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against non-state actors**

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**'State Failure' and the Extraterritorial Use of
Force in Self-Defence
Against Non-State Actors**

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requirements of the University of Westminster
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Abstract

The thesis is first and foremost the examination of the notion and consequences of 'state failure' in international law. The disputes surrounding criteria for creation and recognition of states pertain to efforts to analyse legal and factual issues unravelling throughout the continuing existence of states, as best evidenced by the 'state failure' phenomenon. It is argued that although the 'statehood' of failed states remains uncontested, their sovereignty is increasingly considered to be dependent on the existence of effective governments.

The second part of this thesis focuses on the examinations of the legal consequences of the continuing existence of failed states in the context of *jus ad bellum*. Since the creation of the United Nations the ability of states to resort to armed force without violating what might be considered as the single most important norm of international law, has been considerably limited. State failure and increasing importance of non-state actors has become a greatly topical issue within recent years in both scholarship and the popular imagination. There have been important legal developments within international law, which have provoked much academic, and in particular, legal commentary. On one level, the thesis contributes to this commentary.

Despite the fact that the international community continues to perpetuate a notion of 'statehood' which allows the state-centric system of international law to exist, when dealing with practical and political realities of state failure, international law may no longer consider external sovereignty of states as an undeniable entitlement to statehood. Accordingly, the main research question of this thesis is whether the implicit and explicit invocation of the state failure provides sufficient legal basis for the intervention in self-defence against non-state actors in located in failed states. It has been argued that state failure has a profound impact, the extent of which is yet to be fully explored, on the modern landscape of peace and security.

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I hereby declare that all the material contained in this thesis is my own work.

CHAPTER 1

INTRODUCTION

1.1. Scope and context of the thesis

This thesis addresses two increasingly important areas of international legal concern – state failure and the use of force in self-defence against non-state actors located on the territory of so-called ‘failed states’. Since the creation of the United Nations in 1945, the ability of states to resort to armed force without violating what might be considered as the single most important norm of international law, has been considerably limited. Unless the use of force comes within the ambit of the two exceptions contained in the UN Charter, namely the inherent right of individual and collective self-defence, as prescribed by Article 51, or force which has been authorised by the United Nations Security Council acting under Chapter VII of the Charter, Article 2(4) of the UN Charter renders it unlawful. The system established at the San Francisco Conference aimed at preventing inter-states conflicts and, consequently favoured rigorous principles of non-intervention, as well as equality and sovereignty of states. The *sine qua non* condition for the functioning of that arrangement was the existence of empirically viable political communities capable of discharging obligations under the Charter including those owed to other states.

The international community which embarked upon the creation of the United Nations, right after the end of the Second World War, has undergone a considerable transformation throughout the years. The international power structure became increasingly complex and accordingly, security threats changed

noticeably. What seems to remain constant is that since the creation of international law states have always been its central element. Through their governmental structures, states play a primary role in the creation as well as implementation of international law both within their internal jurisdiction and external arenas.¹

In the latter part of the twentieth century, however, the international legal system began to confront a phenomenon of failing and collapsed states – territorial units formally not deprived of statehood but empirically incapable of providing basic political goods to their populations and fulfilling their obligations to other states.² Overwhelmed by mass violence steaming from internal conflicts as well as by the humanitarian emergencies which followed, such states as Somalia, Democratic Republic of Congo, Afghanistan, Yemen, Haiti, Cote d'Ivoire and in fact many other countries, were pushed towards the brink of failure. These circumstances had and in many cases continue to have serious repercussions not only for the state in question and its people, but also for its neighbours and the international community of states.³ Internal difficulties, however, were not the only challenges to

¹ It has been, however, recognised that various non-state entities, such as non-governmental organisations, transnational corporations, organised armed opposition groups, rebel groups, insurgents and belligerent groups, indigenous peoples and others, play an increasingly important role in the processes of international law-making as well as monitoring compliance with international law. See: A Boyle and C Chinkin, *The Making of International Law* (Oxford, Oxford University Press, 2007) and International Law Association, The Hague Conference (2010) Non-State Actors, available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/1023>

² See: G Helman and S Ratner, 'Saving Failed States', 89 *Foreign Policy*, (1992-93) pp 3-20.

³ For one of the first thorough research projects on state failure see early reports of Political Instability Task Force (formerly known as State Failure Task Force) The research conducted by both State Failure Task Force and subsequently by Political Instability Task Force was funded by the United States Central Intelligence Agency's Directorate of Intelligence through a contract with Science Applications International Corporation (SAIC). The initial task of this group of researchers from various American institutions was to assess and explain the vulnerability of states all over the world to political instability and state failure. During the course of the research, the researchers focused not only on the extreme cases of state failure but also shifted their attention towards more

be tackled. Throughout the decades, following creation of the UN, states became increasingly inter-dependent and presently have multitude of obligations towards each other as well as international community as a whole. Highly globalised economy, information systems and interlaced security all confront fragile states with demands they are practically incapable to cope with. Additionally, states have been confronted with the emergence of new standards of governance and the high levels of expectations regarding their fulfilment.⁴ Failed states are incapable of operating within this new globalised system of extended responsibilities and consequently become ineffective actors in the international stage.

Dealing with the, now widely acknowledged, problem of state failure has proven to be difficult both at the theoretical level and in practice. States which are incapable of operating in an increasingly interdependent international community in fact weaken the whole system. Nevertheless, autonomy and the principle of equal sovereignty are still highly prized by all states. Accordingly, although fragile, failing and failed states do not fulfil their internal and external obligations, the major institutions of international law are very cautious to authorise intervention in the internal affairs of these states as it is feared that such action would lead to abuses.

general political instability caused by outbreaks of revolutionary or ethnic war, adverse regime changes and genocide. After the September 11, 2001, PITS initiated a programme focusing on the relationship between states and international terrorist groups. Nevertheless, the main objective for the group remained the same and that is the development of a statistical model that would be capable of accurately assessing the countries' prospects for major political change and identifying key risk factors of interest to US policymakers. Further details regarding Political Instability Task Force can be found on Centre for Global Policy website: <http://globalpolicy.gmu.edu/political-instability-task-force-home/>

⁴ See, e.g., T M Franck, 'The Emerging Right to Democratic Governance', 86(1) *American Journal of International Law*, 46 (1992): "Both textually and in practice, the international system is moving toward a clearly designated democratic entitlement, with national governance validated by international standards and systematic monitoring of compliance".

State failure undeniably causes great human suffering and consequently the state itself becomes questionable in the hearts and minds of its inhabitants.⁵ It is not unprecedented that the void caused by the state collapse is being filled by powerful, armed, non-state actors.⁶ These groups may not necessarily aim at replacing a legitimate government and they often vary considerably in terms of the degree and the level of their organization as well as the political, religious and military objectives they pursue. As explained in more detail below, recent times provided numerous cases of such situations.

The proliferation of non-state actors in the international political and legal arenas has been noted and widely discussed in international legal scholarship.⁷ There are various types of actors described as non-state actors, including, non-governmental organizations, transnational corporations, so called *sui generis* entities, such as, the International Committee of the Red Cross, the Holy See, The Sovereign Military Order of Malta, and finally organized indigenous peoples' groups in themselves. The

⁵ According to Rotberg: 'A nation-state fails when it loses legitimacy –when it forfeits the 'mandate of heaven'. Its nominal borders become irrelevant...The state increasingly comes to be perceived as being owned by an exclusive class or group, with all others pushed aside. The social contract that binds inhabitants to an overreaching polity becomes breached'. R I Rotber ed., *When States Fail. Causes and Consequences*, (Princeton, Princeton University Press, 2004), p. 9.

⁶ 'Failed states are tense, deeply conflicted, dangerous and contested bitterly by warring factions. In most failed states, government troops battle armed revolts led by one or more rivals. Occasionally, the official authorities in a failed state face two or more insurgencies, varieties of civil unrest, different degrees of communal discontent, and a plethora of dissent directed at the state and the groups within the state'. R I Rotberg, ed. *State Failure and State Weakness in a Time of Terror*, (Washington D.C., Brookings Institution Press, 2003), p. 5.

⁷ *Supra* note 1. See also e.g. W C Jenks , 'Multinational Entities in the Law of Nations,' in W Friedmann, L Henkin & O J Lissitzyn, (eds), *Transnational Law in a Changing Society. Essays in Honor of Philip C. Jessup* (New York, Columbia University Press, 1972); R Hoffmann and N Geissler (eds.), *Non-State Actors as New Subjects of International Law: International Law – from the Traditional State Order Towards the Law of the Global Community* (Berlin, Duncker & Humblot, 1999); P Alston, ed. *Non-State Actors and Human Rights* (Oxford, Oxford University Press, 2005); J Alvarez, *International Organizations as Lawmakers* (Oxford, Oxford University Press, 2005); A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, Oxford University Press, 2006); M Noortmann and C Ryngaert eds. *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Aldershot, Ashgate Publishing Ltd., 2010).

legal status of non-state actors can be developed based upon their activities and functions within various international institutional arrangements and substantive areas of international law. The status of armed non-state actors, including organized armed opposition groups, rebel groups, insurgents and belligerent groups has been assessed in some areas of international law such as, for example, international humanitarian law and human rights law.⁸ The same cannot be said regarding the examination of their influence on and status under the *ius ad bellum*. More specifically, the matter of self-defence against such groups located within a failed state setting increasingly requires attention. Array of irregular, non-state armed forces, often transcends beyond the borders of territorial units which failed in many respects both internally and on the international plane. By conducting armed activities on the territory of neighbouring states, armed non-state actors pose a serious challenge for the international regime regarding use of force in international relations.

The primary area of international law on which this thesis will focus is the UN Charter and framework of international law regulating the resort to force in the territory of other states in self-defence. *Ius ad bellum* regulates the exercise of powers which are commonly regarded as falling within the monopoly of the state. Accordingly, the UN Charter regime regarding use of force in states' relations refers to inter-state conflict. Much of the applicable body of law is subject to widespread agreement. Some issues nevertheless, such as use of force in anticipatory self-

⁸ See, e.g., Alston, *supra* note 7; Clapham, *supra* note 7; L Zegveld, *The Accountability of Armed Opposition groups in International Law* (Cambridge, Cambridge University Press, 2002); International Committee of the Red Cross, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, M Mack, Geneva, February 2008; available at http://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf

defence or the definition of 'armed attack', remain contentious. Recent developments, including state failure and rise of powerful, armed non-state actors, have challenged the traditional rules restricting resort to armed force even further. Most importantly for the subject matter of this thesis, one cannot fail to notice the increasing importance of armed non-state actors and their corresponding capacity to carry out military operations which may amount to an armed attack against other states. Accordingly, although subject to, at times widespread, contestation, states invoked the right to exercise self-defence against attacks by armed non-state actors, even in cases where the state on whose territory force is used cannot be held responsible for the attack. For instance, in July 2006, Israel invaded parts of Lebanon in order to put an end to the firing of rockets by Hezbollah; in December 2006, Ethiopia sent a considerable number of troops into Somalia pursuing what has been portrayed as self-defence against the threat posed by the Union of Islamic Courts; similarly, Russia repeatedly claimed broad right of self-defence against non-state actors emanating from Georgia; in February 2008, Turkey started a major operation into Iraq to put an end to attacks carried out by Kurdistan Worker's Party; and finally, from December 2008 until January 2009, Israeli army entered territory of Gaza with an objective to destroy the Palestinians' capacity to fire missiles into southern Israeli territory. The recent developments in Iraq and Syria in a fight against so-called Islamic State provide yet another example.⁹

One of the recent illustrative representations of a conflict with substantial involvement of powerful non-state actors operating within a setting of a state

⁹ See Chapter 5 for further examination of the above cited cases of state practice in relation to the use of force in self-defence against non-state actors located on the territory of failed states.

which in many respects fulfils the criteria of a failed one, is certainly the Great Lakes dispute between the Democratic Republic of Congo and its neighbours – Uganda and Rwanda amongst others. A vast array of actors participated in a conflict which had aspects of non-international armed conflict, internal disturbances and interstate conflict, all at the same time. The cross border implications of this conflict had been the subject of the *Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda)* decision of the International Court of Justice issued on December 19, 2005.¹⁰ The conflict in question had been factually unusually complex and involved both state and non-state actors. Additionally, the rebel groups implicated were varying when it comes to the degree and level of their organization, as well as the character of their association with the state actors – some of them acted independently, whereas the others in fact as a surrogates of the participating states.¹¹ The latest chapter in the history of this deeply conflicted region is the rise of yet another powerful, rebel military group, the March 23 Movement.¹² The group operates in the Eastern regions of the DRC, mainly North Kivu province, and accuses the government of President Kabila of not respecting a peace deal signed on 2009 with the rebel group National Congress for the Defence of the People (CNDP), as well as cheating in the November 2011 elections.¹³ It appears that there is every possibility that the history may repeat itself, as the First

¹⁰ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgement of 19th December 2005(Merits) <http://www.icj-cij.org>

¹¹ For a comprehensive list of the armed groups operating in the DRC, see: Letter of 1st April 2002 from the Secretary-General addressed to the President of the Security Council, 'First Assessment of the armed groups operating in the Democratic Republic of Congo', S/2002/341; as well as 'Third Special Report of the Secretary-General of the United Nations Mission in the Democratic Republic of Congo', S/2004/650.

¹² See: The Guardian, 20 November 2012, 'M23 may be DRC's new militia, but it offers same old horrors' <http://www.guardian.co.uk/world/2012/nov/20/m23-drc-militia-horrors>

¹³ See: BBC News, 3 December 2012, 'Congo Army Returns to Goma as M23 Demand Negotiations' <http://www.bbc.co.uk/news/world-africa-20585179>

Congo War started with the fighting in the very same region.¹⁴ Undisputedly, legal ramifications of the conflicts in the Great Lakes region will be of concern for some time to come.¹⁵ One of the reasons why this is the case, is due to the fact that the conflict emphasises a very significant challenge to the contemporary international law regime regarding the use of force – the failure of the state to effectively govern its territory and control armed non-state actors.

The country which has become known as an epitome of a ‘failed state’ is certainly Somalia.¹⁶ The state of Somalia had been without effectively functioning government for over two decades since president Siad Barre was overthrown in 1991.¹⁷ Years of fighting between the rival warlords left the country ridden by famine and disease. It is estimated that up to one million people lost their lives.¹⁸ The vacuum of central authority led to the division of the country between clans and group leaders who eventually became warlords. Several attempts to unite Somalia proved futile. In 2006 Islamist insurgency, including the Al-Shabaab group, gained control of much of the south of the country. Al-Shabaab is a radical youth

¹⁴ The New York Times, 20 November 2012, ‘Congo Rebels Seize Provincial Capital’ <http://www.nytimes.com/2012/11/21/world/africa/congolese-rebels-reach-goma-reports-say.html>

¹⁵ Most recently, the M23 rebels proclaimed that they will fight against that newly created first United Nations offensive force – 3,000 strong Intervention Brigade. See: The Guardian, 5 May 2013, ‘M23 rebels in DRC prepare for battle with new UN force’ (<http://www.theguardian.com/world/2013/may/05/m23-rebels-drc-un-force>).

¹⁶ Somalia has been on the top of the Foreign Policy Failed States Index for four consecutive years, see: http://www.foreignpolicy.com/articles/2011/06/17/2011_failed_states_index_interactive_map_and_rankings

¹⁷ Following the interim mandate of the Transitional Federal Government, the Federal Government of Somalia has been established on 20th August 2012.

¹⁸ See: <http://www.globalsecurity.org/military/world/war/somalia.htm>

group of the Union of Islamic Courts established in 2006¹⁹ in order to fight the Ethiopian forces that have entered Somalia around that time.

As a result of the inability of the central government to control the entirety of the state's territory, in 2011 and 2012 Al-Shabaab gained control of a large portion of the South Somalia. Their military incursions into the Kenyan territory led to an announcement by the Kenyan minister of defence, Yusuf Haji, and minister of internal security, George Saitoti on 15th October 2011, at a press conference held in Nairobi, that in order to protect territorial integrity from foreign aggression, Kenyan security forces will engage in a military operation against the Al-Shabaab militants in Somali territory.²⁰ Article 51 of the UN Charter has been invoked as a legal basis for the action and the declaration made that all measures taken in the exercise of the right of self-defence will be reported to the Security Council. The announcement came after several incidents which involved the Al-Shabaab incursions as deep as 120 kilometres into the Kenyan territory and abduction of several foreign nationals.²¹

The situation on the border of Somalia and Kenya clearly puts into context troublesome questions concerning legal and political aspects of state failure and the use of force in self-defence against non-state actors. First of all, although it may

¹⁹ See Council on Foreign Relations, Al-Shabaab Profile: <http://www.cfr.org/somalia/al-shabaab/p18650>

²⁰ See: Kenya Broadcasting Corporation, Saturday, 15 October 2011: <http://www.kbc.co.ke/news.asp?nid=72938>

²¹ See: The Standard, 16 October 2011:

<http://www.standardmedia.co.ke/insidePage.php?id=2000044912&cid=4&ttl=Kenyan%20military%20crosses%20into%20Somali>

As also an article published in The Standard on 17 October 2011:

<http://www.standardmedia.co.ke/insidePage.php?id=2000044985&cid=4&story=Assault:%20Kenya%20troops%20attack>

And the BBC News, 'Kenya sends troops into Somalia to hit al-Shabab', 17 October 2011, <http://www.bbc.co.uk/news/world-africa-15331448>

be justifiable, is the Kenyan operation legal? In more general terms, can military measures against non-state actors be considered legitimate self-defence under international law and, if so, in what circumstances? Are the measures which do not comply with the parameters of self-defence necessary unlawful, or could there be other legal justification for them? Al-Shabaab is obviously not a state and its acts cannot be attributed to the weak Somali Transitional Federal Government since the latter is engaged in an armed conflict with this armed group. Al-Shabaab is an armed non-state group operating within a territorial entity which has been recognised as an independent state by the international community but in fact does not possess many of the attributes of an effectively governed state capable of entering into relations with other international law subjects. Is the fact that Al-Shabaab at some point in time controlled and, to a certain extent, administered large parts of south Somalia at all relevant? How does the 'failed state' setting affect the rules regarding use of force in self-defence in international relations? The above questions constitute the core of the subject matter to be extensively examined through this thesis. In late September 2012 Kenyan forces claimed to have taken over Kismayu, the last stronghold of Al-Shabaab in Somalia.²² Despite some success of Kenyan armed forces, the militants' attacks continued and, although recognised by an increasing number of countries,²³ Somali Federal Government faces a long struggle before regaining effective control over the entire states' territory. A number of other African countries similarly suffer from the lack

²² The New York Times, 5 October 2012, 'Last Somali militant bastion falls, Kenya claims' http://www.nytimes.com/2012/09/29/world/africa/kenya-says-it-captures-last-islamist-bastion-in-somalia.html?_r=0

²³ See: CNN, 17 January 2013, *After more than 2 decades, US recognises Somalia*: <http://edition.cnn.com/2013/01/17/us/somalia-recognition>

of central governments' capacity to effectively govern the entirety of their territories. Recently, strong presence of powerful non-state armed groups in both Mali and Central African Republic led to the overthrow of the existing governments, serious humanitarian crises and the necessity for the international community's interventions.²⁴

The above described cases indicate that failed states and powerful armed non-state actors raise a multitude of complex legal problems, the examination of which remains relevant and important. This thesis is therefore, first and foremost, the legal analysis of state failure and the extraterritorial use of force in self-defence against non-state actors. In particular, the international legal consequences of continuing existence of failed state and non-state actors control over extensive parts of a state territory will be considered in the context of *jus ad bellum* with a specific emphasis on the rules governing self-defence. Firstly, the thesis re-examines core principles of international law to which both traditional and more avant-garde approaches to failed states and non-state actors refer to. Subsequently, the focus will shift towards the area of international law regulating the use of force in the states' relations. The central problem posed in this relation concerns the right to use force in self-defence against non-state armed groups whose actions cannot be attributed to the failed state. Accordingly, this thesis seeks to identify and analyse international law norms regarding the use of force in self-defence which would be applicable in the specific context of state failure. The military operations investigated here will be those taking place outside the borders

²⁴ See, *inter alia*: 28 November 2012 – Report of the Secretary-General on the situation in Mali, S/2012/894; 14 June 2013 – The situation in the Sahel region, S/2013/354; 3 May 2013 - The situation in the Central African Republic, S/2013/261.

of the state being a victim of an armed attack by non-state actors, and on the territory of failed states. Throughout the thesis, a state taking extraterritorial defensive measures against non-state actors will be referred to as the “victim state” and a state on whose territory such measures are taking place will be the “territorial state” and/or a “failed state”. The thesis will concentrate on defensive measures taken without the consent of a failed state and analyse unilateral state actions in self-defence, rather than the UN sanctioned or multinational peace support operations, as the investigation of the latter ones would be beyond its scope. Finally, the armed non-state actors which will be taken into consideration, are the groups not acting under control and/or on behalf of a state, and do not form part, neither *de jure* or *de facto*, of any state organisation, and accordingly maintain existence independent of the state.

1.2 Literature Review

The notion of ‘failed state’ became an increasingly recognisable feature in international legal literature since the 1990s.²⁵ While the existence of states suffering from governance problems is nothing new in statehood’s history²⁶, the

²⁵ See, *inter alia*: J Milliken ed, *State Failure, Collapse and Reconstruction* (Blackwell Publishings Ltd., 2003) (situating state failure and state collapse in historical context and analysing contemporary interventions and reconstruction efforts); S E Eizenstat, J E Porter, and J M Weinstein, ‘Rebuilding Weak States’, *Foreign Affairs* 134 (Jan-Feb 2005) (discussing how to limit threats to America by rebuilding failed nation-states); J L Holzgrefe and R O Keohane, eds, *Humanitarian Standards for Political Trusteeship*, 8 *UCLA J Intl L & Foreign Affairs* 385 (2003) (proposing a political framework based on trusteeship as a model for international intervention in failed states);

²⁶ See: A Yannis, *State Collapse and the International System, Implosion of Government and the International Legal Order from the French Revolution to the Disintegration of Somalia* (2000), unpublished Doctoral Thesis, University of Geneva, on the file with the Library of the Graduate Institute of International and Development Studies, Geneva; R H Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, (Cambridge, Cambridge University Press, 1990).

most recent wave of failed states coincided with the end of Cold War and a considerable shift in states' relations where super powers progressively lost interest in providing their economic and military support to former allies in Africa and Asia.²⁷ Simultaneously, the United Nations Security Council, acting under Chapter VII of the UN Charter, consistently broadened the understanding of the notion of a threat to the international peace and security for it to encompass humanitarian crises, massive violation of human rights and humanitarian law, and breakdowns in national governance²⁸ - all of which, as will be noted below, are features of a situation of state failure. Ever since, the absence of effective government is undoubtedly one of the most important challenges for the international peace and security in a state-orientated international law system. Up until the events of September 11, 2001, however, the international community continued to view failing and collapsed states as relatively containable humanitarian disasters with limited global impact beyond immediate threat to their neighbours. The rhetoric changed dramatically after 2001 and failed states, as well as non-state actors operating within their territories, became one of the primary threats to international peace and security and arguably, the legitimate target of self-defence operations.²⁹

²⁷ See, *inter alia*: I W Zartman, 'Introduction: Posing the Problem of State Collapse' in I W Zartman, ed. *Collapsed States: The Disintegration and Restoration of Legitimate Authority*, (London, Lynne Rienner Publishers, 1995); J Herbst, *States and the Power in Africa, Comparative Lessons in Authority and Control* (Princeton University press, 2000); S Chesterman, M Ignatieff, and R Thakur *Making States Work: State Failure and the Crisis of Governance* (United Nations University, 2005).

²⁸ K Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future' 8(1) *Journal of Conflict and Security Law* 15 (2003).

²⁹ R H Dorff, 'Failed States After 9/11: What Did We Know and What Have We Learned?' 6(1) *International Studies Perspectives* 20 (2005).

The manifestations of failure may differ in each country and it is difficult to precisely denominate the characteristics of state failure. As a consequence, although the labels of 'failed state' or 'fragile state' are repeatedly used in international legal and political discourse, it is with a general 'we will know one when we see one' attitude.³⁰ Academics struggled to approach in a systematic way the conundrum raised by the collapse of state institutions at the international level.

The actual term 'failed state' had been introduced by Gerald Helman and Steven Ratner in their 1992 article published in the *Foreign Policy* magazine.³¹ The phenomenon of 'failed nation-state utterly incapable of sustaining itself as a member of international community'³² led the authors to question whether the nation-state framework remains appropriate for all peoples and territories. Accordingly, they proposed a new form of the United Nations conservatorship as a

³⁰ Thürer points out that '[t]he term "failed State" does not denote a precisely defined and classifiable situation but serves rather as a broad label for a phenomenon which can be interpreted in various ways.' D Thürer, 'The "Failed State" and international law'. In: 81 *International Review of the Red Cross* (1999), p. 733. Wallace-Bruce notes that 'the scope of the term ['failed State'] is not entirely clear. To start with, it would seem that the term has no legal meaning, and therefore, different people use it to refer to different things.' In: N L Wallace –Bruce, 'Of Collapsed, Dysfunctional and Disoriented States' XLVII *Netherlands International Law Review* (2000) at p. 58. Similarly, Geiss considers that 'the concept of failing or weak States embraces [a great] variety of States, and a Babylonian diversity of terminology furthermore enhances the legal uncertainty entailed in this concept.' R Geiss, 'Failed States. Legal Aspects and Security Implications'. 47 *German Yearbook of International Law* (2005), p. 458. Koskenmäki agrees that '[d]ue to the complex nature of the phenomenon [...] no well established definition of state collapse exists.' In: R Koskenmäki 'Legal Implications Resulting from State Failure in Light of the Case of Somalia'. In: 73 *Nordic Journal of International Law* (2004), p. 2. Yannis, similarly, points out that there is a 'lack of precise conceptions about state disintegration'. A Yannis, 'State Collapse and its Implications for Peace-Building and Reconstruction'. 33 *Development and Change* (2002), p. 823.

³¹ *Supra* note 2, at p. 2.

³² *Ibid.* Back in 1992, the authors pointed towards three groups of states which would require close attention of the international community and implementation of innovative policies: 'First, there are the failed states like Bosnia, Cambodia, Liberia, and Somalia, a small group whose governmental structures have been overwhelmed by circumstances. Second, there are the failing states like Ethiopia, Georgia, and Zaire, where collapse is not imminent but could occur within several years. And third, there are some newly independent states in the territories formerly known as Yugoslavia and the Soviet Union, whose viability is difficult to assess'.

solution for failed states.³³ As such, it would be only a temporary reduction in sovereignty ultimately leading to the failed state regaining its full independence.³⁴ A similar theme reverberates in the earlier work on 'quasi-states' by Robert Jackson who argued that a considerable number of third world states 'appear to be juridical no more than empirical entities' which without support from international law and material aid would not be a self-standing territorial jurisdictions.³⁵

The relevant literature addresses state failure in many different contexts, primarily in terms of humanitarian intervention³⁶, state-building³⁷ and neo-colonialism.³⁸ It has also been discussed how the phenomenon affects statehood, as well as

³³ *Ibid.* 'The international community should now be prepared to consider a novel, expansive -- and desperately needed -- effort by the U.N. to undertake nation-saving responsibilities. The conceptual basis for the effort should lie in the idea of conservatorship (...)The traditional view of sovereignty has so decayed that all should recognize the appropriateness of U.N. measures inside member states to save them from self-destruction'.

³⁴ The propositions for the international intervention through some form of conservatorship aimed at re-establishing 'failed states' has been criticised by many authors. Amongst others, Ruth Wedgwood for example noted that: 'Some observers speak of "failed states"-a locution resented by the developing world, which points out that European state formation was a slow and difficult process. The "failed state" proposal calls for the United Nations to step in, perhaps through the Trusteeship Council, when local leaders are unable to stem anarchy or govern effectively. At times there is almost an intimation that sovereignty does not properly belong to people who cannot employ it well. What sounds so utterly benign as peacekeeping can devolve into a kind of multilateral condescension. While I don't believe in accepting human suffering as growing pains (the whole political development remains, whether it is a multilateral or a unilateral intervention'. R Wedgwood, 'The Evolution of United Nations Peacekeeping', 28 *Cornell International Law Journal* (1995), at p. 636.

³⁵ *Supra* note 26, at p. 5.

³⁶ See, *inter alia*: M R Hutchinson, 'Restoring Hope: U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention', 34 *Harvard International Law Journal* 624 (1993), J Herbst, 'Responding to State Failure in Africa', 21 *International Security* 120 (1996/97) and R. van Eijk, 'The United Nations and the Reconstruction of Collapsed States in Africa', 9 *African Journal of International and Comparative Law* 573 (1997).

³⁷ See, *inter alia*: A Ghani and C Lockhard, *Fixing Failed States: A Framework for Rebuilding a Fractured World* (Oxford, Oxford University Press, 2008), F Fukuyama, *State-Building: Governance and World Order in 21st Century*, (Cornell University Press, 2004).

³⁸ See, *inter alia*: R Gordon, 'Some Legal Problems with Trusteeship', 28 *Cornell International Law Journal* 301 (1995), H Richardson, "'Failed States", Self-Determination and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations', 10 *Temple International and Comparative Law Journal* 1 (1996); R Gordon, 'Saving Failed States: Sometimes a Neo-colonialist Notion', 12 *American University Journal of International Law and Policy* 903 (1997); and R Wilde, 'The Skewed Responsibility Narrative of the Failed States Concept' 9 *ILSA JICL* 425 (2003).

sovereignty.³⁹ Likewise, the issue of state failure emerged in debates about the future of a state as a basic unit in international relations and primary subject of international law.⁴⁰ Finally, more recently, ‘disappearing states’ have been discussed by Jane McAdam with reference to the potential impact of climate change on the two necessary requirements for statehood, namely, a defined territory and a permanent population.⁴¹ Due to an overwhelming complexity of the concept of ‘failed state’, however, it has been extremely difficult to achieve agreement on an articulated, objective definition and a number of propositions have been put forward. Zartman for example focuses on the failed state’s inability to fulfil its social contract and defines state collapse as ‘a situation where structure, authority (legitimate power), law, and political order have fallen apart and must be reconstituted in some form, old or new’.⁴² Similarly, Rotberg observes that ‘nation-states fail when they are consumed by internal violence and cease delivering positive political goods to their inhabitants’.⁴³ Thürer, whose definition appears to be the most broadly cited, argues that state failure is ‘the product of collapse of the power structures providing political support for law and order’.⁴⁴

Although it is widely acknowledged that state collapse raises a number of fundamental legal and political questions as it puts the very core of international

³⁹ See, *inter alia*: D Thürer, *supra* note 30, R Gordon, *supra* note 33; N L Wallace-Bruce, ‘Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law’, XLVII *NILR* 53 (2000), and G Kreijen, ‘The Transformation of Sovereignty and African Independence: No Shortcuts to Statehood’, in G Kreijen, et al. (eds.), *State, Sovereignty, and International Governance* (Oxford:Oxford University Press, 2002), at pp. 45–107.

⁴⁰ See, *inter alia*, M Reisman, ‘Designing and Managing the Future of the State’, 8 *EJIL* 409 (1997); R E Brooks, ‘Failed States, or the State as a Failure’ 72(4) *University of Chicago Law Review* 1159 (2005).

⁴¹ J McAdam, *Climate Change, Forced Migration, and International Law* (Oxford, Oxford University Press, 2012) and in particular Chapter 5: ‘Disappearing States’, Statelessness, and Relocation’.

⁴² *Supra* note 27, at p. 1.

⁴³ R Rotberg, *When States Fail: Causes and Consequences*, (Princeton University Press, 2004), at p. 1.

⁴⁴ *Supra* note 30, at p. 733.

legal system – the state itself – in doubt, it remains insufficiently explored how the concept can be encapsulated within a legal paradigm. In particular, it remains to be clarified under which criteria a state in question may be described as being in the process of failing or already failed and collapsed.⁴⁵ Some academics adopt a utilitarian approach and focus on specific purpose for which the definition of state failure is sought. Crawford for example refers to state failure as primarily crises of government.⁴⁶ As he concludes, none of the situations described as state failure, i.e. Somalia, the Congo, Liberia, etc. ‘has involved the extinction of a State in question and it is difficult to see what possible basis there could be for supporting otherwise (...) although there are many poor, often desperately poor, States, one must ask what they might otherwise be or have been – satellites of a neighbour, for example, or equally poor or even poorer colonies?’.⁴⁷ Nevertheless, it remains somewhat unexplained how the criterion of the lack of effective government should be applied.

Additionally, the concept requires further analysis both with reference to the international law rules regarding the creation as well as extinction of states. It remains to be clarified how the requirement for effective government in control of a state’s territory affects the continuing existence of states and what are the legal consequences should this essential precondition for statehood not be fulfilled for a

⁴⁵ As pointed out by Giorgetti, the discussion about relevant criteria is further complicated by the fact that ‘State failure is better described as a phenomenon in evolution, which, in a graphical representation, is better visualized as a line, not a point. Thus, while complete State collapse is the final stage of the phenomenon, there are several stages that link complete failure to a fully functioning State, depending on the residual capacity of a State to fulfil its obligations’. C Giorgetti, ‘Why Should International Law Be Concerned About State Failure’ 16 *ILSA JICL* 469 (2009-2010), at p. 483.

⁴⁶ J Crawford, *The Creation of States in International Law*, 2nd edn. (Oxford: Oxford University Press, 2006), pp. 721-722.

⁴⁷ *Ibid.*

prolonged period of time.⁴⁸ Chiara Giorgetti attempts to provide a basis for a principal approach towards state failure. The author makes an argument that state failure is a phenomenon characterised by a progressive inability of a state to perform its obligations both towards its own population and the international community, from which particular consequences should derive under international law at different points of this continuum.⁴⁹ Nevertheless, one of the most important premises which Giorgetti puts forward is that, despite alleged state failure, whether understood as a governmental collapse or a more complex process of societal disintegration, its sovereignty remains intact.⁵⁰ As shown by the example of Somalia, to which the author devotes a significant part of her book, the interventions by the international community in response to state failure should at all times observe the principle of sovereign equality. Notwithstanding the fact that it is probably more factually accurate, the description of state failure as a 'continuum' raises some concerns from the *jus ad bellum* perspective and in particular with reference to matter of self-defence and its requirements. That is primarily due to the uncertainty of the legal consequences at each given moment during the process of failure, as well as the difficulties in factually ascertaining whether a state in question has reached a certain 'level of failure' when the rules regarding the use of force in self-defence come into play. Following the utilitarian approach, it may therefore still be necessary to examine the possibility of

⁴⁸ As Geiß points out '...while loss of control over certain delimited parts of a state's territory is not uncommon, total and protracted loss of central control over the entire territory is rare and arguably warrants the specific categorization and suggestive designation as a failed state, in view of the various implications it entails at the international level'. R Geiß, 'Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties' 91 (873) *International Review of the Red Cross* (2009), at pp. 129-130.

⁴⁹ C Giorgetti, *A Principled Approach to State Failure. International Community Actions in Emergency Situations* (Leiden, Boston, Martinus Nijhoff Publishers, 2010), at p. 43.

⁵⁰ *Ibid.* at. p. 179.

constructing the definition of state failure for the specific purposes of the international rules concerning the use of armed force in self-defence. The above will be one of the matters addressed later in this thesis.

As noted above, state failure has been discussed from a variety of perspectives. Nonetheless, the issue which remains largely unexplored is the impact of the continuing existence of failed states on the rules regarding the use of force in self-defence in states' relations. Neither of the above mentioned publications directly discusses this. The complex process referred to as state failure is commonly accompanied by and associated with armed conflict and non-state actors control over vast proportions of the state's territory. This situation not only creates innumerable humanitarian problems, but also, as it often expands beyond the state's borders, raises multitude of difficult legal questions relating to the self-defence aspect of the *jus ad bellum*. In the circumstances where the state, and its government, as a central addressee of international legal obligations is largely inexistent and non-state armed groups take over the majority of the governmental functions, it is of a great importance to determine the applicable framework of international law regarding the use of force in self-defence and that is where the present thesis will attempt to fill the vacuum in the literature. Analysing the issue of state failure from the *jus ad bellum* perspective, it is evident that many descriptions of the phenomenon do not seem adequate for its purposes. The discussion on the notion relates predominantly, if not exclusively, to reasons for failure, prevention of failure, the reactions of the international community and state's rebuilding

process.⁵¹ In contrast, this thesis focuses primarily on the legal implications relating to the use of force in self-defence in the situations where the paradigm of traditional statehood is inapplicable.

It is hardly groundbreaking to argue that the prohibition of the use of force in states' relations has undergone some corrosion in recent decades. Undoubtedly, state failure and powerful non-state actors sit in the middle of the debate about international peace and security due to their potentially great impact on shaping the contemporary state practice regarding the use of force. Although for a long time, due to the fact that the United Nations Charter focuses on the inter-state use of force as the primary source of threats to international peace and security, most writing in the field related mainly to the use of armed force by states against other states;⁵² increasingly, the attention has been given in the relevant literature to the activities of non-state actors operating across frontiers and, in particular, those branded as transnational terrorists.⁵³ Notwithstanding the fact that state failure

⁵¹ See: A Ghani & Lockhard, C. *supra* note 37; Zartman, *supra* note 27; Rotberg, *supra* note 43; Giorgetti, *supra* note 49.

⁵² The most significant works on the use of force in international relations, published in the post-UN Charter era, include, amongst others: C H M Waldock, *The Regulation of the Use of Force by Individual States in International Law* (1952) 81 *Recueil des Cours* 455; D W, Bowett, *Self-Defence in International Law* (Manchester, Manchester University Press, 1958); I Brownlie, *The Use of Force by States in International Law* (Oxford, Oxford University Press, 1963); A Cassese, *Current Legal Regulation of the Use of Force* (Kluwer Academic Publishers, 1986); L Henkin, *Right v. Might: International Law and the Use of Force* (Council on Foreign Relations Press, 1991); A Ardent, & R J Beck *International Law and the Use of Force: Beyond UN Charter Paradigm* (London: Routledge, 1993); T M Franck, *Recourse to Force. State Action Against Threats and Armed Attacks* (Cambridge, Cambridge University Press, 2002); C Gray, *International Law and the Use of Force* (Oxford, Oxford University Press, 2004); Y Dinstein, *War, Aggression and Self-Defence* (Cambridge, Cambridge University Press, 2005); T Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester: Manchester University Press, 2005).

⁵³ See, *inter alia*: G Travalio, 'Terrorism, International Law and the Use of Military Force' 18 *Wisconsin International Law Journal* 145 (2000); D Brown, 'Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defence and Other Responses' 11 *Cardozo Journal of International and Comparative Law* 1(2003-2004); J Charney, 'Use of Force Against Terrorism and International Law' 95 (4) *American Journal of International Law* 835 (2001); M Byers, 'Terrorism, the Use of Force and International Law After September 11' 16 (2) *International Relations* 155 (2002); T

and the extraterritorial use of force against non-state actors within the framework of inter-state rules concerning the use of force in self-defence remains one of the most difficult and controversial areas of international law, it has received proportionally little scholarly attention. In particular, it remains insufficiently examined how state failure affects the international legal order by undermining the prohibition of the use of force which stands as one of the instrumental elements of state-centric, Westphalian system. Accordingly, this thesis will focus on ascertaining the impact of the continuing existence of state without effectively functioning governments and increasing dominance of non-state actor element on one of the exceptions to the prohibition of the use of force in states' relations, namely self-defence.

The discussion in the relevant literature regarding the idea of the use of force against non-state actors' attacks relates predominantly to either the relevant degree of state's involvement in such attacks⁵⁴ or, the actual capacity of the non-state actors to perpetrate the attack so that it can be considered an 'armed attack'

Franck, 'Terrorism and the Right of Self-Defence' 95(4) *American Journal of International Law* 839 (2001); S Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter 43(1) *Harvard International Law Journal* 41(2002).

⁵⁴ Article 51 of the UN Charter has been traditionally interpreted as excluding measures of self-defence against private attacks, unless a certain degree of state involvement could be inferred. See, *inter alia*: H Kelsen 'Collective Security and Collective Self-Defence Under the Charter of the United Nations', (1948) 42 *American Journal of International Law* 783-796; *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), 'Judgment of 27 June 1986', (1986) 14 ICJ Rep. para. 195. More recently, Ruys and Verhoeven argue that although self-defence against private attacks can be lawful, it is only providing that an attack is attributable to a state or a state is substantially involved in one. The authors 'reject the legality of self-defence in the absence of substantial state involvement, even with regard to failed states, as the acceptance of this idea would seriously erode the prohibition on the use of force and the principle of non-intervention and would overly jeopardise international peace and security'. See: T Ruys and S Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence' 10 *Journal of Conflict and Security Law* (2005), at p. 319.

under the Article 51 of the UN Charter.⁵⁵ Additionally, a number of commentators engage in the examination of the conditions attached to the right of self-defence against non-state actors.⁵⁶ Nevertheless, the question of when it is lawful to use force across borders against non-state actors remains insufficiently explored, particularly if such a military action takes place in a failed state setting. As will be analysed below, the existing literature does not satisfactorily answer all the questions pertaining to the implications of state failure and in particular the prolonged loss of effective government for the international rules regarding the use of force in self-defence in states' relations.

⁵⁵ For example, Yoram Dinstein questions restrictive approach towards self-defence against non-state actors' attacks arguing that it does not provide sufficient margin of action to the states whose interest is threatened. Referring to the fact that the perpetrator of the attack is not identified in Article 51, Dinstein confidently asserts that an armed attack can be carried out by the non-state actors acting alone. The determination of what constitutes the armed attack is therefore strictly speaking dependent primarily on the intensity of the attack. See: Y Dinstein, *War, Aggression and Self-Defence*, 5th edn. (Cambridge, Cambridge University Press, 2011). Invoking the prevalent role played in the development of the customary law by the practice of major states, Olivier Corten submitted that the US military operation in Afghanistan in response to the terrorist attacks of September 11, 'immediately rendered obsolete the conception according to which a military action against another state could be launched only if it could be demonstrated that it had participated in a substantial manner in an armed attack'. See: O Corten, 'The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate' 16 *European Journal of International Law* (2006), at p. 810. Theresa Reinold arrives at a similar conclusion stating that 'It is probably fair to conclude that as a result of international acquiescence of the U.S. intervention in Afghanistan, the existing rules governing the use of force have been called into question, with *Nicaragua* standard losing its validity as the yardstick for what constitutes and armed attack'. T Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-Defence Post 9/11' in 105 *American Journal of International Law* (2011), at p. 252. Other authors questioning the restrictive approach towards self-defence against non-state actors include, *inter alia*: T M Franck, 'Terrorism and the Right of Self-Defence', (2001) 98 *American Journal of International L* 840; or J Paust, 'Use of Armed Force Against Terrorists in Afghanistan, Iraq and beyond', (2002) 35 *Cornell Journal of International Law* 534

⁵⁶ T Franck, 'Editorial Comments: Terrorism and the Right of Self-Defence' 95 *American Journal of International Law* (2001), at p. 840; M Schmitt, 'Counter-Terrorism and the Use of Force in International Law' The Marshall Centre Papers no. 5, The George C. Marshall European Centre for Security Studies, at pp. 26-27; J Paust, 'Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond' 35 *Cornell International Law Journal* (2002), at pp. 533-534; C Greenwood, 'International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' 4 *San Diego International Law Journal* (2003), at p. 17. More recently, Noam Lubell also submitted that 'There is in fact plentiful evidence to provide solid support for the contention that non-state actors can be responsible for armed attacks which give rise to self-defence...This evidence rests on both a reading of the texts, and on the state practice in the interpretation of the rule'. See: N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford, Oxford University Press, 2011).

Some authors do acknowledge the difficulties of adopting the inter-state rules on the use of force in self-defence to the extraterritorial forcible measures undertaken against non-state actors which operate within failed state settings. In his recent contribution to the debate on the subject, Noam Lubell analyses the relevant rules of international law applicable to the extraterritorial use of force against non-state actors' attacks which cannot necessarily be attributed to a particular state.⁵⁷ The author analyses the use of force against non-state actors from the perspective of three international legal frameworks: *jus ad bellum*, *jus in bello* and the law enforcement framework found in the international human rights law. In the first part of his book, Lubell makes an argument that self-defence, as the only lawful option of unilateral extraterritorial use of force against non-state actors, can only be a reaction to an 'armed attack' as understood by Article 51 of the UN Charter. He underlines the position of States as the primary actors at the international level and interprets the existing rules so as to cover extraterritorial forcible measures against non-state actors. Consequently, Lubell argues that an attack by non-state actors may require a higher threshold than an attack by a state, however, he does not provide a direct answer as to what this threshold might be.⁵⁸ Similarly, although it is recognised that a lack of willingness or ability of a host state to prevent attacks from non-state actors is a part of a necessity requirement of self-defence, the author does not engage in a discussion regarding the assessment of the state's condition. It is not elaborated upon what constitutes state failure nor is it examined in detail how to establish state's unwillingness or inability for the *jus ad bellum* and in particular, self-defence purposes.

⁵⁷ N Lubell, *supra* note 56.

⁵⁸ *Ibid.* at page 51.

The most important defining criterion of failed states in legal terms is undoubtedly the loss of effectively functioning government. Consequently, one of the aspects to consider regarding the possible international responsibility of a failed state for the actions of non-state actors, is the question of attribution of conduct to a state. Thürer makes the general argument that a state with no organs or agents capable of acting on its behalf is not internationally responsible for the violations of international law committed by individuals in its territory.⁵⁹ On the other hand, Trapp explores the potential of existing legal rules to hold states responsible for their implication in the commission of terrorist attacks.⁶⁰ Despite the fact that the author's main prism of analysis is international terrorism, which definition she draws from the existing 'terrorism suppression conventions' as well as elements of practice of both the UN Security Council and the UN General Assembly⁶¹, some insights regarding the invocation of state responsibility for acts of non-state actors in general, remain relevant. Her analysis of the post September 11 states practice, leads to a conclusion that 'despite the ICJ's failure to engage the issue, there is a right under international law to use force directly against non-state terrorist actors operating from foreign territory. An attribution-based reading of 'armed attack' under Article 51 of the UN Charter should therefore be laid to rest'.⁶² Trapp focuses largely on the international legal tools aiming to address state-sponsored terror,

⁵⁹ *Supra* note 30, at p. 747. According to the author: [I]n principle, current international law holds that a State cannot be held liable for any breaches if it no longer has institutions or officials authorized to act on its behalf. In particular, the State cannot be held responsible for not having prevented offences against international law committed by private individuals or for not having called them to account for their conduct. The reason for this is that the State does not have the necessary power to act'.

⁶⁰ Trapp, K. *State Responsibility for International Terrorism. Problems and Prospects*. (Oxford, Oxford University Press, 2011).

⁶¹ *Ibid.* at p. 23.

⁶² *Ibid.* at p. 59.

rather than focusing on the lawfulness of extraterritorial forcible measures and the analysis of state's inability to prevent non-state actors' attacks. The author's examination of state practice in relation to the latter issues is not entirely convincing and an alternative interpretation has been offered by other commentators.⁶³ In particular, it has been suggested that, despite the fact that the concept of self-defence against non-state actors as traditionally interpreted by the ICJ is no longer satisfactory, some form of state attribution is still indispensable. Accordingly, the rules of attribution contained in Articles 4-11 of the International Law Commission Articles on State Responsibility ought to be differently or more loosely interpreted in cases of attacks by non-state actors.⁶⁴ As Ruys points out that this is primarily due to the recent shift in customary practice in relation to cross border attacks.⁶⁵ Nevertheless, it remains somewhat unclear as to how to deal with a difficulty in claiming the international responsibility of a failed state associated primarily with that state's inability to interact in the international level.⁶⁶

⁶³ Trapp's analysis of state practice in order to argue her case relies primarily on the examination of the Israel-Lebanon conflict in 2006 as well as various incursions of Turkey into Iraq in order to fight PKK. As Tom Ruys points out, however, 'states that recognized Israel's right of self-defence did not explain why the right was applicable in the present circumstances and refrained from elaborating on the legality of self-defence against attacks by non-state actors'. The same commentator stressed with respect to the Turkish operation against the PKK in 2007–2008 that the reactions of both the US and the EU were far from being unequivocal. See: Ruys, T *'Armed Attack' and Article 51 of the UN Charter. Evolutions in Customary Law and Practice* (Cambridge, Cambridge University Press, 2010), at p. 455.

⁶⁴ See, e.g., Murphy, S D, 'Terrorism and the Concept of "Armed Attack"' 43(1) *Harvard International Law Journal* (Winter 2002) at pp. 50-51; Travalio, G. and Altenburg, J. 'Terrorism, State Responsibility, and the use of Military Force', 4 *Chicago Journal of International Law* 97 (2003), at pp. 102, 107, 110–111; Ruys, T and Verhoeven, S. *supra* note 54, at p. 318-319.

⁶⁵ Ruys, T *supra* note 63, at p. 491.

⁶⁶ As Koskenmäki points out: '[a] claim concerning the responsibility of a failed state presented during its collapse would fail from the very beginning, since in the absence of a government, it has no *locus standi* in a judicial forum', See: R Koskenmäki 'Legal Implications Resulting from State Failure in Light of the Case of Somalia' 73 *Nordic Journal of International Law* (2004), at p. 34.

It is undoubtedly a challenging conundrum to solve trying to ascertain on what legal basis states could defend themselves against non-state actors' attacks emanating from failed states territories. The lawfulness of extraterritorial forcible measures has been consistently put into question. The extensive analysis of both state practice and *opinio juris* concerning the use of force against non-state actors conducted by Ruys led him to a conclusion that 'De lege lata, the only thing that can be said about proportionate trans-border measures of self-defence against attacks by non-state actors in cases falling below the Nicaragua threshold is that they are 'not unambiguously illegal'.⁶⁷ In his study, the author focuses primarily on the 'armed attack' requirement of self-defence and discusses each of the major areas of debate surrounding the concept, namely: what actions will constitute an armed attack (*rationae materiae*), when an armed attack begins and ends thus allowing a state to respond in self-defence (*rationae temporis*), and finally who may be responsible for an armed attack (*rationae personae*). He does not, intentionally, concentrate on the necessity and proportionality aspects of self-defence. As noted above, it has been proposed, that the necessity requirement for self-defence encompasses the inability or incapacity of the territorial state to prevent armed attacks from non-state actors. In that respect, Ruys analysis is somewhat incomplete and accordingly, there is a room for further analysis of state practice and *opinio juris* in terms of the necessity requirement for self-defence against non-state actors. The present thesis will aim to contribute to the debate.

The above analysis leads to a conclusion that a lot of the literature relating to the subject of extraterritorial use of force in self-defence against non-state actors

⁶⁷ Ruys, T *supra* note 63, at p. 491.

concentrates predominantly, if not exclusively, on the controversies surrounding the definition of an 'armed attack' in this context and further, to the proportionality of the use of force.⁶⁸ Very little scholarly attention has been given to the examination of the problem of inability of the territorial state to prevent non-state actors from using its territory to launch attacks. Ashley Deeks recognizes the necessity for the evaluation of the issue however, her analysis of the 'unwilling or unable' test fails to successfully argue the proposition that international law traditionally requires the state which is a victim of the attack by non-state actors, to assess the ability or willingness of a territorial state to suppress the threat itself first.⁶⁹ It is quite clear that with reference to the international legal consequences of the continuing existence of failed states, the analysis of the 'unwilling or unable' test undoubtedly proves relevant. It should therefore be further explored how the 'unable or unwilling' test could be applied and what it requires. This thesis's intention is to analyse whether state failure and its inability to prevent attacks by non-state actors provides sufficient legal basis for the exercise of the right of self-defence under the rules of *jus ad bellum* as it presently stands. Additionally, the issue needs to be considered from the allegedly unable territorial states perspective

⁶⁸ As Jean D'Aspremont points out: '[A]ttention now focuses not on the question of whether the use of force is permitted, but instead on whether the use of force is proportionate...Overall, claims that force can be used [against non-state actors] as a measure of self-defence are no longer the exception and are closer to becoming a rule'. D'Aspremont, J, 'Mapping the Concepts Behind the Contemporary of the Use of Force in International Law' 31 *University of Pennsylvania Journal of International Law* 1089(2009-2010), at p. 1120-1121.

⁶⁹ Although Deeks states the 'there is little question that the test exists as an internationally recognised norm governing the use of force, given how regularly states and commentators invoke it. Indeed, it is possible that the test has become customary international law'; she then proceeds on to explain that 'I have found no cases in which states clearly assert that they follow the test out of a sense of legal obligation (i.e., the *opinion juris* aspect of custom), nor have I located cases in which states have rejected the test. Even if one concludes that the rule does not rise to the level of custom, however, the rule makes frequent appearance in state practice and therefore is the appropriate starting point from which to determine how the norm should develop'. Deeks, A "'Unwilling or Unable": Towards a Normative Framework for Extraterritorial Self-Defence' 52 *Vancouver Journal of International Law* (2011- 2012), at p. 503.

– namely whether they are entitled to act upon the use of armed force by a victim state launched in response to the initial attack by non-state actors. Although it will not be its main focus, it is the intention of this thesis to provide some insights regarding this aspect of the problem which remains largely unexplored in the relevant literature.

It is the prevailing view that the statehood of failed states continues in international law despite the absence of effective government even for a prolonged period of time⁷⁰ and that international legal system is not willing to abandon the fundamental principle of sovereign equality of states. Nevertheless, the states in question suffer from serious difficulties in the exercise of their international legal personality. Article 51 of the UN Charter may well have been drafted in the context of dealing with armed attacks carried out by one state against another; nevertheless, it is undeniable that non-state actors increasingly present a serious threat to international peace and security.⁷¹ Although at times strongly contested, some recent state practice tends to accept the possibility of self-defence absent the

⁷⁰ See, *inter alia*: Georgetti, *supra* note 49, at p. 52: '[i]t is beyond doubt that State failure does not extinguish statehood, once it is given, and, in fact, failed States do not become extinct'; Thürer also recognizes that '[e]ven when States have collapsed, their borders and legal personality have not been called in question.' *Supra* note 28, at p. 752; Similarly, Geiss states that: '[q]uite strikingly, the legal personality of States that have lacked an effective government [such as] Somalia, for example, [...] has never been questioned.' *Supra* note 30, at p. 465.

⁷¹ The inherent difficulty is that, as stated by Ruys and Verhoeven: 'On the one hand, it cannot be accepted that states must simply undergo private attacks without having the right to defend themselves by using force against the home bases of these groups and their accomplices. It cannot be the Charter's intention that the authors and architects of state-sponsored terrorism should evade all deterrence and prospect of punishment if the fiction is that states are not involved and only their agents are deemed responsible for the terrorism. On the other hand state sovereignty is and remains one of the basic pillars of international law and order and should not be violated'. Ruys, T and Verhoeven, S, *supra* note 54 at p.310.

attribution of the conduct of non-state actors to the state itself.⁷² As Lindsay Moir concludes: 'Both common sense and realpolitik dictate that the military action against non-state actors in situations where the host state is either unable or unwilling to take preventive action may well be necessary, in that there is no reasonable or effective alternative to the use of force. Indeed, it may even be the case that the inability or unwillingness of a host state to take effective measures against non-state actors operating from within its territory is now seen as tantamount to the level of involvement required to render military action against non-state actors lawful'.⁷³ Nevertheless, the exact conceptual foundations of the extension of self-defence to the situations of armed attacks by non-state actors in the context of failed state is still very much a matter of debate. Further analysis of the ongoing state practice and relevant *opinio juris* is therefore necessary. Following the methodology proposed in the subsequent chapter, this thesis's goal will be to contribute towards the discussion and fill the above identified gaps in the literature.

1.3 Methodology

Doctrinal legal research methodology⁷⁴ is considered to be the most appropriate for the scope and context of this thesis. Accordingly, the study will focus primarily on

⁷² This is as well the opinion expressed by Gray, *supra* note 22, at p. 130. See also Van Steebnerghe, R 'Self-Defence in Response to Attacks by Non-State Actors in the Light of the Recent State Practice: A Step Forward?' 23 (1) *Leiden Journal of International Law* (2010) at p. 207.

⁷³ Moir, L *Reappraising the Resort to Force. International Law, Jus ad Bellum and the War on Terror* (Oxford&Portland, Hart Publishing, 2010), at p. 151.

⁷⁴ The aim of doctrinal research, otherwise known as 'black-letter' research is to 'systematise, rectify and clarify the law on any particular topic by a distinctive mode of analysis to authoritative texts that

the collection of the relevant body of law and analysis of how it applies. The contentiousness of the application of appropriate legal provisions is certainly one of the reasons why this research was undertaken, since its general objective is to explore what are the implications of the state of the law. Although the thesis does not intend to employ interdisciplinary outlook or methodology, it is considered that certain sections will benefit from the insight and conceptual knowledge produced by the international relations scholars. This is primarily relevant in consideration of the legal issues pertaining to state failure, as well as, although to a lesser extent, to the question of self-defence against non-state actors located in failed states' territories. The determination of the existing law will be followed by a consideration of the policy underpinning the international regulations and issues currently affecting the law and its application. Accordingly, alongside the doctrinal methodology, the thesis will analyse selected, recent state practice in order to ascertain how the actors in the legal system behave and in turn, how this behaviour affects the system itself. The examination of state practice will involve collection and analysis of data regarding various incidents of the use of extraterritorial forcible measures in self-defence by states against non-state actors. Subsequently, the most relevant case studies, examined in Chapter 5 below, will be identified based on the investigation such factual data with specific focus on the use of force by states in self-defence against non-state actors operating within failed state setting as described in detail in Chapter 3.

consists of primary and secondary sources'. See: M McConville and W Hong Chui, *Research Methods for Law* (Edinburgh University Press, 2007), at p. 4.

The most striking features of the international legal system are that it is consensual, decentralised and that there is no clear hierarchy among the sources of international law. In contrast to the domestic legal systems, it is not possible to single out institutions endowed with readily identifiable legislative and executive functions on the international plane. Furthermore, the jurisdiction of existing international judicial organs is not compulsory and there is no international legal instrument which possesses unambiguously constitutional character such as domestic constitutions or statutes. This has profound consequences for the conduct of research in international law which, for a long time, used to be primarily a system of customary law increasingly supplemented by treaty law.⁷⁵ As the

⁷⁵ The sources of international law are described in the Statute of International Court of Justice, Article 38 (I) which provides as follows: '1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.
- Similarly, *The Restatement of the Law 3rd: Foreign Relations Law of the United States*, Articles 102 and 103 refers to sources of international law and evidence of international law as follows:

§ 102 Sources of International Law

(1) A rule of international law is one that has been accepted as such by the international community of states

- (a) in the form of customary law;
- (b) by international agreement; or
- (c) by derivation from general principles common to the major legal systems of the world.

(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.

(4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.

§ 103 Evidence of International Law

(1) Whether a rule has become international law is determined by evidence appropriate to the particular source from which that rule is alleged to derive (§ 102).

(2) In determining whether a rule has become international law, substantial weight is accorded to

- (a) judgments and opinions of international judicial and arbitral tribunals;
- (b) judgments and opinions of national judicial tribunals;
- (c) the writings of scholars;

doctrinal research is based on authority and hierarchy, the objective is to construct any statements of what the law is on primary authority and that is either a legislation or case law. Accordingly, the kaleidoscope of sources of international law deeply affects the structure of legal research conducted in this field. As a result, for the analysis undertaken in this thesis to be effective, it is required to pay close attention to a particular system of primary sources of international law and their interpretation. It is therefore necessary to begin with the identification of the relevant treaties and customary international law⁷⁶ as well as, where applicable, general principles of international law. Consequently, the body of relevant judicial decisions will be identified as they are 'subsidiary means for the determination of the rules of law'⁷⁷ as well as the applicable state practice. Likewise, the secondary sources in the form of the works of leading scholars on the subject, contained in the monographs and law journals, will be examined in their supporting role. Similarly to judicial decisions, these are not in themselves sources of international law, however, they are significant for the purpose of ascertaining the state of customary international law in relation to questions raised as well as helpful in interpreting and applying the treaties. The international law materials can be collected from a multitude of resources and accordingly, in order to discover all the possible relevant documents, the author will inspect, amongst others, the United Nations Treaty

(d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states'.

⁷⁶ According to the International Law Association *Statement of Principles Applicable to the Formation of General Customary International Law*: 'a rule of customary international law is one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future'. And further 'If a sufficiently extensive and representative number of States participate in such a practice in a consistent manner, the resulting rule is one of "general customary international law". At p. 8 of the Statement. International Law Association, London Conference 2000.

⁷⁷ ICJ Statute Article 38 (I) (d)

Collection; United Nations, African Union, European Union and other international organisations online document databases; International Law Commission texts, instruments and final reports; International Court of Justice and other international tribunals databases; International Law Association Reports; current awareness series; as well as online databases (HeinOnline, Westlaw, LexisNexis).

The ability to identify and interpret treaties as well as knowledge of the law relating to the operation of the treaties is a fundamental requirement for an effective research in any area of international law. The Vienna Convention on the Law of Treaties codifies the methods of treaty interpretation and in particular Articles 31-33 contain the rules of treaty interpretation.⁷⁸ The primary rules for interpreting any treaty are contained in Article 31 and indicate the necessity to take into consideration three main elements, namely the text, context as well as the object and purpose of a treaty.⁷⁹ The supplementary means of interpretation, such as the analysis of the *travaux préparatoires* and the circumstances of the treaty conclusion, can be found in Article 32.⁸⁰ Nevertheless, as pointed out by Malgosia Fitzmaurice,

⁷⁸ Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, Articles 31-33, 1155 United Nations Treaty Series 331.

⁷⁹ Article 31 VCLT. General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties in as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

⁸⁰ Article 32 VCLT. Supplementary Means of Interpretation

‘the issue of treaty interpretation has always been one of the most difficult questions in treaty law, which the 1969 Vienna Convention on the Law of Treaties did not settle in a satisfactory manner’.⁸¹ The traditional methods of interpretation of treaties will obviously be followed throughout this thesis. Additionally, the author intends to incorporate the dynamic interpretation of treaties as it is conceivable that adoption of such a method of interpretation will benefit the research undertaken here. The dynamic/evolutive interpretation of treaties is a part of the teleological principle which focuses on the analysis of the object and purpose of the treaty.⁸² Although the dynamic interpretation of treaties appears to be particularly relevant in relation to human rights conventions, the dynamism of treaty interpretation could be productive and in fact at times necessary in order to account for the practice of state parties to the treaty and organs of the international organisation in relation to other multilateral treaties as well. According to Bernhard, the Charter of the United Nations provides the best example for the necessity of the evolutive interpretation.⁸³ Undoubtedly, the international law regulations regarding the use of force contained in the UN Charter are relatively brief and, as Professor Gray points out, ‘cannot constitute a comprehensive code’.⁸⁴ Accordingly the employment of the dynamic treaty

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

⁸¹ M Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties’ part I, 21 *The Hague Yearbook of International Law* 101 (2008), p. 101.

⁸² *Ibid*, at p. 117.

⁸³ R Bernhard, ‘Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights, 42 *German Yearbook of International Law* 11 (1999), at p. 20.

⁸⁴ Gray, *supra* note 50, at p. 7.

interpretation, in this instance, the UN Charter rules on the use of force in states' relations, will be necessary in order to account for the practice of state parties in relation to the extraterritorial use of force in self-defence against non-state actors operating within failed states.

It has been submitted that although stability is an essential component of every legal order, placing too much emphasis on this aspect would neglect the temporal dimension of law.⁸⁵ In that sense, stability requires adaptability and change in accordance with the evolution of the situation for which it was designed to apply. It is of a great importance to note that the survival of unrevised treaty obligations largely depends on the ability to follow the political, social and economic changes which transform the scope and indeed sometimes the very nature of the obligations agreed upon. According to Pierre-Marie Dupuy, there are two variations of evolutionary interpretation: one supported by memory and therefore based on the will of the parties as manifested in the past; and the other one heading more towards prophecy and preoccupied with ensuring the continuing existence of objectives articulated by a community.⁸⁶ Following the first version one would interpret treaty provision in such a way so that it reflects a common desire of the parties as if they had renegotiated the same agreement taking into consideration changing circumstances. On the other hand, and in accordance with the second variation, evolutionary interpretation of a treaty would manifest itself in a concern about the furtherance of a collective plan and achievement of a shared purpose. However, as pointed out by Dupuy, 'according to the current state of the positive

⁸⁵ P-M Dupuy, 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy' in Cannizzaro, E. ed. *The Law of Treaties Beyond the Vienna Convention*, p. 123.

⁸⁶ *Ibid.*

international law, the ICJ only allows for a dynamic interpretation of a treaty where justified by notions and concepts in the terms of the treaty from which it may be inferred that the text is open to considerations of factual or legal evolution after the conclusion of the treaty'.⁸⁷ The terms in which a treaty provisions are drafted are therefore the most important indication of whether the text is open to an evolutionary interpretation. Accordingly, the examination of selected state practice will focus on ascertaining whether and if so, how, the unrevised provisions of the UN Charter regarding the use of force in self-defence have been interpreted by states using dynamic interpretation to the specific circumstances of failed states and armed attacks perpetrated solely by non-state actors.

As the UN Charter provisions regarding the use of force in states' relations are rather brief, the UN Security Council's resolutions play an important role in establishing the current state of the law in this relation. The interpretation of the UN Security Council's resolutions however, similarly to the interpretation of treaties presents some difficulties. The International Court of Justice did state the following in the 1971 Namibia Advisory Opinion: 'The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked, and in general all circumstances that might assist in

⁸⁷ *Ibid.* at p. 131

determining the legal consequences of the resolution of the Security Council'.⁸⁸ Consequently, as Wood points out, 'interpretation of the SCRs requires an understanding of the nature of the Security Council and its place under the United Nations Charter and an appreciation of the nature and indeed variety of SCRs. And it also requires some knowledge of how they are drafted'.⁸⁹ The rules regarding the interpretation of the UN Security Council's resolutions have not been codified unlike the rules regarding the interpretation of treaties. Nevertheless, there are certain similarities to the rules of interpretation contained in Article 31 and 32 of the VCLT and accordingly, the first step would be to decide which terms of the resolution are to be interpreted. It is obviously important to note that, unlike most treaties, the Security Council's resolutions are not self-contained in that they refer to other documents, or incorporate by reference other documents, and often constitute part of a series. Article 2 paragraph 2 of the UN Charter, according to which all Members shall fulfil in good faith the obligations assumed by them in accordance with the Charter, supports the requirement of good faith in interpretation of the Security Council's resolutions. Furthermore, the aim of the interpretation should be to give effect to the intention of the Council as expressed by the words of the Council and taking into consideration the surrounding circumstances. Accordingly, as Wood notes 'In case of the SCRs, given their essentially political nature and the way they are drafted, the circumstances of the adoption of the resolution and such preparatory work as exists, may often be of a

⁸⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion of 21 June 1971, ICJ Reports 1971, para.53.

⁸⁹ M C Wood, 'The Interpretation of Security Council Resolutions' 1 *Max Planck Yearbook of United Nations Law* 73 (1995) at p. 77.

greater significance than in the case of treaty. The Vienna Convention distinction between the general rule and supplementary means has even less significance than in the case of treaties'.⁹⁰ Consequently, when interpreting the Security Council's resolutions attention will be given, more so than in the case of treaties, to the overall political background as well as the background of related Security Council action.

It is often submitted that purely doctrinal research is too narrow in its scope and application to understand law.⁹¹ While rules certainly guide and structure legal environment, their application involves a multitude of factors. The practice of international law, being no exception to this statement, occurs in a wider political context. The legal rules cannot in themselves provide a complete statement of the law in any given situation. This can only be discovered by application of the relevant legal provisions to the particular facts of the situation under consideration. Consequently, the research undertaken in this thesis intends to collect and analyse data regarding recent state practice in relation to the use of force in self-defence against non-state actors acting from a territory of a failed state. According to Yin, a case study is a 'study that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between the phenomenon and context are not clearly evident'.⁹² The analysis of selected case studies undertaken in this thesis will have the characteristics of both descriptive and evaluative research. The starting point will be to collect data regarding a set of factual circumstances as

⁹⁰ *Ibid.* at p. 95.

⁹¹ See for example D W Vick 'Interdisciplinary and the Discipline of Law, 31 *Journal of Law and Society* 163 (2004), p. 164.

⁹² R K Yin, *Case Study Research Design and Methods*, 2nd edn. (Thousand Oaks, CA: Sage Publications, 1994), p.13

encompassed in the notion of extraterritorial use of force in self-defence against non-state actors. The most relevant cases of state practice will be selected according to specified criteria described in detail in the following chapters. The collection of data regarding the factual evidence will be followed by its evaluation based on the analysis conducted in the preceding chapters. It will be examined how the law regarding use of force in international relations works in practice and in particular its influence on the actions, attitudes and expectations of states. As pointed out by Armstrong, Farrell and Lambert, 'the content of any legal system will in practice inevitably tend to reflect the interests and assumptions of those most able to make their voices heard in the law-making process. These, in turn, will tend to be the more powerful members of the community to which the legal system applies'.⁹³ The case analysis will therefore also aim to draw conclusions about whether and, if so, how, recent state practice interprets and influences the content of the regulations regarding the use of force in self-defence in international relations.

The factual materials regarding selected incidents of the extraterritorial use of force in self-defence against non-state actors will be gathered using a variety of sources including official documents as well as, where appropriate, press reports and academic works. A state is a legal person and accordingly its will is necessarily expressed through the choices and conduct of natural persons whose activities are legally attributable to it, and in particular its government and any other person,

⁹³ D Armstrong, T Farrell and H Lambert *International Law and International Relations*, 2nd ed. (Cambridge, Cambridge University Press, 2012), p.302.

organ or institutions exercising official public authority or public functions.⁹⁴ State practice will therefore be evidenced by reference to a wide array of materials. These will include speeches by state official and diplomats, policy statements, press releases and communiques, reports of military activities, diplomatic correspondence and comments by governments on the work of international bodies, voting records in international forums and others. State practice can also include omissions and these will be considered where necessary. Equally, any protests will be deliberated upon as they are significant in the case of alleged new rules of customary international law

1.4 Structure of the thesis

It is intended that the structure of this thesis will shape as outlined below. **Chapter One** comprises an introduction which presents the research question, its justification and the methodology applied in seeking the answer to it. **Chapter Two** investigates and critically assesses the concept of statehood and sovereignty in international law. The main research question posed in this section concerns the international law regulations applicable to statehood – primarily its creation but also, extinction. Initially however, the concepts will be outlined from a historical perspective for the purpose of presenting how they developed through legal reasoning. The research method adopted in this Chapter will be generally doctrinal,

⁹⁴ The International Law Association identifies four principles regarding the act constituting state practice, namely: 1. When defining State practice - the objective element in customary law - it is necessary to take account of the distinction between what conduct counts as State practice, and the weight to be given to it. 2. Verbal acts, and not only physical acts, of States count as State practice. 3. Acts do not count as practice if they are not public. 4. In appropriate circumstances, omissions can count as a form of State practice. *Supra* note 76, at pp. 13-16.

as the author analyses the basic concepts in the law of statehood which will be relevant for the subsequent chapters. The principal aim will be collection of the relevant body of primary as well as secondary sources in order to identify the law and how it applies. In terms of the definition of statehood in international law, the 1933 Montevideo Convention on the Rights and Duties of States⁹⁵ is the starting point of the analysis. The other applicable documents would be, amongst others, the 1991 European Communities 'Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union", the 1969 Vienna Convention on the Law of Treaties and the applicable provisions of the UN Charter. Additional materials such as the relevant United Nations General Assembly's resolutions, including the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples or the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, will be examined. Equally, a number of relevant international cases will be investigated. Additionally, there is a significant body of legal literature on the subject.⁹⁶ Nevertheless, the above is obviously only a short selection of the materials to be investigated. It will be argued that, notwithstanding the fact that the notion of sovereign statehood has profound implications for the nature of international law, its definition remains unsatisfactory. The examination of the criteria for statehood

⁹⁵ Convention on Rights and Duties of States (signed 26 December 1933, entered into force 26 December 1934) 165 LNTS 19

⁹⁶ See: *inter alia*: H Lauterpacht, *Recognition in International Law* (Cambridge, Cambridge University Press, 1947), H Kelsen, *General Theory of Law and State* (Cambridge, Harvard University Press, 1949), R Higgins, *The Development of International Law through the Political Organs of the United Nations* (London, Oxford University Press, 1963), J Crawford, *The Creation of States in International Law*, 2nd edn. (Oxford, Oxford University Press, 2006), I Brownlie, *Principles of Public International Law*, 7th edn. (Oxford, Oxford University Press, 2008).

in this Chapter will identify the legal context in which factual issues arise. Several case studies will be selected in order to attempt to answer the question whether due to the contentious character of the criteria for statehood, the process of creation and recognition of new states remains overwhelmingly politicised.

The disputes surrounding criteria for creation and recognition of states pertain to efforts to analyse legal and factual issues unravelling throughout the continuing existence of states, as best evidenced by the 'state failure' phenomenon. Accordingly, in **Chapter Three**, the more traditional doctrinal methodology focused on finding the applicable legal rules, will be complemented by problem orientated research centred around the examination of the issue of state failure in international law as well as the policy underpinning the existing law's approach towards this dilemma. In terms of the primary and secondary sources analysed in this Chapter, a lot of the documents referred to in the preceding section on statehood in international law will have relevance for the investigation of the 'state failure' phenomenon. There are obviously some additional sources which will be studied, such as for example, the United Nations International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, United Nations Secretary-General 'Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations', as well as a number of the United Nations Security Council and General Assembly Resolutions. Even more importantly, however, the recent state practice in connection to the state failure phenomenon will be closely examined.

Chapter 3 will consider to what extent the criteria for the recognition of statehood in international law are relevant for the examination of the viability of existing states. It will be scrutinised whether and, if so, how, statehood is altered by changes to the constitutive elements of a state from the international law's perspective. The Chapter also aims to assess if the sovereignty of a state can be questioned due to prolonged periods of time without effectively functioning governmental authorities and the state's inability to participate in international affairs. Expansive descriptions of the concept of 'failed state' embrace a large number of states which temporarily do not fulfil some of the requirements for effective and legitimate government. They are accordingly more in line with the broad definitions of the minimum requirements of government preferred by the political perspective to state collapse. On the contrary, in legal discourse, it would only seem relevant for the purposes of the legal analysis, to reserve the notion of 'failed state' to territorial entities where the governmental authority ceased to function or disappeared for a prolonged period of time. In order to position the notion of state failure in a wider political context, the perspective of international relations will be integrated into the investigation of the matter. There are some considerable differences between the methodology proposed by international law and international relations. The disciplines share the same research area; however, they employ different presumptions, questions, data collection methods and nature of the conclusions.⁹⁷ Whereas the international relations scholars are primarily

⁹⁷ For further exploration of the debates surrounding differences and well as interface between international law and politics see, amongst others: M Byers (ed.) *The Role of Law in International Politics. Essays in International Relations and International Law* (Oxford, Oxford University Press, 2000); T Biersteker, P Spiro, C Sriram and V Raffo (eds.) *International Law and International Relations: Bridging Theory and Practice* (London, Routledge, 2007); D Armstrong, T Farrell, and H

interested in understanding how and why states and other actors on the international plane behave in the ways that they do, the nature of the international system, and the role of international actors, processes and discourses; the international law preoccupies itself primarily with the regulation of international affairs. The Chapter will therefore analyse, without actually employing the interdisciplinary methodology, whether and if so how, the international relations perspective can contribute towards understanding of the state failure phenomenon in legal context. It will be discussed whether in fact that the international relations scholars have embraced the concept of state failure and produced a considerable amount of conceptual knowledge about the subject matter can be useful for the international law discourse. The Chapter aims to conclude with the workable definition of a 'failed state' in international legal context.

Drawing on the doctrinal analysis conducted in Chapters Two and Three **Chapter Four** examines the applicable 'primary' and 'secondary' rules of international law regarding the use of force in self-defence in response to attacks by non-state actors located in failed states. The extraterritorial use of force against non-state actors includes a wide variety of incidents and the framework for addressing these actions is not always clear and consequently, it is necessary to identify applicable legal rules. **Chapter Four** will therefore explain the fundamental concepts involved in the discussion. Undoubtedly, the most significant multilateral treaty in terms of the regulation of the use of force in states relations is the United Nations Charter. The Charter departed from the Covenant of the League of Nations and provided a new

Lambert *International Law and International Relations*, 2nd ed. (Cambridge, Cambridge University Press, 2012).

terminology and first expression of the rules regarding use of force in their modern form. Accordingly, the position of the UN Charter relating to the issues in question will be examined. The Chapter will deliberate upon the question of whether the state-centric security regime envisaged by the UN Charter is in fact adequate to face the problem of failed states and powerful non-state actors, or whether there is a gap in a treaty based regime governing the use of force in self-defence in international relations. If the latter is the case, how, if at all, are the UN Charter regulations supplemented by the customary law? Consequently, the question of the legality of extraterritorial self-defence measures against non-state actors under international law rules will be discussed. In particular, if there is a customary right of self-defence of victim state which is not contingent upon consent of the host state and what are the conditions under which the victim state may act in self-defence against non-state actors. How do the conditions of necessity and proportionality relate to self-defence against non-state actors' attacks? Is the organisational structure of non-state actors at all relevant for the *jus ad bellum* purposes? Most importantly however, the Chapter investigates if state failure has in fact contributed to shaping various incipient doctrines relating to the use of force in self-defence. Is the implicit or explicit invocation of the state weakness and incapacity to act sufficient basis for intervention? The conceptual routes, by which the notion of self-defence can accommodate the contemporary state practice of armed force used against non-state actors operating within 'failed states', are examined. 'Attribution' of responsibility to a state for the actions of non-state actors presents a great juridical challenge in the context of balancing between the sovereignty of failed state and legitimate grounds for self-defence. More generally,

the underlying question of this section of the thesis will be whether it is necessary to contextualise the building blocks of international law – sovereign equality and non-intervention – in order to address the issues raised by state failure and non-state actors.

Apart from the UN Charter, there are a number of additional primary as well as secondary sources which have to be analysed in order to reflect the evolution of the law regarding use of force in states relations. These are, amongst others, regional arrangements such as for example Constitutive Act of the African Union and the later African Union Non-Aggression and Common Defence Pact, The Charter of the Organisation of American States or The North Atlantic Treaty. Although generally the subsidiary sources for identifying evidence of customary law, the judicial decisions played an incredibly important role in the evolution of the regulations regarding the use of force in self-defence. Accordingly, it will be necessary to revert to such landmark decisions by International Court of Justice as the 1948 Corfu Channel Case, the 1986 Nicaragua Case, 2003 Oil Platforms Case, the 2004 Advisory Opinion regarding the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory or the 2006 Armed Activities on the Territory of Congo case. Similarly, the United Nations Security Council and the General Assembly numerous resolutions on the matter play an integral part in the analysis of the current state of the use of force regime in states' relations.

The primary goal of the penultimate **Chapter Five** will be the identification and analysis of recent state practice in relation to the use of force in self-defence against non-state actors operating from a territory of a 'failed state'. The main

research questions which this section will endeavour to answer are, firstly, whether it can be submitted that states increasingly invoke self-defence to justify responses to attacks committed solely by non-state actors acting on the territory of a failed state; secondly, how does the alleged failure of a territorial state affect actions undertaken by victim states; and finally, is the recent state practice consistent enough and acceptable by the international community so that it may possibly have an impact on customary international law rules regarding the use of force in self-defence. There are frequent instances of extraterritorial use of force by states against non-state actors located in other jurisdictions. It is, however, not anticipated that this thesis will consider all of them. Many of the incidents of the extraterritorial use of force against non-state actors are nowadays referred to as constituting a part of the 'war on terror'. Using the context of terrorism as a frame of reference for this thesis however, is not considered to be the most useful approach. Firstly, because of the fact that the definition of terrorism has not been unanimously agreed upon and secondly due to the controversies surrounding the notion of the 'war on terror' – the actions taking place under this heading as well as whether such 'war' exists at all and if so, what its legal and practical meaning is. Consequently, the second criterion for selection of the relevant case studies will be that of a factual and visible phenomenon of extraterritorial use of force in self-defence against non-state actors located in failed state, as defined in Chapter Three. The choice therefore, will not be guided by unclearly defined notion of extraterritorial forcible counter-terrorist measures. The final important criterion will be that of the alleged failure of a territorial state where non-state actors operate. As stated above, the proposed definition of state failure will be provided in

Chapter Three and only the cases where the territorial states conform to that definition will be examined.

The foundation of the analysis undertaken in this thesis is international law as it currently stands. Whereas in some instances past cases may be relevant, the author does not intend to conduct a historical analysis of the development of the rules regarding the use of force in international relations. A number of issues examined may certainly raise questions about the adequacy of the international law in certain areas and at times, claims of a need for development. These will be addressed and perhaps in some cases supported by the results of the research. Overall however, the examination will be centred on the question of how the existing international law can assist in regulating the matters under discussion here.

CHAPTER 2

INTERNATIONAL LAW AND STATEHOOD

2.1 Introduction

This chapter identifies and analyses international law rules regarding statehood – primarily its creation and continuity as well as, to some extent its extinction. The introductory section provides the examination of the principle of sovereign equality of states from a historical perspective. Subsequently, this part of the thesis will be dedicated to the inquiry regarding the principal criteria for statehood and their application. It will furthermore outline the development of any additional criteria for statehood. The main goal of this chapter, however, will be to establish whether the statehood is altered by changes to its constitutive elements from the formal legal perspective. To that end, the relevant international norms and principles, as well as, state practice and *opinio juris* will be analysed. The Chapter will cover the issue of the relationship between the constitutive elements of statehood and the process of creation, transformation and extinction of states. Additionally, the dynamics of the state in time will be considered, in order to identify the different characteristics and effects that the processes of creation, transformation and extinction of a state have on the existence of statehood under international law in general. This chapter is this first part of two main sections of the thesis. The analysis carried out therein provides the essential starting point and background for the subsequent investigation of the failed state phenomenon. The second main part of

the thesis builds upon chapters two and three by way of examining the impact of state failure on the use of force in self-defence against non-state actors.

2.2 States as the primary subjects of international law. The principle of sovereign equality of states in historical perspective

‘A subject of the law is an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims’.¹

Sovereign states constitute building blocks of the modern world order and the primary subjects of international law. It is generally recognized that the concept of sovereign equality of states started to dominate, at least in Europe, since the 1648 Peace of Westphalia. Historically, ever since then, international law has been perceived as an essentially state-centric discipline.² Consequently, the emergence of many new states throughout the twentieth century has to be considered a major

¹ I Brownlie, *Principles of Public International Law*, 6th edn (Oxford, Oxford University Press, 2003), p.57.

² Even though it is widely accepted that the congresses in Osnabrück and Münster, which ended the Thirty Years War in Europe, were the forum in which the transition from the vertical-imperial to the horizontal inter-state model took place, from the historical perspective such statement must be considered an oversimplification. As John Hilla points out: ‘The myth of Westphalia creates an impression that the Peace rescued the independence and autonomy of European states from the unjust oppression of international power. The treaties themselves, which are concerned with practical settlements, espouse none of this sort of propaganda. The treaties are devoid of any mention of sovereignty or of any related concepts, such as non-intervention and there is no mention of imperial or papal prerogatives or of the balance of power...Rather the two main areas of concern in the treaties are related to the practice of religion and the settlement of territories’; J Hilla, ‘The Literary Effect of Sovereignty in International Law’, 14 *Widener Law Review* 77 (2008), p. 114. From the historical perspective, as Christop Schreuer notices: ‘The Empire existed until 1806 and the process towards sovereign equality was gradual. It culminated with the collapse in the early twentieth century of the Austro-Hungarian and Ottoman Empires, and the displacement of the Concert of Europe as the most important international arena by an open global community of states’; C Schreuer, ‘The Waning of the Sovereign State: Towards a New Paradigm for International Law’, 4 *European Journal of International Law* 447 (1993), p. 447.

political development having a substantial impact on both international law and international relations. In parallel, throughout the latter part of the twentieth century the position and functions of states, both on domestic and international level, have changed rapidly. Due to transforming social, economic and political dynamics new standards of governance have emerged, whereupon national governments have to bear increasing responsibilities towards the inhabitants of the territorial entity they control. Additionally, states become ever more inter-dependent and consequently, their obligations towards each other and international community as a whole increase.

Despite fast changing international settings, states undoubtedly remain the primary subjects of international law. As Professor Wolfgang Friedmann observes,

‘The basic reason for this position is, of course, that ‘the world is today organized on the basis of the co-existence of States, and that fundamental changes will take place only through State action, whether affirmative or negative’. The States are the repositories of legitimate authority over peoples and territories. It is only in terms of State powers, prerogatives jurisdictional limits and law making capabilities that territorial limits and jurisdiction, responsibility for official actions, and a host of other questions of co-existence between nations can be determined (...) This basic primacy of the State as a subject of international relations and law would be

substantially affected, and eventually superseded, only if national entities, as political and legal systems were absorbed in a world state'.³

Although written in 1964, the above statement is very much relevant to present times and as Professor Higgins stated 'States are...still at the heart of international legal system'.⁴

Notwithstanding the unquestionable importance of statehood in international law, it has to be noted that it remains to some extent an unsatisfactorily defined concept. Indisputably, the notion of state is a particularly complex one. It is not only the domestic elements such as constitutions, legislatures, courts, elections, parties, bureaucracies, local governments and many more that form statehood. The expression of sovereignty internationally – mutual recognition, diplomacy - is equally important. It has been argued that '[t]he existence of a state is a question of fact and not of law. The criterion of statehood is not legitimacy but effectiveness...'.⁵ The statement reflects postulates of the declaratory theory, which describes statehood as a legal status independent of recognition. Accordingly, if a state already exists, the legality of its creation and existence is somewhat an abstract issue, as it is necessary for the law to recognize a new situation despite its alleged illegality. Consequently, where the state does not effectively exist, rules considering it as legitimately functioning are pointless. As Sir Hersch Lauterpacht formulates it:

³ W Friedmann, *The Changing Structure of International Law*, (New York: Columbia University Press, 1964), p. 213.

⁴ R Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Oxford University Press, 1994), p.39.

⁵ Foreign Ministry Eban (Israel), arguing against a request for an advisory opinion of the International Court on the status of Palestine: SCOR 340th mtg, 27 July 1948, p. 29-30.

‘The guiding juridical principle applicable to all categories of recognition is that international law, like any other legal system, cannot disregard facts and that it must be based on them provided they are not in themselves contrary to international law’.⁶

The constitutive theory of statehood on the other hand, asserts that the rights and duties pertaining to statehood derive from discretionary recognition by other states. Accordingly, any rules granting a status of a state to a territory that is not being recognized as such by the international community seem futile.

According to James Crawford neither of the above mentioned theories appropriately explains modern practice. In general, declaratory theory confuses ‘fact’ with ‘law’ – ‘[f]or, even if effectiveness is the dominant principle, it must nonetheless be a legal principle’.⁷ On the other hand, the constitutive theory incorrectly equates identification of subjects in international law with diplomatic recognition and ‘fails to consider the possibility that identification of new subjects may be achieved in accordance with general rules or principles rather than on an ad hoc, discretionary basis’.⁸ The most important question behind these considerations is, according to Crawford, to what extent creation and later existence of a state is simply a matter of fact and to what extent it is regulated by international law. As it will be discussed subsequently, international law is primarily concerned with the creation of states. Once a territorial entity becomes a state, it

⁶ H Lauterpacht, *Recognition in International Law*, (Cambridge, Cambridge University Press, 1948), p. 91.

⁷ J Crawford, *Creation of States in International Law*, 2nd edn (Oxford, Oxford University Press, 2006), p.5.

⁸ *Ibid.*

seems that even considerable changes to the constitutive elements of statehood do not dissolve it.

The Montevideo Convention on Rights and Duties of States in the Article 1 provides that: 'The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory, (c) government; and (d) capacity to enter into relations with other states'.⁹ Accordingly, the most commonly referred to legal characteristics of a state include capacity to perform acts, make treaties in the international sphere as well as an exclusive competence with regard to its internal matters, although, obviously, international law can impose certain constraints. States are not subject to compulsory international process, jurisdiction, or settlement without their consent and, as recognized by the Article 2(1) of the United Nations Charter, in principle states have equal status and standing. Finally, derogation from the abovementioned principles shall not be presumed:

'In case of doubt an international court or tribunal will tend to decide in favour of the freedom of states' action, whether with respect to external or internal affairs, or as not having consented to a specific exercise of international jurisdiction, or to a particular derogation from equality'.¹⁰

Generally speaking, the five above mentioned principles constitute the core of the concept of statehood – the essence of the special position of states in international law. Nevertheless, it has to be noted that the exclusive attributes of states do not

⁹ Montevideo Convention on the Rights and Duties of States of 26 December 1933, (1933) 165 *League of Nations Treaty Series* 19.

¹⁰ *Interpretation of Peace Treaties (Second Phase)*, International Court of Justice Reports 1950, p.228-9.

prescribe specific rights, powers and capacities that all states must, in order to be states, possess. These attributes should rather be considered as presumptions that such rights, powers and capacities exist unless otherwise stipulated.

While all the above mentioned legal characteristics of the state are important, sovereignty is probably the one which remained the most controversial and broadly discussed over the centuries.¹¹ The theory of sovereignty had been elaborated upon by Aristotle as well as Roman and Medieval laws. Jean Bodin wrote about it in his 1576 treatise *Six Livres de République*, creating what became known as the theory of 'absolute' sovereignty. Grotius, the so-called 'father of international law', for the first time referred to sovereignty in the context of relations between states.¹² At approximately the same time, Thomas Hobbes created the theory of 'uncommanded commander' – sovereignty understood as subject to no exception in natural or divine law.¹³ The subject had been approached basically by all the most important political philosophers between seventeenth and twentieth century: Samuel Pufendorf¹⁴, John Locke¹⁵, Jean-Jacques Rousseau¹⁶, Immanuel Kant¹⁷, Georg Hegel¹⁸, Jeremy Bentham¹⁹, John Austin²⁰ and many others.

¹¹ 'There exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon', L Oppenheim, *International Law*, Sir Arthur D. McNair ed., 4th ed., 1928, p.66.

¹² 'The power is called sovereign whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will', Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, 1625, Francis W. Kelsey trans., (Clarendon Press, 1925) p. 102.

¹³ T Hobbes, *Leviathan*, 1651, Edited with an introduction and Notes by J. C. A. Gaskin (Oxford, Oxford University Press, 1996).

¹⁴ S Puffendorf, *De Jure Naturae Et Gentium Libri Octo*, Introduction by Walter Simons (Oxford, Clarendon Press Clarendon Press; London: Humphrey Milford, 1934. Reprinted by W.S. Hein & Co., 1995. Cloth. New. Carnegie Classics of International series. Reproduction of 1688 Latin edition (first published 1672).

¹⁵ J Locke, *Two Treatises of Government*, edited by Peter Laslett, Cambridge Texts in the History of Political Thought (Cambridge, Cambridge University Press, 1988).

In the eighteenth century Emmer de Vattel took a major step forward in developing the external aspect of sovereignty. In *The Law of Nations* the author laid theoretical foundations of international law and particularly the doctrine of equal sovereignty.

According to Vattel:

‘Nations or States are political bodies, societies of men who have united together and combined their forces, in order to protect their mutual welfare and security. Such a society has its own affairs and interests; it deliberates and takes resolutions in common, and it thus becomes a moral person having an understanding and a will peculiar to itself, and susceptible at once of obligations and of rights’.²¹

Consequently, he defined the law of nations as ‘the science of the rights which exists between Nations or States, and of obligations corresponding to these rights’.²² States in Vattel’s theory were free and independent, although, he also noticed that the existence of international community requires certain degree of mutual respect among nations.

Accordingly, with regard to sovereign equality of states Vattel concludes that:

¹⁶ J-J Rousseau, *The Social Contract*, edited by Tom Griffith, Wordsworth Classics of World Literature (Wordsworth Editions Limited, 1998).

¹⁷ I Kant, *The Metaphysics of Morals*, edited by Mary Gregor, Cambridge Texts in the History of Philosophy (Cambridge, Cambridge University Press, 1996).

¹⁸ G W F Hegel, *Elements of the Philosophy of Right*, edited by Allen W. Wood, Cambridge Texts in the History of Political Thought (Cambridge, Cambridge University Press, 1991).

¹⁹ J Bentham, *A Comment on the Commentaries and A Fragment on the Government*, edited by J.H. Burns and H.L.A Hart, The Collected Works of Jeremy Bentham (Oxford, Oxford University Press, 1977).

²⁰ J Austin, *Lectures on Jurisprudence: Or, The Philosophy of Positive Law*, originally published in 1911 (Cornell University Library, 2009).

²¹ Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, first published in French in 1758 (Gale ECCO, Print Editions, 2010).

²² *Ibid.*

‘Since man are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom’.²³

A sovereign state is defined as an entity:

‘...which governs itself, under whatever form, and which does not depend on any other Nation...Its rights are, in the natural order, the same as every other state. Such is the character of the moral persons who live together in a society established by nature and subject to the Law of Nations. To give a Nation the right to a definite position in this great society, it need only be truly sovereign and independent; it must govern itself by its own authority and its own laws’.²⁴

Sovereign states are independent and, therefore, the intervention with one another’s matters is not allowed. The Law of Nations had an immense impact on later considerations of the content of both sovereignty and the principle of legally equal relations between states.

The impact of colonization on the meaning and scope of territorial sovereignty had been mainly exercised through the debate over which ‘civilized’ and ‘uncivilized’

²³ *Ibid.*

²⁴ *Supra* note 21.

peoples were thought capable of exercising it. Sovereignty was primarily authored in the nineteenth century by the first international institutions such as the Concert of Europe established by the 1815 Congress of Vienna.²⁵ A century later the League of Nations was created and the primary principles of the Wilsonian system,²⁶ which were subsequently introduced, incorporated both aspects of sovereign equality among nations and legalized hegemony. The judicial organ of the League, the Permanent Court of International Justice (hereinafter PCIJ), attempted to define sovereignty in several of its cases.²⁷ In one of the most famous proceedings, The Lotus Case,²⁸ the PCIJ implemented, what Koskenniemi calls the 'pure fact approach', in defining the scope of sovereignty. The Court considered state sovereignty unlimited unless constrained by some specific rules.²⁹ The PCIJ also stated that independence constitutes the cornerstone of sovereignty.

Together with the creation of the United Nations the concept of sovereign equality as imposed and maintained by the legal hegemony of the Great Powers has been reinforced. At the San Francisco Conference smaller states were understandably anxious to accept legalized hegemony of the Great Powers, nevertheless they agreed that certain amount of it would benefit the new world system. As Simpson observes:

²⁵ In fact, however, the 1815 Congress of Vienna only incorporated the doctrine of sovereign equality into a system of legalized hegemony and truly sovereign equality existed afterwards only among the Great Powers themselves, who were the states whose collective hegemony was legally instituted by the resulting treaties.

²⁶ That is the principles of collective security and self-determination.

²⁷ See: *Austro-German Union Case*, PCIJ ser A/B no 41 (1931); *Wimbledon Case*, PCIJ, Series A No 1 (1923).

²⁸ *The Lotus Case*, PCIJ, Series A no. 10 (1927).

²⁹ This theory became known as the Lotus Principle and it adopts the idea 'that State sovereignty is the starting-point of international law in the same way as individual liberty is the basis of the municipal legal order'. Consequently, states possess a natural independence which cannot be restrained when individual rules are ambiguous. See: M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge, Cambridge University Press, 1989) p. 221.

‘Ultimately, there was agreement on three points. First, sovereign equality was to be a cornerstone of the new international system. Second, departures from the principle or, at least, deviations from the strict implementation of the principle, would be necessary to give the new international security regime some teeth. Third, these departures would have to be justified on the basis either of competing legal principles or by reference to overwhelming political necessity’.³⁰

One of the major concerns for the small states, as well as for the Great Powers, for different reasons however, was the maintenance of protection of states’ domestic jurisdiction. Finally, it was agreed that the Article 2(7) of the United Nations Charter will read as follows:

‘Nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII’.³¹

As a consequence, domestic jurisdictions had been limited by potentially extensive Chapter VII powers of the United Nations Security Council. The membership provisions of Chapter II of the Charter also impose certain institutional limits upon state sovereignty. State in order to become a member of the United Nations must

³⁰ G Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order*, (Cambridge, Cambridge University Press, 2004) p.179.

³¹ United Nations, Charter of the United Nations 1945, 1UNTS XVI, Article 2(7).

be a 'peace-loving' nation that accepts all Charter obligations as well as the obligations of international law as developed under the Charter.³²

Sovereign equality undoubtedly constitutes the basic principle of the United Nations Charter and has been principally preserved by the Article 2(4)'s prohibition of the use of force in international relations. The only, very limited and in fact ambiguous in many respects, exception to the prohibition of the use of force is Article 51 of the UN Charter.³³ Notwithstanding the above, legalized hegemony still emerges in some of the UN Charter provisions which preserve the primary responsibility for the maintenance of international peace and security for the Security Council – a single, membership-restricted organ.³⁴ It is to be noted that the text of the UN Charter did not by itself generate the concept of sovereignty under the UN system. The balance between sovereign equality and legalized hegemony has been further remodelled by the ongoing practice of the organization, which is not always coherent and depending on the circumstances puts emphasis either on sovereign equality or human rights. Hilla argues that:

[t]here is no 'current juridical reality' of sovereign equality that can be asserted as the version of sovereignty upheld by the U.N. Charter System...

It is clear that the U.N. has not generated a definitive guideline to the actual,

³² *Ibid.* Article 4.1.

³³ Article 51 of the United Nations Charter reads as follows: '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'.

³⁴ See Article 24.1 of the UN Charter: 'In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'.

workable scope of sovereignty under international law. For the member – states of the U.N., the Charter represents a set of voluntary restrictions on freedom of action, which may or may not be limiting action that can be classified as a sovereign prerogative in the historical or contemporary customary sense'.³⁵

In conclusion, it is quite clear that there is a tension in the international system established by the UN Charter which is based on principles of international concern and obligations on the one side and sovereign, territorial and political independence of the Member States on the other.

2.3 Constitutive elements of statehood

The existence of the concept of statehood is a prerequisite for determining criteria that should be applied in order to establish which entities are to be considered a state. It is understood that, a moment in which a state's existence under international law can be identified and from which it enjoys a full international legal personality, occurs when the constitutive elements of statehood are verified in practice. In that sense, the existence of a state is in principle a matter of a fact. Nevertheless, as noted below, international law plays a central role in determining if an entity is a state. The criteria for statehood are of a special character, in that their application conditions the application of most other international law rules. As a consequence, existing states have been inclined to retain for themselves as much freedom of action with regard to new states as possible. During its existence, a

³⁵ *Supra* note 2, at p. 141.

state may go through transformations in those constitutive elements which in turn raise questions under international law as to the state's position, international obligations and relations with other subjects of international law. Lastly, a state may cease to exist or some of its constitutive elements disappear – both situations raising plenitude of complex legal questions.

As pointed out above, the best known formulation of the classic criteria for statehood is the one included in the Article I of the Montevideo Convention on the Rights and Duties of States.³⁶ These provisions have acquired the status of customary international law.³⁷ However, 'the question remains whether these criteria are sufficient for Statehood, as well as being necessary'.³⁸ Despite the fact that the formal definition of statehood remained unchanged, the separate components of statehood have been interpreted and applied in a flexible manner, generally depending on the circumstances and context in which the claim for

³⁶ *Supra* note 9. More recently, the validity of the Montevideo Convention definition of statehood has been confirmed by the Conference on Yugoslavia, Arbitration Committee, which stated in its First Opinion that 'the State is commonly defined as a community which consist of a territory and a population subject to an organized political authority' and that 'such a State is characterized by sovereignty'; in Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, (1992) 31 I.L.M. 1488. The Commission chaired by Robert Badinter delivered its four opinions concerned with the question of whether the Republics of Croatia, Macedonia and Slovenia, who had formally requested recognition by the Community and its Member States, had satisfied the conditions laid down by the Council of Ministers of the European Community on the 16th of December 1991. The Committee ruled that two Republics, Macedonia and Slovenia, fulfilled all the conditions. In the case of Croatia a reservation was made in relation to the rights of minorities. The request for recognition made by Bosnia-Herzegovina was, in the absence of a referendum, refused. The above cited statement has to be considered against the background of the particular international circumstances. It was argued that the international involvement had constitutive effect on the creation of new states in case of the dissolution of the Socialist Federative Republic of Yugoslavia. While the declarations of independence of Slovenia and of Croatia were initially considered to be attempts at unilateral secession, it was the opinion of the Badinter Commission which provided the authority that the dissolution was underway and thus Yugoslavia's claim to territorial integrity was removed. Although the Badinter Commission expressly held that recognition was declaratory, its opinions had notable constitutive effects.

³⁷ D J Harris, *Cases and Materials on International Law* 7th ed. (London Sweet & Maxwell, 2004), p. 99.

³⁸ M Dixon & R McCorquodale, *Cases and Materials on International Law* 4th ed. (Oxford, Oxford University Press, 2003), p. 137.

statehood had been made. More importantly however, as Professor Higgins concludes: '[O]nce in the club, the rules by which admission was tested – and that always with a degree of flexibility – become less relevant'.³⁹ The following sections of this chapter will be dedicated to the analysis of international legal criteria for statehood as well as, to a certain extent, the process of creation, continuity and extinction of states.

2.3.1 Permanent Population

States constitute territorial units but also aggregate of individuals; consequently, a territory alone cannot be considered a state without a group of people intending to inhabit it permanently. It is required for an entity claiming statehood to possess a permanent population, although international law does not prescribe any minimum levels for the number of people needed to inhabit certain territory. As a consequence, even entities such as Tuvalu, Nauru or Palau all having very small populations, are considered to constitute viable states. Similarly, the criterion of permanency has not been described in detail and it does not seem to be affected by even the major shifts in population's dynamics, as evidenced in cases of Somalia or Sudan.

The population should not be confused with the international legal concept of a "people".⁴⁰ It should also be noted that the requirement of permanent population

³⁹ *Supra* note 4, p. 41.

⁴⁰ A "people" enjoys under international law the right of self-determination. Under the principle of self-determination "people" is commonly understood as 'a group with a common identity and a link to a defined territory allowed to decide its political future in a democratic fashion. On the right of

does not refer to the nationality of that population – it is the latter that is dependent upon statehood and not the other way round.⁴¹ As Brownlie concludes, the criterion of permanent population should be exercised in relation to that of territory and ‘connotes a stable community’.⁴²

The requirement of permanent population had been assessed during the debate over the membership of microstates to the United Nations in the 1970s. Although Article 4 of the UN Charter⁴³ states that membership is open to all states, it took some time before all so-called microstates became equal members of the United Nations.⁴⁴ Consequently, there are no specific requirements for a minimum population inhabiting a territorial entity for it to be considered a state for the purposes of the United Nations membership.

In conclusion, the size of the population of a state may vary greatly and the element of permanency is equally undetermined. Nevertheless, the changes in the number of people living in a state and their connection with central authority do not, in principle, affect the criterion of permanent population as an element which defines

self-determination applied to statehood, see: D Raič *Statehood and the Law of Self-Determination* (The Hague: Kluwer Law International, 2002).

⁴¹ *Supra* note 7, p. 52.

⁴² *Supra* note 1, p. 70.

⁴³ Article 4 of the UN Charter states: ‘1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgement of the Organization are able and willing to carry out these obligations. 2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council’.

⁴⁴ ‘Proposals have been made that measures be studied which would limit their [microstates] admission to the UN or would assign them a kind of limited participation. In particular, a kind of ‘associated membership’ has been proposed for mini-States which not only have limited population but also few economic resources. Such Associate States would enjoy most of the advantages connected with membership status without the obligations...Yet the practice followed up to now has been exactly the opposite. Admission of countries such as Seychelles, San Marino, Lichtenstein, Tonga, Nauru to the United Nations and granting them full voting rights in the Assembly has certainly not helped to strengthen the role of this organ’. B Conforti, *The Law and Practice of the United Nations*, 3rd ed.(Leiden/Boston, Martinus Nijhoff Publishers, 2005), p. 27.

statehood. More recently however, McAdam raised a question of whether a state ceases to meet the criterion once a large proportion or in fact all of its population lives outside the state's territory as a result that territory being severely affected by the climate change.⁴⁵ The author refers to the situation of a number of Pacific countries where 'the exodus of population is accompanied by, or premised on, the imminent or eventual loss of territory'.⁴⁶ As noted above, as the international law currently stands, even major shifts in the population do not seem to affect the element of permanent population as a criterion that defines statehood. Nonetheless, if no population remained on the territory, it would become necessary to ask whether and how a state may continue to exist.

2.3.2 A Defined Territory

States are undoubtedly territorial entities and at least at the first instance, the right to be a state depends upon exercising full governmental powers with respect to some area of territory.⁴⁷ As is the case with the permanent population element, international law does not prescribe minimum limits with regard to area of territory required for an entity to claim statehood.

Much of what has been said above regarding the element of permanent population applies to the criterion of defined territory. The territory needs not to be

⁴⁵ J McAdam, *Climate Change, Forced Migration, and International Law* (Oxford, Oxford University Press, 2012) and in particular Chapter 5: 'Disappearing States', Statelessness, and Relocation'.

⁴⁶ *Ibid.*

⁴⁷ *Supra* note 7, at p. 46.

continuous as even split territories are accepted as constitutive of statehood.⁴⁸ Similarly, international law does not require settled borders but rather 'sufficient consistency' of the territory.⁴⁹ As confirmed by the International Court of Justice in the North Sea Continental Shelf cases:

'The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations'.⁵⁰

Consequently, although the link between statehood and territory is crucial, even a substantial boundary or territorial dispute is not enough to bring statehood into question. As stated by Crawford:

'The only requirement is that the State must consist of a certain coherent territory effectively governed – a formula that suggest that the requirement of territory is rather a constituent of government and independence than a distinction criterion of its own'.⁵¹

⁴⁸ The separation of Alaska from other states casts no doubt on the statehood of the United States. Similarly, some archipelagic states like Federated States of Micronesia or the Marshall Islands constitute viable states despite the fact that small areas of their land territory is being separated by wide expanses of ocean.

⁴⁹ See the German-Polish Mixed Arbitral Tribunal: "[I]t is enough that this territory [of a state] has sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory." *Deutsche Continental Gas- Gesellschaft v Polish State* (1929), pp. 11–15.

⁵⁰ *North Sea Continental Shelf Cases*, ICJ Reports, 1969, p. 32

⁵¹ *Supra* note 7, p. 52.

With regards to the membership in the United Nations, again, the size of a state's territory does not seem to be relevant. However, as argued by Conforti, Article 4 of the UN Charter adopts the traditional notion of a state and consequently, admission has to be restricted to these governments which actually exercise authority over a territorial community. Consequently, '...the possible admission of governments in exile or of Organisations or Committees of national liberation operating abroad should be considered illegal'.⁵²

The criterion of a defined territory received a lot of attention in terms of it being a requirement for the creation of a state. As pointed out by the above mentioned Jane McAdam however, the criterion raises some interesting legal questions regarding its continuous fulfilment by states throughout their existence. Referring to the phenomenon of 'disappearing states' or 'sinking islands', the author examines the possibility of potential extinction of a state because of the climate change.⁵³ She concludes that 'in legal terms, the absence of population, rather than of territory, may provide the first signal that an entity no longer displays the full indicia of statehood' and accordingly 'the focus on loss of territory as the indicator of a State's disappearance may be misplaced'.⁵⁴ Undoubtedly, the general requirement for a state to have a defined territory 'assumes that there remains a population on that territory to be governed'.⁵⁵

⁵² *Supra* note 44, p. 26.

⁵³ *Supra* note 45, at p. 119 *et ss.*

⁵⁴ *Ibid.* at p. 130.

⁵⁵ *Ibid.*

To sum up, although as Lowe points out, the concept of a state 'is rooted in the concept of control of territory'⁵⁶, it seems that the criterion of defined territory as a necessary element of statehood is in fact minimal. It is not required that a state possesses defined borders and that its territory is uncontested. Most importantly, however, it is not required that sovereignty is exercised at every moment in every point of a territory – the only minimal requirement is that a certain territorial base exists for a state to operate. It is therefore necessary to agree with Craven that:

'[T]he criterion of territory assumes a highly indeterminate form in the legal conception of statehood – it being a simultaneously indispensable quality, but yet one incapable of being articulated in anything other than an abstract, and once again metaphorical way'.⁵⁷

2.3.3 A Government

The requirement that an entity claiming its right for statehood has an effective government might be regarded as a central one since all other criteria to a large extent depend upon it. International law defines territory by reference to the reach of governmental power exercised or capable of being exercised with respect to some territory and population. It is the governmental authority that creates the basis for normal inter-states relations. The government needs not only exercise effective control over certain territory but it is also required that it does so

⁵⁶ V Lowe, *International Law* (Oxford, Oxford University Press, 2007), at p. 138.

⁵⁷ M Craven, *Statehood, Self-Determination, and Recognition*, in Evans, M. D. (ed), *International Law*, 2nd edn (Oxford, Oxford University Press, 2006), p. 224.

independent from the authority of other states.⁵⁸ The effectiveness means that the government is in a position to exercise all governmental functions effectively over the population and territory.⁵⁹ As Raič further explains:

‘Effectiveness operates to some extent as evidence of the ability to possess legal rights and to fulfil legal obligations. Thus (...) an entity wishing to acquire (full) international personality must have effective existence of certain facts (that is, it must satisfy the traditional criteria for statehood) before the attribution of this status will take place by the international legal system’.⁶⁰

The requirement of government should not be identified exclusively with the executive power of a state as it comprises other organs such as the parliament, judiciary as well as the regional and local levels of government.

⁵⁸ See Aust: ‘There must be a central government operation as a political body within the law of the land and in effective control over the territory ... The government must be sovereign and independent, so that within its territory it is not subject to authority of another state.’ A Aust, *Handbook of International Law* (Cambridge, Cambridge University Press, 2005), pp.136-137.

⁵⁹ The position of Finland in the period between 1917 and 1918 has frequently been referred to as a situation which clarifies the requirement of effective government (see, *inter alia*: Crawford, *supra* note 7 at pp.44 – 45). The League of Nations appointed a Commission of Jurists to report on certain aspects of the Aland Islands, which gave the following opinion: ‘For a considerable time, the conditions required for the formation of a sovereign State did not exist. In the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a fairly considerable period. Political and social life was disorganized; the authorities were not strong enough to assert themselves [...] the Government had been chased from the capital and forcibly prevented from carrying out its duties [...] It is therefore difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops’. *League of Nations Official Journal*. Special Supplement No. 4 (1920), pp. 8-9.

⁶⁰ *Supra* note 40, at p. 73. The author further states that: ‘Effectiveness (...) means the quality of a fact (here the exercise of power or territorial jurisdiction), which - according to international law – makes this fact suitable as a condition for the attribution of the full international legal personality’.

It is important to note that traditionally, international law does not prescribe a particular type of government.⁶¹ As concluded by the International Court of Justice in Western Sahara Advisory Opinion 'no rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today'.⁶² Positively, the existence of governmental system in and of specific territory signifies certain legal status and should be considered in general as a precondition for statehood. On the other hand, the lack of government in a given territory greatly impacts the claim against that territory being a state. Nevertheless, as noted by Rosalyn Higgins:

'[W]hile the concept of what constitutes a state has a certain undeniable core, the application of the component elements will also depend upon the purpose for which the entity concerned is claiming to be a state, and the circumstances in which that claim is made'.⁶³

The above statement is definitely correct with regard to the effective government criterion. The strict application of the necessary effectiveness element of the government in particular, seems to have been altogether abandoned in some recent situations of the state creation. Probably the best modern example to support this claim is that of the former Belgian Congo which had been granted the independence in 1960 as the Republic of the Congo, later renamed Zaire and since 1997 known as the Democratic Republic of Congo. The country experienced various

⁶¹ H Charlesworth and C Chinkin, *The Boundaries of International Law* (Manchester University Press, Manchester 2005), p.132.

⁶² *Western Sahara, Advisory Opinion* ICJ Reports 1975, pp. 35-36, para. 94

⁶³ *Supra* note 4, p. 42.

secessionist movements⁶⁴ and the division of central government, shortly after the independence, into two fractions, both posing a claim to be a lawful government.⁶⁵ The Congolese authorities required continuing international assistance due to its effective bankruptcy and the UN had to introduce its forces in the country shortly after the independence in order to restore law and order and prevent civil war.⁶⁶ It is doubtful whether the country in question had any form of effective government; nevertheless, the existence of the Congolese state was never put into question. On the contrary, the state had been widely recognized and its application for the UN membership accepted without dissent.⁶⁷ One might therefore conclude that the requirement of effective government is less rigorous than has been thought, particularly in some circumstances. The reaction of the international community to the situation in Somalia in the 1990s appears to provide further supporting argument to that claim. Yet again, anything less like effective government it would be hard to imagine, nevertheless, the existence of Somali state has never been doubted.⁶⁸

The relaxation of the criterion of effective government in the second half of the twentieth century would have to be associated with the introduction of the principle of self-determination of peoples. In 1960 the UN General Assembly

⁶⁴ See: T Kanza, *Conflict in the Congo: The Rise and Fall of Lumumba* (Harmondsworth, Penguin, 1972).

⁶⁵ For post-independence history of the Republic of the Congo see: C Hoskyns, *The Congo Since Independence, January 1960 – December 1961* (London, Oxford University Press, 1965).

⁶⁶ See: G Abi-Saab, *The United Nations Operations in the Congo, 1960-1964*, (Oxford, Oxford University Press, 1978).

⁶⁷ United Nations Security Council, 1960, Resolution 142 of 7 July, UN Doc. S/RES/142: 'The Security Council, Having examined the application of the Republic of Congo, Recommends to the General Assembly that the Republic of the Congo be admitted to membership in the United Nations'; United Nations General Assembly, 1960, Resolution 1480 of 20 September 1960, UN Doc. A/RES/1480(XV)

⁶⁸ See UN Security Council Res. 733 (1992), Res. 746 (1992), Res. 794 (1992), Res. 814 (1993), Res. 886 (1993) and Res. 897 (1994) among others.

proclaimed that when a people exercises its right of self-determination 'inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence'.⁶⁹ Consequently, the entities which traditionally would not have qualified for statehood due to the lack of effective government have been granted one under international law.⁷⁰

Referring to the continuing existence of states, it would appear that the requirement of effective government is even more leniently applied in cases of recognised states notwithstanding the fact that they might be going through a considerable internal turmoil. Even the loss of stable and effective governing body does not remove the attribute of their statehood once acknowledged by the international community. Consequently, it is necessary to agree with Brownlie's conclusion that: 'Once a state has been established, extensive civil strife or the breakdown of order through foreign invasion or natural disasters are not considered to affect personality'.⁷¹ Similarly, transformations to the constitutive element of the government do not mean that a state in question ceases to exist as such. Governments change almost constantly in terms of their internal composition after elections or due to a political crisis (e.g. revolutions or coups d'État). In neither of the above cases the statehood is being questioned. The most recent example confirming this claim is The Arab Spring. The revolutionary wave which so far led to

⁶⁹ UN General Assembly Resolution 1514 (XV) of 14 December 1960, UN Doc A/RES/1514(XV) para. 3.

⁷⁰ Raic explains how the requirement for effectiveness becomes less relevant in this type of circumstances: [E]ffectiveness as a pre-condition for the acquisition of a legal right is required only when this right is *claimed* or when it has to be *proved*. Thus, when the existence of a right can directly be based on, for instance, a treaty provision or another source of law, or when a right is inherent or implied in another right, power or competence, then the notion of effectiveness as a basis for the evaluation of the existence of the right becomes substantially less relevant and sometimes even irrelevant, at least from a theoretical point of view. *Supra* note 40, at p. 51.

⁷¹ *Supra* note 1, p. 71.

a complete regime change in Tunisia, Egypt and Libya certainly did not put in doubt the statehood of these entities.⁷²

Consequently, once again, it has to be concluded that the criterion of effective government proves to be quite loosely defined. International law lays no specific requirements as to the nature and extent of the governmental control, as long as it includes some degree of maintenance of law and order and the establishment of basic institutions. Even more so, certain territorial entities continue to enjoy statehood despite lacking any sort of central authority at all.⁷³

2.3.4 Capacity to enter into relations with other states

Finally, the last requirement for statehood, as recognized by the Montevideo Convention, is the capacity to enter into relations with other states. In principle, it is the government of a state that can bind a state, for example, by a treaty. The capacity to enter into relations with other states is therefore more a consequence of statehood than a precondition for it. Consequently, Crawford argues that:

⁷² As Crawford concludes: '[t]here is a strong presumption that the State continues, with its rights and obligations, despite revolutionary changes in government, or despite a period in which there is no, or no effective, government'. *Supra* note 7, at p. 34

⁷³ See: R Jennings and A Watts, *Oppenheim's International Law*, Vol 1: Peace, 9th edn (London, Longman, 1996): 'Once a state is established, temporary interruption of the effectiveness of its government, as in civil war or as a result of belligerent occupation is not inconsistent with the continued existence of the state'.

‘[C]apacity to enter into relations with other States, in the sense in which it might be useful criterion, is a conflation of the requirements of government and independence’.⁷⁴

Additionally, the competency to enter into relations with other states at international level is not an exclusive prerogative of a state.⁷⁵ It has been argued that various non-state entities more commonly participate in law-making processes, monitoring compliance with international law and enforcement of international rules.⁷⁶ Nonetheless, it has to be noted that it is still only state that can enter into a full range of international relations. Actors other than states may have certain capacity to enter into international relations but, most commonly, only for limited purposes. Both selected international organisations and sub-units of states do have a significant, however limited at the same time, capacity to enter into relations with states. This limited capacity nevertheless, cannot imply their statehood.

It is also important to remember that the law of statehood does not impose the obligation on states to enter into relations with other states at all if they do not

⁷⁴ *Supra* note 7, p.62.

⁷⁵ For example, D’Aspremont argues with reference to the international law-making process that ‘states have incrementally been joined by other actors...while not being an utterly new phenomenon, this *ratione personae* pluralisation of international law-making has, over the last few decades, reached an unprecedented degree...In fact, normative authority is no longer exercised by a closed circle of high-ranking officials acting on behalf of states, but has instead turned into an aggregation of complex procedures involving non-state actors.’ D’Aspremont, J. (ed.) *Participants in International Legal System. Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011), p. 2.

⁷⁶ See: International Law Association, The Hague Conference (2010), First Report of the Non-State Actors Committee, *Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues*.

wish to do so.⁷⁷ The latter would be a matter of state policy rather than the precondition for statehood. Consequently, the criterion of capacity to enter into relations with other states has been criticised as being problematic for its lack of substantial contribution to the definition of state.⁷⁸

The above described 'Montevideo criteria' are considered to be essentially based on the principle of effectiveness.⁷⁹ However, in contemporary international law there exist significant and important evidence that effectiveness is no longer the only principle on which the law of statehood stands and there are some other, additional criteria which should be considered.

2.4 Additional Criteria for statehood

Certain additional criteria are sometimes suggested as required for statehood. In particular, even though it has not been specifically mentioned in the Montevideo Convention, independence should be regarded as yet another central criterion for statehood and various legal consequences can be attached to the lack of it in specific cases. As Judge Huber noted in the Islands of Palmas arbitration:

'Sovereignty in the relations between States signifies independence.

Independence in regard to a portion of the globe is the right to exercise

therein, to the exclusion of any other State, the functions of a State. The

⁷⁷ See Raič: 'It does not seem to be correct to state that a territorial and political entity must have relations with existing States in order to qualify as a State, because the existence or lack of such relations is largely dependent on the will of the existing States to enter into relations with the entity in question. The emphasis must, therefore, be put on the term 'capacity''. *Supra* note 40, at p.73.

⁷⁸ T Grant, 'Defining Statehood: the Montevideo Convention and its Discontents' 37 *Columbia Journal of Transnational Law* 403(1999) pp. 434-435.

⁷⁹ *Supra* note 7, p.97.

development of the national organization of States during the last few centuries, and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations'.⁸⁰

The independence of an existing state is protected by the rule against unlawful use of force in international relations contained in Article 2.4 of the United Nations Charter. Accordingly, the state may exist as a legal entity, even for a considerable time, despite its lack of effectiveness.⁸¹ On the contrary, an entity claiming statehood may need to demonstrate a substantial independence from the state it attempts to secede in order to be recognized as definitely established, separate state. Consequently, it is important to distinguish between independence as an initial criterion for statehood and as a condition for a continued existence of a state.⁸²

⁸⁰ *Island of Palmas Case*, 4 April 1928, Reports of International Arbitral Awards, Vol. II, p. 838.

⁸¹ *Supra* note 7, p.132.

⁸² According to Crawford, the above distinction is applicable to the examination of the *Austro-German Customs Union Case*. The case in question is considered to be the 'leading case' on the notion of independence and the definition provided by Judge Anzilotti has become a classic statement since: '[T]he independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a separate State and not subject to the authority of any other State or a group of States. Independence as thus understood is really no more than a normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no other authority than that of international law...It follows that the legal conception of independence has nothing to do with a State's subordination to international law or with the numerous and constantly increasing states of *de facto* dependence which characterises that relation of one country to other countries. It also follows that the restrictions upon a State's liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains and independent State however extensive and burdensome those obligations may be'. Permanent Court of International Justice, Series A/B no. 41, Advisory Opinion, pp. 57-58.

It should be noted that 'independence' as requirement for statehood should not be understood literally. As Conforti observes, the formal element of the 'independence' criterion requires that a state's 'legal system is original, it draws its power from its own Constitution and is not derived from the legal system or the Constitution of another State'.⁸³ Consequently, for the purposes of the admission to the United Nations, all the states which have become members have been independent territorial entities.⁸⁴

Both capacity to enter into relations with other subjects of international law and independence are crucial for the existence of a state, however they both directly refer to the criterion of government and in that respect do not constitute separate elements which exist in parallel to the latter.

It has been submitted that the ability and willingness to observe international law also constitutes an important element of statehood. The recently published Report of the EU's Independent Fact-Finding mission on the conflict(s) in Georgia finds that 'In current international law, the observation of legal principles which are themselves enshrined in international law (notably the principles of self-determination and the prohibition of the use of force), are accepted as an additional standard for the qualification of an entity as a state'.⁸⁵ Similarly, the 1991 EU's foreign ministers' Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' proclaims that the process of recognition of new states requires respect for the basic international law

⁸³ *Supra* note 44, p.25.

⁸⁴ *Ibid.*

⁸⁵ Independent International Fact-Finding Mission on the Conflict in Georgia. Report, Volume II, September 2009, at p. 127.

obligations and in particular these referring to the human and minority rights.⁸⁶ As Crawford points out however, it is necessary to distinguish recognition from the concept statehood itself.⁸⁷ Consequently, 'unwillingness or refusal to observe international law may constitute grounds for refusal of recognition, or for such actions as international law allows, just as unwillingness to observe Charter obligations is a ground for non-admission to the United Nations. Both are distinct from statehood'.⁸⁸ Additionally, the inability or unwillingness to observe international law does not seem to affect the continuing existence of states. As noted above, the statehood of Somalia has not been questioned despite the lack of governmental authority and clearly a complete inability to fulfil international law obligations.

Likewise, a state's legal order or legal system, namely the existence of at least some basic rules, does not seem to possess a status of a distinct criterion for statehood. As noted above, particularly during the decolonisation process, states may only have had basic or incomplete legal systems nevertheless had been recognised as states. Furthermore, even 'revolutionary change of constitution does not as such affect the identity or continuity of the state'.⁸⁹ Some scholars claim that recent developments in state practice lead to the creation of the requirement of

⁸⁶ Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (16 December 1991): '[T]he process of recognition of these new States, which requires: respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights; guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE'.

⁸⁷ *Supra* note 7, at p. 91.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* p.94.

democratic governance in recognition of states.⁹⁰ The view is primarily supported by the practice of states in relation to the recognition of new states formally part of the Soviet Union. Nevertheless, as Murphy states, although 'notions of democratic legitimacy are certainly present in contemporary practice concerning recognition of states (...) the evidence of these notions is not uniform, and it derives exclusively from practice of States that are themselves democratic'.⁹¹

It is doubtful whether the above mentioned additional elements constitute legal conditions for statehood. They may nevertheless guide the political practice of recognition of states. The assessment of statehood in international law and international politics does overlap to a certain extent but also differs. Accordingly, it is feasible that an entity short of statehood from the formal legal perspective is recognised as a state by another state or states for particular political motives. It would therefore perhaps be more appropriate to consider the elements of willingness and ability to observe international law as well as the existence of a minimal legal order as relevant in the process of recognition of states, not necessarily as defining components of statehood. Nevertheless, it is difficult to establish the accurate guidelines as to how to assess whether the above mentioned criteria are sufficiently met in practice. As a consequence, these requirements prove to be even more problematic from the international law perspective.

⁹⁰ G H Fox & B R Roth eds. *Democratic Governance and International Law* (Cambridge, Cambridge University Press, 2000).

⁹¹ S D Murphy 'Democratic Legitimacy and the Recognition of States and Governments' in G H Fox & B R Roth eds. *Democratic Governance and International Law* (Cambridge, Cambridge University Press, 2000), at p. 139.

2.5 Conclusion

The concept of statehood has been in flux throughout the twentieth century and it can be argued that the Montevideo Convention definition does not accurately reflect these changes. It appears that the application of constitutive elements of statehood differs in relation to creation of states, their continuing existence and extinction. Furthermore, as has been argued in this chapter and will be further analysed in the following section of the thesis, Montevideo definition is primarily limited to an indication of the elements necessary for a state to be created. Even in the circumstances of state creation however, the application of constitutive requirements for statehood varies as is most evidently shown by the implementation of the effective government requirement. Consequently, although it is theoretically required that a state must fulfill all four Montevideo requirements when it is created, as will be evidenced by the state failure phenomenon, it is difficult to employ the analysis of the constitutive elements to assess any transformations in an already recognised state. In fact the international legal consequences of the change to any of the elements are not clear and as it would appear that they do not affect the condition of an entity as a state as such. A strong presumption applies to the continuity of a state once it has been created and even protracted loss of effective government does not appear to affect its international legal personality. It is therefore essential to establish the international legal consequences of the continuing existence of states in a situation where one of the principal features of statehood – effective government – is not in place. The following chapter will accordingly explore the concept of state failure from formal,

legal perspective. The analysis conducted in chapter three provides a starting point for the investigation of a more specific matter, namely the impact of state failure on self-defence against non-state actors operating from within such territories.

CHAPTER 3

CONCEPTUALISING STATE FAILURE

3.1 Introduction

This chapter examines the concept of 'failed state' from the international law perspective. The point of departure will be the consideration of applicability of the Montevideo Convention requirements for statehood in the evaluation of failed state. Two different possible approaches towards failed states will be analysed, namely their extinction and their continuity under international law. Subsequently, it will be analysed how the concept has been embraced by the international relations scholars and whether this perspective can contribute towards resolving the conceptual and terminological difficulties that such construct entails. Throughout the chapter some examples of 'failed' and 'collapsed' states will be presented in order to provide an understanding of how the phenomenon occurs in practice. It is anticipated that chapter three will conclude with a proposition of a legal approach to the definition of state failure – such that is suitable for an international law analysis and application. Finally, the international legal consequences of the lack of effective government will be analysed focusing on three main areas: states' incapacity to interact with other subjects of international law, its inability to exercise rights and fulfil international legal obligations and the international responsibility of such entities. The investigation of state failure phenomenon carried out in this chapter provides the essential background for

chapters four and five where the thesis engages in consideration of the issue of whether a state may use force in self-defence in response to forcible action by non-state actors operating from within a failed state.

3.2 Conceptualising state failure

The disintegration of governmental structures and accompanying intense internal conflicts are not an infrequent occurrence. Subsequent failure or at times total collapse of the social organisation of society entails numerous conceptual and terminological difficulties. The following section of this chapter will be dedicated to the examination of the phenomenon of state failure and the statehood of 'collapsed' or 'disintegrated' states in public international law. Accordingly, legal definition, suitable for an analysis based in international law, of a failed state will be provided.

3.2.1 State failure and the Montevideo Convention requirements for statehood.

Is statehood altered by changes to the constitutive elements of a state?

States experience constant transformations in their constitutive elements which nevertheless, as observed in the preceding chapter, do not have effect upon recognition of their statehood in international law. As noted above, the population of states continuously changes. At any given moment it is not exactly the same as nationals die and new are born, some people obtain nationality and others renounce it. Equally, territorial changes, although less frequent, also occur. Internal

political organisation of a society, and in particular governments, similarly does not permanently remain the same. Changes in the governments may take place after each elections, as an effect of political crises or even through revolutions and coups d'État. In neither of these cases statehood is being put into question. The transformations to the constitutive elements of the government certainly do not equate to the extinction of a state and an emergence of a new one to occupy the position of the former. Accordingly, the concept of a state continuity is one of the most important presumptions in international law.¹ The notion indicates that despite suffering some internal changes in its constitutive elements, the state continues to exist without these transformations affecting its condition of state or legal personality.

Generally, therefore, there is a strong presumption favouring the continuity of states and negation of state extinction. A state does not cease to exist even if it is occupied, either lawfully or unlawfully, by another state.² As Brownlie pointed out: 'illegal usurpation of power as a result of foreign invasion will not cause the demise of a State (...) it will compromise its enjoyment of the incidents of statehood within a part or the whole of its own territory'.³ That is why when Iraq illegally invaded Kuwait in 1990 the latter did not cease to exist and the United Nations Security

¹ As noted by Crawford, the notion of state continuity has been criticised as misleading and over-general. Nevertheless, several arguments had been presented in defence of the concept: '[T]he notion of continuity is well established and, given the State/government distinction, is even logically required(...) [I]t preserves legal relations despite changes in the subjects of those relations, and it does so to a much greater degree than the law of State succession, which is often marked by discontinuity, in fact if not law'. See: J Crawford, *Creation of States in International Law*, 2nd edn (Oxford, Oxford University Press, 2006), p.668.

² *Supra* note 1, p. 34: 'Belligerent occupation does not affect the continuity of the State, even where there exists no government claiming to represent the occupied State'.

³ I Brownlie, *Principles of Public International Law*, 6th edn (Oxford, Oxford University Press, 2003), p.81.

Council called upon 'all states, international organisations and specialised agencies not to recognise that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation'.⁴ Equally, when Iraq was invaded and consequently occupied in 2003, the UN Security Council again, clearly indicating that the state continued to exist, reaffirmed 'the sovereignty and territorial integrity of Iraq'.⁵

Failed states witness major changes in all of their constitutive elements. Large portions of their populations migrate outside the state border, as shown by the examples of Sudan or Somalia. Major shifts in population however, do not prevent the recognition of states in question as fully-fledged sovereign entities with all the obligations that follow. Additionally, it is not infrequent occurrence that parts of the failed states' territory remain contested or suffer continuous incursions. As discussed earlier, due to the rapid climate change some of the island states may lose large parts of their territory. Nevertheless, the requisite of a determined territory is not strict and remains fulfilled despite competing claims over a territory.⁶ As Giorgetti concludes, 'the requisite for a definite territory is minimal and it only requires that a certain territorial base exists for a State to operate (...) failed State continue to be considered fully fledged and fully responsible States even if their territories are altered'.⁷ In conclusion, even substantial changes to the first two elements of statehood, do not in any event indicate that state becomes extinct. It would be an extreme and unprecedented, although in view of the rapid

⁴ UN Security Council Resolution 662 of 9 August 1990, UN Doc. S/RES/662, para. 2.

⁵ UN Security Council Resolution 1511 of 16 October 2003, UN Doc. S/RES/1511 para.1.

⁶ *Supra* note 1, at p. 38.

⁷ C Giorgetti, *A Principled Approach to State Failure. International Community Actions in Emergency Situations* (Leiden, Boston, Martinus Nijhoff Publishers, 2010), at pp. 58-59.

climate change perhaps not unforeseeable, case for a state to lose its entire territory and population.

Furthermore, and perhaps most importantly, failed states experience not just simple changes in government but prolonged periods of time without any government capable of exercising its functions. Undoubtedly, from a legal point of view, this is a considerably more complex scenario than the shifts in population and territory. As noted in Chapter two, statehood has been at times achieved without an effective government. Furthermore, international law allows for an existence of a state which lost its effective government as a result of the violation of the prohibition of the use of force. The lack of effective government characterising failed state situation is somewhat different and appears to be its most relevant feature from the international legal perspective. Again, however, the contradictory nature of the definition of statehood contained in the Montevideo Convention is particularly evident here. Despite being considered as the core of statehood, it is accepted that momentary lack of effective government does not affect it.⁸ Accordingly, it can be concluded that in terms of continuing existence of states, temporary disappearance of effective government does not bear any fundamental consequences. As Higgins points out, 'what is absolutely clear is that a loss of 'stable and effective government' does not remove the attribute of statehood once statehood has been acknowledged'.⁹ Consequently, failed states remain states

⁸ As Oppenheim concludes :'Once a State is established, temporary interruption of the effectiveness of its government, as in civil war or as a result of belligerent occupation is not inconsistent with the continued existence of the State' *Oppenheim's International Law* (Sir Robert Jennings and Sir Arthur Watts eds., 9th ed.1992), at p. 122.

⁹ R Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Oxford University Press, 1994), p.40.

notwithstanding a complete lack or radical alterations to their governmental structures.

Finally, it would appear that the fourth element identified in the Montevideo Convention as a requirement for statehood, namely the capacity to enter into relations with other states, also does not provide much assistance in assessing the status of failed states. It is quite evident that a state continues to exist despite its incapacity not only to enter into international relations but even when it is unable to fully perform its international obligations.¹⁰ Failed states possess a very limited capacity to engage into international relations and discharge their international obligations. Nevertheless, they remain recognised as states by the international community and their status in the international community does not change.

The above shows that the loss of any or in fact all elements that define statehood does not result in its automatic disappearance or even alteration of its status in international law. Alleged state failure does not seem to alter the identity of a state once it has been recognised by the international community. The definition of a state contained in the Montevideo Convention does not assist in the assessment of the changes in the position and responsibilities of a state once it has been created. It is difficult to transpose the analysis of the constitutive elements to inspect any modification in an already existing and recognised state. The Montevideo Convention focuses primarily on the elements needed to create a state and not necessarily on the elements required to maintain statehood. At present, the phenomenon of failed states is not acknowledged by the framework of

¹⁰ *Supra* note 7, at p. 64.

international law. As a result of the definition of constitutive elements of statehood remaining very general, states which failed continue to be considered fully-fledged sovereign entities required to behave like states and fulfil many obligations imposed on them despite the fact that there may be no authority which can perform them. Nevertheless, while it is clearly necessary to recognise that a state does not disappear due to certain characteristics that were required at its creation being no longer present, it is also important to acknowledge that the transformations in the constitutive elements of statehood, and in particular lack of effectively functioning government, severely affect the ability of the state to exercise its rights and perform its obligations. Chapter four will focus on examining how such inability of a state to perform its duties under international law impacts the rules regarding self-defence against non-state actors.

3.2.2 The notion of 'Failed State' - analysis of the concept

The phenomenon of state failure and collapse entails a multitude of conceptual and terminological problems. The concept of 'failed state' originated in international relations and has been first brought into prominence with the 1992 article by Helman and Ratner.¹¹ Ever since then, the idea has been widely used to describe states which are unable to maintain themselves as members of the international community. Nevertheless, there is no standard definition of what a failed or collapsed state actually is. Additionally, different terms are used by different

¹¹ G Helman and S Ratner, 'Saving Failed States', 89 Foreign Policy, 3(1992-93) pp 3-20.

authors to refer to the same or similar situation: 'failing' states¹², 'collapsed' states¹³, 'disintegrated' states¹⁴, 'dysfunctional' states¹⁵ and 'weak' states¹⁶ – all these can be found in the relevant literature. Academics struggled to approach in a systematic way the phenomenon and conundrum raised by the collapse of state institutions at the international level. One of the most important reasons for such a situation may be that, as explained by James Crawford at the beginning of his seminal book *The Creation of States in International Law*, statehood is a creature of law and fact, it is 'not a fact in the sense that a chair is a fact ... [but in the sense of] a legal status attaching to a certain state of affairs by virtue of certain rules or practices'.¹⁷ Consequently, if one of the essential factual elements of statehood, that is an effective government, is non-existent for a number of years, it may become questionable to insist that a state still is. The reality of dysfunctional territorial entities which lack organised central governments emphasises the inadequacies of the Westphalian system of international law which is organised around fully operational states. Failed states do not fit this paradigm and therefore present a great challenge for the largely static international legal order.

Observers and various institutions attempted to create indexes of failed states in order to classify nations with the least effective governments. Probably the best

¹² R Rotberg, *When States Fail: Causes and Consequences*, (Princeton University Press, 2004).

¹³ I W Zartman, 'Introduction: Posing the Problem of State Collapse' in Zartman, IW (ed), *Collapsed States: The Disintegration and Restoration of Legitimate Authority*, (London, Lynne Rienner Publishers, 1995).

¹⁴ D Thürer, 'The "Failed State" and International Law', (1999) 836 *International Review of the Red Cross*, p. 733.

¹⁵ N L Wallace-Bruce, 'Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law' 47 *Netherlands International Law Review* 53 (2000).

¹⁶ *Supra* note 12.

¹⁷ J Crawford, *The Creation of States in International Law*, 2nd edn (Oxford, Oxford University Press, 2006), p.5

known ranking is the annual Failed State Index (later renamed as Fragile State Index) produced by Fund for Peace in cooperation with Foreign Policy Magazine.¹⁸ Fund for Peace constructed its own, unique methodology based on the Conflict Assessment Software Tool analytical platform. The study focuses on the indicators of risks and state vulnerability to failure. Scores are apportioned to every country based on twelve key political, social and economic indicators. According to the 2015 Fragile State Index, the ten worst functioning states are:

1. South Sudan
2. Somalia
3. Central African Republic
4. Sudan
5. Democratic Republic of Congo
6. Chad
7. Yemen
8. Afghanistan
9. Syria
10. Guinea¹⁹

¹⁸ Foreign Policy, The Fragile State Index 2015, <http://fsi.fundforpeace.org/rankings-2015> (accessed on 28 September 2015).

The study refers to the following attributes of failed states: 'One of the most common is the loss of physical control of its territory or a monopoly on the legitimate use of force. Other attributes of state failure include the erosion of legitimate authority to make collective decisions, an inability to provide reasonable public services, and the inability to interact with other states as a full member of the international community. The 12 indicators cover a wide range of state failure risk elements such as extensive corruption and criminal behaviour, inability to collect taxes or otherwise draw on citizen support, large-scale involuntary dislocation of the population, sharp economic decline, group-based inequality, institutionalized persecution or discrimination, severe demographic pressures, brain drain, and environmental decay. States can fail at varying rates through explosion, implosion, erosion, or invasion over different time periods.'

¹⁹ *Ibid.*

Similarly, The World Bank has created a "Country Policy and Institutional Assessment" (hereinafter CPIA) index that ranks states for purposes of allocating aid. The CPIA employs sixteen criteria, divided into four groups, that is: economic management, structural policies, policies for social inclusion and equity, and public sector management and institutions.²⁰ The CPIA is referred to as International Development Association Resource Allocation Index for the purposes of resource allocation. In the 2010 - 2014 Index, the World Bank experts assessed 81 states being eligible recipients for concessional funds and the countries with the lowest average IDA Resource Allocation Index score were as follows:-

1. Zimbabwe
2. Sudan
3. Chad
4. Democratic Republic of Congo
5. Angola
6. Comoros
7. Haiti
8. Timor Leste
9. Afghanistan²¹

It has to be noted that Somalia has not been rated in the 2010 - 2014 Index. Nevertheless, it would be included in the World Bank 'core' fragile states group along with all other states with the average IDA Resource Allocation Index score

²⁰ The World Bank Group, *CPIA 2015 Criteria*, available at <http://data.worldbank.org/data-catalog/CPIA> (last accessed 28 September 2015).

²¹ International Development Association, <http://data.worldbank.org/indicator/IQ.CPA.IRAI.XQ> (last accessed 28 September 2015)

below 3.0. According to the World Bank reports, these states experience high levels of extreme poverty, low levels of economic growth, savings and investment, and education, repeated circles of violent conflicts as well as high infant mortality and deaths from disease.²²

There are certain differences in the way observers and various institutions rank failed states, however, there is also the strong degree of overlap. For example, the Brookings Institution's 2008 Index of State Weakness in the Developing World assesses more or less the same states as the World Bank using similar twenty economic, political, security and social welfare indicators.²³ It is therefore commonly agreed that Somalia is the failed state par excellence, or to put it differently, the only truly 'collapsed state'.

The origin of 'failed states' is often considered to be the decolonisation process of the 1960s, when the execution of the principle of self-determination of peoples as defined by the UN General Assembly, led to the creation of a number of new states which lacked the capacity to govern themselves effectively. Referring to the phenomenon of 'quasi-State', Robert Jackson argued that a considerable number of 'third world' states 'appear to be juridical more than empirical entities' which without support from international law and material aid would not be self-standing

²² *Ibid.*

²³ S Rice and S Patrick, Brookings Institution, *Index of State Weakness in the Developing World*, 2008, at pp.10-11. The index however, only identifies three bottom countries, that is Somalia, Afghanistan and Democratic Republic of Congo, as failed state, while the remaining countries which have been assessed are referred to as 'critically weak states'. The failed states are described as lacking 'the ability to effectively control substantial portions of their territory, and they are all currently in conflict. Their governments are unable and/or unwilling to provide for the essential human needs of their people—in terms of security as well as adequate food, clean water, health care, and education'. *Ibid*, p.14.

territorial jurisdictions.²⁴ The author distinguishes between 'positive' and 'negative' sovereignty, the latter being employed to describe international normative framework which upholds sovereign statehood in the Third World.²⁵ According to Jackson, 'a great variety of international statuses including more intrusive forms of international trusteeship might have rendered the post-colonial situation less unsatisfactory than it proved time and again under the one-dimensional negative sovereignty regime'.²⁶ The theme of a necessity for some form of international trusteeship recurs in the literature on state failure which followed. Helman and Ratner also questioned whether the nation-state framework remains appropriate for all peoples and territories. They accordingly proposed a new form of United Nations conservatorship as a solution for failed states.²⁷ As such, it would be only a temporary reduction in sovereignty ultimately leading to the failed state regaining its full independence.²⁸

²⁴ R H Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, Cambridge Studies in International Relations: 12 (Cambridge, Cambridge University Press, 1990), p. 5.

²⁵ *Ibid.* p. 1.

²⁶ *Ibid.* p. 202.

²⁷ *Supra* note 11: 'The international community should now be prepared to consider a novel, expansive -- and desperately needed -- effort by the U.N. to undertake nation-saving responsibilities. The conceptual basis for the effort should lie in the idea of conservatorship (...)The traditional view of sovereignty has so decayed that all should recognize the appropriateness of U.N. measures inside member states to save them from self-destruction'.

²⁸ The propositions for the international intervention through some form of conservatorship aimed at re-establishing 'failed states' has been criticised by many authors. Amongst others, Ruth Wedgwood for example noted that: 'Some observers speak of "failed states"-a locution resented by the developing world, which points out that European state formation was a slow and difficult process. The "failed state" proposal calls for the United Nations to step in, perhaps through the Trusteeship Council, when local leaders are unable to stem anarchy or govern effectively. At times there is almost an intimation that sovereignty does not properly belong to people who cannot employ it well. What sounds so utterly benign as peacekeeping can devolve into a kind of multilateral condescension. While I don't believe in accepting human suffering as growing pains (the whole corpus of international human rights law argues against that), nonetheless, the need to respect autonomous political development remains, whether it is a multilateral or a unilateral intervention'. R Wedgwood, 'The Evolution of United Nations Peacekeeping', 28 *Cornell International Law Journal* 631 (1995), at p. 636.

Due to an overwhelming complexity of the concept however, it has been extremely difficult to achieve agreement on an articulated objective definition and a number of propositions have been put forward. Zartman, for example, focuses on the failed state's inability to fulfil its social contract and defines state collapse as 'a situation where structure, authority (legitimate power), law, and political order have fallen apart and must be reconstituted in some form, old or new'.²⁹ The author argues that state failure manifests itself not only through the ineffectiveness of the central government but also in general breakdown of societal infrastructures and in fact the very foundations of society.³⁰ Similarly, Rotberg, clearly referring to the theory of unfulfilled social contract, observes that 'nation-states failed when they are consumed by internal violence and cease delivering positive political goods to their inhabitants'.³¹ The author proposes a hierarchy of political goods amongst which security and in particular human security is considered to be of utmost importance.³² Contrary to Zartman, he does distinguish between different kinds of state failure, identifying weak, failed and collapsed states.³³ Accordingly, depending

²⁹ I W Zartman, *supra* note 13, p. 1.

³⁰ *Ibid.* p. 5: As the decision-making centre of government, the state is paralysed and inoperative: laws are not made, order is not preserved, and societal cohesion is not enhanced. As a symbol of identity, it has lost its power of conferring a name on its people and a meaning to this social action. As a territory, it no longer assures security and provision by a central sovereign organization. As the authoritative political institution, it has lost its right to command and conduct public affairs. As a system of socioeconomic organization, its functional balance of inputs and outputs is destroyed; it no longer received support from, nor exercise controls over its people, and it no longer is even the target of demands, because its people know that it is incapable of providing supplies. No longer functioning, with neither traditional nor charismatic nor institutional sources of legitimacy, it has lost its right to rule' (internal citation omitted).

³¹ R Rotberg, *supra* note 12, p. 1.

³² *Ibid.* at p. 3.

³³ *Ibid.* at p. 4: 'Weak states (broadly, states in crisis) include a broad continuum of states: they may be inherently weak because of geographical, physical, or fundamental economic constrains; or they may be basically strong but temporarily or situational weak because of internal antagonisms, management flaws, greed, despotism, or external attacks'; at p. 5: 'Failed states are tens, deeply conflicted, dangerous, and contested bitterly by warring factions(...) government troops battle armed revolts led by one or more rivals. Occasionally, the official authorities in a failed state face two or more insurgencies, variety of civil unrest, different degrees of communal discontent, and a

on the degree of inability to provide various political goods, states can be classified as being more or less failed, since the phenomenon is considered to be more correctly depicted as a continuum rather than a once and for all established set of circumstances.

Encapsulating the concept within a legal paradigm is undoubtedly a difficult task as the existence of a state without effective government has not been foreseen by international law and therefore, failed states are fundamentally unique creatures requiring specifically tailored responses to the challenges they pose. Consequently, it is difficult to resolve some terminological and conceptual issues involved in the studies on state failure. One of the principal sources of ambiguity is under which criteria a state may be described as being in the process of failing or already failed or collapsed. Thürer in his 1999 article 'The "failed state" and International Law' argued that the term 'failed' is far too broad since the aggressive, arbitrary tyrannical or totalitarian states could equally be considered as 'failed' states according to international law standards.³⁴ Then again the approach focusing primarily on the lack of governmental authority is too narrow due to the complexity of the phenomenon and multi layered failure of a state as a whole.³⁵ Consequently, Thürer acknowledges that 'the term "failed" State does not denote a precisely defined and classifiable situation but serves rather as a broad label for a phenomenon which can be interpreted in various ways'.³⁶

plethora of dissent directed at the state and at groups within the state'; at p. 9: 'A collapsed state is a rare and extreme version of failed state (...) A collapsed state exhibits a vacuum of authority'.

³⁴ D Thürer, *supra* note 14, p. 733.

³⁵ *Ibid.*

³⁶ *Ibid.* The author identifies three elements which characterise 'failed states' from the political point of view: 'Firstly, there is a geographical and territorial aspect, namely the fact that 'failed States' are

The discussion about the applicable criteria under which a state can be described as being in a process of failing or already collapsed is far from being satisfactorily concluded. It is perhaps primarily due to the fact that, as Chiara Giorgetti observes: 'State failure is better described as a phenomenon in evolution, which, in a graphical representation, is better visualized as a line, not a point. Thus, while complete State collapse is the final stage of the phenomenon, there are several stages that link complete failure to a fully functioning State, depending on the residual capacity of a State to fulfil its obligations'.³⁷ As will be evident in the analysis conducted in chapter four, this "evolutive" character of state failure has profound consequences on the legality of the use of force in self-defence against non-state actors.

The common feature of state failure is the loss of governmental control over states' territory, which may of course vary in its form and extent, and which follows logically the implosion of central authority. Failed states suffer from implosion of the structures of power and authority which inevitably leads to disintegration and destruction of the state. However, as Geiß points out '...while loss of control over certain delimited parts of a state's territory is not uncommon, total and protracted loss of central control over the entire territory is rare and arguably warrants the

essentially associated with internal and endogenous problems (...) Secondly, there is the political aspect, namely the internal collapse of law and order (...) Thirdly, there is the functional aspect, namely the absence of bodies capable, on the one hand, of representing the State at the international level and, on the other hand, of being influenced by the outside world'. From a legal point of view 'failed state' could be characterised as one which 'though retaining legal capacity, has for all practical purposes lost the ability to exercise it'. In terms of historical and developmental context, Thürer points towards 'Third World States which have been affected by three geopolitical factors: the end of Cold War (...) the heritage of colonial regimes (...) general processes of modernisation'. Finally, from the sociological perspective, the phenomenon is characterised by 'the collapse of the core of government' and 'the brutality and intensity of violence used'. pp.733.

³⁷ C Giorgetti, *supra* note 7, p. 43.

specific categorization and suggestive designation as a failed state, in view of the various implications it entails at the international level'.³⁸ In such situations various non-state entities claim and indeed eventually possess a monopoly on the use of force and perform a number of state functions such as taxation or even supply of education and health services to the local population. As it was noted above, the lack of effective governmental authority results in the state's representation on the international arena being reduced to a bare minimum. The entity in question cannot enter into international agreements and may also be incapable of requesting or consenting to often urgently required interventions by third parties.

One of the terminological difficulties presented by the notion of 'failed state' is the fact that it involves a value judgement which would imply that there is an agreed standard of social, political and economic performance to which all states should aspire. Such an approach would not be useful in the legal analysis of the problem. Instead, as Yannis argues, 'such situation should be evaluated in terms of the minimum standards of governance that reflect a universal consensus about the minimum requirements of effective and responsible government'.³⁹ It is necessary to employ legal terms when conducting the legal examination of the problem. From the international legal perspective, the most important element of state failure is undoubtedly the loss of effective government. The effective government is a constitutive element of statehood and a legal concept. Accordingly, as analysed below, from the legal perspective, it is more appropriate to refer to the situations

³⁸ R Geiß, 'Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties' 91 (873) *Int'l Rev Red Cross* (2009), pp. 129-130.

³⁹ A Yannis, 'State Collapse and its Implications for Peace-Building and Reconstruction' 33 *Development and Change* (2002), at p. 818.

considered as state failure in terms of the loss of effective government. As pointed out by Koskenmäki, 'contrary to the not uncommon practice, the terms 'failed' or 'collapsed state' should not be employed carelessly, at least in legal discourse, but with awareness of their meaning and legal consequences'.⁴⁰

3.2.3 A legal approach to a definition of state failure – the loss of effective government

Despite the fact that there are various characteristics of 'failed' or 'collapsed' states, it is important to distinguish between the symptoms or features which characterise them and actual legal concepts which can constitute their defining criteria. Consequently, although such elements as widespread human rights violations, humanitarian law violations, famine and poverty, or internal displacements and refugee flows are all present in case of state failure, they are equally relevant for other situations such as, for example, international and internal armed conflicts or natural disasters. They may be considered as the indicators of the phenomenon but hardly defining criteria in a legal sense.

The way to achieve a workable definition of state failure would be through adopting a utilitarian approach and focus on specific purpose for which the definition is sought. Consequently, for the purposes of international law, the total or near total implosion of effective central government and governmental services guaranteeing law and order is the most relevant common denominator of failed states. The

⁴⁰ R Koskenmäki 'Legal Implications Resulting from State Failure in Light of the Case of Somalia' 73 *Nordic Journal of International Law* (2004), p. 18.

effectiveness of government is, as a matter of fact, an extension of the principle of effectiveness which has been widely accepted as one of the general principles of international law in accordance with Article 38(I)(c) of the Statute of the International Court of Justice.⁴¹ As noted by Akpinarli, the principle of effectiveness is being implemented in the existing statehood through the internal and external aspects of the effectiveness of the government.⁴² The internal aspect of effectiveness is therefore expressed through the ability of the existing government to maintain law and order and govern the existing population within a defined territory. This is precisely where failed states prove to be unsuccessful. According to Kreijen, 'the virtual absence of government (...) generates a general inability on the part of the failed state to maintain law and order'.⁴³ Similarly, Thürer argues that state failure is 'the product of collapse of the power structures providing political support for law and order'.⁴⁴ It means 'the absence of bodies capable...of representing the State at the international level and...being influenced by the outside world. Either no institution exists which has the authority to negotiate, represent and enforce or, if one does, it is wholly unreliable, typically acting as 'statesman by day and bandit by night''.⁴⁵ It is in fact as well a point taken upon by James Crawford who refers to state failure as primarily crises of government.⁴⁶ As he concludes, none of the situations described as state failure, i.e. Somalia, the Congo, Liberia, etc. 'has involved the extinction of a State in question and it is

⁴¹ Statute of the International Court of Justice, Article 38 (I)(c)

⁴² N Akpinarli *The Fragility of the 'Failed State' Paradigm: A Different International Law Perception of the Absence of Effective Government* (Leiden/Boston, Martinus Nijhoff, 2010), p.10.

⁴³ G Kreijen *State Failure, Sovereignty and Effectiveness. Lessons from the Decolonization of Sub-Saharan Africa*, (Leiden/Boston: Martinus Nijhoff, 2003), p. 84.

⁴⁴ *Supra* note 14, p. 735.

⁴⁵ *Ibid.*

⁴⁶ *Supra* note 1, p. 721-722.

difficult to see what possible basis there could be for supporting otherwise (...) although there are many poor, often desperately poor, States, one must ask what they might otherwise be or have been – satellites of a neighbour, for example, or equally poor or even poorer colonies?'.⁴⁷ On the other hand, the external effectiveness would be expressed via state's ability to represent its people, active participation in states' relations and the capacity to exercise its rights and fulfil its duties under international law. Yet again, failed states prove deficient in this respect.

The absence of effective government, as evidenced by the collapsed of state institutions understood in a broad sense, leads to a long-term default of decision-making power which in turn causes the gradual decline of administrative structure of a failed state. As noted above, prolonged lack of a functioning legislature, executive and judicial organs lead to the end of law and order and severe fragmentation of authority. Consequently, the power vacuum which emerges is often filled by a variety of non-state actors governing sections of the state's territory. As a result of the above, failed states are most commonly incapable to reorganise and rebuild themselves and their effective governments by their own means. Furthermore, the appearance of powerful non-state actors and their armed activities beyond the boundaries of a failed state, necessitate the reconsideration of the rules regarding the use of force in self-defence.

Prolonged inability to effectively govern a state and maintain law and order may be seriously compromised during an armed conflict. Such conflicts had been described

⁴⁷ *Ibid.*

by the former UN Secretary-General Boutros Boutros-Ghali as being characterised by 'the collapse of state institutions, especially the police and judiciary, with resulting paralysis of governance, a breakdown of the law and order, and general banditry and chaos. Not only are the functions of government suspended, but its assets are destroyed or looted and experienced officials are killed or flee the country. This is rarely the case in inter-state wars'.⁴⁸ Undoubtedly, state collapse is linked to a particular type of conflicts which, through the various causes of state failure, manifest themselves in a society to the point where the governmental failure occurs. These conflicts have been identified and referred to by the International Committee of the Red Cross as 'anarchic conflicts'.⁴⁹ The essential characteristics of such conflicts are as follows: (a) the disintegration of the organs of the central government, which is no longer able to exercise its rights or perform its duties in relation to the territory and the population (b) the presence of many armed factions (c) divided control of the national territory, and finally (d) the breakdown of the chain of command within the various factions and their militias.⁵⁰ According to the ICRC, these conflicts are non-international armed conflicts regulated by the applicable rules of international humanitarian law.⁵¹ The difference between such type of armed conflicts and the classic civil war is that in the former, it is often difficult to identify the number of parties involved as well as their aims and alliances. The fragmentation of the parties to an anarchic conflict is

⁴⁸ Boutros Boutros-Ghali, *Introduction, The United Nations and Somalia 1992-1996*, The United Nations Blue Book Series, Volume VIII (New York, United Nations Publications, 1996), p.45.

⁴⁹ The International Committee of the Red Cross, *Armed Conflicts Linked to the Disintegration of State Structures*, Geneva, 9-23 January 1998. Available at: <http://www.icrc.org/eng/resources/documents/misc/57jplq.htm>

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

most commonly determined along ethnic, religious and cultural lines or through the struggle for control over the country's natural resources. It is not infrequent that the groups involved in such a conflict often lack military organisation and political identification. Furthermore, it has been identified that anarchic conflict usually last considerably longer than the civil wars.⁵² As a result, failed states remain without effectively functioning governments for a prolonged period of time. Although, as noted by the ICRC, anarchic conflicts would be govern by the applicable rules of international humanitarian law, the armed attacks perpetrated outside the state borders by non-state armed groups engage in this type of conflict, necessitate the implementation of the international law rules regarding the use of force in self-defence in states' relations.

It has to be noted that no state in the world exercises a complete degree of control via its government over its population and territory. There is no support for the view that such loss of effective government entails the extinction of the state, as the acceptance of this argument would be in direct contradiction to some of the most fundamental norms of international law, including, most importantly, the principle of sovereign equality of states. Accordingly, the continuation of failed states is the preferred and widely accepted position despite the absence of a constitutive element of statehood. According to Classen, 'in principle, the legal personality of the State survives and so do all rights which are derived from it. In particular, the State retains its territorial sovereignty and enjoys the protection

⁵² *Ibid.*

from the prohibition of interference in internal affairs, and of military intervention'.⁵³

The continuing existence of failed states presents a set of difficulties and challenges to international law, one of them being provision of the actual definition of such territorial entities. Taking into consideration the defining criteria for statehood analysed in the preceding chapter, from an international legal perspective, the prolonged lack of effective governance appears to be the main characteristic of failed states. Accordingly, a suitable legal definition would be applicable to the situations of the states which as a consequence of anarchic conflicts, as described by the ICRC above, lack, either totally or partially, an effective government capable to maintain law and order in its territory or substantial part of its territory, and which also lack the capacity to rebuild their governments by their own means. Consequently, the degree of state collapse or disintegration would be determined by the degree of lack of effective government – with extreme cases of a complete lack of governmental authority and other examples where the existing power structures exercise only marginal control over population and territory of the State.

3.3 International legal consequences of the continuing existence of states with no effective government

As a subject of international law, each state has two capacities – the legal capacity, namely the rights and duties under international law, and the capacity to exercise

⁵³ C D Classen, "'Failed States" and the Prohibition of the Use of Force' in *Les nouvelles menaces contre la paix et la sécurité internationales*, Société Française pour le Droit International, 2004, p.130.

rights and fulfil duties under international law order.⁵⁴ The ability to act with unrestricted capacity by states is of paramount importance in international law. Failed states face numerous international legal consequences arising as a result of prolonged periods without effectively functioning governments and consequent inability to exert their sovereignty over national territory and in international relations. The three sections below, however, will only be concerned with a selection of issues which appear to be the most relevant for this thesis. Additionally, the question of possible international legal responsibility of failed states will be further examined in Chapter five with a specific reference to the regime governing the use of force in self-defence in states relation.

3.3.1 The inability to enter into relations with other subjects of international law

As pointed out by the Permanent Court of International Justice, 'States can only act by and through their agents and representatives'.⁵⁵ Consequently, the lack of effective government means that a failed state may not be in a position to provide such agents and representatives resulting in exclusion of the state and its people from international relations.⁵⁶ The situation is well described by Kreijen:

'From a material point of view (...) the capacity of the failed State to enter into international relations is affected. It stands to reason that this capacity must be severely reduced by the virtual absence of government within the failed State. As

⁵⁴ *Supra* note 1, at p. 25.

⁵⁵ *German Settlers in Poland Advisory Opinion*, 10th September 1923. PCIJ, Series B., No. 6, at p. 22.

⁵⁶ Thürer points out that from a legal perspective, a failed state is one which despite retaining legal capacity 'has for all practical purposes lost the ability to exercise it'. D Thürer, *supra* note 14, p. 734.

revealed by the extreme case of Somalia, the general lack of a clearly identifiable responsible agent severely complicates, and may even render impossible, the conduct and maintenance of any bilateral or multilateral international relations. Both individual States and international organisations will as a rule find it very difficult, if not impossible, to identify a counterpart to deal with the failed State'.⁵⁷

From a functional perspective, the fact that failed states lack bodies capable of representing them on the international level means that they are unable to conclude international treaties.⁵⁸ Similarly, it proves difficult for the states with no effective government and representatives to participate in international proceedings.⁵⁹ The ability of the state to participate in diplomatic relations suffers as a consequence of incapacity to issue credentials to diplomatic missions' personnel.⁶⁰ This can certainly have serious consequences for the nationals of a failed state as, for example, their passports cannot be renewed and their interests abroad protected.

The absence of an effective government makes it impossible for a failed state's representation to have its credentials renewed for every session of the UN General Assembly. For example, when Somalia lacked any government, although remaining

⁵⁷ *Supra* note 43, p. 87-88.

⁵⁸ Somalia, for example, was unable to ratify the Lomé IV Convention and consequently did not participate in the Lomé IV *bis* treaty, or the Cotonou agreement. Effectively, the country did not benefit from international aid that would have been of a great assistance to its population. See: R Geiss, 'Failed States. Legal Aspects and Security Implications' 47 *German Yearbook of International Law* (2005), p. 472. Similarly, Somalia could not conclude any agreement with the World Bank or enter into an agreement with the UN regarding the status of forces that intervened in its territory. See: R Koskenmäki 'Legal Implications Resulting from State Failure in Light of the Case of Somalia' 73 *Nordic Journal of International Law* (2004), p. 18.

⁵⁹ Koskenmäki, *supra* note 40, p. 17.

⁶⁰ Koskenmäki points out that this is 'inevitable, since the continued existence of uncontrolled representative powers for an unlimited period of time could lead to a difficult situations, especially, if several entities claim authority for the failed state'. *Supra* note 40, p. 8.

a member state of the UN and theoretically having a place in the UN General Assembly, in practice, nobody was authorised to represent it in the functioning of the organ between 1992 and 2000.⁶¹ Nevertheless, the practice of the UN Security Council and the UN human right bodies has been somewhat different as they allowed the participation and even invited Somalia to their meetings despite presumably defective or non-existent credentials of its representatives.⁶² This inconsistent approach evidences the unpreparedness of the organisation as a whole to deal with the issues relating to the representation of the failed state.

There are some partial solutions to the problem of the failed state's inability to engage in international relations. The Rome Statute of the International Criminal Court for example, in Article 57(3) (d) 'authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9'.⁶³ Nevertheless, although suitable for the purposes of this particular international treaty, this type of

⁶¹ Koskenmäki, *supra* note 40, at p. 13.

⁶² Koskenmäki concludes that 'The system-wide practice of the UN with respect to the representation of Somalia appears quite inconsistent. Nonetheless, it seems that the representatives of a failing state, duly accredited to the Organisation by the last government, retain limited representative powers during the period of uncertainty following state collapse. This applies, however, only for certain purposes, such as information sharing. Once the total absence of government, with no foreseeable possibility of recovery had been established with regard to Somalia, the country had no representative authority in the UN System. The inconsistencies of practice should, therefore, be considered as unintentional incidents rather than deliberate judgement of the situation'. *Supra* note 40, p. 16.

⁶³ Rome Statute of the International Criminal Court of 17th July 1998, Article 57(3)(d).

provision does not solve the above described wider problem of the incapacity of territorial entities without functioning government to participate in states' relations. To sum up, the lack of effectively functioning government undoubtedly complicates the state's capacity to interact with other subjects of international law by making it incredibly difficult to sign and implement treaties, as well as representing a state in regional and international organisations.

3.3.2 The inability to exercise rights and fulfil international legal obligations

States which experience lack of effective government or in fact lack of any government at all, are in great difficulties to fulfil their international legal obligations deriving from both conventional and customary international law. Despite suffering from disintegration of their governmental institutions, as noted above, failed states retain their legal personality. Without their agents and organs however, they are either unable to exercise their rights and fulfil their duties as subjects of international law or their capacity to do so is in fact severely limited. Koskenmäki pointed out that 'the prolonged absence of any state organs, entails an absolute impossibility to comply with the international obligations of the state'.⁶⁴

First of all, the absence of an effective government presents an obstacle to exercise rights under treaties which have already been concluded. Additionally, as evidenced by the situation in Somalia, the capacity to conclude international treaties under Article 6 of the 1969 Vienna Convention on the Law of Treaties is missing in case of failed states. The latter is particularly important in terms of international

⁶⁴ Koskenmäki, *supra* note 40, p. 19.

development policy as international efforts to rebuild failed states suffer from the lack of central and other organs within such states.⁶⁵ As stated in the UN Security Council Resolution 387 of 31st March 1976, it is ‘the inherent and lawful right of every state, in the exercise of its sovereignty, to request assistance from any other state or group of states’.⁶⁶ It would be physically impossible however, for a state without effective government to request such assistance. Again, the case of Somalia is an illustrative example. The UN Security Council Resolution 794 of 3rd December 1992 clearly stated that ‘in Somalia there is no government that can be the interlocutor of the United Nations for the purposes of agreeing upon a humanitarian-assistance operation’.⁶⁷ Furthermore, failed states would not be able to participate in judicial proceedings in either foreign or international courts since there exists no person or institution capable of such representation.

The nonexistence of an effective government has a great impact on the capacity to fulfil international legal obligations by the failed state. As described by Akpinarli, ‘The lack or restricted effectiveness of the central organs hinders the fulfilment of international duties in good faith. A state with no effective government cannot observe treaties according to the general principle of *pacta sunt servanda* in Article 26 of the Vienna Convention on the Law of Treaties. The state could appear in default on its payment or fail to fulfil multinational treaties on human rights or international humanitarian law.’⁶⁸ Similarly, absence of effective government

⁶⁵ See, *inter alia*, K van Hippel and A Yannis ‘The European Response to State Collapse in Somalia’ in *European Approaches to Crisis Management* (The Hague: Kluwer Law International, 1997); C Giorgetti, *supra* note 7.

⁶⁶ United Nations Security Council Resolution 387 (1976) of 31 March 1976, UN Doc. S/RES/387.

⁶⁷ United Nations Security Council Resolution 794 (1992) of 3 December 1992, UN Doc. S/RES/794.

⁶⁸ *Supra* note 42, p. 28.

equates to state's complete incapacity to fulfil its duties as a member of international organisations.

As noted above, a failed state would not be in a position to fulfil its conventional duties. There are a couple of provisions in the Vienna Conventions on the Law of Treaties (hereinafter VCLT) which could perhaps apply in these circumstances. Article 61 of the Convention concerns the impossibility of performance when that impossibility is either temporary or permanent and relates to the disappearance or destruction of an object indispensable for the execution of a treaty.⁶⁹ Nevertheless, as noted in the International Law Commission's commentary to what would eventually become Article 61(1) of the VCLT, 'the type of cases envisaged by the article is the submergence of an island, the drying up of a river or the destruction of a dam or hydro-electric installation indispensable for the execution of a treaty'.⁷⁰ The Article therefore, has not been drafted having in mind cases of states lacking effective governments and consequently, unable to discharge treaty obligations. Similarly, the applicability of the *clausula rebus sic stantibus* contained in the Article 62 of the VCLT to the situations of failed states proves problematic.⁷¹ Although it

⁶⁹ Vienna Convention on the Law of Treaties, Article 61(1) reads as follows: 'A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty'.

⁷⁰ See: Report of the International Law Commission on the work of its eighteenth session (4 May -19 July 1966). Yearbook of The International Law Commission, 1966, Vol. II, p.256, para. 2.

⁷¹ Vienna Convention on the Law of Treaties, Article 61(1) reads as follows: '1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

would appear that the partial or total collapse of a state could possibly satisfy the first condition contained in the Article, that is unforeseeable external change that influences the circumstances which formed the basis for concluding the treaty, the fulfilment of the second condition may be difficult to argue. It is questionable whether the disintegration of state structures has a radical effect on the extent of the obligations to be performed under a treaty. Additionally, in order to invoke the circumstances described in the Article 62, the procedure contained in the Articles 65 – 68 of the Convention has to be followed.⁷² A state would therefore need to have the necessary organs in place in order to engage in international relations. It is therefore, correct to agree with Koskenmäki when she states that ‘the application of the VCLT to situations of state failure seems unsatisfactory, first, since its provisions on the non-application of treaties are difficult to apply to that particular situation, and second, as it completely ignores the possibility of the absence of a representing authority’.⁷³

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

⁷² As stated by the ICJ in the *Fisheries Jurisdiction Case*: ‘the doctrine [of *rebus sic stantibus*] never operates so as to extinguish a treaty automatically or to allow an unchallengeable denunciation by one part; it only operates to confer a right to call for termination’. *Fisheries Jurisdiction Case* (United Kingdom v. Iceland), Judgement of 2 February 1973, ICJ Reports 1973, p.21, para. 44.

⁷³ Koskenmäki, *supra* note 40, p. 22.

3.3.3 The question of international responsibility

Considering the fact that failed states continue to enjoy their international legal personality, in principle, they also continue to have international rights and obligations and could be subject to be held internationally responsible. The question, however, is whether a state with no organs or agents capable to act on its behalf can be held responsible for the violations of international law. According to Thürer, 'current international law holds that a State cannot be held liable for any breaches if it no longer has institutions or officials authorised to act on its behalf. In particular, the State cannot be held responsible for not having prevented offences against international law committed by private individuals or for not having called them to account for their conduct. The reason for this is that the State does not have the necessary power to act'.⁷⁴ Nevertheless, in order to analyse the problem of possible international responsibility of the failed state, it is necessary to take into consideration the work of the International Law Commission and, in particular, the Articles on State Responsibility.⁷⁵

In principle, states are responsible for the conduct of its agents or organs and the conduct of private persons or entities is not in general attributable to the state, unless in particular exceptions. Article 9 of the ILC's Articles on State Responsibility provides for one such exception stating that 'a person or a group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those

⁷⁴ Thürer, *supra* note 14, at p. 747.

⁷⁵ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts With Commentaries*, text adopted by the International Law Commission at its fifty-third session, UN Doc. A/56/10 (9 June 2001), available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

elements of authority'.⁷⁶ These circumstances, according to the ILC's commentary to the Article, occur only rarely and the cases referred to 'presuppose the existence of a Government in office and a State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances'.⁷⁷ This commentary appears to suggest that the provisions of Article 9 intend to cover primarily transitional situation where, nevertheless, the governmental authority is present at least to a certain degree.⁷⁸ Despite the above, the ILC's commentary clearly points out to the possibility for the application of Article 9 to the situations of state collapse. The ILC's states that: 'The phrase "in absence or default of" is intended to cover both situations of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over certain locality. The phrase "absence or default" seeks to capture both situations'.⁷⁹ This is in contradiction with above cited commentary referring to the necessity for existence of at least some presence of the governmental authority.

Once certain conduct has nevertheless been attributed to the failed state in the light of the provisions contained in Article 9, the state in question could only be held internationally responsible if its conduct does not fall under one of the

⁷⁶ *Ibid.* Article 9.

⁷⁷ Report of the International Law Commission on the work of fifty-third session (23 April-1 June and 2 July-10 August 2001), p.49 at para. 4.

⁷⁸ According to the ILC Commentary, such circumstances '[O]ccur only rarely, such as during revolution, armed conflict, or foreign occupation, where the regular authorities dissolve. Are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g. after foreign occupation', p. 49, para. 1.

⁷⁹ *Ibid.* at para. 5.

circumstances precluding wrongfulness as referred to in Chapter V of the Articles on State Responsibility. One of such circumstances, namely *force majeure*, is of a particular relevance to the situation of the state without effectively functioning government. Article 23(1) of the Articles on State Responsibility provides the definition of *force majeure* as 'the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation'.⁸⁰ One would, therefore, have to consider whether the collapse of an effective government satisfies the conditions set out in Article 23(1). Undoubtedly, the disintegration of state structures may occur in such a way that the state in question is unable to avoid or oppose it by its own means and in that sense it may also be beyond its control. With regards to the material impossibility of performance, the ILC's commentary states that this may be due to either natural or physical events or to human intervention.⁸¹ It could therefore, be concluded that the conditions for *force majeure* may be validly invoked in particular circumstances of state collapse and accordingly preclude the wrongfulness of illegal acts which took place during the period of state's disintegration.

The problem of possible state responsibility of a failed state for internationally wrongful acts and in particular the responsibility for the acts of non-state actors will be the primary subject of Chapter five of this thesis. Furthermore, the issue will be

⁸⁰ International Law Commission. Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Article 23(1).

⁸¹ Report of the International Law Commission on the work of fifty-third session (23 April-1 June and 2 July-10 August 2001), p.76 at para. 3.

analysed with specific reference to the international law rules governing the use of force in self-defence.

3.4 Conclusion

International law requires certain constitutive elements discussed in Chapter two above for an entity to qualify as a state. Additionally, international law plays an important role in determining when an entity constitutes a state – in certain cases even if it lacks an effective government. Despite the fact that states experience constant changes in their constitutive elements, there is a strong presumption in international law of continuity of states once they have been created. Consequently, failed states continue to be considered fully-fledged, sovereign states under international law despite experiencing extreme difficulties in exercising their international legal personality. Despite not infrequent appearance of the phenomenon in international arena, there is no standard definition of what constitutes a ‘failed’ state and different terms are used to describe the same situation or seeming different ones but closely related.

From an international law perspective, the employment of the expression ‘lack of effective government’ as a consequence of states’ disintegration and collapse, better describes the phenomenon of failed states as it uses the notions commonly employed in international legal discourse. Accordingly, the proposed definition of failed states would be reserved for the territorial entities which as a consequence of anarchic conflicts, lack, either totally or partially, an effective government

capable to maintain law and order in their territory or part of their territory, and which also lack the capacity to rebuild their governments by their own means. Following the analysis based in the current international law, there is no foundation to support the view that the above described states become extinct due to the loss of effective government they suffered. Both state practice and practice of the international organisations, in particular the United Nations via General Assembly and Security Council, as well as the majority of legal commentators agrees that failed states continue their international legal personality.

The lack of effective government, however, entails grave difficulties. Failed states are incapable to interact with other subjects of international law in a usual manner. Their ability to fulfil international treaty obligations is severely diminished and so is the capacity to participate in international proceedings. Failed states' diplomatic and consular relations suffer and the involvement in the work of international organisations is affected as well. The invocation of state responsibility in case of the type of states here analysed also proves problematic.

It is clear that international law has several complex challenges that need to be addressed in relation to the failed states. The following chapters will investigate one of such problems – the question regarding the use of force in self-defence in response to the attacks conducted by non-state actors operating from a territory of the failed state. It is important to note, however, that when dealing with the phenomenon of failed states, the international legal order cannot completely forsake its most fundamental principles, including the sovereign equality of states.

CHAPTER 4

THE LEGALITY OF SELF-DEFENCE AGAINST NON-STATE ACTORS

LOCATED IN FAILED STATES

4.1 Introduction

The law on the use of force in states relations is the cornerstone of post-Second World War legal order and is to be located in two main sources: the Charter of the United Nations¹ and customary international law. The brevity and simplicity of the law stated in the Charter has given rise to multiple problems of interpretation and application. There are three main provisions regarding the use of force in the treaty. Firstly, Article 2.4² contains the prohibition of the use of force in states relations. Secondly, the inherent right of individual and collective self-defence is acknowledged in Article 51³ and, finally, Article 42 allows the United Nations Security Council to authorise the use of force⁴. Self-defence is an exception to the

¹ Charter of the United Nations (opened for signature 25 June 1945, entered into force 24 October 1945) 1 UNTS XVI

² Article 2.4 of the Charter of the United Nations: 'All 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 Purposes of the United Nations'. Charter of the United Nations (opened for signature 25 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

³ Article 51 of the Charter of the United Nations: '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'. Charter of the United Nations (opened for signature 25 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

⁴ Article 42 of the Charter of the United Nations: 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or

general rule prohibiting the use of force in states relations and accordingly, it must be constructed in the context of other principles of international law, and in particular territorial integrity and sovereign equality of states. Nevertheless, the credibility of the law depends upon its ability to address effectively the realities of contemporary threats.⁵

The interpretation of the provisions of Articles 2.4 and 51 of the UN Charter in relation to cases involving non-state actors and failed states remains uncertain and contested. Similarly, the efforts to clarify the development of customary international law regarding the use of force in self-defence against non-state actors in failed states are continuously obstructed by the ambiguities and inconsistencies in the ongoing state practice.⁶ The core of the problem is the decentralisation of international legal system and the fact that multiple claims may be considered as law by some actors and not by others.⁷

This chapter aims to present and examine issues pertaining to the legality of the use of force in self-defence against non-state actors operating from the territories of

land forces of Members of the United Nations'. Charter of the United Nations (opened for signature 25 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

⁵ See: D Bethlehem, 'Self-Defence Against an Imminent or Actual Armed Attack By Nonstate Actors' 106 *American Journal of International Law* 770 (2012), p.772: 'Self-defence is not a static concept but rather one that must be reasonable and appropriate to the threats and circumstances of the day'.

⁶ As noted by Crawford, '[...] custom does not spring into existence fully formed, but it must undergo a period of maturation. The crucial question remains whether acts by states during that period are lawful or unlawful, or whether indeed their status as lawful or unlawful is somehow pending'. J E Crawford, Keynote Speech, 'Identification and development of customary international law', Spring Conference of the ILA British Branch – Foundations and Future of International Law, 23 May 2014.

⁷ For further discussion regarding the identification and development of customary international law see: M Wood, Special Rapporteur, *Second Report on Identification of customary international law*, International Law Commission, Sixty-sixth session, A/CN.4/672, May 2014, para. 21&22: 'The present report proceeds on the basis that the identification of a rule of customary international law requires an assessment of both practice and the acceptance of that practice as law ('two-element' approach) [...] Under this approach, a rule of customary international law may be said to exist where there is 'a general practice' that is 'accepted as law'.

failed states. In order to do so, it firstly identifies both the relevant treaty law and customary international law. The chapter seeks to analyse if and how states may use defensive force against non-state actors operating from failed states without actual attribution of the initial attack to the latter. This section of the thesis is closely linked with Chapter Five which turns towards the analysis of the recent state practice with regard to the exercise of self-defence against armed attacks perpetrated solely by non-state actors located within failed states. Chapter Five therefore, examines the application of the law, namely, to what extent state practice reflects the existing law analysed here, as well as, whether it may be contributing to the emergence of new rules of customary international law. Firstly, however, some limitations have to be disclosed with regard to the analysis provided in the present chapter. Accordingly, this part of the thesis will not aim to conduct a thorough investigation of the entirety of pre-conditions for self-defence. Instead, the chapter mainly focuses on the 'armed attack' element and in particular the aspect relating to the *ratione personae* of the 'armed attack'. Clearly, the attacks by states' regular forces come within the ambit of Article 51 of the UN Charter. The legal issues discussed in the two parts below relate to the circumstances where the application of the said Article would not be immediately obvious. Such are the cases where the state fails to control its territory and the non-state actor carries out transborder military operation of such 'scale and effect' which may suffice for it to be considered an 'armed attack'. The growing support for a flexible reading of *ratione personae* element of 'armed attack' which may trigger the right of self-defence is driven primarily by the increasing threat from international terrorism as well as developments and availability of modern transport, weaponry and

communication technology. Another caveat is expressed with regard to the fact that there may either be no link between the state apparatus and a non-state actor or the state is simply unable to prevent a non-state actor from launching the attack. The fact of the matter is, however, that one must distinguish between the question of possibility of non-state actors being responsible for an armed attack without state involvement and the necessity of actual attribution of such an attack to the territorial state in order to justify self-defence measures.

The present chapter is divided into three main parts. The first one provides some essential background and identifies the law relevant to the use of force in self-defence. The subsequent section focuses on the analysis of possible grounds for the exercise of the right of self-defence against non-state actors perpetrating alleged armed attacks from territories of failed states. The penultimate part addresses the parameters and application of self-defence which particular emphasis on what constitutes an “armed attack” for the purposes of self-defence, as well as, principles of necessity and proportionality. Final segment provides conclusion which links into Chapter Five.

4.2 Identification of the law

The law regarding use of force in states relations is set out in the United Nations Charter, in the rules of customary international law and in general principles of international law. Collectively, it is known as the *jus ad bellum*. The starting point in the examination of the treaty law in the area is the prohibition of the use of force

contained in Article 2.4 of the UN Charter⁸. The International Court of Justice confirmed that, as well as being a treaty provision, the Article constitutes a rule of customary international law.⁹ The relevant *opinio juris* was found in, amongst others, General Assembly Resolution 2625 (XXV) 'Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations'.¹⁰ Furthermore, the Court¹¹ as well as the International Law Commission¹² has taken the view that the prohibition has the character of a norm of *jus cogens*. Considered to be a response to the Second World War, Article 2(4) is one of the bedrocks of modern day international

⁸ As noted by Moir 'Although the terms of the prohibition may, prima facie, seem relatively clear, the precise scope of this provision had nonetheless been the subject of continued debate, even regarding the central concept of 'force' itself'. L Moir, *Reappraising the Resort to Force. International Law, Jus ad Bellum and the War on Terror* (Oxford&Portland, Hart Publishing, 2010), p.6.

⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Reports 14,100 [190] (*Nicaragua*). The Court states that the prohibition of the use of force could be regarded as a principle of customary international law 'not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter', para. 188.

¹⁰ UN Doc A/RES/2625. Principle (a) of the Resolution repeats Article 2.4 of the UN Charter near-verbatim.

¹¹ In the *Nicaragua* case the Court stated: 'A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*'. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Reports 14, para. 190.

¹² In 1996, the ILC pointed out in its commentary to Article 50 of the Vienna Convention on the Law of Treaties (which later became Article 53) that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*'. *Reports of the International Law Commission to the General Assembly*, 21 U.N. GAOR Supp. No. 9, pt. II, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. Int'l L. Comm'n 172, at 247, U.N. Doc. A/CN.4/SER.A/1966/Add.1. More recently, in the context of the articles regarding the state responsibility, the Commission stated that: 'It is generally agreed that the prohibition of aggression is to be regarded as peremptory'. Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, at 283, U.N. Doc. A/56/10, GAOR, 56th Sess., Supp. No. 10 (2001).

law order which established prevention of armed conflicts as its primary goal.¹³ Nevertheless, the UN Charter recognises the fact that an absolute prohibition on the use of force in states relations is unrealistic and therefore allows for certain exceptions, the most important one being the self-defence contained in Article 51 which reads in full as follows:

Nothing in the present Charter shall impair the inherent right of individual and 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.

The concept of self-defence is both a treaty-based provision and the rule of customary international law. Throughout the post-Charter era its interpretation underwent numerous changes and the evolving custom reflected the threats and circumstances of the day.¹⁴ The focus of this study is the aspect of self-defence which has raised a lot of controversy in recent years and relates, first of all, to the question of whether the use of defensive force against non-state actors operating from the territory of a failed state is allowed by Article 51 and other recognised

¹³ See: C Gray, *International Law and the Use of Force* (Oxford University Press, 2008), p.7.

¹⁴ O Corten, 'The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate' 16 *European Journal of International Law* 803 (2006), p.803

rules of international law.¹⁵ Subsequently, if states have a right of self-defence against non-state actors' attacks emanating from the territories of failed states, what has to be analysed is the scope of such right and how it should be exercised. Before turning to these questions, however, it is necessary to reflect upon the preconditions of self-defence in general. Accordingly, the present chapter briefly examines the text of Article 51 as well as the relevant customary international law pre-existing the events of 11th September 2001. This will determine the baseline for the consideration of questions outlined above. Chapter five will then focus on the application of the law and identification of the relevant post 9/11 practice of states and address the question of evolving custom in respect of state sovereignty and use of force in self-defence against attacks coming from non-state actors in failed states.¹⁶

Article 2.4 of the UN Charter constitutes a comprehensive ban against all uses, as well as threats, of force irrespective of their impact and gravity.¹⁷ Accordingly, the

¹⁵ According to Taft IV and Buchwald: 'In the end, each use of force must find legitimacy in the facts and circumstances that the States believe made it necessary. Each should be judged not on abstract concepts, but on the particular events that gave rise to it'. W H Taft IV and T F Buchwald 'Preemption, Iraq and International Law' 97 *American Journal of International Law* 557 (2003), p.557.

¹⁶ As noted by Michael Wood, state practice plays important role in international law: 'Practice, often referred to as the 'material' or 'objective' element, plays an "essential role" in the formation and identification of customary international law. It may be seen as the 'raw material' of customary international law, as the latter emerges from practice, which "both defines and limits it". Such practice consists of "material and detectable" acts of subjects of international law, and it is these "instances of conduct" that may form "a web of precedents" in which a pattern of conduct may be observed'. Wood, *supra* note 6, para. 32.

¹⁷ See: T M Franck, *Recourse to force: State action against threats and armed attacks* (Cambridge University Press, 2002), p.12: "...[A]t San Francisco, many states that had not been at Dumbarton Oaks insisted that this provision be strengthened by introducing a duty to respect the territorial integrity and political independence of states. Australia offered an amendment that, after the prohibition on the use of force added the words "against the territorial integrity or political independence of any member state..." This was adopted unanimously by the participants. Unintentionally, they thereby created an opening for some, later, to argue that the prohibition against force did not extent to "minor" or "temporary" invasions that stopped short of actual threatening of the territorial integrity of the victim state or its independence. Such a reading of

provision prohibits not only the use or threat of force against territorial integrity or political independence of another state, but also such force which is “in any manner inconsistent with the Purposes of the UN Charter”. The prohibition of the threat or use of force contained in Article 2.4 is directly linked with the legal mechanisms contained in Chapter VII of the UN Charter.¹⁸ The UN Security Council bears primary responsibility for the maintenance of international peace and security and possesses the power to resort to enforcement measures (economic, diplomatic and military ones) if it determines that a threat to the peace, breach of the peace or an act of aggression has occurred.¹⁹ Nevertheless, the drafters of the UN Charter recognised the fact that the UN Security Council may not always be capable to respond promptly to threats to international peace and security and acts of aggression and accordingly adopted Article 51 dealing with self-defence.

Since the UN Charter came into force, the interpretation of self-defence exception to the general prohibition of the use or threat of force in states relations has undergone both adoption and expansion as a result of changing circumstances and through institutional and state practice. Nevertheless, the San Francisco Conference documents confirm that the intention of the drafters of the Article 51 was to limit the right of states and regional organisations to act in self-defence in several

Article 2(4) is utterly incongruent, however, with the evident intent of the sponsors of this amendment”. See also Y Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 2005), p.87

¹⁸ For a comprehensive study regarding the questions pertaining to the powers of the Security Council Under Chapter VII of the UN Charter see: E de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford, Hart Publishing, 2004)

¹⁹ See: Articles 39, 41 and 42 of the UN Charter.

ways.²⁰ First of all, it is clear from the text of Article 51 that self-defence was designed as a temporary measure to be implemented only until such time as the UN Security Council takes an appropriate action.²¹ Secondly, the drafters limited the right to exercise self-defence to the situations where “armed attack” occurred thereby excluding the possibility of anticipatory self-defence.²² An ‘armed attack’ has been understood as implying ‘an act or the beginning of a series of acts of armed force of considerable magnitude and intensity (i.e. scale) which have as their consequence (i.e. effects) the infliction of substantial destruction upon important elements of the target State namely, upon its people, economic and security infrastructure, destruction of aspects of its governmental authority, i.e. its political independence, as well as damage to or deprivation of its physical element namely, its territory’²³ There are three important aspects of the notion of an ‘armed attack’ for the self-defence purposes. Firstly, what acts can be considered an ‘armed attack’, secondly, what does one take place, and finally, from whom must the attack emanate. The thesis will focus primarily on the *ratione personae* aspect of an ‘armed attack’. This is due to the fact that, as stated by Judge Kooijmans in his

²⁰ The reference to *travaux préparatoires* demonstrates that the provision was designed to limit the legitimate scope for the unilateral use of force. See: United Nations Conference on International Organisation, Documents, Vol VI (New York, United Nations, 1945) and US Department of State, *Foreign Relations of the United States, Diplomatic Papers (1945) General: the United Nations* (1967).

²¹ As Frank points out: “Article 51, as drafted does not sanction continuation of the use of force by states in self-defence after the Council has taken measures. It is only by subsequent practice that the potential coexistence of collective measures with the continued measures in self-defence has become accepted practice”. T M Franck, *Recourse to force: State action against threats and armed attacks* (Cambridge University Press, 2002), p.50

²² According to Ruys: ‘In general, an analysis of *travaux préparatoires* affirms our initial interpretation, according to which Article 51 qualifies the exercise of individual and collective self-defence by imposing a double procedural condition, as well as a substantive condition, namely the incidence of an ‘armed attack’. The ‘armed attack’ requirement thus constitutes an integral part of Article 51; no self-defence can be exercised if no armed attack occurs’. T Ruys, *‘Armed Attack’ and Article 51 of the UN Charter: Evolution in Customary Law and Practice* (Cambridge University Press, 2013).

²³ A Constantinou, *The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter*, (Sakkoulas, Athens), p.64.

Separate Opinion to the ICJ Armed Activities case: '[i]f 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'.²⁴

Article 51 does not specifically define its key terms such as “inherent right”, “self-defence” or “armed attack”²⁵ leaving them open for discussion. Article 31(1) of the Vienna Convention on the Law of Treaties lists three primary elements of interpretation of any treaty provisions.²⁶ Accordingly, considering the ordinary meaning of the words, it could be concluded that, rather than stating the obvious – that self-defence is available against armed attack – the drafters of Article 51 added the phrase “if an armed attack occurs” in order to characterise and limit the scope of permissible self-defence. Secondly, analysing the contextual aspect, Article 51 must be interpreted taking into consideration the other provisions of the UN Charter relating to the use of force in states relations, namely Articles 2(4), 39, 42 and 53. It would appear that the intention was to create a comprehensive system whereby Article 51 is a temporary and exceptional measure which must be exercised in a restrictive manner. Finally, reference to the UN Charter ‘objects and

²⁴ *Armed Activities on the Territory of Congo*, 2005, ICJ, Separate Opinion of Judge Kooijmans, para. 29.

²⁵ As a consequence, ‘the law on self-defence is the subject of the most fundamental disagreement between states and between writers (...) as far as writers are concerned, the disagreement as to the scope of self-defence generally turns on the interpretation of Article 51’. C Gray, *International Law and the Use of Force* 3rd edn. (Oxford University Press, 2008), pp. 114&117.

²⁶ Article 31 (1) of the Vienna Convention on the Law of Treaties: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

purpose' supports the above conclusions.²⁷ Clearly, being the response to the Second World War, the overall and primary goal of the UN Charter was to limit the scope of the unilateral use of force by states as much as possible and entrust the responsibility for the maintenance of international peace and security with the Security Council. This restrictive reading of Article 51, however, has been contested by those who support a wider right of self-defence. The key element of contention is the fact that the first part of the first sentence of the provision refers to the fact that "nothing shall impair the inherent right of ...self-defence".²⁸ Accordingly, some authors claimed that Charter did not impose any limitations on the pre-existing customary right of self-defence and is therefore not incompatible with such customary right.²⁹

²⁷ See Chapter I, Articles 1 and 2 of the UN Charter.

²⁸ The legal position regarding correlation between the customary international law and the provisions of the UN Charter was stated by the ICJ in the *Nicaragua* case. According to the Court: 'On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" (in the French text the "droit naturel") of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed. Customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content'. *Nicaragua case: Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United States), Judgement on merits of 27 June 1986, para. 176.

²⁹ See: D W Bowett *Self-Defence in International Law*, (The Law Book Exchange, 2014), p. 187; S M Schwebel, *Aggression, Intervention and Self-Defence in Modern International Law*, pp. 479 – 83; C Kahgan, 'Jus Cogens and the inherent right to self-defence', (1996-7) 3 *ILSA Journal of International and Comparative Law*, p.802.

In addition to the requirement of occurrence of an 'armed attack', the right to exercise self-defence is further limited by several other conditions. Some of these restrictions can be found in Article 51, whereas the others are required by customary international law. The UN Charter provision stipulates that measures taken in the exercise of the right of self-defence must be immediately reported to the Security Council. The organ bears primary responsibility to 'take any such action as it deems necessary in order to maintain or restore international peace and security'.³⁰ The reporting obligation was discussed by the ICJ in the Nicaragua case.³¹ The Court held that "the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence".³² The ICJ's decision in the case concerning Armed Activities on the Territory of the Congo reconfirms the argument that the compliance with reporting requirement is an important element which has to be taken into consideration in order to determine the legality of measures allegedly taken in self-defence. The Court observed that 'Uganda did not report to the Security Council the events which it had regarded as requiring it to act in self-defence'.³³ In the Nicaragua case the ICJ considered the reporting requirement from customary international law's perspective asking 'whether in customary international law there is any requirement corresponding to that found in the treaty law of the United Nations Charter, by which the State claiming to use the right of individual or collective self-defence must report to an international body, empowered to determine the

³⁰ See Article 42 of the UN Charter.

³¹ ICJ, *Nicaragua case (Merits)*, para. 200 & 235.

³² *Ibid.* at para 200.

³³ ICJ, *Case concerning armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda)*, para. 145.

conformity with international law of the measures which the State is seeking to justify on that basis'.³⁴ Accordingly, the question is whether the reporting requirement is a procedural necessity or whether it is an essential precondition for self-defence in the absence of which the latter cannot be invoked. It would appear that the requirement to report actions taken in self-defence cannot be considered as a pre-condition to self-defence as it only arises once measures in self-defence have already been taken. It would, therefore, be illogical to conclude that failure to comply with the requirement automatically destroys a claim to self-defence.³⁵ Nevertheless, if a state fails to report its actions to the Security Council, it undoubtedly raises questions about the lawfulness of the operation. This may be particularly relevant in cases where the legal basis for the exercise of self-defence is questionable. The recent state practice with regard to self-defence against non-state actors located in failed states which will be analysed in detail in Chapter five, supplies some evidence that victim states consider compliance with the reporting requirement as, to a certain extent, a supporting element for their claim.

Furthermore, the Article 51 imposes temporary limitation on the exercise of self-defence specifically stating that it continues 'until the Security Council has taken measures necessary to maintain international peace and security'. It has been

³⁴ ICJ, *Nicaragua case* (Merits), para. 200

³⁵ See: C Gray, *International Law and the Use of Force*, p. 122: '[I]t is clear that the reporting requirement is merely procedural; failure to comply does not in itself destroy a claim to self-defence'; T Ruys, *supra* note 22, pp.71 - 72: 'It suffices to note that there do not appear to be any statements in the practice of the Security Council whereby States have claimed that the actions undertaken were unlawful merely because of the absence of a report, and that, conversely, States have sometimes supported the legality of unilateral interventions that were not reported to the Council (...)In sum, if the Charter provisions on the recourse to force are technically not applicable, a failure to report many nonetheless cast doubt on the legality of the State's actions. If, on the other hand, the Charter is technically applicable – as will normally be the case – the absence of a report will not only negatively influence a State's legal case, but will also constitute a violation of a separate legal obligation of a procedural nature, linked to the effective exercise of the Security Council's powers'.

argued that only such measures which effectively restore international peace and security impinge upon the right of self-defence.³⁶ Accordingly, the right to exercise self-defence would be suspended if the Security Council imposes military enforcement measures in accordance with Article 42 of the UN Charter or economic sanctions in accordance with Article 41. It could be argued that other enforcement measures, such as, for example, a call for the aggressor state to withdraw its forces from the territory of the victim state, may only affect the exercise of self-defence if they are adequate and effective.

Finally, it is widely agreed that in order to be lawful, recourse to self-defence must be necessary and proportionate. Customary nature of these two criteria has been reaffirmed by the International Court of Justice in several cases.³⁷ Furthermore, they have been repeatedly invoked in the practice of states. The two standards are often referred to in connection with the 1837 Caroline incident involving a pre-emptive attack by the British forces in Canada on a ship operated by Canadian rebels who were planning an attack from the USA.³⁸ The famous formula proclaimed by the US Secretary of State Webster refers to the 'necessity of self-defence, instant overwhelming, leaving no choice of means, and no moment for

³⁶ See: D W Greig 'Self-defence and the Security Council: What does Article 51 require?' 40 *International and Comparative Law Quarterly*, 366 (1991), p. 389: 'The common sense of the situation suggests that a State is not obliged to cease acting in self-defence against an aggressor which is continuing with its offensive until the measures, its own or those employed by the Security Council, prove effective. The use of the word "necessary" in Article 51 would seem to reinforce such an interpretation. While the Security Council might take measures which it regards as necessary to terminate the armed attack, whether they do have that effect only time will tell. If they do not have that consequence, then clearly additional measures are "necessary".'

³⁷ See: ICJ, *Nicaragua case (Merits)*, para. 194, 237; ICJ, *Oil Platforms case*, para. 51, 73 -7; ICJ, *Legality of the threat or use of nuclear weapons*, Advisory opinion of 8 July 1996, para. 41 – 44; ICJ, *Armed Activities case*, para. 147.

³⁸ See: R Jennings, 'The Caroline and McLeod cases' 32 *American Journal of International Law* 82 (1938).

deliberation'.³⁹ Although the precedential value of the Caroline incident for the modern law regarding the use of force has been questioned, the standards of necessity and proportionality constitute integral part of the concept of self-defence and it is widely agreed that any action taken in self-defence must abide by these principles.

The requirements of necessity and proportionality are not expressed in the UN Charter but constitute essential elements of customary international law relating to the use of force in self-defence. As Professor Gray states, 'Necessity is commonly interpreted as the requirement that no alternative response be possible. Proportionality relates to the size, duration and target of the response, but clearly these factors are also relevant to necessity'.⁴⁰ The requirements are closely linked since if the use of force cannot be considered necessary; it is difficult to envisage how it could be proportionate.⁴¹ Likewise, if it is not proportionate, its necessity will be questionable. The primary goal of two principles is to limit the scope of self-defence in that the latter should serve the purpose of halting and repelling of an armed attack only. If that goal is exceeded, self-defence would turn into a reprisal having punitive or retaliatory character. It is generally agreed, that in times of peace, reprisals involving the use of force are unlawful.⁴² Nevertheless, it is

³⁹ See: 29 *British and Foreign State Papers* 1137-138; 30 *British and Foreign State Papers* 195-196. See also: M N Schmitt, 'Preemptive Strategies in International Law' 24 *Michigan Journal of International Law* 513 (2003).

⁴⁰ Gray, *supra* note 35, at p.150.

⁴¹ *Ibid.*

⁴² This view has been reaffirmed by the General Assembly in the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States*, GA Res. 2625 (XXV) of 24 October 1970; and in *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, GA Res. 36/103 of 9 December 1981. Furthermore, reprisals were condemned by the Security Council as incompatible with the purposes and principles of the United Nations in Resolution 188 of 9 April 1964. In the *Nuclear Weapons* case, Advisory opinion, the ICJ clearly states that armed reprisals in times of peace are unlawful (para.46). For further discussion

sometimes problematic in practice to distinguish between lawful self-defence and unlawful reprisal.

The principle of necessity comprises of several elements. First of all, the necessity criterion implies that, by definition, self-defence must be exercised as a last resort when all peaceful means have been reasonably exhausted and there are no other realistic means available for the victim state. Nevertheless, in practice, 'the need to exhaust peaceful means only plays a subsidiary role for the assessment of self-defence claims in response to a prior attack, and [...] unlawfulness will only result when a manifest unwillingness to address diplomatic channels can be demonstrated'.⁴³ Accordingly, the question of whether or not a state complied with the requirement to exhaust all available peaceful means must be assessed on a case-by-case basis and taking into account state's actions preceding the eventual use of force in self-defence. It has been noted however, that although the obligation in question does require that the victim state actively pursues peaceful resolution; it is not expected that it will compromise its sovereignty while doing so.⁴⁴

The second element of the necessity requirement is 'immediacy' which determines that actions undertaken in self-defence should occur while the original armed attack is still in progress or in close proximity to it.⁴⁵ Although subject to a certain

regarding the ICJ Advisory Opinion on the legality of nuclear use in this context see also T Farrell & H Lambert, 'Courting controversy: international law, national norms and American nuclear use' 27 *Review of International Studies* 309 (2001).

⁴³ Ruys, *supra* note 22, at p. 98.

⁴⁴ J Green, *International Court of Justice and Self-defence in International Law* (Oxford, Hart Publishing, 2009), pp. 80-86.

⁴⁵ See: J Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004), at p. 150: 'The requirement of immediacy is in fact inherent in the text of Article 51.

degree of uncertainty, immediacy undoubtedly presupposes the need for temporal link between the initial attack and lawful self-defence.⁴⁶ Such link must, however, be assessed on a case-by-case basis and taking into consideration the entirety of circumstances. This is particularly relevant in cases of the ongoing and repeated cross-border attacks⁴⁷ whereby victim state's partial justification for defensive action relies on the need to prevent further attacks.⁴⁸ As it will be discussed later in this Chapter, such situation is especially relevant in the context of non-state actors' attacks who often rely on a series of small scale attacks.

The second customary criterion applicable to the exercise of self-defence is the proportionality principle which imposes the limits on the size, duration and target of defensive actions. The principal difficulty however, is establishing in relation to what the action taken in self-defence must be proportional. There are two most commonly referred to options. First of all, defensive action must be reasonably

What is contemplated by the Charter is that States have the right to respond to an armed attack only for the period that it takes for the Security Council to be notified and for the necessary action to be taken to restore international peace and security. With the failure of this scheme, States have been reluctant to accept this 'instancy' or 'immediacy' requirement of self-defence under the Charter, and support has developed for the legitimacy of 'defensive reprisals' and anticipatory self-defence, particularly in the context of sustained insurgent activities. Nevertheless, State practice and the views of commentators confirm the relevance of instancy to a legitimate exercise of self-defence'.

⁴⁶ In the *Nicaragua* case, the ICJ concluded that the conditions *sine qua non* for the lawful exercise of self-defence by the United States were not fulfilled. In relation to the requirement of necessity, the Court states that: '(...) the United States measures taken in December 1981 (or, at the earliest, March of that year - paragraph 93 above) cannot be said to correspond to a "necessity" justifying the United States action against Nicaragua on the basis of assistance given by Nicaragua to the armed opposition in El Salvador. First, these measures were only taken, and began to produce their effects several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed (January 1981) and the actions of the opposition considerably reduced in consequence(...) Accordingly, it cannot be held that these activities were undertaken in the light of necessity'. (Merits), para. 237.

⁴⁷ The 'accumulation of events' theory of armed attack argues that states may use force not in response to every isolated cross border incursions but in response to the whole series of incursions which collectively amount to an armed attacks.

⁴⁸ According to Ruys, 'Customary practice indicates that if a State has been subject not to an isolated attack, but to a series of armed attacks, and if there is a considerable likelihood that more attacks will imminently follow, then self-defence is not automatically excluded'. Ruys, *supra* note 22, p. 106.

proportionate to the initial attack which provoked it. Secondly, as the proportionality and necessity criteria are closely interlinked, the former must be evaluated by reference to the overall goal of defensive actions.⁴⁹ It is therefore not required for the victim state to be restricted to use the same weapons or the same armed forces as the perpetrators of the initial armed attack which triggered the military response. The methodology for assessment of proportionality becomes even more complex in cases of small-scale ongoing attacks which arguably reach gravity threshold of an armed attack. It is controversial whether the evaluation of proportionality requirement must include not only past but also future possible incursions.⁵⁰ Nevertheless, it has been agreed that in order to repel the attack and prevent possible future attacks no more force than necessary must be used in order for it to be considered reasonably proportionate. There are several other elements which provide further assistance in the appraisal of the proportionality of defensive action. These are 'the geographical and destructive scope of the response, the duration of the response, the selection of means and methods of warfare and targets and the effect on third States'.⁵¹

To conclude, the customary requirements of necessity and proportionality overlap to a certain degree. Their ultimate goal is limitation of the defensive action to the halting and repelling of an armed attack, with exception of the case of ongoing

⁴⁹ See Gray, *supra* note 35, p.150; According to Green, 'These methods of assessing proportionality cannot be neatly separated, and in reality both of them affect whether a use of force in self-defence will be considered 'proportional' to some degree'. Green, *supra* note 44, p. 88.

⁵⁰ According to Ruys, 'If there exists a great likelihood that a chain of successive attacks will persist in the immediate future, then self-defence may be warranted in order to prevent further attacks against the victim State. The implication is that the proportionality requirement must be constructed to include, as appropriate, both a retrospective and a prospective element'. Ruys, *supra* note 22, p.116.

⁵¹ Gardam, *supra* note 45, at p. 162 - 179.

small scale incursions where the aim also includes prevention of future attacks. The two criteria are also closely linked to the *ratione personae* element of the 'armed attack' requirement for lawful exercise of self-defence. In this respect, it has been suggested that the reference to necessity and proportionality standards neutralises concerns regarding the legality of the use of defensive force against non-state actors.⁵² This argument will be analysed in more detail later in this chapter.

The interpretation of Article 51 of the UN Charter undoubtedly evolved through the institutional and state practice. Similarly, developing custom which 'continues to be constructed as a source of rules that does not require the solemnity of treaty-making'⁵³, challenges the established rules regarding the use of force in states relations. It is therefore necessary to examine the impact of such practice on the relevant treaty provisions as well as customary international law. In the post-Charter era states proposed various justifications for the use of military force – sometimes explicitly put forward, other times implicit in the situation. This thesis will focus on the analysis of the latest claim, namely that states may resort to the use of force in self-defence against non-state actors operating from the territory of failed states and whose attacks cannot be attributed to such a state. Accordingly, the following section of this Chapter analyses legal positions which may be invoked in relation to the exercise of the right to self-defence in response to attacks emanating from the territories of failed states and perpetrated solely by non-state actors. The law in this area is unsettled and consequently, multiple legal claims may

⁵² See: K N Trapp, 'Back to basics: necessity, proportionality, and the right of self-defence against non-state terrorist actors' 56 *International and Comparative Law Quarterly* 141 (2007).

⁵³ J D'Aspremont, *Formalism and the Source of International Law – A Theory of the Ascertainment of the Legal Rules* (Oxford, Oxford University Press, 2011), p.162.

be put forward simultaneously. Consequently, Chapter five will then investigate the application of the law and how the states responded in practice to the question of whether there exists a right to self-defence against non-state actors in failed states and how it can be exercised.

4.3 Self- defence against non-state actors in failed states

There is a great difficulty in the application of the traditional law of self-defence to the conflicts dominated by non-state actors, especially in circumstances where those actors exercise control over extensive parts of failed states' territory. In such situations, strict adherence to purely state-orientated rules regarding the use of force may no longer be possible. It is, therefore, necessary that the international law engages with the new reality of conflicts characterised by the presence of powerful non-state actors operating from the territory of a state which has absolutely no control over their actions. The following sections examine several possible legal positions concerning the legality of the use of defensive force against non-state actors in failed states. As such, they focus on investigating the questions of if and when such use of force may be considered as lawful.

4.3.1 Absolute prohibition

As noted above, it could be argued that according to Article 51 of the UN Charter, self-defence can only be invoked if an armed attack occurs.⁵⁴ The most restrictive position would permit use of force against non-state actors only if the initial armed attack was attributable to the state. Accordingly, use of defensive force against non-state actors without attribution of their act to the territorial state and without that state's consent would be equal to operating in breach of that state's territorial integrity. The lawful means of addressing the problem would be requesting from the territorial state to prevent non-state actors' attacks, obtaining the territorial state's consent for the operation or finally, seeking the assistance of the UN Security Council. This legal position emphasises the fact that when interpreting Article 51, it must be taken into account that self-defence is first and foremost an exception to the general rule which prohibits the use or threat of force against the territorial integrity of another state.⁵⁵

⁵⁴ See, *inter alia*, Y Dinstein, 'Since the right of self-defence arises under Article 51 only 'if an armed attack occurs', it is clear that the use of force in self-defence is contingent on demonstrating that an armed attack has taken place [...] Any other interpretation of the Article would be counter-textual, counter-factual and counter-logical. Counter-textual because the use of the phrase 'armed attack' in Article 51 is not inadvertent. The expression should be juxtaposed with comparable locutions in other clauses of the Charter. It is particularly striking that the framers of the text preferred in Article 51 the coinage 'armed attack' to the term 'aggression', which appears in the Charter in several contexts [...] The choice of words in Article 51 is deliberately confined to a response to an armed attack'. Y Dinstein, *War, Aggression and Self-Defence* 4th edn. (Cambridge University Press, 2005), pp. 183-184;

⁵⁵ See: I Brownlie, 'Where the Charter has a specific provision relating to a particular legal category, to assert that this does not restrict the wider ambit of customary law relating to that category or problem is to go beyond the bounds of logic. Why have a treaty provision at all? [...] a restrictive interpretation of the provisions of the Charter relating to the use of force would be more justifiable and even as a matter of 'plain' interpretation the permission of Article 51 is exceptional in the context of the Charter and exclusive of any customary right of self-defence'. I Brownlie, *International Law and the Use of Force by States* (Oxford, Oxford University Press, 1963).

The absolute prohibition on the use of defensive force against non-state actors without considerable element of territorial state's involvement finds support in the jurisprudence of the International Court of Justice.⁵⁶ First of all, in the 1986 Nicaragua case, the Court stated that 'an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force'.⁵⁷ Accordingly, it could be argued that the ruling implied that in order to qualify as an armed attack which would justify use of force in self-defence, the attack perpetrated by non-state actor must be imputable to the state on whose territory the victim state exercises alleged self-defence. Furthermore, in the 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the ICJ clearly stated that article 51 of the UN Charter applies only 'in the case of an armed attack by one State against another State'.⁵⁸ Similarly, in the 2005 Armed Activities case, the Court declared that 'there was no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of DRC'.⁵⁹ Consequently, the attack was not attributable to the DRC and the Court stated that 'the legal and factual circumstances for the exercise of self-defence by Uganda against DRC were not present'.⁶⁰

⁵⁶ B Simma et al. eds, *The Charter of the United Nations. A Commentary*, 3rd edn. (Oxford, Oxford University Press, 2012), p.213 'In its recent jurisprudence, the ICJ made it clear that acts of violence by non-state actors can only become relevant as amounting to an armed attack, if they are attributable to a State'.

⁵⁷ ICJ, *Nicaragua case (Merits)*, para. 195.

⁵⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, ICJ, para 139.

⁵⁹ *Armed Activities on the Territory of Congo*, 2005, ICJ, para 168.

⁶⁰ *Ibid.* para. 147.

Many international lawyers disagree with the ICJ's position and argue that it has been superseded by more recent events and state practice.⁶¹ The latter will be examined in detail in the subsequent chapter with a view to analyse whether this is in fact correct position. Nevertheless, the Court's judgements and advisory opinions are considered as highly authoritative in international law.⁶² As a result, some authors find support in the ICJ's decision to the claim that 'attacking non-state actors on the territory of another state is attacking that state'.⁶³ According to Tladi, 'The use of force by a state against non-state actors for acts not attributable at all to another state falls to be considered under the paradigm of the law enforcement (in which the consent of the territorial state would be required) and not the law of self-defence'.⁶⁴

The absolute prohibition of the use of defensive force against non-state actors has also been invoked by some international organisations. Notably, the Latin American States collectively referred to the restrictive reading of Article 51 in response to

⁶¹ See: R Mullerson: 'The need to interpret the Charter in the context of current realities [...] indicates that the right of self-defence may arise also in the case of attacks by non-state entities'. R Mullerson, 'Jus ad Bellum ad International Terrorism' in F L Borch and P S Wilson (eds.), *International Law Studies, Volume 79: International Law and the War on Terror* (Newport, Naval War College, 2003), p.112. It has been argued, for example, that the Court did not address the question of possible self-defence against non-state actors' attacks without substantial state involvement where it had the opportunity to do so. See, *inter alia*, P Okowa, 'Congo's War: the legal dimensions of a protracted conflict' 72 *British Yearbook of International Law* 203 (2006); R Wedgwood, 'The ICJ Advisory Opinion on the Israeli security fence and the limits of self-defence' 99 *American Journal of International Law* 52 (2005); C J Tams, 'Light treatment of a complex problem: the law of self-defence in the Wall case' 16 *European Journal of International Law* 963 (2005); S D Murphy 'Self-defence and the Wall Opinion' 99 *American Journal of International Law* 62 (2005).

⁶² Accordingly some authors continue to refer to the ICJ decisions in support of the restrictive view on the right to exercise self-defence. See, for example, B Simma et al. eds, *supra* note 54, p.1397: 'The preferable view still seems to be that attacks by organised armed groups need to be attributed to a State in order to enable effected State to exercise its right of self-defence, albeit under special [looser than normal] rules of attribution'.

⁶³ M E O'Connell, 'Dangerous Departures', 107 *American Journal of International Law*, 383 (2013), p.383.

⁶⁴ D Tladi, 'The nonconsenting innocent state: the problem with Bethlehem's principle' 107 *American Journal of International Law* 570 (2013), p.576.

Colombia's 2008 incursions against non-state actors emanating from Ecuador.⁶⁵ The OAS Commission declared Colombia's response 'a violation of the sovereignty and territorial integrity of Ecuador and of principle that the territory of a State is inviolable and may not be object, even temporarily, of (...) measures of force taken by another State, directly or indirectly, on any group whatsoever'.⁶⁶ Nevertheless, as it will be evidenced by the analysis carried out in Chapter five, there is an increasing dissonance between the absolute prohibition of the use of defensive force against non-state actors in failed states and the practice of states in this regard. It is therefore, necessary to investigate possible grounds states may submit for the exercise of the right to self-defence in these circumstances.

4.3.2 Grounds for defensive action against non-state actors

Despite the unquestionable importance of the ICJ jurisprudence, an absolute prohibition may not be considered as the most dominant position in current international law and many authors now regard self-defence against non-state actors as legal, at least in some circumstances,⁶⁷ and support this claim by reference to the recent state practice. It is nevertheless unsettled when exactly the use of defensive force is permitted against the attacks by non-state actors, since it remains somewhat controversial exactly what type of activity could be considered as an armed attack. If states are entitled to exercise their right to self-defence only

⁶⁵ See Chapter 5.4 *infra* for further discussion.

⁶⁶ Organisation of American States Commission, *Report of the OAS Commission that Visited Ecuador and Colombia* 10,, OEA/Ser.F/11.25 RC.25/doc.7/08, 16 March 2008.

⁶⁷ See, *inter alia*, T Reynolds, 'State Weakness, Irregular Warfare and the Right to Self-Defence Post-9/11' 105 *American Journal of International Law* 244, (2011); C J Tams, 'The Use of Force Against Terrorists', 20 *European Journal of International Law* 359, (2009).

if an armed attack occurs, the first question which needs to be considered is whether non-state actors' actions could amount to such an attack. As noted above, the absolute prohibition requires that an armed attack must denote state involvement. The relationship between territorial state and non-state actors might have a variety of implications. It should not, however, be confused with the question of the possibility of non-state actors' armed attack without the state involvement. As noted by Brownlie, there may be various different relationships between the state and non-state actors.⁶⁸ At the one end of the spectrum, the state may be responsible for the organisation and support of the armed groups engaging in cross border incursions. This situation is commonly labelled as 'indirect military aggression', although the nexus between the state and the armed group can be so close that the latter becomes an agent of a state and consequently, any resulting attacks could in fact be, more appropriately, considered as 'direct' aggression. On the other side, state could be completely unable to control the activities of armed groups. The question arises whether the inability of a state to take sufficient measures in order to control non-state actors operating from within its territory could be classified as an 'indirect military aggression'.

Unlike Article 2(4), which specifically refers to states, Article 51 of the UN Charter does not explicitly identify the nature of the party responsible for the armed attack. Self-defence can be exercised by the members of the UN (states), however, the provision in question does not indicate who must be behind the initial armed attack. According to the ICJ, 'Article 51 of the Charter thus recognises the existence

⁶⁸ I Brownlie, 'International law and the activities of armed bands' 7 *International and Comparative Law Quarterly*, 712 (1958), at p. 712-713.

of an inherent right of self-defence in the case of armed attack by one State against another State'.⁶⁹ It is unclear however, how exactly the Court has arrived to the conclusion about the identity of the attacker.⁷⁰ The Wall Advisory Opinion refers to the Nicaragua case as allegedly confirming the limitation of armed attacks to actions of states only.⁷¹ Nevertheless, it is to be noted that in Nicaragua case, the ICJ considered the question of attribution to a state and its consequences and did not analyse completely separate matter of whether the attacks by non-state actors alone without any state support could itself constitute an armed attack. The Court had further opportunity to clarify the issue of self-defence against non-state actors in the 2005 Armed Activities case. Yet again however, the position of the ICJ in this regard is unclear and the focus remains on the question of whether the non-state

⁶⁹ ICJ, *Advisory Opinion on the Wall*, para.139.

⁷⁰ See *Separate Opinion* of Judge Higgins, *Wall Advisory Opinion*, at para. 33: 'I do not agree with all that the Court has to say on the question of the law of self-defence. In paragraph 139 the Court quotes Article 51 of the Charter and then continues "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." There is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State. That qualification is rather a result of the Court so determining in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits, Judgment, I. C.J. Reports 1986, p. 14). It there held that military action by irregulars could constitute an armed attack if these were sent by or on behalf of the State and if the activity "because of its scale and effects, would have been classified as an armed attack . . . had it been carried out by regular armed forces" (*ibid.*, p. 103, para. 195). While accepting, as I must, that this is to be regarded as a statement of the law as it now stands, I maintain all the reservations as to this proposition that I have expressed elsewhere'.

⁷¹ In *Nicaragua* case, the ICJ referred to the UN General Assembly *Definition of Aggression* but did not specifically indicate the required scale of force in order to in order for the military activities to qualify as an 'armed attack'. As a result, according to Professor Higgins, 'By adopting the unsatisfactory definition of the General Assembly Definition of Aggression Resolution, and proclaiming it customary international law, the Court appears to have selected criteria that are operationally unworkable. When a state have to decide whether it can repel incessant low-level irregular military activity, does it really have to decide whether that activity is the equivalent of an armed attack by a foreign army – and, anyway, is not any use of force by a foreign army entitled to be met by sufficient force required for it to withdraw? Or is that now in doubt also? Is the question of level of violence by regular force not really an issue of proportionality, rather than a question of determining what is an 'armed attack'?'. R Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Oxford University Press, 1994)

actors' attacks could be attributed to the Democratic Republic of Congo.⁷² The position was criticised by Judges Simma and Kooijmans in their separate opinions. Judge Kooijmans stated 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'.⁷³ The Judge also specifically referred to, what is understood in this thesis as a failed state situation, arguing that: 'If armed attacks are carried out by irregular bands from such territory [*namely the territory experiencing the almost complete absence of government authority in the whole or part*] against a neighbouring State they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require'.⁷⁴

⁷² The ICJ stated as follows: 'It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The armed attacks to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement 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 on or behalf of the DRC, within the sense of Article 3 (g) of the general Assembly resolution 3314 (XXIX) on the definition of aggression, adopted in 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.

For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces'. Para. 146-147.

⁷³ *Armed Activities on the Territory of Congo*, 2005, ICJ, Separate Opinion of Judge Kooijmans, para. 30.

⁷⁴ *Ibid.*

The fact of the matter is that the argument that non-state actors can be responsible for armed attacks which give rise to self-defence has been increasingly invoked.⁷⁵ The support for this claim can be found in the interpretation of the Article 51, state practice based on this reading and secondary literature.⁷⁶ Furthermore, in historical terms, the argument that non-state actors might be behind an armed attack which gives rise to self-defence has been recognised by states. The 1837 Caroline Case is of particular relevance here. According to Greenwood, '[...] the famous Caroline dispute, itself shows that an armed attack need not emanate from a State. The threat in the Caroline case came from a non-State group of the kind most would probably call terrorist today. The United States was not supporting the activities of that group and certainly could not be regarded as responsible for their acts. Yet, nowhere in the correspondence or in the subsequent reliance on the Webster formula on self-defence is it suggested that this fact might make a difference and that the Webster formula might not apply to armed attacks that did not emanate from a State'.⁷⁷

Increasing acceptance for the claim that self-defence can be exercised against armed attacks perpetrated solely by non-state actors requires examination of legal issues raised by this kind of situations. Three matters are particularly important in

⁷⁵ See Chapter 5.3 *infra* for further discussion regarding the analysis of the grounds for defensive action submitted by the intervening states.

⁷⁶ See, *inter alia*, C Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' 4 *San Diego International Law Journal* 7, (2003); Y Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 2005); O Schachter, 'The Extraterritorial Use of Force Against Terrorist Bases' 11 *Huston Journal of International Law* 309, (1988-89); J Paust 'Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond' 35 *Cornell International Law Journal*, 533, (2002); T Franck, 'Editorial Comments: Terrorism and the Right of Self-Defence', 95 *American Journal of International Law*, 839 (2001).

⁷⁷ C Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' 4 *San Diego International Law Journal* 7, (2003), p.17.

the context of this thesis. First of all, it will be analysed if and how defensive action against non-state actors is influenced by the by the position of the territorial state. The relationship between the non-state actors and territorial state is of particular relevance in case of failed states where governmental control does not extend to large parts of state's territory. The second issue which needs to be addressed is whether the failed states could possibly bear any responsibility for actions of non-state actors by not preventing such acts and what are the possible consequences if none such responsibility can be in fact established. The final issue requiring attention is how the two above matters influence the legality of defensive measures taken by the state which has fallen victim of non-state actors' attacks.

The relationship between non-state actors and the state is both a factual question of the formal connection between the two as well as a political one. It is obviously extremely challenging at times to determine the factual circumstances and each situation must be assessed on a case-by-case basis. As noted previously, the problem becomes even more complicated in cases of failed states. On the one end of the spectrum, the non-state actors may be so closely linked with the state that it could be considered as de facto state organ or in fact act in place of the non-existent official governmental authority. On the other side, the official state apparatus may be either completely absent or unable to prevent non-state actors' activities. There are various possibilities between those two extremes. For example, the non-state actor may receive considerable support and assistance from the state, it may have consent of a state to operate independently on its territory or the state may be unwilling to control its operations. Once the factual circumstances

have been determined, for the purposes of the legal analysis, it must be established whether or not the acts of non-state actors can be attributed to the state and whether such attribution is in fact required at all in order to legitimise the exercise of self-defence. This in turn leads to the assessment of possible available grounds for exercising self-defence against attacks perpetrated solely by non-state actors.

The most commonly referred to test regarding the attribution of non-state actors attacks to the territorial state was set out by the International Court of Justice in the Nicaragua Case. The Court referred to the Definition of Aggression⁷⁸ at the same time establishing a high threshold for the attribution of action by an armed group.⁷⁹ The ruling referred to the fact that even provision of weapons to an armed group operating in another country would not in itself be sufficient to establish such attribution.⁸⁰ The situation whereby attacks by non-state actors can clearly be attributed to the territorial state will not receive further consideration in the present thesis as it is outside of the scope of work focusing on the defensive measures directed against non-state actors located in failed states and operating independently. Accordingly, the sections below examine scenarios where the

⁷⁸ See ICJ, *Nicaragua* case (Merits), para. 195: 'There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein". 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'

⁷⁹ United Nations General Assembly, 1974, Resolution 3314 of 14 December 1974, *Definition of Aggression*, UN Doc. A/RES/3314(XXIX), Article 3(g) states that: 'Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: [...]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'.

⁸⁰ ICJ, *Nicaragua* case (Merits), at para. 115 and 195.

factual examination of the relationship between the state and non-state actors does not automatically translate into the responsibility of the former on account of its relationship with the latter. This will be conducted by way of analysing possible available grounds for allowing defensive action against non-state actors' attacks.

Failing the obvious attribution threshold, the possible available grounds for allowing defensive action against non-state actor could be divided into two groups:-

- (a) The territorial state actively harbours and/or supports independent non-state actors operating within its territory;
- (b) The territorial state is either unwilling or unable to confront the threat posed by non-state actors.

The above listed classifications obviously overlap to a certain extent. Noticeably, however, starting from point (a), the second category appears to considerably extend the scope of permissible defensive action against non-state actors.

4.3.2.1 Armed attacks originating from harbouring and/or supporting states

The first possible ground for allowing defensive action against non-state actors stipulates that the territorial state actively harbours or supports them. Accordingly, the victim state is not in a position to rely on the territorial state to fulfil its international obligations and contain the threat. There is an increasing support for the argument that even in circumstances where a state is not directly sending armed groups; it may nevertheless bear some form of responsibility for their actions under the international law. In spite of that, the question remains whether

establishing such responsibility provides sufficient justification for the exercise of defensive force against non-state actors and violation of that territorial state's sovereignty and territorial integrity. Furthermore, the reference to harbouring and/or supporting by the territorial state indicates that this particular ground for defensive action against non-state actors does not dispose entirely of the requirement for the link to exist between the two entities for the purposes of establishing the applicability and scope of self-defence.

The Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in accordance with the Charter of the United Nations states 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' and further that 'no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State'⁸¹

The International Court of Justice referred to the above statement in the Armed Activities Case and declared it as customary international law.⁸² It has to be noted,

⁸¹ Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in accordance with the Charter of the United Nations, GA Resolution 2625(1970), Annex, UN Doc A/5217 at 121.

⁸² See: ICJ, *Armed Activities on the Territory of Congo*, 2005, para, 162. The Court stated that '(...) even if the evidence does not suggest that the MLC's conduct is attributable to Uganda, the training

however, that the Declaration on Friendly Relations refers to the prohibition of the threat or use of force in states relations contained in Article 2(4) of the UN Charter.⁸³ Accordingly, although the threat or use of force may constitute a violation of Article 2(4) of the UN Charter, it does not automatically mean that they also amount to an 'armed attack' justifying use of force in self-defence.⁸⁴ In accordance with the restrictive reading of Article 51 of the UN Charter, it would still be necessary to attribute the actual actions of non-state actors which may constitute armed attack to the territorial state in order to provide a legal basis for the exercise of self-defence.

Despite the fact that 'considerable uncertainty [...] remains on the long-standing controversy as to the definition of armed attack'⁸⁵, self-defence in response to cases involving harbouring and/or supporting non-state actors had been endorsed by many states primarily on the basis that Article 51 extends to attacks by non-state actors.⁸⁶ The prime example is the global reaction following the 9/11 terrorist attacks which will be discussed in detail in Chapter five. Referring to, *inter alia*, widespread support for the allied forces operation some commentators concluded that the use of defensive force in Afghanistan which allegedly harboured Al-Qaeda

and military support given by Uganda to the ALC, the military wing of the MLC, violates certain obligations of international law' (para. 161).

⁸³ See: L Moir, *Reappraising the Resort to Force. International Law, Jus ad Bellum and the War on Terror* (Oxford&Portland, Hart Publishing, 2010), p.60.

⁸⁴ See: A Randelzhofer, 'Article 51' in B Simma (ed.), *The Charter of the United Nations, A Commentary* (Oxford University Press, Oxford, 1994), p.790.

⁸⁵ Gray, *supra* note 35, p.200.

⁸⁶ The 'effective control' test established by the ICJ in the *Nicaragua* case was criticised long before the events of September 11. In his Dissenting Opinion, Judge Schwebel concluded that: '[T]he Judgment of the Court on the critical question of whether aid to irregulars may be tantamount to an armed attack departs from accepted - and desirable - law. Far from contributing, as so many of the Court's judgments have, to the progressive development of the law, on this question the Court's Judgment implies a regressive development of the law which fails to take account of the realities of the use of force in international relations' (para. 155).

was lawful.⁸⁷ The same harbour and/or support standard was applied in case of the 2006 Israeli operation against Hezbollah in Lebanon.⁸⁸ In this situation, however, the element of lack of governmental control over the territory controlled by non-state actor had to be taken into consideration. Although the Israeli use of defensive force was criticised in terms of its proportionality, the right of victim state to act in self-defence was recognised by many states. All the above cases will be analysed in detail later in this thesis.

The proponents of harbouring and/or supporting standard point towards the text of the UN Security Council Resolutions 1368⁸⁹ and 1373⁹⁰ adopted following the events of September 11, 2001 in support of their argument. In Resolution 1373 adopted under Chapter VII of the UN Charter on 28 September 2001, the Security Council decided that 'all States shall

- (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

⁸⁷ See, *inter alia*, Y Dinstein, *War, Aggression and Self-Defence* 4th edn. (Cambridge University Press, 2005), C Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' 4 *San Diego International Law Journal* 7 (2003), J Paust 'Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond' 35 *Cornell International Law Journal* 533 (2002).

⁸⁸ See Chapter 5.3 *infra* for further discussion regarding the grounds for defensive action submitted by Israel.

⁸⁹ United Nations Security Council, 2001, Resolution 1368 of 12 September 2001, UN Doc. S/RES/1368

⁹⁰ United Nations Security Council, 2001, Resolution 1373 of 28 September 2001, UN Doc. S/RES/1373

- (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
- (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts⁹¹

Accordingly, states that provide the assistance or fail to attempt to prevent non-state actors from launching attacks from its territory are in breach of their international obligations and may be held responsible.⁹² The reference to ‘harbour and/or support’ standard can also be found in other sources, including the 2005 African Union Non-Aggression and Common Defence Pact. Its definition of ‘aggression’ includes, amongst others, ‘the encouragement, support, harbouring or provision of any assistance for the commission of terrorist acts and other violent

⁹¹ Security Council Resolution 1373 adopted on 28 September 2001, S/RES/1373 (2001), para. 2.

⁹² O Schachter, ‘The Extraterritorial Use of Force Against Terrorist Bases’ 11 *Huston Journal of International Law* 309 (1988-89), p.311

trans-national organized crimes against a Member State'.⁹³ Nonetheless, it is necessary to distinguish between the responsibility for harbouring and/or supporting non-state actors and the actual responsibility for carrying out an armed attack for the purposes of Article 51. Accordingly, if the state is found responsible for the armed attack, it may become a legitimate target of self-defence action. On the other hand, it is questionable whether it could be so, if, although possibly being in violation of the international law, its only responsibility is for harbouring and/or supporting non-state actors.

To conclude, the fact that a state bears responsibility for harbouring and/or supporting the non-state actors or not attempting to prevent their attacks does not equate to the determination that such attacks can be automatically attributed to such a state and justify response in self-defence.⁹⁴ If one is to accept the fact that non-state actors can be responsible for armed attacks of such a 'scale and effect' as to give rise to the exercise of self-defence, then this is entirely separate matter from the question of the territorial state's responsibility.⁹⁵ The question is how it influences the legality of defensive measures taken by the victim state against non-state actors. Maogoto suggested that 'It may be of a greater consequence to admit

⁹³ African Union, African Union Non-Aggression and Common Defence Pact, Article 1(c)(xi), 31 January 2005.

⁹⁴ According to Paust: 'Absent UN Security or regional organisation authorisation to use military force against a state that merely harbours terrorists or is unable to control misuse of its territory, and absent direct involvement by such state in a process of armed attack that triggers the right of self-defence, the use of military force against such a state would be impermissible under the Charter'. J Paust 'Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond' 35 *Cornell International Law Journal* 533 (2002), p. 540.

⁹⁵ According to Moir: 'It would seem perfectly reasonable to argue that the question of whether or not an armed attack has occurred, in the sense of scale and consequences, should – or, at least, could – be distinguished from the question of whether any particular state bears responsibility for that attack. Whether a state has been attacked, and who the attacked state may legitimately respond against, would accordingly be treated as two separate questions'. L Moir, *supra* note 8, p. 51.

openly that the requirement of attribution does not play a role in definition of 'armed attack' [...] One may argue that criterion of the attribution of an 'armed attack' is only relevant in the context of the question towards whom forcible response may be directed'.⁹⁶ As we will be evident from the analysis carried out in Chapter five, recent developments in state practice and increasing importance of non-state actors in international order, certainly make this approach appealing in some respects.

The distinction between the two different issues, that of attribution and the classification of an armed attack for the purposes of Article 51, cannot divert from the question of justification for the violation of territorial state's sovereignty in cases where defensive measures are employed solely against non-state actors. Nevertheless, on the other hand, the issue of whether the territorial state can itself be the object of self-defence, does not change the fact that the armed attack by non-state actor operating from its territory took place. Accordingly, it would appear that the right to exercise self-defence should not be analysed by reference to the question of whether the territorial state failed to comply with its international obligations by harbouring and/or supporting or by not preventing the non-state actors' activities. The relevant focus is on the fact that there is a state which is the victim of an armed attack perpetrated by non-state actors and in need to take recourse to defensive measures in order to avert the danger.

⁹⁶ J N Maogoto, 'War on the Enemy: Self-Defence and State Sponsored Terrorism' 4(2) *Melbourne Journal of International Law* 406 (2003), p. 431

4.3.2.2 Armed attack originating from unwilling and/or unable state

The second possible ground for exercising the right of self-defence against attacks perpetrated solely by non-state actors refers to the unwillingness and/or inability of the territorial state to contain the threat posed by them.⁹⁷ This standard is broader than the 'harbouring and/or support' as it also applies to the circumstances where the government of the territorial state, although actively trying, is ineffective in its attempts to control non-state actors' activities.⁹⁸ This ground is undoubtedly relevant in the context of failed states. As noted above, the two grounds analysed here overlap to a certain extent. Accordingly, it could be argued that unwillingness of the territorial state to control non-state actors may also manifest itself in providing them with a safe haven. On the other hand, the inability scenario refers to state failure at its most extreme where the official state apparatus is either completely incapacitated or even non-existent. The latter scenario is of particular relevance to the circumstances of states whose governments collapsed as a result of anarchic conflict and are unable to exercise effective control over its population and territory.

In the 2005 *Armed Activities* case, Judges Kooijmans and Simma specifically referred to the lack of governmental authority being an important factor in the

⁹⁷ According to Deeks: 'The "unwilling or unable" test requires a victim state to ascertain whether the territorial state is willing and able to address the threat posed by the nonstate group before using force in the territorial state's territory without consent'. A S Deeks, "Unable or Unwilling": Towards a Normative Framework for Extraterritorial Self-Defence' 52 *Virginia Journal of International Law* 483 (2012), p.487.

⁹⁸ According to Trapp: 'State practice strongly suggests that the international community has recognized a right to use force in self-defence targeting non-State actors in foreign territory to the extent that the foreign State cannot be relied on to prevent or suppress terrorist activities'. K N Trapp, 'Back to basics: necessity, proportionality, and the right of self-defence against non-state terrorist actors' 56 *International and Comparative Law Quarterly* 141 (2007), p. 156.

assessment of the legality of self-defence measures taken against non-state actors. The two Judges asserted that if attacks are carried out by non-state actors against neighbouring states from the territory of a state which almost completely lacks governmental authority in the whole or part of its territory, such attacks are still considered to be armed attacks despite the fact that they cannot be attributed to the territorial state.⁹⁹ The position was followed by the Institut de Droit International in 2007. Resolution 10A of 27 October 2007 states that 'In the event of an armed attack against a State by non-State actors, Article 51 of the Charter as supplemented by customary international law applies as a matter of principle' and further that 'If an armed attack by non-State actors is launched from an area beyond the jurisdiction of any State, the target State may exercise its right of self-defence in that area against those non-State actors'.¹⁰⁰ Furthermore, the 'Principles Relevant to the Scope of a State's Right to Self-Defence Against an Imminent or Actual Armed Attack by Nonstate Actors'¹⁰¹ proposed by Daniel Bethlehem as well as The Chatham House Principles of International Law on the Use of Force in Self-Defence¹⁰² and Leiden Policy Recommendations on Counter Terrorism and

⁹⁹ *Armed Activities on the Territory of Congo*, 2005, ICJ, Separate Opinion of Judge Simma, para. 12 and Separate Opinion of Judge Kooijmans, para. 30. Judge Kooijmans stated that '(...) If armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require'.

¹⁰⁰ Institut de Droit International, 'Present Problems of the Use of Force in International Law, Resolution 10A (27 October 2007), para. 10 (ii).

¹⁰¹ Bethlehem, *supra* note 5. Principle 1 states that 'States have a right of self-defence against an imminent or actual armed attack by nonstate actors' and further Principles 11 and 12 explicitly recognise the fact that if the territorial state on whose territory the non-state actors operate is either unwilling or unable to contain the threat, then the victim state may use armed force on the territory of such a state against non-state actors even without territorial state's consent.

¹⁰² Chatham House, *Principles of International Law on the Use of Force in Self-Defence*, October 2005, <https://www.chathamhouse.org/publications/papers/view/108106> Principle 6 states 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. (i) In such a case the attack must

International Law¹⁰³, all refer to the unwillingness and/or inability of the territorial state to prevent the attacks by non-state actors and, therefore, possibly justifying use of defensive force by the victim state, as becoming increasingly accepted in state practice and supporting statements of both governments and international organisations.

The distinction between the actual legal responsibility of the territorial state which is unable to prevent non-state actors' attacks and the possibility of taking defensive measures against non-state actors is equally important here. Following the approach outlined in point 4.3.2.1 above, the conclusion regarding the legality of exercising the right of self-defence by the victim state would be the same. Accordingly, if the failed state is either unwilling or unable to prevent the military activities launched by independent non-state actor and if such activities amount to an armed attack for the purposes of Article 51 of the UN Charter, the victim state may have the right to take forcible self-defence measures against the non-state actors on the territory of such a state. The issue of attributing the armed attack to the failed state would therefore remain irrelevant in the assessment of the legality of self-defence measures. Nevertheless, the controversy remains with regard as to whether the occurrence of an armed attack perpetrated solely by non-state actors and the inability of the territorial state to prevent it provide sufficient justification

be large scale. (ii) If the right of self-defence in such a case is to be exercised in the territory of another state, it must be evident that that state is unable or unwilling to deal with the non-state actors itself, and that it is necessary to use force from outside to deal with the threat in circumstances where the consent of the territorial state cannot be obtained'

¹⁰³ N Schrijver & L van den Herik, 'Leiden Policy Recommendations on Counter-terrorism and International Law' 57 *Netherlands International Law Review* 531 (2010), p.12: 'It should be emphasised that states considering the use of force against terrorists must take due account of the exceptional nature of military action on foreign territory. The territorial state's consent to military action is required, except where the territorial state is unable or unwilling itself to deal with the terrorist attacks'.

from the violation of the territorial sovereignty of the latter. The fact of the matter is that although self-defence would be directed against non-state actors, it would nonetheless, take place on the territory of a state innocent of perpetrating an armed attack.

According to Randelzhofer: 'For the purpose of responding to an 'armed attack', the state acting in self-defence is allowed to trespass on foreign territory, even when the attack cannot be attributed to the state from whose territory it is proceeding (...) Thus it is compatible with Art. 51 and the laws of neutrality when a warring state fights hostile armed forces undertaking an armed attack from neutral territory on the territory of neutral state, provided that the state concerned is either unwilling or unable to curb the ongoing violation of its neutrality'.¹⁰⁴ The advocates of the 'unwilling or unable' test point towards its alleged 'historical lineage' in the law of neutrality mentioned above by Randelzhofer.¹⁰⁵ In principle, the victim state is obliged to initially resort to peaceful means and request that a territorial/neutral state deals with a threat posed by non-state actors.¹⁰⁶ If however, it becomes apparent that the territorial/neutral state is unwilling or unable to prevent violations of its neutrality by non-state actors 'neutrality laws permit a belligerent

¹⁰⁴ A Randelzhofer, 'Article 51' in B Simma (ed.), *The Charter of the United Nations, A Commentary* (Oxford University Press, Oxford, 1994), p.673.

¹⁰⁵ See: Deeks, *supra* note 97, p. 497: 'Although neutrality law does not directly govern uses of force between states and nonstate actors [...] the equities and concerns of the neutral state and an offended belligerent state in the neutrality law context are analogous to those of the territorial state and the state seeking to use force in self-defence against a non-state actor in that territory. The fact that the "unwilling or unable" test finds its roots in neutrality law anchors the test's legitimacy'. See also: N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford, Oxford University Press, 2011), p.41: 'The possibility of taking action on the territory of another state in order to curb attacks by a third party is not unique to the challenges of confronting non-state actors, and the debate here can find analogy in the context of the use of force as it relates to the laws of neutrality'.

¹⁰⁶ See discussion in subchapter 4.4.2 below regarding the 'necessity' element of self-defence.

to use force on a neutral state's territory'.¹⁰⁷ It has been argued that 'From a doctrinal point of view, such an approach may be based on two foundations: a conception of sovereignty as responsibility, entailing protective duties vis-a-vis third states; and the relative character of territorial integrity, placing states under the obligation to acquiesce in defensive action of other states, if no other option is available, to put an end to an impending danger'.¹⁰⁸

The 'due diligence rule'¹⁰⁹, which is one of the basic principles of international law, provides that states have a duty to prevent their territory from being used to the detriment of the other states.¹¹⁰ It has to be noted however, that non-compliance with the due diligence standard raises the issue of state's legal responsibility for the omission on the part of the state and not for the actual wrongful act of a non-state actor. Furthermore, the due diligence rule is not absolute and presupposes an obligation of means.¹¹¹ Whether or not a state has fulfilled its obligation and taken 'all reasonable measures' depends on the specific circumstances as well as the primary rules involved and must be established on case-by-case basis.¹¹² The two most important applicable criteria are whether the state possesses the necessary means in order to suppress the said activity by non-state actors and whether the state is aware of such actions taking place. In many cases of failed states such necessary means are lacking. Accordingly a state's failure to exercise due diligence

¹⁰⁷ Deeks, *supra* note 97, p. 499.

¹⁰⁸ C Stahn, 'Terrorist Acts as "Armed Attack": The Right to Self-Defence, Article 51 (1/2) of the UN Charter, and International Terrorism' 27 *Fletcher Forum of World Affairs* 35(2003), p. 47.

¹⁰⁹ ICJ, *Corfu Channel Case*, Judgment of 9 April 1949, para. 22: 'States must not allow knowingly its territory to be used for acts contrary to the rights of other states'.

¹¹⁰ See: R P Barnidge Jr., 'The due diligence principle under international law' 8 *International Community Law Review* 81 (2006).

¹¹¹ *Ibid.*

¹¹² R Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States', 35 *German Yearbook of International Law* 9 (1992), at pp. 44-45.

and prevent the non-state actors from using its territory in order to launch cross-border attacks does not necessarily automatically entails the state's responsibility for the use of force. Consequently, it is quite possible that a state's territory could be used for launching cross border incursion without it committing any internationally wrongful conduct in terms of non-compliance with its due diligence obligations. It has been argued that 'the duty to suppress illegal conduct carried out by non-state actors must be applied in a flexible manner for host states that may be ineffective in meeting their diligence duty due to the lack of means'.¹¹³ It would therefore, appear correct to conclude, taking into consideration specific situation of a failed state, that such a state cannot be held liable for the breach of its due diligence obligations.

The implementation of the 'unable and/or unwilling' standard appears to allow for a defensive action against non-state actors even if the territorial state exercises governmental authority but is simply ineffective in containing the threat posed by non-state actor element.¹¹⁴ Although taking defensive action in these circumstances may constitute an infringement of the territorial state's sovereignty, as well as, a threat to international peace and security in general, support for this argument can be found in some recent state practice and will be investigated in further detail in the subsequent chapter.¹¹⁵ Shortly, however, for example, it has been submitted that the 2008 Turkey's intervention against the PKK is one such

¹¹³ D I Ahmed, 'Defending Weak States Against the "Unwilling or Unable" Doctrine of Self-Defence' 9 *Journal of International Law and International Relations* 1 (2013), p. 11. See also S E Smith, 'International Law: Blaming Big Brother: Holding States Accountable for the Devastation of Terrorism' 56 *Oklahoma Law Review* 735 (2003).

¹¹⁴ See C Stahn, *supra* note 108, p.47: 'If it becomes evident that the host state is unable or unwilling to act, the injured may, as an *ultima ratio* measure, take military action to stop the persisting threat'

¹¹⁵ See Chapter 5.3 *infra* for discussion regarding possible state practice with respect to the 'unwilling and/or unable test'.

application. Although the region in Northern Iraq could not have been considered as completely ungoverned, the actual Iraqi government was unable to prevent the escalation of violence.¹¹⁶ The international community's reaction to the operation was predominantly muted as majority of states tacitly tolerated it without either endorsing or rejecting Turkey's claim of self-defence in accordance with the Article 51 of the UN Charter.¹¹⁷ Similarly, the standard was referred to during the Russian interventions in 2002 and 2007 against Chechen rebels in Georgia. Although Georgian government attempted to suppress the violence, the measures taken were considered as ineffective. The Russian military intervention met with mixed responses but nevertheless, majority of states did not condemn it thereby denying Russia's right to use force extraterritorially.¹¹⁸ Most recently, the unwilling and/or unable scenario together with reference to the Article 51 of the UN Charter has been invoked by the US in providing the legal argument for the airstrikes against Islamic State in Syria.¹¹⁹ In contrast to some of the operations invoking the use force in response to states harbouring and/or supporting non-state actors, in the unwilling and/or unable scenario rather than expressly endorsing the legal claim, majority of states tacitly condoned the military operations. This difference may suggest that although the operations in response to state's inability and/or

¹¹⁶ *Ibid.*

¹¹⁷ R van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors in Light of Recent State Practice: A Step Forward?' 23 *Leiden Journal of International Law* 183, (2010), p. 193.

¹¹⁸ T Reinold, 'State Weakness, Irregular Warfare and the Right to Self-Defence Post-9/11' 105 *American Journal of International Law* 244 (2011), p.256; C J Tams, 'The Use of Force Against Terrorists', 20 *European Journal of International Law* 359 (2009), p.380.

¹¹⁹ US Representative to the United Nations, Samantha J Power, Letter of 23 September 2014 to Secretary General of the United Nations, Mr Ban Ki-Moon, stated as follows: 'States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the UN Charter, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks'.

unwillingness to take effective measures against a threat posed by non-state actors may be tolerated, majority of states do not actively support them.¹²⁰

As noted by d'Aspremont customary international law 'is a convenient instrument to vindicate the progressive development of international law and its expansion'.¹²¹

Undoubtedly, the restrictive reading of the right to self-defence under Article 51 of the UN Charter has been challenged by recent state practice. At the same time however, it has to be remembered that 'custom is a judgement of acceptability over time'.¹²² The legality of self-defence against non-state actors in failed states without those states consent remains controversial. Chapter five will therefore investigate the validity of the claim that 'it is possible that the [unable and/or unwilling] test has become customary international law'¹²³ and that 'states frequently cite the test in ways that suggest that they believe it is a binding rule'¹²⁴, particularly if an armed attack has been perpetrated by non-state actors operating from a territory of failed states as defined in Chapter three above.

4.4 State failure and the parameters of self-defence

The acceptance that there may exist some possible grounds for the deployment of defensive force against non-state actors operating from the territories of failed states is only the first step of the examination of self-defence in this context. The

¹²⁰ See Chapter 5 for further examination of the recent state practice.

¹²¹ J d'Aspremont 'Customary International Law as a Dance Floor: Part I', <http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i/>

¹²² J E Crawford, Keynote Speech, 'Identification and development of customary international law', Spring Conference of the ILA British Branch – Foundations and Future of International Law, 23 May 2014

¹²³ Deeks, *supra* note 97, p. 503.

¹²⁴ *Ibid.*

second set of questions which need to be addressed relates to the parameters and application of that right. According to Judge Kooijmans: 'The lawfulness of the conduct of the attacked [by non-state actor] State must be put to the same test as that applied in the case of a claim of self-defence against a State: does the armed action by the irregulars amount to an armed attack and, if so, is the armed action by the attacked State in conformity with the requirements of necessity and proportionality'.¹²⁵ It is of paramount importance that, when exercising their right of self-defence, states must comply with the limits of necessity and proportionality. Nevertheless, measuring specific uses of defensive measures against the yardsticks of these two principles may prove problematic. This is due to the fact that necessity and proportionality, although 'consistently referred to[...], are rarely, if ever, analysed in relation to the Charter scheme of self-defence'.¹²⁶

In order to employ defensive measures against non-state actors in failed states, various aspects of necessity and proportionality need to be reconsidered and perhaps even modified. This is due to the fact that, first of all, the attacks by non-state actors may differ substantially from those of a state in that they are often a 'one-off', 'pin prick' attacks of a limited duration. Such attacks considered individually, would possibly not reach the required 'scale and effect', however, when taken into consideration cumulatively, they may justify exercise of self-defence.¹²⁷ Taking into consideration a specific character of non-state actors' military operations, the victim state might not be in a position to respond while the

¹²⁵ *Armed Activities on the Territory of Congo*, 2005, ICJ, Separate Opinion of Judge Kooijmans, para. 31.

¹²⁶ J Gardam, *supra* note 45, p.149.

¹²⁷ The doctrine of the 'accumulation of events' in the context of self-defence against non-state actors has been referred to by a number of commentators. See, *inter alia*, Ruys, *supra* note 22; Van Steenberghe, *supra* note 116; Reinold, *supra* note 117.

attack is still on-going instead of taking action either before the attack has begun or after it has ended. Secondly, the need to re-assess the principles follows from the fact that if one is to admit self-defence against non-state actors in failed states, it requires a more lenient standard of attribution allowing forcible response on the territory of states which are unable to contain the threat posed by non-state actors. Finally, use of force on the territory of 'non-consenting innocent state' requires addressing the possible conflict between protection of the sovereignty and territorial integrity of such a state and the victim's state right to defend itself.

The following sections analyse if and how the specific circumstances surrounding failed states influence the application of necessity and proportionality principles to the defensive measures taken against non-state actors operating within their territories. The subsequent chapter will then focus on examination of state practice in this respect with reference to the factors and considerations which will be highlighted in the sections below as particularly relevant in the interpretation of necessity and proportionality.

4.4.1 Necessity and immediacy of self-defence measures against non-state actors in failed states

The principles of necessity and proportionality of self-defence require that the military response by the victim state be limited to what is necessary to address the actual armed attack and proportionate to the threat that the state faces.¹²⁸

¹²⁸ See: D Akande & T Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defence' 107(3) *American Journal of International Law* 563(2013), p. 564.

Immediacy refers to the temporal connection between the armed attack and the response in self-defence (*ratione temporis* element of an armed attack).¹²⁹ Accordingly, in order to be legitimate, the victim state should respond to an armed attack without delay. State practice indicates that the interpretation of the necessity criterion could differ depending on the type of actual or threatened attack to which the victim state is responding.¹³⁰ It would appear that in terms of the assessment of the legality of forcible measures taken in response to attack perpetrated solely by non-state actors, the principle of necessity plays a crucial role.¹³¹

The requirement of necessity imposes an obligation on the victim state to use forcible measures only if there are no alternative means of effectively responding to the threat.¹³² In cases of the armed attack being perpetrated by a state, the obvious initial alternative to military action is diplomatic efforts in order to attempt to reach peaceful solution. In circumstances where the armed attack was carried out solely by non-state actors, the victim state may try and seek a solution via the territorial state. Accordingly, the legality of self-defence measures might depend upon the victim state exploring the diplomatic avenues and demanding that the territorial state exercises its jurisdiction and takes appropriate actions in order to control armed activities by non-state actors. If this option exists and the victim state

¹²⁹ *Ibid.*

¹³⁰ *Ibid.* According to the authors: 'When self-defence is used in immediate response to an ongoing attack by another state, practice indicated that a state is not required to seek or use alternative means [...] By contrast, the necessity test is no mere formality when the use of force is in response to an attack by non-state actor or when there is no ongoing use of force at the moment, either because no actual armed attack has yet occurred or because the armed attack appears to have ceased'.

¹³¹ See, *inter alia*, C J Tams & J G Devaney 'Applying Necessity and Proportionality to Anti-terrorist Self-Defence' 45 *Israel Law Review* 91 (2012), p. 96.

¹³² ICJ, *Nicaragua* case (Merits), para. 237

decides not to pursue it, then the legality of measures taken in self-defence may be questioned and such state could find itself in violation of the UN Charter prohibition of the use of force in states relations.¹³³ It has to be noted, however, that the victim state is under no obligation to exhaust absolutely all non-forcible measures before turning to self-defence. The victim state must only pursue those alternatives which are likely to be effective.¹³⁴

As noted above, the relationship between the territorial state and the non-state actor may be of such kind that the former chooses not to take any measures in order to prevent the latter from perpetrating armed attacks. This link between the territorial states and non-state actors appears to be a crucial element of the victim state's justification for the necessity of self-defence. In some cases of failed states the opportunity to make demands towards them to take action against non-state may not be available to the victim state. As noted above in Chapter three, the ability of failed states to enter into international relation with other subjects of international law and to fulfil their international legal obligations is seriously compromised. This is due to the fact that the effective government simply does not exist or it is obvious that any attempts to pursue peaceful resolution would not be

¹³³ According to Special Rapporteur of the International Law Commission, Robert Ago: 'The reason for stressing that action taken in self-defence must be necessary is that the State attacked (or threatened with imminent attack, if one admits preventive self-defence) must not, in particular circumstances, have had any means of halting the attack other than recourse to armed force. In other words, had it been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of armed force. The point is self-evident and is generally recognize; hence it requires no further discussion'. R Ago, 'The internationally wrongful act of the State, source of international responsibility (part 1)', Addendum to the 8th report on state responsibility by the Special Rapporteur, 32nd session of the ILC (1980).

¹³⁴ The Chatham House, Principles of International Law on the Use of Force in Self-Defence, state that: 'Force may be used in self-defence only when this is necessary to bring an attack to an end, or to avert an imminent attack. There must be no practical alternative to the proposed use of force that is *likely to be effective* in ending or averting the attack' (Principle 3).

effective. In these circumstances, the victim state could claim that it has no other option but to exercise its right to self-defence, even without territorial state's consent, on the basis that it is necessary to avert the armed attack. Nevertheless, the question remains whether the fact that the territorial state is failed and unable to provide control over non-state actors armed activities, automatically renders self-defence against the latter lawful in terms of necessity since the peaceful means alternative may not exist.

The Bethlehem 'Principles Relevant to the Scope of a State's Right of Self-Defence Against an Imminent or Actual Armed Attack by Nonstate Actors' also refer to the necessity of initially pursuing consent of the territorial state before taking action in self-defence against non-state actors attacks.¹³⁵ The application of the Principle in practice would equate to the permissibility of the use of force against non-state actors on the territory of non-consenting innocent state if the latter was unable to contain the threat. Similarly, according to the Chatham House Principles of International Law on the Use of Force in Self-Defence, 'The right of states to defend themselves against ongoing attacks, even by private groups of non-state actors, is not generally questioned. What is questioned is the right to take action against the

¹³⁵ According to Principle 12 however, 'The requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is unable to effectively restrain the armed activities of the nonstate actor such as to leave the state that has a necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack. In such circumstances, in addition to the preceding requirements, there must also be a strong, reasonable, and objective basis for concluding that the seeking of consent would be likely to materially undermine the effectiveness of action in self-defense, whether for reasons of disclosure, delay, incapacity to act, or otherwise, or would increase the risk of armed attack, vulnerability to future attacks, or other development that would give rise to an independent imperative to act in self-defense. The seeking of consent must provide an opportunity for the reluctant host to agree to a reasonable and effective plan of action, and to take such action, to address the armed activities of the nonstate actor operating in its territory or within its jurisdiction. The failure or refusal to agree to a reasonable and effective plan of action, and to take such action, may support a conclusion that the state in question is to be regarded as a colluding or a harboring state'.

state that is the presumed source of such attacks [...] It may be that the state is not responsible for the acts of the terrorists, but it is responsible for any failure to take reasonable steps to prevent the use of its territory as a base for attacks on other states. Its inability to discharge the duty does not relieve it of the duty. But the right to use force in self-defence is an inherent right and is not dependent upon any prior breach of international law by the state in the territory of which defensive force is used'.¹³⁶

In conclusion, it is undeniable that the principle of necessity requires the victim state to pursue peaceful avenues before resorting to forcible measures. It is a primary responsibility of the territorial state to avert armed attacks by non-state actors. Nevertheless, the relationship between the territorial state and non-state actors heavily determines which non-forcible measures will be accessible to the victim state and could be potentially effective. It would appear that state failure and government's lack of territorial control may considerably limit the alternatives available before exercising the right to self-defence.

4.4.2. Proportionality of action taken in self-defence against non-state actors in failed states

As noted above, the principle of proportionality also constitutes a crucial requirement of lawful self-defence and is equally applicable in the context of self-defence against non-state actors.¹³⁷ Despite the fact that proportionality remains a fundamental principle of international law, its implementation in practice and

¹³⁶ The Chatham House, Principles of International Law on the Use of Force in Self-Defence, p.12.

¹³⁷ K Trapp, *supra* note 98, p. 156.

precise content might be difficult to define.¹³⁸ Requirements of proportionality apply in many areas of law including international human rights law and the laws of armed conflict regulating the means and methods of warfare. While their primary goal is always a balancing of interest, it has to be noted that the application of proportionality in different fields has various functions and consequently, this influences the formulation of respective proportionality equations.¹³⁹

In the context of self-defence as well as in general, the rules of *ius ad bellum*, proportionality has a dual function. First of all, it is an additional factor for determination of whether a state may resort to self-defence at all. Secondly, it imposes limitations on the scope and intensity of lawful self-defence. Compliance with proportionality requires that the defending state employs no more force than it is necessary in order to achieve the pursued objective.¹⁴⁰ According to Ago, 'It would be mistaken to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the 'defensive action, and not the forms, substance and strength of the action itself'.¹⁴¹ Accordingly, the measures employed in self-defence do not necessarily have to quantitatively commensurate either with the attack

¹³⁸ See: T Franck, 'On Proportionality of Countermeasures in International Law' 102 *American Journal of International Law* 715(2008). D Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in *Jus Ad Bellum*' 24 (1) *European Journal of International Law* 235(2013); Gardam, *supra* note 43.

¹³⁹ N Lubell, *supra* note 105, p. 64.

¹⁴⁰ See: The Chatham House, Principles of International Law on the Use of Force in Self-Defence, Principle 5.

¹⁴¹ R Ago, 'The internationally wrongful act of the State, source of international responsibility (part 1)', Addendum to the 8th report on state responsibility by the Special Rapporteur, 32nd session of the ILC (1980), para 121.

which it is responding to or with the threatened attack.¹⁴² This makes the proportionality requirement difficult to apply in practice as it does not operate on the basis of equivalence between the effects and is dependent upon the scope of legitimate objectives pursued by self-defence measures. As noted above, the defensive action is acceptable in response to ongoing or imminent attacks. Accordingly, the future harm which is reasonably expected to occur is relevant in the assessment of proportionality which imposes an obligation on states not to resort to self-defence actions which would be excessive in relation to the injury expected from the attack.

When acting in self-defence against the attacks perpetrated by non-state actors, the same reasoning as above must be applied.¹⁴³ Accordingly, if the proportionality of self-defence action is to be measured by reference to the danger faced by the victim state, the first task would be the assessment of this danger. The evaluation of the magnitude of the threat posed will be dependent upon the circumstances of each case and their evaluation. In cases of non-state actors' attacks emanating from failed states this might be extremely difficult as the abilities of non-state actors are far less evident than those of a state. Additionally, the fact that a territorial state lacks effective governmental institutions and may be unable or unwilling to cooperate with the victim state, contributes even further to the evaluation of the threat posed by them being largely prognostic and often based on factual uncertainties.

¹⁴² See: Green, *supra* note 44, p.86 *et seq.*

¹⁴³ See: O Schachter, 'The Extraterritorial Use of Force Against Terrorist Bases' 11 *Huston Journal of International Law* 309 (1988-89), p.315.

There are a number of factors which are generally considered relevant in the assessment of proportionality of self-defence¹⁴⁴ which should, undoubtedly, also be applied in cases involving non-state actors. First of all, the proportionality will depend on the scale and effects of an armed attack as well as the likelihood of the attacker's success in the realisation of its goal. In cases of an ongoing small scale attacks by non-state actors, it has to be taken into consideration whether the armed attacks have been successful and the harm they already inflicted on the victim state. Furthermore, in order to appraise the proportionality of defensive measures, it is necessary to compare the injury already inflicted or expected from the non-state actors' attack with the consequences of the self-defence action itself.¹⁴⁵ The victim state would have to provide evidence justifying the scale of the response and means employed. It has to be noted however, that this should not be done by reference to the rules imposed by international humanitarian law and human rights law, as the proportionality test laid out by the rules of *ius ad bellum* is an entirely autonomous requirement.¹⁴⁶ Accordingly, the means and methods employed by the victim state must be considered as necessary to respond to the attack or a threat thereof.¹⁴⁷ Two further factors are relevant in the discussion on proportionality of defensive response, namely its geographical and temporal scope. Finally, it is also dependent on what may be subsumed under the broad notion of

¹⁴⁴ See: C J Tams & J G Devaney, *supra* note 130, p. 102.

¹⁴⁵ *Oil Platforms*, ICJ 2003, 161, at para. 77.

¹⁴⁶ See: C Greenwood, 'Self-defence and the Conduct of International Armed Conflict' in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Y Dinstein (ed) (1989), at p.279: 'The laws of armed conflict impose considerable restrictions upon a State's freedom to select targets (...) The motive behind the test of proportionality in Article 51(5)(b) (of the *First Protocol of 1977 to the 1949 Geneva Conventions of*) is also different, being based on purely humanitarian considerations, whereas the proportionality requirement in self-defence is more concerned the preservation of international order and the minimisation of the use of force'.

¹⁴⁷ *Ibid.*

'collateral damage'.¹⁴⁸ This denotes injurious consequences of defensive measures affecting actors not involved in the conflict (for example, failed state). Traditionally, the rights and duties of third states influenced by the armed conduct were governed by the laws of neutrality.¹⁴⁹ Undoubtedly, the effects of self-defence on such a neutral/failed state may affect the assessment of proportionality. Accordingly, the greater the loss inflicted by defensive measures employed against non-state actors, the more detailed justification for inflicting them would have to be.

The assessment of proportionality of self-defence would always be a challenging task, even in traditional state-only setting. In respect of self-defence against non-state actors in failed states, matters are even more complex. The appraisal of proportionality is to a large extent dependent on the gravity of the threat posed by the non-state actors and the fact that failed states cannot contain them; as well as value judgement regarding what level of response would be permissible. As it will be evident from the analysis of state practice in subsequent Chapter, states often refer to the element of proportionality in self-defence against non-state actors. Nevertheless, it may be difficult to identify considerations on which assessment of the specific content and requirements of proportionality, as well as its application, are based.

¹⁴⁸ *Ibid.* p.281

¹⁴⁹ See: Randzelhofer, *supra* note 103, p.673.

4.5 Conclusions

The aim of this Chapter was to provide legal analysis of the questions pertaining to the use of force in self-defence against non-state actors operating from the territories of failed states, as previously defined in Chapter three. Clearly, the attacks by states' regular forces come within the ambit of Article 51 of the UN Charter. The legal issues which were discussed here relate to the circumstances where the application of the said Article would not be immediately obvious and the application of customary international law remains unsettled. Such are the cases where the state fails to control its territory and the non-state actor carries out transborder military operation of such 'scale and effect' which may suffice for it to be considered an 'armed attack'. The first part of the Chapter provided essential background and identified the law relevant to the use of force in self-defence in general. The subsequent section proceeded to analyse possible grounds for the exercise of the right of self-defence against non-state actors perpetrating alleged armed attacks from territories of failed states. The penultimate part addressed the possible potential of principles of necessity and proportionality as limitations on the use of force against non-state actors in failed states.

The adherence to strictly state-orientated rules regarding the use of force in self-defence has been increasingly challenged by the new reality of conflicts characterised by the presence of powerful non-state actors operating from the territory of a state which, due to the lack of effectively functioning government, has absolutely no control over their actions. Accordingly, the Chapter addressed possible legal positions concerning the question whether and, if so, when the use of

defensive force against non-state actors in failed states may be considered as lawful. The use of force targeting non-state actors on the territory of 'non-consenting innocent state' requires consideration of the possible conflict between protection of the sovereignty and territorial integrity of such a state and the victim's state right to defend itself. It has been concluded that, despite the importance of state sovereignty and territorial integrity, the absolute prohibition of the use force in self-defence against armed attacks committed solely by non-state actors without attribution of their conduct to the territorial state, becomes increasingly challenged position in the current international law. The supporters of a widely understood right of self-defence question the restrictive reading of the *ratione personae* element of an armed attack and point towards the fact that Article 51 of the UN Charter does not explicitly identify the nature of the party responsible for the armed attack and that non-state actors are undoubtedly capable of perpetrating such an attack. The Chapter then proceeded to investigate three matters of particular interest in connection to the above claim. Firstly, it has been examined if and how defensive action against non-state actors could be influenced by the position of the territorial state. Secondly, the chapter addressed the possibility of the failed states bearing the responsibility for actions of non-state actors by not preventing such acts and failing to comply with their due diligence obligations. Finally, it has been examined how the two above matters influence the legality of defensive measures taken by the state which has fallen victim of non-state actors' attacks. It has been concluded that the distinction between the two different issues, that of attribution and the classification of an armed attack for the purposes of Article 51, cannot divert from the need for a legal basis for deployment

of defensive measures against non-state actors in possible violation of sovereignty and territorial integrity of a failed state. The final part of the current Chapter examined the potential of the principles of necessity and proportionality as limitations on the use of force against non-state actors in failed states.

This section of the thesis is the opening part of the discussion which continues in Chapter five and turns towards the analysis of the application of the law and recent state practice with regard to the exercise of the right to self-defence against armed attacks perpetrated solely by non-state actors located within failed states. The current situation can be characterised by an increasing gap between what is considered as the norms of international law and the norms which rule the operational practice of states. It will be argued that state practice is hardly uniformed and consolidated. It is often the case that states do not explicitly condemn military operation against non-state actors as unlawful. Nevertheless, this does not obviously imply that the victim states' justification for the intervention remains uncontested. The analysis of recent state practice supports the conclusion that it is becoming increasingly difficult to sustain the claim that international law absolutely prohibits the use of defensive force against non-state actors operating from the territories of failed states which are unable to control their activities. Nevertheless, states remain conflicted as to when such force can be employed and is lawful.

CHAPTER 5

FAILED STATES AND THE USE OF FORCE AGAINST NON-STATE ACTORS.

ANALYSIS OF RECENT STATE PRACTICE

5.1 Introduction

A considerable proportion of the world's population today lives in states which are developing and whose political structure, boundaries and frequently even the very existence is highly artificial and often a legacy of the colonial system. The process of colonisation and subsequent decolonisation did not necessarily result in reproduction or implementation of the Westphalian model of states, possessing clearly defined territory, population and effective governments capable of entering into international relations with other international law subjects. Failed states are unique creatures which have no real analogy to concepts already existing in international law. As a consequence, although the international community continues to perpetuate a notion of 'statehood' which allows the state-centric system of international law to exist, when dealing with practical and political realities of state failure, international law may no longer consider external sovereignty of states as an undeniable entitlement to statehood.¹ Recent state practice with regard to the use of force in self-defence against non-state actors operating within failed states appears to support this conclusion. Accordingly, although the 'statehood' of failed states remains uncontested, their sovereignty is increasingly considered to be dependent on the existence of effective governments and recent cases of military interventions in the exercise of self-defence indicate a

¹ See *supra* Chapter 3.2 & 3.3.

clear movement beyond sovereignty-driven reluctance in the use of force in states' relations. The analysis of state practice in this respect appears to suggest that failed states considerably changed the modern landscape of peace and security. Nevertheless, the exact consequences and the impact of this change in international law are yet to be fully explored.

The circumstances surrounding failed states clearly show increasing dissonance between the challenges facing contemporary security system, and the largely static international legal order, particularly in relation to the use of force. Clearly, these difficulties have been noticed and consequently, the actions of states in their international legal relations have evolved. As a result, although the absence of effective government and other failed state characteristics, investigated in details in Chapter three above, do not affect statehood as such, the same cannot perhaps be concluded with regard to the sovereignty of such territorial entities. This thesis addresses one of the manifestations of this claim, namely increasing number of the examples of the use of defensive force against non-state actors operating from the territories of failed states.

The following Chapter aims to analyse state practice with regard to both the interpretation of the treaty law and contribution towards a dynamic and continuous process of creation of customary international law within the area of the use of force in states' relations. In particular, it will be examined if and how the lack of effective government and inability to fulfil international obligations by failed states influenced states' reactions towards armed attacks perpetrated solely by non-state actors. The main question will be whether there is a constant and

uniform practice of states regarding the military intervention in self-defence on the territory of failed states despite the fact that the responsibility for an 'armed attack' cannot be attributed to the latter. Can one have a legitimate expectation of the same conduct in the future in a similar set of circumstances? Did state failure become a lawful justification for intervention in self-defence against the attacks committed solely by non-state actors? Chapter five, therefore, complements the analysis conducted in the preceding chapter by putting the factual situations of failed States into the particular context of the legal framework relating to the use of force in states relations.

When the United Nations Charter was created, its drafters focused predominantly on armed attacks carried out by one state against another.² The idea of cross-border attacks perpetrated by non-state actors did not receive any attention. The following sections identify and analyse instances of recent state practice in relation to the use of force in self-defence against non-state actors operating from a territory of states lacking effective government capable of guaranteeing law and order. Accordingly, the chapter seeks to investigate how the *ratione personae* requirement of 'armed attack' is being interpreted in recent state practice. From whom must an armed attack emanate in order to trigger the right of self-defence and how the alleged failure of territorial state influences this analysis? In principle, it is uncontroversial that when substantial cross-border attacks by non-state actors can be imputed to a state, there is an 'armed attack' against which the victim state may exercise defensive measures, subject to the necessity and proportionality criteria. Nevertheless, the precise content of the rules on state responsibility has

² See *Supra* Chapter 4.2.

only recently been clarified as a result of the ICJ's case law and the work of the International Law Commission³ but still does not by any account remain undisputed. Consequently, the analysis carried out in this Chapter aims to contribute towards the discussion regarding the state practice with respect to the exercise the right of self-defence absent state imputability.

The present Chapter proceeds in four parts. The first one briefly analyses the situation of a territorial state with reference to Chapter's three definition of state failure phenomenon; as well as the position of the perpetrators of the attack – non-state actors. As noted previously, state failure is not a static situation and although there are significant common denominators, the level of 'failure' may vary from country to country. Accordingly, various states are considered in the section below, including, for example, Afghanistan, which under the Taliban rule may have had seemingly strong government, and Somalia, which at certain points in time did not possess any sort of government at all. The second part ascertains the justifications provided by the victim states for the military operation as well as the response, if any, of the territorial/failed states to the intervention. In particular, it is analysed whether despite the failed states' inability to exercise control over the non-state actors operating from within their territory, the victim states still implies the responsibility of the failed state for the armed attack. Furthermore, it is considered if and how such inability can be interpreted by the victim state as an element of responsibility. The penultimate section of the Chapter examines the reaction of

³ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts With Commentaries*, text adopted by the International Law Commission at its fifty-third session, UN Doc. A/56/10 (9 June 2001), Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

individual states as well as various international organisations to the identified instances of the use of defensive force. The creation of customary international law is not momentary. Accordingly, the conclusion of the present Chapter will discuss whether recent state practice with regard to the exercise of right of self-defence against non-state actors' attacks emanating from the territory of failed states is sufficiently widespread and consistent and considered to be accepted as law.⁴

5.2 Failed states and non-state actors – situation of the territorial state

The underlying assumption of the UN Charter state-centric security framework is that within each internationally recognised state there is some form of central authority in control of all internationally relevant armed forces based within that territory.⁵ The common denominator of states discussed in this section is the inability to effectively govern the entirety of their territory and population. The lack of effective control manifests itself in the powerlessness of the state's military and police vis-à-vis non-state actors seeking to establish safe haven within the state's territory. The inability to control violence within a defined territory, as well as, increasing capacity of non-state actors to perpetrate transborder armed attacks, presents increasing threat to international peace and security and emphasises the growing inadequacy of state-centric security regime.

⁴ See: M C Wood, Special Rapporteur, *Second Report on Identification of Customary International Law*, International Law Commission, Sixty-sixth session, A/CN.4/672, Geneva, 5 May-6 June and 7 July-8 August 2014, para. 21-30.

⁵ See: Z Daboné, 'International law: armed groups in a state-centric system' 93(882) *International Review of the Red Cross* 395 (2011).

Examples of failed states abound. Despite the fact that the level of their ineffectiveness in exercising territorial control varies, the one common denominator is the fact that they all failed to prevent non-state actors from operating across international frontier. In the early days of the post-Charter era, states consistently relied on a close association between the non-state actors and the territorial states in order to hold the latter responsible for the attacks by armed groups. More generally, the non-state actors were regarded as 'instruments' in the hands of states. This approach has changed and since the late 1960s there have been many incidents where the states relied on self-defence justification and the link between territorial state and non-state armed groups carrying out cross-border attacks was far less evident. There are a number of cases of resort to use of force in self-defence in response to armed attacks by non-state armed groups in the post-Charter era.⁶ Nevertheless, it is argued that the military operation in Afghanistan following the events of the 9th of September 2001 and subsequent international community's reaction to these events opened up a new chapter in the analysis of the matters pertaining to the use of force in self-defence against non-state actors.⁷

When exactly Afghanistan became a failed state is a matter of some contention. Following its creation, the country never became a homogenous nation and remained more of a collection of varying groups divided along ethnic, linguistic, religious and racial lines. The majority of a failed state features were present in Afghanistan at the time of September 11, 2001 events, including, *inter alia*, limited

⁶ See: T Ruys, *'Armed Attack and Article 51 of the UN Charter'*, (Cambridge, Cambridge University Press, 2012), pp. 428 – 433;

⁷ A Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories in International Law' 12 (5) *European Journal of International Law* 993(2001)

political institutionalisation of the society, strong ethnic and/or religious divisions, systematic humanitarian law and human rights violations and poverty. Despite the fact that Taliban government exercised some level of control over the majority of the state's territory, this did not mean that their rule remained uncontested.⁸ Special Representative of the UN Secretary-General for Afghanistan, Lakhdar Brahimi, described the country as de facto collapsed before the events of September 11, 2001, when the Taliban controlled vast majority of the State's territory.⁹ According to the Reports of the UN Secretary-General¹⁰, Afghanistan was one of the poorest countries on earth.

State practice analysed in this Chapter relates to the use of force against independent non-state actors which do not satisfy ICJ's 'effective control' test for state responsibility nor do they function as de facto agents of state government. The September 11 attacks were not perpetrated by the Taliban regime but by a powerful non-state actor based in Afghanistan – Al-Qaeda¹¹, an international terrorist network founded by Osama bin Laden in the late 1980s. The existence of a close relationship between Al-Qaeda and the Taliban regime would seem beyond doubt. According to the available information however, the Taliban regime did not

⁸ By 11 September 2001, only three states, Pakistan, Saudi Arabia and the UAE, recognised the Taliban regime as a legitimate Afghan government. The majority of international community recognised a government represented by the United Islamic Front for Salvation of Afghanistan ("Northern Alliance") fighting the Taliban since the USSR left Afghanistan in 1989.

⁹ Lakhdar Brahimi, *Briefing to the Security Council*, Transcript from 13 November 2001, available at: <http://www.un.org/News/dh/latest/afghan/Brahimi-sc-briefing.html>.

¹⁰ *Report of the Secretary-General on the Situation in Afghanistan and Its Implications for International Peace and Security*, S/2000/1106, 20 November 2000. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/754/94/PDF/N0075494.pdf?OpenElement>

¹¹ US President George W. Bush stated on 20th September 2001 in his Address before a Joint Session of the Congress that 'The evidence we have gathered all points to [the attacks having been carried out by] a collection of loosely affiliated terrorist organisations known as Al-Qaeda'. US President 'Address Before Joint Session of the Congress of the United States Response to the Terrorist Attacks of September 11' 37 *Weekly Compilation of Presidential Documents* 1347.

control or instruct Al-Qaeda fighters.¹² Although the Taliban government was in breach of the UN General Assembly Resolution 2625 (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations)¹³ by providing safe haven and training facilities on the Afghan soil to the Al-Qaeda, it is questionable whether this breach of international obligations can be considered an ‘armed attack’ on the US. In particular, it has been suggested that it was the Taliban government which was dependent on and even subordinate to Al-Qaeda rather than the other way round.¹⁴ The United Kingdom’s government report on ‘Responsibility for the Terrorist Atrocities in the United States’ stated that: ‘Usama Bin Laden has provided the Taleban régime with troops, arms and money to fight the Northern Alliance. He is closely involved with Taleban military training, planning and operations. He has representatives in the Taleban military command structure. He has also given infrastructure assistance and humanitarian aid’.¹⁵ Although the document did not conclude that the Taliban regime was directly involved in the attack, it did make an observation that a close link existed between the two structures. Nevertheless, the non-state actor seems to have been operationally and financially independent from the Taliban and on the factual basis it is not possible to consider Al-Qaeda as an

¹² The UK Government’s report on ‘Responsibility for the Terrorist Atrocities in the United States’ clearly states that: ‘Usama Bin Laden and Al Qaida, the terrorist network which he heads, planned and carried out the atrocities on 11 September 2001’. The Report further states that: ‘Usama Bin Laden and Al Qaida were able to commit these atrocities because of their close alliance with the Taleban régime, which allowed them to operate with impunity in pursuing their terrorist activity’.

Available at: <http://www.fas.org/irp/news/2001/11/ukreport.pdf>

¹³ UN Docs A/RES/2625 (XXV), 24 October 1970. These violations of international law were the subject of the Resolutions 1214 (1998), 1267 (1999) and 1333 (2000) of the Security Council, which requested, in their operative parts, that the Taliban stop their support and extradite Osama bin Laden

¹⁴ See: A C Müller ‘Legal Issues Arising from the Armed Conflict in Afghanistan’ 4 *Non-State Actors and International Law* 239 (2004), at p. 248

¹⁵ The UK government’s report on ‘Responsibility for the Terrorist Atrocities in the United States’ Available at: <http://www.fas.org/irp/news/2001/11/ukreport.pdf>

organ of the Afghan state or a mean in the hands of the Taliban to fulfil their own objectives.¹⁶ Accordingly, although the unwillingness of the Taliban regime to comply with international obligations relating to the duty to refrain from supporting terrorist attacks against another state could be quite easily established, the actual ability of this de facto government would have to be analysed separately. It is questionable whether, even if they were willing to do so, the Taliban would be able to control Bin Laden's organisation as the latter was financially and militarily a superior force. The inability of governments, if they exist at all, to exercise control over non-state actors is a common denominator in case of state failure and the examples of the recent state practice examined in this Chapter.

The UN Charter's state centric security regime is predicated upon states exercising monopoly of force within their territorial boundaries. Failed states are unable to fulfil this function. Consequently, the gap between the ideal of effective statehood and the reality faced by the states with ineffective or even non-existing government creates optimal environment for the non-state actors to thrive. This was certainly the case in Africa's Great Lakes Region where political strife, armed conflict and population displacement resulted in grave humanitarian consequences. The conflict in the Democratic Republic of Congo was characterised by a multitude of rebel groups controlling vast proportions of the state's territory and often being allied with neighbouring states involved in the conflict.¹⁷ The conflict involved a number of unaffiliated non-state actor groups capable of allying with other states as well as

¹⁶ *Ibid.*

¹⁷ See: R Lemarchand 'The Democratic Republic of Congo: From Failure to Potential Reconstruction' in R I Rotberg, ed. *State Failure and State Weakness in a Time of Terror*, (Washington D.C., Brookings Institution Press, 2003), pp. 29-70

acting independently.¹⁸ In particular, the Eastern part of the country became a region where 'rebel groups were able to operate 'unimpeded' (...) because of its mountainous terrain, its remoteness from Kinshasa (more than 1500 km), and almost complete absence of central government presence or authority'.¹⁹ By 2002, the Democratic Republic of Congo was described as 'not just a failed state' but 'the epitome of the failed state'.²⁰ It is estimated that at the time, approximately half of the state's territory was under control of the rebel movements and six other nations (Rwanda, Uganda, Burundi, Angola, Zimbabwe and Namibia) were involved in the conflict. When the first annual Failed State Index was presented in 2005 (also the year when the ICJ issued its judgement in the Armed Activities case), the DRC ranked second.²¹ Accordingly, the country could be considered a perfect example of a failed state as described in Chapter three above.

Nowhere was, and to a certain extent still is, the inability to effectively control its territory more evident than in the case of Somalia. The country features on the Failed State Index from its inception and is considered by many as the best contemporary example of a failed state. Its history has been marked anarchic conflicts characterised by constant violence, military coups, assassinations, alliances, and more recently, the turn to radical Islamic militancy.²² Consequently,

¹⁸ P Okowa, 'Congo's War: the legal dimensions of a protracted conflict' 72 *British Yearbook of International Law* 203 (2006)

¹⁹ *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda), Judgement of 19th December 2005(Merits) <http://www.icj-cij.org>, para. 301.

²⁰ See: R Lemarchand, *supra* note 11, p.29.

²¹ See: The Failed State Index 2005, available at: <http://foreignpolicy.com/2009/10/22/the-failed-states-index-2005/>

²² Various parties struggled for control over its territory since the country's formation in 1960 following the unification of the Italian and British territories and the proclamation of the independent Somali Republic in July 1961. The concept of a 'State', however, was foreign to the

there has been virtually no control of Somalia's borders. This lack of territorial control, as well as persistently ineffective governments, created a very volatile and dangerous situation for Somali security, seriously undermining the country's long term stability and that of the region in general. Many different groups bear responsibility for Somalia's difficulties, ranging from clans, sub-clans, criminals, nationalists, warlords, military entities, and Islamists.²³ In 1991, General Mohamed Siad Barre, who came to power through a military coup in 1969, was ousted from power by several Somali armed groups.²⁴ The state became a playground for non-state armed groups due to the fact that ever since forced departure of President Mohamed Siad Barre, it essentially lacked any effective government. The international community has certainly taken steps to resolve the situation in Somalia and a number of attempts have been made to establish effective government.²⁵ Nevertheless, various groups operating within the country undermined every attempt to do so.

In 2004 an agreement was reached between competing fractions to create a Transitional Federal Government (hereinafter TFG) under President Abdullahi

inhabitants of Somali territory, as the society was traditionally organised in clans where the clan elders and chiefs exercised the primary authority. Consequently, despite nearly a century of colonial rule, Somalia's clan structure had not essentially changed. The Cold War complicated the situation in the country even further. As a result, intensified by the influence of the US and the Soviet Union, the Ogaden War fought between Somalia and Ethiopia between July 1977 and March 1978 is believed to be the cruellest armed conflict in Africa since the Second World War.

²³ The major clan groups are the Darod, Hawiye, Isaaq, Dir, Rahanwayn, and Digil. See: T Dagne, 'Somalia: Current conditions and Prospects for Lasting Peace' Congressional Research Service, Report for Congress, 31 August 2011, Figure 1, p. 29. Available at <http://www.fas.org/sgp/crs/row/RL33911.pdf>

²⁴ Mohamed Siad Barre took control of Somalia in 1969. He was deposed from power by the Habar Gida militia sub-clan of the Hawiye clan headed by General Muhammad Farah "Aideed." See: J McLure, 'The Troubled Horn of Africa: Can the War-torn Region Be Stabilised?', 3 *CQ Global Researcher* 149, 163–64 (2009). Following the collapse of central authority in Mogadishu, rival Somali groups engaged in armed struggle for personal political power and prevented food and medicine from reaching innocent civilians suffering from drought and famine. What followed was the death of an estimated 500,000 people due to violence, starvation, and disease.

²⁵ UNSOM I & II, UNITED TASK FORCE (UNITAF)

Yusuf.²⁶ The government received expressed African Union and UN Security Council support.²⁷ The newly formed government, however, did not exercise control over the entirety of the state's territory and soon faced a very serious challenge from the Union of Islamic Courts (hereinafter UIC)²⁸. According to a Chatham House report: 'During 2006 a variety of Islamist organizations, centred on a long-standing network of local Islamic or sharia courts in Mogadishu, had come together under an umbrella organization, popularly known in the Western media as the Islamic Courts Union. (...) the movement (...) became an alternative to the internationally recognized, but internally disputed, Transitional Federal Government, then restricted to Baidoa'.²⁹ In June 2006, the UIC took control over much of the southern and central Somalia including capital Mogadishu. In an unprecedented turn of events, the Courts managed to unite Mogadishu for the first time in 16 years and re-establish some peace and security.³⁰ The UIC officials heavily criticised the policies of Transitional Federal Government in Baidoa and raised questions about the status of the self-declared Republic of Somaliland in a future Somalia.³¹

²⁶ See: 2004 Nairobi Conference: *Declaration on the Harmonization of Various Issues Proposed by the Somali Delegates at the Somali Consultative Meetings from 9–29 January 2004*.

²⁷ UN Security Council Resolutions 1587 (15 March 2005) and 1676 (10 May 2006).

²⁸ The Union of Islamic Courts renamed itself the Supreme Islamic Courts Council on 24th July 2006.

²⁹ C Barnes and H Hassan, 'The Rise and Fall of Mogadishu's Islamic Courts' Chatham House, Africa Programme, April 2007. Available at:

<http://www.chathamhouse.org/sites/default/files/public/Research/Africa/bpsomalia0407.pdf>

The Report further explains the origins of the UIC: 'The phenomenon of Islamic Courts in 'stateless' Somalia first appeared in north Mogadishu in August 1994. After nearly four years of persistent anarchy and political failures, Islamic clerics from the locally powerful Abgal sub-clan of the Hawiye (...), with the blessing of their 'secular' political leaders, founded the first fully functioning sharia court (...) At root, the Islamic Courts were part and parcel of clan power in Mogadishu. They served specific Hawiye clans and earned the support of the Hawiye business class of Mogadishu for whom the primary purpose of the Islamic Courts was to provide 'security'.

³⁰ Ibid. For example, the airport and seaport were both re-opened.

³¹ The Transitional Federal Government remained weak, 'confined to part of Mogadishu, riven by political squabbles and dependent for its survival on the troops of the African Union (AU) mission (AMISOM). Relatively stable regions to the north refuse to recognise its authority, and much of southern and central Somalia is controlled by Al-Shabaab, a Salafi jihadi group bent on overthrowing the TFG and imposing its extreme version of Islam on the entire country, if not the

Furthermore, prominent UIC figures publicly criticised the role of Ethiopia in Somalia's internal affairs.³² Both the USA and Ethiopia accused the group of being a terrorist organisation with strong links to Al-Qaida.³³ Ever since taking over control in Mogadishu and other areas, the UIC accused Ethiopia of sending troops into Somalia in order to assist the TFG. Clashes between the UIC and the TFG began to escalate from July 2006.³⁴

The disintegration of Somali state led to implosion of national institutions, law and order and authority. The failure of the state to provide good governance, security, and respect for the rule of law is at the very heart of Somalia's endemic conflict. In 2011 the country topped the Failed State Index for the fourth year running.³⁵ Ten out of twelve Somalia's indicators scores were above 9.0 on the scale of 10. In

entire region'. See: International Crisis Group, Africa Report No. 170, 21 February 2011, 'Somalia: The Transitional Government on Life Support', p.1.

³² Ibid.

³³ 'Somalia: Eliminating the Terrorist Threat' Fact Sheet, African Affairs, US Department of State, 25 January 2007. Available at: <http://2001-2009.state.gov/p/af/rls/fs/2007/79383.htm>

The Ethiopian Prime Minister associated the UIC with Eritrea and global terrorism. He declared that: '... [y]ou have the messenger voice of the government of Eritrea who has been actively involved in the fighting in Mogadishu. Theirs is not a specifically Somali agenda. And finally, you have the jihadists led by Al-Itihad-al-Islamia, which I am sure you know, is registered by the United Nations as a terrorist organization. And so, for us, the Islamic Courts Union is not a homogeneous entity. Our beef is with Al-Itihad, the internationally recognized terrorist organization. It so happens that at the moment the new leadership of the Union of the Courts is dominated by this particular group. Indeed, the chairman of the new council that they have established is a certain colonel who also happens to be the head of Al-Itihad. Now, the threat posed to Ethiopia by the dominance of the Islamic Courts by Al-Itihad is obvious'. See: Meles Zenawi, Prime Minister of Ethiopia, Press Conference, 20 June 2006.

³⁴ The UIC forces made significant advances towards Baidoa where the TFG resided. According to the 22 November 2006 Report of the Security Council Committee under Resolution 751(1992), it was alleged that both the UIC and the TFG were actively supported inside Somalia by certain states. The Report further concluded that 'military build-up facilitated by aggressive State support not only perpetuates widespread instability and rising tensions, but also helps to sustain a clearly discernible momentum towards the possibility of a major military conflict involving most of Somalia (...) further aggravating and contributing to this momentum towards possible conflict is the direct involvement inside Somalia of the military personnel of Ethiopia, Eritrea (...) Consequently, there exists the not unlikely prospect of violent confrontations inside Somalia between the military personnel of those States, since Ethiopia and Uganda support TFG and Eritrea supports ICU' Report of the Security Council Committee under Resolution 751 (1992), S/2006/913, 22nd November 2006.

³⁵ See: Failed State Index 2011. Available at: <http://ffp.statesindex.org/rankings-2011-sortable> Somalia remained on the top of the list of failed states in 2012 as well as 2013. Somalia remained on the top of the list of failed states in 2012 as well as 2013.

particular, Security Apparatus indicator score was at the possible maximum of 10.0, whereas the Legitimacy of State indicator score was almost equally high at 9.8.³⁶ As a consequence of the unstable situation in the country and near complete lack of government for a number of years, since the mid-1990s a number of extremist groups operating from Somalia carried out or facilitated multitude of attacks in the region.³⁷

The state's capacity to maintain relatively homogenous effective control throughout the internationally recognised borders has also been seriously compromised in many Middle Eastern countries. As a result, non-state actors thrived where states such as Lebanon, Iraq and most recently Syria failed to consolidate control over their population and territory. From 1975 until the early 1990s Lebanon endured an anarchic conflict where a number of regional players such as Israel, Syria and the Palestine Liberation Organisation used the country as a battleground to carry out their own conflicts.³⁸ Following the Taif Accord of 22nd October 1989 which provided the basis for ending the civil war in Lebanon, south of the country nevertheless remained the one area of active fighting. Hezbollah

³⁶ Both Security Apparatus and Legitimacy of State indicators belong to the group of Political and Military Indicators developed by the Fund for Peace in order to compile the annual Failed States Index. The Security Apparatus indicator is being described as follows: 'The security apparatus should have a monopoly on the use of legitimate force. The social contract is weakened when this is affected by competing groups. Includes pressures and measures related to: internal conflict, small arms proliferation, riots and protests, fatalities from conflicts, military coup, rebel activity, militancy, bombings, political prisoners'. The Legitimacy of State indicator relates to 'Corruption and a lack of representativeness in the government directly undermine the social contract. Includes pressures and measures related to *[[inter alia]]*: government effectiveness and power struggles'.

³⁷ These include, amongst others, several terrorist attacks in Ethiopia carried out by al-Ittihaad al-Islami group in the mid-1990s, the 7th of August 1998 attacks on the US embassies in Nairobi and Dar es Salaam, the 28th of December 2002 attack on the Paradise Hotel in Kikambala, Kenya; and 11th July 2010 bombings in Kampala which was attributed to Al-Shabaab.

³⁸ See: Foreign & Commonwealth Office, The National Archives, Country Profiles, Lebanon <http://collections.europarchive.org/tna/20080205132101/http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029394365&a=KCountryProfile&aid=1018721190906> (accessed 28 September 2015).

emerged during the Lebanese civil war as a Shiite militia and in response to Israeli invasion in 1982 and subsequent occupation of some parts in the south of the country.³⁹ The group maintains extensive security apparatus, political organisation and social services network in many parts of Lebanon and is often described as 'state within a state'.⁴⁰ According to the Report of the Commission of Inquiry on Lebanon, 'Hezbollah has grown to an organization active in the Lebanese political system and society, where it is represented in the Lebanese parliament and in the cabinet. It also operates its own armed wing, as well as radio and satellite television stations. It further funds and manages its own social development programmes'.⁴¹ At the time of the beginning of the so-called 'Second Lebanese War', it has been widely recognised that the Lebanese government was deeply divided and did not have the capacity to control Hezbollah militia. It has been reported that 'Hezbollah's militia, estimated at some 3,000 full-time fighters based in Lebanon's southeast, is as strong as the Lebanese army, and the government has made no effort to take the group's weapons. Hezbollah resists control by the government, and considers itself a representative of the Shiite majority in Lebanon'.⁴² Lebanese government lacked political base and effective army capable of disarming Hezbollah militia. Yet again, the situation of Lebanon serves as a good example of a state

³⁹ Council on Foreign Relations, Hezbollah: <http://www.cfr.org/lebanon/hezbollah-k-hizbollah-hizbullah/p9155> (accessed 28 September 2015). At the beginning of its existence, the movement obtained critical financial support and training from Iran's Revolutionary Guards. Hezbollah has grown to become the Shiite Muslim political party and a militant group with significant support from Iran and Syria.

⁴⁰ Ibid.

⁴¹ Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, para 37, UN Doc. A/HRC/3/2 (23 November 2006).

⁴² E Pan, 'Lebanon's Weak Government', Council on Foreign Relations, available at: <http://www.cfr.org/lebanon/lebanons-weak-government/p11135>

where ineffectiveness of the existing government lead to a severe deterioration of its capacity to maintain law and order.

Iraq placed second on the 2007 Failed State Index with only Sudan's situation being considered as comparatively worse.⁴³ Following the US-led military operation in Iraq which began in March 2003, the country experienced prolonged time of conflict and the period between mid-2007 and mid-2008 was considered to be one of the bloodies ones with high number of deaths among both US personnel and Iraqi civilian population.⁴⁴ Although a permanent Iraqi government took office on 22nd May 2007, the year was marked by increasing sectarian and political violence.⁴⁵ Widely autonomous Kurdish region in the north was much more stable than the rest of the country and the two dominant parties, the Kurdistan Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK), agreed to form a unified government for the region, the Kurdish Regional Government, which was announced in May 2007.⁴⁶ Nevertheless, the relationship between the leadership of Iraq's Kurds and the Kurdistan Workers' Party (hereinafter PKK) fighters was somewhat ambiguous – on the one hand they wanted to maintain positive trade relations with Turkey; on the other hand remained to a certain extent sympathetic

⁴³ See: The Failed State Index 2007, available at <http://ffp.statesindex.org/rankings-2007-sortable>

⁴⁴ See: BBC News, 19 June 2007: 'Iraq raises up Failed State Index' <http://news.bbc.co.uk/1/hi/6766877.stm>

⁴⁵ According to the Amnesty International's report: 'Members of different armed groups, including Ba'athists, Sunni and Shi'a extremists and others, targeted civilians for deliberate killings, abductions and other abuses. Iraqi security forces linked to some of the armed groups were accused of involvement in sectarian killings'.

Amnesty International, *Amnesty International Report 2007 – Iraq*, 23 May 2007, available at: <http://www.refworld.org/docid/46558ecf5.html> (accessed on 28 September 2015)

⁴⁶ Iraq. Report of the Secretary-General pursuant to paragraph 6 of resolution 1770 (2007), 15 October 2007, S/2007/608.

towards the struggle of Turkish Kurds and considered the PKK as a bargaining chip to exert pressure on Turkey over the disputed status of oil-rich region of Kirkuk.⁴⁷

Both Iraq and Syria are considered to be the two Middle Eastern nations that are the most diverse countries in the region with a number of different communities, including Sunni, Shia and Christians. According to the Fragile States Index Decade trends, the situation in Syria became significantly worse over the last 10 years.⁴⁸ This has been particularly evident during the past four years when following the pro-democracy protests which erupted in March 2011, the country descended into a conflict.⁴⁹ The fighting claimed hundreds of thousands of lives and created even more refugees.⁵⁰ Territorial control in Syria has changed repeatedly since the beginning of the conflict. It is currently divided between the Islamic State militants⁵¹, Syrian armed forces loyal to President Bashar al-Assad and a number of various armed groups.⁵² Syria has been labelled as ‘Somalia-style failed state’⁵³ and indeed, it is apparent that the hugely contested state apparatus is incapable to prevent non-state actors from controlling significant parts of the state’s territory

⁴⁷ See: International Crisis Group: ‘Iraq: Allaying Turkey’s Fears over Kurdish Ambitions’ Middle East Report No. 35, 26 January 2005, available at: <http://www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-iran-gulf/iraq/035-iraq-allaying-turkeys-fears-over-kurdish-ambitions.aspx>

Also: International Crisis Group: ‘Iraq and the Kurds: Resolving the Kirkuk Crisis’, Middle East Report No. 64, 19 April 2007, available at: <http://www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-iran-gulf/iraq/064-iraq-and-the-kurds-resolving-the-kirkuk-crisis.aspx>

⁴⁸ See: Fragile States Index Decade Trends, available at: <http://fsi.fundforpeace.org/fsi-decadetrends>

⁴⁹ The reported death toll at the beginning of 2015 was estimated at 210,060. See: The Syrian Observatory for Human Rights, 7 February 2015.

⁵⁰ As at 17 September 2015, the UN Refugee Agency recorded 4,086,760 total Persons of Concern in Iraq, Lebanon, Turkey, Jordan, Egypt and North Africa. Available at: <http://data.unhcr.org/syrianrefugees/regional.php>

⁵¹ See: The Guardian: ‘ISIS ‘controls 50% of Syria’ after seizing historic city of Palmyra’, 21 May 2015 <http://www.theguardian.com/world/2015/may/21/isis-palmyra-syria-islamic-state>

⁵² BBC News, ‘Syria: Mapping the conflict’, 12 May 2015, <http://www.bbc.co.uk/news/world-middle-east-22798391>

⁵³ BBC News ‘Ex UN envoy predicts Syria will be ‘failed state’, 8 June 2014, <http://www.bbc.co.uk/news/world-middle-east-27754732>

and population. Undoubtedly, the most powerful non-state actor in the conflict is the Islamic State in Iraq and Syria, a Salafi militant organisation established in the early 2000s and whose main goal is the establishment and expansion of a caliphate.⁵⁴

Sovereign states have a responsibility to protect their own citizens and the security interests of other states by exercising control over their territory and monopoly over the use of force.⁵⁵ Many states undoubtedly lack the resources to do so and accordingly the non-state element activity around the world is on the rise. This has been and still is in some cases, the experience of states like Ecuador, Georgia or Mali. Increasing importance of non-state actors reveals the inadequacy of state-centric security regime and exposes the fact that formal equality of states has not resulted in substantive equality. As a consequence, the international system based upon the formal equality of states fails as it does not account for the challenges posed by failed statehood and the security threat created by non-state actors. The following section provides support for the claim that 'States increasingly invoke the notion of sovereignty as responsibility in justifying military operations against irregular forces'.⁵⁶ Nevertheless, the question remains whether the failed state can be held accountable for the non-state actors' activities that it is unable to control and if so, what is the exact scope of the victim state's right to self-defence? Subchapter 5.3 investigates how states responded to those questions in their practice.

⁵⁴ Stanford University, 'Mapping Militant Organisations. The Islamic State'. Available at: <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/1>

⁵⁵ With regard to sovereignty as responsibility see: F M Deng, S Kimaro, T Lyons, D Rothchild & I W Zartman, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington D.C., The Brooking Institution, 1996)

⁵⁶ T Reinold, 'State Weakness, Irregular Warfare and the Right to Self-Defence Post-9/11' 105 *American Journal of International Law* 244 (2011), p.284.

5.3 The analysis of the grounds for defensive action submitted by the victim states and the failed states' response

As discussed in the previous chapters, the international community refuses to withdraw recognition for the sovereignty of failed states unable to discharge even the most basic important international obligations.⁵⁷ Accordingly, the inability to prevent attacks by non-state actors does not meet the high attribution standard established by the International Court of Justice or even slightly less stringent requirement proposed by the International Criminal Tribunal for the Former Yugoslavia.⁵⁸ As a consequence, the restrictive interpretation of self-defence favours the territorial/failed states' right to non-interference over the victim states' security concerns. A number of examples of the use of force in self-defence against non-state actors located in failed states, however, illustrate increasing dissonance between the theory and reality of statehood and *jus ad bellum*. It is evident from the ambiguous and inconsistent state practice that the content of the law in the area of defensive action against non-state actors remains uncertain and controversial. This chapter looks both at the operational practice as well as the legal position advanced by the intervening states and the response of the territorial state, if any.

⁵⁷ *Ibid*, p.250: 'State practice has thus long reflected a conscious policy choice on the part of the international community to accept blatant discrepancies between de jure and de facto sovereignty. The rationale behind this policy was to prevent interventionist powers from exploiting the vulnerability of weak states, thereby jeopardising the supreme value of international peace. Recent developments, however, have called into question elements of the traditional notion of the sovereignty such, as the (failed) state's right to be left alone'.

⁵⁸ See: *supra* Chapter 4.3.

There are a number of cases prior to the events of 9/11 which relate to the use of force in another state's territory where the initial armed attack was attributable primarily to a non-state actor.⁵⁹ Nevertheless, Operation Enduring Freedom in Afghanistan commenced a period of intense struggle against armed groups having no association with the territorial state or even openly opposing the internationally recognised central government of a state. The debate regarding the content of the rules regarding the use of force in self-defence against non-state actors followed. The conflict in Afghanistan continues today, however, the period considered in this section occurred between the 11th of September 2001 attacks on the World Trade Centre and the Pentagon, the subsequent US bombing of Afghanistan, removal of the Taliban government from the country and the installation of the interim government lead by Hamid Karzai in the final months of 2001. The events of 11th September 2001 are extremely well known. Briefly, four civilian aeroplanes were hijacked by terrorists and subsequently two of them were flown into the World Trade Centre, one into the Pentagon while the fourth one crashed in the Pennsylvania countryside.⁶⁰ After demands issued to the Taliban government in Afghanistan were not met, the United States and United Kingdom launched 'Operation Enduring Freedom' on 8th October 2001.

⁵⁹ For further discussion regarding pre 9/11 state practice see, *inter alia*, Ruys, *supra* note 6, pp. 368 -418; I Brownlie, *International Law and the Use of Force by States* (Oxford, Oxford University Press, 1963); M Noortmann and C Ryngaert eds. *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Aldershot, Ashgate Publishing Ltd., 2010).

⁶⁰ For further details regarding the events leading up to the military intervention in Afghanistan see, *inter alia*, S D Murphy, 'Terrorist Attacks on World Trade Centre and Pentagon' 96 *American Journal of International Law* 237 (2002); G K Walker 'The Lawfulness of Operation Enduring Freedom's Self-Defence Responses' 37(2) *Valparaiso University Law Review* 489 (2003).

Despite the fact that the September 11 attacks could not be attributed to the State of Afghanistan both the United States and the United Kingdom relied on self-defence as the legal justification for their military operation.⁶¹ A national emergency was proclaimed on 18 September in the US and the US Congress authorised President Bush to use 'all necessary and appropriate force against those nations, organisations or persons he determines planned, authorised, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organisations or persons'.⁶² The Taliban's control over the terrorist attacks has never been alleged nor proven by the US. The claim on which the US based its self-defence action was that the Taliban provided 'safe heaven' to the Al-Qaeda organisation. In its letter to the UN Security Council, the US stated that there was a compelling evidence that the Al-

⁶¹ The US informed the Security Council that 'In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in 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 (...) 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' *Letter dated 7 October 2001 from the Permanent Representative of the United States to the United Nations addressed to the President of the Security Council*, UN Doc S/2001/946 (7 October 2001).

The United Kingdom in a similar fashion reported to the Security Council that: 'In accordance with Article 51 of the Charter of the United Nations, (...) the United Kingdom of Great Britain and Northern Ireland has military assets engaged in operation against targets that we know to be involved in the operation of terror against the United States of America, the United Kingdom and other countries around the world, as part of the wider international effort. These forces have been deployed in the exercise of the inherent right of individual and collective self-defence, recognised in Article 51, following the terrorist outrage of 11 September, to avert continuing threat of attacks from the same source (...) The military action has been carefully planned, and is directed against Usama Bin Laden's Al-Qaeda terrorist organisation and the Taliban regime that is supporting it'. *Letter dated 7 October 2001 from the Charge d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council*, UN Doc S/2001/947 (7 October 2001).

⁶² Authorisation for Use of Military Force, Pub L No 107-40, 115 Stat 224 (18 September 2001), para 2(a).

Qaeda organisation which is 'supported by the Taleban regime in Afghanistan had a central role' in the 'armed attacks' against the United States and that these was 'made possible by the decision of the Taleban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation'.⁶³

Despite the fact that the Taliban movement established itself in Afghanistan and managed to exercise some form of control over extensive parts of the State's territory, it did so without any respect for international norms and values. Consequently, it quickly became isolated from the international community and had been branded a rogue State by the West. Notwithstanding the historical interpretation one adopts regarding the Afghanistan's functionality, it is quite clear that once the Taliban succumbed to the US military intervention, the country failed completely. The public institutions imploded, there was no longer any centralised control over the State's territory and population and undoubtedly no monopoly on the legitimate use of force existed at this point. As a consequence, the external sovereignty, as described in detail in Chapter three, of the State was considered by the international community as lost as well. This argument is further supported by the provisions of the Bonn Agreement which was designed to facilitate the rebuilding of Afghanistan after US intervention and which concluded that a new Afghan Interim Authority would become 'the repository of Afghan sovereignty with immediate effect'.⁶⁴ The phrase seems to suggest that its authors considered Afghanistan's sovereignty as having been lost as a consequence of the US military

⁶³ UN Doc. S/2001/946, 7 October 2001 (US).

⁶⁴ *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions*, S/2001/1154, 5 December 2001, available at: <http://www.refworld.org/docid/3f48f4754.html> [accessed 28 September 2015]

action and perhaps preceding inability of the government to rule the country, and now being returned to a new legitimate government. Nevertheless, the statehood of the country as such was not questioned at any point.

The case of the military intervention in Afghanistan in response to the September 11 attacks is somewhat different from the other cases of state practice considered here. First of all, initially it may appear that the Taliban exercised quite a substantial level of control over the majority of the State's territory. Secondly, the US and its allies clearly attempted to indirectly attribute the responsibility for the armed attack to the Taliban government. The situation was viewed in the context of the Taliban's repeated failure to comply with the explicit demands from the UN Security Council that Osama bin Laden be handed over to the appropriate authorities and that all training facilities on the territory under the Taliban control be closed. Nevertheless, the reason for including the consideration of the Operation Enduring Freedom in this Chapter is the fact that clearly the primary responsibility for the attack had been attributed to a non-state actor operating on the territory of a State which, although it did have some form of government, at the same time manifested a lot of failed state symptoms as described previously. Based on the information available at the time, it was generally accepted that the 9/11 attacks were not attributable to the Taliban government within the meaning of the ILC Articles on State Responsibility. The terrorist attack was not 'directed or controlled' by the Taliban's as envisaged in Article 8 of the ASR⁶⁵, nor could the refusal of the Taliban

⁶⁵ Article 8 of the ASR reads as follows: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or a group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.

to extradite Osama Bin Laden amount to the ‘acknowledging and adopting’ of the attacks as their own as provided for in Article 11 of the ASR.⁶⁶ Nevertheless, the intervening powers accused the Taliban of ‘allowing the Afghan territory to be used as a base of operation’ by Al Qaeda – in other words: they relied on a ‘harbouring’ doctrine as discussed in sub-chapter 4.3.2.1 above. It could therefore be concluded that in this respect, despite the presence of failed State features, which entail inability to control State’s territory and non-state actors, the States which acted in self-defence implied some sort of ‘positive’ action on the side of Afghanistan and its government, namely the ‘harbouring and/or supporting’ Al-Qaeda. Accordingly, although claims have been made that the 9/11 precedent could be held to constitute ‘instant custom’⁶⁷ and amount to acceptance of self-defence against non-state actors regardless of State’s involvement; the fact that intervening States put forward a flexible interpretation of ‘substantial involvement’⁶⁸ element which encompasses the ‘harbouring’, or ‘aiding and abetting’ of non-state actors that conduct cross-border attacks, might as well mean that the nexus between the non-State actors and the territorial State has not become completely redundant for the purpose of determining the applicability or scope of the right of self-defence.

Shortly after the events of 9/11 and the commencement of the Operation Enduring Freedom, Russia began to link what has become known as the international ‘war against terrorism’ to its own struggle against the Chechen rebels emanating from

⁶⁶ Article 11 of the ASR states that: ‘Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

⁶⁷ See: C Gray, *International Law and the Use of Force* 3rd edn. (Oxford University Press, 2008), p.198.

⁶⁸ *Nicaragua case: Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v United States of America), Judgement on merits of 27 June 1986, para.

the Georgian region of Pankisi Gorge. It was alleged that a number of Al-Qaeda members relocated to Georgia following the onset of the conflict in Afghanistan⁶⁹ but nevertheless, Georgia insisted that it was capable of effectively controlling its borders. On the contrary, Russia claimed that Pankisi Gorge became a safe haven for terrorist element and Chechen rebels. When tensions escalated in the summer of 2002, following initial denial of the intervention, Russia eventually asserted its right to self-defence against attacks committed by non-state actors operating from the territory of a state unable to control their activities. In Letter to the UN Secretary-General, Russia accused Georgia of non-compliance with its international responsibilities and argued that it rendered the use of defensive force against non-state actors as legitimate.⁷⁰ In particular, Russia highlighted the fact that “(t)he continued existence in separate parts of the world of territorial enclaves outside the control of national governments, which, owing to the most diverse circumstances, are unable or unwilling to counteract the terrorist threat is one of the reasons that complicate efforts to combat terrorism effectively. One such place, where the situation is giving rise to particular alarm in the Russian Federation, is the Pankisi Gorge and other areas of contiguous territory along the line of the State

⁶⁹ See: The Guardian, “US targets al-Qaida hideout in Georgia”, 15 February 2002; A Dvali, “Instability in Georgia: A new proliferation threat?” 1 August 2003, available at: <http://www.nti.org/analysis/articles/instability-georgia/>

⁷⁰ Statement by Russian Federation President V V Putin, Annexed to Letter Dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary General, UN Doc. S/2002/1012. The Letter stated that: “The Russian Federation firmly adheres to its international obligations and respects the sovereignty and integrity of other States, but it demands the same attitude towards itself. If the Georgian leadership is unable to establish a security zone in the area of the Georgian-Russian border, continues to ignore United Nations Security Council resolution 1373 (2001) of 28 September 2001, and does not put an end to the bandit sorties and attacks on adjoining areas in the Russian Federation, we reserve the right to act in accordance with Article 51 of the Charter of the United Nations, which lays down every Member States inalienable right of individual or collective self-defence”.

border between Georgia and the Russian Federation”.⁷¹ Clearly, Russia considered the alleged inability of the Georgian state to control its borders and fulfil international obligations by preventing armed attacks emanating from its territory, sufficient justification for the use of defensive force against non-state actors in Pankisi Gorge.⁷²

Georgia responded to Russia’s raids by labelling them as “acts of aggression” and claiming that it complied fully with its international obligations.⁷³ The state pointed out “unaptness of the reference to article 51 of the United Nations Charter, which allows the attacked State to render armed resistance in order to defend its territorial integrity and sovereignty. The Russian Federation has not been subjected to armed aggression by Georgia”.⁷⁴ Georgia denied that it was unable to deal with the non-state actors Pankisi Gorge and claimed that it did comply with its counter terrorist obligations under international law.⁷⁵ It is to a certain extent unclear whether Russia believed that Georgia was unable or unwilling to exercise control over the entirety of its territory as the official statements refer to both scenarios.⁷⁶ Nevertheless, it would appear that from the legal point of view, at least in Russian

⁷¹ *Ibid.*

⁷² *Ibid.* “None of this will be necessary, no measures or special operations will be needed if the Georgian leadership actually controls its own territory, carries out international obligations in combating international terrorism and prevents possible attacks by international terrorists from its territory against the territory of the Russian Federation”.

⁷³ See: Letter from Georgian President Eduard Shevardnadze, Annexed to Identical Letters Dated 15 September 2002 from the Permanent Representative of Georgia to the United Nations Addressed to the Secretary General and the President to the Security Council, UN Doc. A/57/408 – S/2002/1033.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ In the letter to the Security Council, the Russian representative stated that ‘If the Georgian leadership is unable to establish a security zone in the area of the Georgian-Russian border,...we reserve the right to act in accordance with Article 51 of the Charter of the United Nations’. Russian Defence Minister, Sergei Ivanov suggested that without Russian assistance, Georgia will never resolve the problem in Pankisi Gorge.

opinion, this makes no difference as both unwillingness and inability warrants use of defensive force against non-state actors located in the failed state.

States attempted to apply the unable or unwilling standard in other cases. One of them is the 2007-2008 Turkish military operation in Iraq against the Kurdistan Workers' Party (hereinafter PKK) fighters following the general increase in Kurdish separatist violence since 2004. The PKK which emerged in the 1970s strives for the creation of the autonomous Kurdistan on Turkish territory. The group began its armed campaign in 1984 in response to the discrimination of Kurdish minority in Turkey. Ever since 1991, the mountainous terrain of Northern Iraq became a safe haven for the organisation. 2004 saw an intensifying campaign from the Kurdish separatists' violence. Turkey carried out repeated attacks in the PKK bases in the region.⁷⁷ Tensions escalated in 2007 when on 7 October, thirteen Turkish soldiers were killed in an ambush⁷⁸, just days after PKK gunmen had shot dead thirteen village guards on a bus. On 21 October, another cross-border attack resulted in the killing of twelve soldiers and the capture of eight others.⁷⁹ Despite calls for peaceful resolutions of the situation from both Iraq and the US, Turkish operations continued following the release of the captured soldiers on the 4 of November. On 16 of December 2007, Turkey sent over 50 fighter jets in order to hit PKK positions some 95 kilometres into Iraqi territory.⁸⁰ Similar operations continued throughout

⁷⁷ See: Council of Foreign Relations, G Bruno "Inside the Kurdistan Workers Party (PKK)", 19 October 2007.

⁷⁸ See: BBC News: 'Turkish soldiers killed by rebels', 7 October 2007, <http://news.bbc.co.uk/1/hi/world/europe/7033075.stm>

⁷⁹ See: BBC News: 'Turkey vows to defeat PKK rebels', 21 October 2007, <http://news.bbc.co.uk/1/hi/world/europe/7055623.stm>

⁸⁰ 'Further Action against Separatists' (2008) 54 *Keesing's Record of World Events* 48 374.

December and January.⁸¹ The new phase of the intervention began on 21 February 2008 when the Turkish military launched a major ground offensive (Operation 'Sun'), sending several thousand troops into Northern Iraq.⁸² By the end of February, ground operation concluded, however, air strikes continued throughout subsequent months.⁸³

Despite the scale of the operation launched by Turkey on 21st February 2007, the country did not report its military action to the UN Security Council and did not provide any elaborated legal justification for it. Throughout the crisis Turkey's officials adopted the justificatory language with direct reference to the US counterterrorism rhetoric. In *nota verbale* submitted to the Human Rights Council on 26th March 2008, Turkey declared that: '(t)he counter terrorism operation carried out ... in northern Iraq was limited in scope, geography and duration. It targeted solely the PKK terrorist presence in the region. Turkish military authorities took all possible measures to ensure the security of civilians and to avoid collateral damage. As a result, there has been no civilian casualty. Turkey remains a staunch advocate of the territorial integrity and sovereignty of Iraq'.⁸⁴ Turkish Prime Minister, Tayyip Erdogan, repeatedly stated that the operation was justified under the 'international law governing self-defence'⁸⁵ and warned that Turkey 'will not

⁸¹ *Ibid.*

⁸² 'Ground Offensive against Separatists' (2008) 54 *Keesing's Record of World Events*, 48 427.

⁸³ See: BBC News, 'Turkish Troops Pull Out of Iraq', 29 February 2008
<http://news.bbc.co.uk/2/hi/europe/7270566.stm>

⁸⁴ Nota verbale from the Permanent Mission of Turkey to the Human Rights Council, 26 March 2008, UN Doc. A/HRC/7/G/15.

⁸⁵ See: The New York Times: 'Iraq moves to dissuade Turkey from Raids': "We have reached the point of self-defense, and we are ready to do whatever is necessary in light of common sense", available at: http://www.nytimes.com/2007/10/17/world/europe/17turkey.html?_r=0

tolerate those who help and harbour terrorists'.⁸⁶ It is clear that Turkey adopted the justificatory language reminiscent of that used by the US with regards to the counterterrorism operations. The country also implied that Iraq's complete inability to contain the threat posed by non-state actors' violence was a sufficient justification for the defensive operation.

It can be concluded that Iraq failed to take appropriate actions in order to prevent cross-border incursions by the PKK fighters into the Turkish territory. Iraqi government and Kurdish national authorities, despite certain level of sympathy displayed by the latter ones, definitely did not actively support PKK. On the contrary Iraq specifically denounced the non-state actor's actions. The national government did not exercise "overall" or "effective" control over the PKK attacks. On the contrary to the Hezbollah in Lebanon, however, the PKK did not exercise any significant territorial control over the northern Iraq or performed elements of governmental authority. Although initially taking a conciliatory attitude, after the Turkish air strikes of 16 December 2007, the Iraqi government lodged a formal complaint with Turkey declaring that it was neither consulted nor informed about the operation.⁸⁷ The Kurdistan Regional Government President Barzani declared that Turkish strikes constitute violation of Iraqi sovereignty.⁸⁸ Following the commencement of 'Operation Sun' the Iraqi government again strongly condemned

⁸⁶ See: 'Europe again warns against Turkish intervention in Iraq', Deutsche Welle, 22 October 2007, available at: <http://www.dw.de/europe-again-warns-against-turkish-intervention-in-iraq/a-2834888>

⁸⁷ See: 'Offensive against PKK Positions in Northern Iraq' (2007) 53 *Keesing's Record of World Events* 48 316.

⁸⁸ *Ibid.*

the intervention as a violation of its state's sovereignty and demanded immediate withdrawal of the Turkish forces from the region.⁸⁹

The legal arguments presented following Israel's military operation in Southern Lebanon imply further formal recognition of the threat posed by state failure and powerful non-state actors, as well as, the growing acceptance for the use of defensive force in such circumstances. Ever since Israel pulled back its troops from southern Lebanon in 2000 and retreated behind the UN-monitored 'Blue Line', the relations between the two countries remained tense but relatively stable. The situation changed drastically on 12 July 2006 when Hezbollah militants attacked an Israeli military patrol, capturing two soldiers and killing eight.⁹⁰ In response, Israel engaged in military operations to retrieve the captured soldiers while carrying out air strikes against several targets in Lebanon, including Beirut airport. The incident escalated in the following days and the so-called 'Second Lebanon War' ended one month later, when a ceasefire was put in place at the order of the UN Security Council.⁹¹

Israel did comply with the requirement to report its actions to the UN Security Council. In a letter dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, Israel reserved its right to act in accordance with Article 51 of the

⁸⁹ See: 'Ground Offensive against Separatists' (2008) 54 *Keesing's Record of World Events* 48 427.

⁹⁰ See: Report of the Secretary-General on the United Nations Interim Force in Lebanon, 21 July 2006, UN Doc. S/2006/560, §§ 2 et seq.

⁹¹ UN SC Res. 1701 (2006) of 11 August 2006, UN Doc. S/RES/1701.

Charter and exercise its right to self-defence.⁹² Israel's justification for its military action following the incident of 12 July 2006 is, nevertheless, somewhat contradictory. On the one hand Israel argued that the responsibility for the 'acts of war' lay with the government of Lebanon and that the attack of 12 July was 'the action of a sovereign State'.⁹³ On the other hand, Israel accused the governments of Iran and Syria of providing support and embracing those who carried out the attacks but did not specifically allege that such support was provided by the government of Lebanon to Hezbollah.⁹⁴ The reason why Israel held the Lebanese government responsible was the fact that its 'ineptitude and inaction ... [had] led to a situation in which it [had] not exercised its jurisdiction over its own territory for many years'.⁹⁵ Accordingly, Israel relied on the ineffectiveness of the Lebanese government to disarm Hezbollah in accordance with the Security Council Resolution 1559 (2004).⁹⁶ Despite the fact that Israel held the Government of Lebanon responsible, it 'concentrated its response carefully, mainly on Hizbollah strongholds, positions and infrastructure'.⁹⁷ Lebanon negated the responsibility for Hezbollah actions and strongly condemned 'the Israeli aggression that targeted ... the vital and civil Lebanese infrastructure'.⁹⁸ Nevertheless, the state conceded that

⁹² Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2006/515, 12 July 2006 (Israel).

⁹³ See UN Doc. S/2006/515; 'PM Olmert: Lebanon is responsible and will bear the consequences', 12 July 2006.

⁹⁴ UN Doc. S/2006/515, 12 July 2006 (Israel).

⁹⁵ *Ibid.*

⁹⁶ SC Res. 1559 (2004) of 2 September 2004; SC Res. 1680 (2006) of 17 May 2006.

⁹⁷ United Nations, 5489th Meeting of 14th July 2006, UN Doc. S/PV.5489, p. 6.

⁹⁸ Identical letters dated 17 July 2006 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council UN Doc. S/2006/529, 17 July 2006 (Lebanon); UN Doc. S/PV.5489, 4–5; UN Doc. S/PV.5493, 4: The Lebanese representative to the UN, Mr Mahmoud, stated that: 'The Israeli Government has held the Lebanese Government responsible for certain acts, even though the Lebanese Government issued a statement on 12 July whereby it declared that it

it lacked effective control over its southern territory where Hezbollah was based. At the same time Lebanon suggested that this very fact absolved it of responsibility and called upon the Security Council to take up the situation.⁹⁹

Colombia's raids on targets in Ecuador is another case of use of defensive force against non-state actors exploiting ungoverned regions of states in order to carry out armed incursions in its neighbour's territory. Operation 'Phoenix' commenced on 1 March 2008 and was conducted by Colombian military against Revolutionary Armed Forces of Colombia (FARC) bases on the Ecuadorian territory.¹⁰⁰ As a result of the intervention, twenty-five guerrilla fighters were killed including senior FARC commander Raúl Reyes.¹⁰¹ Colombia justified the operation as a use of force in self-defence against non-state actors perpetrating attacks on Colombian territory from their bases in Ecuador.¹⁰² The country accused Ecuador of failing to take appropriate action in order to secure its borders.¹⁰³ The operation resulted in the most serious diplomatic crisis in Inter American Diplomacy within the decade.¹⁰⁴ Colombia claimed that evidence obtained from computers seized during the operation suggested that FARC fighters received financial support from Ecuador,

was not aware of the incident that occurred on the Blue Line on that date, that it did not take responsibility for it and that it did not endorse that act'.

⁹⁹ "The Lebanese Government was not aware of the events that occurred and are occurring on the international Lebanese border. The Lebanese Government is not responsible for these events and does not endorse them". Identical Letters dated 13 July 2006 from the Charge d'affaires of the Permanent Mission of Lebanon addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2006/518.

¹⁰⁰ See: G Marcella 'War without borders: the Colombian-Ecuador crisis of 2008' December 2008, Strategic Studies Institute.

¹⁰¹ *Ibid.*

¹⁰² See: Comunicado No. 081 del Ministerio de Relaciones Exteriores de Colombia, Bogota, 2 March 2008.

¹⁰³ *Ibid.*

¹⁰⁴ See: G Marcella 'War without borders: the Colombian-Ecuador crisis of 2008' December 2008, Strategic Studies Institute.

weapons supplies from Venezuela and that Ecuadorian government communicated with the guerrilla commanders.¹⁰⁵

The March 2008 military operation against FARC is yet another incident in the longest running and the most violent conflict in Latin America. The UN Security Council as well as the Organisation of American States both determined that FARC violence against Colombia constitutes acts of terrorist and threatens peace and security in the region. The UN Security Council Resolution 1465 of 13 February 2003 expressly stated that the bomb attack in Bogota on 7 February 2003 was an act of terrorism.¹⁰⁶ In a similar fashion, the Permanent Council of the Organisation of American States in the Resolution adopted on 12 February 2003, condemned the same terrorist attack and further decided to 'ratify the commitment of the member states to step up actions for strict observance of the provisions of the United Nations Security Council resolution 1373 and the Inter-American Convention Against Terrorism concerning the obligation to refrain from providing any form of support to entities or persons involved in terrorist acts' and 'reaffirm the unwavering commitment of the member states to deny refuge and/or safe haven to those who finance, plan, or commit acts of terrorism in Colombia or who lend support to such persons, noting that those responsible for aiding, supporting, or

¹⁰⁵ On 14 May 2008, The Interpol declared that the computer files were authentic.

¹⁰⁶ UN Security Council Resolution 1465 of 13 February 2003, UN Doc. S/RES/1465 (2003). The document further urged 'all States, in accordance with their obligations under resolution 1373 (2001), to work together urgently and to cooperate with and provide support and assistance, as appropriate, to the Colombian authorities in their efforts to find and bring to justice the perpetrators, organizers and sponsors of this terrorist attack'.

harboring the perpetrators, organizers, and sponsors of these acts are equally complicit'.¹⁰⁷

The fact that FARC used Ecuadorian territory as safe heaven and a base to launch attacks against Colombia has been well known.¹⁰⁸ Nevertheless, Colombia refrained from using military force against FARC units located in Ecuador until March 2008. Colombia's Defence Minister, Juan Manuel Santos, stated that the fact that his government did not seek Ecuador's assistance with the March military operation was dictated by lack of confidence that the Ecuadorian government will maintain secrecy. Colombia's repeated notifications to Ecuador about FARC bases and activities did not result in the latter redeeming the situation and preventing the non-state actor from using its territory. On the contrary, FARC established strong support network within Ecuador. The area where FARC set up its bases has been described as being 'remote ungoverned territory lacking Ecuadorean state presence and security'.¹⁰⁹ The heavily forested border between the two countries has never been properly controlled and lacks state presence, services, security and infrastructure. As a result, it became an ideal environment for drug and weapon trafficking. Colombian President Uribe maintained its country's right of self-defence stating that FARC conducted some 40 armed incursions from Ecuadorean territory in the last 5 years.¹¹⁰

¹⁰⁷ The Permanent Council of the Organisation of American States, 'Condemnation of Terrorist Acts in Colombia', OAS/CP/RES. 837 (1354/03), 12 February 2003.

¹⁰⁸ G Marcella 'War without borders: the Colombian-Ecuador crisis of 2008' December 2008, Strategic Studies Institute, pp. 13-19. 'The FARC habitually used safe havens in Ecuador because of Ecuador's inability to control its border and national territory, and in Venezuela, because of difficult terrain and the apparent laissez faire complicity and demonstrated support of Caracas for the FARC'.

¹⁰⁹ *Ibid.* p.13.

¹¹⁰ *Ibid.* p.21

Ecuador labelled Colombian operation as an aggression and violation of its sovereignty and territorial integrity.¹¹¹ Furthermore, both Ecuador and Venezuela broke off diplomatic relations with Colombia and sent troops to the border.¹¹² Ecuador denied the fact that it tolerated the presence of 'irregular forces', as it labelled FARC units. The country's representative to the United Nations stated that Ecuador is 'a victim of Colombian conflict and not a facilitator'¹¹³ and reiterated the fact that Colombia has 'the obligation under international law to prevent the effects of its internal conflict from spilling over its borders and affecting the societies and territories of neighbouring countries'.¹¹⁴

As noted above, Somalia has been an epitome of failed state for a number of years. Unsurprisingly, non-state actors took advantage of the state's inability to effectively control its territory to launch attacks on the neighbouring states. On the 30th of November 2006 the Ethiopian Parliament authorised military intervention aimed at countering any attacks or incursions in Ethiopia by non-state actors operating from Somali territory.¹¹⁵ The resolution declared that the Parliament sees "clear and present danger" from Somali Islamists. Furthermore, the resolution also alleged that the Islamists are training, sheltering and arming Ethiopian groups opposed to

¹¹¹ See: Letter dated 3 March 2008 from the Chargé d'affaires a.i. of the Permanent Mission of Ecuador to the United Nations addressed to the President of the Security Council, UN Doc. S/2008/146;

¹¹² UN Doc. S/2008/177: 'In view of the incapacity of Colombia to prevent some members of the irregular FARC group from crossing the border and establishing themselves clandestinely in Ecuador, our country has deployed 11,000 members of the Armed Forces and police to our shared border, at a high economic cost to the Ecuadorian State, necessitating the diversion of considerable resources from other urgent social needs'.

¹¹³ See: Identical letters dated 13 March 2008 from the Permanent Representative of Ecuador to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2008/177.

¹¹⁴ *Ibid.*

¹¹⁵ See: All Africa'Somalia: Ethiopian Parliament Approves a Military Action On Islamists', 30 November 2006. Available at: <http://allafrica.com/stories/200611300743.html>

the government, and accepting help from Ethiopia's rival in the Horn of Africa, Eritrea. The vote authorised Prime Minister Meles Zenawi to take any legal action to protect Ethiopia from an invasion.¹¹⁶

On 21 December 2006, Sheik Hassen Dahir Aweys, one of the UIC spiritual leaders declared from Mogadishu that Somalia was in a state of war against Ethiopia, and that all Somalis should take part in this struggle against Ethiopia.¹¹⁷ The clashes continued to escalate and on 24th December 2006 Ethiopia admitted having combat troops inside Somalia and that it had acted in self-defence.¹¹⁸ In an official statement, Prime Minister Meles Zenawi said that his Government had taken self-defensive measures and started counter-attacking the aggressive extremist forces of the Islamic Courts and foreign terrorist groups.¹¹⁹ The UIC faced a major ground and air force attacks and as a result was soon forced to leave all cities and towns, including Mogadishu and Kismayo.¹²⁰ Ethiopia officially declared that the UIC had been defeated on 9th January 2007 and began withdrawing its troops on the 18th January 2007.¹²¹

Ethiopia relied on a number of justifications for its military intervention including the inherent right to self-defence and intervention by invitation. The focus here will be on the self-defence aspect of the Ethiopian military action which covers the

¹¹⁶ See: Voice of Africa: Ethiopia Parliament Authorizes Action Against Somali Islamists, 30 November 2006. Available at: <http://www.voanews.com/content/a-13-2006-11-30-voa25/316661.html>

¹¹⁷ E Fanta, Regional Coordinator for Great Lake Conflict Early Alert Report, 'Analysis: Ethiopian intervention in Somalia in context'. Available at: <http://www.bloggernews.net/14238>

¹¹⁸ *Ibid.* at para. 5.

¹¹⁹ Report of the Secretary-General on the Situation in Somalia to the Security Council, S/2007/115, 28 February 2007, at para. 5.

¹²⁰ BBC News, 'Timeline Ethiopia –Somalia', 1 January 2007, at: <http://news.bbc.co.uk/1/hi/world/africa/6159735.stm>

¹²¹ Sudan Tribune: 'Ethiopia pulls troops out of southern Somalia' (18 January 2007) at: <http://www.sudantribune.com/spip.php?article19805>

period of time after the 24th December 2006. The above mentioned Ethiopian Parliament Resolution voted on 30th November 2006, although not providing the authorisation for automatic military action, approved of the government taking all necessary and legal steps to avert the danger arising from the repeated declaration of a “holy war” against the country’. According to the Resolution, ‘the UIC has been training, sheltering and arming Ethiopian groups that are trying to overthrow the government’ and ‘the Courts have an expansionist intent to annex the Somali-speaking parts of Ethiopia, Kenya and Djibouti’.¹²² The Resolution did not refer to one specific attack or a string of attacks which would trigger the necessity to use military force in self-defence. On the 24th of December, the Ethiopian Prime Minister Meles Zenawi declared that his country had “taken self-defensive measures and started counter-attacking the aggressive extremist forces of the Islamic Courts and foreign terrorist groups”.¹²³ The action however, was not reported to the Security Council under Article 51 of the UN Charter. The Prime Minister further stated in his speech to the Parliament on 2nd January 2007, that the enemies were the extremist leadership of the UIC, as well as, the foreign extremist terrorists and the soldiers of Eritrea. He concluded that ‘the UN Security Council did not put into question the measures we took in self-defence. Similarly, various governments in different parts of the world have supported our right to

¹²² See: ‘Ethiopian parliament authorises “all necessary” steps against Somalia’s UIC’ People’s Daily Online (30 December 2006).

¹²³ United Nations Security Council 5614th Meeting of 26 December 2006, S/PV.5614

self-defence and have refrained from putting any kinds of declarations which might have put into question our inherent right of self-defence'.¹²⁴

There are some questions regarding the precise legal basis for the Ethiopian military intervention in Somalia. Although Ethiopia initially denied the deployment of troops, it subsequently claimed self-defence. As Professor Gray states, 'this was clearly not self-defence against armed attack by government forces, but apparently self-defence as part of the 'war on terror' against the threat posed by the UIC, and against its past terrorist attacks (...) Its major military operations extending far beyond the border area look more like action to protect TFG government against the UIC than self-defence of Ethiopia'.¹²⁵

As a consequence of the unstable situation in Somalia and near complete lack of government for a number of years, since the mid-1990s a number of extremist groups operating from Somalia carried out or facilitated multitude of attacks in the region. These include, amongst others, several terrorist attacks in Ethiopia carried out by al-Ittihaad al-Islami group in the mid-1990s, the 7th of August 1998 attacks on the US embassies in Nairobi and Dar es Salaam, the 28th of December 2002 attack on the Paradise Hotel in Kikambala, Kenya; and 11th July 2010 bombings in Kampala which was attributed to Al-Shabaab. According to the International Crisis Group reports, the Kenyan Defence Forces considered and prepared for a military intervention in Somalia for a number of years.¹²⁶ The military operation was eventually prompted by a number of cross-boarder kidnapping attacks which

¹²⁴ See: Ethiopian Ministry of Foreign Affairs, Press & Media, at:

<http://www.mfa.gov.et/pressmedia.php>

¹²⁵ C Gray, *supra* note 67, p. 250.

¹²⁶ International Crisis Group, Africa Report No. 184, 15 February 2012, 'The Kenyan Military Intervention in Somalia', p.1.

targeted Western tourists on the Kenyan coast and aid workers from the refugee camp in Dadaab.

At the press conference held in Nairobi on 15th October 2011, the Kenyan ministers of defence and interior announced that Kenya will engage in a military operation against Al-Shabaab militants operating in the Somalia's Juba Valley.¹²⁷ They invoked Article 51 of the UN Charter as a legal basis for the action and confirmed that all measures taken in the exercise of the right of self-defence will be duly reported to the UN Security Council. The announcement of operation Linda Nchi (Protect the Country) came after Al-Shabaab's repeated incursions, as deep as 120km, into the Kenyan territory and abductions of several foreign nationals. The first phase of Operation Linda Nchi was launched on 16th October 2011. In the letter of the Permanent Representative of Kenya to the United Nations, it was claimed that: 'Kenya has been facing serious challenges emanating from the collapse of the State of Somalia over the past two decades. The situation has worsened of late, following the unprecedented escalation of threats to the country's national security. Kenya has suffered dozens of incursions that were repulsed by its military and police forces. Scores of Kenyans have lost their lives over the past 36 months in border towns and communities owing to terrorist actions and incursions from Al-Shabaab militants'.¹²⁸

It is clear that, if observed in isolation, the Al-Shabaab incursions could not be individually considered as an 'armed attack'. In its claim of acting in self-defence,

¹²⁷ See: Kenya Broadcasting Corporation, Saturday, 15 October 2011: <http://www.kbc.co.ke/news.asp?nid=7293>

¹²⁸ Letter dated 17 October 2011 from the Permanent Representative of Kenya to the United Nations Addressed to the President of the Security Council' UN Doc S/2011/646.

however, Kenya invoked nine separate incidents which occurred from 2009 to 2011 accordingly relying on the argument that a number of successive lower intensity attacks which show a distinctive pattern can constitute an armed attack when taken into consideration as a whole. Furthermore, Kenyan government suggested that the country suffered severe economic loss due to the impact of the deteriorating security situation in the border area on the tourism industry. It is doubtful, however, whether the Al-Shabaab incursions reached the threshold necessary to be considered as an 'armed attack' and therefore, calling for the exercise of the right to use force in self-defence. On the other hand, this particular example of the use of force might support the argument that when assessing the necessity to use force in self-defence, the gravity of non-state actors' cross-border attacks is one of many factors which has to be taken into consideration. The fact that TFG was unable to prevent Al-Shabaab from operating within its territory and crossing over into the Kenyan territory undoubtedly influenced Kenyan decision to carry out military operation against powerful non-state actor.

5.4 The international community's response to the use of defensive force against non-state actors in failed states

Customary international law is the source of international law which most accurately reflects the changing practice and attitudes of states.¹²⁹ Its creation, however, is not instant. On the contrary, the custom must undergo a 'maturation'

¹²⁹ See: J d'Aspremont, *Formalism and the Source of International Law – A Theory of the Ascertainment of the Legal Rules* (Oxford, Oxford University Press, 2011)

process and is a product of an ongoing debate amongst the international actors over time.¹³⁰ The question is when state practice contributes to this process and eventually changes customary international law; and when it simply breaches a customary international rule. In order to establish the consequences of particular events for the development of customary international law, one must look at, amongst others, explicit responses of individual states and international organisations as well as lack thereof.¹³¹ Accordingly, the following section analyses the response of individual states and international community to the above described instances of the use of defensive force against non-state actors operating from the territories of failed states.¹³²

The international condemnation of the 9/11 attacks was widespread and immediate. On the day of the attacks, the Secretary General of NATO¹³³, the North Atlantic Council¹³⁴, Secretary General of the Organisation of American States

¹³⁰ J E Crawford, Keynote Speech, 'Identification and development of customary international law', Spring Conference of the ILA British Branch – Foundations and Future of International Law, 23 May 2014

¹³¹ See: M C Wood Special Rapporteur, *Second Report on Identification of Customary International Law*, International Law Commission, Sixty-sixth session, A/CN.4/672, Geneva, 5 May-6 June and 7 July-8 August 2014, at p. 42, para. 60: 'The second element necessary for the formation and identification of customary international law – acceptance of the 'general practice' as law – is commonly referred to as *opinio juris* (or "*opinio juris sive necessitatis*"). This "subjective element" of customary international law requires, in essence, that the practice in question be motivated by a "conception... that such action was enjoined by law". States are to "believe themselves to be applying a mandatory rule of customary international law", or, in other words, "[feel] legally compelled to ... [perform the relevant act] by reason of a rule of customary law obliging them to do so'.

¹³² As noted by Byers, '[T]he future shape of the international legal system will depend, above all, on how we interpret Security Council resolutions and treaties, on how we create and change rules of customary international law, and on how we understand the relationship between customary international law and treaties'. M Byers, 'The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq' 13 *European Journal of International Law* 21(2002), p.41.

¹³³ 'Statement by the Secretary General of NATO, Lord Robertson', NATO Press Release PR/CP (2001) 121, 11 September 2001.

¹³⁴ 'Statement by the North Atlantic Council' NATO Press Release PR/CP (2001) 122, 11 September 2001.

(OAS)¹³⁵ as well as the OAS General Assembly¹³⁶ all issued public statements strongly condemning the attacks. On 12th September 2001, the UN Security Council unanimously approved Resolution 1368¹³⁷ and a further one (Resolution 1373)¹³⁸ on the 28th September 2001. Both resolutions condemned the attacks and implicitly affirmed the right of self-defence in response to terrorist attacks for the first time, however, whilst calling for redoubled efforts to prevent and suppress terrorist acts, the documents did not specifically mention al Qaeda or the Taliban. Similarly, the UN General Assembly Resolution 56/1 on the 18th of September strongly condemned 'heinous acts of terrorism'.¹³⁹ For the first time in its history, NATO invoked Article 5 of the Washington Treaty which states that an attack on any one or more states being NATO members is considered to be an attack on all.¹⁴⁰ Yet more condemnation followed in succeeding days.¹⁴¹ The European Union declared its "wholehearted support for the action that is being taken in self-defence and in

¹³⁵ 'OAS Secretary General Condemns Acts of Terrorism in United States' OAS Press Release E-002/01, 11 September 2001.

¹³⁶ 'Statement from the OAS General Assembly' OAS Press Release E005/01, 11 September 2001.

¹³⁷ UN Security Council Resolution 1368 (2001), 12 September 2001, UN Doc S/RES/1368 (2001). The preamble of the Resolution recognised 'the inherent right of individual and collective self-defence in accordance with the Charter'. In point 1, the Resolution identified acts of international terrorism as a threat to international peace and security. Finally, the Security Council expressed 'its readiness to take all necessary measures to respond to the terrorist attacks of 11 September 2001'.

¹³⁸ UN Security Council Resolution 1373 (2001), 28 September 2001, UN Doc S/Res/1373 (2001). Again, the preamble of the Resolution recognised 'inherent right of individual and collective self-defence as recognised by the Charter of the United Nations and reiterated in resolution 1368 (2001)'.

¹³⁹ General Assembly Resolution 56/1 GAOR, 56th Sess. UN Docs A/RES/56/1 (2001).

¹⁴⁰ Article 5 states: 'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security'.

¹⁴¹ See: Joint Declaration by the Heads of States and Government of the European Union, the President of the European Parliament, the President of the European Commission and the High Representative for the Common Foreign and Security Policy (14 September 2001); Statement by General Secretariat of the League of Arab States (17 September 2001).

conformity with the [UN Charter] and Security Council resolution 1368 (2001)'.¹⁴² On the 15th of September Australia invoked the Australia-New Zealand-United States Pact instructing Australian personnel attached to the US forces to deploy with the US counterparts inside and outside of the United States.¹⁴³ Most individual foreign leaders denounced the attacks. Several States, such as Canada, France, Australia, Germany, the Netherlands, New Zealand and Poland, notified the UN Security Council that 'in accordance with Article 51 UN Charter', they had adopted various measures in support of Operation 'Enduring Freedom'.¹⁴⁴ Even States like Russia and China expressed their support.¹⁴⁵ Arabic states did not criticise the action.¹⁴⁶ Furthermore, States provided practical support by unprecedented offers of airspace and landing rights.¹⁴⁷ Although certain States did

¹⁴² UN Doc. S/2001/967, 8 October 2001 (Belgium, on behalf of the EU).

¹⁴³ Security Treaty between the United States, Australia and New Zealand (ANZUS), 1st September 1951.

¹⁴⁴ UN Doc. S/2001/1005, 24 October 2001 (Canada); UN Doc. S/2001/1103, 23 November 2001 (France); UN Doc. S/2001/1104, 23 November 2001 (Australia); UN Doc. S/2001/1127, 29 November 2001 (Germany); UN Doc. S/2001/1171, 6 December 2001 (Netherlands); UN Doc. S/2001/1193, 17 December 2001 (New Zealand); UN Doc. S/2002/275, 15 March 2002 (Poland).

¹⁴⁵ Russian President Putin confirmed that Russia will support the US by arming the Northern Alliance forces considered by the majority of international community as the legitimate government. He further stated that Russia will share intelligence and open Russian airspace to humanitarian air shipments.

China's President Jiang Zemin also condemned the attacks and later on offered intelligence.

¹⁴⁶ Saudi Arabia for example, strongly condemned the attacks and indicated that it would support US-led coalition.

¹⁴⁷ Murphy had outline the international community's reaction in the following terms: 'In initiating its airstrikes against Afghanistan, the United States received support from various quarters that this military response was an appropriate exercise of the right of self-defence against an armed attack. The United Kingdom itself directly participated in airstrikes against Afghanistan. Access to airspace and facilities was provided not just by NATO allies, but also by nations such as Georgia, Oman, Pakistan, the Philippines, Qatar Saudi Arabia, Tajikistan, Turkey and Uzbekistan. Other leading nations, such as China, Egypt, Mexico and Russia announced support for the US campaign. The fifty-six nations of the Organisation of the Islamic Conference called upon the United States not to extend its military response beyond Afghanistan, but made no criticism of military action against that state. Several representatives at the League of Arab States meeting denounced bin Laden as seeking to wage a war against the world, and said that he falsely stated that he represented Muslims and Arabs. The twenty-one nations of the Asia-Pacific Economic Cooperation forum issued a statement 'unequivocally' condemning the September 11 attacks and denouncing all forms of terrorism, but remained silent on the US-led airstrikes. Australia, Canada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey,, and the United Kingdom committed the use of their

express concerns regarding the fate of the Afghan people, condemnation of the Operation 'Enduring Freedom' was highly exceptional.¹⁴⁸ Even the Organisation for the Islamic Conference made no criticism of the military action and only urged the US not to extend the military response beyond Afghanistan.

The international response to Russian raids in Pankisi Gorge was relatively muted. Such lack of reaction by the international community of states may indicate either legal uncertainty or tacit acquiescence. Noticeably, however, the US condemnation of the Russian raids revealed the fact that although the major powers may agree regarding the use of force against non-state actors in principle, at the same time they differ with regard to its application. The United States Department of State reaffirmed Georgia's right to territorial integrity and opposed unilateral action against Chechen rebels.¹⁴⁹ Furthermore, the Parliamentary Assembly of the Council of Europe in its Recommendation of 24 September 2002 explicitly stated that 'Article 51 of the UN Charter and Resolution 1269 (1999) of the UN Security Council on international terrorism as well as Resolution 1368 (2001) of the UN Security Council of 12 September 2001 do not authorise the use of military force by the Russian Federation or any other State on Georgian territory'.¹⁵⁰ At the same time,

ground forces if and when a military deployment occurred in Afghanistan'. S D Murphy, 'Terrorist Attacks on World Trade Centre and Pentagon' 96 *American Journal of International Law* 237 (2002), p. 248.

¹⁴⁸ C. Gray, 'The use of force and the international legal order', in M. D. Evans (ed.), *International law* (Oxford University Press, 2003), pp. 589–619, at 604 (noting that only Iran and Iraq expressly challenged the legality of the operation); S R Ratner, 'Jus ad Bellum and Jus in Bello after September 11', 96 *American Journal of International Law* 905(2002), p. 910, footnotes 24–7.

¹⁴⁹ See: BBC News, 13 September 2002, 'US warns Russia over Georgia Strikes', <http://news.bbc.co.uk/1/hi/world/europe/2254959.stm>

¹⁵⁰ Parliamentary Assembly of the Council of Europe, Recommendation 1580, *The Situation in Georgia and Its Consequences for the Stability of the Caucasus Region*, 24 September 2002, available at: <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9859&lang=en> The Recommendation specifically called upon Russian federation 'to refrain from any action or declarations, which might interfere in the internal affairs of Georgia or violate the sovereignty

however, the Parliamentary Assembly called upon the authorities of Georgia 'to cooperate with all States concerned as regards to the fight against terrorism and to take the necessary measures to ensure the rule of law on all parts of its territory, including the Pankisi valley'.¹⁵¹ Otherwise, there was no principled condemnation from other international actors which would deny Russia the right to use defensive force against non-state actors. Accordingly, the use of defensive force by Russia in Pankisi Gorge region does not necessarily mark a clear trend on matters of self-defence against non-state actors operating from within a state unable to suppress their activities. It is nevertheless significant to note that Georgia's inability to effectively control its territory was specifically invoked as a reason for the eventual military intervention.

Despite the fact that international community urged Turkey to seek a diplomatic solution to the conflict, at the same time strongly condemning PKK attacks of 7 and 21 October¹⁵², when Turkey eventually decided to proceed with the military intervention, the response was surprisingly muted. The emphasis was given to the importance of dialogue and cooperation between the governments of Turkey and Iraq in order to resolve the crisis. The EU Presidency statement called upon the government of Iraq as well as the Kurdish Regional Government to ensure that Iraqi

and the territorial integrity of Georgia, in particular from launching any military action on Georgian territory as expressed by the President of the Russian Federation on 11 September 2002'.

¹⁵¹ *Ibid.*

¹⁵² A statement by the EU Presidency of 22 October 2007 reiterated the EU's 'total condemnation of the terrorist violence perpetrated by the PKK in Turkish territory, in particular the attacks carried out over this last weekend'. Presidency of the EU, 'EU Presidency Statement on the Terrorist Attacks of the PKK in Turkey over the Weekend' (Press Release, 22 October 2007) ('Statement on the Terrorist Attacks of the PKK').

territory is not being used for violent attacks against Turkey.¹⁵³ Similar statements motivated by fears that conflict will deteriorate regional security and negatively influence peace-building process in Iraq, followed from the US, Great Britain, France and other countries. The United Nations Secretary-General Ban Ki-Moon repeatedly expressed concerns about the operation and urged for 'utmost restraint' and respect for territorial integrity of both countries.¹⁵⁴ The EU failed to state clearly its position regarding the legality of the intervention and instead focused on the proportionality of the action and urged Turkey to seek political solution.¹⁵⁵ The United States although labelling the PKK 'a common enemy'¹⁵⁶, did not specifically endorsed the Turkish intervention. The country did not condemn it either and in fact aided Turkey by supplying the military intelligence regarding the PKK bases in Northern Iraq.¹⁵⁷ The US Defence Secretary Gates however, stated that Turkey's operation 'should be short and precisely targeted as possible'.¹⁵⁸ As noted by Ruys, the US reaction towards the Turkish operation must be evaluated against three factors: 'the background of the deteriorating 'strategic partnership' with Turkey; Turkey's strategic importance for the US presence in Iraq (...) and the US' broader

¹⁵³ *Ibid.*

¹⁵⁴ See: 'Ban Ki-Moon Calls for "Utmost Restraint" in Turkey-Iraq Border Actions', *UN News Service*, 22 February 2008.

¹⁵⁵ On 25 February 2008, the EU issued a statement which read as follows: 'While recognizing Turkey's need to protect its population from terrorism, the Presidency calls on Turkey to refrain from taking any disproportionate military action and to respect Iraq's territorial integrity, human rights and the rule of law. It also calls on Turkey to limit its military activities to those which are absolutely necessary for achieving its main purpose – the protection of the Turkish population from terrorism'. Presidency of the EU, 'EU Presidency Statement on the Military Action Undertaken by Turkey in Iraqi Territory' (Press Release, 25 February 2008).

¹⁵⁶ 'US Labels Kurdish Group as Terrorist', *CNN* (US) 11 January 2008, 53 *Kessing's* 48 316.

¹⁵⁷ *Ibid.*

¹⁵⁸ See: *BBC News* (UK) 'Turkey Must End Iraq Raid - Bush', 28 February 2008

<http://news.bbc.co.uk/2/hi/europe/7268345.stm>

'war on terror'.¹⁵⁹ Clearly, it must be taken into consideration that the US position towards the Turkish intervention left both the Iraqi government and the Kurdistan Regional Government with little choice but to take a non-confrontational approach in order to maintain positive relations with its neighbour. Furthermore, a majority of states refrained from pronouncing on the legality of the Turkish intervention. In conclusion, although certain individual states explicitly declared that Turkey had a right to defend itself against PKK attacks by military means,¹⁶⁰ generally muted reaction of the international community may indicate that it did not choose to set a precedent based on the events in question. On the other hand, however, the above described case of Turkish intervention in Northern Iraq confirms the tendency identified in previous cases. Namely, the growing acceptance of the fact that an attack coming from a non-state actors in which the territorial state is not in any way substantially involved, may potentially trigger the right to exercise self-defence and use of force on the territory of another state, particularly, if the territorial state could be defined as a failed one.

The reaction of the international community to the Israeli intervention in Lebanon is significant in several respects. First of all, due to the fact that it recognised the ineffectiveness of the Lebanese government to fully and effectively govern the entirety of the state's territory; and secondly, in view of the implicit legitimisation of the Israeli claim of self-defence. The initial international reaction to the Israeli strikes was positive. The applicability of Article 51 of the UN Charter was recognized

¹⁵⁹ T Ruys 'Quo Vadit Jus Ad Bellum?: A Legal Analysis of Turkey's Military Operation Against the PKK in Northern Iraq' 9 *Melbourne International Law Journal* 334 (2008), p.342.

¹⁶⁰ See: Statement by the Belgian Foreign Minister De Gucht, 21 February 2008; Statement by the Dutch Foreign Minister Verhagen, 3 March 2008.

implicitly or explicitly by the G8 countries¹⁶¹, the US Senate¹⁶², the Australian Prime Minister¹⁶³, the Council of the European Union¹⁶⁴, and even by UN Secretary-General.¹⁶⁵ During the Security Council debate following the initial strikes, a majority of the Council members supported Israel's invocation of self-defence in principle even though they refrained from speaking out on Lebanon's government possible responsibility for the Hezbollah attacks.¹⁶⁶ Similarly, during the debate on 21st July 2006¹⁶⁷, despite increasing concerns regarding the proportionality of the Israel's military actions, majority of States accepted, in principle, its right to defend itself against the attacks by Hezbollah. On the other hand, military action was strongly condemned as 'act of aggression' by the League of Arab States, as well as Russia¹⁶⁸ and China¹⁶⁹. Despite recognition and support for the Lebanon's sovereignty and territorial integrity, it has been noted that it is the Lebanese government responsibility to exercise full sovereign control over its territory. For example, the United States stated that: 'All militias in Lebanon, including Hizbollah, must disarm and disband immediately, and the Lebanese Government must extend and exercise its sole and exclusive control over all Lebanese territory (...) We urge all parties to accept the principle that Governments must exercise sovereign control

¹⁶¹ G8 St. Petersburg Summit Declaration, Middle East, 16 July 2006, available at <http://en.g8russia.ru/docs/21.html> (accessed 15 September 2014).

¹⁶² US Senate, Resolution Condemning Hezbollah and Hamas and their State Sponsors and Supporting Israel's Exercise of its Right to Self-defence, 18 July 2006, 109th Congress, 2nd Session, S. Res. 534.

¹⁶³ 'Israel Acting in Self-Defence, Says Howard', ABC News Online 16 July 2006.

¹⁶⁴ Council of the European Union, Press Release No. 11575/06 (17-18 July 2006).

¹⁶⁵ UN Secretary-General Press Release, 'Secretary-General says "Immediate Cessation of Hostilities" needed in Lebanon, describes package aimed at lasting solution, in Security Council briefing', UN Doc. SG/SM/10570, SC/8781, 20 July 2006.

¹⁶⁶ UN Doc. S/PV.5489, 14 July 2006.

¹⁶⁷ UN Doc. S/PV.5493, 21 July 2006.

¹⁶⁸ UN Doc. S/PV.5489, 14 July 2006. Russia rejected Israel's response as 'disproportionate and inappropriate use of force that threatens the sovereignty and territorial integrity of Lebanon'.

¹⁶⁹ UN Doc. S/PV.5489, 14 July 2006. China declared that Israel's action is an act of aggression and condemned disproportionate use of force.

over their territories'.¹⁷⁰ Finally, although the Security Council's Resolution 1701 of 11th August 2006 did not affirm the Israel's right to self-defence, the documents also refrained from specific condemnation of the state's behaviour.¹⁷¹ The Resolution emphasised 'the importance of the extension of the control of the Government of Lebanon over all Lebanese territory (...) for it to exercise its full sovereignty, so that there will be no authority other than that of the Government of Lebanon'.¹⁷²

The conclusion which can be put forward following the examination of the international community's reaction to Israel's military action in Lebanon in 2006 is that the majority of States did accept that the right to self-defence existed in principle and focused the criticism on the disproportionate character of the military intervention. Furthermore, it appears as though majority of States did not believe that there was an issue with the *ratione personae* element of an 'armed attack'. In terms of the attribution of the Hezbollah's attacks, Israel's position was that they should be attributed to the government of Lebanon, be that through the government's inability to exercise control over the entirety of the State's territory – one of the main characteristics of failed State. The Lebanese government specifically rejected the responsibility for the Hezbollah's actions. The state claimed that it had no means to prevent them as it repeatedly failed to comply with the Security Council Resolutions asking to expand territorial control to the areas where the group created a 'State within a State'. The Report of the Secretary-General on the United Nations Interim Force in Lebanon clearly stated that Hezbollah remained

¹⁷⁰ UN Doc. S/PV.5489, 14 July 2006.

¹⁷¹ SC Res. 1701 (2006) of 11 August 2006.

¹⁷² *Ibid.*

predominant force in the Southern part of the country.¹⁷³ It cannot therefore be concluded that the armed attack on Israel was in any way adopted or acknowledged by the central authorities. The widespread international support for the government of Lebanon and the fact that the Resolution 1701 (2006) implicitly recognised its inability to exercise jurisdiction over all of the State's territory, supports the conclusion that it was not in any way directly responsible for or complicit in the attack of 12 July 2006. Despite the above, Israel's right to self-defence was not questioned as such. In conclusion, the response of international community to the so-called 'Second Lebanese War' may indicate that the actions in self-defence against non-state actors' attacks emanating from the territory of failed State could be justified as long as such a response is necessary and proportionate.

Similar to the case of the Israeli strikes against Hezbollah, the international response to Colombia's raids against FARC in Ecuador represents another case of major powers tacitly recognising the right to cross-border use of defensive force against powerful non-state actors operating from the territory of an 'unable' state. Nevertheless, the response of the states in the region to the Colombian operation was highly condemnatory. On 5 March 2008, the OAS condemned Colombian operation and stated that conducting it without express consent of the government of Ecuador constituted 'a violation of the sovereignty and territorial integrity of

¹⁷³ Report of the Secretary-General on the United Nations Interim Force in Lebanon, 21 July 2006, UN Doc. S/2006/560, para. 27: 'The Lebanese Government's authority and security control remained limited, especially in the areas close to the Blue Line' and para. 28: Control of the Blue Line and its vicinity appears to have remained for the most part with Hizbollah. During the reporting period, Hizbollah maintained and reinforced a visible presence in the area, with permanent observation posts, temporary checkpoints and patrols. It continued to carry out intensive construction works to strengthen and expand some of its fixed positions, install additional technical equipment, such as cameras, establish new positions close to the Blue Line and build new access roads. These measures resulted in a more strategically laid out and fortified structure of Hizbollah's deployment along the Blue Line'.

Ecuador and of principles of international law'.¹⁷⁴ The Resolution reaffirmed 'the principle that the territory of a state is inviolable and may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatsoever'.¹⁷⁵ It was further decided that a fact-finding mission will be established in order to investigate the circumstances of Colombian military operation.

Mexico criticised the raid and the Mexican President rejecting 'any action that constitutes a violation of territorial sovereignty'.¹⁷⁶ On 7 March 2008 Members of the Rio Group adopted a declaration denouncing 'the violation of the territorial integrity of Ecuador'.¹⁷⁷ Following the final report presented by the fact-finding mission established by its Resolution of 5 March, the OAS rejected 'the incursion by Colombian military forces and police personnel into the territory of Ecuador (...) carried out without the knowledge or prior consent of the Government of Ecuador, since it was a clear violation of Articles 19 and 21 of the OAS Charter'.¹⁷⁸ At the same time, the declaration 'reiterated firm commitment of all Member States to combat threats to security caused by the actions of irregular groups or criminal organisations, especially those associated with drug trafficking'.¹⁷⁹

¹⁷⁴ OAS, 'Convocation of the meeting of consultation of ministers of foreign affairs and appointment of commission', 5 March 2008, CP.RES.930 (1632/08).

¹⁷⁵ *Ibid.* Article 21 of the OAS Charter states that 'The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized'.

¹⁷⁶ Alberto Barrera and Jason Lange, 'Mexico criticizes Colombia's Ecuador raid', Reuters, 5 March 2008.

¹⁷⁷ Rio Group Declaration of the Head of State and Government of the Rio Group on the recent events between Ecuador and Colombia, Santo Domingo, 7 March 2008.

¹⁷⁸ OAS, Resolution of the Twenty-Fifth Meeting of Consultation of Ministers of Foreign Affairs, 17 March 2008, DOC.OEA/Ser.F/il.25 RC.25/RES.1/08 rev.1.

¹⁷⁹ *Ibid.*

The UN Secretary General, Ban Ki-Moon, urged restraint and called upon Colombia, Ecuador and Venezuela to seek a diplomatic solution to the crisis.¹⁸⁰ The sole international supporter of the Colombian operation was the United States. The country declared that Colombia was 'defending itself against terrorism'.¹⁸¹ Despite the condemnation by OAS and outrage by Ecuador and Venezuela, neither the UN Security Council nor the UN General Assembly took any definitive action regarding the raids.

The above mentioned OAS Resolutions and Declarations did not address the scope of self-defence, nevertheless, it appears as though they adhered to the more restrictive reading of Article 51 of the UN Charter and its application towards non-state actors. The international reaction to operation 'Phoenix' focused on the fact that by deciding to carry it out against FARC on Ecuadorian soil; Colombia violated the neighbouring state's sovereignty and territorial integrity. The international community did not comment on the lack of Ecuadorean government's presence in the border areas where FARC set up its bases and the respective inability of the country to deal with a threat posed by the non-state actor. Neither did the international organisations' statements referred to the possible unwillingness or inability of Ecuador to cooperate with Colombia in its fight against FARC. It could, therefore, be concluded that this particular incident stands as a clear example of state practice contrary to the concept that state failure and 'unwillingness' or 'inability' to prevent non-state attacks, provides sufficient legal basis for the

¹⁸⁰ See: UN Secretary-General Press Release, 3 March 2008, SG/SM11446.

¹⁸¹ See: US State Department, Daily Press Briefings, 3-5 March 2008, available at: <http://2001-2009.state.gov/r/pa/prs/dpb/2008/mar/index.htm>

intervention in self-defence against armed attacks perpetrated solely by non-state actors.

In response to the worsening situation in Somalia, the United Nations Security Council unanimously passed the Resolution 1725 (2006) under Chapter VII of the UN Charter calling upon the resumption of peace talks and clearly providing support for the TFG against the UIC.¹⁸² The Resolution reaffirmed 'its respect for the sovereignty, territorial integrity, political independence, and unity of Somalia',¹⁸³ and called upon 'all parties inside Somalia and all other States to refrain from action that could provoke or perpetuate violence and violations of human rights, contribute to unnecessary tension and mistrust, endanger the ceasefire and political process, or further damage the humanitarian situation'.¹⁸⁴ Concluding that the situation in Somalia continues to constitute a threat to international peace and security, the UN Security Council Resolution 1725 (2006) authorised the establishment of a regional protection and training mission in Somalia, modified the arms embargo as required and specifically stated that those states that border Somalia should not deploy troops.¹⁸⁵ The UIC rejected the Resolution and claimed that the deployment of foreign troops in Somalia equals an invasion.¹⁸⁶

The UN Security Council neither condemned nor formally approved of the Ethiopian intervention. On the 22nd December 2006, however, the UN Security Council issued a Presidential Statement expressing deep concern over the continued violence

¹⁸² UN Security Council Resolution 1725 (2006), UN Doc. S/RES/1725.

¹⁸³ *Ibid.* In voting for the Resolution Qatar emphasized 'the need to respect the sovereignty and territorial integrity of Somalia'.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ Report of the Secretary General on the Situation in Somalia, S/2007/115, 28th February 2007. At para. 4

inside Somalia and calling upon all parties to draw back from conflict.¹⁸⁷ The UN Secretary General subsequently called upon all parties to cease hostilities.¹⁸⁸ No further comment had been made or a statement published until the UN Security Council unanimously adopted Resolution 1744 on 21st February 2007. The Resolution welcomed the withdrawal of Ethiopian forces from Somalia and authorised the African Union member states to establish a regional force, AMISOM, in Somalia in order to ‘help avoid a security vacuum’.¹⁸⁹ Acting under Chapter VII of the UN Charter, the UN Security Council provided the ANISOM with authorisation to employ all necessary measures in order to fulfil its mandate; amongst others ‘provide protection to the Federal Institutions (...) and security for key infrastructure’ and contribute to ‘creation of necessary security conditions for the provision of humanitarian assistance’.¹⁹⁰ The UN Security Council did not discuss the legality of the Ethiopian use of force and did not call for an end of the fighting. The document expressed its support for the TFG throughout the military intervention as being the only representative government of Somalia.

The African Union along with the Arab League called upon Ethiopia to withdraw its troops from Somalia. On 27th December 2006, in a Joint Communiqué, AU, the Arab League and Inter-Governmental Authority on Development appealed to all the parties involved to ‘ensure an immediate and unconditional ceasefire (...) and

¹⁸⁷ United Nations Security Council, Statement by the President of the Security Council, 22nd December 2006, S/PRST/2006/59.

¹⁸⁸ SC 5614th meeting, 26th December 2006.

¹⁸⁹ UN Security Council Resolution 1744, 21st February 2007. UN Security Council: ‘Decides to authorize member States of the African Union to establish for a period of six months a mission in Somalia, which shall be authorized to take all necessary measures as appropriate’

¹⁹⁰ *Ibid.*

complete cessation of hostilities'.¹⁹¹ The document further called for an immediate withdrawal of Ethiopian and other foreign troops from Somalia.¹⁹² Later on in January 2007, the AU Peace and Security Council's statement 'noted that the recent developments in Somalia have represented a new and historic opportunity that should be seized upon by Somali parties and the international community alike, with a view to fostering peace and reconciliation in Somalia'.¹⁹³ Furthermore, in the same month, the AU Assembly also 'noted with satisfaction the recent positive developments in Somalia which have resulted from Ethiopia's intervention upon the invitation of the legitimate TFG of Somali, and which has unprecedented opportunity for lasting peace in the country'.¹⁹⁴

The individual states' position varied. Eritrea strongly opposed the operation and claim that Ethiopia attempts to drag Somalia back into the previously existing instability. On the other hand, the United States provided strong support for the operation and considered it an appropriate response to the "aggression" by Islamists.¹⁹⁵ The US shortly became a party to the conflict by carrying out air raids on fleeing UIC targets.¹⁹⁶

Effective governmental control is an imperative test not only for the creation of statehood in international law but also to assess the political independence and sovereign authority of any already existing state. It is clear from the UN Security

¹⁹¹ Joint Communiqué of the African Union, League of Arab States and the Inter-Governmental Authority on Development on the current situation in Somalia, 27 December 2006.

¹⁹² *Ibid.*

¹⁹³ 'Press Statement on the Situation in Somalia African Union Peace and Security Council' 8 January 2007, Addis Ababa, Ethiopia.

¹⁹⁴ Assembly/AU/Dec.142(VIII), Decisions and Declarations, 29-30 January 2007.

¹⁹⁵ See: A Talbot 'US Backs Ethiopia's Invasion of Somalia' 28 December 2006. Available at:

<http://www.wsws.org/en/articles/2006/12/soma-d28.html>

¹⁹⁶ *Ibid.*

Council's Monitoring Group Reports that neither the TFG nor the UIC could have achieved whatever level of territorial control they have achieved without military, financial and logistical support of external forces.¹⁹⁷ Although internationally recognised, the TFG did not have the political and territorial independence to enter into international relations with other states. Throughout the period of the conflict, the statehood of Somalia has never been put into question. On the contrary, every single applicable UN Security Council Resolution, UN Security Council Presidential Statements or the Monitoring Group Report reaffirmed the respect for the sovereignty, territorial integrity, political independence and unity of Somalia. Although the country did have a legitimate and internationally recognised governing body, the TFG did not have the capacity to maintain law and order in the country as it only exercised control over a very small portion of its territory. Nevertheless, Ethiopia did not consider the inability or unwillingness of the TFG to control UIC and its affiliates as a sufficient justification for its military intervention. On the other side, although the UIC exercised control over extensive parts of the state's territory, it was neither recognised by the international community as a government of Somalia nor considered to have the entitlement to act for the Somali people.

The international response to Kenyan intervention in 2011 was similar in many respects. The UN Security Council in Resolution 2036 of 22 February 2012

¹⁹⁷ See: Report of the Monitoring Group on Somalia pursuant to Security Council Resolution (1676) 2006. The Report states: 'The principal sources for the overall military build-up involving arms, military material and foreign military personnel can be variously attributed to ten States as follows: Djibouti, Egypt, Eritrea, Ethiopia, Iran, Libya, Saudi Arabia, Syria, Uganda and Yemen. Of the foreign States, seven are aligned with the UIC, as follows: Djibouti, Egypt, Eritrea, Iran, Libya, Saudi Arabia, and Syria; the remaining three States, Ethiopia, Uganda and Yemen, are aligned with the TFG'. At p. 44.

reaffirmed 'its respect for the sovereignty, territorial integrity, political independence and unity of Somalia'.¹⁹⁸ The document proclaims full support for the Transitional Federal Government and condemns all attacks on TFG , AMISOM, UN personnel and facilities and the civilian population by armed opposition groups and in particular Al-Shabaab which is considered to pose a terrorist threat to Somalia as well as the international community.¹⁹⁹

5.5 Conclusions

The analysis conducted in this Chapter proves that state practice with regard to the use of force in self-defence against non-state actors located in failed states is far from settled. One of the indicators of sovereign statehood is the ability to provide certain public goods including, in particular, effective control of state's territory and monopoly of the use of force. It is one of the primary responsibilities of the state to protect not only its own citizens but also essential security interests of other states. The post 9/11 state practice indicates that states increasingly invoke sovereignty as responsibility in justifying the military response against non-state actors. It has been more commonly argued by the victim states that state's failure to discharge their international obligations in respect of exercising control over territory and population and preventing non-state actors' attacks, may trigger the victim state's right to exercise use of force in self-defence. It would appear that states are not willing to apply more lenient standard towards failed states regarding their due diligence obligations under international law. Although the law in this area remains

¹⁹⁸ UN Security Council Resolution 2036 of 22 February 2012, UN Doc. S/RES/2036(2012).

¹⁹⁹ *Ibid.*

unsettled, it is clear that many states have accepted, if not necessarily always endorsed, use of defensive forces against non-state actors operating from within states which are incapable to effectively govern the entirety of their territory. Furthermore, the international community frequently, although not always, considered such interventions as lawful when the use of force was proportionate and necessary. The examples of state practice discussed in this Chapter also represent a growing trend towards the recognition of a right to self-defence against non-state actors irrespective of the territorial state's responsibility for the attack. Notwithstanding, the issue of attribution of non-state actors' attacks to the failed states remains uncertain as the victim states presented varying legal rationale, if any, at all to justify the military operation in self-defence against the latter ones only. It appears as though states increasingly put forward the inability and/or unwillingness scenario as a justification for the use of defensive force against non-state actors located in the territory of failed states. It has to be noted, however, that although there may be an agreement regarding the existence of the standard in principle, there is hardly a broad consensus regarding its application and that it provides sufficient legal basis for the use of defensive force against non-state actors in failed states. In view of the above, it is not surprising that the criteria of necessity and proportionality remain crucial in restraining the military action against non-state actors. Hence, it is evident that the reaction of international community is very much dependent upon the fact whether the defensive response to a sufficiently grave armed attack is considered to be necessary and proportionate. Nevertheless, the exact scope of this 'new' right to self-defence remains unsettled.

CHAPTER 6

CONCLUSION

This thesis examined questions pertaining to state failure and its consequences in international law and in particular in the context of rules regarding self-defence against non-state actors. It has been argued that, in view of the recent developments in states relations, one of the most pressing legal issues relates the right to use force in self-defence against non-state armed groups whose actions cannot be attributed to the failed states. The thesis focused on defensive measures taken without the consent of a failed state and analysed unilateral state actions rather than UN sanctioned or multinational peace support operations. It has been established that dealing with widely acknowledged issue of state failure has proven to be difficult both at the theoretical level and in practice. The thesis aimed to identify and analyse both treaty law and customary international law norms regarding the use of force in self-defence which would be applicable in the specific context of state failure.

Sovereign states constitute building blocks of the modern world order and the primary subjects of international law. The system established at the San Francisco Conference aimed at preventing inter-states conflicts and, consequently favoured rigorous principles of non-intervention, as well as equality and sovereignty of states. The *sine qua non* condition for the functioning of that arrangement was the existence of empirically viable political communities - states. Chapter two provided some preliminary and essential background relating to the international law regulations applicable to sovereignty and statehood, primarily its creation but also,

extinction. It was submitted that notwithstanding the fact that the notion of sovereign statehood has profound implications for the nature of international law, its definition remains unsatisfactory. The examination of the criteria for statehood in this Chapter identified the legal context in which factual issues arise. The thesis has, thus, argued that definition of a state referred to in the Montevideo Convention applies primarily to the elements required for a state to be created. It was concluded that there exists a strong presumption regarding the continuity of states in international law and that even substantial changes in the four constitutive elements do not affect the condition of an entity as a state.

In Chapter three of the thesis the more traditional doctrinal methodology focused on finding the applicable legal rules, was accompanied the by problem orientated research centred around the examination of the issue of state failure in international law as well as the policy underpinning the existing law's approach towards this dilemma. It was argued that the Montevideo criteria provide very limited support in the analysis of statehood throughout its continuing existence. Nevertheless, while it is clearly necessary to recognise that a state does not disappear due to certain characteristics that were required at its creation being no longer present, it is equally important to acknowledge that the transformations in the constitutive elements of statehood, and in particular lack of effectively functioning government, severely affect the ability of the state to exercise its rights and perform its obligations. So-called failed states although formally not deprived of statehood are empirically incapable of providing basic political goods to their populations and fulfilling their obligations towards other states. Consequently, the

reality of dysfunctional territorial entities which lack organised central governments emphasises the inadequacies of the Westphalian system of international law relying on the presence of fully operational states. Failed states do not fit the paradigm and therefore, present a great challenge for the largely static international legal order. The thesis has explored how the debate surrounding statehood is currently conducted and what implications this might have for the analysis of the phenomenon of state failure.

This thesis has established that encapsulating the concept of failed state within a legal paradigm is somewhat problematic. Such entities are fundamentally unique creatures requiring specifically tailored responses to the challenges they pose. Accordingly, the preliminary difficulty is the fact that in a state-orientated international legal system, there is no standard definition of what constitutes a 'failed' state and different terms are used to describe the same situation or seeming different ones but closely related. The common denominator of state failure is the loss of governmental control over states' territory, which may, of course, vary in its form and extent, and which follows logically the implosion of central authority. This thesis took the view that it is important to distinguish between the symptoms or features which characterise failed states and actual legal concepts which can constitute their defining criteria. It has been submitted that from the international legal perspective, the most important element of state failure is undoubtedly the protracted loss of effective government. The notion of effective government is a constitutive element of statehood as well as a legal concept. It is therefore suitable for the purposes of the present analysis. Consequently, the first part of Chapter

three concluded with an introduction of a proposed definition of state failure which would be reserved for such states which as a consequence of anarchic conflicts, lack, either totally or partially, an effective government capable to maintain law and order in its territory or part of its territory, and which also lack the capacity to rebuild their governments by their own means. Accordingly, the level of state failure could be determined by reference to the degree of lack of effective government – with extreme cases of a complete lack of governmental authority and other examples where the existing power structures exercise only marginal control over population and territory of the State. The final part of Chapter three dealing with selected examples of international legal consequences of continuing existence of failed states provided a bridge between examination of state failure and account and the analysis pursued in Chapters four and five.

For a considerable period, the international community continued to view failed states in terms of relatively containable humanitarian disasters with limited global impact beyond immediate threat to their neighbours. The rhetoric changed dramatically after the terrorist attacks of September 11, 2001. In the wake of the twenty first century, failed states, as well as non-state actors operating within their territories, became one of the primary threats to international peace and security. The complex process referred to as state failure is commonly accompanied by and associated with armed conflict and non-state actors control over vast proportions of the state's territory. This thesis introduced the analysis of legal consequences of continuing existence of failed state and non-state actors control over extensive parts of a state territory in the context of *jus ad bellum* with particular emphasis on

self-defence. Accordingly, Chapter four examined issues pertaining to the legality of the use of force in self-defence against non-state actors operating from the territories of failed states. In order to do so, it firstly identified both the relevant treaty law and customary international law.

Self-defence is first and foremost an exception to the general rule prohibiting the use of force in states relations and accordingly, it must be constructed in the context of other principles of international law, and in particular territorial integrity and sovereign equality of states. Nevertheless, it is argued here that the credibility of the law depends upon its ability to address effectively the realities of contemporary threats. The contentiousness of the application of appropriate legal provisions is certainly one of the reasons why this research was undertaken, since its general objective is to explore what the implications of the state of the law are. The interpretation of Article 51 of the UN Charter in relation to cases involving non-state actors and failed states remains uncertain and contested. Similarly, efforts to clarify the development of customary international law regarding the use of force against non-state actors in failed states are continuously obstructed by the ambiguities and inconsistencies in ongoing state practice.

This thesis focused primarily on the legal implications relating to the use of force in the situations where the paradigm of traditional statehood is inapplicable. Accordingly, the investigation conducted in Chapter four proceeded in three main parts. After giving some preliminary background identifying the relevant law, the thesis proceeded on to the analysis of possible grounds for the exercise of the right of self-defence against non-state actors operating within the territories of failed

states. The final section of the chapter addressed applicability of the principles of necessity and proportionality in such circumstances. In view of the recent developments in state practice, it was submitted that international law must engage with the new reality of conflicts characterised by the presence of powerful non-state actors operating from the territories of states which have absolutely no control over their actions. Consequently, this thesis provided an in-depth analysis of the problems relating to strict adherence to purely state-orientated rules regarding the use of force.

Chapters four and five were the crux of the thesis and concluded that, despite the importance of state sovereignty and territorial integrity, the absolute prohibition to exercise self-defence against non-state actors without attribution of their conduct to the territorial state, may not be considered as the most dominant view in the current international law and state practice. The supporters of a widely understood right of self-defence point towards the fact that Article 51 of the UN Charter does not explicitly identify the nature of the party responsible for the armed attack and that non-state actors are undoubtedly capable of perpetrating such an attack. It is indeed increasingly difficult to defend the argument that non-state actors lack the capacity to carry out transborder military operation of such 'scale and effect' which may suffice for it to be considered an 'armed attack'. Accordingly, the growing support for a flexible reading of *ratione personae* element of 'armed attack' which may trigger the right of self-defence is driven primarily by the increasing threat from international terrorism as well as developments and availability of modern transport, weaponry and communication technology. The chapter proceeded to

investigate three matters of particular interest in connection to the above claim. It was examined if and how defensive action against non-state actors could be influenced by the position of the territorial state. Secondly, the chapter addressed the possibility of the failed states bearing the responsibility for actions of non-state actors by not preventing such acts and failing to comply with their due diligence obligations. Finally, it was examined how the two above matters influence the legality of defensive measures taken by the state which has fallen victim of non-state actors' attacks. Rather than taking a position for or against restrictive reading of Article 51 of the UN Charter, the thesis focused on emphasising the fact that the distinction between the two different issues, firstly that of attribution and secondly, the classification of an armed attack for the purposes of Article 51, cannot divert from the need for a legal basis for deployment of defensive measures against non-state actors in possible violation of sovereignty and territorial integrity of a failed state.

The acceptance that there may exist some possible grounds for the deployment of defensive force against non-state actors operating from the territories of failed states is only the first step in the examination of self-defence in this context. In view of this, the second part of Chapter four aimed to contribute towards the debate regarding the parameters and application of self-defence focusing specifically on the principles of necessity and proportionality. It has been submitted that in order to apply to the defensive measures employed against non-state actors in failed states, various aspects of necessity and proportionality need to be reconsidered

and perhaps even modified. Nevertheless, their role remains crucial in discussions regarding self-defence against non-state actors located in failed states.

Despite the fact that the international community continues to perpetuate a notion of 'statehood' which allows the state-centric system of international law to exist, when dealing with practical and political realities of state failure, international law may no longer consider external sovereignty of states as an undeniable entitlement to statehood. Recent state practice with regard to the use of force against non-state actors operating within failed states appears to support this conclusion. Accordingly, although the 'statehood' of failed states remains uncontested, their sovereignty is increasingly considered to be dependent on the existence of effective governments and recent cases of military interventions in the exercise of self-defence indicate a clear movement beyond sovereignty-driven reluctance in the use of force in states' relations. This thesis argued that the analysis of selected state practice appears to suggest that failed states considerably changed the modern landscape of peace and security. Nevertheless, the exact consequences and the impact of this change in international law are yet to be fully explored.

The penultimate Chapter of this thesis examined selected examples of post 9/11 state practice in pursuit of an answer to the question whether there exists an increasing dissonance between the absolute prohibition of the use of defensive force against non-state actors in failed states and the practice of states in this regard. In particular, it was examined if and how the lack of effective government and inability to fulfil international obligations by failed states influenced states' reactions towards armed attacks perpetrated solely by non-state actors. The main

purpose of Chapter five was to complement the analysis conducted in the preceding chapter by putting the factual situations of failed States into the particular context of the legal framework relating to the use of force in self-defence in states relations. Consequently, the analysis carried out in this Chapter aims to contribute towards the discussion regarding the state practice with respect to the exercise the right of self-defence absent state imputability.

It was concluded that in the post 9/11 state practice the trend is crystallising which points towards perception of sovereignty as responsibility in justifying the military response against non-state actors. It has been more commonly argued by the victim states that state failure to discharge their international obligations in respect of exercising control over their territory and population and preventing non-state actors' attacks, may trigger the victim state right to self-defence. It does not appear that states are willing to apply more lenient standard towards failed states with respect to the latter due diligence obligations under international law. The examples of state practice discussed in Chapter five also point towards the fact that states increasingly recognise the right to self-defence against non-state actors irrespective of the territorial state's responsibility for the attack.

Chapter five further investigated to what extent state practice reflects the existing law analysed previously as well as whether it may be contributing to the emergence of new rules of customary international law. The thesis argued that state practice is hardly uniformed and consolidated. It is often the case that states do not explicitly condemn military operation against non-state actors as unlawful. Nevertheless, this does not obviously imply that the victim states' justification for the intervention

remains uncontested. The analysis of recent state practice seems to support the conclusion that it is becoming increasingly difficult to sustain the claim that international law absolutely prohibits the use of defensive force against non-state actors. Nevertheless, states remain conflicted as to when such force can be employed and is lawful.

Lastly, this thesis posed a question whether state failure has in fact contributed to shaping various incipient doctrines relating to the use of force in self-defence. Put differently it has asked whether the implicit or explicit invocation of the state weakness and incapacity to act provides sufficient legal basis for the intervention in self-defence. This thesis took the view that states increasingly put forward the inability and/or unwillingness scenario as a justification for the use of defensive force against non-state actors located in the territory of failed states. The conclusion, nevertheless, emphasised the fact that although there may be an agreement regarding the existence of the standard in principle, there is hardly a broad consensus regarding its application and that it provides sufficient legal basis for the use of defensive force against non-state actors in failed states. This thesis has accordingly taken a position that it should be acknowledged that the criteria of necessity and proportionality are here to play an increasingly important role in restraining the military action against non-state actors. Hence the reaction of international community is very much dependent upon whether the defensive response to a sufficiently grave attack is considered to be necessary and proportionate. This thesis therefore generally concluded that the exact scope of the right to self-defence against non-state actors in failed states remains unsettled.

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