *are* imputable to a state. The UN Charter clearly prohibits in article 2(4) the threat or use of force in international relations *by states*. And aggression is by its own definition in the UN General Assembly resolution of 1974¹⁷⁵ the use of armed forces *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. In the UN General Assembly's resolution the term state is explained. According to the resolution the term is "*used without prejudice to questions of recognition or to whether a State is a Member of the United Nations and it also includes the concept of a "group of States" where appropriate.*"¹⁷⁶ The language of the resolution does however not include non-state actors. In any case, article 3 of the resolution describes various incidents which should be considered an act of aggression, and although they are all described as actions taken by states, it is the proposition of this thesis that these actions, if taken by non-state actors, could be equally threatening to the security of the 'victim state' and article 3 should therefore be consulted when establishing what actions lead to a state being victimized, even if it involves a non-state actor as the executor of those actions.

It is also the proposition of this thesis that international law had not anticipated that non-state actors could act in a way similar to states, and thus pose a threat of the same scale and effect as a state could do. Therefore, it is understandable that these actions are defined as state actions in a resolution which dates back to the year 1974. In addition, there may be further evidence in recent treaty law and scholarly writings¹⁷⁷ that suggest that an act of aggression may under international law be considered a crime which a non-state actor can be guilty of, without necessarily a state also being responsible.

Looking at article 6(a) of the International Military Tribunal Charter,¹⁷⁸ it provided that waging a war of aggression was in violation of international law and was a crime coming

¹⁷⁵ UN Doc. A/RES/3314 (XXIX).

¹⁷⁶ Article 1 in UN Doc. A/RES/3314 (XXIX).

¹⁷⁷ Ian Brownlie: *Principles of Public International Law*, pp. 563-564.

¹⁷⁸ 82 U.N.T.S. 279, *entered into force* Aug. 8, 1945.

within the jurisdiction of the tribunal, so under that provision, individuals could incur responsibility. Although the 1974 definition did not address this individual responsibility, it has been noted that the definition was deliberately incomplete, leaving the UN Security Council with a broad area of discretion, and that the definition did mention war of aggression as a crime against international law.¹⁷⁹ In addition, the recently established ICC will have jurisdiction over individuals who are guilty of the crime of aggression, once a definition of the concept is adopted through an amendment of the Statute.¹⁸⁰ It thus seems evident that entities outside of states can be responsible for aggression and thus aggression can occur outside of state actions.

With regard to the above, it is proposed in this thesis that any threat of or use of force or any action taken which is similar in nature to that of the act of aggression under international law, must be considered of such gravity as to allow for the term 'victim state' to be used for the injured state, even in the cases of non-state actors executing these acts, as domestic judicial measures cannot sufficiently defend a state against suffering injury from these actions.

Before reaching a conclusion, it is important to emphasize that the act of aggression and the use of force does not necessarily constitute an armed attack allowing for the use of self-defence. These acts can however, be of such a scale and effect and of such nature as prompt the 'victim state' to defend itself and take action.

3.1.2 The Attacks Threaten the Security of the State or the Citizens of the State

Although it is naturally contained in the definition of aggression and the traditional concept of the use of force, a 'victim state' that has suffered an attack, needs to have been attacked within its own territory. This refers to the portion of land subject to the sovereign authority of that very state.¹⁸¹ It also refers to the territorial sea where the coastal state enjoys full sovereignty.¹⁸² In addition, there are a few areas which are traditionally also considered to be included in the territory of a sovereign state, because it exercises sovereignty over the area, and thus if an attack is aimed against these, it would constitute as an act of an aggression against the 'victim state'. This would be the situation of governmental ships sailing under a certain national flag,¹⁸³ and that of diplomatic agents in foreign countries and embassies.

¹⁷⁹ Antonin Cassese: *International Law*, p. 447.

¹⁸⁰ Article 5(1)(d) of the Rome Statute UN Doc. A/CONF.183/9, Antonin Cassese: *International Law*, p. 448.

¹⁸¹ Antonin Cassese: *International Law*, p. 82.

¹⁸² Antonin Cassese: *International Law*, p. 85.

¹⁸³ Yoram Dinstein: *War, Aggression and Self-Defence*, pp. 197, 200.

Attacks against structures and vessels such as these have been considered under international law to have constituted attacks against the state represented.¹⁸⁴

Moreover there is a question of whether attacks against nationals or citizens situated in a foreign territory constitute an attack against the state itself or whether a state may react, as a 'victim state', in response to such an attack. There are incidents where states have used force without or with the consent of a territorial state in order to protect their nationals whose lives were in danger on foreign territory, using the justification of self-defence.¹⁸⁵ These threats to the nationals have usually been that of arbitrary violence, and been in a context of a real breakdown in the domestic system of public order or inability on the part of the local government to prevent perpetration of unlawful acts against foreigners.¹⁸⁶ Although there have been objections to these actions taking place and this general rule emerging, it seems that forceful actions to protect civilians in a foreign territory may be taken.¹⁸⁷ Certain conditions have been put forward to regulate under which circumstances these actions could be legitimate. These conditions are:

- (1) The threat or danger to the life of nationals is serious.
- (2) No peaceful means of saving their lives are open either because they have already been exhausted or because it would be utterly unrealistic to resort to them.
- (3) Armed force is used for the exclusive purpose of saving or rescuing nationals.
- (4) The force employed is proportionate to the danger or threat.
- (5) As soon as nationals have been saved, force is discontinued.
- (6) The State that has used armed force abroad needs to report to the Security Council.¹⁸⁸

Taking these actions and rules into account, it seems that it can be generally accepted that if an attack of a certain magnitude and effect would be committed and directed against the civilians of a certain state, located in a foreign territory, then the *attacked* state could view those actions as directed against itself, thus constituting the classification of 'victim state'. It would in turn be reasonable also to consider attacks against ships flying under the flag of a certain state to be classified as attacks against a 'victim state'.

¹⁸⁴ Such as in the following cases: *Case concerning United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, [Iran Hostages case] and *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p.161.

¹⁸⁵ Antonin Cassese: *International Law*, p. 366.

¹⁸⁶ Antonin Cassese: *International Law*, p. 366.

¹⁸⁷ Derek William Bowett: *Self-Defence in International Law*, pp. 91-94; Yoram Dinstein: *War, Aggression and Self-Defence*, pp. 200-201.

¹⁸⁸ Antonin Cassese: *International Law*, p. 366.

3.1.3 *The Attack or the Threat of an Attack Originates from a Non-State Actor*

As the subject of this thesis has to do with attacks which are committed by non-state actors it is necessary to mention in a few words this fairly self-explanatory requirement of the attacks originating from non-state actors. It simply refers to the situation where the threat or the attack committed is executed or planned, in part or fully, by a non-state actor. A ‘victim state’ in this thesis would therefore refer to any state that has suffered the breach of law stipulated in Chapter 3.1.1 which is directed against the territory or people described in Chapter 3.1.2 and committed by a group of individuals that would be classified as non-state actors in accordance with this Chapter 2.5 which would usually constitute a group of combatants, a terrorist group or even a pirate group.

Whether actions taken by these non-state actors are later imputed to a state does not matter as to the initial classification of the ‘victim state’. Some sort of acquiescence or attribution may though be relevant with regard to other areas of international law.¹⁸⁹

3.1.4 *International Character of the Actions*

Finally, it is a requirement that the threats or actions of threats originate abroad. Meaning that non-state actors, acting solely within the state in which they are committing violence, are excluded. This, therefore, excludes rebel groups, rebelling against their own government, or violent protest groups, which ought to be controlled or controllable by the municipal enforcement mechanisms within the state suffering these attacks. It is also a requirement that the origin or some part of the non-state actor must be outside the internal areas of the injured state. This distinction is very important, as incidents which are not of an international character, limit the available options a state has to defend itself. Thus, for example, the right to self-defence cannot be resorted to against a purely internal threat, as influenced the decision in the *Palestinian Wall advisory opinion*.¹⁹⁰ It is, thus, a clear requirement that the non-state actors operate on an international level.

This international requirement is though a very open one. The *9/11 attacks* were, for example, committed by individuals who worked and lived within the USA and even had gained some education in the USA.¹⁹¹ However, they had received support and training from the terrorist group known as Al-Qa’ida, from abroad, and this terrorist group is known to be

¹⁸⁹ Attribution, in connection with self-defence specifically will be discussed in chapter 5.5 of this essay

¹⁹⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136. [Palestinian Wall Advisory Opinion]

¹⁹¹ Sean D. Murphy: “Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?”, p. 68.

established in over 60 countries, which gave the attacks the element of internationality.¹⁹² Thus, the determination of this international element requirement is dependent on an evaluation on a case by case basis.

3.2 Who Decides a ‘Victim State’

In the *Nicaragua case*¹⁹³ the ICJ stated that “...it is...clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked.”¹⁹⁴ Although the court in that case was considering an armed attack and whether or not collective self-defence could be initiated by an allied state before the attacked state had declared itself a victim of the armed attack, this view of the court, that such a declaration is the responsibility of the ‘victim state’, is of great value to the analysis of the ‘victim state’ concept. It is suggested that it be up to the injured state every time to identify when it is under an attack, whether or not it be an armed attack. The court’s judgment must be construed as putting the responsibility to identify when a breach of law, which injures the security of the state, has occurred against a ‘victim state’. It must be considered natural that a victim of an attack be the first to realize that it has been injured. In addition, with respect to the principle of sovereignty, it is important to realize that under the right of self-defence it is necessary for a state to be allowed to defend itself quickly, resulting in the fact that international law deems it unnecessary for a ‘victim state’ to seek the approval of an *outsider*, such as another state, an organization or a judicial organ, in order to resort to rights such as self-defence. However, it is a matter of principle that any actions taken in defence of an attack may be evaluated later by a judicial organ or the international community as to decide the lawfulness of the actions.

In addition to this, the UN Security Council has broad discretion as to identify threats to international peace and security as well as identifying breach of peace.¹⁹⁵ This means that the UN Security Council can also declare a state to be a victim of a certain attack, and it can even take measure to allow for certain actions to be taken in defence of the ‘victim state’ in order to maintain peace and security internationally.

The exact moment of when a state becomes a ‘victim state’ is also a discussion which is quite parallel to that of the discussion of armed attacks in regard to self-defence. The moment a state has suffered an armed attack, is the moment in which it can, under article 51

¹⁹² Christopher C. Joyner: *International Law in the 21st Century, Rules for Global Governance*, p. 27.

¹⁹³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p.14. [Nicaragua Case]

¹⁹⁴ *Nicaragua Case*, para. 195.

¹⁹⁵ Article 39 of the UN Charter; Pétur Leifsson: “Öryggisráð Sameinuðu Þjóðanna og Réttur Ríkja til að beita Vopnavaldi Samkvæmt Reglum Þjóðarréttarins”, pp. 594-595.

of the UN Charter, resort to self-defence. In the case of the ‘victim state’ it has to be born in mind that the requirements are not as strict as those of armed attack. And there are certain actions which obviously constitute a use of force or an act of aggression against a state, such as the attack itself, whether it is the explosion of a missile within the territory of the ‘victim state’ or the firing of guns over a border.¹⁹⁶ But it should be held in high regard that not only is it the use of force itself that constitutes a breach of international law, but it is also the threat of force. That is the mere *threat* of an attack or use of force constitutes a breach of international law under the provisions of the UN Charter.¹⁹⁷

3.3 Conclusion

Many situations may warrant granting a state the classification of a ‘victim state’ and to that effect the above mentioned requirements should be used to evaluate their position under international law. These requirements are though not exhaustive and are not to be viewed as strict rules but first and foremost as guidelines to be followed when classifying a ‘victim state’. International law is constantly evolving and so is the international community. Thus, it is not possible to foresee every circumstance in which a state should rightfully be considered to be a ‘victim state’ and be able to resort to international remedies in defence against a non-state actor. It should furthermore be stressed that although many of the rules mentioned in this chapter and used as guidelines, require the aggressor or the attacker to be another state, this thesis is examining the new situation in international law, where a threat, similar to that which a state can pose to another state, is not coming from another state but a non-state actor, and rules regarding such incidents are scarce. Therefore this chapter aims at giving mere guidelines, rather than pointing to established rules on this subject.

4. What Action, Not Amounting to the Use of Force, is Available to a ‘Victim State’?

Before resorting to force there exist obligations to try to resolve a situation, dispute or conflict by other means. Use of force is always a last resort in international relations; first of all it is generally prohibited according to article 2(4) of the UN Charter. In addition to that article 2(3) of the UN Charter provides that:

¹⁹⁶ Yoram Dinstein: *War, Aggression and Self-Defence*, pp. 188-189.

¹⁹⁷ Article 2(4) of the UN Charter.

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.¹⁹⁸

Therefore it can be and has been assumed that all other measures need to be exhausted before forceful measures are resorted to.¹⁹⁹ The 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states²⁰⁰ supports this claim. In article 2(3) of that declaration it is provided that “*States shall ... seek early and just settlement of their international disputes by negotiation, inquiry mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.*” Although both of these articles can be interpreted as limited to interactions and disputes between two or more states, this thesis holds that these rules must be interpreted with regard to three very important facts and may be applied to interactions between non-state actors and states, in a similar way as was done in chapter 3.

Firstly, the nature of the international law is that it has emphasized interstate relationship. This fact does not however negate that when a state interacts with a non-state actor whether or not that non-state actor resides within the state or another state, same or at least similar principle apply in their interactions. Thus, even international humanitarian law obligates states to behave in a certain way when confronted with non-state combatants which are generally to be treated in the same way as armed state actors. This is especially important in today’s era where there is, as Chapter 2 deals with, considerably more regard given to non-state actors than ever before in the history of international law.

Secondly, the obligation that is so clear from article 2.3 of the UN Charter, to ensure that international peace and security is not endangered, as well as the general prohibition of the use of force must be interpreted in a broader sense than only ensuring peace and security between the contracting states. This is supported by the fact that the UN Charter obligates and aims not only at ensuring *international peace and security*²⁰¹, but it also refers to a responsibility to *strengthen universal peace*.²⁰² This term of *universal peace* must be construed as not only affecting interstate peace but the concept of *universal* covers a much broader area, which this thesis proposes can include non-state actors. Thus in the context of modern international law as explained in chapter 2, these obligations must be considered to be of such importance and such nature as to include non-state actors when that is appropriate.

¹⁹⁸ Article 2(3) of the UN Charter.

¹⁹⁹ Antonin Cassese: *International Law*, p. 464.

²⁰⁰ UN Doc. A/RES/2625(XXV).

²⁰¹ Article 2(6) of the UN Charter.

²⁰² Article 1(2) of the UN Charter.

Lastly, the fact is that any use of force against a non-state actor operating from a foreign territory must affect, at least to some degree, the sovereignty of that state, even though the ‘victim state’s’ response could be considered legitimate use of force.²⁰³ This means that states need to respect the fact that the UN articles²⁰⁴ as well as customary rules of international law²⁰⁵ demand that states resort to force as a last resort, thus also demanding that more peaceful and non-forceful measure be tried, even when faced with non-state actors.

In addition to the above mentioned general principles which obligate a state to resort to peaceful measure before resorting to forceful countermeasures against non-state actor, many states have signed and ratified treaties which obligate the state in specific circumstances to resolve a dispute or communicate with states and terrorists in a particular way. Some of these treaties are mentioned in chapter 2.6 regarding terrorism where some sort of interstate co-operation to suppress terrorism is required.

4.1 The Difficulty when Dealing Peacefully with a Non-State Actor

Of course some methods which are generally used in the resolution of disputes and conflicts cannot be used in all cases of non-state actors, as not all of them have a structure which allows for, for example, efficient negotiations, and some non-state actors might not want to respond to any negotiation efforts made by states.²⁰⁶ Thus it stands to reason that these groups are naturally more unlikely to follow peaceful dispute resolution methods than states which sometimes are obligated to do so. But even though it may be more difficult to deal with non-state actors a peaceful settlement to the disagreement between a non-state actor and state should always be tried, since dispute and conflict resolutions is not at all limited to interstate relations.²⁰⁷

A ‘victim state should also, when possible, attempt peaceful resolution in co-operation with other states, in particular the state in which the non-state actor is operating from, without any assumption of attribution. With regard to the unpredictable nature of non-state actor combatants, it is natural to assume that such co-operation attempts are more likely to prevail and wield results than settlement attempts with an unco-operative non-state actor.

²⁰³ A situation where a non-state actor attacker is operating from the high seas or outside all jurisdictions is not taken into account here.

²⁰⁴ Articles 1, 2, 51 of the UN Charter.

²⁰⁵ Yoram Dinstein: *War, Aggression and Self-Defence*, pp. 91-95, 209-210.

²⁰⁶ See chapter 2.5

²⁰⁷ John Merrills: “The Means of Dispute Settlement”, p. 530.

4.2 Diplomatic Methods

It is usually the first stage to start an attempt of peaceful settlement of a dispute with acts of diplomacy or negotiations between the state and its aggressor, these acts are of a political nature, not a legal one although sometimes these actions may be required by a treaty.²⁰⁸ The 1970 Declaration of Friendly Relations and Co-operation among states, gives the following specific examples of peaceful means such as negotiations, inquiry, mediation, conciliation.²⁰⁹ All of these actions entail some sort of diplomacy between the parties of a dispute, and although these methods are set up to address interstate situations, these methods can also be used between a state and the non-state actor. However when dealing with non-state actors these options may be a more limited and demand that the non-state actor is capable of enforcing the agreement made between him and the state, which might not always be the case, such as with non-state actors that are spontaneously gathered groups without a command structure. These methods of resolving the dispute, conflict or disagreement would first and foremost be used when dealing with a state or a non-state actor that could be categorized as a regularly constituted group of combatants with military command structure and a political structure.²¹⁰ However if the non-state actor has another structure, these methods may seem unpractical and unrealistic, but can of course not be excluded under very special circumstances. In addition it should be noted that, usually these methods would all require that an agreement of cease-fire would be made between the parties of the relevant dispute or conflict. In relation to these diplomatic methods it needs to be born in mind that the various conventions on issues relating to non-state actor threats such as multilateral treaties on terrorism can and will accordingly play an integral part in the diplomatic settlement as well as UN instruments.²¹¹ These treaties may obligate a state to take appropriate actions to prevent its territory from being used as a basis for non-state actor operations.

Examples of these requirements and obligations that exists on grounds of a treaty regarding terrorism, are for example to make certain terrorist offences illegal under the domestic law of the signatories, to establish jurisdiction over these offences, take necessary measures to prosecute or extradite the offenders, co-operate in preventing these offences

²⁰⁸ John Merrills: "The Means of Dispute Settlement", pp. 529-539.

²⁰⁹ John Merrills: "The Means of Dispute Settlement", p. 530.

²¹⁰ See Chapter 2.5

²¹¹ Ved. P. Nanda: "Terrorism, International Law and International Organizations", pp. 6-10.

etc.²¹² In the event that the state does not fulfil its obligation under the treaty it may incur state responsibility for internationally wrongful acts.

4.3 Arbitration and International Courts

Arbitration is the oldest legal method of dispute settlement in international law, but other legal methods include international courts such as the ICJ.²¹³ These methods are usually only available to states, as for example the ICJ only accepts cases between states.²¹⁴ In addition, the process behind arbitration and other courts is of a nature that is fairly time consuming, expensive and can be complicated, as certain procedural rules need to be followed.²¹⁵ This limits to a great extent the practical application of these methods for the resolution of a dispute regarding a possible non-state actor threat, since such circumstances usually call for fairly quick actions.

Although there exist courts, such as the ICC that can take on matters relating to individuals, these organs usually deal with prior incidents, in order to ensure proper justice be adjudicated to the individuals that have committed a certain crime or an illegal act. They are therefore not a viable option for a state that wants to or needs to defend itself. This after the fact argument is also very valid when it comes to international courts, as many of the cases that have been brought to the attention of the ICJ have been cases presented after the fact, pleading for a judgment on the legitimacy of certain actions or the revocation of certain actions.²¹⁶ Therefore, these are not very practical solutions to the non-state actor threat situation, except in the aftermath to ensure that individuals be brought to justice.

4.4 United Nations and International Co-operation

The 1970 declaration regarding friendly relations²¹⁷ also mentions that states should resort to regional agencies or arrangements.²¹⁸ This may be of high importance, especially with regard to the before mentioned diplomatic methods. Many regional organizations provide governments with opportunities for diplomatic contact in a structured setting, and can be of great

²¹² See for example articles 3-8 in the 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents and articles 4-10 of the 1998 International Convention for the suppression of terrorist bombings in addition various articles in the treaties mentioned in Chapter 2.6. have similar provisions relating to terrorism.

²¹³ John Merrills: "The Means of Dispute Settlement", p. 539-543.

²¹⁴ It can also give advisory opinions to the organs of the UN in accordance with article 96 of the UN Charter

²¹⁵ John Merrills: "The Means of Dispute Settlement", p. 539-543.

²¹⁶ Such as the *Nicaragua Case*, and the many cases concerning *The Legality of Use of Force*, where Serbia and Montenegro brought many cases to the court against various states in 1999.

²¹⁷ UN Doc. A/RES/2625 (XXV).

²¹⁸ Article 1 in the UN Doc. A/RES/2625 (XXV).

importance when a 'victim state' and the foreign state from which the non-state actor operates are members of the same regional organization.²¹⁹ Also the presence of the United Nations and its organs can be of a great resource in the resolution of a dispute or conflict, and is more likely to work when the parties in the dispute include a non-state actor, compared with the situation of using regional organizations in that regard.

Examples of how a regional organization can assist in a dispute (mainly between two states) are for example the European Union, which for example attempted mediation during the break-up of Yugoslavia.²²⁰ Although unsuccessful in that particular case the European Union can in many areas be of great importance, especially if there exists an obligation between the member states to ensure some sort of co-operation with regard to non-state actor threats, such as terrorism, then the European Union can facilitate for negotiations or diplomatic methods to resolve the disagreement, as it works very closely with its member states. In fact when enforcing treaties such as the 1977 European Convention on the Suppression of Terrorism the existence of the European Union may be very important to provide a setting for the peaceful resolution of a possible threatening situation between its members' states.

But probably the most widely used and most powerful method in regard to the peaceful solution of a non-state actor threat is seeking the assistance of the United Nations, especially the UN Security Council. The United Nations can, in essence, be a facilitator and a platform for all of the above mentioned to diplomatic methods, in addition, the United Nations have certain powers which can assist a 'victim state' in protecting itself and resolving a situation peacefully whether it be directly with the non-state actor or via the assistance and co-operation between one or more member states of the UN.

Without going into details on the structure and process of the typical diplomatic methods which were mentioned above, certain organs of the UN which have participated in the resolution and management of disputes and conflicts should be mentioned. The UN are equipped with the UN General Assembly that can be an important ground for the diplomatic methods, in addition the Assembly can resort to legal methods, as it can ask the ICJ for an advisory opinion on a particular legal dilemma.²²¹ Furthermore the Secretary General of the United Nation has very influential authorities, and can bring certain matters to the attention of both the General Assembly as well as the Security Council which can later result in the

²¹⁹ John Merrills: "The Means of Dispute Settlement", p. 547.

²²⁰ John Merrills: "The Means of Dispute Settlement", p. 547.

²²¹ Article 96 of the UN Charter; John Merrills: "The Means of Dispute Settlement", p. 550-552.

peaceful resolution of a certain dispute.²²² The Secretary General can also be very important in the diplomatic process and has on occasion been introduced as a neutral third party to a dispute.²²³ In this way the Secretary General can act as a mediator and can supply various material and expertise to the negotiation table. This has been done several times, for example with the creation of fact-finding and conciliation commissions together with the provision of good offices in the *Iran Hostages situation* of 1979.²²⁴ Emphasis should though be given to the actions which can be taken via the UN Security Council. If the situation threatens international peace and security it should always be brought to the attention of the Security Council, which can then take appropriate actions if it deems necessary. What is particularly interesting is the fact that these actions are not limited to the member states, but these actions can be taken against a non-member state, but also against non-state actors such as a terrorist organization. In article 33 of the UN Charter it is stated that:

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Notice the wording of the first paragraph, that *the parties to any dispute* not mentioning specifically the parties to an interstate dispute, but also that the UN Security Council can call upon the parties to settle their dispute by such means as mentioned above.

Because the UN Security Council has this power and is quite often, in situations that threaten international peace and security, the most appropriate mechanism which a threatened state should seek assistance from its power and authority will be examined in two parts with respect to the peaceful measures to resolve a conflict where a non-state actor is involved. Firstly the available actions which the UN Security Council can take against the foreign state from which a non-state actor group is working will be examined and secondly the actions this powerful organ of the UN can take, and has taken against non-state actors directly ought to be addressed.

²²² Article 99 of the UN Charter.

²²³ John Merrills: "The Means of Dispute Settlement", p. 551

²²⁴ John Merrills: "The Means of Dispute Settlement", p. 551

4.4.1 UN Security Council Actions against States

In Chapter VI of the UN Charter it is stated, as has been identified above, that the UN Security Council can call upon parties to settle their disputes according to diplomatic methods. In addition to this the Security Council has under Chapter VII power to take actions which it deems necessary to ensure peace and security. These actions, which do not amount to the use of force, are stipulated to in article 41 of the UN Charter which states:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The Security Council can therefore if it finds it necessary recommend the adoption of *sanctions* against states which may be found assisting non-state actors such as terrorists, or directly or indirectly participating in their actions.²²⁵ A state can do that by not following their obligations under international law which it has agreed upon under international treaties for the suppression of certain actions or obligations which the UN Security Council has decided upon in a binding resolution.²²⁶ In addition a state may be obligated under customary international law not to allow its territory be used in a way that threatens the security of another state, as the ICJ found in the *Corfu Channel case*, which was the first case before this court that succeeded the Permanent Court of Justice.

These *sanctions* can be imposed on states in order to compel compliance to international law, and these sanctions have been used on occasions. Following the Lockerbie incident in 1988 the UN Security Council imposed sanctions on the government of Libya in 1992.²²⁷ This was due to the fact that an investigation into the terrorist attacks on the Pan Am flight over Lockerby as well as Frances UTA flight over Republic of Niger the year after, 1989, implicated officials of the Libyan Government.²²⁸ After the Libyan Government persistently failed to co-operate with the UN Security Council in establishing the responsibility for the terrorist acts it decided to lay down a string of sanction against Libya when they adopted their resolution 748 (1992).²²⁹ These sanctions, which were to be taken by

²²⁵ Antonin Cassese: *International Law*, p.468.

²²⁶ See for example UN Doc. S/RES/1214 (1998)

²²⁷ Michael Plachta: "The Lockerbie Case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*", p. 125-126; Antonin Cassese: *International Law*, p. 468.

²²⁸ Antonin Cassese: *International Law*, p. 468.

²²⁹ Michael Plachta: "The Lockerbie Case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*", p. 129-130; UN Doc. S/RES/748 (1992).

all states, included the denying permission to any aircraft destined to Libya to take off from, land or overfly their territory, to prohibit the supply of any aircraft or aircraft components to Libya, to prohibit any provision to Libya of arms and ammunitions, technical advice, assistance or training on military matters.²³⁰ Although these actions did not create immediate reactions on the behalf of the Libyan government, they did eventually prove effective, as in 2003 Libya acknowledged responsibility and paid compensation to the victims of the terrorist attacks, in addition it must be acknowledged that terrorist activities connected to Libya seem to have been very limited while the sanctions were in place.²³¹

Another example of the actions of the UN Security Councils are the recent actions taken after the *1998 bombings of US embassies* and the *9/11 attacks* on USA against Afghanistan. The Security Council adopted resolutions which put sanctions on Afghanistan as their Taliban government was found to have permitted terrorist activities in their territory.²³²

4.4.2 UN Security Council Actions against Non-State Actors

Looking at the *9/11 attacks* on the United States of America, the UN Security Council took action that was not aimed against any particular state *per se* but rather against the terrorists themselves, whatever nationality or wherever in the world they would be found. The Council identified in particular the terrorist organization of Al Qa'ida and individuals such as Osama bin Laden and ordered certain actions against these groups in resolutions 1390 (2002), 1455 (2003).²³³ Not only did they do that in the aftermath of *9/11* but also in their earlier resolutions 1267(1999) 1333 (2000).²³⁴ These resolutions didn't target states or state like entities but rather groups of individuals accused of terrorism.²³⁵

It is particularly interesting that the UN Security Council took actions against, not states, but rather non-state actors, in the above mentioned case the terrorist group known as Al Qa'ida. Also, as was mentioned in chapter 2.5.3, the UN Security Council has recently taken actions against pirates operating off the coast of Somalia. This will have some influence on the later discussion on the legitimacy of using force, but with respect to the matter of peaceful actions taken against non-state actors, it is evident that the UN Security Council holds authority and the power to take the actions it deems necessary. However it is limited by the

²³⁰ See for example articles 3, 4 and 5 in UN Doc. S/RES/748 (1992).

²³¹ Antonin Cassese: *International Law*, p. 468.

²³² Such as UN Doc. S/RES/1214(1998); UN Doc. S/RES/1267(1998); Doc S/RES/1189(1998) ; UN Doc. S/RES/1363(2001).

²³³ UN Doc. S/RES/1390 (2002); UN Doc. S/RES/1455 (2003).

²³⁴ UN Doc. S/RES/1267 (1999); UN Doc. S/RES/1333 (2000).

²³⁵ Antonin Cassese: *International Law*, p. 469.

fact that it needs the co-operation of the member states of the United Nations to execute the decisions of the Council its decisions. Thus although the UN Security Council has decided on actions to be taken against a non-state actor, it lacks the capacity to execute that particular action by itself. Nonetheless, in the example provided above, the UN Security Council took a binding decision which obligated all states to take certain actions against terrorism.

4.5 Conclusion

It is important to consider that all of the above mentioned options are generally available to states faced with a threat from a non-state actor and that these options need to be taken seriously and be utilized. However, state practice shows that for whatever reasons states do opt for immediate forcible responses to non-state actor attacks such as terrorist actions.²³⁶ This might be somewhat because of the fact that although the general rule that peaceful measures must be tried and exhausted before coercive measures are used there is no requirement that states exhaust a particular peaceful measure.²³⁷ It has also been contemplated that the reason for this may be the fact that while rules governing the use of armed force are part of customary international law, binding on all subjects of international law, the rules governing peaceful responses are mostly contained in treaties, thus not universally binding, except for the general principle on the peaceful settlement of disputes.²³⁸ The difficulties in dealing or negotiating with non-state actors such as terrorist group that are often of a very political and unpeaceful nature must be taken into account. Many countries do not view these violent groups as groups which can be dealt with and political opinions on this matter, that a government of a state will not negotiate or make an agreement with violent groups such as terrorists, can be extremely powerful and influential when it comes to making a decision on a whether or not to resort to peaceful means of resolution.²³⁹ Finally, in the opinion of this author, the fact that most of the available options involve other states to some extent or some of the UN organ can usually result in a time consuming process while the nature of attacks which a state needs to defend itself against requires a quick response in order to deal effectively with the security threat. Nonetheless the most viable options of peaceful settlement must be considered to be those found via the organs of the United Nations, in particular within the authority of the Security Council.

²³⁶ Antonin Cassese: *International Law*, p. 465

²³⁷ Antonin Cassese: *International Law*, p. 464

²³⁸ Antonin Cassese: *International Law*, p. 465

²³⁹ As can somewhat be deduced from the U.S.'s President Bush's Address to the United Nations General Assembly in 2001 (10 November 2001). UN Doc. A/56/PV.44 7-10.

Because of the fact that there is a tendency not to choose peaceful means when dealing with non-state actor threats considerable effort will be given to the analysis of using force against non-state actors.

5. The Use of Force against Non-State Actors

5.1 General Prohibition of the Use of Force

In the aftermath of World War II there was a shift in the legal regime governing a state's right to resort to force. The state practice before indicated that war and the use of force were a last resort of dispute settlement and although the provisions of the League of Nations Covenant from 1919²⁴⁰ provided certain constraints on the right to use force, it did not ban such an action from taking place as a last resort.²⁴¹ Following the creation and adoption of the United Nations Charter in 1945 after the Second World War, a new legal regime emerged in international law, which demanded a general prohibition on the use of force, which actually had been agreed upon by over sixty states with the General Treaty for the Renunciation of War signed in Paris in 1928²⁴² with only four states in the international society at that time not being bound by its provisions.²⁴³ Although the 1928 agreement, sometimes referred to as the Kellogg-Briand Pact,²⁴⁴ did not prevent the war which broke out in 1939, it did have significant influence on the post-war development of the UN Charter especially with regard to the provisions found in articles 2(3) and 2(4), the latter which has been described as “the corner-stone of the Charter system”.²⁴⁵

Portraying principles which all member states are to follow in pursuit of the purposes put forth in article 1 of the UN Charter, article 2(3) and 2(4) state that:

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

²⁴⁰ U.K.T.S. 4 (1919).

²⁴¹ Ian Brownlie: *Principles of Public International Law*, p 697; Rebecca M.M. Wallace: *International Law*, p. 277.

²⁴² U.K.T.S. 29 (1929).

²⁴³ Ian Brownlie: *Principles of Public International Law*, pp 698-699; Rebecca M.M. Wallace: *International Law*, p. 277; David J. Harris: *Cases and Materials on International Law*, p. 888.

²⁴⁴ The US Department of State webpage: “The Kellogg-Briand Pact, 1928”, <http://www.state.gov/>; Ian Brownlie: *Principles of Public International Law*, pp 698-699; David J. Harris: *Cases and Materials on International Law*, p. 888.

²⁴⁵ David J. Harris: *Cases and Materials on International Law*, p. 888; Rebecca M.M. Wallace: *International Law*, p. 278; Ian Brownlie: *Principles of Public International Law*, p. 699.

Although article 2(4) provides for all *members* of the United Nations to refrain from the use of force, this article is not limited to the *members* of the United Nations. It is binding upon all *members* of the *international community* as it has been firmly established, for example in the *Nicaragua case*, that the rule on the non-use of force is a principle of customary international law applying thus to all states, some have even stated that the rule has attained the character of a *jus cogens* norm.²⁴⁶ This prohibition of not only the use of force but the threat to use force is much broader than the 1928 Kellogg-Briand Pact, which only aimed at the renunciation of war, thus not literally outlawing use of force falling short of war, which article 2(4) of the UN Charter includes.

In spite of the status this principle has in international law, the prohibition of the use of force is not absolute, exceptions do exist. Article 42 of the UN Charter allows the UN Security Council to take actions which, in the context of Chapter VII of the Charter, can amount to the use of armed force. In addition, article 51 of the UN Charter reserves the right of individual or collective self-defence in situations where an armed attack occurs against a member of the United Nations. The language of the Charter describes the right to self-defence as an *inherent right* which has been recognized as referring to pre-existing customary law, which according to the ICJ in the *Nicaragua case*, must be considered distinct from that of the treaty provisions.²⁴⁷ In addition to the above mentioned exceptions from the prohibition of the use of force in international law, which generally are considered the only exceptions, some scholars speculate whether or not there exist other exceptions to this principle such as in the case of unilateral humanitarian intervention or on the basis of necessity.²⁴⁸ As expected, after having analysed to what extent a state is allowed use force, it needs to be examined to what extent these rules are applicable to an attack or a threat from an armed non-state actor

Since prohibition of the use of force does not apply in purely domestic situations when some form of force, for example military deployment is solely against individuals or groups within a state's own territory, exercise of such force does not need to be justified with regard to article 2(4).²⁴⁹ Rather Article 2(7) of the UN Charter prohibits the UN from intervening in such matters to the extent that the situation is not deemed a threat to international peace and

²⁴⁶ Rebecca M.M. Wallace: *International Law*, pp. 278, 889; Antonin Cassese: *International Law*, p. 893; *Nicaragua Case*, para. 184.

²⁴⁷ Ian Brownlie: *Principles of Public International Law*, p. 700; David J. Harris: *Cases and Materials on International Law*, p. 893-895; *Nicaragua Case*, para. 176-177.

²⁴⁸ See for example the 2005 World Summit Outcome, UN Doc. A/60/L.1 (Sept. 20, 2005) and the United Nations Report of the Secretary-General's High Level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2 December 2004).

²⁴⁹ Jörg Kammerhofer: "The *Armed Activities Case* and Non-state Actors in Self-Defence Law", p 105; it should be noted that international humanitarian law as well as human rights law may apply to such situations.

security in accordance with Chapter VII of the Charter.²⁵⁰ Thus this chapter will examine the legitimacy of situation such as that where a ‘victim state’ resorts to the use of force against a non-state actor that is not located within the ‘victim state’s’ territory, thus including a situation where essentially a ‘victim state’ may have to violate the territorial integrity and sovereignty of the state where the non-state actor is located.

5.2 Use of Force as Authorized by the UN Security Council

According to article 39 of the UN Charter it is the UN Security Council, with its fifteen members, five of which are permanent members with the right to veto substantive proposals that determines the existence of any threat to peace, breach of the peace or act of aggression.²⁵¹ A situation which may pose as a threat to international peace and security may and should be brought to the Security Council’s attention and the UN Charter explicitly states that Member states as well as non-member states may, according to article 35(1)(2) bring such situations to the attention of the UN Security Council. In addition, article 34 states that the UN Security Council is permitted to investigate any situation, whether or not it has been brought to their attention by a specific state, which might endanger the maintenance of international peace and security.²⁵²

Under Chapter VII of the UN Charter the UN Security Council is granted specific powers for the purpose of fulfilling the Council’s primary responsibility, laid out in article 24(1) of the UN Charter, that of maintaining international peace and security. These specific powers allow the UN Security Council, in limited situations, to authorize the use of force, making it the only international organ capable of allowing states to use force.²⁵³ This authorization can be given even in circumstances when the use of force would otherwise be considered illegal, as long as it is consistent with the principle of the UN Charter, to maintain international peace and security.²⁵⁴ The UN Security Council has utilized this authority which it possesses in the past, such as with resolution 678 (1990)²⁵⁵ when it authorized member states to *use all necessary means* to restore international peace and security in the area,

²⁵⁰ Rebecca M.M. Wallace: *International Law*, p. 304

²⁵¹ Sidney D. Bailey and Sam Daws: *The Procedure of the UN Security Council*, p. 3.

²⁵² Article 34 in the UN Charter

²⁵³ Pétur Leifsson: “Öryggisráð Sameinuðu Þjóðanna og Réttur Ríkja til að beita Vopnavaldi Samkvæmt Reglum Þjóðarréttarins”, p. 585.

²⁵⁴ Rebecca M.M. Wallace: *International Law*, p. 305.

²⁵⁵ UN Doc. S/RES/678 (1990).

invoked article 42, but the council only does so in support of measures imposed under article 41 or when it deems such measures would be inadequate.²⁵⁶

It is important to note that the UN Security Council's authorization for the use of force is by no means limited to inter-states disputes; rather it has been interpreted in a broader sense, by the Council itself, to include any incident which it determines endangers international peace and security.²⁵⁷ A recent example of such an authorization is the Security Council's recent resolution authorizing actions under chapter VII against pirates operating off the coast of Somalia, which will be examined in greater detail in chapter 5.2.1.

It therefore follows that the UN Security Council has the powers and authority under international law to deem a threat or an attack by a non-state actor to be of such scale as to constitute a threat to international peace and security. Such a determination is according to article 39 of the UN Charter a prerequisite of any later measures suggested or taken by the UN Security Council under Chapter VII, such as authorizing member states to use force.²⁵⁸

In practice the Security Council has only four times found that a breach of the peace has occurred. First time relating to the invasion of South Korea by North Korea where it called up on member states to assist South Korea in its resolution S/1501.²⁵⁹ In the 1982 resolution 502 the council determined that a breach of peace had occurred in the Falkland Island region following invasion from Argentine and again in resolution 598 (1987)²⁶⁰ the Security Council determined that the Iran-Iraq war constituted a breach of peace. Finally, the fourth occasion was in the before mentioned resolution 660 (1990)²⁶¹ where the Iraqi invasion of Kuwait constituted a breach of international peace and security.²⁶² In all of the above situations the use of force was only authorized twice, first regarding the invasion into South Korea with resolution 83/1950 and secondly against Iraq in 1990 with resolution 660 (1990)²⁶³

The above mentioned incidents represent particularly well the 'typical' situation when use of force should be authorized in an interstate dispute, since all of these examples included

²⁵⁶ Ian Brownlie: *Principles of Public International Law*, p. 709; Rebecca M.M. Wallace: *International Law*, p. 305.

²⁵⁷ Pétur Leifsson: "Öryggisráð Sameinuðu Þjóðanna og Réttur Ríkja til að beita Vopnavaldi Samkvæmt Reglum Þjóðarréttarins", p. 598.

²⁵⁸ Pétur Leifsson: "Öryggisráð Sameinuðu Þjóðanna og Réttur Ríkja til að beita Vopnavaldi Samkvæmt Reglum Þjóðarréttarins", p. 598.

²⁵⁹ Malcolm N. Shaw: *International Law*, p. 1124; UN Doc. S/1501 from 25 June 1950.

²⁶⁰ UN Doc. S/RES/598 (1987).

²⁶¹ UN Doc. S/RES/660 (1990).

²⁶² Malcolm N. Shaw: *International Law*, p. 1124.

²⁶³ Pétur Leifsson: "Öryggisráð Sameinuðu Þjóðanna og Réttur Ríkja til að beita Vopnavaldi Samkvæmt Reglum Þjóðarréttarins", p. 598; Malcolm N. Shaw: *International Law*, pp. 1133-1136; UN Doc. S/RES/660 (1990).

at least two states in conflict. The Security Council has, in addition to these four incidents, also allowed for the use of force in other situations, many of whom are not directly connected to an interstate dispute, such as in an internal conflict where the Council deems the conflict a threat to peace and security in the region. Examples of such incidents are found in the 1990's following peacekeeping missions in the former Yugoslavia and in Somalia.²⁶⁴

There is a clear tendency in recent Security Council resolutions regarding Chapter VII action to show greater attention to the acts of non-state actors. The last undisputed interstate conflict which the Security Council decided to act upon was in 1991. Very recent developments concerning piracy may give evidence to the emphasis the Security Council will put on issues relating to violent actions taken by non-state actors.²⁶⁵

5.2.1 Case Study: U.N. Security Council's Response to the Threat of Piracy near and in the Territory of Somalia

Between 2008 and 2009 the international community has witnessed an extraordinary growth of piracy off the coast of Somalia which some have reported to be of epidemical proportions, with attacks on international shipping in the Gulf of Eden increasing by over 200% from the year before.²⁶⁶ This international crime, piracy, has been said to be the only true case where universal jurisdiction is accepted in international law somewhat because of its description of being *hostis humani generis*.²⁶⁷ As was addressed in Chapter 2.5.2 piracy is an act committed by a non-state actor for private gain of the perpetrators. In Chapter 2.5.2 it was also established that the act of piracy is most readily described as being committed by spontaneously gathered groups who engage in combat or who engage in sporadic acts of collective violence with or without a command structure and with or without political leadership. In essence they can be described as common criminals, murderers, kidnappers or thieves of the high seas. If the existing rules regarding piracy are observed it seems at first glance that international law only has interests in piracy for the purpose of ensuring that there exist proper jurisdictional rules regarding these criminal acts committed on the high seas. In 2008 the piracy incidents off the coast of Somalia seem to have triggered the international community to view piracy acts as a bigger threat than before. In response to the increased pirate activities several states deployed military ships for patrolling and protecting

²⁶⁴ Malcolm N. Shaw: *International Law*, pp. 1138-1146.

²⁶⁵ Eugene Kontorovich: "International Legal Responses to Piracy off the Coast of Somalia".

²⁶⁶ Eugene Kontorovich: "International Legal Responses to Piracy off the Coast of Somalia".

²⁶⁷ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, p. 3. Separate Opinion of President Guillaume, para 5.

commercial ships in the narrow straight between the Horn of Africa and the Arabian Peninsula where pirate attacks have often occurred.²⁶⁸ Although these naval ships have managed to interrupt numerous piracy attempts the gravity of the subject has awoken the attention of the UN Security Council which has deemed the situation a threat to international peace and security in the region.²⁶⁹ As evidence of the seriousness of this situation, the UN Security Council in 2008 passed five separate resolutions dealing with piracy – more than on any other subject that year.²⁷⁰ This indicates that the international community is now starting to look at defensive measures against piracy rather than emphasize the judicial issues.

The available treaty law permits states to deal with piracy in accordance with the rules of the Convention of the High Seas from 1958 and UN Law of the Sea Convention of 1982. These conventions allow for certain limited defensive measures such as the visiting and boarding of any ship, of whatever flag, which is reasonably suspected to be engaged in pirate acts.²⁷¹ They also allow for pirate ships on the high seas to be seized by appropriate ships which may lead to the arresting of the crews. This authorization in article 105 of the UNCLOS is though limited to the high seas, thus Somali pirates, although they commit the illegal acts on the high seas, are very close to the territorial waters of Somalia and usually manage to escape into those waters before naval vessels manage to reach them.²⁷² The resolutions passed by the UN Security Council, which are made under Chapter VII, have broadened the authority of the international community to address acts of piracy beyond what is permitted under treaty law. The first resolution number 1816 of June 2, 2008²⁷³ authorized nations to take action against pirates within Somalian sovereign waters. The resolution thus allows in essence for the violation of Somalia sovereignty, by allowing armed vessels from other states to exercise authority which would normally be considered use of force, for the purpose of apprehending non-state actors within the territory. This resolution was however, passed with the consent of the Somalia government, which according to the text *lacks the capacity to interdict pirates or patrol and secure its territorial waters*.²⁷⁴ The consent of the Somalia government is of course of high importance when evaluating the legitimacy of

²⁶⁸ Eugene Kontorovich: “International Legal Responses to Piracy off the Coast of Somalia”.

²⁶⁹ Eugene Kontorovich: “International Legal Responses to Piracy off the Coast of Somalia”.

²⁷⁰ Eugene Kontorovich: “International Legal Responses to Piracy off the Coast of Somalia”; UN Doc. S/RES/1816 (2008); UN Doc. S/RES/1838 (2008); UN Doc. S/RES/1844 (2008); UN Doc. S/RES/1846 (2008); UN Doc. S/RES/1851 (2008).

²⁷¹ See article 22 of the 1958 High Seas Convention and article 110 of the 1982 Law of the Sea Convention.

²⁷² R.R. Churchill and A.V. Lowe: *The Law of the Sea*, p. 210; see additionally article 19 of the 1958 High Seas Convention and article 105 of the 1982 Law of the Sea Convention HSC and 105 LOSC,

²⁷³ UN Doc. S/RES/1816 (2008).

²⁷⁴ See the preamble of UN Doc. S/RES/1816 (2008).

actions taken by other states within the sovereign territory of Somalia; but it should be noted that the UN Security Council had full authority under the UN Charter to authorize these actions, even if the consent from the Somalia government was not readily available, should this be deemed necessary for the maintenance of international peace and security.

Following resolution 1816 which authorized these measure for a six month period the Council passed an even broader resolution in December of 2008, resolution 1851,²⁷⁵ allowing for military force not only within the territorial waters of Somalia but extended to the mainland. This document authorizes nations to “*undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea.*”²⁷⁶ The resolution does not give unlimited authority for actions in Somali territory as any action taken requires approval from the provisional government and needs to be in conformity with international humanitarian law as can be seen in article 6 of the resolution.

These actions by the UN Security Council are unprecedented and may be an indication of greater actions in the future within the territorial sovereignty of other nations. It has been stated by some of the members of the UN Security Council that the resolutions solely apply to the Somali situation and that they ought not to establish any precedent under customary international law. Although it is quite true that the actions authorized are limited to the present situation in Somalia, it is difficult to assert now, regardless of the above mentioned statements, whether or not these actions will later, prove as a precedent for similar situations in the future. It is the opinion of the author of this thesis that these statements are of very little value in that respect. International law is *formally* very passive when it comes to accepting precedents. Thus the rulings of the ICJ only bind the states which bring forth a case before the court and are not regarded as necessarily giving precedence for future judgments. Nonetheless, in practice international law accepts precedents very readily and thus the rulings of the Court are held in high regard as the current correct interpretation of international law and its treaties. Furthermore, article 38 of the Court’s Statute, which describes the generally accepted sources of international law, mentions customary law as one of these sources. And customary law can emerge with state practice, such as the UN Security Councils actions in the Somali situation, although the statements regarding Somalia may be meant to diminish the effect of *opinio juris* in that aspect. In any case, it is necessary to analyze the possible precedent in the context of what is happening in other areas of the law and the development of the UN Security Councils decisions in regard to non-state actors.

²⁷⁵ UN Doc. S/RES/1851 (2008).

²⁷⁶ See article 6 of UN Doc. S/RES/1851 (2008).

In the bigger context a clear trend is visible in the Security Councils actions. The Council allows for actions to be taken against non-state actors operating partly within the territorial sovereignty of a particular state. The UN Security Council authorizes other states, essentially, to use force within the non-state actors' state of primary operations, allowing pirates to be chased from the high seas into the territorial sea and onto dry land, and even there to exercise not only judicial jurisdiction but also enforcement jurisdiction.²⁷⁷ Regardless of the acceptance of the Somali government, the fact is that the UN Security Council has the power to authorize these kinds of actions.

These resolutions also raise the question of whether international law will need to classify pirates as combatants rather than civilians with respect to international humanitarian law, as their actions are now considered a threat to international peace and security.²⁷⁸ Although the UN Security Council resolutions have allowed for such broad actions to be taken, the international community has not utilized the authorization to the fullest, as great respect is given to the sovereignty of Somalia. In a few of these instances, restraint may have been shown by the states in order not to create a precedent which might affect the general rule of sovereignty.

Although not committed under the UN Security Council's Chapter VII authorization, France has before taken actions on the Somalian mainland against the pirates.²⁷⁹ That situation will however be examined further in Chapter 5.6 as it is not directly related to the UN Security Council's authorization of the use of force.

5.2.2 Conclusion

From the legal arguments presented above and the examples given, it is without any doubt that the UN Security Council has authority to react to non-state actor threats with authorization to use force. What is more, the Council has started to act in this manner, both establishing that non-state actors pose a threat to international peace and security and also authorizing states to use force in order to defend the international community from threats these non-state actors pose. Although the specific incident of piracy is not necessarily a general precedent, it does show a tendency of the international community to take more

²⁷⁷ Eugene Kontorovich: "International Legal Responses to Piracy off the Coast of Somalia".

²⁷⁸ Eugene Kontorovich: "International Legal Responses to Piracy off the Coast of Somalia".

²⁷⁹ Eugene Kontorovich: "International Legal Responses to Piracy off the Coast of Somalia".

extreme actions against the security threat of non-state actors and those actions are by no means the only actions that the Council has taken against non-state actors.²⁸⁰

5.3 Use of Force outside the Authorization of the UN Security Council

In the absence of UN Security Council authorization to use force, a state has only one universally accepted justification for the otherwise illegal use of force. This justification is called self-defence. Although generally a simple concept, its application in international law has always been controversial due to the strict rules on the legal consequences and legal requirements for resorting to self-defence.²⁸¹ Other instances where use of force can legitimately be resorted to are highly disputed and controversial, but will be examined in Chapters 5.6 and 5.7 since some scholars seem to agree that in special circumstances a state can resort to force under certain very limited situations which do not necessarily amount to self-defence. Most of these circumstances are similarly justified, with special emphasis on the principle of necessity and proportionality.

5.3.1 Self-Defence in General

In general the prerequisites of self-defence and the ways a state can resort to this right need to be established. Furthermore it is necessary to establish what self-defence allows a state to do.

Self-defence is a right under customary international law for a state to use force. It is not only found in customary international law but it is also codified in art. 51 of the UN Charter that states:

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

The UN Charter refers to this right as an inherent one, referring to the fact that it is a customary law and it has generally been accepted that the codification of this customary law in article 51 of the UN Charter has not caused the rules regarding self-defence as they exist in

²⁸⁰ Such as is evident, notably in its many resolutions against terrorist actors, specifically targeting for example Al-Qa'ida.

²⁸¹ When going through various judgments of the International Court of Justice on the issue of Self-defence, it seems that the Court has never taken a position whereas to accept that a State's use of force was legitimate under the rule of self-defence.

customary international law to change. This has been confirmed, not only by scholars²⁸², but also by the ICJ in the *Nicaragua case* as well as in the *Oil Platforms case*.

In the *Nicaragua case* the ICJ, in its merits, discussed whether or not claims by Nicaragua which were founded in customary international law with the same content as rules in the UN Charter could be applied when the United States had made reservations to the provisions in which the rules were found in the UN Charter.²⁸³ The court was essentially examining the relationship and independence of customary rules in international law which have later been codified to some extent, and whether customary law can exist alongside treaty law when both address the same issue and a similar rule.

The Court's approach is consistent with earlier and later decisions on this issue, such as the *North Sea Continental Shelf case*²⁸⁴ where the Court recognized the existence of identical rules in international treaty law and customary law.²⁸⁵ The Court stated that on a number of points in the dispute, the areas governed by the two sources of law, that of treaty and customs, do not exactly overlap, and the substantive rules in which they are framed are not identical in content.²⁸⁶ In addition the court stated:

...even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective.²⁸⁷

Although the court was not dealing specifically with the rule of self-defence in the above mentioned quote, its method of analysis and interpretation when faced with two sources of law which support a common rule in international law is important when analyzing the relationship between article 51 of the UN Charter and customary international law on self-defence.

The Court in the *Nicaragua case* in its merit addressed exactly that, article 51 of the Charter. In its text the court identified that the UN Charter does by no means cover the whole area of regulation of the use of force in international relations, which may be construed as to mean that there are other rules that may allow for the use of force outside article 51 and the

²⁸² Antonin Cassese: *International Law*, p. 359.

²⁸³ *Nicaragua case*, para. 174-176.

²⁸⁴ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3. [*North Sea Continental Shelf case*]

²⁸⁵ *North Sea Continental Shelf case*, para. 63; *Nicaragua case*, para. 177.

²⁸⁶ *Nicaragua case*, para. 176-177.

²⁸⁷ *Nicaragua case*, para 175.

authorization of the Security Council (some of which rules will be addressed in Chapters 5.6 and 5.7 in this thesis). The Court implicitly describes one essential point which is found in the clear wording of the Charter in Article 51 which refers to a pre-existing customary international law and mentions the *inherent right* of individual or collective self-defence, which “*nothing in the present Charter shall impair*”²⁸⁸. From the wording of the Charter the court concludes that the Charter acknowledges a natural or inherent right of self-defence which, as the court describes “*is hard to see how this can be other than of a customary nature*”²⁸⁹. The court goes even further and states that because the Charter does not regulate all aspects of the rule of self-defence, for example regarding proportionality and the rule of necessity found in customary international law, it cannot be held “*that article 51 is a provision which “subsumes and supervenes” customary international law.*”²⁹⁰

This analysis by the ICJ is very important to establish the fact that when dealing with rules of self-defence they can be studied and evaluated from various standpoints, depending amongst others on the meaning of article 51. The meaning of this article has been debated among scholars, some of which have held that article 51 should be read as meaning that for UN members, bound by the UN Charter, the right of self-defence has no other content than the one determined by said article, thereby excluding right of anticipatory self-defence and the right to defend nationals abroad.²⁹¹ Others have on the other hand argued that the article was not intended to limit pre-1945 customary international law right as evident from the word *inherent*.²⁹² Bowett, who shares the second view states that it is fallacious to assume that members have only those rights which the Charter accords to them, unless to the extent that they have surrendered them under the Charter.²⁹³

Bowett’s opinion and arguments are in more harmony with the view of the Court in the *Nicaragua case* and with the idea that customary international law does not become extinct merely because the same rule is adopted in a written treaty as the ICJ made clear in the before mentioned *North Sea Continental Shelf case*.

Having established the above mentioned facts that self-defence is, can and ought to be viewed from the standpoint of international customary law as well as international treaty law it becomes clearer what aspects of the rules surrounding states’ right to self-defence need to

²⁸⁸ See article 51 of the UN Charter.

²⁸⁹ *Nicaragua case*, para. 176.

²⁹⁰ *Nicaragua case*, para. 176.

²⁹¹ David J. Harris: *Cases and Materials on International Law*, p. 922.

²⁹² David J. Harris: *Cases and Materials on International Law*, p. 922.

²⁹³ David J. Harris: *Cases and Materials on International Law*, p. 922.

be examined and established so that the legitimacy of using self-defence against non-state actors can be assessed.

5.3.2 *The Requirements of Necessity and Proportionality*

Self-defence as a customary law is almost synonymous with the so-called *Caroline affair* or *Caroline case*, which has been a test of self-defence for a very long time.²⁹⁴ The *Caroline affair* arose out of a strained relationship between the United States and Britain, in December 1837, relating to American nationals which assisted Canadian rebels fighting Britain.²⁹⁵ A large number of Americans were engaged in attacks on the British on Canadian shore and utilized for this purpose and that of shipping supplies a ship, the *Caroline*.²⁹⁶ In response the British, on the night of December 29, seized the *Caroline* in an American port and sent her over Niagara Falls, resulting in the death of two American nationals.²⁹⁷ What followed was a correspondence exchange between the US government and the British government. Mr. Webster formulated a test which has commonly been accepted as indicating the customary international law for self-defence.

The test according to Mr. Webster on behalf of the US Government included that the British had to show a necessity of self-defence and that the threat was instant, overwhelming, leaving no choice of means and no moment for deliberation.²⁹⁸ This test originating in the *Caroline* incident is generally accepted as to show that the requirements of both necessity and proportionality need to be fulfilled if a state resorts to self-defence. In the *Nicaragua case* as well as in the *Courts Oil Platform's case* this has been confirmed,²⁹⁹ and in addition, the ICJ has found that this test applies equally to the interpretation of article 51 of the UN Charter as it does customary international law. This was concluded in the Court's *Nuclear Weapons advisory opinion*³⁰⁰, in paragraph 41 the court states that "*The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. --- This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed*".³⁰¹

²⁹⁴ Judith Gardam: *Necessity, Proportionality and the Use of Force by States*, pp. 40-41.

²⁹⁵ Judith Gardam: *Necessity, Proportionality and the Use of Force by States*, pp. 40-41; David J. Harris: *Cases and Materials on International Law*, pp. 921-922.

²⁹⁶ David J. Harris: *Cases and Materials on International Law*, p. 921.

²⁹⁷ David J. Harris: *Cases and Materials on International Law*, pp. 921-922.

²⁹⁸ David J. Harris: *Cases and Materials on International Law*, pp. 921-922.

²⁹⁹ David J. Harris: *Cases and Materials on International Law*, p. 922.

³⁰⁰ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p.226 [Nuclear Weapons advisory opinion]

³⁰¹ *Nuclear Weapons opinion*. para. 41.

Article 51, according to its wording, reserves a right of individual or collective self-defence if “*an armed attack occurs against a Member of the United Nations*”, thereby opening for controversy regarding whether the provisions of the UN Charter exclude or allow for the possibility of resorting to anticipatory self-defence.³⁰² Because of the clear reference to the “inherent” self-defence right and the interpretation of, amongst others ICJ, it is normally concluded that a justification for anticipatory self-defence can be found in customary law and the article’s reference to it.³⁰³ In addition, at least two examples of the use of anticipatory self-defence can be found in recent history. The first example is Israel’s strike on the United Arab Republic in June of 1967.³⁰⁴ The latter example was affirmed by Security Council resolution 1368³⁰⁵ shortly after the terrorist attack on the World Trade Centre in 2001, where that resolution along with resolution 1373 recognized and reaffirmed the inherent right of individual and collective self-defence as recognized by the Charter of the UN. The question of anticipatory self-defence will be addressed more fully in Chapter 5.3.5.

5.3.3 *The Requirement of an Armed Attack*

According to article 51 of the UN Charter, a state that has suffered an *armed attack* may respond to the attack through individual or collective self-defence. It is therefore imperative to understand what the term *armed attack* refers to in order to determine whether such an attack has occurred. This has sometimes been described as a particularly difficult issue of interpretation, and is of particular importance when evaluating, to what extent the prerequisite requirement of *armed attack* negates the right to anticipatory self-defence, which may or may not exist under customary international law.³⁰⁶ Again the ICJ’s decision in the *Nicaragua case* (and the *Oil Platforms case*) is of much assistance in answering these questions and gives us an idea as to what constitutes an armed attack. The Court’s considerations in the *Nicaragua case* shed light on the concept *armed attack* and its decision confirmed a fairly restrictive understanding.³⁰⁷ One of the primary issues was the claim made by the United States of acting, primarily, in self-defence, or collective self-defence of El Salvador, which had been a victim of attacks by rebel groups which allegedly were supplied with arms from Nicaragua

³⁰² Ian Brownlie: *Principles of Public International Law*, p. 700.

³⁰³ Ian Brownlie: *Principles of Public International Law*, p. 701.

³⁰⁴ Rebecca M.M. Wallace: *International Law*, p. 285.

³⁰⁵ UN Doc. S/RES/1368 (2001).

³⁰⁶ Ian Brownlie: *Principles of Public International Law*, p. 700; Rebecca M.M. Wallace: *International Law*, p. 283.

³⁰⁷ Christian J. Tams: “Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case”, p. 965.

with the active support or at least complicity of the Government of Nicaragua.³⁰⁸ The question therefore arose whether or not these attacks by rebel groups, which were supported by the Nicaraguan government, amounted to an armed attack justifying the use of self-defence. The court in its decision gave a narrow definition of an *armed attack* excluding amongst others “*assistance to rebels in the form of the provision of weapons or logistical or other support*” although such assistance would amount to the use of force.³⁰⁹

In paragraph 195 of the court’s judgment, it is asserted that an *armed attack* needs to have occurred in order for either individual or collective self-defence to be exercised. The court does therefore not make an initial distinction between the requirements for individual self-defence opposed to collective self-defence. It should be noted, that the court did not address the issue of anticipatory self-defence as the parties only relied on the right to self-defence in the case of an armed attack, not claiming self-defence as a response to an imminent threat.³¹⁰ The court continued and stated, referring to article 3(g) of the Definition of Aggression annexed to the UN General Assembly resolution 3314 (XXIX):

[that there seems] to be a general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” (inter alia) an actual armed attack conducted by regular forces, “or its substantial involvement therein.”³¹¹

The court concludes that the definition in UN General Assembly resolution 3314 may be interpreted as to reflect customary international law. Working from this definition the court finds that the sending by a state of armed bands to the territory of another state can be classified as an armed attack, rather than as a mere frontier incident, if such an operation, *because of its scale and effects*, would have been classified as such, had it been carried out by regular armed forces. The Court continues by stating that it does not believe that assistance to rebels in the form of the provision of weapons or logistical or other support should amount to armed attack. Taking it further the Court indicates that acts may amount to a threat or use of

³⁰⁸ Kimberley M. Trapp: “Back to Basics: Necessity, Proportionality, and the Right to Self-Defence Against Non-State Terrorist Actors”, p. 143.

³⁰⁹ *Nicaragua case*, para. 195.

³¹⁰ David J. Harris: *Cases and Materials on International Law*, p. 899; Rebecca M.M. Wallace: *International Law*, p. 284; *Nicaragua*, para. 194.

³¹¹ *Nicaragua case*, para. 195.

force or amount to intervention in the internal or external affairs of other states without justifying use of force under the prerequisite of an armed attack.³¹²

This decision and interpretation by the court is not agreed to by all scholars. If the judgment is analysed, it is evident that the Court emphasizes both the effect as well as the scale of an attack when determining whether or not a particular attack can be deemed an *armed attack*. Although scholars such as Professor Brownlie states that an armed attack “*has a reasonably clear meaning*”³¹³ and seem mostly to agree with the judgment in the *Nicaragua case*, other scholars such as Yoram Dinstein have however approached this concept with a different emphasis, where the effects of an attack are the deciding factor in the measurement of whether or not a state has suffered an armed attack.³¹⁴ Thus Dinstein states that an armed attack postulates attacks causing human casualties and/or serious destruction of property. If that requirement is met, Dinstein suggests that the international community needs to accept that an armed attack has occurred.³¹⁵ Although an armed formation crossing the border of a country may be of such scale as to fulfil the requirements set forth in the *Nicaragua case*, it is unlikely that the effect requirement is met with a mere crossing of a border. Such an action would however be seen as an illegal use of force, unless otherwise justified under international law.

What is especially interesting in analyzing the concept of an armed attack is the fact that article 51 in no way limits itself to specially large armed attacks or directed at a specifically important target, nor does it request that an attack need to be committed using specific weapons or armour. So it is the concept itself that according to the interpretation of the ICJ that demands in and by itself a certain scale and effect. However, because of the vagueness of this requirement of article 51 it is necessary to bear in mind that in the *Nicaragua case* the Court stated, as Chapter 3.2 describes that the ‘victim state’ bears an obligation to form and declare the view that it has been a victim of an armed attack. This is also, as has been stated in Chapter 3.2, a prerequisite of collective self-defence.³¹⁶ From this it must be concluded that an attack must be evaluated on a case by case basis, keeping in mind the principles and measurements set forth by the ICJ in the *Nicaragua case* and with respect to the specific situation being dealt with. It can be very helpful to look at other incidents where an attack has been deemed an armed attack, in order to assess a situation at hand. For

³¹² *Nicaragua case*, para. 195.

³¹³ Ian Brownlie: *Principles of Public International Law*, p. 700.

³¹⁴ Yoram Dinstein: *War, Aggression and Self-Defence*, pp. 193-196.

³¹⁵ Yoram Dinstein: *War, Aggression and Self-Defence*, pp. 193-196.

³¹⁶ *Nicaragua case*, para. 199.

example in the *Iran Hostages case* of 1980 the ICJ used the phrase *armed attack* when it discussed the takeover by Iranian militants of the US embassy in Tehran and the seizure of the embassy staff as hostages, in November 1979.³¹⁷

5.3.4 *Collective Self-Defence*

In article 51 of the UN Charter a reference is made to both individual and collective self-defence. This reference allows by its own wording for states to resort to collective self-defence, meaning that a 'victim state' can ask for assistance from other states in effort to protect itself.

Collective self-defence has been resorted to, e.g. World War II,³¹⁸ and can be resorted to amongst others on the basis of a treaty and military alliances, such as article 5 of NATO's statute. That article essentially describes a regional arrangement consistent with article 52(1) of the Charter of the United Nations that states that an armed attack on one member state of the treaty shall constitute an attack on all. Essentially referring to the fact that, all the NATO members will be allowed to resort to collective self-defence, if one member has suffered an armed attack. The concept of collective self-defence is not disputed under international law and should be considered equally legitimate to individual self-defence in the situations of states or non-state actors. It should be noted that in the 9/11 response collective self-defence was resorted through via NATO's response as well as the UK's response to the attacks.³¹⁹ One important aspect of collective self-defence needs though to be noted. It is the fact that the 'victim state' to an armed attack, must have declared that it is under attack. This is based on the *Nicaragua case* where the ICJ ruled that a state may not exercise the right of collective self-defence merely 'on the basis of its own assessment of the situations'.³²⁰

Thus the question of legitimacy of collective self-defence with regard to a non-state actor is not a controversial one, and collective self-defensive measures ought to be considered equally legitimate to that of individual self-defence measures, assuming that a 'victim state' has declared itself a victim of an armed attack.

5.3.5 *Anticipatory Self-Defence*

Anticipatory self-defence is the use of self-defence against an imminent attack; that is against an attack that has not yet occurred. This has been somewhat a controversial concept in

³¹⁷ *Iran Hostages case*, para 57.

³¹⁸ Yoram Dinstein: *War Aggression and Self-Defence*, p. 253.

³¹⁹ See Chapter 5.4.2.2

³²⁰ Yoram Dinstein: *War Aggression and Self-Defence*, p. 268.

international law but should be mentioned as it may be an option available to a ‘victim state’ of a non-state actor attack. It should however be noted before this aspect of self-defence is analysed that the exercise of self-defence against a non-state actor should not exclude the possibility of anticipatory self-defence. Therefore if anticipatory self-defence is found to be a legitimate action which a state can resort to against another state, it should be equally available against a non-state actor if “normal” self-defence is found to be available against such an actor.³²¹

Anticipatory self-defence is essentially the use of force which is resorted to because of *a risk* of an armed attack. The controversy behind this concept derives from the fact that article 51 of the UN Charter seems not to recognize this right, as the article requires, by its own wording, that an armed attack has occurred before a state can resort to forcible measures. The view that anticipatory self-defence is unlawful was the predominant view of scholars, although by no means the exclusive view, as well as states in the international community, until the *9/11 attacks*.³²² But the idea behind anticipatory self-defence dates back to the so-called *Caroline affair* which was described in Chapter 5.3.2., where correspondence exchange between the United States and Britain in the 18th Century resulted in the formulation of anticipatory self-defence.³²³ The *Caroline affair* which is often cited as showing customary international law regarding self-defence, justified the exercise of force in self-defence if four requirements were met including that the countermeasures were proportionate. The requirements were that a threat needed to be instant, overwhelming, immediate and that no viable alternative action could be taken.³²⁴

For anticipatory self-defence to be considered legitimate under international law, article 51 of the UN Charter needs to be interpreted as to allow for the *Caroline affair* understanding of self-defence to be applied today, after 1945. Thus many of the advocates for the anticipatory self-defence have emphasized the fact that article 51 mentions the ‘*inherent right*’ to self-defence and that this would essentially mean that customary principles such as those found in the *Caroline affair* apply readily today, as ‘*nothing in the present Charter impairs*’ that right. This has furthermore been supported with reference to the *travaux préparatoires* which stressed that the use of arms in legitimate self-defence remains admitted

³²¹ As is the subject of Chapter 5.4. of this essay.

³²² Abdul Ghafur Hamid: “The Legality of Anticipatory Self-Defence in the 21st Century World Order: A Re-appraisal”, p. 443.

³²³ Ian Brownlie: *Principles of Public International Law*, p. 701.

³²⁴ Rebecca M.M. Wallace: *International Law*, p. 282.

and unimpaired.³²⁵ This view stresses the imminence of an attack as the justification for self-defence. However it seems that a lot of criticism can be argued as a response to the use of *travaux préparatoires* arguments as well as the selectivity of interpreting article 51 of the UN Charter.³²⁶ And it is a fact that with the UN Charter, there was made a decision to limit the right to self-defence to an armed attack and that there isn't really anything that suggest that the framers of the UN Charter intended something broader than the language implied.³²⁷

It is not the intention or the goal of this thesis to evaluate anticipatory self-defence, thus the author does not take a particular standing on this issue, nonetheless, it is mentioned here because of it may be an option which is available to 'victim states'. In addition it should be mentioned as the issue is closely related to and sometimes confused with *pre-emptive self-defence* which has in recent years been connected with self-defence measures against non-state actors and *interceptory self-defence*. The concept of pre-emptive self-defence has often also been described also as the *Bush Doctrine*.³²⁸ First of all a distinction should be made between *pre-emptive self-defence* and that of *anticipatory self-defence*. While *anticipatory self-defence* focuses on imminent threats, pre-emptive self-defence is a response to a non-imminent threat which may not even have formally been formed.³²⁹ Such tactics have been upheld by the United States in the aftermath of 9/11 and have often been justified using the concept interchangeably with that of anticipatory self-defence.³³⁰ This type of action is much more controversial than that of anticipatory self-defence and has not received much recognition under international law.³³¹

The distinction between *interceptory self-defence* and *anticipatory self-defence* is a more subtle one. *Interceptory self-defence* is often described as falling within the scope of article 51 of the UN Charter and is a more descriptive way of interpreting the exact moment of an armed attack.³³² Thus it has been described that in circumstances when a state response in defence to missiles which have not yet hit the state, it is an act of interceptory self-defence

³²⁵ Derek W. Bowett: *Self-Defence in International Law*, pp. 185-186, 188-192.

³²⁶ Abdul Ghafur Hamid: "The Legality of Anticipatory Self-Defence in the 21st Century World Order: A Re-Appraisal", pp. 450-455.

³²⁷ Philip C. Jessup: *A Modern Law of Nations*, p. 166; David J. Harris: *Cases and Materials on International Law*, p. 931.

³²⁸ Jim Whitman: "Humanitarian Intervention in an era of Pre-emptive Self-Defence", p. 264.

³²⁹ Abdul Ghafur Hamid: "The Legality of Anticipatory Self-Defence in the 21st Century World Order: A Re-Appraisal", p. 445.

³³⁰ Abdul Ghafur Hamid: "The Legality of Anticipatory Self-Defence in the 21st Century World Order: A Re-Appraisal", pp. 478-482.

³³¹ Ian Brownlie: *Principles of Public International Law*, p. 702

³³² Abdul Ghafur Hamid: "The Legality of Anticipatory Self-Defence in the 21st Century World Order: A Re-Appraisal", pp. 485-486.

as an armed attack has essentially occurred, although the missiles have yet to hit any target.³³³ This is a position that the author of this thesis readily accepts and thus emphasizes the clear distinction between such circumstances and those in which would classify as anticipatory measures.

Whether anticipatory self-defence is a lawful action under international law is a difficult issue and has yet to even be addressed by the ICJ which has left the question open in the *Nicaragua case* and did not refer to it in the *Oil platforms case*.³³⁴ It is a controversial one, partly due to situations such as Israel's attack and destruction of a nuclear reactor in Iraq that was nearing completion.³³⁵ Israel justified its actions on the grounds of anticipatory self-defence; that the nuclear reactor would be used to manufacture weapons which would be used against Israel.³³⁶

Although it may seem to be an issue which lacks support from the international community, certain events in the 9/11 aftermath may indicate a change, giving more support to anticipatory self-defence. In the UN Secretary General's High Level Panel on Threats, Challenges and Change, it was concluded that "*a threatened state, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate.*"³³⁷ In addition the summit concluded that "*there are good arguments for preventive military action, with good evidence to support them*".³³⁸ It seems therefore that more support to the legitimacy of anticipatory self-defence exists today than before, whether this increased support will affect customary international law regarding use of force may be too soon to elaborate on.

What matters to this thesis is essentially that there ought not to be discrimination as to non-state actors when evaluating the legality of anticipatory self-defence. Thus if anticipatory self-defence is held to be a legal response in international law it should not discriminate between non-state actors or states.

³³³ Abdul Ghafur Hamid: "The Legality of Anticipatory Self-Defence in the 21st Century World Order: A Re-Appraisal", pp. 485-486.

³³⁴ David J. Harris: *Cases and Materials on International Law*, p. 931.

³³⁵ Abdul Ghafur Hamid: "The Legality of Anticipatory Self-Defence in the 21st Century World Order: A Re-Appraisal", pp. 470-471; David J. Harris: *Cases and Materials on International Law*, p. 932.

³³⁶ Abdul Ghafur Hamid: "The Legality of Anticipatory Self-Defence in the 21st Century World Order: A Re-Appraisal", pp. 470-471; David J. Harris: *Cases and Materials on International Law*, p. 932.

³³⁷ *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change* (United Nations 2004) Part 3, para. 188-192.

³³⁸ *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change* (United Nations 2004) Part 3, para. 188-192.

5.4 Self-Defence against a Non-State Actor

Having analysed and put forth the above mentioned general principles and requirements of self-defence as they exist in international law the next step is to evaluate whether or not these same principles apply when dealing with a non-state actor attacker. These principles all apply when dealing with interstate relations where both parties are states; however the question this chapter will examine is the question of self-defence when triggered by a non-state actor attack. This chapter will also address the issue of self-defence with reference to the attributability of a non-state actor attack to a foreign state

Recent events³³⁹, *opinio juris*³⁴⁰ and recent cases before the ICJ³⁴¹ are important sources of reference with regard to the current analysis of the legitimacy of self-defence against non-state actors. First, it needs to be evaluated whether a non-state actor attack can in and of itself trigger the right to self-defence, that is, can a non-state actor fulfil the prerequisites of self-defence. Secondly the action of using force in self-defence against a non-state actor will be examined with respect to the fact that using force within a foreign state will inevitably the territorial integrity and the political independence of that state. Here different situations in which self-defence could be executed will be examined. Lastly the issue of anticipatory self-defence as a response to a non-state actor attack will be looked into.

In order to address these issues the language of the UN Charter needs to be analysed with regard to the concept of an *armed attack*.

5.4.1 The Language of the UN Charter

Looking into the language of article 51 of the UN charter it is evident that the wording of the article does not mention that an armed attack needs to come from a state in order for the right to self-defence to be invoked. The article merely mentions the state as the victim or target of an armed attack. There has been some debate on whether or not the language of the charter allows for an armed attack to be considered when carried out by a non-state actor.³⁴² And although the absence of mentioning a state attack may be interpreted as allowing for a non-state actor as some uphold, others claim that self-defence may be exercised only in response to an armed attack by a state.³⁴³ As with many of the provisions of international law it can be

³³⁹ Such as the 9/11 attacks and the response of the international Community, 1998 bombings of Somali and Afghanistan and the recent events of Russian invasion into South Ossetia in Georgia.

³⁴⁰ The reactions of NATO, and other States to the aftermath of the events of 9/11.

³⁴¹ Such as the *Palestinian Wall Advisory opinion*, *DRC v Uganda*, *Iran Hostages case*, *Nuclear Weapons case*.

³⁴² Yoram Dinstein: *War Aggression and Self-defence*, p. 204.

³⁴³ Thomas M. Franck: "Terrorism and the Right of Self Defence", p. 839-840; Yoram Dinstein: *War, Aggression and Self-Defence*, p. 204.

of great source to look at the ICJ's interpretation of the provision. One case in particular is of great importance when examining the language of article 51 in respect of an armed attack by a non-state actor, that of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*³⁴⁴ in addition some reference must be made to the courts judgment in the *Nicaragua case*.

In the *Nicaragua case* the court found that there appeared to be a general agreement in the international community on the nature of the acts which could constitute armed attacks and that this would include not merely actions by regular armed forces across an international border but also “*the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an actual armed attack conducted by regular forces.*”³⁴⁵ Although this statement has been previously addressed regarding the general rule on self-defence, it needs to be analysed again with respect to non-state actor. First of all it should be noted that the definition that the Court proposes is according to its own words, one that appears to be generally agreed upon.³⁴⁶ Secondly it should be noted that this definition includes a clear reference to the fact that a state is the sender of the attacker, whatever form that attacker has. Although the issue before the court in the *Nicaragua case* did not require that the court answered the question of under what circumstances a state could legitimately use force against non-state actors in a foreign territory,³⁴⁷ it remains the fact that this was the Courts finding in this very important and often cited case on the issue of self-defence, however controversial it may be.³⁴⁸ This finding must though be considered in light of the, then recent UN General Assembly resolution on the definition of Aggression.³⁴⁹ This resolution stated in article 3(g) “*The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement thereof.*” The language of the court is therefore a clear reference to this definition of aggression, and the court therefore authoritatively held that this definition reflects customary international law.³⁵⁰ The fact that the Court is merely

³⁴⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136. [Palestinian Wall Advisory Opinion]

³⁴⁵ *Nicaragua case*, para. 195.

³⁴⁶ *Nicaragua case*, para. 195.

³⁴⁷ Kimberley M. Trapp: “Back to Basics: Necessity, Proportionality, and the Right to Self-Defence Against Non-State Terrorist Actors”, p. 143.

³⁴⁸ Sean D. Murphy: “Self-Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?”, p. 65.

³⁴⁹ UN Doc. A/RES/3314 (XXIX).

³⁵⁰ Antonin Cassese: *International Law*, p. 365; Christian J. Tams: “Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case”, p. 965, *Nicaragua case*, para. 195.

reiterating the resolutions article and claiming it to be customary international law, does not in and of itself stand to reason that the court is actually precluding the fact that an armed attack committed by a non-state actor can be initiate a right to self-defence. Rather the court is emphasizing a principle of attributability of certain acts that may on the surface be non-state acts but are in fact acts of the state. This author's interpretation of the ICJ's wording, although shared by some, is not undisputed,³⁵¹ however it is supported to some extent by the opinions of some of the judges in the *Palestinian Wall opinion*.

The recent events that had occurred before the advisory opinion in the *Palestinian Wall advisory opinion*, those of the 9/11 attacks clearly sparked the controversy of non-state actor armed attacker, as this had become a very important matter in the international community and not all scholars seemed to agree whether or not article 51 of the UN Charter recognized the existence of an inherent right of self-defence in the case of armed attack by one state against a non-state actor.³⁵² It stood therefore to reason that the issue would be an ideal one for the Court to clarify the rules surrounding a non-state actor and self-defence. But instead of addressing the issue comprehensively the ICJ's position on the issue of self-defence was made known in mere five sentences and has been criticized heavily by many scholars and was even addressed by some of the judges in their separate opinions.³⁵³ Judge Higgins recognized the concern behind the armed attack requirement in regard to non-state actors when she, in her advisory opinion in the *Palestinian Wall advisory opinion*, criticized the following part of the judgment of the court in that case:

“Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.”³⁵⁴

Judge Higgins notes that “*There is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State.*”³⁵⁵ In addition to Judge Higgins' separate opinion other judges also addressed this issue which the Court had merely mentioned, but failed to address adequately. Judge Kooijmans noted in his separate opinion in the same case that:

³⁵¹ Antonin Cassese: *International Law*, pp. 364-365

³⁵² Antonin Cassese: *International Law*, pp. 360-362; Yoram Dinstein: *War, Aggression and Self-Defence*, p. 204; *Palestinian Wall Advisory Opinion*.

³⁵³ Sean D. Murphy: “Self-Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?”, p. 62; Iris Canor: “When *Jus ad Bellum* meets *Jus in Bello*: The Occupier's Right of Self-Defence against Terrorism Stemming from Occupied Territories”, pp. 129, 132; Christian J. Tams “Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case”, p. 965.

³⁵⁴ *Palestinian Wall Advisory Opinion*, para. 139.

³⁵⁵ *Palestinian Wall Advisory Opinion, separate opinion of Judge Higgins*, para. 33.

This new element [referring to international terrorism] is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years.³⁵⁶

Thus he agreed with Judge Higgins that article 51 of the Charter does not exclude the possibility of an armed attack coming from a non-state actor. The rationale in Kooijmans' opinion is very interesting as he in particular mentions that although it has been generally accepted that the Charter be interpreted as allowing only self-defence in the circumstances involving an armed attack from another state, that does not preclude the fact that the wording of the Charter does in no way demand this interpretation or that this be the case. This rationale is very interesting from the perspective of chapter 2 in which it was observed that international law has developed from a purely interstate community into today's modern international community which does accept non-state actors, even accepting them to the fact that they can be considered a threat to the peace and security of the community as a whole. This has been very evident in the post *9/11 era* where the UN Security Council adopted one resolution after another, recognizing and reaffirming the inherent right to self-defence after the *9/11 attack*.³⁵⁷ This was in fact what Judge Buergenthal in this same case noted in his declaration where he stated:

The first [problem with the conclusion of the court] is that the United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State³⁵⁸

Judge Buergenthal continues in his declaration and refers to the fact that the UN Security Council invoked the right to self-defence in calling on the international community to combat terrorism the day after the *9/11 attacks*.³⁵⁹ The Council, moreover, did not limit their application to state actors and if the past resolutions of the UN Security Council are taken into account, where the Council has taken actions against individuals and named terrorist groups, it reinforces the understanding that non-state actors can be responsible for an armed attack under the language of article 51.

Indeed if the particular case of the *Palestinian Wall advisory opinion* is evaluated one notices that although the decision of the Court was that the wall in question was unlawful

³⁵⁶ *Palestinian Wall Advisory Opinion, separate opinion of Judge Kooijmans*, para 35

³⁵⁷ UN Doc. S/RES/1368 (2001); UN Doc. S/RES/1373 (2001).

³⁵⁸ *Palestinian Wall Advisory Opinion, declaration of Judge Buergenthal*, para 6.

³⁵⁹ *Palestinian Wall Advisory Opinion, declaration of Judge Buergenthal*, para 6.

under international law, the decision was not reached solely on the argument that self-defence against non-state actors is not permitted according to traditional interpretation of article 51 of the UN Charter. The reasoning of the Court is not alone aimed at excluding the application of article 51 on the grounds that self-defence cannot be used against non-state actors. The right of Israel to resort to self-defence in accordance with article 51 was not available because the threat originated from within the territory which was under Israel's control. It is interesting to see the language of the court:

“Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.”³⁶⁰

The Court implicitly states that Israel does not claim that the attacks against it are imputable to a foreign state, in addition the court notes that the situation is different from that contemplated by the UN Security Council resolutions following the *9/11 attacks* against the United States, in a way that the attacks of *9/11* originated outside the territory of the USA, but in the Palestinian Wall Case the attacks originated from within.

This is interesting because the court seems to accept that the actions of the UN Security Council in the aftermath of *9/11 attacks*, were in accordance with international law, at the same time the court states as a reason for the inapplicability of article 51 that the attacks against Israel are not imputable to a foreign state. More importantly, the court makes the distinction between the *Palestinian Wall advisory opinion* and the *9/11 attacks*, not on grounds of state attribution, but on the grounds of the attacks originating in foreign territory.

The decision and especially the courts interpretation of article 51 is clearly very controversial, even among the judges themselves. Therefore, it is helpful to examine the courts judgment in the *DRC v. Uganda* case before the ICJ from 2005.³⁶¹

The *DRC v. Uganda* touches on this issue and some of the separate opinions of the judges also give this issue of non-state actor armed attack weight, as the judgment itself fails

³⁶⁰ *Palestinian Wall Advisory Opinion*, para. 139.

³⁶¹ *ICJ Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, 19 Dec 2005, <www.icj-cij.org> [DRC v Uganda].

to address the circumstances under which a state has a right to resort to self-defence against non-state actors.³⁶² The court did not in its decision mention that article 51 of the Charter required an armed attack by one state against another as it had done in the *Palestinian Wall advisory opinion*.³⁶³ However the court found that the attacks on Uganda, which were carried out by rebel forces among others the ADF, from the territory of the DRC were non-attributable to the DRC.³⁶⁴ Although that finding of the court would have been an excellent one³⁶⁵ for the court to discuss and conclude on the issue of self-defence being resorted to when non-state actors which actions are non-attributable to the foreign state which they operate from, attack, the court did not address that issue. Instead it noted that Uganda never did claim that it had been a victim of ‘armed attacks’ from the non-state actor, the ADF.³⁶⁶ Because the Court only tested the attributability of the attacks to the DRC and concluded, using the test of the *Nicaragua case* and article 3(g) of General Assembly resolution 3314 (XXIX) on the definition of Aggression, that the attacks were non-attributable to the state.³⁶⁷ The court therefore addressed this issue as self-defence of a state against another state, rather than self-defence against a non-state actor as is evident in the language of the court when it states “*the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present*”³⁶⁸ Following this the court found no need to further deliberate on the issue of self-defence.

Again the judges did not all agree upon the Court’s approach to the issue of self-defence. Judge Kooijman criticized the Court in his separate opinion for not answering the question as to what actions a victim state is entitled to take when confronted with an attack that fulfils the scale and effect test of the *Nicaragua case*, when carried out by irregulars and no involvement from the host government can be proven.³⁶⁹ While Judge Kooijman implies that the Court may be taking the same position as it did in the *Palestinian Wall advisory opinion*,³⁷⁰ he repeats his criticism from that opinion and reiterates his very important observation of *opinio juris*. That of the fact that the UN Security Council does not seem to agree to the interpretation of the ICJ in the *Palestinian Wall case* and that it does

³⁶² Kimberley M. Trapp: “Back to Basics: Necessity, Proportionality, and the Right to Self-Defence Against Non-State Terrorist Actors”, p. 141.

³⁶³ Kimberley M. Trapp: “Back to Basics: Necessity, Proportionality, and the Right to Self-Defence Against Non-State Terrorist Actors”, pp. 144-145.

³⁶⁴ *DRC v. Uganda*, para. 146.

³⁶⁵ *DRC v. Uganda, separate opinion of Judge Simma*, para. 8.

³⁶⁶ *DRC v. Uganda*, para. 146.

³⁶⁷ The test of attribution will be addressed in Chapter 5.5.

³⁶⁸ *DRC v. Uganda*, para. 146.

³⁶⁹ *DRC v. Uganda, separate opinion of Judge Kooijmans*, para. 26.

³⁷⁰ *DRC v. Uganda, separate opinion of Judge Kooijmans*, para. 27.

acknowledge that a non-state actor, for example via international terrorism, may be considered a threat to international peace and security without ascribing the threat to any state.³⁷¹ Judge Kooijman goes on and states:

If the activities of armed bands present on a State's territory cannot be attributed to that State, the victim State is not the object of an armed attack by it. But if the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its *inherent* right of self-defence³⁷²

Judge Kooijman in this paragraph refers to a very important element of the rule on self-defence, that of its *inherency* and thus, that of its relationship to customary international law.

Although Judge Kooijman does not refer to the *Caroline* incident, his reference to the *inherent* right of self-defence which Article 51 of the UN Charter indeed acknowledges and gives full reason to look into the situation surrounding that incident. In essence, the *Caroline affair*³⁷³ was nothing more than self-defence *as a reaction to attacks by non-state actors*, that of the U.S. nationals supporting the rebellion in Canada.³⁷⁴ Thus it can be assumed that the *inherent* right of self-defence must, supported by precedents such as the *Caroline* incident,³⁷⁵ allow for armed attacks from non-state actors to be considered invoking a states right to self-defence.

In addition to this, judge Kooijman notes a particular shortcoming if the concept of armed attack is interpreted to preclude non-state actors armed attack. This is actually a phenomenon that the Court itself identified and described as unfortunately becoming as familiar as terrorism.³⁷⁶ It is the almost complete absence of government authority in the whole or part of the territory of a state, resulting in a clear dilemma when armed non-state actors operate and attack a foreign state from that territory.³⁷⁷ If the implications deduced from the Court's decision in its former cases are correct, that would result in situations where a government, which cannot exercise authority over all of the territory from which non-state attackers are operating, would never allow for the consideration of an armed attack.³⁷⁸ In addition this interpretation of article 51 would preclude a state from resorting to the right to

³⁷¹ *DRC v. Uganda, separate opinion of Judge Kooijmans*, para. 28.

³⁷² *DRC v. Uganda, separate opinion of Judge Kooijmans*, para. 29, 30.

³⁷³ Referred to in chapter 5.3.2.

³⁷⁴ Sean D. Murphy: "Self-Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?", p. 65.

³⁷⁵ And other incidents, where governments invoked the right of self-defence against the acts of individuals in numerous cases, such as the seizure of vessels engaged in smuggling. See Sean D. Murphy: "Self-Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?", p. 65.

³⁷⁶ *DRC v. Uganda*, para. 301.

³⁷⁷ *DRC v. Uganda, separate opinion of Judge Kooijmans*, para. 30.

³⁷⁸ Unless of course that the attacks would be attributable to a particular State outside the 'victim State'

self-defence if the non-state actor, who has no connection with any state, is operating from outside the jurisdiction of all states such as from the high seas or outer space and an armed attack is executed from that place.³⁷⁹

This concern of Judge Kooijman is shared by others such as Judge Simma and Yoram Dinstein.³⁸⁰ Because according to the strict requirements of the ICJ when it is attributing actions of non-state actors to states, it becomes very evident in its *Nicaragua case*, that a state that provides rebels with logistical support, financial aid, and weapons may well violate international law, but that such assistance is not normally sufficient to involve the assisting state in an armed attack, even though the actions of the rebels would have, if carried out by state agents, amount to an armed attack.³⁸¹ This decision of the court seemed to allow for a state to gather the assistance of non-state actors when attacking another state without having to fear for self-defence.³⁸² The test of attribution and control from the *Nicaragua case*, which seems to be upheld in the recent controversial cases of the ICJ such as the *Oil Platforms cases*, *Palestinian Wall Advisory Opinion* and the *DRC vs. Uganda case*, does not seem to allow for self-defence to be initiated by armed attack from groups such as the above mentioned example of Judge Kooijman, and disregards the fact that an attack which is launched against a ‘victim state’ by non-state actors operating from outside the ‘victim state’s’ territory may be expected to originate in another state but does not denote that, that state’s government is necessarily implicated in the attack. It is very important, in this respect, to note that two judges, Judges Scwebel³⁸³ and Jennings³⁸⁴ did not agree with the court *Nicaragua case* decision in this respect and that the *opinio juris*, at least from the actions of the UN Security Council seems to support the opinion of the two dissenting judges, and stray’s away from the decision of the ICJ.³⁸⁵

In respect to all of this it becomes quite convincing when Judge Kooijman states that “*it would be unreasonable to deny the attacked State the right to self-defence merely because*

³⁷⁹ Such a situation might allow for other reactions on behalf of the attacked state as it could be defined as piracy see Yoram Dinstein: *War, Aggression and Self-Defence*, p. 205; In addition it has been contemplated that an interception of a foreign aircraft or ship suspected of carrying terrorists is lawful, that is in the context that the non-state actor is flying or sailing under the flag of a foreign state, and thus does not answer fully the question of a non-state actor situation where no-connection exists between the private actor and a state, see Antonin Cassese: *International Law*, p. 479.

³⁸⁰ Yoram Dinstein: *War, Aggression and Self-Defence*, pp. 204-206.

³⁸¹ Antonin Cassese: *International Law*, pp 470-417.

³⁸² Sean D. Murphy “Self-Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?”, pp. 65-66

³⁸³ *Nicaragua case, dissenting opinion of Judge Scwebel*, para. 170-171.

³⁸⁴ *Nicaragua case, dissenting opinion of Judge Jennings*, p. 543 in the I.C.J. Reports (1986).

³⁸⁵ Antonin Cassese: *International Law*, p. 471.

there is no attacker State, and the Charter does not so require".³⁸⁶ And he is not alone in having this opinion, as Judge Simma in this same case of DRC v. Uganda, agrees with most of the points made in Judge Kooijman's opinion.³⁸⁷ Judge Simma's reasoning is again very convincing, as he in more detail than the court, addresses the issue as well as the apparent *opinio juris* when evaluating the concept of an armed attack.³⁸⁸ His approach leads him to the same conclusion as Judge Kooijman, that if armed attacks are carried out by irregular forces from such territory against a neighbouring state, these activities are still armed attacks even if they cannot be attributed to the territorial state.³⁸⁹ Finally, before leaving the subject of armed attack in the decisions of the ICJ it the courts description of the events taking place in Iran on November 4th 1979 regarding the *Iran hostages* ' case. There the court states:

...from the failure on the part of the Iranian authorities to oppose the *armed attack* by the militants on 4 November 1979 and their seizure of the Embassy premises and staff, to the almost immediate endorsement by those authorities of the situation thus created, and then to their maintaining deliberately for many months the occupation of the Embassy and detention of its staff by a group of armed militants acting on behalf of the State for the purpose of forcing the United States to bow to certain demands. [emphasis added]³⁹⁰

Although this is an older case than the *Nicaraguan case*, and although there were no questions of the legality of the United States operations of self-defence against Iran, it is very informative to note that the Court itself, in the above mentioned paragraph uses the term *armed attack* to describe the actions of non-state actors against the US Embassy in Iran, which was essentially an attack on US territory. Even though the court notes that the Iranian authorities endorsed the actions, and later maintained the occupation of the Embassy, the court does quite clearly distinguish between the initial armed attack, which was committed solely by non-state actors not by or on behalf of Iranian authorities and the later situations where the authorities, indeed where very much illegally involved in the situation.

5.4.2 State Actions – *opinio juris*

Having gone through several examples of the debate in the ICJ, it is reasonable to examine a few incidents where self-defence was resorted to in response to an armed attack by a non-state actor, thus showing for an *opinio juris* among states with regard to the interpretation of the concept of armed attack in article 51 of the UN Charter.

³⁸⁶ DRC v. Uganda, separate opinion of Judge Kooijman, para. 30.

³⁸⁷ DRC v. Uganda, separate opinion of Judge Simma, para. 12.

³⁸⁸ DRC v. Uganda, separate opinion of Judge Simma, para. 11.

³⁸⁹ DRC v. Uganda, separate opinion of Judge Simma, para. 12.

³⁹⁰ Iran Hostages case, para. 91.

5.4.2.1 1998 Bombings of Somalia and Afghanistan

On August 7, 1998, Al Qaeda, a terrorist non-state actor, sponsored bombings of U.S. Embassies in Nairobi, Kenya and Dar es Salaam in Tanzania resulting in the death of nearly three hundred people including twelve Americans.³⁹¹ In response to this situation the United States invoked their right of self-defence according to article 51 of the UN Charter and launched cruise missiles against sites in Afghanistan and Sudan on August 20th, 1998.³⁹² These sites were allegedly training camps in Afghanistan and a Sudanese pharmaceutical plant that allegedly served as a chemical weapons facility.³⁹³ The attacks were the same day announced to the president of the UN Security Council in a Letter from the Permanent Representative of the USA.³⁹⁴ Interestingly enough these attacks seem not to have been imputable to either Sudanese or Afghan government organs,³⁹⁵ and even if that would be the case, that the actions were imputable; that in and of itself suggest a much broader standard of attributability than the one found in the *Nicaragua case*. The actions of the United States prompted protests from the government of Sudan along with Iran, Iraq, Libya, Pakistan, Russia and Yemen, Palestinian officials, and from certain Islamic militant groups.³⁹⁶ On the other hand the United States gained various degrees of expressed support from Australia, France, Germany, Japan, Spain and the United Kingdom.³⁹⁷ However neither the UN General Assembly nor the UN Security Council condemned the attacks, and while the League of Arab States condemned the actions in Sudan they were silent regarding the one in Afghanistan.³⁹⁸

These actions, whether lawful or not, received global reaction that may suggest a measure of acceptance. This is a highly important fact in determining the *opinio juris* with regard to the actions taken against non-state actors. In this case it was clear that the measures taken against the terrorist sites in Sudan and Afghanistan were not rushed to. The US government states in its letter to the UN Security Council that the attacks were carried out only after repeated efforts to convince the governments in both countries to shut down the

³⁹¹ W. Michael Reisman: "International Legal Response to Terrorism", p. 47; Sean D. Murphy: "Self-Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?", p. 69; Christopher Greenwood: "International law and the 'war against terrorism'", p. 309.

³⁹² W. Michael Reisman: "International Legal Response to Terrorism", p. 47; Sean D. Murphy: "Self-Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?", p. 69.

³⁹³ Sean D. Murphy: "Self-Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?", p. 69.

³⁹⁴ UN Doc. S/1998/780 (2001).

³⁹⁵ Sean D. Murphy: "Self-Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?", p. 70.

³⁹⁶ W. Michael Reisman: "International Legal Response to Terrorism", p. 49.

³⁹⁷ W. Michael Reisman: "International Legal Response to Terrorism", p. 49.

³⁹⁸ Sean D. Murphy "Self-Defence and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?", p. 69.

terrorist activities.³⁹⁹ This statement may to some be a clear example of attribution, which we will discuss further in chapter 5.5 however the United States seemed to have assumed in all regards that the terrorist organization was an independent one, finding refuge in these countries, rather than being retained by particular states, which again, supports the claim that *if there is* attribution it is of a much lower standard than that put forward by the ICJ.⁴⁰⁰ In any respect it is clear from the actions taken by the US that they were not aimed at Afghanistan or Sudan but at the non-state actors only. Therefore this thesis proposes that the US did not try to attribute the attacks to the states of Sudan or Afghanistan.

5.4.2.2 *The Attacks on the United States in 2001*

Probably the most famous incident of a non-state actor armed attack is the often mentioned attacks on the United States of America on the September 11th. It is not necessary to describe the attacks themselves in detail; rather it is important to note the response of the United States and its allies as well as the response of the UN Security Council.

The day after the attacks, NATO, in response to the attacks, gave out a press release stating among other:

The Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.⁴⁰¹

Here it is imperative to keep in mind that NATO's later reactions confirmed that this was indeed viewed as an armed attack against United States of America and thus an armed attack against the member states of NATO.⁴⁰² Also, it should be noted that NATO's statement, representing then 19 states,⁴⁰³ made only one requirement that needed to be fulfilled in order for this attack to be considered an armed attack, that of the attacks being directed from abroad against the U.S. and opted for the use of force under article 51 of the UN Charter over that of collective use of force under the authority of the UN Security Council.⁴⁰⁴ This view supports the argument put forward above, that the Court in the Palestinian Wall Case did not exclude

³⁹⁹ UN Doc. S/1998/780 (2001).

⁴⁰⁰ W. Michael Reisman: "International Legal Response to Terrorism", p. 49.

⁴⁰¹ The NATO website, "Statement by the North Atlantic Council", <http://www.nato.int/> 12 September 2001.

⁴⁰² Carsten Stahn: "Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism", p. 36.

⁴⁰³ Antonin Cassese: *International Law*, p. 474.

⁴⁰⁴ Antonin Cassese: *International Law*, p. 474; Antonin Cassese: "Terrorism is Also Disrupting some Crucial Legal Categories of International Law", p. 996.

the right to self-defence on grounds of a non-state actor, but rather on the grounds that the threat did not originate from a foreign territory, as was the distinguishing factor between that case and the 9/11 incident according to the courts own language.

In addition the Security Council in resolutions 1368 (2001) and 1373 (2001)⁴⁰⁵ recognized the inherent right of individual or collective self-defence in the aftermath of the attacks. This is very interesting as there is no reference in the resolutions to an armed attack by a state. Rather there is quite clear references to the fact that the terrorist acts are a threat to international peace and security that needs to be combated by all means and that this threat is essentially originating from a non-state actor, not a state.

Both the United States as well as the United Kingdom wrote letters to the UN Security Council informing them of the measures which they were taking, in self-defence, following the armed attack.⁴⁰⁶ The letters both claimed that the actions taken were aimed against Al-Qa'ida, an organization which had a base of operation in Afghanistan. Their emphasis on the non-state actor as the subject of the actions taken by the US and the UK is very evident in the language of the letters:

The US Letter:

The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals **posed by the Al-Qa'ida organization**...In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include **measures against Al-Qa'ida** terrorist training camps and military installations of the Taliban regime in Afghanistan.⁴⁰⁷ [emphasis added]

The UK Letter:

These forces have now been employed in exercise of the inherent right of individual and collective self-defence, recognized in Article 51, following the terrorist outrage of 11 September, to avert the continuing threats of attacks from the same source...This military action has been carefully planned and *is directed against Osama bin Laden's Al-Qa'ida terrorist organization* and the Taliban regime that is supporting it.⁴⁰⁸ [emphasis added]

It would therefore seem, that practically all states, referring to all members of the UN Security Council plus the members of NATO other than those sitting on the UN Security council, in addition to all states that have not objected to resort to Article 51, have come to assimilate a terrorist attack by a terrorist organization to an armed aggression *by a state*.⁴⁰⁹ Some have

⁴⁰⁵ UN Doc. S/RES/1368 (2001); UN Doc. S/RES/1373 (2001).

⁴⁰⁶ Christopher Greenwood: "International law and the 'war against terrorism'", p. 310-311.

⁴⁰⁷ UN Doc. S/2001/946.

⁴⁰⁸ UN Doc. S/2001/947.

⁴⁰⁹ Antonin Cassese: "Terrorism is Also Disrupting some Crucial Legal Categories of International Law", pp. 996-997; It should further be noticed that no State, except for Iraq and Iran openly and expressly challenged the

speculated that this is an incident of *instant customary international law* and an authoritative re-interpretation of the Charter, at least with regard to terrorism as the response widens the concept of armed attack.⁴¹⁰ This is though not agreed to by all, and it has been held that there doesn't yet exist a consistent practice as these reactions were only related to this one instance.⁴¹¹

While not claiming that there has necessarily been an instant custom formed regarding the interpretation of article 51, it cannot either be agreed upon that there hasn't been any change in the interpretation of the article. It seems evident that there has been some widening of it, even a gradual one, as there was considerably less controversy behind the 9/11 response to that of the 1998 response to the US embassy bombing, thus showing a gradually increasing acceptance of the international community to a new interpretation of article 51.

But even with all this *opinio juris* the fact remains that while the ICJ has not yet taken a stand on the issue, and merely strayed away from adequately addressing it, the international community is left confused, but still it has the very convincing opinions of Judge Kooijman, Judge Simma, Judge Higgins and Judge Buergenthal which have all noted that there has been, or at least seems to have been a shift in the interpretation of article 51 with regard to non-state actors.

5.4.2.3 Conclusion

This is a controversial issue, as to whether or not the concept of *armed attack* allows for such an attack to be committed by non-state actor without attribution to any state. It seems that there are a few very convincing positions on this issue, which may be put into three categories. First of all, it is the position that article 51 does not allow for an armed attack to occur if committed by a non-state actor whose actions are non-attributable to a state. Then there is the other position that holds that an armed attack need not be attributable to a state in order to fulfil article 51 of the UN Charter, thus a non-state actor, acting alone, may commit an armed attack. Finally, a position which meets in the middle of these two can be identified, one that accepts that a lower standard of attribution is necessary in order for the armed attack to have occurred in accordance with article 51.

legality of resort to force by the USA, see Antonin Cassese: *International Law*, p. 474; Christine Gray: "The Use of Force and the international Legal Order", p. 604.

⁴¹⁰ Antonin Cassese: *International Law*, p. 474; Christine Gray: "The Use of Force and the international Legal Order", p. 604.

⁴¹¹ Antonin Cassese: *International Law*, p. 475.

Convincing arguments can be made for all of the above positions, and many of them have been explained in the sections above. The first position demanding full attribution is a very understandable one in the context of the state-centricity of the international community, as well as with regard to the fact that self-defence as stipulated to in article 51 can be considered and is essentially an exception from the general rule that use of force and violation of state sovereignty is forbidden in interstate relations. And in turn if this position is taken when interpreting the ICJ's decisions in the *Palestinian Wall advisory opinion* and the *DRC v. Uganda* case it is a very compelling and convincing argument. However, that argument seems to completely disregard the fact of the recent emergence of the non-state actor threat, especially that of an international terrorist threat.

It is therefore not unreasonable that a new threshold be proposed for attribution and state responsibility, one which lowers the threshold put by the disputed *Nicaragua* judgement. A threshold where the 'aiding and abetting' of a non-state actor would constitute an armed attack, thus allowing to some extent, for the recent terrorist threats to be addressed.⁴¹²

However it seems that even that position may not fully satisfy or address the situation in modern international law which may lead to a very difficult situations for 'victim states' faced with certain situations, and is not consistent with recent state practice which seems to be slowly establishing as customary law. Here it is again very important that a distinction be made between the need for attribution when deciding when a state *has become a victim of an armed attack under article 51* compared to when a state *has a right to violate another State's sovereignty because it suffered an armed attack*.

Deciding a test on the first issue does not necessarily decide the test on the second issue. When these two issues have been adequately separated it seems that recent developments and *opinion juris* is towards a position that accepts that an armed attack can be committed by a non-state actor without any attribution. Firstly, as has been correctly stated by many of the judges in the cases mentioned above, article 51 does not demand any attribution. Secondly, the recent activities surrounding the 9/11 incident show that the international community, before deciding on invading Afghanistan for the purpose of targeting and responding to the terrorist threat, viewed the attacks committed by the non-state actor to be armed attack. Furthermore the UN Security Council has been taking actions against non-state actors, not states, such as the many resolutions relating to terrorism, as well as the actions taken against pirates (notice that these actions are not taken against Somalia). So the fact that

⁴¹² Tom Ruys and Sten Verhoeven: "Attacks by Private Actors and the Right of Self-Defence", pp. 314-315.

recently states as well as international organizations such as NATO and the UN Security Council have increasingly been taking actions not against states *per se* but against the non-state actors, even excluding actions against states is of great importance. The recent events where states have targeted non-state actors as the responsible entities for an attack or as international threats would seem illogical if there existed a condition of attribution to a state before actions could be taken, even if the test of attribution was a low one. This is because of the fact that attribution leads to state responsibility, resulting in the fact that actions ought to be taken against the state responsible, instead of against some non-state actor. When this all is taken into context with the changes in the international community where the fact is that certain areas of world don't seem to be under the effective control of any state this position gains more support.

From the above mentioned facts it must be considered that an armed attack may occur if a non-state actor is the attacker, even if his actions are non-attributable to another state. That does not however mean that a state has automatically the right to use force against the non-state actor, wherever he is found as will be discussed in the next chapter.

5.5 The Exercise of the Right to Self-Defence and Attribution

As was mentioned above in Chapter 5.4, although a non-state actor can be responsible for an armed attack under article 51 thus allowing the 'victim state' to resort to self-defence legitimately, that fulfilment does not in and of itself allow for the 'victim state' to violate another states sovereignty by for example invade the territory of that state, even though such an action would only be aimed at targeting the non-state actors and not the foreign state itself. Therefore the test of when a 'victim state' can actually exercise the right to self-defence against a non-state actor, especially in circumstances where the non-state actor is situated within the territory of a foreign state, needs to be examined as the test may be substantially different from that of the armed attack. The attribution factor seems to be the deciding factor among many scholars as to what extent self-defence can be exercised by the 'victim state'. What level of attribution is necessary must in most situations be evaluated on a case by case basis and of course many different types of situations may exist which effect the outcome. By examining the imputability of non-state actors actions to a state some level of responsibility may be put on the foreign state from which the non-state actors are attacking, making it somewhat internationally responsible for non-state actors violation of international law. This responsibility may have the effect that self-defence is not only exercised *against* the non-state actor, but it is exercised *against* the foreign state, it may then be considered a threat. In

addition to the attribution aspect levels of connections between a foreign state and the non-state actors may also lead to the right to exercise self-defence against the non-state actors, without necessarily claiming that the non-state actors behaviour be counted as the foreign states behaviour.⁴¹³ To what extent actions are to be taken against the state itself in the event that it has connection to the non-state actor or that actors actions are imputable to the state is not within the scope of this thesis. Therefore the focus is on answering to what extent a ‘victim state’ is allowed to violate another state’s sovereignty for the purpose of defending itself against a non-state actor which is located and operating from that state’s territory.

In addition to the situations where violation of another state’s sovereignty is somewhat necessary to exercise self-defence against non-state actors, theoretical situations where such violations does not need to take place will also be examined, such as self-defence against non-state actors operating from outside the jurisdiction of all states. There the specific nature of the exercise of use of force may be of importance, as the actions taken against non-state actors in such locations may not necessarily be *prima facie* illegal under international law, and may be more similar to the legal apprehension of pirates on the high seas.

5.5.1 The Exercise of Self-Defence against Non-State Actors in a Foreign Territory

Different levels of connection and or attribution exist and have different legal consequences as to the ‘victim states’ right to exercise self-defence. Some of these attributions and/or connections have been tested before International Courts and some are addressed by ILC draft articles or to some extent treaty law, finally the recent developments and an apparent *opinio juris* may also influence the findings as to what level of connection or attribution between a non-state armed attack and a foreign state from which the non-state actor operates is necessary to allow for a ‘victim state’ to violate the territorial sovereignty of the foreign state in its defence actions against the non-state actor.

In general, international law is very restrictive in attributing private conduct to a state and as a rule, only the acts of state organs, acting in their official capacity are attributable to a state.⁴¹⁴ However other connections may exist between a state and a non-state actor which will be explored here below.

It is proposed that essentially there are 4 principal situations where attribution and/or connection between the foreign state and the non-state actor may exist.

⁴¹³ Jörg Kammerhofer: “The armed activities case and non-state actors in Self-Defence Law”, p. 101.

⁴¹⁴ Tom Ruys and Sten Verhoeven: “Attacks by Private Actors and the Right of Self-Defence”, p. 300.

- 1) The non-state actor may be comprised partly by state officials and/or be commanded, organized or controlled by the state or essentially employed by the state.
- 2) Non-state actors may be independent but also supplied with financial aid, logistical support, weapons, training facilities or any other advantages by a state.
- 3) A state may be giving no 'active' support to the non-state actor in the form of any assistance mentioned in example 2. However, the state may be providing refuge on its territory before and after the armed attack is committed against the 'victim state'. And in so doing harbouring and actively even condoling the non-state actors presence on its territory by taking no actions against them.
- 4) A state may be unable to exercise control over non-state actors, because either the area is under the authority of insurgents or the central authorities are no longer able to wield authority over parts of their territory.⁴¹⁵

The question of legitimacy of self-defence under these circumstances is a very valid one. It is obvious that in most cases a state in which non-state actors operate from will have to suffer a violation of its sovereignty if a 'victim state' chooses to exercise self-defence against the non-state actors, as they are located on the territory of the foreign state. The rules of state responsibility are in this regard of much importance, as they are today's measure of the imputability of non-state actor's actions to states. But whether or not a clear attribution is necessary as to allow for a state's sovereignty to be violated when attempting to defend against a non-state actor within that state's border, is also a valid issue which will be addressed.

5.5.1.1 A State is the Author or Director of the Acts

The situation presented in example (1) is one where the non-state actor is essentially a state actor, as the situation describes a state official committing the acts of violence. This situation is essentially outside of the scope of this thesis as the non-state actor is then essentially not a non-state actor but literally a state actor. This is moreover a question of effective control and substantial involvement, which has been addressed by international courts.

The Draft Articles on Responsibility of States for internationally wrongful acts⁴¹⁶ addresses this issue. In article 8 it says that if a state controls, instructs or directs a group then its action would be considered the act of the state. This article has two sides to it, first it deals

⁴¹⁵ Somewhat based on Antonin Cassese: *International Law*, p. 470 and W. Michael Reisman: "International Legal Responses to Terrorism", pp. 3, 30-57.

⁴¹⁶ UN Doc. A/56/83 (2001).

with states that give specific instructions to non-state actors to perform a wrongful act, and this is universally accepted as being attributable to a state regardless of whether the non-state actor has a connection to governmental authority.⁴¹⁷ Regarding the second side, again the ICJ's *Nicaragua case* is of importance to the discussion. The question of attribution and effective direction or control was raised in regard to the conduct of the Contras and the United States. In that case the United States was held responsible for its support of the Contras, but their actions were not necessarily attributable to the United States. The test proposed in the *Nicaragua case* is a basis for the second aspect of article 8 of the draft articles; according to that it needs to be shown that the state directed or controlled the specific operation and the conduct complained of was an integral part of that operation. Although the *Tadic case* is often cited as giving another test requiring an overall control, that case posed a different situation to the *Nicaragua case* and the ICTY has endorsed the *Nicaragua standard* in other cases where the controlling state is not the territorial state and the armed non-state actors perform their attacks abroad.⁴¹⁸

Article 11 of the draft articles may also be referred to in regard to our first category of extremely active state support and involvement. That article states that if and to the extent that the state acknowledges and adopts the conducts of non-state actors as its own those conducts will be considered an act of the state itself. This is a high threshold where factual acknowledgement and endorsement of private acts are insufficient; states explicitly have to recognise the private conduct as their own. The ILC uses the example of the *Iran Hostages case* to elaborate on this rule. In that case the Court decided that the mere approval of the actions of the hostage takers was insufficient to attribute the actions to Iranian authorities, but that the policy of maintaining the occupation of the embassy and the continuation of the hostage situation of the individuals and the fact that this policy was endorsed by various Iranian authorities transformed the acts into acts of Iran.⁴¹⁹

In situations such as the above mentioned and those to which article 8 and article 11 of the draft articles refer to, where the state is essentially the executor of the illegal acts, it is generally considered that self-defence can be resorted to as long as the necessary preconditions are fulfilled.⁴²⁰ It should furthermore be noted that in these circumstances self-defence can be exercised against the state itself, as it is then considered the responsible entity.

⁴¹⁷ *Yearbook of the International Law Commission, 2001*, vol. II, Part Two. p. 47.

⁴¹⁸ Tom Ruys and Sten Verhoeven: "Attacks by Private Actors and the Right of Self-Defence", p. 301.

⁴¹⁹ Tom Ruys and Sten Verhoeven: "Attacks by Private Actors and the Right of Self-Defence", p. 301; *Yearbook of the International Law Commission, 2001*, vol. II, Part Two. pp. 52-53.

⁴²⁰ Antonin Cassese: *International Law*, p. 471.

Self-defence would thus not be limited to actions taken against non-state actors, but these actions which may be taken against the state itself are outside the scope of this thesis and will therefore not be addressed further.

5.5.1.2 State Supports the Non-State Actors

In situations where the state does not have effective control over the non-state actors but supplies the non-state actors with support of financial aid, logistics, training etc. international law lacks a detailed legal regulation.⁴²¹ So what needs to be examined with regard to this is essentially whether or not a state can be considered *responsible* for the attacks committed by the attackers. Once again it is the *Nicaragua case* that gives us information on this issue. In that case the court addressed the issue of assistance to non-state actors which the United States provided for. In that case the question that the Court was examining was whether or not the assistance would amount to an *armed attack*. As this thesis suggests that an *armed attack* may be carried out by non-state actors, nonetheless the court clearly stated that although such assistance would not normally suffice to involve the assisting state in the armed attack, it could be considered a violation of international law. As has been mentioned above, not all the judges in the court agreed to this decision. Judges Schwebel and Jennings took the view that providing this kind of support would render the assisting state responsible for the armed attack. As the *Nicaragua case* is not really applicable to the situation proposed in this thesis it does not give us a clear idea of the principles that should be applied, except that of the state support of non-state attacker can be considered unlawful and if the separate opinions are to be taken into account, such support may be considered of such gravity as to allow self-defence.

Another situation which may give some information on this is the UN Security Councils response to the Lockerbie incident.⁴²² There the Council adopted sanctions against Libya in 1992 and reaffirmed the principle, based on article 2(4) of the UN Charter, that every state has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force. It should be remembered that this part of the Council's resolution is based on the principles mentioned in the Declaration on principles concerning friendly relations.⁴²³ It is therefore clear that such actions must be considered in violation of International Law, but at the same time this kind of

⁴²¹ Antonin Cassese: *International Law*, p. 471.

⁴²² Michael Plachta: "The Lockerbie Case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*.", p. 125-126.

⁴²³ UN Doc. A/RES/2625 (XXV).

support does not seem to incur attribution to the state of the non-state actors' actions. Therefore the question remains unanswered whether or not this clear violation of international law can allow the 'victim state' to take such actions that would violate the territorial integrity and sovereignty of such a state. That question will be answered in chapter 5.5.1.4 after the legality of the rest of the above mentioned classification has been analysed.

5.5.1.3 A State is Harboursing a Non-State Attacker

A state may be giving no 'active' support to the non-state actor in the form of any assistance mentioned, but it may be providing refuge on its territory before and after the armed attack is committed against the 'victim state'. Such actions are according to the before mentioned Declaration on Friendly Relations unacceptable under international law as it states that there exists a duty on states to refrain from acquiescing in organized activities within its territory directed toward the commission of such acts. There are various incidents where states have harboured terrorist groups and condoned their actions and willingly not taken any actions against non-state actor groups which are operating from their territory. In 1998 after the bombings of the United States embassies, the Security Council obligated Afghanistan to prevent its territory to be used by terrorist groups which were responsible for the attacks on the embassies.⁴²⁴ And in addition the United States fired missiles against both Afghanistan and Sudan in self-defence without there being much debate on its legitimacy.⁴²⁵ In addition there have been several incidents where states have used force against other states in response of terrorist attacks coming from terrorist in those states. These responses have been justified by Article 51 and have been primarily committed by Israel and USA.⁴²⁶ Although many of these incidents were condemned by the international Community, some of them, especially in later years, have received recognition either directly by members of the international community or indirectly from of their silence.⁴²⁷

The harbouring or provision of refuge to a non-state actor is readily condemned by the international community, especially in relations to terrorism. As the 1994 Declaration on Measures to Eliminate Terrorism,⁴²⁸ it was specifically recalled that states should refrain from acquiescing in or encouraging activities within their territories directed towards the commission of terrorist acts. Even though the non-state actor groups are inactive for an

⁴²⁴ UN Doc. S/RES/1214(1998); UN Doc. S/RES/1267(1998).

⁴²⁵ See Chapter 5.4.2.1.

⁴²⁶ Antonin Cassese: *International Law*, pp. 473-476.

⁴²⁷ Antonin Cassese: *International Law*, pp. 473-476.

⁴²⁸ UN Doc. A/RES/49/60 (1994).

extended period of time; that should not make their presence any more acceptable under international law.⁴²⁹

Again, the righteousness of self-defence against non-state actors within states which are essentially harbouring them will be examined more closely later, but there is ample evidence that such actions by a state is a violation of international law.

5.5.1.4 The Legitimacy of Exercising Self-Defence against Non-State Actors within the Territories of States which Support and Harbour Them

Both of the situations mentioned above are essentially unlawful under international law, and states are responsible for their actions, although they do not necessarily bear any direct responsibility for the actions taken by the non-state actors, as they do in the instances where the state is actively involved in the non-state actors' actions. However it seems that international law may in these circumstances allow for a very limited use of force against non-state actors even though such use of force violates the host state's sovereignty. This of course is a very difficult issue as the violation of another state's sovereignty goes against the most basic principle of international law that of sovereign equality.

The question which is essentially posed in this thesis is a little different from that which is usually raised in the context of non-state actors and self-defence. Instead of demanding that the state necessarily be responsible directly for an armed attack, this thesis proposes that the state need not be responsible for the armed attack of a non-state actor *per se* but that certain actions or inactions on the part of the state may lead to a conclusion that its sovereignty can be violated legally under the rule of self-defence, as it has violated international law and has some connection with the armed attack or its executer, the non-state actor. In that way it may be justifiable for the 'victim state' to take self-defence measures against non-state actors present on the territory of the host state.

It needs be born in mind that sovereignty is not absolute and that international law does recognize limitations on state sovereignty in customary international law as a natural legal consequence of the obligation to respect the sovereignty of other states.⁴³⁰ In addition many limitations to the rule of sovereignty exist in treaty law, in the UN Charter broad powers are conferred on the Security Council in the province of collective security where the

⁴²⁹ W. Michael Reisman: "International Legal Response to Terrorism", p. 41.

⁴³⁰ Antonin Cassese: *International Law*, p. 98.

council can when necessary override the sovereignty of any UN Member state.⁴³¹ Although such views may not be widespread it has been suggested that under certain circumstances a state may have given certain states or the international community as such consent as to their use of force on their territory in circumstances such as those mentioned above, through the signing and ratification of treaties.⁴³²

It is clear that international law puts obligation on states not to allow its territory to be used against other states; this was confirmed in the ICJ's first case the *Corfu Channel Case*.⁴³³ This obligation is also evident in the draft articles on friendly relations. The real question is whether or not international law allows for the violation of state sovereignty on grounds of acts which are not-attributable to the host-state. In order to attempt to answer that question state practice ought to be examined.

In 1969, Portugal attacked Guinea, Senegal and Zambia claiming its right to self-Defence against terrorist attacks on the grounds of these countries offering sanctuary to terrorist conducting activities against its colonies, the UN Security Council strongly criticized the military actions in their resolutions 268, 273 and 275 of 1969.⁴³⁴ In 1985, Israel bombed the headquarters of the Palestinian Liberation Organization (PLO) in Tunisia as a response to a terrorist attack.⁴³⁵ Furthermore Israel claimed that Tunisia had harboured the terrorist. Israel's argument before the Security Council was very interesting as it specifically argued that it used force against the non-state actor, the terrorist but not Tunisia itself.⁴³⁶ However, the Council had condemned the Israeli actions in resolution 573 (1985) as they did not consider their violation of international law to be justified under the principle of self-defence.⁴³⁷

But during the mid nineties there seems to have been a shift in the position of the international community with regard to state sponsored and supported terrorism. The UN Security Council stopped condemning self-defensive operations, the clearest example of which is the 1998 bombings of the United States embassies did not incur any condemnation

⁴³¹ Yoram Dinstein: *War, Aggression and Self-Defence*, p. 288.

⁴³² Yoram Dinstein: *War, Aggression and Self-Defence*, pp. 114-115.

⁴³³ *Corfu Channel Case Judgement of April 9th, 1949: I.C.J. Reports 1949, p. 4* [Corfu Channel Case]; Ian Brownlie: *Principles of Public International Law*, p. 425; Antonin Cassese: *International Law*, p. 476.

⁴³⁴ UN Doc. S/RES/268 (1969); UN Doc. S/RES/273 (1969); UN Doc. S/RES/275 (1969).

⁴³⁵ A. Mark Weisburd: *Use of Force. The Practice of States Since World War II*, pp. 166-169.

⁴³⁶ Kimberley M. Trapp: "Back to Basics: Necessity, Proportionality, and the Right to Self-Defence Against Non-State Terrorist Actors", p. 148; UN Doc. S/PV.2611 (1993) 22-5.

⁴³⁷ UN Doc. S/RES/573 (1985).

from the UN Security Council.⁴³⁸ It is interesting that the United States are using very similar reasoning as Israel in 1985, as they claimed to be using force against the installations of bin Laden's organization, not Afghanistan itself.⁴³⁹ But the justification behind the violation of the territorial sovereignty of Afghanistan was based on the acquiescence of the government of Afghanistan as well as their inability to rely on the host states counter-terrorism efforts.⁴⁴⁰ It seems evident that the acquiescence of the government in Afghanistan was very important in justifying the US's response against Al-Qa'ida on their territory.

This recent shift in state practice is difficult to reconcile with the ICJ's decisions in the *Nicaragua case*, *Palestinian Wall advisory opinion* and the *DRC v Congo case*, if those cases are interpreted as holding that it is unlawful to use force against non-state actors unless those actors' actions are attributable to the host state. If a closer look is given to the Courts arguments in the *Palestinian Wall advisory opinion* it is very interesting that the Court decided only to quote the text of article 51 of the UN Charter without addressing it further, and it seems that if the intention of the Court was to stick to its past strict requirements of an armed attack and attribution to states as prerequisites of self-defence it would have had to do so in another manner than it did, as the wording of the article cannot bear the load the Court seeks to place on it.⁴⁴¹ As the issue of non-state actors, self-defence and article 51 was given similarly short attention in the *DRC v Congo case*, another interpretation might be more appropriate, given the above mentioned state practice. It is simply that the court has yet to engage in the recent state practice of using defensive force against non-state actors in reliance of article 51 of the UN Charter.⁴⁴²

If then a closer look is given to events after the 1998 bombings, there are several instances where force has been used against non-state actors. In the aftermath of 9/11 force was used against Al-Qa'ida in Afghanistan and was even encouraged by the UN Security Council as has been referred to before in this thesis.⁴⁴³ Other examples of such actions taken

⁴³⁸ Although the attacks on the pharmaceutical plant was condemned by some, that was primarily because there lacked evidence that the plant was used for terrorist purposes. See. The letter to the UN Security Council from Sudan. UN Doc. S/1998/786.

⁴³⁹ UN Doc. S/1998/780.

⁴⁴⁰ Sean D. Murphy: "Contemporary Practice of the United States. Efforts to obtain Custody of Osama Bin Laden", p. 367.

⁴⁴¹ Christian J. Tams: "Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case", p. 973.

⁴⁴² Kimberley M. Trapp: "Back to Basics: Necessity, Proportionality, and the Right to Self-Defence Against Non-State Terrorist Actors". p. 150

⁴⁴³ But also against the taliban government, which poses a slight dilemma as to the justification of those actions, the actions taken directly against the government are though not the subject of this essay and will therefore not be addressed. See Kimberley M. Trapp: "Back to Basics: Necessity, Proportionality, and the Right to Self-Defence Against Non-State Terrorist Actors", p. 152

against non-state actors in a foreign territory as a measure of self-defence are the Israeli's missile attacks in Syrian territory which allegedly was an attack on a terrorist base following a terrorist attack on a Café in Haifa.⁴⁴⁴ These attacks were firmly condemned by many states of the international community, as well as the UN Secretary General⁴⁴⁵ and would therefore at first glance seem to show that the recent shift mentioned above is not grounded in international law. However at closer inspection none of the condemnations specifically addressed the use of force against non-state actors in a foreign territory, rather it was in the context of the Middle East peace process which was being worked at diligently at the time of the Israeli attacks.⁴⁴⁶ Again in 2006, Israel was under threat from a non-state actor where Hezbollah abducted two Israeli soldiers and launched a number of rockets from southern Lebanon into Northern Israeli towns.⁴⁴⁷ Israel responded by using force in Lebanese territory and again doing so against non-state actor threats in the area, and while the proportionality of the response may be disputed, the majority of the UN Security Council members as well as the UN Secretary General recognized Israel's right to defend itself against the Hezbollah attacks, thus recognizing a right to use self-defence against non-state actors.⁴⁴⁸ In addition the UN Secretary General explicitly stated in this regard: "*I have already condemned Hizbollah's attacks on Israel and acknowledged Israel's right to defend itself under Article 51 of the United Nations Charter. I do so again today.*"⁴⁴⁹

When these recent events are examined it seems therefore evident that there has been a change in the rules regarding the use of defensive force under article 51 against non-state actors in a foreign state, and that *opinio juris* today indicates that non-state actors can be the target of defensive force under article 51 when that use of force is necessary due to circumstances of the host state.⁴⁵⁰ In addition it seems evident that the requirement of full attribution in order for the host state's sovereignty to legitimately be violated is no longer

⁴⁴⁴ Kimberley M. Trapp: "Back to Basics: Necessity, Proportionality, and the Right to Self-Defence Against Non-State Terrorist Actors", p. 152.

⁴⁴⁵ See Official Journal of the EU, Council Common Position 2005/847/CFSP of 29 Nov 2005; and discussions at the UN Security Council UN Doc. S/PV.4836 (2003); 9 (Spain, United Kingdom) 10 (Germany), 11 (France); UN Press Release, SG/SM/8918, 6 Oct 2003.

⁴⁴⁶ Kimberley M. Trapp: "Back to Basics: Necessity, Proportionality, and the Right to Self-Defence Against Non-State Terrorist Actors", p. 153.

⁴⁴⁷ Kimberley M. Trapp: "Back to Basics: Necessity, Proportionality, and the Right to Self-Defence Against Non-State Terrorist Actors", p. 153.

⁴⁴⁸ UN Doc. S/PV.5489 (2006), Argentina 9; Japan 12; United Kingdom 12; Peru 14; Denmark 15; Slovakia 16; Greece 17; France 17; UN Doc. S/PV.5493 (2006), United States of America 17.

⁴⁴⁹ UN Doc. S/PV.5492 (2006) 3.

⁴⁵⁰ Christian J. Tams: "Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case", p. 973.

necessary. What is proposed seems to be a lower standard of test⁴⁵¹ a threshold which may be used is one that uses an ‘aiding and abetting’ test.⁴⁵² This test would comprise of a broader range of activities in support of private groups than the *Nicaragua case*, thus meaning that states giving support or harbouring non-state actors may be seen as being substantially contributing to the commission of private acts if they are aware that their support is used to commit attacks abroad, thus permitting in some instances force to be used against the state, but more importantly justifying the necessity of violating the sovereignty of the state in order to use defensive measures against non-state actors.⁴⁵³

The rules of international law are far from unambiguous and states may have plenty of room for manoeuvre in these situations.⁴⁵⁴ Whether a threat or an armed attack on a ‘victim state’ is committed by terrorists, non-state actors or in any other way, it seems that it can be inferred that attacks against the non-state actors within states which are harbouring them is a *lawful form of self-defence*, subject to the principles of proportionality and necessity.⁴⁵⁵ The necessity principle is of course overwhelmingly important as arbitrary use of force on another state’s territory is of course unacceptable even if it is being targeted against non-state actors. In the instances where a state actively harbours and/or supports the non-state actor, it seems evident that there exists clear necessity for action, and state practice supports this position.

5.5.1.5 A State is Unable to Exercise Control Over Non-State Actor Activities on its Territory

The situation where a state may be unable to exercise control over non-state actors, because of either that the area is under the authority of insurgents or the central authorities are no longer able to wield authority over large parts of the territory is probably the most difficult category when trying to decide whether a ‘victim state’ can take any measures against it.

It seems clear that a state in this situation does not bear responsibility for the terrorist attacks, therefore no attribution is available, necessity of using force in defence against non-state actors cannot be justified on grounds of the state’s support or unwillingness to follow international obligation to suppress the non-state actor’s activities within its borders.

But is the international community supposed to accept and tolerate such a situation? It has been proposed that such a state may not oppose its sovereign rights to any foreign state

⁴⁵¹ Tom Ruys and Sten Verhoeven: “Attacks by Private Actors and the Right of Self-Defence”, pp. 315-316.

⁴⁵² Tom Ruys and Sten Verhoeven: “Attacks by Private Actors and the Right of Self-Defence”, p. 316.

⁴⁵³ Tom Ruys and Sten Verhoeven: “Attacks by Private Actors and the Right of Self-Defence”, pp. 316-317.

⁴⁵⁴ Antonin Cassese: *International Law*, p. 472.

⁴⁵⁵ Antonin Cassese: *International Law*, p. 472; Kimberley M. Trapp: “Back to Basics: Necessity, Proportionality, and the Right to Self-Defence Against Non-State Terrorist Actors”, p. 150.

that intends lawfully to use force against such non-state actors.⁴⁵⁶ Also several scholars have argued that states can lawfully resort to self-defence in these kinds of situations because otherwise these territories would turn out to be safe havens for non-state actors.⁴⁵⁷

If another look is taken on state practice, such as the Israeli's attack on Lebanon in 2006, that attack was partly justified on grounds of necessity of self-defence because Lebanon could not (rather than was unwilling to) prevent its territory from being used as a base for terrorist activities.⁴⁵⁸ In addition in 1995, the Turkish Army invaded Iraq in an anti PKK (Kurdistan Workers' Party) operation.⁴⁵⁹ In a letter to the UN Security Council, Turkey argued that since Iraq could not exercise control over the northern part of its territory and the invasion originated from principles of self-preservation, it had not violated any sovereignty.⁴⁶⁰

Although this right may exist for states to use force against non-state actors in the territory of another state which is unable to control the latter, strict requirements must be put on this use and special emphasis must be put on both the prerequisites of necessity and proportionality. Thus recent events should be held in high regard where Somalia has given permission for actions which it is unable to take. Such permission should, if possible, always be sought from an unable host state, as was indeed the case with the UN Security Councils measures against pirates operating off the coast of Somalia.

5.5.2 Conclusion

It seems from all of the above that although there may exist extreme positions on the requirements of self-defence when a non-state actor attacks, from one that demands full attribution to a state and another that requires no attribution, that international law recognizes first of all that an armed attack may be committed by a non-state actor and secondly that it recognizes a position which is in the middle of the two extremes. When an armed attack has been identified, a state may, if there exists a *connection* between a non-state actor and a state which can be classified under one of the four classifications proposed in this thesis in Chapter 5.5.1, whether it be support, harbouring or aiding and abetting, resort to defensive measures under article 51 if these actions fulfil the necessity requirement of self-defence. Thus the violation of the host state's sovereignty is justified under international law if such a

⁴⁵⁶ Antonin Cassese: *International Law*, p. 472.

⁴⁵⁷ Tom Ruys and Sten Verhoeven: "Attacks by Private Actors and the Right of Self-Defence", p. 317.

⁴⁵⁸ Kimberley M. Trapp: "Back to Basics: Necessity, Proportionality, and the Right to Self-Defence Against Non-State Terrorist Actors", pp. 154-155.

⁴⁵⁹ John Roberts: "Turkey's invasion of Northern Iraq", p. 59.

⁴⁶⁰ UN Doc. S/1995/605; It should also be noted that the principle of self-preservation was one that the ICJ acknowledged in the *Legality of Nuclear Weapons advisory opinion*, *I.C.J. Reports 1996*, p. 226 para. 96.

connection exist which essentially has the effect of a breach of international law which may result in a threat to the peace and security in the international community. In the case of a state which is unable to prevent its territory to be used by non-state actors, similar reasoning applies, as to the requirement and emphasis on necessity. Thus if it is necessary, the host state may not object to proportionate and necessary actions taken by a 'victim state' within the territory of the host state. Again it should be asserted that these actions need to be in accordance with the strict requirements of necessity and proportionality and can in these circumstances only be directed against the non-state actor. If these requirements are not followed it may incur on the 'victim state' responsibility to remedy the wrong such as via reparations.

5.5.3 The Exercise of Self-Defence when a Non-State Actor is Located on the High Seas, International Airspace or in Outer Space

Finally, the theoretical situation where a non-state actor which attacks a 'victim state' is located on the high seas or from outer space by a non-state actor is outside the jurisdiction of all state, and may thus not be attributable to any state if no state can be implicated any way.⁴⁶¹ Such acts however might be attributable to a state under the test presented above of mere inability to maintain peace and order, if the non-state actor on the high seas, for example, is sailing under a certain flag. Therefore this part needs to be addressed by first analyzing the situation where a non-state actor is sailing under the flag of a certain state or flying under a certain flag state, secondly to address the issue of a non-state actor which is not sailing under any flag.

5.5.3.1 A Non-State Actors is on a Vessel under the Flag of a Certain State

If the non-state actors is operating from a vessel which is under a jurisdiction of a particular state, that state may of course take actions against that vessel, and if the 'victim state' and the flag state of the non-state actor are the same, such a situation essentially falls outside the scope of this thesis, as the threat would essentially not originate outside the jurisdiction of the 'victim state'. Thus the circumstances where a 'victim state' is not the flag state need to be examined.

There are a few examples of states that have used force against non-state actors on a ship or an aircraft where the non-state actors have been under the jurisdiction of another

⁴⁶¹ Yoram Dinstein: *War, Aggression and Self-Defence*, p. 205.

state.⁴⁶² In these cases the state that uses force usually justifies it with a reference to self-defence and the security of its nationals, and more often than not these actions have received some condemnation from the international community, as they involve the interception of a vessel which is under the jurisdiction of another state.⁴⁶³ But it has been suggested that under certain conditions an interception of foreign aircrafts or ships suspected of carrying terrorists is lawful, and may generally be regarded as warranted if the intercepting state is prepared to pay compensations if the fact is that the vessel is not a terrorist vessel.⁴⁶⁴

5.5.3.2 *Non-State Actors on a Vessel under the Flag of No State*

If a non-state actor is attacking from outside all jurisdictions, the actor shares certain traits with pirates but more importantly it is essentially stateless.⁴⁶⁵ It has been held that ships in such a position will not in and of itself be subjected to the jurisdiction of any state that wishes to approach it.⁴⁶⁶ Nonetheless it doesn't enjoy the protection of any state. According to article 110 of the 1982 Law of the Sea Convention, states have a right to visit and board stateless ships.⁴⁶⁷ Same principles must be assumed to apply to similar situations were vessels are found in *terra nullius*. In these circumstances, even in outer space, the right to self-defence can be invoked⁴⁶⁸ and forceful measures must be allowed to be taken against the non-state actor. Of course the same principles of proportionality and necessity apply, but in these situations there doesn't exist any need to attribute or find connection between the non-state actor and a state, as states have under international law the right to approach, board and visit stateless vessels, thus they are allowed to take actions if threatened by non-state actors on such vessels without regard to the question of sovereignty of other states.

5.5.3.3 *Conclusion*

It seems that in general if a threat originates from outside all jurisdictions the *normal* requirements of self-defence apply to the same extent as they would if the threat originated within the jurisdiction of another state. What is more is that there is no need for attribution or connection between a non-state actor and a state in order for self-defence to be exercised.

⁴⁶² Antonin Cassese: *International Law*, pp. 477-478.

⁴⁶³ Antonin Cassese: *International Law*, pp. 477-479.

⁴⁶⁴ Antonin Cassese: *International Law*, pp. 479.

⁴⁶⁵ Yoram Dinstein: *War, Aggression and Self-Defence*, p. 205; R.R. Churchill & A.V. Lowe: *The Law of the Sea*, pp 213-214.

⁴⁶⁶ R.R. Churchill & A.V. Lowe: *The Law of the Sea*, pp. 213-214.

⁴⁶⁷ R.R. Churchill & A.V. Lowe: *The Law of the Sea*, p. 214.

⁴⁶⁸ Bin Cheng: *Studies in International Space Law*, p. 10.

5.6 Principles of Necessity

Necessity is a principle that is affirmed and recognized as precluding wrongfulness in article 25 of the Draft Articles on State responsibility. It can be resorted to only if certain requirements are fulfilled. These are that the action is the only way for the state to safeguard essential interest against a grave and imminent peril and that the act does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole.⁴⁶⁹ Furthermore it is required that necessity cannot be invoked if the international obligation in question excludes the possibility of invoking necessity or the state has contributed to the situation of necessity.⁴⁷⁰ The principle of necessity differs from self-defence in a way that it does not require for example an armed attack, and some situations suggest that necessity can be resorted to as a justification for certain use of force. The ILC itself refers to the *Caroline case* as a evidence of the use of necessity as a principle justifying use of force, and indeed, necessity is not only a justification in and of itself but also a contributing requirement of self-defence.⁴⁷¹ This principle has furthermore been accepted and acknowledged by the ICJ in its *Gabčíkovo-Nagymaros Project case*.⁴⁷² In that case, the court though did not accept that necessity could be used to justify the acts committed. The court however did state that “*the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis.*”⁴⁷³ According to the ILC necessity has been invoked to preclude wrongfulness of acts contrary to a broad range of obligations so it van even be considered that a State of Necessity may apply in situations of attacks by non-state actors.⁴⁷⁴

State practice does also support this, in 1964, a few weeks after the independence of Congo from Belgium, Congo was entered by Belgium troops that came to ensure the Safety of European residents.⁴⁷⁵ Belgium justified their actions before the Security Council claiming a State of Necessity, and little debate followed in the council on the legality of the action, implying that it was legitimate.⁴⁷⁶ Although this action by Belgium is not directly related to

⁴⁶⁹ UN Doc. A/56/10 (2001).

⁴⁷⁰ UN Doc. A/56/10 (2001).

⁴⁷¹ *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p. 52.

⁴⁷² *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgement, I.C.J. Reports 1997*, p. 7

⁴⁷³ *Nagymaros Project case*, para. 51

⁴⁷⁴ *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p. 83.

⁴⁷⁵ A. Mark Weisburd: *Use of Force. The Practice of States Since World War II*, pp. 266-268.

⁴⁷⁶ A. Mark Weisburd: *Use of Force. The Practice of States Since World War II*, pp. 267-268.

the question of non-state actors threats it shows that necessity can be used to justify essentially use of force, that is in violation of territorial sovereignty.

Another example, which does pertain to the topic of this thesis, is the before mentioned 1995 Turkish invasion into Iraq, which was justified on grounds of self-preservation and necessity and discussed in Chapter 5.5.1.4. But maybe the most recent incident of a state of necessity where sovereignty is violated because of non-state actors is the raid by French commandos on pirates holding French hostages on the mainland of Somalia. This raid preceded the UN Security Council's authorization of actions in the area, and was therefore not justified under that resolution, and although it has not been publicly claimed that the justification for the actions was a State of Necessity, the actions have not been condemned by the international community, which seems to acknowledge the proportionality and the necessity of the actions taken by the French against the pirates.⁴⁷⁷

It therefore doesn't seem unreasonable that in certain circumstances where the prerequisites of Necessity are fulfilled that it can be used to justify actions against non-state actors where a violation of the host-states sovereignty would otherwise occur. This in turn does not necessitate that an armed attack has occurred, as this can even be used against pirates as the above example shows.

5.7 Extraterritorial Apprehensions

In the era of international terrorism where non-state actors operate from a neighbouring state or even further away and attack from or plan an attack from abroad, often being protected willingly or unwillingly by the sovereign rights of the state from which they operate, state may resort to uncommon measures in order to protect their interests. One of the methods which have been used to counter threats from non-state actors is the abduction or apprehension of a specific threatening target extraterritorially, that is from within another state. This can be an important step in protecting the security interests of a victim state, to abduct potential or known attackers and thereby neutralizing a potential threat or upholding justice by bringing the abductees before competent courts to be tried for the offences committed.

This can of course be done legitimately with the permission of the state in which the adversary is located or in other ways giving enforcement jurisdiction to the state in question. In the absence of such permission, however, the abduction is a violation of customary law and

⁴⁷⁷ "France raid ship after crew freed". <http://news.bbc.co.uk>, April 12, 2008.

the principle of territorial sovereignty of states. Such abduction would have to be considered a use of force according to art 2(4) of the UN Charter as it is a violation of the territorial integrity of the state. Thus such an action would require clear justification under international law to be considered legitimate.

The sending of state agents into another state's territory with the purpose of abducting a person or persons, even a national of that state from within the state's jurisdiction, is a violation of the territorial sovereignty, as states have according to international law, exclusive control over everything within its territory. This reasoning seems quite clear, although not undisputed. According to one international law scholar, Derek Bowett, the sending of agents into a state's territory to specifically target a criminal does not violate the territorial integrity or political independence of that state.⁴⁷⁸ Bowett argues that "*the action which it is necessary to take against an expedition still within the jurisdiction of the state of its origin must not be considered as directed against the state so invaded.*"⁴⁷⁹

Furthermore, this theory claims that actions of espionage and law enforcement agents within a nation's territory have never been considered a *use of force* under international law and thereby it is reasoned that a simple abduction should not necessarily be considered a use of force either.⁴⁸⁰

Two other justifications for the use of force via extraterritorial abduction have been asserted. One of which is that if the abduction would meet the requirements of necessity and proportionality that such an action would be fully justified under the rule of self-defence.⁴⁸¹

The second justification holds that a state can seize a non-state actor in another country as long as the capture is necessary to prevent future harm to its citizens and the mission's objectives are strictly confined to that task.⁴⁸² The benefit of such an apprehension is that the capture and successful punishment of the actor would prevent and deter other future attacks from being committed.

Historically there have been some incidents of extraterritorial abductions, notably, that of the abduction and subsequent trial of Adolf Eichmann in Israel, which occurred in 1960.⁴⁸³

⁴⁷⁸ Douglas Kash: "Abducting Terrorists Under PDD-39: Much Ado About Nothing New", p. 145.

⁴⁷⁹ Derek W. Bowett: *Self-Defence in International Law*, p. 152.

⁴⁸⁰ Douglas Kash: "Abducting Terrorists Under PDD-39: Much Ado About Nothing New", p. 146.

⁴⁸¹ Douglas Kash: "Abducting Terrorists Under PDD-39: Much Ado About Nothing New", p. 146; Since self-defense has been extensively evaluated and analyzed before with special regard to self-defense against non-state actors, this justification will not be examined here.

⁴⁸² Douglas Kash: "Abducting Terrorists Under PDD-39: Much Ado About Nothing New", p. 148-149.

⁴⁸³ Malcolm N. Shaw: *International Law*, p. 577; Vaughan Lowe: "Jurisdiction", pp. 352-353.

Although extraterritorial apprehension is not widely agreed upon,⁴⁸⁴ it can be stated that for such an action to be considered lawful it essentially needs to be justified under the above mentioned principle of a State of Necessity or Self-Defence. In addition it needs to be certain that the 'victim state' that is extraterritorially apprehending a non-state actor has judicial jurisdiction over the actor. In any case such an apprehension is much disputed and therefore it seems that this option is not a very viable action which a 'victim state' could resort to.

6. Conclusion

The international community is very dynamic and international law similarly is very dynamic. Its method of legislation and enforcement is radically different from that of municipal systems, mainly because of its principle of sovereign equality of its member states. This nature of the international community and its law effect the outcome of this thesis's research as to essentially what actions a 'victim state' can legitimately resort to under international law. Because international law has recently been faced with a new situation, involving non-state attackers on a scale not known before, certain changes seem to have occurred in the legal regime of the system, especially relating to the rules on the use of force. In this essay the existing principles, rules and norms of international law have been applied and interpreted to the extent possible, to address this new situation of non-state attackers. Although the community of sovereign equal states may share different opinions and interpretations of these existing principles, there are some very clear indications that it may be reaching some consensus on this issue of non-state attackers.

As the international community evolved into a community accepting not only states but also non-state actors as legal personalities, and as these entities have grown and become more influential in international law, certain rules which formerly applied only to states, have begun to be interpreted as principles which essentially bind all, including non-state actors. But although many of the rules of the international legal system may bind non-state actors, the method of ensuring that the rules of the community are followed has mainly been twofold. If a state is faced with a breach of international law, then international rules apply, but if a non-state actor breaches rules of international law, most often it can be and should be dealt with, within the domestic legal system in which that non-state actor is situated and/or has committed the actions. Thus a state's response to a terrorist attack within its territory ought

⁴⁸⁴ Malcolm N. Shaw: *International Law*, p. 577.

traditionally to be that of municipal remedies, such as arresting the individuals culpable, bringing them before a court and proceeding accordingly to adjudicate justice. Even if the individuals responsible for such an attack would try to escape, international co-operation via Interpol or other treaty agreements ought to be the correct remedy and response of a state which has been a victim of a terrorist attack or another attack committed by a non-state actor.

States have, however, increasingly been faced with the new situation where non-state actors operate on such a scale that it compares to another state attacking and the nature of the non-state actor groups is such that it, in and of itself, threatens international peace and security to such an extent that these typical methods of resolving situations, of for example terrorism, are not efficient and do not effectively provide a solution. Instead it seems that there exists a problem when an attacker may be located in many states abroad, and domestic remedies are of no use. International law seems not to have addressed this situation adequately.

This thesis proposes that in these situations certain remedies can be resorted to legitimately by a state against a non-state attacker. To be able to resort to these remedies, the state needs however to fulfil four requirements put forward in Chapter 3. It has to have (1) suffered a breach of international law, (2) that affects or threatens the security of the state or its citizens, (3) originates from a non-state actor (4) and has an international nature. The state essentially needs to have become the 'victim state' of an attack which is of such a scale that domestic remedies do not suffice and international remedies must be sought in order for the state to ensure its own security and the security of its citizens.

When a 'victim state' has been determined, that state should in conformity with basic principles of international law resort to non forceful measures as a primary focus to resolve the threatening situation. Although these peaceful measures of diplomatic, judicial and other co-operative means may be time consuming and inefficient, compared to that of forceful measures, they ought to be examined closely and tried before resorting to force. In some extreme situations, however, forceful response is needed and may be resorted to immediately, sometimes because the nature of the attacker precludes any peaceful measures to be resorted to.

It is in these situations as well as in those situations where the peaceful measures have not worked, that the legal regime of international law has become highly controversial and debated among scholars, judges and states; the issue is that of forceful measures against non-state actors.

Having closely examined and analysed recent events, such as the 1998 bombings, 9/11 attacks and the acts of piracy off the coast of Somalia as well as the positions taken by scholars, states, such as the NATO states and judges of the ICJ in their recent judgements and opinions in the *Palestinian Wall advisory opinion* and *DRC v. Congo*, certain principles seem to be emerging on the issue, which suggest that using force against non-state actors is approaching a level of acceptance within the international community. This is not only with respect to the authority and actions of the UN Security Council, but also the unilateral or collective use of force in accordance with the right to self-defence. Needless to say, strict requirements exist as to the circumstances in which force may be used, but the international community seems to have accepted that the threat which modern society is faced with is of such magnitude and of such a nature that force is sometimes necessary to defend and protect the security interests of states and therefore must be considered a legitimate action in order to preserve international peace and security. The strict position taken in the *Nicaragua case* concerning the concept of *armed attack* does not seem to apply anymore as the state practice of 9/11 shows, in addition an emerging principle where more obligation is put on states to not allow their territories to be used against the security of others, seems to be gaining support.

The rules regarding use of force are still very controversial and this controversiality is very dangerous as to the maintenance of a peaceful co-existence between states since they will sometimes use the opportunity when the law is vague to stretch it and even utilize it in a controversial or unlawful way. Therefore it is sad to note that the ICJ seems to stray away from taking a position on the issue, leading to the effect that UN Security Council's actions seem to be the most authoritative indicators on the legitimate use of force in international law.

Of course it is very important that rules on the use of force be restricted as the principle of sovereignty must be protected. This means that the international community must take more co-operative actions on the issue of non-state actors as security threats. It needs to redefine the acts of terrorism and piracy with respect to the international nature of the crimes. But also, the community of nations needs to establish more effective means of co-operation and establish obligations for ensuring security, as now the threat to international peace seems not to originate as much from other states but rather originate from the non-state actors. It seems that the community has, through its 2005 World Summit started to take actions in this respect; actions towards a more broader understanding of both the effects of not complying with obligations under international law, but also the understanding and interpretation of article 51 with respect to non-state actors and the concept of anticipatory self-defence.

In the 21st century it therefore seems that a state is not allowed to claim a violation of sovereignty when a ‘victim state’ acts against non-state actors on its territory, if its territory is being used as a base for non-state actors attacking other states and that state disregards its obligations to prevent threats originating from its territory. The obligation put forward in the *Corfu Channel Case*, that states may not allow their territory to be used against the security of another state is of even greater importance today than it was then. If terrorism is to be eliminated, this principle needs to be upheld and applied to international co-operation in relations to non-state actor threats in the modern world and interpreted with respect to the principle of sovereignty.

In the absence of clear rules regarding the co-operation of states against threats of non-state actors, the available remedies a ‘victim state’ has are the above mentioned principles and rules regarding non-forceful and forceful measures which this thesis has described.

From all of the above it can be concluded that even circumstances which international law has not expressly addressed can be analyzed with respect to their legitimacy. This is in large due to the special nature of international law, relating to its formation, but also due to the purpose international law serves, that of ensuring the continuing co-existence of states in the international community.

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1648 Peace treaty at Westphalia

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1937 Convention for the Prevention and Punishment of Terrorism

1945 Charter of the International military Tribunal (Nuremburg).

1945 Statute of the International Court of Justice

1945 Charter of the United Nations

1949 Geneva Conventions

1949 North Atlantic Treaty (NATO)

1958 Geneva Convention on the High Seas

1966 International Covenant on Civil and Political Rights

1966 International Covenant on Economic, Social and Cultural Rights

1970 Hague Convention on the suppression of unlawful seizure of aircraft

1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents

1977 Additional Protocols to the Geneva Conventions

1979 Convention against taking hostages

1982 Convention on the Law of the Sea

1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,

1998 International Convention for the suppression of terrorist bombings and the Convention on terrorist bombings

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