

PANTEION UNIVERSITY OF SOCIAL AND POLITICAL SCIENCES



**FACULTY OF INTERNATIONAL STUDIES, COMMUNICATION AND
CULTURE
DEPARTMENT OF INTERNATIONAL, EUROPEAN AND REGIONAL
STUDIES**

**POST GRADUATE PROGRAMME
INTERNATIONAL LAW AND DIPLOMATIC STUDIES**

**ARTICLE 51 IN A WORLD THAT IS CHANGING:
THE INHERENT RIGHT OF SELF-DEFENCE IN RELATION TO NON-
STATE ACTORS**

Dissertation

**Tenoshvili Maria
(1217M011)**

Athens, 2018

Committee:

Marouda Maria-Daniella, Assistant Professor (Advisor)

Perrakis Stelios, Professor Emeritus

Tsagourias Nicholas, Professor



Copyright © Τενοσβίλι Μαρία, 2018

All rights reserved. Με επιφύλαξη παντός δικαιώματος

Απαγορεύεται η αντιγραφή, αποθήκευση και διανομή της παρούσας διπλωματικής εργασίας εξ ολοκλήρου ή τμήματος αυτής, για εμπορικό σκοπό. Επιτρέπεται η ανατύπωση, αποθήκευση και διανομή για σκοπό μη κερδοσκοπικό, εκπαιδευτικής ή ερευνητικής φύσης, υπό την προϋπόθεση να αναφέρεται η πηγή προέλευσης και να διατηρείται το παρόν μήνυμα. Ερωτήματα που αφορούν τη χρήση της διπλωματικής εργασίας για κερδοσκοπικό σκοπό πρέπει να απευθύνονται προς τον συγγραφέα.

Η έγκριση της διπλωματικής εργασίας από το Πάντειον Πανεπιστήμιο Κοινωνικών και Πολιτικών Επιστημών δεν δηλώνει αποδοχή των γνώμων του συγγραφέα

TABLE OF CONTENTS

Abstract	4
Introduction.....	6
I. Sources for the justification of self-defence in relation to non-state actors	8
I. A The Multifaceted notion of Self-Defence	8
I.A.1 The relation of the customary nature of self-defence with its conventional form, regarding non state actors.....	10
I.A.2 Article 51 of the UN Charter and Article 21 of the Articles on State Responsibility of States for Internationally Wrongful Acts.	21
I.B The Practical basis behind the targeting of non-state actors.....	23
I.B.1 The relation of the non-state actor with the host – state.	24
I.B.1.i Control of a State upon non-state actors.....	24
II.B.1.ii The unable or unwilling test.....	26
II.B.2 The ambiguity of the language of Security Council Resolutions.	29
II. The implications of the association of non-state actors with the right of self-defence	32
II. A. Can the broadened interpretation of the right to self-defence be necessary or proportionate?	32
II.B The implications of the exercise of the right of self-defence by states against non-states actors, concerning the territorial integrity and the sovereignty of states	38
II.B.1 The principles of territorial integrity and self-determination	38
II.B.2 The Right to Self-defence concerning non-state recognized territorial entities.....	46
Conclusion	57
Bibliography	62

Abstract

The main focus of this dissertation is the examination of the association of the right of self-defence with non-state actors which has gained an excessive dynamic since 11 September 2001. More specifically, at issue here are the implications of the practice of targeting non-state actors through the basis of self-defence regarding the principle of territorial integrity. The confusion of such notions can lead to dilution of sovereignty and therefore provoke constructed conclusions of legitimization of the status of de facto entities. The methodology of this paper was based upon the study and the analysis of both primary and secondary sources, the jurisprudence of the International Court of Justice, Resolutions of the United Nations, state practice and opinion juris. It is consisted of two parts, firstly the sources of the justification of the invocation of self-defence in relation to non-state actors and secondly, the implications of this practice. Each part is also structured in 2 subsections.

The conclusion reached, concerns the fact that this well spread practice only creates dangerous precedents diluting the goal of the United Nations Charter. Only the United Nations Security Council has the duty of promoting the establishment and maintenance of international peace and no entity should have the privilege of exploiting the temporary right of self-defence for their own interest. The prohibition of use of force is “*regarded [...] as a principle of customary international law*” and, according to some, “*even as jus cogens*”. Therefore, isn’t it contrary to international law that an exception to this rule acquires a broad interpretation?

Keywords: Jus ad bellum, Use of force, Self-defence, Non-state actors, Territorial integrity, De facto regimes

Το Άρθρο 51 σε έναν κόσμο που αλλάζει: το φυσικό δικαίωμα της νόμιμης άμυνας σε σχέση με τους μη κρατικούς δρώντες

Συγγραφέας: Τενοσβίλι Μαρία

Περίληψη

Στην παρούσα διπλωματική μελέτη κεντρική υπόθεση εργασίας αποτελεί η εξέταση της συσχέτισης του δικαιώματος στη νόμιμη άμυνα με τους μη κρατικούς δρώντες, μία πρακτική που έχει απόκτηση εξαιρετική δυναμική μετά την 11^η Σεπτεμβρίου 2001. Πιο συγκεκριμένα, εξετάζονται οι συνέπειες της πρακτικής της στόχευσης μη κρατικών δρώντων μέσω της νόμιμης άμυνας, σχετικά με την αρχή της εδαφικής ακεραιότητας. Η σύγχυση αυτών των εννοιών μπορεί να οδηγήσει στην αλλοίωση της αρχής της εδαφικής ακεραιότητας και άρα να προκαλέσει την κατασκευή συμπερασμάτων νομιμοποιητικών του *status de facto* οντοτήτων. Η μεθοδολογία της εργασίας βασίστηκε στην μελέτη και ανάλυση πρωτογενών και δευτερογενών πηγών, στη νομολογία του Διεθνούς Δικαστηρίου της Χάγης, σε Ψηφίσματα και Αποφάσεις των Οργάνων των Ηνωμένων Εθνών καθώς και στην κρατική πρακτική και το *opinion juris*. Η εργασία δομείται λοιπόν σε δύο μέρη, πρώτα θα γίνει εξέταση των πηγών επίκλησης της νόμιμης άμυνας σε σχέση με τους μη κρατικούς δρώντες και σε δεύτερο πλάνο θα αναλυθούν οι συνέπειες αυτής της πρακτικής. Κάθε μέρος επίσης χωρίζεται σε δύο υπό-μέρη.

Συμπεραίνεται, ότι η διαδεδομένη πρακτική στόχευσης μη κρατικών δρώντων μέσω νόμιμης άμυνας δημιουργεί μόνο επικίνδυνα προηγούμενα που αποδυναμώνουν τον στόχο του Χάρτη του ΟΗΕ. Μόνο το Συμβούλιο Ασφαλείας του ΟΗΕ έχει τον ρόλο της προώθησης της καθιέρωσης και της διατήρησης της διεθνούς ειρήνης και καμία οντότητα δεν θα έπρεπε να έχει το προνόμιο να εκμεταλλεύεται το προσωρινό αυτό δικαίωμα της νόμιμης άμυνας για τα συμφέροντά της. Η απαγόρευση της χρήσης βίας αποτελεί εθιμικό δίκαιο και κατά πολλούς «*jus cogens*». Επομένως, δεν είναι αντίθετο του διεθνούς δικαίου η εξαίρεση του κανόνα να αποκτά διευρυμένη ερμηνεία;

Λέξεις κλειδιά: Jus ad bellum, Χρήση βίας, Νόμιμη άμυνα, Μη κρατικοί δρώντες, Εδαφική ακεραιότητα, de facto καθεστώτα

Introduction

During this Dissertation, the writer will analyze the implications of a possible acceptance of the relation of the right of self-defence with non-state actors. The practice of states reflects a broadened interpretation of Article 51 of the United Nations (UN) Charter but it is evident that a broad interpretation of exceptions can be dangerous, especially when applied in jus ad bellum matters.

The purpose of the writer is to indicate the consequences of the use of jus ad bellum norms such as the right to self-defence in their broad interpretation and will try nevertheless to prove that the exception is and will remain the confirmation of the rule. The principles at stake are the prohibition of the use of force, the sovereignty and the territorial integrity. The reason this is worth analyzed is that traditionally, in the sense of the UN Charter, self-defence has been an inherent right of states. The UN Charter refers to the relations of nations, states recognized by the UN and also Article 51 explicitly mentions “measures taken by its Members”. Moreover, in the *Palestinian Wall opinion*, the International Court of Justice, established that an ‘armed attack’ under Article 51 is confined to States, either in direct or indirect terms and does not include actions by non-State actors which are not attributable to States.¹ However, today we see a different practice by many actors.

These are subjects frequently discussed but, what is new at this analysis is the issue of the right to self- defence of non-recognized territorial entities which has not been dealt with in the framework of contemporary international relations.²

An important example of this practice is what happened between the parties of the Georgia –Russia War of 2008. The Tagliavini report, the report of the EU fact finding commission regarding the Georgia – Russia War of 2008 which marks the “first time in its history that the European Union has decided to intervene actively in a serious armed conflict”, interpreted the concept of self-defence broadly and did not exclude it of any of the parties.³ It has to be clear thought that notably, Georgia’s territorial integrity at the time of August 2008 conflict was recognized by all member States of

¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 136, para. 139. (Hereinafter Wall Advisory Opinion)

² Institut de droit International, 10A Resolution en Session de Santiago – 2007, 27 October 2007 10ème Commission, Present Problems of the Use of Armed Force in International Law A. Self-defence Rapporteur: M. Emmanuel Roucouas.

³ Independent International Fact Finding Mission on the conflict in Georgia, volume I, September 2009; Independent International Fact Finding Mission on the conflict in Georgia, volume II, September 2009; Independent International Fact Finding Mission on the conflict in Georgia, volume III, September 2009.

the UN. Today, after the advisory opinion on Kosovo⁴, the few but still recognitions of S. Ossetia, Abkhazia, Nagorno Karabakh and the annexation of Crimea, highlight important lacunae in the concepts of the Prohibition of the use of force and of the principle of territorial integrity.

The methodology of this paper was based upon the study and the analysis of both primary and secondary sources, the jurisprudence of the International Court of Justice, Resolutions of the United Nations, state practice and opinion juris. It is construed in two parts, first the sources of the justification of the invocation of self-defence in relation to non-state actors and second, the implications of this practice. Each part is also structured in 2 subsections.

Regarding the first part, the first subsection consists of a chapter referring to the multifaceted notion of self-defence, conventional and customary on the one hand and its nature as a primary and secondary rule, on the other hand. The second subsection consists of a chapter referring to the practical basis of this pretention, namely the ways states are justifying their actions regarding non-state actors. More precisely, these ways consist of the research of a relation between the host state and the non-state actor as well as the ambiguity of the language of the relevant resolutions of the Security Council.

As for the second part, the first subsection covers the issue of whether the right of self-defence against non-state actors can be necessary and proportionate, two factors analyzed separately and both essential in order for the exercise of self-defence to be legitimate. During the second subsection, the implications regarding the principle of territorial integrity and sovereignty will be thoroughly examined. First of all, there will be an analysis of what the principles are consisted of and what is their part in the jurisdiction. This chapter is crucial in order to reach the second chapter regarding the consequences of this practice in relation to de facto regimes. It is held that articles Articles 2(4) and 51 of the UN Charter do not apply beyond inter-state relations, however this aspect is also worth to be examined in the case of secession. The false messages spread concerning the legitimization of their status leave a dangerous legal basis supporting even statehood claims.

⁴ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403. (Hereinafter Kosovo Advisory Opinion)

I. Sources for the justification of self-defence in relation to non-state actors

I. A The Multifaceted notion of Self-Defence

In order to acquire a more spherical opinion on the matter, it is essential to examine how the customary nature of the right of self-defence interacts with its conventional form, and how this could affect the legitimacy of self-defence regarding non-state actors. At the same time, it is essential to see what are the consequences of stipulating this right both as a primary and as a secondary rule. This is an aspect that should be seen, taking into consideration that the right of self-defence is recognized as an inherent right. This means that the right existed before its insertion into the Charter of the United Nations⁵ and it was not a notion created by the birth of the Charter⁶, therefore the right of self-defence derives from customary law.⁷ There is no need to prove that this right is customary since it has been confirmed by the International Court of Justice in relevant cases⁸ as well as the Security Council in the relevant Resolutions.⁹ It is important to note at this point that it is claimed that Article 51 is supplemented by customary law¹⁰. This point is also adopted by the Institute of International Law at its Resolution during the Santiago Conference in 2007, where it was stipulated that: “Article 51 of the United Nations Charter as supplemented by customary international law adequately governs the exercise of the right of individual and collective self-defence.”¹¹

At the same time, it is held that both the language and the drafting history of Art. 51, confirm that, within the limits set forth in the Article, the customary law right of self-defence is preserved.¹² Therefore, the question that will be analyzed here

⁵ Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945, 1 UNTS XVI

⁶ Goodrich L. M., Hambro E., and Simons A. P. (1969). *Charter of the United Nations Commentary and Documents* (3rd and reviewed edition). New York: Columbia University Press p.344.

⁷ Αντωνόπουλος Κ., Μαγκλιβέρας Κ. (2014). *Το Δίκαιο της Διεθνούς Κοινωνίας*, (2^η έκδοση), Αθήνα: Νομική Βιβλιοθήκη, παρα. 1314, σελ.699.

⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America) Judgment*, 27 June 1986 (Hereinafter *Nicaragua case*). *Oil Platforms (the Islamic Republic of Iran v. the United States of America), Judgment*, I. C. J. Reports 2003, p. 161 (Hereinafter *Oil Platforms case*). *Wall Advisory Opinion*, *supra* note 1. *Armed Activities on the Territory of the Congo (the Democratic Republic of the Congo v. Uganda), Judgment*, I.C.J. Reports 2005, p. 168 (Hereinafter *Armed Activities Case*)

⁹ United Nations Security Council Resolution 1368 (2001), [Threats to international peace and security caused by terrorist acts], 12 September 2001, S/RES/1368 third preambular paragraph, and paras. 1, 3 and 5. UN Security Council, Security Council resolution 1373 (2001) on threats to international peace and security caused by terrorist acts, 28 September 2001, S/RES/1373 (2001) fourth preambular paragraph, UN Security Council, Security Council resolution 2249 (2015) on terrorist attacks perpetrated by ISIL also known as Da'esh], 20 November 2015, S/RES/2249.

¹⁰ Ρούκουνας Ε., (2010). *Δημόσιο Διεθνές Δίκαιο*. Athens: Νομική Βιβλιοθήκη, σελ. 507.

¹¹ Institut de droit International, *supra* note 2.

¹² Greenwood Ch. (2011). Self-Defence. in *Max Planck Encyclopedia of Public International Law*. Retrieved from: (<http://opil.ouplaw.com>). Accessed: 19.12.18

concerns the amount that the customary nature of the Article coincides with its conventional form. It is crucial to answering this question since, as far as non-state actors are concerned, the first major incident was a reference to self-defence was made, concerned non-state actors. On the other hand, the UN Charter and more specifically in our case jus ad bellum norms, have been interpreted as notions concerning inter-state relations.¹³

As far as the second contradictory nature of self-defence is considered, there has to be an examination of whether on the one hand self-defence as a circumstance precluding wrongfulness, can justify the violation of the territorial integrity of a state in order to act against non-state actors or the nature of self-defence as a primary rule prohibits such a practice.

¹³ *Kosovo Advisory Opinion*, supra note 4. paras. 79-84.

I.A.1 The relation of the customary nature of self-defence with its conventional form, regarding non state actors.

Self-defence has its roots in human relations under the concept of criminal and national law.¹⁴ Moreover, at the dawn of international law, academicians applied the concept of self-defence in relation to just war. In the 19th century, its importance was limited by the fact that international law then recognized a general right of resort to war, meaning that self – defence was significant only with regard to lesser instances of use of force. It was only used as a political justification of the use of force.¹⁵

Basically, the notion of self-defence acquires judicial form and surpasses its function as a political justification, on the occasion of the Caroline incident.¹⁶

The Caroline Incident has its origins in a rebellion against British rule in Canada, in 1837. A British island called Navy Island situated on the river boundary between Canada and the United States was occupied by a group of insurgents and their American supporters. The steamer *Caroline* was used in order to transport men and munitions to the island, which would be the starting point of an attack against Canada. There was no evidence that the USA was supporting this move, but it is evident that it did not have the means to prevent this attack against Canada. In the end, the boat was destroyed by British forces while it was in an American port, killing two people.¹⁷

This launched a series of actions and diplomatic communications between the USA and Great Britain. The legal argument of the notion of self-defence is first found in a note addressed by Mr. Forsyth, the American Secretary of State, to Mr. Fox, the British Minister at Washington, saying that the incident would be made the subject of a demand for redress.¹⁸ Mr. Fox in reply to this first letter raised three defenses, one of which was self-defence, as well as the reference to the piratical character of the vessel.

However, a more serious approach will be adopted by Daniel Webster, on the occasion of the arrest of Alexander Mc Leod in 1840 on a charge of murder in

¹⁴ Dinstein Y. (2001). *War, Aggression and Self Defense*. Cambridge: Cambridge University Press, para 497, p. 188.

¹⁵ Jiménez de Aréchaga E. (1978), *International Law in the Past Third of a Century. Collected Courses of the Hague Academy of International Law*, 159.
Retrieved from: https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*-ej.9789028603592.001_344 Accessed: 19.12.18

¹⁶ Jennings R. Y., (1938). The Caroline and McLeod Cases, *The American Journal of International Law*. 32 (1).

¹⁷ Greenwood C. (April 2009). The Caroline. In *Max Planck Encyclopedia of Public International Law*. Retrieved from: (<http://opil.ouplaw.com>). Accessed: 19.12.18

¹⁸ Jennings R. Y., *supra* note 16, p.85

connection with the events of the Caroline incident. He will address the charge of piracy which can be interpreted as an examination of the concept of non-state actors today¹⁹:

On July 27, 1842, Webster will send the famous note to Lord Ashburton, the new special Minister appointed in Washington charged with the task of effecting an agreement on the boundary question, containing the first elaboration of self-defence. The fact that Americans elaborated on this notion is normal since their goal was to limit its effects and not let British talk vaguely of its notion

The criteria the Webster utilized, *“necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation”* is the famous Caroline Test but in this point, there will be a focus on the non-state factor. It is characteristic the example of the Chatham House publication of principles of international law on the use of force by states in self-defence where it stipulates in principle 6 that:

“Article 51 is not confined to self-defence in response to attacks by states. The right of self-defence applies also to attacks by non-state actors.” The principle is followed by this commentary: *“This conclusion is supported by reference to the Caroline case; the criteria in Caroline were enunciated in the context of a marauding armed band, not orthodox state-to-state conflict.”*²⁰

Moreover, the International Law Association Report²¹ states that the use of force in such circumstances (referring to circumstances against non-state actors) is not a new phenomenon and has occurred in numerous situations over the past two centuries namely stating the Caroline incident and the US incursion in Mexico in 1916, as examples for the Pre-Charter practice of States.

However, during the 19th century, the notion of self-defence had no practical importance. It gained importance as an exception to the prohibition of the use of force, as it is normal, when after the Covenant of the League of Nations (1919), the General Treaty for Renunciation of War as an instrument of National Policy, a general

¹⁹ British Parliamentary Papers, Vol. LXI, (1843). British & Foreign State Papers, 29, p. 1129.

²⁰ Wilmschurst E. (October 2005). Chatham House Principles of International law on the use of force by states in self-defence. *International & Comparative Law Quarterly am House*, 55.

²¹ Report on Aggression and the Use of force, International Law Association, Sydney Conference, 2018, p.14.

prohibition was established.²² It has to be noted however that there was no explicit mention to self-defence.²³

Moving on towards the adoption of Article 51, it is important to note points which are highlighted by diverging opinions. First of all, there was no provision proposed by the Dumbarton Oaks Proposals on the United Nations Charter (1944) regarding self-defence. Later, in the San Francisco Conference (1945) it was deemed necessary by some delegations to state in the Charter that the victim state should have the right to act individually until the Security Council takes measures to “*repel or forestall*” an aggressor State. The right of collective self-defence was mentioned by Latin American Delegations in their effort to give importance also to regional defence treaties or further arrangements and agencies of collective security, namely referring to the Interamerican Act of Chapultepec rather than only to the Security Council.²⁴ “*If any conclusion could be drawn from the above, is that the drafters intended to recognize self-defence in a derogative sense*”.²⁵

Nevertheless, turning on again to the element of non-state actors, the fact that Article 51 does not specify that the armed attack which gives rise to self – defence must have been carried out by a state, leaves room for a reading that includes attacks by non-state actors that have no connection to the state.

Article 51 of the Charter is formulated as such:

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

²² Report of the International Law Commission, 32nd Session, (1980). *Yearbook of the International Law Commission*, Volume II, Part 2, pp. 52.

²³ Constantinou A. (2000). *The right of Self-Defence under Customary International Law and Article 51 of the UN Charter*. Athenes, Bruxelles : Ant. N. Sakkoulas/ Bruyant, p.25.

²⁴ Trapp N. Kimberley (2015). Part III The Prohibition of the Use of Force, Self-Defence, and Other Concepts, Ch.30 Can Non-State Actors Mount an Armed Attack? In *The Oxford Handbook of the Use of Force in International Law*, p. 679, Retrieved from (<http://opil.ouplaw.com>)

²⁵ Institut de droit International, supra note 2.

It is reminded that draft Article 51 (which was ironically drafted by the US) contained the phrase “armed attack by another State” but on the insistence of France and the United Kingdom for reasons related to the then existing regional agreements the expression was subsequently not adopted.²⁶ However, the formulation of Article 51 remains restrictive as far as possible to the use of force by individual States. This can be confirmed by the prerequisites enumerated in the Article.

The first criterion held is that there should be an armed attack against a Member of the United Nations. The claim made here is that there is no reference to the author of the attack, thus this absence is interpreted as a possibility for self-defence to be triggered by the use of force of non-state actors.

At this point, it is crucial to analyze the notion of the armed attack. The right of self- defence has been interpreted by the International Court of Justice as a reaction invoked only after an armed attacked. The apparition of ISIS and thus the augmentation of attacks by non-state actors against states has brought into light the problematic of whether the right of self-defence can be invoked against non-state actors.²⁷

When is the use of force considered to be an armed attack? The analysis and the definition of this term were given in 1974 with the Resolution 3314 of the UNGA for the definition of the act of aggression²⁸.

It is noteworthy that at the resolution the term used is an act of aggression as written in Article 39 and not Article 51 where the term armed attack is used. Ago, in fact, states that not all the actions written down at the Resolution are an armed attack. Moreover, taking into consideration the travaux preparatoires of the resolution, it is evident that there was no goal of using the definition of armed attack, especially by the USA and the other Western States. Similarly, the USSR considered that the act of aggression and that the armed attack is not the same.

According to Article 3, the following actions can be considered as aggression:

- a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,*

²⁶ Murphy S. (2005). Self-Defence and the Israeli Wall Advisory Opinion. An Ipse Dixit from the I.C.J.? *American Journal of International Law*, 99 (1), pp. 62-76, p. 70.

²⁷ Brent M. (2009). Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence. *Australian Journal of International Law*, 16 p.133 – 159.

²⁸ UN General Assembly, Definition of Aggression, 14 December 1974, A/RES/3314.

- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

In all of the actions enumerated in Article 3, the attack is coming from a state. However, an armed attack is not clearly defined. Having a look at the *Nicaragua case* of the International Court of Justice, it is, in fact, stated that “*there appears now to be a general agreement on the nature of acts which can be treated as constituting armed attacks*”²⁹.

Nevertheless, in the same case, what is important to highlight is that there is a difference between a mere frontier incident and an armed attack. The way it is stated, it gives once more the impression that armed attacks are directed by states.

*“The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State. If such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces”*³⁰

²⁹ *Nicaragua case*, *supra* note 8, para. 195

³⁰ *Ibid.* para 195

Nevertheless, this was referring to indirect attacks where attribution was given to states and not to the irregular armed forces.

Moreover, another classical citation from the Nicaragua case is the paragraph referring “*In the case of individual self- defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack*” *There is also a distinction between the gravest forms of the use of force from other less grave forms.*³¹ By mentioning the Declaration on Friendly Relations the Court states several uses of force that are less grave, such as for instance the duty to refrain from the threat of use of force to violate existing international boundaries. The difference, in fact, is between these forms is one of scale and effects. More precisely, the scale refers to the amount of force used, the duration of the attack or its locate and its effect lays on the damage or casualties caused.³²

The International Court of Justice has expressed its opinion in the *Oil Platforms case*³³, the *Armed Activities on the Territory of the Congo (DRC v Uganda)*³⁴ and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory advisory opinion.*³⁵

More precisely, at the case of the *Oil platform case* there was a reference on whether the incident “*sufficed in itself to justify action in self- defence, as amounting to an "armed attack"*”³⁶ More precisely, there was a reference to the term of mining, whether it was enough to provoke the inherent right of self-defence. In this case, there was no armed attack by Iran that would justify the invocation by the USA of the self-defence right. The Court judged that the attack at the Iranian oil platforms was under the right of self-defence, and they should prove that for the previous attacks, Iran was responsible by making a reference to Nicaragua.³⁷

In the case of *Armed Activities on the Territory of the Congo (DRC v Uganda)*³⁸ the court confirmed its previous decision of *Nicaragua*, highlighting that “*reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred*”

³¹ *Nicaragua case, supra* note 8, para 195.

³² Ruys T. (2010). *Armed attack and Article 51 of the UN Charter*. Cambridge: Cambridge University Press, p. 139.

³³ *Oil Platforms case, supra* note 8.

³⁴ *Armed Activities case, supra* note 8.

³⁵ *Wall Advisory Opinion, supra* note 1.

³⁶ *Oil Platforms case, supra* note 8, para 72.

³⁷ *Nicaragua case, supra* note 8, para 195.

³⁸ *Armed Activities case, supra* note 8, para. 146.

At this point, since the concept of the armed attack has been analyzed it is important to note the jurisprudence of the International Court of Justice in order to detect whether there is a conflict between the customary and conventional nature of Article 51 as well as whether self-defence focuses in fact on the results of the armed attack or is it also taking into consideration the author of the attack.

According to the *advisory opinion of the International Court of Justice on the wall of Palestine*: “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.”³⁹ In that case, the court gave brief consideration to whether Israel’s construction of a security wall within the occupied Palestinian territories might be justified as a measure of self-defence.

Israel legally based the constriction of the wall to Article 51, arguing that it was a measure to defend themselves against terrorist attacks, and explicitly referred to the Security Council Resolution 1368 (2001) and 1373 (2001). The Court did not agree with Israelis reasoning and reaffirmed that armed attacks giving rise to the right of self-defence must be attributed to a State.

Moreover, the Court, did not accept the applicability of relative Security Council resolutions, holding that the occupied territories from which terrorist attacks were launched were under Israeli control and therefore could not be considered in the context of resolutions addressing the terrorist attacks of 11 September, since the attacks at that case, were directed from abroad.

It has to be considered that the Court could not be more clarifying since the terrorist attacks launched, were directed from territories with occupied status. The problem concerning the use of defensive force directly against non-State actors, is more evident when they are targeted in foreign territory, because of the territorial integrity of the host-state which is a stake.

However, in such cases where the International Court of Justice has affirmed this statement, the separate and dissenting opinions of Judges as Higgins, Simma, Kooijmans, Buergenthal, and Dinstein give another perspective.

At the *advisory opinion of the Court for the Wall of Palestine*, Judge Higgins highlighted that there is nothing in the text of Article 51 that ... “*stipulates that self-*

³⁹ *Wall Advisory Opinion*, *supra* note 1 para 139.

defence is available only when an armed attack is made by a State”.⁴⁰ Judge Kooijmans also mentions that the resolution of the UN after the 11th of September shows the change concerning the perception of the right to self-defence: “*without making any reference to an armed attack by a state.*”⁴¹

In the case of *Nicaragua*, Judge Schwebel states that “*the conduct of the non-State actors with a certain degree of State involvement constitute an armed attack*”⁴².

At the same reasoning, judge Buergental also mentions in the case of *Congo v. Uganda* that : “*the UN Charter does not, by its terms, make the exercise of self-defence dependent on an armed attack by another State*” and he expressively referred to the decisions of the Security Council of the UN 1373 and 1368 where the Security Council invoked self-defence against terrorism.⁴³

In the same case, Judge Kooijmans notes that:

*“[...]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-defence.[...]. If armed attacks are carried out by irregular bands from such territory against a neighboring state, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require.”*⁴⁴

Judge Simma also states that “*attacks by non-State actors could still ‘qualify as’ armed attacks.*”⁴⁵

However, it is also important to note that in these cases it was clearly stated that the attack has to be directed by a state. In the case of *Nicaragua*, the court adjudged that:

“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

⁴⁰ Ibid, Separate opinion of Judge Higgins, para 33.

⁴¹ Ibid, Judge Kooijmans, para 35.

⁴² *Nicaragua Case*, supra note 8. Dissenting opinions of Judge Schwebel, pp. 211-14.

⁴³ *Armed Activities case*, supra note 8. Dissenting opinion of Judge Buergental, p. 6.

⁴⁴ Ibid, Separate opinion of Judge Kooijmans.

⁴⁵ Ibid, Separate opinion of Judge Simma, para 11 -12.

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".

This description, contained in Article 3, paragraph (g), of the Definition of Aggression, annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court doesn't deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation occurs.⁴⁶ In the *Nicaragua case*, the court had to examine whether the assistance given by the Americans to the contras amounted to a legitimate exercise of the right of collective self-defence. The Court concluded that in order that the actions of USA were legitimate, the armed attacks by rebel groups against El Salvador had to be attributable to Nicaragua

Furthermore, the Court noted in the *Congo v. Uganda* case that

*"...while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC."*⁴⁷

It is important to note that the inherent right of self-defence is temporary. It doesn't give full freedom to states to act as they want. Therefore, there are two procedural obligations relating to the right.⁴⁸ The Security Council, according to the Charter of the United Nations has the fundamental responsibility for the maintenance of peace and security⁴⁹, and Article 51 gives a special role to it:

⁴⁶ *Nicaragua case*, *supra* note 8, para. 195.

⁴⁷ *Armed Activities case*, *supra* note 8, para. 146.

⁴⁸ Greenwood (2011). *supra* note 12.

⁴⁹ Nolte G., Randelzhofer A., (2012). Ch.VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 51, The Charter of the United Nations: A Commentary,

“[...] until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”

Another important element, confirmed at the case of *Nicaragua* is that in order for the invocation of self-defence to be legit, the states have to have reported it to the Security Council: *“measures taken by Members in the exercise of the right of self-defence shall be immediately reported to the Security Council»*. The Court had, in fact, stated that the absence of a report to the Security Council is an element indicative of the conviction of a state about whether the state was acting under self-defence.⁵⁰

Similarly, the UK, during the war of Vietnam claimed that the USA reported to the Security Council at 1964, as a reaction to the alleged attacks of Northern Vietnamese Vessels at the Gulf of Tonkin. This simple report is the indication that the USA was, in fact, acting under the self-defence right.⁵¹

Moreover, after the intervention of the USSR to Afghanistan, UK said in the UNGA that if the USSR was going to invoke the right of self-defence it should have reported it to the Security Council⁵². Generally, these arguments were also held in 1986 when the USA alleged that Libya at the incident of the Sirda Gulf had not reported to the Security Council thus it was not acting in self-defence, whereas the USA, had reported to the Security Council and this was proving good faith.⁵³

Nevertheless, it has to be noted that this is a procedural measure and surely not sole evidence of the existence of self-defence. The International Court of Justice in *the Congo vs Uganda* case, just mentioned that Uganda failed to report to the Security Council that it was acting under self-defence without further analyzing.⁵⁴

The states interpreted that this procedural measure is an obligation that should

Volume II (3rd Edition), *Oxford Commentaries on International Law*, para. 56. Retrieved from: (<http://opil.oupilaw.com>)

⁵⁰ *Nicaragua case*, *supra* note 8, para 200.

⁵¹ Nolte. (2012). *supra* note 49.

⁵² Letter from the Permanent Representative of the United States of America Addressed to the President of the Security Council (Aug. 20, 1998), U.N. Doc. S/1998/780 (1998)

⁵³ UNSC 2671st meeting (1986); UN doc S/17938, 25 March 1986

⁵⁴ *Armed Activities case*, *supra* note 8, para. 145.

be kept each time they take an action as it happened from Iraq and Iran during 1980 - 1988⁵⁵ and from the UK and Argentina during the War of Falkland⁵⁶ as well as during the conflict between Erythrea⁵⁷ and Ethiopia.⁵⁸ Similarly, the USA at their participation in the Iran-Iraq conflict justified each of their actions and not only their first act.⁵⁹

To conclude the declaration of Judge Coroma, in the *Case Concerning Armed Attacks on the Territory of the Congo*, merging the concepts of the armed attack, its author and the power of the Security Council as described above, reaches to the conclusion and reminds the constant jurisprudence of the Court to distinguish between armed attack and other “less grave forms of use of force”, and stressed that:

*“according to the Court, it is necessary to distinguish between a State’s massive support of armed groups, including deliberately allowing them access to its territory, and a State’s enabling groups of this type to act against another State. Only the first hypothesis could be characterized as an ‘armed attack’ within the meaning of Article 51 of the Charter thus justifying a unilateral response. Although the second would engage the international responsibility of the State concerned, it constitutes no more than a ‘breach of peace’, enabling the Security Council to take action pursuant to Chapter VII of the Charter, without, however, creating an entitlement to unilateral response based on self-defence”*⁶⁰

Therefore, it is being evident that the right of self-defence is temporary and that only the Security Council is responsible for the maintenance of international peace and security and not a state.⁶¹

⁵⁵ Repertoire of the Practice of the Security Council 1981–84, Part XI note 73.

⁵⁶ *ibid* note 141.

⁵⁷ De Guttry A. and Ronzitti N. (eds) (1993). *The Iran-Iraq War (1980–1988) and the Law of Naval Warfare*. Cambridge: Grotius Publications, at 219, 226. Gray Chr. (1988). The British Position with regard to the Gulf Conflict, *International and Comparative Law Quarterly*, 37(2), pp. 420-428.

⁵⁸ Gray Ch. (2008). *The international Law and the Use of Force*. Oxford: Oxford University Press, p. 122.

⁵⁹ UN docs S/19149, 22 September 1987, S/19194, 9 October 1987, S/19219, 19 October 1987, S/19791, 18 April 1988, S/19989, 6 July 1988.

⁶⁰ *Armed Activities case*, *supra* note 8, Declaration of Judge Koroma, para. 9.

⁶¹ Gray (2008). *supra* note 58, p. 124 - 125.

I.A.2 Article 51 of the UN Charter and Article 21 of the Articles on State Responsibility of States for Internationally Wrongful Acts.

At this point, there has to be an examination of the right of self-defence as a primary rule, stipulated in Article 51 of the UN Charter, and as a secondary rule of international law, as covered in Article 21 of the Draft Articles on Responsibility of States for Internationally wrongful acts.

Robert Ago is the first who made the distinction between self-defence as a primary rule and as a secondary norm,⁶² it was also highlighted by James Crawford⁶³ and it is where Prof. Tsagourias also bases his position regarding the invocation of the right of self-defence against non-state actors.⁶⁴

However, it is important to note that Ago stated that: *“Acting in self-defence means responding by force to forcible wrongful action carried out by another; and the only reason why such a response is not itself wrongful is that the action which provoked it was wrongful”*⁶⁵

Therefore, he did not consider attacks by private individuals as enough to launch the right of self-defence, since only states are bound by the primary rule prohibiting the use of force. Nevertheless, it is held by scholars, basing their arguments on the broad interpretation of the authorship of an armed attack⁶⁶ and of the criterion of *“substantial involvement”*, that the responsibility of the host State can be engaged based upon the duty of due diligence. There is however the issue of the fact that self-defence will be carried out on the territory of a state that is not the author of the armed attack, and this is where self-defence as a secondary rule really functions.⁶⁷

Moreover, in Article 21 of the Draft Articles on state responsibility, the right of self-defence is codified as a circumstance precluding wrongfulness.⁶⁸

⁶² ILC, ‘Working paper prepared by Mr. Roberto Ago’, UN Doc A/CN.4/SC.1/WP.6, [1963] II *Yearbook of the International Law Commission*, 253

⁶³ Crawford J., *The International Law Commission Articles on State Responsibility*, Article 21 commentary, 166, para 1 and 2. Also J. Crawford, *Second Report on State responsibility* 1999 A/CN.4/498, para 296.

⁶⁴ Tsagourias, N. (2016). Self-Defence against Non-state Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule. *Leiden Journal of International Law*, 29(3), pp. 801-825, p. 33.

⁶⁵ ILC, ‘Working paper prepared by Mr. Roberto Ago’, UN Doc A/CN.4/SC.1/WP.6, [1963] II *Yearbook of the International Law Commission*, 253. See also *Nicaragua Case*, supra note 8, paras 74, 193, 195, 211.

⁶⁶ Alexandrov S.A. (1996). *Self-defence against the Use of Force in International Law*. Netherlands: Kluwer, p.114.

⁶⁷ Tsagourias (2016) supra note 64, p. 32.

⁶⁸ Paddeu, F. (2015), Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility. *British Yearbook of International Law*, 85, pp. 90-132.

It is also mentioned by Crawford at his report, that a State may violate other obligations towards the aggressor. *For example, it may trespass on its territory, interfere in its internal affairs, disrupt its trade contrary to the provisions of a commercial treaty, etc.*⁶⁹ He argues that when a state is exercising self-defence as referred to in Article 51 of the Charter, is not, even potentially, breaching article 2(4).⁷⁰

However, this doesn't mean that in order to attack non-state actors, the violation of the territorial integrity of a state could be justified. It is further explained in a clearer way at the commentary of Article 21, where it is stated that: "*Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision.*"⁷¹ How could the breach of the territorial integrity of a state be related to violations of non-state actors acting in the territory of a sovereign state but how should the victim state remain passive when it has been attacked because there is no attribution? It is also argued that it could not be concluded that self-defence precludes the wrongfulness of conduct in all of the cases or with respect to all of the obligations specifically referring to international humanitarian law and human rights obligations.

Moreover, Article 21 itself at the commentary clearly states that: *The essential effect of Article 21 is to preclude the wrongfulness of conduct of a State acting in self-defence vis-à-vis an attacking State.*⁷²

However, there is a theory stating that Article 21 of the Articles on state responsibility permits incidental violation of the territorial state's sovereignty provided that the self-defence action is lawful⁷³ which means that the conditions of necessity and proportionality are met.⁷⁴ Relevant is also the *advisory opinion on the Legality of the Threat or Use of Nuclear Weapons* of the International Court of Justice which can be examined in order to give some guidance on this question of necessity and proportionality.⁷⁵

⁶⁹ Crawford J. (1999). *supra* note 63, paras 297, 299.

⁷⁰ Ibid, Vol. II, p. 74

⁷¹ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Article 21, para. 2, pp. 74, 2001.

⁷² Draft articles on state responsibility, paragraph. 5 p. 75,

⁷³ *ibid*, paragraph 6

⁷⁴ Dinstein, Y. (2005). *War, Aggression and Self-Defence*. Cambridge: Cambridge University Press., 275-7; paras 728-733.

⁷⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, International Court of Justice. Reports 1996, p. 257, para. 79. (Hereinafter Nuclear Weapons Advisory Opinion)

States exercising self-defence against non-state actors on the territory of the host state make great efforts to confirm that their actions are specifically directed against the non-state actor and not against the state in the territory of which, the non-state actors are functioning.⁷⁶ It is argued that such a use of force against non-state actors, could violate the territorial integrity of the host state but does not constitute a violation of Article 2(4), since this falls under the scope of Article 21, applied in order to exonerate the breach without therefore touching upon a primary rule, provided that self-defence complies with the requirements of it.⁷⁷

To sum up, according to this theory, self-defence as a secondary rule in the law of state responsibility justifies the incidental breach of the territorial integrity of the host state.

I.B The Practical basis behind the targeting of non-state actors

At this sub-section, there will be an analysis of how States have used practical tools to justify their actions against non-state actors. In a first place, there will be an analysis of the notion of attribution and the association of the host state with the non-state actor by referring to the Articles on State Responsibility and fundamental notions of State responsibility. At the second section of this part of the dissertation the writer will argument about the doctrine of the unwilling-unable, a doctrine emphasized by the USA, in a Letter to the Security Council in 2015, referring to Syria. Lastly the way the States have utilized the ambiguity of several Security Council Resolutions will also be highlighted.

⁷⁶ Tsagourias, N. (2016), *supra* note 64, p. 37.

⁷⁷ *Ibid*

I.B.1 The relation of the non-state actor with the host – state.

I.B.1.i Control of a State upon non-state actors.

A way to render self-defence directed against non-state actors uncontested is to attribute the actions of non-state actors to the state which has jurisdiction upon the territory where the non-state actors are acting.

This will happen through the invocation of the Articles on Responsibility of States for Internationally Wrongful Acts which consist of the conditions for the attribution of the actions of non-state actors to the host-state. More precisely, the extent to which a State can be held internationally responsible is determined by the relevant standards of attribution⁷⁸ which are mainly found in the Articles of State Responsibility and more specifically in Articles 4 to 11.

This is a basis in order to attribute the commission of the armed attack to the State and thus render undoubtable, at least at first place, the possibility for the victim of invoking self-defence. In other words, attribution can be found on the basis of an institutional, a functional and an agency test.⁷⁹

More precisely, the institutional basis is stipulated in Article 4 of the Articles on State responsibility, stating that the attribution of an attack to a state is found when this attack is committed by a de jure or a de facto organ of that state.⁸⁰ Articles 5 and 6 of the Draft Articles on State Responsibility constitute the functional criteria, based on which an attack can be attributed to a state if it has been conducted by an entity that is empowered by that state to exercise governmental authority or in case it is committed by an organ of another State, acting on the disposal of the first State.

Finally, the Article which is mostly relevant in the case examined by this Dissertation is Article 8, where it is stipulated that private conduct is further attributable if it happened upon the instructions State organs or if it was exercised under their effective and direct control, reflecting customary law.⁸¹

⁷⁸ Kees A. (2011). Responsibility of States for Private Actors in *Max Planck Encyclopedia of Public International Law*, para. 10. Retrieved from: (<http://opil.ouplaw.com>). Accessed: 19.12.18.

⁷⁹ Boon K.E. (2014). Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines. *Melbourne Journal of International Law* 15(1); Tsagourias, N. (2016). Self-Defence against Non-state Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule. *Leiden Journal of International Law*, 29 (3). pp. 801-825, p.8.

⁸⁰ Crawford J. (2013). *State Responsibility-The general Part*. Cambridge: Cambridge University Press, pp.124-126.

⁸¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, International Court of Justice, Reports 2007, p. 43, para. 389.

The rule has been interpreted narrowly by the International Court of Justice since it is found that private conduct which is merely supported or planned by the State, exercised in its interest or otherwise on its behalf is not attributable, nor is the mere influence of a State is sufficient. In the *Nicaragua case* the Court formulated the effective control test.⁸² The Court when considering whether some actions by the contras in breach of international humanitarian law could be attributed to the US, concluded that the fact that the USA was financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation was not sufficient in order to attribute their conduct to USA.⁸³

On the other hand, the International Criminal Tribunal for the former Yugoslavia adopted a test with a lower threshold than the one adopted by the International Court of Justice, namely, the overall control test. This test refers to the general influence of a state on a non-state actor without being necessary to prove the state involvement in specific acts as it is demanded by the International Court of Justice. According to this test, a state exercises overall control by simply *coordinating* or *helping*, regarding the general plan of its military activity and stresses that issuing directions to the non-state actors is also not a necessary factor in order to attribute acts of the non-state actor contrary to the international law to a state.⁸⁴

Another important step of the Court in the *Case of Armed Activities in the Congo* is that it proclaimed the declaratory character under customary international law of the 1970 Declaration on Friendly Relations providing that it is a duty of States “*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 referred to (...) involve a threat or use of force*”⁸⁵

Finally, as for the responsibility of states for actions taken by non-state actor, specific reference should be made to Article 11 of the International Law Commission Articles. It reflects the jurisprudence of the U.S. Diplomatic and Consular Personnel

⁸² Cassese A. (2007). The Nicaragua and Tadić Tests Revisited in Light of the International Court of Justice. Judgment on Genocide in Bosnia. *The European Journal of International Law*, 18(4), pp. 649-668, p. 650.

⁸³ *Nicaragua*, *supra* note, 8, para 115.

⁸⁴ *Prosecutor v Duško Tadić (Appeal)* ICTY-94-1-A (15 July 1999) para 131, 137.

⁸⁵ *Armed Activities case*, *supra* note 8, para. 162.

case of the International Court of Justice and stipulates that a conduct of non-State actors that is not otherwise attributable to a State, shall be also considered an act of that State under international law, if and to the extent that the State acknowledges and adopts the conduct in question as its own.⁸⁶

Consequently, according to all of the above, there are a lot of ways to establish responsibility of a state for the actions of non-state actors. It is not impossible to find the control of a State over a non-state actor – either a terrorist group or a de facto regime- that has initiated an armed attack and therefore direct self-defence against it. For example, in the case of the war between Georgia and Russia in 2008, Georgia stated that its actions in August 7th, 2008, were in self defence.⁸⁷

I.B.1.ii The unable or unwilling test.

The unable or unwilling test⁸⁸ is another way of targeting a state through the actions of non-state actors. As showed, the Doctrine is not contained in the UN Charter or other treaties or by virtue of judicial interpretation by the ICJ.⁸⁹ This test is usually described as a set of criteria and requirements, and it is defined as the right of a victim state to engage in extraterritorial self-defence where the host is either unwilling or unable to take measures to mitigate the threat posed by domestic non-state actors, thereby circumventing the need to obtain consent from the host state.

The most recent practice of states invoking this doctrine concerns the actions taken against ISIL in Syria. The US, Canada, Turkey and Australia clearly spoke of the unable or unwilling test whereas France and UK did not mention it but they were influenced. Relevant is the statement of USA:

“ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the US and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self- defense, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the

⁸⁶ *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, p. 35, para. 74. Williams G. (2013). Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the “Unwilling or Unable” Test. *University of New South Wales Law Journal* 36(2) pp. 619-641, p. 625.

⁸⁷ Statement of the Georgian representative in the Security Council debate of 8 August 2008, 1.15 a.m. (UNDoc. S/PV.5951), p. 5.

⁸⁸ Deeks S.A. (2012). Unwilling or Unable” Toward a Normative Framework for Extraterritorial Self-defence, *Virginia Journal of International Law*, 52, p. 483.

⁸⁹ Williams (2013) *supra* note 86.

government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe-havens effectively itself. Accordingly, the US has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq.”⁹⁰

However, Ashley Deeks states: “*the victim state’s preference in each case should be to obtain the consent of the territorial state [. . .] the victim state should, as a rule, explore whether there is an opportunity to work cooperatively with the territorial state to suppress the threat.*”⁹¹ At the same time, there is also the possibility that despite the willingness of the host state, there is a lack of capacity at its behalf, rendering it unable, and once more, falling into the scope of the test. Therefore when the Host state tries to react but fails due to its lack of control over the territory from which the non-state actor operates or due to lack of capacity of law enforcement, this suffices as a justification for the victim state to act against the non-state actor.

As for its legal origin, there is also no clarity detected. On the one hand, it is argued that it originates from neutrality law⁹² and more specifically the Hague Convention V⁹³ and on the other hand that it derives from the fact that the use of force in self-defence can be necessary.⁹⁴ Supporting to this, it is also found that if in fact it can be proven that the host state is willing and able to control the threat against the victim state, then the use of force as self-defence, should be deemed unnecessary.⁹⁵

Nevertheless, this is not a new notion. It can be first detected before and during the 1970s through the cases of the bilateral agreement between US and South Vietnam against North Vietnamese targets in Cambodia,⁹⁶ the Israeli Invasion in Lebanon in 1978-1982⁹⁷ and also through the Case concerning United States Diplomatic and

⁹⁰ Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695, 23 September 2014.

⁹¹ Deeks, *supra* note 88, p. 502-533.

⁹² *Ibid*, p.505.

⁹³ International Conferences (The Hague), Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907.

⁹⁴ Williams (2013) *supra* note 86, p. 640.

⁹⁵ *Ibid*.

⁹⁶ Chachko E. Deeks A. (2016). Who is on Board with “Unwilling or Unable”?, *Lawfare Blog*. Retrieved from: <https://www.lawfareblog.com/who-board-unwilling-or-unable>. Accessed: 19.12.18.

⁹⁷ Israel’s ambassador to the UN, Haim Herzog addressed the UNSC in 17th of March 1979, arguing that Israel’s action was in line with international law and the UN Charter citing Fawcett, who refers to the Unwilling or Unable Doctrine under Article 51, as a legitimate way for intervention to remove or destruct threats on another state’s territory. UN Security Council, 2071st meeting, UN Docs. S/PV.2071, 17 March 1979.

Consular Staff in Tehran (1979) between the U.S. and Iran. Moreover, the doctrine is also found invoked by South Africa against Zambia and Angola referring to SWAPO.⁹⁸ During the 1980s the doctrine is utilized once more by Israel explicitly where in 1981, the Israeli ambassador to the UN, Yehuda Blum, addressed the UN Security Council to remind states that *“if a state is unwilling or unable to prevent the use of its territory to attack another state, that latter state is entitled to take all necessary measures in its own defense”*.⁹⁹

Another occasion where the doctrine of the unable or unwilling can be detected is during 2002, between the Russian Federation and Georgia. Russia mentioned the right to use force in self-defence in Georgian territory since it was arguing that there were Chechen and terrorist bases from where their attacks were launched against Russia, in Georgian territory. Russia specifically stated that in fact Georgia was unwilling to take measures to halt terrorist attacks against Russian territory from its border region. Georgia on the other hand was claiming that it was restoring order along its border. As a result, Russia was claiming that Georgia was the one responsible for the “consequences of the armed incursion by bandits” into Russian territory¹⁰⁰ and therefore claimed that it had a right to use force directly against non-State actors, accusing that Georgia is unwilling to take measures to prevent its territory from being used as a terrorist base. Georgia on the contrary stated that Russia’s claims were unfounded, objecting to Russia’s interpretation of Article 51 of the UN Charter, and concluded that Russian Federation was not attacked by Georgia.¹⁰¹ It should be noted that no Resolution of the Security Council of the United Nations was issued regarding this matter.

Generally, one can detect the presence of the doctrine in the practice of many states relating to their actions against non-state actors, such Israel also in 1993 against Hezbollah and PLO,¹⁰² USA in Afghanistan in 2001,¹⁰³ Iran in Iraq, throughout 1993-

⁹⁸Letter dated 10 April 1980 from the Permanent Representative to the United Nations addressed to the President of the Security Council, UN Doc. S/13886, 10 April 1980 and Letter dated 27 August 1981 from the Charge d’Affaires a.i. of the Permanent Mission of South Africa to the United Nations addressed to the Secretary-General, UN Doc. S/14652, 27 August 1981.

⁹⁹ UN Security Council, 2292th meeting, UN Doc. S/PV.2292, 17 July 1981, paras. 54-55.

¹⁰⁰ UN Doc S/2002/854. See also UN Doc S/2002/1012.

¹⁰¹ UN Doc S/2002/1035. UN Doc S/2002/1033.

¹⁰² Letter dated 26 July 1993 from the Permanent Representative of Israel to the United Nations addressed to the President of the Security Council, UN Doc. S/26152, 26 July 1993.

¹⁰³ Legal Adviser Bellinger speech (21.10.2006). *Legal Issues in the War on Terrorism*. Retrieved from: <https://www.state.gov/s/l/2006/98861.htm>. Accessed: 19.12.18

2001¹⁰⁴ as well as even Rwanda, Colombia and Ethiopia in relevant cases.¹⁰⁵ However Williams is of the view that the required element of *opinio juris* appears to be largely absent, despite the fact there is a growing state practice in support of the Doctrine, and that state practice is increasing. He further argues that there are no such cases in which states have cited using the Doctrine out of legal obligation.¹⁰⁶ It is in fact most of the time, cited under the scope of self – defence, in its multifaceted nature.

Taking into consideration all of the above, as well as the opinions of scholars both in favor and contrary to this doctrine, it is evident that no clear test exists and the criteria are difficult to be determined. It is in fact pointed out by Deeks that “*one is left with the certainty that the test exist, but puzzlement about how states should apply it*”.¹⁰⁷ It can therefore be argued that the attempt to shift customary international law has not succeeded and, indeed, that it may not succeed at all.¹⁰⁸ It is evident that the Unwilling or Unable Doctrine is highly debated amongst scholars and nations. There are not only different opinions concerning legality of the Doctrine, but also its origin, substantive provision, and scope.

I.B.2 The ambiguity of the language of Security Council Resolutions.

The role that the UN Security Council attributes to self-defence in the fight against threats to peace is not entirely clear. In the past, it did directly refer to Art. 51 UN Security Council in its resolutions.¹⁰⁹

The resolution 2249, adopted by the Security Council in 2015 condemning the terrorist attacks of ISIL, provides an argument for the scholars that argue in favor of the targeting of non-state actors through its main operative paragraph of the resolution is para 5, according to which the Council:

¹⁰⁴ Letter dated 18 April 2001 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/381, 19 April 2001; See also Annex to the Letter dated 22 March 2001 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc. S/2001/271, 26 March 2001.

¹⁰⁵ Ruys T., Verhoeven S., Attacks by Private Actors and the Right of Self-Defence, *Journal of Conflict and Security Law*, 10(3), p. 296.

¹⁰⁶ Williams (2013) *supra* note 86, pp. 634 and 639.

¹⁰⁷ Deeks (2012) *supra* note 88.

¹⁰⁸ Wood M. (2013). *The Law on the Use of Force, What Happens in Practice?* *Indian Journal of International Law*, 53, p. 365.

¹⁰⁹ UN Security Council, Security Council resolution 661 (1990) [Iraq-Kuwait], 6 August 1990, S/RES/661 (1990). For more information see: Halberstam M. (1996), *The Right to Self-Defense Once the Security Council Takes Action*, *Michigan Journal of International Law*, 17(2), pp. 229- 248.

“5. Calls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da’esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da’esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al-Qaida, and other terrorist groups, as designated by the United Nations Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council, pursuant to the statement of the International Syria Support Group (ISSG) of 14 November, and to eradicate the safe haven they have established over significant parts of Iraq and Syria;”

It is noted that there is no explicit authorization of *“all necessary measures,”* but a simple expression calling upon states to take such measures diverging from the usual form of resolutions, under Chapter 7, authorizing the use of force. Evidently, the Security Council is not contrary to the use of force by states but there is a problem since it does not authorize such action, something emphasized by the fact that the resolution calls for all necessary measures, *“in compliance with international law, in particular the United Nations Charter”*. This wording suggests that measures taken should comply with other rules of international law, including the jus ad bellum rules in the Charter. Thus, *“the resolution is to be seen as only encouraging states to do what they can already do under other rules of international law. It neither adds to, nor subtracts from, whatever existing authority states already have.”*¹¹⁰

Nevertheless, before resolution 2249 there were other resolutions of the Security Council that failed to clearly authorize the use of force and create more problems than solve. The writer is referring to the Resolutions 1368 and 1373 (2001) which after the 9/11 attacks, reaffirmed the inherent right of individual and collective self-defence. In this situation, these resolutions functioned as a stamp of legitimization, without however giving a clear authorization. Besides, this legitimization is in fact

¹¹⁰ Akande D., Milanovic M. (2015). The Constructive Ambiguity of the Security Council’s ISIS Resolution, *EJIL: Talk!*. Retrieved from: <https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>
Accessed: 19.12.18

expressed in the preambular paragraphs and not even in an operative paragraph. It is noted that there was no qualification of the attacks on US territory as being “armed” and the resolutions only spoke of a “terrorist attack”. While the reference to self-defence in resolution 661, authorizing use of force in the case of the intervention of Iraq to Kuwait, left no room to doubt for the legitimacy of the authorization of use of force, the relative reference of the Security Council in resolutions 1368 and 1373 had the exact opposite effect and created even more questions adding up on the debate surrounding the scope of Article 51.

This proactive of *de facto* “legitimizing” self-defence raises two issues. First of all, the UN Security Council has the capacity to interpret Art. 51 but cannot amend it. When these kind of references, concerning the status of self defence in situations where the application of Article 51 is contentious, are evidently ambiguous, the UN Security Council diverges from its duty to interpret Article 51 into amending it.¹¹¹

Consequently, in the opinion of the writer, the reason why self-defence only exists until the UN Security Council takes action is evident: “*self-defence is an extraordinary, interim and subsidiary measure and not a long-term, coordinated solution.*”¹¹²

¹¹¹ Starski P. (2015), Letimized Self- Defense – Quo vadis Security Council? EJIL: Talk! Retrieved from: <https://www.ejiltalk.org/legitimized-self-defence-quo-vadis-security-council/> Accessed: 19.12.18

¹¹² *Ibid*

II. The implications of the association of non-state actors with the right of self-defence

At the second part of the dissertation, there will be a clear affiliation of the legal basis analyzed above used by the States and scholars in order to justify the use of force against non-state actors, with serious implications and the dilution of fundamental principles of international law. First of all, there will be an analysis about whether the broadened interpretation of self-defence concerning non-state actors could ever be necessary or proportionate since these are the criteria in order for an action of self-defence to be legitimate. Secondly, the implications upon the principle of territorial integrity by the practice of targeting non-state actors inside the host state will be highlighted having examined the principle of territorial integrity in connection with the principle of self-determination taking into consideration the nature of the de facto regimes concerned.

II. A. Can the broadened interpretation of the right to self-defence be necessary or proportionate?

There are specific elements of both of the principles that are acceptable by all but they should be distinct from the principles applied in *jus in bello*.¹¹³ Both necessity and proportionality presuppose that self-defence should not be an act of revenge, but the objective has to be the repulsion of the attack. This doesn't mean that the country in defence is obliged to use the same weapons and the same armed forces as the attacking state, nor that it has to limit its actions at the state itself.¹¹⁴ This was confirmed by the GA at the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and at the declaration for the inadmissibility of intervention.¹¹⁵ The International Court of Justice has noted the elements of necessity and proportionality, which are customary¹¹⁶, at the cases of *Nicaragua*¹¹⁷, *Oil Platforms*¹¹⁸, *Congo vs Uganda*¹¹⁹ and

¹¹³ Μαρούδα Ντ. Μ. (2015). Διεθνές Ανθρωπιστικό Δίκαιο. Αθήνα: Εκδόσεις Σιδέρης, σελ.170 - 173

¹¹⁴ Gardam J. (July 2009). *Necessity, Proportionality and the Use of Force by States*, Cambridge: Cambridge University Press.

¹¹⁵ Ibid

¹¹⁶ Nolte (2012). *supra* note 49.

¹¹⁷ *Nicaragua case*, *supra* note 8, paras 197, 237.

¹¹⁸ *Oil Platforms case*, *supra* note 8, para 43, 51, 73 – 77.

¹¹⁹ *Armed Activities*, *supra* note 8, para 147.

*at the advisory opinion for the Nuclear Weapons*¹²⁰.

It is mentioned that Necessity is commonly interpreted as the requirement that no alternative response be possible¹²¹ whereas proportionality is related to "size, duration, and target of the response, but clearly these factors are also relevant"¹²²

At the Caroline incident, Lord Webster interpreted this necessity by saying that the actions justified by this factor should be kept within its scope. It has to be proven that any other way of reacting would be unpractical and insufficient, that it was necessary to act immediately because otherwise the seizure and detainment of the vessel would have been impossible. Therefore, it was necessary, present and inevitable to use force *while unarmed men were asleep on board, killing some and wounding others, and then drawing the vessel into the current, above the cataract, setting her on fire.*¹²³

Generally, from the moment that an armed attack is directed by a state, directly or indirectly, this doesn't mean that the other state can react with unlimited force.¹²⁴ The first time that limitations to the right of self-defence were enumerated was as a result of the Caroline incident as explained earlier. More importantly, it was stated in the *Nicaragua* case that one "*specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it*"¹²⁵

The court asked from the USA in the *Oil Platforms* case to "*show that its actions were necessary and proportional to the armed attack made upon it*"¹²⁶

The International Court of Justice established the principle of necessity in order to find whether a specific target could be attacked for the purposes of Article 51, whereas the principle of proportionality, in order to examine that even if the target is legitimate, the gravity of the first hit should be taken into consideration.¹²⁷

As regards the state practice some incidents are worth being mentioned.

In 1985, Israel attacked through the air against the offices of the Palestinian Liberation Organization.¹²⁸ Tunisia complained against this attack at the Security

¹²⁰ *Nuclear Weapons Advisory Opinion*, *supra* note 75, para 41.

¹²¹ Gardam J. (2004). *Necessity, Proportionality and the Use of Force by States*. Cambridge: Cambridge University Press, at 149–153.

¹²² Gardam J. (July 2009) *supra* note 114.

¹²³ British Parliamentary Papers, *supra*., note 19.

¹²⁴ Greenwood (2011). *supra* note 12

¹²⁵ *Nicaragua case*, *supra* note 8, para 176.

¹²⁶ *Oil Platforms case*, *supra* note 8, para 51.

¹²⁷ *Ibid.*, para 76 .

¹²⁸ Brent (2009), *supra* note 27, p.146.

Council and Israel invoked self-defence. The Security Council condemned the attack, referring to Article 2(4) of the Charter. The USA abstained from the voting procedure but defended Israel and Reagan stated that "*Israel and other nations had the right to strike back at terrorists 'if they can pick out the people responsible.*"¹²⁹ Tunisia did not accept that its territory was used by the terrorists and denied that itself was implicated in any such acts. In fact, other States also did not argue against Tunisia, denying its responsibility and Israel's legal argument.

Turkey also had attacked the PKK (Kurdistan Workers Party) in the area of Iraq invoking self-defence in 1995, 1996 and 1997 and still goes on. The European Countries are condemning these actions.¹³⁰

In 1986, the USA attacked Libya as an answer to the bombardment of a night club of western Berlin where many Americans died, invoking self-defence and that they had the right to use violence against states that reinforce terrorism but accepted negative criticism.¹³¹

In 1993, the USA also attacked Iraq in reaction to the attempted murder of former President George H. W. Bush during his visit in Kuwait but there was generally a positive reaction to this attack by Italy, Germany, Russia, France whereas the Arab League condemned it.¹³²

At the case of *Congo vs. Uganda* the International Court of Justice mentioned that: "*the taking of airports and towns many hundreds of kilometers from Uganda's border would not seem proportionate to the series of trans-border attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end*"¹³³

Regarding the notion of proportionality, there is a second interpretation¹³⁴ reflected by Judge Ago:

"the requirement of the proportionality of the action taken in self-defence ...

¹²⁹ Ibid

¹³⁰ Ibid

¹³¹ O Connell M. (2013). Dangerous Departures. *American Journal of International Law* Vol. 107. Tladi D. (2013). The Nonconsenting Innocent State: The Problem with Bethlehem's Principle. *American Journal of International Law*, 107, Issue 3 July 2013, pp. 570-576, p. 570, 572; Antonopoulos C. (2008). Force by Armed Groups as Armed Attack and the Broadening of Self-Defence. *Netherlands International Law Review*, 55 159, 169-71.

¹³² Murphy S. (2002). Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter. 43 *Harvard International Law Journal*, 41.

¹³³ *Armed Activities case*, *supra* note 8, para 147.

¹³⁴ Christodoulidou T. Chainoglou K. (2015). Part VII General Problems, Ch.55 The Principle of Proportionality from a Jus Ad Bellum Perspective. *The Oxford Handbook of the Use of Force of International Law*, Oxford Scholarly Authorities on International Law.

concerns the relationship between that action and its purpose, namely ... that of halting and repelling that attack. ... It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct ... What matters is the result to be achieved by the defensive action and not the forms, substance, and length of the action itself ... Its lawfulness cannot be measured except by its capacity for achieving the desired result. ¹³⁵

Similarly Judge Schwebel¹³⁶, Higgins¹³⁷ and Kooijmans¹³⁸, have expressed their opinion on proportionality.

In the *Oil Platforms case*, the International Court of Justice held that the attack of 19 October 1987 might have been proportionate if it had been found to be necessary, but the attacks of 18 April 1988 were conceived and executed as part of a more extensive operation. The Court could not close its eyes to the scale of the whole operation¹³⁹

In 1998, the USA bombarded training camps of terrorists in Afghanistan and a pharmaceutical plant in Soudan, as a reaction to the terrorist attacks at the Embassies of the USA in Kenya and Tanzania. In a letter dated 20.8.1998 to the Security Council USA claimed to have been exercising its right of self-defence. The USA noted that its use of force was only directed against installations and training camps used by the Bin Laden organization that was carried out only after repeated efforts to convince the Government of Sudan and the Taliban in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Laden organization. The argument of the USA was based on their right to specifically target non-state actors in the foreign territory on an inability to rely on the host states in counter-terror efforts. The reaction of the international community was negative since the evidence that the pharmaceutical plant was used for anything other than civilian purposes was absent.¹⁴⁰

In 2001, USA justified its intervention in Afghanistan stating that the attacks of 11th September:

¹³⁵ Robert Ago (1980). Addendum to the Eighth Report on State Responsibility. *Yearbook of the International Law Commission*. vol II (1), A/CN.4/318/ADD.5-7, 60, para 121.

¹³⁶ *Nicaragua case*, Merits, Dissenting Opinion of Judge Schwebel, paras 211-14.

¹³⁷ *Nuclear Weapons Advisory Opinion*. *supra* note 75, Dissenting Opinion of Judge Higgins, para 5.

¹³⁸ *Armed Activities case* *supra* note 8, Judgment, Separate Opinion of Judge Kooijmans, paras 33-4.

¹³⁹ *Oil Platforms case*, *supra* note 8, para. 77.

¹⁴⁰ Beard J. M. (2001). America's New War on Terror: The case for self-defence under international law. *Harvard Journal of Law & Public Policy* 25 pp. 559-590

*“have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan it controls to be used by this organization as a base of operation and despite every effort by the United States and the international community, the Taliban regime has refused to change its policy”.*¹⁴¹

The Security Council has also stood for this argument through the resolution 1368 and 1373, recognizing the inherent right of self-defence against terrorism. It is said that Afghanistan has, in fact, played a major role in the vast acceptance of this interpretation of the right to self-defence.¹⁴²

The United States, in its letter to the Security Council dated 7 October 2001, informed the Council that:

“[it had] initiated actions in the exercise of its inherent right of individual and collective self- defence following the armed attacks that were carried out against the United States on 11 September 2001 ... The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation ... In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan States informing the Security Council of measures taken in Afghanistan in exercise of the collective right of self-defence emphasized that uses of force were directed against both Al Qaeda bases and the Taliban which supported and harboured Al Qaeda (but not against the Afghan people or Islam)

143 ”

However, even though there was the authorization of the Security Council confirming the inherent right of USA to self-defence, it is proved that Afghanistan was also targeted disproportionately.

¹⁴¹ UN Doc S/2001/947.

¹⁴² Derek J. (2003). State Responsibility for the Acts of Private Armed Group, *Chicago Journal of International Law* 4(1) Article 8.

¹⁴³ UN Doc S/2001/967 (European Union); UN Doc S/2001/1005 (Canada); UN Doc S/2001/1127 (Germany); UN Doc S/2001/1193 (New Zealand).

In 2003 Israel launched a guided missile attack in Syrian territory, following a terrorist attack in Haifa in, claiming that it was targeting a terrorist base used by Syrian and Iranian sponsored Islamic Jihad responsible for terrorist attacks against Israel. Despite Islamic Jihad being recognized as a terrorist organization by the EU, EU Member States condemned Israel's military response to the Haifa bombing, as did most other States appearing before the Council¹⁴⁴. The Secretary-General condemned both the Israeli attack in Syria and the preceding terrorist attack in Haifa.¹⁴⁵

In July 2006, Hezbollah abducted two Israeli soldiers and launched a number of rockets from southern Lebanon into northern Israeli towns. Israel used force which it claimed not to be acting against the territorial host state, but against non-state terrorists, as self-defence.¹⁴⁶ The destruction of all runways of the Beirut International Airport and the civilian casualties,¹⁴⁷ were justified by Israel because of the practice of Hezbollah of using civilians as human shields. But could this still be considered as a necessary and proportional self-defence, which is only targeting the non-state actors? Qatar characterized Israel's use of force as beyond its stated objective, given the civilian nature of the Israeli targets.¹⁴⁸ Lebanon-stated that:

*“It has been very clear from the beginning that it was not Hezbollah that was the target. It was Lebanon that was the target. Infrastructure was targeted and hundreds of civilians were killed before Israel even took up any campaign against Hezbollah and its positions”*¹⁴⁹.

The Secretary-General also referred to Israel's use of force as *“collective punishment of the Lebanese people”*¹⁵⁰

¹⁴⁴ UN Doc S/PV.4836 (2003) 10: Only the US, which also characterizes Islamic Jihad as a terrorist organization, did not condemn the Israeli attack and admonished Syria for 'harboring and supporting the groups that perpetrate terrorist acts'.

¹⁴⁵ UN Press Release, SG/SM/8918, 6 Oct 2003.

¹⁴⁶ S/PV.5503 (2006) and See S/PV.54899 (2006)

¹⁴⁷ Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1*, 23 November 2006, A/HRC/3/2, p. 26, para. 76

¹⁴⁸ UN Doc S/PV.5493 (2006)

¹⁴⁹ S/PV5498 (2006) 6

¹⁵⁰ Annan says Israeli blockade of Lebanon must not be a 'collective punishment' (31 August 2006). UN News. Retrieved from: <https://news.un.org/en/story/2006/08/190612-annan-says-israeli-blockade-lebanon-must-not-be-collective-punishment> Accessed in 19.12.18

On the other hand, missions such as the Mayaguez¹⁵¹ and Entebbe¹⁵² could be justified¹⁵³, because of their really temporary and incidental nature, on the contrary with the extended conflicts that begun with the justification of self-defence.

II.B The implications of the exercise of the right of self-defence by states against non-states actors, concerning the territorial integrity and the sovereignty of states

For the purposes of the Dissertation, there will be a thorough analysis of the principles of territorial integrity and political independence in order to render evident the way their fundamental nature is challenged by the practice adopted by several countries and by the theories of scholars, concerning the right of self-defence against non-state actors. Having analyzed that, emphasis will be given to the implication concerning the legitimization of the status of non-state entities and the possible promotion of terrorist organizations if such practice continues. Finally, it will be demonstrated that *jus ad bellum* only concerns inter-state relations, with a parallel examination of cases of secession, highlighting thus the impossibility of associating self-defence with non-state actors.

II.B.1 The principles of territorial integrity and self-determination

Statehood is in fact consisted of the notions of territorial integrity and political independence¹⁵⁴ and their importance has been acknowledged by the International Court of Justice in several cases.¹⁵⁵ In order to examine the concepts of territorial integrity and political independence in depth it is essential to follow the developments of international relations, since their content and understanding has also been developed in analogy with them.

¹⁵¹ For details see: Ronzitti N. (2018), Part 1 The Cold War Era (1945–89), 18 The Mayaguez Incident—1975 in *The Use of Force in International Law: A Case-Based Approach*, Ruys T., Corten O., Hofer A. (Editors), Oxford Scholarly Authorities on International Law [OSAIL], Retrieved from:

¹⁵² For details see: Kreß C., Nußberger B. (2018). Part 1 The Cold War Era (1945–89), 19 The Entebbe Raid—1976 in *The Use of Force in International Law: A Case-Based Approach*, Tom Ruys, Olivier Corten, Alexandra Hofer (Editors), Oxford Scholarly Authorities on International Law. Retrieved from: ¹⁵³ Dinstein Y., *supra* note 14.

¹⁵⁴ Blay K. N. S. (2010). Territorial Integrity and Political Independence in *Max Planck Encyclopedia of Public International Law*, para. 6. Retrieved from: Oxford Public International Law (<http://opil.ouplaw.com>). Accessed: 19.12.18

¹⁵⁵ Nicaragua case, *supra* note 8, pp. 111 (para. 213), 128 (para. 251); Corfu Channel (United Kingdom v. Albania), ICJ Reports 1949, p. 35.

First of all, it is essential to note that the two concepts are incorporated both in the Charter of the United Nations as well as at the constituent instruments of regional Organizations. More precisely, according to Art. 2 (4) of the United Nations Charter: “[a]ll Members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purpose of the United Nations”. The goal of the Charter is to maintain peace and security and protect the territorial integrity and political independence of states. According to this observation should *jus ad bellum* and the exceptions of the prohibition of the use of force be interpreted. At the *Dumbarton Oaks Conference (1944)*, the original draft of Art. 2 (4) was restrictive and the words ‘against the territorial integrity or political independence of any state, were only added to the Charter because of the will of smaller countries.¹⁵⁶

As for the regional organizations, the Organizations of American States, the African Union as well as the Charter of ASEAN, they all highlight the territorial integrity as a founding principle.¹⁵⁷

In 1960, through the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December¹⁵⁸ the United Nations General Assembly also referred that all peoples have “*an inalienable right to complete freedom, the exercise of their sovereignty, and the integrity of their national territory; and that by virtue of that right they freely determine their political status and they freely pursue their economic, social, and cultural development.*” It is also stated that: “*all armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence and the integrity of their national territory shall be respected.*”

Another important resolution, adding to the importance of these two notions is the *Friendly Relations Declaration (1970)*.¹⁵⁹ In this declaration, the principles of territorial integrity and political independence are noted to be found in strong relation not only with the notion of the prohibition of the threat or use of force but also with the

¹⁵⁶ Ibid

¹⁵⁷ Dugard J. (2013). ‘Conflicting Values and Competing Rights : Self-Determination and Territorial Integrity (357)’. In *Collected Courses of the Hague Academy of International Law*, edited by The Hague Academy of International Law. Accessed 19.12.18

¹⁵⁸ UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, A/RES/1514(XV)

¹⁵⁹ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN General Assembly Res 2625 [XXV]

principle of the sovereign equality of States. It is also emphasized that States should refrain in their international relations from military, political, economic, or any other form of coercion aimed against the political independence or territorial integrity of any State. In addition, the General Assembly holds that “any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country, or at its political independence, is incompatible with the purposes and principles of the Charter.” Moreover, this Resolution adds that:

“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 referred to in the present paragraph involve a threat or use of force.... the territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.”

By adding the principles of territorial integrity and political independence within the scope of sovereign equality, the Friendly Relations Declarations has achieved to *“raise them from their monolithic coexistence with the principle of the prohibition of the threat or use of force and their consequent ‘negative’ definition in the context of international law”*¹⁶⁰. In this way, the two principles, have acquired an affirmative status in international law.¹⁶¹

Two other documents are worth to be mentioned regarding territorial integrity and political independence. The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty of 21 December 1965¹⁶² as well as the Definition of Aggression of 14 December 1974.¹⁶³

At the first declaration, the General Assembly, *concerned at the increasing threat to international peace due to armed and other direct or indirect forms of*

¹⁶⁰ Blay K. N. S. (2010), *supra* note 154.

¹⁶¹ Rosenstock R. (1971). The Declaration of Principles of International Law Concerning Friendly Relations: A Survey, *The American Journal of International Law*, 65(5) pp. 713-735.

¹⁶² UNGA Res 2131 [XX]

¹⁶³ Definition of Aggression, *supra* note 28.

interference threatening the sovereign personality and the political independence of States, stated that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty, and the integrity of their national territory, and that, by virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural developments.

An important factor that should be highlighted at this point of the dissertation, is the definition of aggression as given by the United Nations General Assembly Resolution 3314 (XXIX) in order to underline the concepts of the principles of territorial integrity and political independence.¹⁶⁴ In Article 3 it is stipulated, as mentioned above, “invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary” qualifies as aggression and it is also provided that the *‘action of a State in allowing its territory...to be used by [another] State for perpetrating an act of aggression against a third State also qualifies as aggression (Art. 3 (f)).* Therefore, if a state lets terrorists commit attacks against another State through its territory it means that it commits aggression against the attacked state leading to the invocation by the victim state of the right of self-defence under Art. 51 UN Charter.

This is always in relation with the concept of attribution as examined above. This is also the basis of the US attacks against Afghanistan, which was also enhanced by *“the ambiguous language of Security Council Resolution 1368 of 12 September 2001 where the inherent right of self-defence was recognized at its preamble.* The UN High-level Panel on Threats, Challenge and Change clearly reflected this opinion noting that Resolution 1368 *“opened the way for United States-led military action against the Taliban regime in self-defence”*¹⁶⁵

However, Resolution 3314 only covers one aspect of the possibilities. The real problem arises when the terrorist organization has its own structure and organization and acts without the control or consent of the host State. The attack by the Hezbollah in Lebanon against Israel that prompted the conflict in 2006 is a typical example. Therefore, the recognition of the existence of aggression becomes more blare.¹⁶⁶

¹⁶⁴ Ibid

¹⁶⁵ ‘A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change’, in UNGA, ‘Note by the Secretary-General’ [2 December 2004] UN Doc A/59/565, 8

¹⁶⁶ Blay K. N. S. (2010), *supra* note 154.

Additionally, the *Helsinki Final Act*, is the document which provides to the principles of the concepts of territorial integrity and political independence the most clarifying image.¹⁶⁷ It is stipulated at the Final Act that:

“the participating States will respect each other’s sovereign equality and individuality as well as the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence.

Furthermore, there is a combination of the concepts of territorial integrity and political independence with the notion of the prohibition of the threat or use of force in the traditional manner.¹⁶⁸ These principles are closely associated, a fact reiterated also by the International Court of Justice in the *Temple of Preah Vihear case*.¹⁶⁹

What is also worth to be mentioned is that the General Assembly has been highlighting the contradictory notions of territorial integrity and sovereignty on the one hand and self-determination on the other. It was first apparent in Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples in the 1960s, where it was declared that all peoples “have the right to self-determination” noting at the same time that any ‘*attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations*’.

However, it has to be underlined that this declaration was referring to decolonization. There is a big difference between this type of self-determination and the self-determination that occurs through the secession, which happens through the separation of part of the territory and the population of an existing State from that State, without the consent of the Government of that State.¹⁷⁰

The statement of Secretary – General U. Thant concerning Biafra’s attempted secession from Nigeria is extremely relevant:

As far as the question of secession of a particular section of a Member State is concerned, the United Nations attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I

¹⁶⁷ Ibid. para. 31.

¹⁶⁸ Sir Jennings R., Sir Watts A. (2008), Part 1 The subjects of international law, Ch.3 Position of the states in international law, Intervention, in Oppenheim’s International Law: Volume 1 Peace (9th Edition).

¹⁶⁹ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962: I.C.J. Reports 1962, p. 34.

¹⁷⁰ Dugard J. (2013), *supra* note 157.

do not believe it will ever accept a principle of secession of a part of a Member state.”¹⁷¹

This statement should be taken in relation with purported secessions, condemned by the United Nations because of them being violations of peremptory norms of international law. Besides, the International Court of Justice, even in the case of accepting a unilateral declaration of independency by Kosovo, made clear that the Security Council has condemned particular declarations of independence. It adds that this happened because its case is examined according to its own facts and it concludes that:

*“the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens).”*¹⁷²

Therefore, the Kosovo Advisory opinion has not changed the illegal character that secessions can have.

The fact that these parts that have seceded are sometimes recognized, illustrates that there is no rule of international law permitting secession as there is no rule prohibiting it.¹⁷³ However, it is a fact that self-determination and territorial integrity are into a collision course,¹⁷⁴ since inevitably, secession will undermine the territorial integrity of an existing state. Nevertheless, examining self-determination to its extreme, it threatens the sovereignty and territorial integrity of all nations with minorities that are dissatisfied.¹⁷⁵

Critescu, the rapporteur of the *UN Sub-Commission on Prevention of Discrimination and Protection of Minorities*, having an opinion same with others, comments that:

“The principle of equal rights and self determination...does not grant an unlimited right of secession to populations living in the territory of an independent sovereign state... The right of secession unquestionably exists,

¹⁷¹ United Nations Monthly Chronical, no.2, 1970, p.36.

¹⁷² Kosovo Advisory Opinion, *supra* note 4, pp. 437-438, para. 81.

¹⁷³ Dugard J. (2013), *supra* note 157.

¹⁷⁴ Cassese A. (1995). *Self-Determination of Peoples*. Cambridge: Cambridge University Press, pp. 333-334.

¹⁷⁵ Buchheit L.C. (1978). *Secession. The Legitimacy of Self-Determination*, New Haven, Yale University Press, 1978, p. 7.

however in a special, but, very important case: that of peoples, territories and entities subjugated in violation of international law. In such cases, the peoples have the right to regain their freedom and constitute themselves independent sovereign states”¹⁷⁶.

Moreover, the cases where the International Court of Justice has endorsed this notion was in cases of colonies and occupied territories as in the situations of Namibia¹⁷⁷, Western Sahara¹⁷⁸, East Timor¹⁷⁹ and Palestine.¹⁸⁰

This contradiction is more evidently present in the practice of the Security Council namely the case of the Kurdish demands in Iraq where it affirmed the dependence, sovereignty, unity and territorial integrity of Iraq in Resolution 688 (1991) of 5 April 1991 and Resolution 1546 (2004) of 8 June 2004 without reference to the demands of the Kurdish people to self-determination.¹⁸¹

Moreover, regarding minority rights, the opinion of 1992 concerning the secession of Quebec, signed by the professors Pellet, Shaw, Higgins, Franck and Tomuschat, declare that: “*no legal right existed in favour of secession on the alleged ground that the entity concerned is composed of a linguistic minority within a state in which the majority are of a different linguistic grouping*”.¹⁸²

Relatively, the Badinter Commission, argued in favor of the right of self-determination of the Serbian population in Croatia and Bosnia-Herzegovina but didn't accept their right to secession:¹⁸³ “*... it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except where the States concerned agree otherwise*”

As for the case of South Ossetia and Abkhazia in Georgia, both entities have based their claims upon the right of self-determination. The fact-finding commission of

¹⁷⁶ Critescu A. (1981). The right of Self Determination, Historical and Current Developments on the Basis of United Nations Instruments, UN Doc. E/CN.4/Sub.2/404/ Rev.1, para 173.

¹⁷⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, p. 31, (hereinafter Namibia Advisory opinion)

¹⁷⁸ *Western Sahara, Advisory Opinion*, 1.C.J. Reports 1975, pp. 31-33.

¹⁷⁹ *East Timor (Portugal v. Australia)*, Judgment, I. C.J. Reports 1995, p. 90, p. 102.

¹⁸⁰ *Wall Advisory Opinion*, *supra* note 1, pp. 199-200, paras. 155-159.

¹⁸¹ Blay K. N. S. (2010) *supra* note 154, para. 40.

¹⁸² L' intégrité territoriale du Québec dals l' hypothèse de souverain, Commission d'étude des questions afférentes à l' accession du Québec à la souveraineté, Vol. I. 1992, 377.

¹⁸³ Dahlitz J. (ed.), (2003). *Secession and International Law, Conflict Avoidance – Regional Appraisals*, United Nations, New York and Geneva.

the EU, in its report for the war of 2008, states that external self – determination is secession and it has not been accepted by the practice of states and the claims of these two entities have not been accepted neither de facto nor de jure.

Ironically, Russia, while it did not accept the declaration of independence of Kosovo, it used it as a justification basis for its intervention against Georgia, stating that: *“it would be impossible, after [Kosovo], to tell the Abkhazians and Ossetians (and dozens of other groups around the world) that what was good for the Kosovo Albanians was not good for them. In international relations, you cannot have one rule for some and another rule for others”*.¹⁸⁴ It is a fact that these kinds of seceded regimes are inter – recognized, with the last recognition of South Ossetia and Abkhazia being that of Syria in May 29, 2018.¹⁸⁵ It is evident that these kinds of recognitions are consequences of politics and not of international law.

Another different example highlighting the importance of territorial integrity concerns Cyprus where both the Republic of *Cyprus* and the United Nations have consistently highly discouraged any form of recognition of the territory occupied by Turkey while Cyprus consistently invokes its right to territorial integrity as well as the duty of non-recognition of the so-called "TRNC" by other States. While there is no duty to recognize in international law, there is a duty of non-recognition¹⁸⁶ a fact also reiterated by the International Court of Justice in the advisory opinion concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia.¹⁸⁷

The reason all these notions were analyzed is because they are strongly affected by the invocation of self-defence against non-state actors. Additionally, the increasing presence of terrorists in international relations has been apparent after 2001 and even more evident in recent times due to the terrorist actions of ISIS. What is very concerning is the fact that it is not very rare to find that those terrorist groups, through their activities are acquiring training camps and facilities in states. This practice has caused crucial implications to the norms of territorial integrity and political

¹⁸⁴ Dmitry Medvedev, Why I had to Recognise Georgia's Breakaway Regions, FINANCIAL TIMES, Aug. 26, 2008, available at <http://www.informationclearinghouse.info/article20628.htm>.

¹⁸⁵ Syria recognises Russian-backed Georgia regions (29 May 2018). BBC News. Retrieved from <https://www.bbc.com/news/world-europe-44291091> Accessed: 19.12.18

¹⁸⁶ Frowein J. A. (2013). Non – Recognition in Max Planck Encyclopedia of Public International Law, para. 3. Retrieved from: Oxford Public International Law (<http://opil.ouplaw.com>). Accessed: 19.12.18

¹⁸⁷ *Namibia advisory opinion*, *supra* note 177, para. 54.

independence.¹⁸⁸ All these issues, namely the frequent practice of victim States to target terrorists and other armed groups, in the territory of another State, where, for any reason, the non-state actor is deploying its activities, underline the complex relationship¹⁸⁹ mentioned above regarding the interconnecting nature of the principles of territorial integrity and political independence on the one hand, and the jus ad bellum norms such as armed attack and self defence, on the other hand. These issues become even more blurred when the non-state actor is a de facto regime which has seceded from an existing state.

II.B.2 The Right to Self-defence concerning non-state recognized territorial entities.

A very important implication, however, is that the extension of self-defence to terrorist activities could have as a result the promotion of terrorist groups' status (until now considered as simply criminals) and the dilution of the principles of sovereignty and of territorial integrity. This is an implication that could also extend to de facto regimes, seceded from the main State in the opinion of the writer, and this could be examined in the case of Caucasus and more precisely in the situation between South Ossetia and Georgia.

More specifically, the international law institute in 2007, in the travaux préparatoires of its resolution on self-defence, highlights that the issue of the right to self- defence of non-State recognized territorial entities has not been dealt within the framework of contemporary international relations¹⁹⁰. However, this was in 2007. With the breakout of the conflict in Georgia in August 2008 as well as the strong presence of such de facto regimes, this aspect of self-defence gains importance.

It is argued that the classical understanding of the concept of territorial integrity addresses states alone. According to this perspective, the norms of jus ad bellum only refer to states. This classical view is explicitly held by the International Court of Justice, which has, in a number of decisions, insisted on the state-centered character of the rules on the prohibition of the use of force and self- defense.¹⁹¹ In the *Accordance with*

¹⁸⁸ Värk R. (2011). Terrorism, State Responsibility and the Use of Armed Force, *ENDC Proceedings*, Volume 14, pp. 74–111.

¹⁸⁹ Blay (2010). *Supra* note 154.

¹⁹⁰ Institut de droit International, *supra* note 2.

¹⁹¹ Milanovic M. (October 26, 2017), A Footnote on Secession, EJIL: TALK! Retrieved from <https://www.ejiltalk.org/a-footnote-on-secession/>

International Law of the Unilateral Declaration of Independence in Respect of Kosovo, advisory opinion, it has explicitly pointed out that “*the scope of the principle of territorial integrity is confined to the sphere of relations between States*”¹⁹² insofar as it does not govern the relationship between the parent state and an internal secessionist movement; however the principle of territorial integrity could be relevant if a *third state* assists a secessionist entity, as with Turkey and the TRNC or as Russia with South Ossetia and Abkhazia.¹⁹³

Attention has to be given on how we analyze such situations. On the one hand, it could be accepted that the secession of a part of state is a violation of the territorial integrity of a State, on the other hand, does this mean that territorial integrity is also recognized for the part seceded? Such a question arises also when a group manages to establish a stabilized rule over a certain territory, which is claimed or situated in a recognized State. The character of the entity remains unclarified under international law and the possible implications regarding jus ad bellum notions and the principles of territorial integrity and political independence play a significant role, taking into consideration the interpretation given to such situations by the International Court of Justice¹⁹⁴ and by International Organizations. At the same time, it is crucial to have in mind the possible invocation of the right to auto-determination, a fact that could complicate even more the already unclear situation, regarding international law.

It is argued that state practice, especially within the United Nations (UN), clearly proves that the prohibition of the use of force applies irrespective of recognition to all independent de facto regimes.¹⁹⁵ The writer, however, wants to show that this practice should not be irrespective of recognition. It is dangerous to state and underline that Article 2(4) refers to territorial integrity and political independence when referring to de facto regimes which have seceded by their legitimate authorities and are now being occupied. This could be said that it has led to dangerous practices such as the invocation of self-defence by the de facto regimes themselves, namely South Ossetia.

Taking into consideration what has been examined in this specific dissertation, it is generally accepted that Article 2 (4) of the UN Charter relates only to States, and that Article 51 supports and is seen to support, an exclusive right for States to resort to

¹⁹² *Kosovo Advisory Opinion*, *supra* note 4, para. 80.

¹⁹³ Milanovic M. (October 26, 2017), *supra* note 191.

¹⁹⁴ *Nicaragua case*, *supra* note 8, pp. 111 (para. 213), 128 (para. 251); *Corfu Channel case*, *supra* note 155, p. 35.

¹⁹⁵ Frowein J. A. (2013). *Supra* note 186.

force in self-defence and that only States are bound by the rules regulating the resort to force pursuant to the Charter. Examples of such a situation during the cold war were the military conflicts between North Korea and South Korea, and between North and South Vietnam, where the majority of states rejected the applicability of Article 2(4) of the UN Charter.¹⁹⁶

However, it has to be noted that Art. 1 of the definition of aggression adopted by the UN General Assembly (United Nations, General Assembly) in Resolution 3314 (XXIX) contains an explanatory note according to which the term ‘State’ is used ‘without prejudice to questions of recognition or to whether a State is a member of the United Nations’.¹⁹⁷ Nevertheless, how can there be a question of recognition when there is an issue of illegal cessation and occupation and furthermore which entity should be therefore called a State? The broad approach of the Resolution cannot be transferred to entities which do not even have the minimum requirements of statehood.¹⁹⁸

Besides, the proposal to extend the applicability of the rule to all “political entities”, including those that could not claim statehood, was rejected during the elaboration of the Declaration on the Definition of Aggression.¹⁹⁹ As the travaux préparatoires demonstrate, there was no intention to refer to entities other than states when using the term ‘international lines of demarcation’ either.²⁰⁰

The *Kosovo advisory opinion* is crucial referring to this point since it questioned whether actions of internal non-state actors can violate the territorial integrity of the existing state from which they aim to secede. The International Court of Justice pointed out the neutrality of international law towards such “internal” non-state actors. However, this taken into relation with the *advisory opinion on Namibia in 1971* stating that “*physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States*”²⁰¹ not referring directly to de facto regimes but to a recognized State whose administration of a territory was not

¹⁹⁶ Corten O. (2014). *Le Droit contre la guerre: l'interdiction du recours à la force en droit international contemporain*. Paris: A. Pédone, pp 205-220.

¹⁹⁷ Definition of Aggression, *supra* note 28.

¹⁹⁸ Nußberger A. (January 2013). South Ossetia, Max Planck Encyclopedia of Public International Law, para.24. Retrieved from: (<http://opil.ouplaw.com>). Accessed: 19.12.18

¹⁹⁹ UN Doc. A/AC.134/L.17, 25 March 1969, para. II; UN Doc. A/AC.134/SR.19, 2 July 1968. Cf. UN Doc. A/AC.134/SR.58, 21 July 1970; UN Doc. A/C.6/SR.1206, 26 October 1970, para. 6.

²⁰⁰ Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Supp. no. 18, UN Doc. A/8018 (1970), para. 207; UN Doc. A/AC.125/SR.109, 19 September 1969; UN Doc. A/C.6/SR.1160, 26 November 1969, para. 1; UN Doc. A/AC.125/SR.101, 22 August 1969

²⁰¹ *Namibia advisory opinion*, *supra* note 177, p. 16., at 54.

recognized sheds some light on the issue of South Ossetia and de facto regimes which are territories of “control” by separatists.²⁰² Nevertheless, it is crucial to examine such situations in a case by case basis since there are circumstances where de facto regimes that have declared independence such as Kosovo, were not controlled by another State whereas there are other cases, as the one of Crimea and generally of all of the grey zones currently in ex-Soviet Nations, where the presence of Russia is strongly evident.²⁰³

More precisely, at this point it is important to examine a specific example of this practice, namely the facts that took place between the parties of the Georgia – Russia War of 2008. All of the parties, Georgia, Russia, S. Ossetia, and Abkhazia, invoked self-defence for their reasons respectively. The Tagliavini report,²⁰⁴ the report of the EU fact-finding commission regarding the Georgia – Russia War of 2008 which marks the “*first time in its history that the European Union has decided to intervene actively in a serious armed conflict*”, interpreted the concept of self-defence broadly and did not exclude it of any of the parties. It is highlighted that during the conflict Georgia's territorial integrity was recognized by all member States of the UN.

In its report, the EU states that “*It follows from the illegal character of the Georgian military assault that South Ossetian defensive action in response did conform to international law in terms of legitimate self-defence*”²⁰⁵ accepting that de facto regimes could exercise self-defence. According to the report, the actions of self-defence by South Ossetia were not accepted not because of their status but because of the fact the prerequisite of proportionality was violated. The only legal self-defence accepted in the end was between Georgia and Russia. At the same time, the report states that Georgia could have justified its actions with self-defence and it mentions that Abkhazia claimed that its operation was necessary to pre-empt an imminent military operation by Georgia against it.

What should be absolutely examined, is the status of Abkhazia and South Ossetia under international law which is decisive in order to determine the international rights and obligations of those regions.²⁰⁶ This examination is important so that we see

²⁰² For more information on the subject see Frowein J. A. (2013). *Supra* note 186. Accessed: 19.12.18

²⁰³ For more information see Coyle J. J. (2018), *Russia's Border Wars and Frozen Conflicts*, Cham: Palgrave MacMillan/Springer Nature

²⁰⁴ Independent International Fact-Finding Mission on the conflict in Georgia, *supra* note 3

²⁰⁵ Independent International Fact-Finding Mission on the conflict in Georgia, volume I, *supra* note 3, para. 19

²⁰⁶ Independent International Fact-Finding Mission on the conflict in Georgia, volume II, *supra* note 3.

whether their status could be read under the explanatory note of the Resolution 3314, according to which “State” is used “without prejudice to questions of recognition or to whether a State is a member of the United Nations”.²⁰⁷

Concerning the notion of statehood, it can be said that there exist 3 objective criteria proving statehood, which are (1) a defined territory, (2) a permanent population, and (3) an effective government.²⁰⁸ At the same time, the principle of self-determination and the prohibition of the use of force should also be taken into consideration²⁰⁹

According to the EU report, territorial entities can fall into three different categories: (1) (full) states fulfilling the relevant criteria for statehood and universally recognised; (2) state-like entities fulfilling the relevant criteria, but which are not, or not universally, recognised;²¹⁰ and entities.

Even though recognition has only declaratory value, it can be argued that it can provide of evidence regarding the legal status of state. However, this kind of recognition did not exist for South Ossetia before August 2008 since it was not recognized before the start of a conflict. Besides South Ossetia until then, had not consistently claimed to be a state since on the one hand the South Ossetian authorities have sought to be recognized as a sovereign and independent state but at the same time they were also asking for unification with North Ossetia through integration into Russia.²¹¹

The criteria of the defined territory will not be discussed since there is more or less a stable territory that it is controlled usually by de facto regimes. Relevant is nevertheless the position of Rosalyn Higgins, stating that statehood might be questionable when there are “doubts of a serious nature” on the future frontiers.²¹²

Regarding the second criterion, that of a permanent population the issue of internally displaced persons is highly relevant as well as the policy of passportization for example promoted by Russia to the territories of South Ossetia and Abkhazia. The

²⁰⁷ Definition of Aggression, *supra* note 28.

²⁰⁸ Μαρούδα Μ. Ντ. & Περάκης Στ. (2016). Διεθνής Δικαιοταξία: Θεωρία και Εφαρμογή Διεθνούς Δικαίου. Αθήνα: Εκδόσεις Σιδέρης, σελ. 114-121.

²⁰⁹ Shaw M. (2008). International Law 6th ed. Cambridge: Cambridge University Press at 206.

²¹⁰ The term “de facto” describes “entities ... claiming to state..., which controlled more or less clearly defined territories without being recognized – at least by many states” in Frowein (2013) *supra* note 186, para. 1

²¹¹ There was a “referendum” on the independence of South Ossetia from Georgia on 19 January 1992 in which the vast majority declared itself in favour of independence and unification with Russia. Report.

²¹² Higgins R. (1963). *The Development of International Law through the Political Organs of the UN*. London: Oxford University Press, p. 20.

changes within the demographic composition of the population were even greater in Abkhazia than in South Ossetia. Therefore, the existence of a stable group with a common nationality is doubtful for both regions according also to the Tagliavini report.

Finally, there is the criterion of effective government which is subdivided to “effective government” and “independence” according to Crawford.²¹³ More specifically, these two criteria have to do with the exercise of authority regarding persons and property within the territory of the state on the one hand, and on the other hand they refer to the exercise of the authority in relation to other states. The influence of Russia is vast regarding South Ossetia and Abkhazia, due to the Russian citizenship acquired by people of these territories enabling Russia to possibly claim jurisdiction upon the people of that territory. It is in fact mentioned by the report of the fact-finding mission of the EU that to the information given by the Abkhaz authorities “practically all the inhabitants of Abkhazia are at the same time citizens of the Russian Federation”.

Moreover, Russian officials already had de facto control over South Ossetia's institutions before the outbreak of the armed conflict, and especially over the security institutions and security forces. Then, how could anyone claim that any self-defence action could have been directed against the de facto regime when at that time already the control of the Russian Federation was evident upon the de facto regime of South Ossetia. It is evident, and proved by the fact-finding mission of the EU regarding the Conflict of 2008 in Georgia, that the de facto Government of South Ossetia was not "effective" on its own.

The report of the EU fact-finding mission follows the reasoning according to which the UN Charter and the Helsinki Final Act²¹⁴ are reaffirmed through the preamble of the Sochi agreement, which nevertheless is an agreement between Russia and Georgia. There is also the agreement of 1994 where it is stated that “*The Parties to the conflict reiterate pledged commitments to settle all the issues in dispute exclusively by peaceful means, without resort to force or threat of resort to force.*”²¹⁵ This, however, does not mean that it is a reference to jus ad bellum norms. There are these kinds of obligations in other documents ceasing intrastate conflicts. However, the "Memorandum on Measures to Provide Security and Strengthen Mutual Trust between

²¹³ Crawford J. (2006). *The Creation of States in International Law*, 2nd ed. Oxford: Clarendon Oxford University Press.

²¹⁴ Organization for Security and Co-operation in Europe (OSCE), Conference on Security and Co-operation in Europe (CSCE) : Final Act of Helsinki, 1 August 1975.

²¹⁵ Independent International Fact-Finding Mission on the conflict in Georgia, supra note 3.

Sides in the Georgian-South Ossetian Conflict" of 16 May 1996 states: "*We have agreed on the following: (1) The Parties to the conflict shall denounce application of force or threat of force*" And there is also reference to the UN Charter and international law norms.

According to the EU fact-finding report this is applied both to Article 2(4) and Article 51 of the UN Charter and it emphasizes that if the use of force is prohibited in the relations between the de facto regime and the State then this should apply to self-defence also. What is more, and this is the fact that is the most alarming, is that it adds that these norms should refer to both of the sides.²¹⁶ This explanation of the EU can be dangerous since except for giving grounds of legitimization to de facto regimes it also gives them permission to invoke an inherent right of States. And this is what the writer wants to underline.

Georgia, in fact, asserted that from 1 to 7 August, the "illegal separatist authorities and armed formations" were under the control and direction of the security and defence agencies of the Russian Federation, which was a clear violation of that country's obligation to remain neutral.²¹⁷ The representatives of Croatia and USA also expressed the view that the presence of Russian peacekeepers in South Ossetia violated Georgia's territorial integrity and sovereignty.²¹⁸ Georgia did not refer explicitly to South Ossetia itself as being the recipient of self-defence actions and if this is supposed through the interpretation of the declarations and actions of Georgia, it has to be mentioned that control and direction of Russia over the South Ossetian forces was also several times underlined.²¹⁹

According to Georgia,²²⁰ on August 7th 2008, the Russian Federation launched a large-scale invasion on Georgia's sovereign territory. In response to the large scale Russian invasion that was in progress and in response to these escalations and consistent with his constitutional duty (Article 71 of the Georgian Constitution) to protect the sovereignty and territorial integrity of Georgia as well as the security of

²¹⁶ Independent International Fact-Finding Mission on the conflict in Georgia, Volume II, supra note 3, p.246.

²¹⁷ S/PV.5951, pp. 3-5 and 8-9.

²¹⁸ S/PV.5952, pp. 2-3 and 10.

²¹⁹ For more information on how Russia has been establishing its control over the separatists of South Ossetia and Abkhazia, see the Application instituting proceedings filed in the registry of the Court on 12 August 2008 concerning the Application of the international convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation).

²²⁰ Independent International Fact-Finding Mission on the conflict in Georgia, Volume III, supra note 3, para. 6, p 11.

Georgia's citizens, the President of Georgia issued an order to start a defensive operation. Georgia also has been underlining major hostile actions by the Russian federation in 2004-2007.²²¹

Furthermore, an aspect that should also be highlighted is the fact that under Art. 2 (4) of the UN Charter, the use of force is prohibited only if it is directed against "*the sovereignty, territorial integrity or political independence of another State*", or if it is "*in any other manner inconsistent with the Charter of the United Nations*". Consequently, a government is generally not prevented from using armed force in internal conflicts, e.g. against insurgents starting a civil war or against territorial entities fighting violently for secession.²²² Georgia itself, referring to its action on August 7th, talked of measures directed for the restitution of its constitutional order.²²³

The EU Fact finding mission report has in fact conferred the right of self defence to the de facto regime itself. This is exactly the problem of the legitimization of their status that the writer wants to highlight. It is held, according to Dinstein that "*an armed attack against a State, in the meaning of Article 51, consists some element external to the victim State. Non-State actors must strike at a State from the outside*".²²⁴ How can anyone argue that the strikes by South Ossetia or by Georgia against South Ossetia were outside the state?

Additionally, referring to Article 2(4) of the UN Charter, it is disputed whether the customary character of the prohibition of the use of force in itself binds entities other than states. Besides, the use of force by private actors was originally excluded from Article 2(4) of the UN Charter. However, some scholars have referred to the practice of the UNSC in the 1990s as evidence of the extension of the prohibition of the use of force within the states.²²⁵

These resolutions refer to non-international armed conflicts and they generally consist of obligations to observe a ceasefire or refrain from any use of force, condemnations of violations of the ceasefire by either party and proclamations of the principle of the inadmissibility of territorial gains achieved by force by either party to

²²¹ Ibid, p. 15.

²²² Albrecht R. in Bruno Simma (ed). (2002). *The Charter of the United Nations: A Commentary*. Oxford: Oxford University Press, Volume 1.

²²³ Georgia Decided to Restore Constitutional Order in S.Ossetia' – MoD Official. Civil Georgia 8.08.2008, <http://www.civil.ge/eng/article.php?id=18941&search=Kurashvili>; accessed on 18.08.2009.

²²⁴ Dinstein Y. (2012). *War Aggression and Self-defence*, 3rd edition, Cambridge University Press.

²²⁵ Cassese A. (2005). Article 51', in J.P. Cot and A. Pellet (eds), *La Charte des Nations Unies*, at 1333.

an internal conflict.²²⁶ Olivier Corten in fact mentions that it would be wrong from a strictly legal perspective to find in such practice the basis for extending the rule on the prohibition of the use of force to non-state actors. He further notes that: “*at present, there is nothing to show that any general agreement has been observed in favor of the applicability of Article 2(4) to situations that do not pertain to relations among States*”.²²⁷

In drafting the text of Article 2(4), several states proposed to explicitly extend the applicability of the rule to all “political entities”, including De Facto Regimes²²⁸. The proposition met with “firm opposition” from other states.²²⁹ The explicit inclusion of these groups was rejected in drafting the text of Article 2(4) a fact followed by later state practice. Considering all of the above, Corten reaches to the conclusion that: “*Ultimately, no group of States has consistently defended an extension of the notion of ‘international relations’ as an essential element of the prohibition of the use of force*”.²³⁰

Therefore, since the prohibition of force as well as all the norms deriving from it, refer only to States, for the purposes of the Charter, the completion of a De Facto Regime to this theory might lead to dangerous legitimizations of their status considering also the fact that several non-state actors have established quasi de facto public authorities in portions of a sovereign state (for example, the Donetsk National Republic and the Lugansk National Republic in Ukraine and rebels in Syria or Hezbollah in Lebanon).

However, it is important to underline that these assumptions are being made under the scope of whether the principle of territorial integrity also extends to non-state actors, who are obliged to refrain from actions aimed at the impairment of the territorial integrity of a State and not whether States should refrain from such actions against de facto regimes as analysed in chapter II.B.1. The Security Council reflects these conceptions through its resolutions, and reaffirms the principle of territorial integrity in relation to conflicts within a State involving secessionist movements. Important

²²⁶ UNSC Res. 849 (1993); UNSC Res. 1150 (1998); UNSC Res. 1225 (1999); UNSC Res. 1216 (1998); UNSC Res. 1584 (2005) ; UNSC Res. 1089 (1996), para. 2; UNSC Res. 824 (1993), para. 2; UNSC Res. 859 (1993).

²²⁷ Corten (2014). *Supra* note 196.

²²⁸ UN Doc. A/AC.134/L.17 (1969).

²²⁹ UN Doc. A/AC.134/SR.58 (1970); A/C.6/SR.1206 (1970).

²³⁰ Corten (2014). *Supra* note 196.

examples are the resolutions referring to *Kosovo*²³¹, *Bosnia-Herzegovina*, *Nagorny-Karabakh*²³², Abkhazia, S. Ossetia, and Congo²³³. In all of these resolutions the following concepts are reaffirmed: (a) the sovereignty and territorial integrity (b) the inviolability of international borders; and (c) the inadmissibility of the use of force for the acquisition of territory. More precisely, in the case of Bosnia-Herzegovina in fact, the Security Council with its resolution 787 (1992) stated that it would not accept any entities unilaterally declared in the territory and called for strict respect for the territorial integrity of Bosnia – Herzegovina.²³⁴ Furthermore, in the situation of Somalia, the Security Council also reaffirmed once more the importance of the territorial integrity of the State.²³⁵

As for the Kosovo advisory opinion, it is essential to note that states argued at this line in the proceedings, such as Serbia²³⁶, Argentina²³⁷, Spain²³⁸, Iran²³⁹ and Cyprus²⁴⁰ stating that the obligation to respect the principle of territorial integrity also extends to non-state actors but in no way, is there an obligation to a state to respect the territorial integrity of a de facto entity seceded of their territory.

Consequently, it could even be argued, that a State could exercise self defence only under this specific scope, arguing that a de facto regime, due to its secession, violated Article 2(4) with actions amounting to an armed attack, and as a consequence violated the territorial integrity of the main State. Under no means, should this be interpreted as giving to de facto regimes analogically, the right to self defence, since clearly enough this right is an inherent right of States. There could be no reference to territorial integrity and political independence endangered in relation to a de facto regime itself which has violently seceded from a recognized State. This is the reason, this whole analysis was needed, in order to distinguish the mere saying of exercising self defence in relation to a de facto regime, or even examining their right to self defence against the state from where they seceded. The extension of the prohibition of use of

²³¹ UN General Assembly Resolution 1244 (1999) of 10 June 1999.

²³² UN General Assembly Resolutions: 822 (30 April 1993), 853 (29 July 1993), 874 (14 October 1993), and 884 (12 November 1993).

²³³ UN General Assembly Resolution 1297 (12 May 2000).

²³⁴ UN Security Council Resolutions 859 (1993), 942 (1994). Resolution 981 (1995).

²³⁵ Resolutions 1766 (2007) and 1772 (2007).

²³⁶ Written Statement, 15 April 2009, p. 152, para. 423.

²³⁷ Written Statement, 17 April 2009, p. 30, para. 75.

²³⁸ Written Comments, July 2009, p. 3, para. 4.

²³⁹ Written Statement, 17 April 2009, p. 4, para. 3.1.

²⁴⁰ Written Statement, July 2009, pp. 6-8, paras. 15-18.

force to non-state actors because of their ability to violate territorial integrity should be carefully invoked, the exceptions of use force should not be extended to such entities since this could lead to automatically legitimizing their status. For example, Georgia, when referring to its actions in August 2008, underlined that the Russian Federation launched a large-scale invasion on Georgia's sovereign territory in 7th of August, that Russia was exercising control and that all of the actions of Georgia were held in their own territory.

However, it is essential to mention at this point that, the recovery of an occupied territory, as an act of self-defence, has been denied in the partial award on jus ad bellum by the Eritrea-Ethiopia claims Commission.²⁴¹ It is argued at this aspect that the Commission confused the goal of recovery (repelling an armed attack) of occupied territory in a continuing situation of self defence arguing states shall refrain from the threat or use of force to settle international and territorial disputes.²⁴² Finally, what happened between Georgia and the separatist regimes could had been interpreted under the violation of the Agreements of Armistice signed between them and preferably not under the jus ad bellum norms.²⁴³

²⁴¹ Jus Ad Bellum-Ethiopia's Claims 1-8, Eritrea and Ethiopia, Partial award of the Eritrea-Ethiopia Claims Commission, (2006) 45 ILM 430, ICGJ 362 (PCA 2005), 19th December 2005, Permanent Court of Arbitration [PCA], paras 9-10.

²⁴² De Hoogh A. (2009). Georgia's Short-Lived Military Excursion into South Ossetia: The Use of Armed Force and Self-Defence, *EJIL*!, Retrieved from <https://www.ejiltalk.org/georgia%E2%80%99s-short-lived-military-excursion-into-south-ossetia-the-use-of-armed-force-and-self-defence/> Accessed 19.12.18

²⁴³ Ibid.

Conclusion

Since 11 September 2001, a significant change has taken place in the practice of the right of self-defence. There is a clear dilemma found concerning the use of force against non-state actors since it is not possible to demand inaction of the victim states by non-state actors whereas at the same time the violation of the territorial integrity of the Host State is not accepted. The practice shows an increased acceptance of the right of self-defence against non-state actors but the recognition of this right must overcome the important obstacles described above.

Generally established doctrines of international law have suffered a lot of changes due to the practice of States in their effort to react to the evolving threats to global security. On the other hand, the prohibition on the use of force is the cornerstone of the international legal order²⁴⁴ and at the same time state sovereignty “is and remains one of the basic pillars of international law and order and should not lightly be violated”.²⁴⁵

Gray referring to the practice of the USA reaches to the conclusion *that* there is no wide right of self-defence and her basis this conclusion to the fact that in all of the practices examined where self-defence was exercised against non-state actors, it has been *counter-productive* or has had *unintended effects*. This means that a broad interpretation of self-defence cannot be necessary or proportionate.²⁴⁶ Moreover, as analyzed above, there could be serious consequences when letting *jus ad bellum* notions be associated with non-state actors because of the risk of the legitimization of their status.

More specifically, to the case of the *de facto* regimes analyzed above, it is essential to note also another important factor, that of the occupation of Russia²⁴⁷ which continues its policy of creeping annexation.²⁴⁸ Having seen Russia’s intentions,²⁴⁹ there

²⁴⁴ Dörr O. (2015). Use of Force, Prohibition of in Max Planck Encyclopedia of Public International Law, para.1. Retrieved from: (<http://opil.ouplaw.com>). Accessed: 19.12.18

²⁴⁵ Ruys T., Verhoeven S., Attacks by Private Actors and the Right of Self-Defence, *Journal of Conflict and Security Law Volume* 10, Issue 3, p. 289, at 310

²⁴⁶ Gray Chr., *The limits of force*, Leiden; Boston (Mass.): Brill, 2016, at 111.

²⁴⁷ Helsinki Commission Report, The Russian Occupation of South Ossetia and Abkhazia A Decade of De Facto Annexation in Georgia, July 16, 2018

²⁴⁸ Konarzewska N. (2017). Tensions Remain around Georgia's Breakaway Regions Nine Years After Five-Day War.” The Central Asia-Caucas Analyst Retrieved from: <https://www.cacianalyst.org/publications/analytical-Articles/item/13479-kadyrov-moscow-and-rohingya.html>. Accessed: 19.12.18

²⁴⁹ Christakis T. (2015). Self-Determination, Territorial Integrity and *Fait Accompli* in the Case of Crimea, *ZaöRV*, 75, pp. 75-100

should be a careful utilization of this kind of notions highly attached to the recognition of territorial integrity.

Besides, it is worth mentioning that self-defence is an answer to the breach of Article 2(4) that occurs with the form of an armed attack. Saying that South Ossetia could have invoked self-defence²⁵⁰ it is as if saying that its territorial integrity or political independence was violated. This could under no circumstances be the case. It has to be noted that the report of the EU fact finding mission, bases this aspect on the fact that Georgia's commitment to settle the dispute peacefully and not to use armed force, is governed by international law. Nevertheless, the confusion of such notions can lead to constructed conclusions of the legitimization of the status of de facto regimes,²⁵¹ since the EU report, conferred an inherent right of States to de facto regimes themselves.

The problematic nature of applying self-defence directly against non-state actors, referring to de facto states, is found on the fact that, as it is argued, Article 2(4) of the UN Charter does not apply to situations of rebellion, national liberation struggles, and political non-state entities shows.²⁵² Besides, as a rule, internal disputes, even those involving stabilized regimes, are considered as domestic matters.²⁵³ The object and purpose of Article 2(4) have absolutely to be taken into consideration since Article 2(4) refers to 'all members' – that is, states as subjects to the obligation.²⁵⁴ Moreover, it is clearly evidenced by UN General Assembly resolutions that the prohibition of the use of force has treated a rule applied in inter-state relations.²⁵⁵ What is more, as underlined repeatedly during this dissertation “*there is the risk of dilution of the principles of sovereignty and political independence in the case of extending self-defence to terrorist*

²⁵⁰ Independent International Fact-Finding Mission on the conflict in Georgia, *supra* note 3.

²⁵¹ De Hoogh A. (2009). *Supra* note 242.

²⁵² Lanovoy V. (2017). The Use of Force by Non-State Actors and the Limits of Attribution of Conduct. *The European Journal of International Law*, 28 (2), pp. 563-585, p. 570.

²⁵³ Nußberger A. (2013). *Supra* note 198.

²⁵⁴ Minutes of 1619th meeting, 25 June 1980, reprinted in Yearbook of the International Law Commission (1980) 183, p. 184, para. 3 (Ago): ‘[T]he concept of self-defence should be confined to a defensive reaction against an armed attack by another State, and should exclude an attack by private individuals. Without that restriction, the concept would be far too vague.’

²⁵⁵ UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV); Definition of Aggression, *supra* note 28. See also Constantinou (2000), *supra* note 23 p. 87; Schrijver N. (2001). Responding to International Terrorism: Moving the Frontiers of International Law for “Enduring Freedom. *Netherlands International Law Review* 48, 271, p. 284.

activities”.²⁵⁶ As for the jurisprudence of the International Court of Justice, contrary to what the defenders of the practice of exercising self-defence against non-state actors are arguing, it is a fact that, whatever the reason behind this choice of the Court, it has never recognized the legality of such a practice, relying instead on the classical attribution framework.²⁵⁷

Generally referring to the possibility of the occurrence of an armed attack by a non-state actor, first of all, the cooperation of the host-State should be looked for, and secondly a Resolution of the Security Council, clearly authorizing any action. The writer is of the opinion that self-defence must be considered as a last resort only relevant when other means are not available. This is a position expressed by a plea supported by more than 200 signatories,²⁵⁸ a text where their “*reluctance was expressed to endorse the expansionist conception of self-defence*”.

The measures proposed by them consist of first peaceful actions such as police and judicial cooperation; second, military measures with the cooperation of the territorial State; third, referring the situation to the Security Council: “*aside from cases of emergency leaving no time to seize the UN, it must remain the Security Council’s primary responsibility to decide, coordinate and supervise acts of collective security*”; fourth, in case the first three possibilities are not available or have failed, recourse to the unilateral use of force based on self-defence.²⁵⁹

Finally, if self-defence shall be invoked, this would be a case where attribution is found of the actions of the non-state actor to a state or on the basis of substantial involvement of the host State in the actions of a non-state actor, that could result from the existence of a direct link between the relevant State and the group. “*However, the mere fact that, despite its efforts, a State is unable to put an end to terrorist activities on its territory is insufficient to justify bombing that State’s territory without its consent.*”²⁶⁰

However, it should be taken into consideration that, there exists the position, according to which, legitimizing the status of non-state actors, might help in attributing

²⁵⁶ Verhoeven J. (2002). Les “étirements” de la légitime défense. *Annuaire français de Droit international*, 49, p. 62; Dupuy P.M. (2004) in Bianchi A. (ed), *Enforcing International Law Norms Against Terrorism*. Oxford: Hart, 3, p. 7–8.

²⁵⁷ *Oil Platforms case*, supra note 8, paras 51, 61, 71

²⁵⁸ Corten O. (2016). A Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism, *EJIL*!. Retrieved from: ejiltalk.org/a-plea-against-the-abusive-invocation-of-self-defence-as-a-response-to-terrorism/ Accessed: 19.12.18

²⁵⁹ Ibid

²⁶⁰ Ibid

responsibility since unfortunately in territories where non-state actors thrive, violations of international law also “flourish”. This is the reason why it is argued that non-state actors should be targeted even in self-defence wherever they are situated, so that they don’t remain imputable for their actions just because of legalisms and so that the victims don’t just suffer but also take measures for their protection.

However, it is the opinion of the writer, that such expansions, create more dangers and even more lacunae concerning international law norms. They could be carefully affirmed, but only in special situations described during this dissertation. The duty of promoting the establishment and maintenance of international peace and security is that of the Security Council²⁶¹ and no state should have the privilege of exploiting the temporary right of self-defence for their own interest. It shouldn't be forgotten that the prohibition of the use of force is “*regarded [...] as a principle of customary international law*”²⁶² and, according to some, “*undeniably peremptory*”.²⁶³

The writer wants also to highlight as a concluding remark, that territorial integrity and the prohibition of use of force are the cornerstones of international law and of the status quo of today’s world. In a world that is changing... it is the duty of the international community to safeguard these norms and to do not permit to expansionist practices to be established (either referring to jus ad bellum norms or to territorial aspirations) and at the same time to find a way to protect the rights of those that are the most affected, not the States...but the people. As analysed above, interpreting broadly jus ad bellum norms has led only to unnecessary and disproportionate consequences. Therefore, the exception to this rule of jus cogens, referring to the prohibition of the use of force, should remain as strict as possible.

²⁶¹ Nolte (2012), supra note 49.

²⁶² Shaw M. (2008). supra note 209, 195-197,

²⁶³ Orakhelashvili A. (2005). The Impact of Peremptory Norms of Interpretation and Application of United Nations Security Council Resolution, The European Journal of International Law, 16(1), p. 63

Bibliography

TREATIES

Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1935, 1 UNTS XVI.

International Conferences (The Hague), Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907.

Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2002, 2187 UNTS 90.

RESOLUTIONS OF THE UNITED NATIONS

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 [XXV].

UN General Assembly, Definition of Aggression, 14 December 1974, A/RES/3314.

UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960, A/RES/1514(XV).

UN General Assembly, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 21 December 1965, A/RES/2131(XX).

UN General Assembly Resolution 822 of 30 April 1993.

UN General Assembly Resolutions 853 of 29 July 1993.

UN General Assembly Resolution 874 of 14 October 1993.

UN General Assembly Resolutions 884 of 12 November 1993.

UN General Assembly Resolution 1297 of 12 May 2000.

UN General Assembly Resolution 1244 (1999) of 10 June 1999.

UN Security Council Res. 824 (1993).

UN Security Council Res. 849 (1993).

UN Security Council Res. 859 (1993).

UN Security Council Res. 942 (1994).

UN Security Council Res. 981 (1995).

UN Security Council Res. 1089 (1996).

UN Security Council Res. 1150 (1998).

UN Security Council Res. 1216 (1998).

UN Security Council Res. 1225 (1999).

UN Security Council Resolution 1368 (2001), Threats to international peace and security caused by terrorist acts], 12 September 2001, S/RES/1368.

UN Security Council Resolution 1373 (2001) on threats to international peace and security caused by terrorist acts, 28 September 2001, S/RES/1373.

UN Security Council Res. 1584 (2005).

UN Security Council Res. 1766 (2007).

UN Security Council Res. 1772 (2007).

UN Security Council Resolution 2249 (2015) on terrorist attacks perpetrated by ISIL also known as Daesh 20 November 2015, S/RES/2249.

UN DOCUMENTS

Critescu A. (1981). The right of Self Determination, Historical and Current Developments on the Basis of United Nations Instruments, UN Doc. E/CN.4/Sub.,2/404/ Rev.1

Dahlitz J. (ed.), (2003). Secession and International Law, Conflict Avoidance – Regional Appraisals, United Nations, New York and Geneva.

ILC, ‘Working paper prepared by Mr. Roberto Ago’, UN Doc A/CN.4/SC.1/WP.6, [1963] II Yearbook of the International Law Commission.

Letter dated 10 April 1980 from the Permanent Representative to the United Nations addressed to the President of the Security Council, UN Doc. S/13886.

Letter dated 15 October 2001 from the Permanent Representative of Belgium to the United Nations addressed to the Secretary-General (15 October 2001) U.N. Doc S/2001/967.

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

Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695, 23 September 2014.

Letter dated 26 July 1993 from the Permanent Representative of Israel to the United Nations addressed to the President of the Security Council, UN Doc. S/26152.

Letter dated 27 August 1981 from the Charge d'Affairs a.i. of the Permanent Mission of South Africa to the United Nations addressed to the Secretary-General, UN Doc. S/14652.

Letter from the Permanent Representative of the United States of America Addressed to the President of the Security Council (Aug. 20, 1998), U.N. Doc. S/1998/780.

Repertoire of the Practice of the Security Council 1981–84, Part XI note 73.

Statement of the Georgian representative in the Security Council debate of 8 August 2008, 1.15 a.m. (UNDoc. S/PV.5951).

United Nations Monthly Chronical, no.2, 1970.

UN Doc. A/AC.134/L.17, 25 March 1969.

UN Doc. A/AC.134/SR.19, 2 July 1968.

UN Doc. A/AC.134/SR.58, 21 July 1970.

UN Doc. A/C.6/SR.1206, 26 October 1970.

UN Doc S/19149, 22 September 1987.

UN Doc S/19194, 9 October 1987.

UN Doc S/19219, 19 October 1987.

UN Doc S/19791, 18 April 1988.

UN Doc S/19989, 6 July 1988.

UN Doc S/2002/854, 2002.

UN Doc S/2001/1005, 2001.

UN Doc S/2001/1127, 2001.

UN Doc S/2001/1193, 2001.

UN Doc S/PV.4836, 2003.

UN Doc S/PV.5493, 2006.

UN DocS/PV5498, 2006.

UN Press Release, SG/SM/8918, 6 Oct 2003.

UN Security Council 2671st meeting (1986), UN doc S/17938, 25 March 1986.
UN Security Council, 2071st meeting, UN Docs. S/PV.2071, 17 March 1979.
UN Security Council, 2292th meeting, UN Doc. S/PV.2292, 17 July 1981.
UN Security Council Res. 661 (1990) [Iraq-Kuwait], 6 August 1990, S/RES/661 (1990).

REPORTS

Crawford J., Second Report on State responsibility 1999 A/CN.4/498.
Independent International Fact Finding Mission on the conflict in Georgia, volume I, September 2009.
Independent International Fact Finding Mission on the conflict in Georgia, volume II, September 2009.
Independent International Fact Finding Mission on the conflict in Georgia, volume III, September 2009.
Institut de droit International, 10A Resolution en Session de Santiago – 2007, 27 October 2007 10ème Commission, Present Problems of the Use of Armed Force in International Law A. Self-defence Rapporteur: M. Emmanuel Roucounas.
Helsinki Commission Report, The Russian Occupation of South Ossetia and Abkhazia A Decade of De Facto Annexation in Georgia, July 16, 2018
Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1*, 23 November 2006, A/HRC/3/2
Report of the International Law Commission, 32nd Session, (1980). Yearbook of the International Law Commission, Volume II, Part 2
Report on Aggression and the Use of force, International Law Association, Sydney Conference, 2018.

BOOKS

Ρούκουνας Ε., (2010). *Δημόσιο Διεθνές Δίκαιο*. Athens: Νομική Βιβλιοθήκη.
Αντωνόπουλος Κ., Μαγκλιβέρας Κ. (2014). *Το Δίκαιο της Διεθνούς Κοινωνίας*, (2η έκδοση), Αθήνα: Νομική Βιβλιοθήκη.
Μαρούδα Ντ. Μ. (2015). *Διεθνές Ανθρωπιστικό Δίκαιο*. Αθήνα: Εκδόσεις Σιδέρης
Μαρούδα Μ. Ντ. & Περράκης Στ. (2016). *Διεθνής Δικαιοταξία: Θεωρία και Εφαρμογή Διεθνούς Δικαίου*. Αθήνα: Εκδόσεις Σιδέρης

- Albrecht R. in Bruno Simma (ed). (2002). *The Charter of the United Nations: A Commentary*. Oxford: Oxford University Press, Volume 1.
- Alexandrov S.A. (1996). *Self-defence against the Use of Force in International Law*. Netherlands: Kluwer
- Brownlie I. (1963). *International Law and the Use of Force by States*. Oxford: Oxford University Press.
- Coyle J. J. (2018), *Russia's Border Wars and Frozen Conflicts*, Cham: Palgrave McMillan/Springer Nature
- Crawford J. (2006). *The Creation of States in International Law*, (2nd ed). Oxford: Clarendon Oxford University Press.
- Crawford J. (2013). *State Responsibility-The general part*. Cambridge: Cambridge University Press
- Constantinou A. (2000). *The right of Self-Defence under Customary International Law and Article 51 of the UN Charter*. Athenes, Bruxelles :Ant. N. Sakkoulas/ Bruyant.
- Corten O. (2014). *Le droit contre la guerre : l'interdiction du recours à la force en droit international contemporain*. Paris : A. Pédone.
- De Guttry A. and Ronzitti N. (eds) (1993). *The Iran-Iraq War (1980–1988) and the Law of Naval Warfare*. Cambridge: Grotius Publications
- Dinstein Y. (2001). *War, Aggression and Self Defense*. Cambridge: Cambridge University Press.
- Dinstein, Y. (2005). *War, Aggression and Self-Defence*. Cambridge: Cambridge University Press
- Dinstein Y. (2012). *War Aggression and Self-defence*, 3rd edition, Cambridge University Press
- Dupuy P.M. (2004) in Bianchi A. (ed), *Enforcing International Law Norms Against Terrorism*. Oxford: Hart, 3
- Gardam J. (2004). *Necessity, Proportionality and the Use of Force by States*. Cambridge: Cambridge University Press
- Gray Ch. (2008). *The international Law and the Use of Force*. Oxford: Oxford University Press.
- Gray C. (2018). *International Law and the Use of Force*. Oxford: Oxford University Press.

Goodrich L. M., Hambo E. and Simons A. P. (1969). *Charter of the United Nations Commentary and Documents* (3rd and reviewed edition). New York: Columbia University Press.

Higgins R.(1963). *The Development of International Law through the Political Organs of the UN*. London: Oxford University Press

Jennings R., Watts A. (2008), Part 1 The subjects of international law, Ch.3 Position of the states in international law, Intervention, in Oppenheim's International Law: Volume 1 Peace (9th Edition).

Shaw M. (2008). *International Law* (6th ed.) Cambridge: Cambridge University Press

Ruys T. (2010). *Armed attack and Article 51 of the UN Charter*. Cambridge: Cambridge University Press.

JOURNALS

Akande D., Milanovic M. (2015). The Constructive Ambiguity of the Security Council's ISIS Resolution, *EJIL: Talk!*. Retrieved from: <https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>

Antonopoulos C. (2008). Force by Armed Groups as Armed Attack and the Broadening of Self-Defence. *Netherlands International Law Review*, 55, 159

Beard J. M. (2001). America's New War on Terror: The case for self defense under international law. *Harvard Journal of Law & Public Policy*, 25 pp. 559-590

Bethlehem D. (2012). Principles Relevant to the Scope of a State's Right of Self-Defence Against an Imminent or Actual Armed Attack by Non-State Actors, *The American Journal of International Law*. 106(7), pp. 770-777

Blay K. N. S. (2010). Territorial Integrity and Political Independence in *Max Planck Encyclopedia of Public International Law*, para. 6. Retrieved from: <http://opil.ouplaw.com>

Boon K.E. (2014). Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines. *Melbourne Journal of International Law* 15(1).

Brent M. (2009). Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence. *Australian International Law Journal*, 16., p.133-159.

Buchheit L.C. (1978). Secession. *The Legitimacy of Self-Determination*. New Haven, Yale University Press.

Cassese A. (1995). *Self-Determination of Peoples*. Cambridge: Cambridge University Press, pp. 333-334.

Cassese A. (2007). The Nicaragua and Tadić Tests Revisited in Light of the International Court of Justice. Judgment on Genocide in Bosnia. *The European Journal of International Law*, 18(4), pp. 649-668.

Chachko E. Deeks A. (2016). Who is on Board with “Unwilling or Unable”?, *Lawfare Blog*. Retrieved from: <https://www.lawfareblog.com/who-board-unwilling-or-unable>.

Christakis T. (2015). Self-Determination, Territorial Integrity and Fait Accompli in the Case of Crimea, *ZaöRV*, 75, pp. 75-100.

Christodoulidou T. Chainoglou K. (2015). Part VII General Problems, Ch.55 The Principle of Proportionality from a Jus Ad Bellum Perspective. *The Oxford Handbook of the Use of Force of International Law*, Oxford Scholarly Authorities on International Law. Retrieved from: (<http://opil.ouplaw.com>)

Corten O. (2016). A Plea Against the Abusive Invocation of Self-Defence as a Response to Terrorism, *EJIL!*. Retrieved from: ejiltalk.org/a-plea-against-the-abusive-invocation-of-self-defence-as-a-response-to-terrorism/

Deeks S.A. (2012). Unwilling or Unable” Toward a Normative Framework for Extraterritorial Self-defence, *Virginia Journal of International Law*, 52

De Hoogh A. (2009). Georgia’s Short-Lived Military Excursion into South Ossetia: The Use of Armed Force and Self-Defence, *EJIL!*, Retrieved from: <https://www.ejiltalk.org/georgia%E2%80%99s-short-lived-military-excursion-into-south-ossetia-the-use-of-armed-force-and-self-defence/>

Dörr O. (2015). Use of Force, Prohibition of in *Max Planck Encyclopedia of Public International Law*, para.1. Retrieved from: (<http://opil.ouplaw.com>).

Dugard J. (2013). ‘Conflicting Values and Competing Rights : Self-Determination and Territorial Integrity (357)’. In *Collected Courses of the Hague Academy of International Law*, edited by The Hague Academy of International Law

Gray Chr. (1988). The British Position with regard to the Gulf Conflict, *International and Comparative Law Quarterly*, 37(2), pp. 420-428.

Gray Chr., *The limits of force*, Leiden; Boston (Mass.): Brill, 2016

Greenwood C. (April 2009). The Caroline. In *Max Planck Encyclopedia of Public International Law*. Retrieved from: (<http://opil.ouplaw.com>)

Greenwood Ch. (2011). Self-Defence. in *Max Planck Encyclopedia of Public International Law*. Retrieved from: (<http://opil.ouplaw.com>)

Frowein J. A. (2013). Non – Recognition in *Max Planck Encyclopedia of Public International Law*, para. 3. Retrieved from: (<http://opil.ouplaw.com>).

Jennings R. Y., (1938). The Caroline and McLeod Cases, *The American Journal of International Law*. 32 (1).

Jiménez de Aréchaga E. (1978), International Law in the Past Third of a Century. *Collected Courses of the Hague Academy of International Law*, 159. Retrieved from: https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*-ej.9789028603592.001_344

Derek J. (2003). State Responsibility for the Acts of Private Armed Group, *Chicago Journal of International Law* 4(1) Article 8.

Kees A. (2011). Responsibility of States for Private Actors in *Max Planck Encyclopedia of Public International Law*, para. 10. Retrieved from: (<http://opil.ouplaw.com>).

Kreß C., Nußberger B. (2018). Part 1 The Cold War Era (1945–89), 19 The Entebbe Raid—1976 in *The Use of Force in International Law: A case Based Approach*, Tom Ruys, Olivier Corten, Alexandra Hofer (Editors), *Oxford Scholarly Authorities on International Law*. Retrieved from: (<http://opil.ouplaw.com>).

Konarzewska N. (2017). Tensions Remain around Georgia's Breakaway Regions Nine Years After Five-Day War. *The Central Asia-Caucas Analyst*. Retrieved from: <https://www.cacianalyst.org/publications/analytical-Articles/item/13479-kadyrov-moscow-and-rohingya.html>.

Lanovoy V. (2017). The Use of Force by Non-State Actors and the Limits of Attribution of Conduct. *The European Journal of International Law*, 28 (2), pp. 563-585, p. 570.

Milanovic M. (October 26, 2017), A Footnote on Secession, EJIL: TALK! Retrieved from <https://www.ejiltalk.org/a-footnote-on-secession/>.

Murphy S. (2002). Terrorism and the Concept of “Armed Attack” in Article 51 of the UN Charter. *Harvard International Law Journal*, 43(1).

Murphy S. (2005). Self-Defence and the Israeli Wall Advisory Opinion. An Ipse Dixit from the I.C.J. ? *American Journal of International Law*, 99 (1), pp. 62-76

Nußberger A. (January 2013). South Ossetia, *Max Planck Encyclopedia of Public International Law*, para.24. Retrieved from: (<http://opil.ouplaw.com>).

Nolte G., Randelzhofer A., (2012). Ch.VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 51, *The Charter of the United Nations: A Commentary, Volume II (3rd Edition)*, *Oxford Commentaries on International Law*, para. 56. Retrieved from: (<http://opil.ouplaw.com>)

Connell M. (2013). Dangerous Departures. *American Journal of International Law* Vol. 107 (2)

- Orakhelashvili A. (2005). The Impact of Peremptory Norms of Interpretation and Application of United Nations Security Council Resolution, *The European Journal of International Law*, 16(1), pp. 59-88.
- Paddeu, F. (2015), Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility. *British Yearbook of International Law*, 85, pp. 90-132.
- Ruys T., Verhoeven S., Attacks by Private Actors and the Right of Self-Defence. *Journal of Conflict and Security Law*, 10(3), p.289-320.
- Ronzitti N. (2018), Part 1 The Cold War Era (1945–89), 18 The Mayaguez Incident—1975 in *The Use of Force in International Law: A case Based Approach*, Ruys T., Corten O., Hofer A. (Editors), *Oxford Scholarly Authorities on International Law* [OSAIL], Retrieved from: <http://opil.ouplaw.com>
- Rosenstock R. (1971). The Declaration of Principles of International Law Concerning Friendly Relations: A Survey, *The American Journal of International Law*, 65(5) pp. 713-735.
- Schrijver N. (2001). Responding to International Terrorism: Moving the Frontiers of International Law for “Enduring Freedom. *Netherlands International Law Review* 48, 271, p. 284.
- Starski P. (2015), Legitimized Self- Defense – Quo vadis Security Council? *EJIL: Talk!* Retrieved from: <https://www.ejiltalk.org/legitimized-self-defence-quo-vadis-security-council/>
- Tladi D. (2013). The Nonconsenting Innocent State: The Problem with Bethlehem's Principle. *American Journal of International Law*, 107, Issue 3 July 2013, pp. 570-576.
- Trapp N. Kimberley (2015). Part III The Prohibition of the Use of Force, Self-Defence, and Other Concepts, Ch.30 Can Non-State Actors Mount an Armed Attack? In *The Oxford Handbook of the Use of Force in International Law*, p. 679, Retrieved from: <http://opil.ouplaw.com>
- Tsagourias, N. (2016). Self-Defence against Non-state Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule. *Leiden Journal of International Law*, 29(3), pp. 801-825.
- Värk R. (2011). Terrorism, State Responsibility and the Use of Armed Force, *ENDC Proceedings*, 14, pp. 74–111.
- Verhoeven J. (2002). Les “étirements” de la légitime défense. *Annuaire français de droit international* ,49, p. 62.

Williams G. (2013). Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the “Unwilling or Unable” Test. *University of New South Wales Law Journal* 36(2), pp. 619-641.

Wilmschurst E. (October 2005). Chatham House Principles of International law on the use of force by states in self-defence. *International & Comparative Law Quarterly*.

Wood M. (2013). The Law on the Use of Force, What Happens in Practice?’ *Indian Journal of International Law*, 53, pp.345-367.

INTERNATIONAL JUSTICE

Application instituting proceedings filed in the registry of the Court on 12 August 2008 concerning the Application of the international convention on the elimination of all forms of racial discrimination (Georgia v. Russian Federation).

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, International Court of Justice, Reports 2007, p. 43.

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403.

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

Corfu Channel (United Kingdom v. Albania), ICJ Reports 1949.

East Timor (Portugal v. Australia), Judgment, I. C.J. Reports 1995, p. 90.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971.

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

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, International Court of Justice. Reports 1996, p. 257.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Judgment, 27 June 1986.

Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I. C. J. Reports 2003, p. 161.

Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C. J. Reports 1962, p. 6.

Prosecutor v Duško Tadić (Appeal) ICTY-94-1-A (15 July 1999).

United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 35.

Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p.12.

Written Comments of Spain in the Written Statement of Argentina in the Written Statement of Serbia in the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion, I.C.J. Reports 2010, July 2009, p. 3.

Written Statement of Cyprus in the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion, I.C.J. Reports 2010, July 2009.

Written Statement of Argentina in the Written Statement of Iran in the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion, I.C.J. Reports 2010, 17 April 2009.

Written Statement of Iran Written Comments of Spain in the Written Statement of Argentina in the Written Statement of Spain in the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion, I.C.J. Reports 2010, 17 April 2009.

Written Statement of Serbia in the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion, I.C.J. Reports 2010, 15 April 2009.

OTHER SOURCES

Annan says Israeli blockade of Lebanon must not be a 'collective punishment' (31 August 2006). UN News. Retrieved from: <https://news.un.org/en/story/2006/08/190612-annan-says-israeli-blockade-lebanon-must-not-be-collective-punishment>

British Parliamentary Papers, Vol. LXI, (1843). British & Foreign State Papers, 29, p. 1129.

Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Article 21, para. 2, pp. 74, 2001.

Georgia Decided to Restore Constitutional Order in S.Ossetia' – MoD Official. Civil Georgia 8.08.2008, <http://www.civil.ge/eng/article.php?id=18941&search=Kurashvili>; accessed on 18.12.2018

L' intégrité territoriale du Québec dals l' hypothèse de souverain, Commission d' étude des questions afférentes à l' accession du Québec à la souveraineté, Vol. I. 1992, 377. Legal Adviser Bellinger speech (21.10.2006). *Legal Issues in the War on Terrorism*. Retrieved from: <https://www.state.gov/s/l/2006/98861.htm>.

Organization for Security and Co-operation in Europe (OSCE), Conference on Security and Co-operation in Europe (CSCE) : Final Act of Helsinki, 1 August 1975

Syria recognises Russian-backed Georgia regions (29 May 2018). BBC News. Retrieved from <https://www.bbc.com/news/world-europe-44291091> Accessed: 19.12.18