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ARMED ATTACK, NON-STATE ACTORS AND A QUEST FOR THE ATTRIBUTION STANDARD

Abstract

Article 51 of the UN Charter, in affirming the inherent right of self-defence of each UN Member State "against which an armed attack has occurred", clearly indicates that the concept of armed attack plays a key role in delineating the right of self-defence. The concept in question was not, however, defined in the UN Charter, and no universally acceptable definition has yet emerged either in practice or in doctrine. One of the fundamental questions to be addressed in this context is who must engage in armed activity for it to qualify as an armed attack. This question is of particular relevance today because of the threat of international terrorism and the expansion of the concept of armed attack through the inclusion of an act of terrorism. The article discusses in some detail the emerging legal framework for attribution of actions undertaken by non-state actors to states.

INTRODUCTION

Article 51 of the Charter of the United Nations (the UN Charter), in affirming the inherent right of self-defence of each Member State of the United Nations "against which an armed attack has occurred", clearly indicates that the concept of armed attack plays a key role in delineating the right of self-defence. The concept in question was not, however, defined in the UN Charter, and no universally acceptable definition has yet emerged either in practice or in doctrine.[1]

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[1] A. Randelzhofer, *Article 51*, in: B. Simma (ed.), *Charter of the United Nations* (2nd ed.), Springer Verlag, Berlin: 2002, p. 796.

Defining the concept of armed attack is a highly complex and multifaceted task.[2] One of the fundamental questions to be addressed is who must engage in armed activity for it to qualify as an armed attack.

The traditional approach holds that an armed attack within the meaning of Article 51 of the UN Charter is an attack by one state against another state. This position is affirmed in a solid although – regrettably – most laconic way by the jurisprudence of the International Court of Justice (ICJ).[3] Yet, today there is no doubt that an armed attack does not have to necessarily be an act of a state, but may also stem from acts of non-state actors. What remains in dispute is to what extent, if at all, an act of a non-state actor that is to constitute an armed attack must be attributed to a state.[4]

This question is of particular relevance today because of the threat of international terrorism and the expansion of the concept of armed attack through the inclusion of an act of terrorism. The problem itself had emerged much earlier, but initially it was concerned not so much with terrorism in the strict sense of the term, as with ideology-based non-international armed conflicts. Typical of the Cold War era, these conflicts were, in a sense, internationalized through the involvement of superpowers that supported the armed activities of irregular forces against ideologically hostile state governments. From an international law perspective, the most important example – because of the ICJ judgement of 1986[5] – was the conflict in Nicaragua in the 1980s between the Sandinista government and the US-supported *Contras* forces. Contexts may vary, but the problem of linking the armed actions of a non-state actor to a state remains the same.

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[2] *See generally, e.g., Ibidem*; K. Zemanek, *Armed Attack*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, online version – Oxford 2009 (www.mpepil.com); printed version: Oxford University Press, Oxford: 2011 (forthcoming), para. 1-23; J.A. Green, *The International Court of Justice and Self-Defence in International Law*, Oxford University Press, Oxford: 2009, pp. 147-163; T. Ruys, '*Armed Attack' and Art. 51 of the UN Charter: Evolutions in Customary Law and Practice*, Cambridge University Press, Cambridge: 2010; M. Kowalski, *Napaść zbrojna w prawie międzynarodowym – w poszukiwaniu współczesnej definicji* [Armed Attack in International Law – In Search of Contemporary Definition], Studia Prawnicze 3/2008, pp. 59-82.

[3] *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, 139 et seq.; see especially para. 139; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgement of 19 December 2005; see especially para. 106-147; all ICJ judgements available at: www.icj-cij.org (last accessed on 1 August 2010).

[4] Ch. Gray, *International Law and the Use of Force* (3. ed.), Oxford University Press, Oxford: 2008, p. 130.

[5] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement of 27 June 1986, I.C.J. Reports 1986, 14 et seq.

1. INTERNATIONAL RESPONSIBILITY OF STATES VIS-À-VIS THE RIGHT OF SELF-DEFENCE

If armed activities against a state are taken by a non-state actor, and assuming that only a state can be the source of an armed attack, it must be inferred that the principles governing the international responsibility of states should be applied in any such situation.

The principles of international responsibility of states are founded on the following two basic prerequisites: there must be a breach of international law and an attribution of an act (or omission) to a state. Therefore, firstly – in the context discussed – specific armed activities must occur and must meet certain objective prerequisites (i.e. *ratione materiae*: sufficient gravity, armed character) in order to qualify them as an armed attack. Secondly, they must be attributed to a state. Where these activities are carried out not by a state but by a non-state actor, an armed attack within the meaning of Article 51 of the UN Charter will take place only if the activities of a non-state actor are attributable to a given state in accordance with the principles of international responsibility. Thus, attribution becomes in this context – as formulated by Greg Travalio and John Altenburg – "a critical issue".[6] It should be noted, however, that even accepting the approach – which has been significantly gaining ground in the doctrine since 11 September 2001[7] – according to which a non-state actor is to be regarded as an autonomous source of armed attack under Article 51, attribution remains relevant as far as the exercise of self-defence against a state on territory of which the non-state actor operates.[8]

The rules governing the attribution of an act to a state are laid down in Chapter II (Articles 4–11) of the Draft Articles of 2001 adopted by the International Law Commission (ILC)[9] and are basically in accord with the binding customary

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[6] G. Travalio, J. Altenburg, *Terrorism, State Responsibility and the Use of Military Force*, Chicago Journal of International Law 4 (2003), p. 102.

[7] As such, the approach will be critically referred below: see infra part V.

[8] A. Nollkaemper, *Attribution of Forcible Acts to States: Connections Between the Law on the Use of Force and the Law of State Responsibility*, in: N. Blokker, N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality – a Need for Change?*, Martinus Nijhoff, Leiden: 2005, pp. 143-144.

[9] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Yearbook of the International Law Commission, Vol. II, Part Two, 2001, pp. 38-54; J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge: 2002.

law in this field.[10] These rules – as pointed out by the ILC in its commentary – come down to a general rule "that the only conduct attributable to a state is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the state organs".[11] Article 4 of the Draft Articles lays down the basic rule that the conduct (broadly understood) of any state organ is considered an act of that state. That rule is subsequently expanded in Article 5, which holds that acts of actors empowered to exercise elements of governmental authority are attributable to a state, and then again in Article 7, which provides that acts in excess of authority or in contravention of instructions are also attributable to a state. Article 6 of the Draft Articles is concerned with the attribution to a state of the conduct of an organ placed at the disposal of that state by another state if the organ is acting in the exercise of elements of the governmental authority of the state at whose disposal it is placed. Three consecutive articles of Chapter II of the Draft Articles deal with the attribution of conduct of a non-state actor to a state. Article 8 is concerned with an issue of key importance from the point of view of the problem discussed here, namely that of attributing to a state the conduct of a non-state actor acting on the instructions of, or under the direction or control of, that state. The two other articles govern particular situations where, firstly, the conduct of non-state actors is attributed to a state if those actors were exercising elements of governmental authority in the absence or default of the official authorities (Article 9) and, secondly, the conduct of insurrectional movements or other movements which succeed in establishing a new state is considered an act of a state (Article 10). These provisions must too be considered for their relevance in the context discussed here. The rules of attributing an act to a state, as set forth in Chapter II of the Draft Articles, are further complemented by Article 11, according to which any conduct which is not attributable to a state under the preceding articles is nevertheless considered an act of that state if and to the extent that the state acknowledges the conduct in question as its own.

Focusing on attribution requires a reference to the relationship between the right of self-defence on the one hand and the principles of international responsibility of states on the other hand. It seems that the ILC Draft Articles confirm, through the inclusion of reference to the right of self-defence, that these two mechanisms have, in fact, a complementary nature. Article 21 of the Draft Articles

[10] Yet, it may be noted that only in 1994 Rosalyn Higgins wrote: "[i]n the law of state responsibility one might be forgiven for thinking that there is almost nothing that is certain", R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford University Press, Oxford: 1994, p. 146.

[11] Draft Articles, p. 38, and the literature citied there.

provides that an act of self-defence does not constitute a violation of international law and hence acting in self-defence precludes wrongfulness of the conduct. Being consistent with the obligation to refrain from forcible countermeasures under Article 50(1)(a) of the Draft Articles, this provides further evidence of the extraordinary nature of the right of self-defence as a means of enforcing international law with the use of armed force in the situation where the norm prohibiting aggression was violated. As such, an armed response in self-defence remains separate from the means of countermeasures in a general sense. The right of self-defence and the international responsibility of states are hence complementary mechanisms for enforcing international law and it is in this perspective that the relationships between these two concepts should be considered.[12]

Also, while discussing the relationship between the right of self-defence and the principles of international responsibility of states, it is useful to invoke "the central organizing device of the Articles",[13] i.e. the distinction between the primary and secondary rules. Primary rules determine the required standard of conduct. In the context of self-defence, the primary rules are *jus ad bellum* norms based on the prohibition of the use of force and the right to self-defence as the exception thereof. In contradistinction, the principles of state responsibility are secondary rules, which determine firstly whether a primary rule has been breached and secondly the legal consequences thereof. In other words, as André Nollkaemper put it: "The law on the use of force does not determine responsibility for the wrongful use of force, and the law of state responsibility does not determine conditions for the (un)lawful use of force."[14] That is also (beside the peremptory character of the prohibition of the use of force principle) exactly why necessity, being a part of secondary rules of state responsibility as a circumstance precluding wrongfulness of a conduct, may not be invoked to provide an additional exception to the prohibition of the use of force. It is the former aspect, i.e. determining a breach of a primary rule, which is of utmost importance for the issue dealt with in the present article, as it refers to the determination of a breach of the use of force prohibition by a state through attribution to it of a non-state actor's armed activities – which in consequence qualify as an armed attack and make an attacked state entitled to respond forcibly under self-defence.

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[12] *Cf.* R. Wolfrum, *The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?*, 7(1) Max Planck Yearbook of United Nations Law 1 (2003), pp. 36-37.

[13] J. Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: a Retrospect*, 96 American Journal of International Law 874 (2002), p. 876; Draft Articles, p. 31.

[14] Nollkaemper, *supra* note 8, p. 144.

Another important characteristic of international responsibility principles as secondary rules is their general character, whereas primary rules remain particular. The level of particularity, however, varies considerably and "[w]hat is perfectly clear is that there can be many variants on the *lex specialis* option, from rather minor deviations up to the (nearly) closed regimes".[15] Indeed, the ILC Draft Articles provide for a *lex specialis* in Article 55, which states that the rules governing the international responsibility of states, as laid down in the Draft Articles, do not apply where and to the extent that "the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a state are governed by special rules of international law."[16]

The foregoing applies to attribution *per excellence*. The above-mentioned traditional standards of attribution as included in the Draft Articles represent only – to use Daniel Bodansky's and John Crook's expression – "the tip of the iceberg as to when private acts can create state responsibility".[17] On many other occasions, the rules governing the attribution are specifically determined by primary rules. It is to be argued that the same may apply to the *jus ad bellum* norms and especially to the right to self-defence. Two possible scenarios should be considered in this respect.[18] They would be as following. Firstly, the primary rules governing the right to self-defence incorporate attribution in such a way that attribution becomes an element of armed attack (or in a broader sense: use of force) definition. Alternatively, the primary rules of self-defence have generated the special, expanded standard of attribution, which applies in the situation where a non-state actor carries out armed activities from the territory of one state against another state.

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[15] Crawford, *supra* note 13, p. 880.

[16] Draft Articles, p. 140.

[17] D. Bodansky, J.R. Crook, *Symposium: the ILC's State Responsibility Articles – Introduction and Overview*, 96 American Journal of International Law 773 (2002), p. 783.

[18] The division proposed above differs from that suggested by André Nollkaemper. Especially the view that "the law on the use of force can incorporate the notion of attribution in the principle of necessity or proportionality" is questionable. Indeed, as the Nollkaemper pointed out himself, "(…) attribution, on the one hand, and necessity and proportionality, on the other, refer to different phases in a legal argument". Nollkaemper, *supra* note 8, pp. 145-147.

2. INVOLVEMENT IN ARMED ACTIVITIES OF A NON-STATE ACTOR AS ARMED ATTACK

Under this approach, one defines the notion of armed attack in such a way that its scope covers, as one of possible forms, a state's involvement in military activities carried out by a non-state actor against another state. So, the emphasis would be shifted from the attribution to the determination of whether the degree of involvement of a state in the armed activities of a non-state actor makes that state itself responsible for an armed attack and thereby subject to the use of force in self-defence by the attacked state.[19] In other words, under this approach, the act of support by a state (if, of course, of sufficient gravity) of the armed activities of a non-state actor would alone constitute an armed attack. Sufficient degree of state involvement is generally established by reference to the attribution principles – yet, already in the defining process of the armed attack notion. Thus, attribution principles are, as already indicated above, incorporated by the primary rules. The reference to attribution plays therefore an auxiliary role only, and in some instances it is even claimed to lose its significance at all.[20]

Such an approach was common in older literature on the subject,[21] although it has some currency even today. One such example is the position articulated by Judge James L. Kateka in his dissenting opinion appended to the ICJ judgement on *Armed Activities*.[22] Judge *Kateka* referred to the famous position expressed by Judge Sir Robert Jennings in his dissenting opinion to the ICJ judgement on *Nicaragua*,

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[19] *Cf.* T. Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*, Oxford University Press, Oxford: 2006, pp. 176-177.

[20] *Ibidem*.

[21] *See, e.g.*, literature quoted by Becker, *supra* note 19, pp. 181-182; Becker quotes, among others, the views of Hans Kelsen, who enumerated among the examples of indirect use of armed force which might be interpreted as constituting an armed attack: "the undertaking or encouragement by a state of terrorist activities in another state or the toleration by a state of organized activities calculated to result in terrorist acts in another state"; H. Kelsen, *Principles of International Law* (2nd ed.), Holt, Rinehart & Winston, New York: 1966, pp. 62-63; it could be added that already in 1950 Kelsen in his commentary on the UN Charter mentioned a possible interpretation under which an armed attack would consist of "the fact that a state has interfered in the civil war taking place within another state by arming or otherwise assisting the revolutionary group in its fight against the legitimate government."; H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems,* Stevens, London: 1950, p. 798.

[22] *Armed Activities...*, Dissenting Opinion of Judge Kateka, paras. 15 and 34.

in which he stated that "[…] it seems to me that to say that the provision of arms, coupled with 'logistical or other support' is not armed attack is going much too far".[23]

According to Tal Becker[24] this approach is most famously exemplified by the United Nations General Assembly Resolution 3314 on the definition of aggression.[25] The examples of acts of aggression provided in Resolution 3314 include, in Article 3(g), the sending by or on behalf of a state of non-state actors to carry out acts of armed force against another state or the substantial involvement of a state in those acts. This form of aggression is known as indirect aggression and its inclusion in the Resolution 3314 represents an approach typical already for the very first attempts to define aggression legally, such as the Politis Report of 1933.[26]

The definition of aggression as adopted in the Resolution 3314 illustrates, with regard to indirect aggression, the interpenetration of primary and secondary rules and some ambiguity in this respect. Sending by or on behalf of a state a non-state actor in order to carry out military activities against another state, or substantial involvement in these acts, is defined as an independent instance of the act of (indirect) aggression. Nevertheless, there is no reason why the international responsibility principles governing the attribution could not be applied to that definition. The rules applied would differ in individual cases, encompassing different classifications of acts of non-state actors: from those considered acts of state organs to those carried out on instructions of, or under the direction or control of, a state. What remains very much in dispute is the degree of state involvement required for acts of non-state actors to be attributed to a state – a problem that is still addressed using the principles of attribution. Therefore, on the one hand, a state's substantial involvement in military actions of a non-state actor is part of the act of aggression definition, yet on the other hand, reference to the attribution principles is necessary for the assessment of the degree of the involvement.

The above approach is also characteristic for the ICJ.[27] In its *Nicaragua* judgement, the ICJ – which at least to some extent equated the definition of

[23] *Military and Paramilitary…*, Dissenting Opinion of Judge *Jennings*, 543.

[24] Becker, *supra* note 19, p. 177.

[25] UN GA Res. 3314 (XXIX), UN GAOR 29th Sess., Supp. No. 31 (1974).

[26] Report of the Committee on Security Questions, General Commission, League of Nations Conference for the Reduction and Limitation of Armaments, Conf.D./C.P./C.R.S./9, Geneva 24.05.1933; also reprinted in: B.B. Ferencz, *Defining International Aggression. The Search for World Peace: A Documentary History and Analysis, Vol. I*, Oceana Publications, New York: 1975, pp. 215-227; generally see also O. Solera, *Defining the Crime of Aggression*, Cameron May, London: 2007, pp. 17-204.

[27] *Contra*, Becker, *supra* note 19, pp. 177-179.

aggression with the concept of an armed attack[28] – cited *expressis verbis* Article 3(g) of Resolution 3314 and stated that "the prohibition of armed attacks may apply to the sending by a state of armed bands to the territory of another state."[29] However, it was not of the opinion that "the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapon or logistical or other support".[30] What the ICJ did was to contrast, on the one hand, actions of non-state actors (armed bands) that may fall within the concept of armed attack and, on the other hand, state assistance to those actors (rebels) which does not fall within the concept of armed attack. Armed activities of a non-state actor may be regarded as the armed attack only if they are regarded as state acts, i.e. if they are attributable to a state. What remains disputable is the standard of attribution (degree of a state's substantial involvement). For instance, in the passage of the Nicaragua judgement cited above, the ICJ stated that sending a non-state actor is covered by that standard, whereas assistance in the form of the provision of weapons or logistical or other support is not. This is consistent with another fragment of the *Nicaragua* judgement, in which the ICJ expressly recognized the need to attribute armed activities of a non-state actor (*Contras*) to a state (United States).[31]

That interpretation – referring to the attribution – remains evident even for its critics, as demonstrated by Judge Kateka in his dissenting opinion to the *Armed Activities* judgement cited above.[32] It is also supported by further ICJ jurisprudence[33] – and specifically by its judgement in the *Armed Activities* case. Examining the situation in which armed activities were carried out against Uganda by a non-state actor, the ICJ found that, since those activities could not be attributed to the Democratic Republic of Congo, Uganda could not invoke the right of self-defence for the reason that no armed attack occurred.[34] In a similar vein, when considering the possibility of attributing activities of another non-state actor to

[28] *Cf.* Randelzhofer, *supra* note 1, p. 795.

[29] *Military and Paramilitary…*, para. 195.

[30] *Ibidem*.

[31] *Ibidem*, para. 115; Additionally, one may note that direct invocation to the attribution principles, including a reference to the then version of the ILC Draft Articles on State Responsibility, is to be found in the position taken before the ICJ by Nicaragua: ibid., Memorial of Nicaragua (Merits), para. 228-233.

[32] *Armed Activities…*, Dissenting Opinion of Judge Kateka, para. 32-34.

[33] See also: *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Judgement of 6 November 2003, I.C.J. Reports 2003, paras. 51-61, particularly see paras. 51 and 61; *Legal Consequences…*, para. 139; Nollkaemper, *supra* note 8, pp. 141-142.

[34] *Armed Activities…*, paras. 146-147.

Uganda, the ICJ referred directly to the rules of attribution included in Chapter II of the ILC Draft Articles.[35]

The above analysis shows that – even assuming the incorporation of principles of attribution by the primary rules in the form of defining a state's involvement in military activities of a non-state actor as an armed attack – the attribution's role remains to be crucial. Also, it is hardly possible to unequivocally determine its primary or secondary character. Indeed, as André Nollkaemper rightly commented: "(…) the distinction between attribution principles as part of the primary rules and as part of the law of state responsibility is not as watertight as sometimes is contended".[36] The situation concerned seems to be a good example to illustrate how difficult – if possible at all – is strict differentiation between primary and secondary rules. This difficulty, or some arbitrariness of the division between primary and secondary rules, has been critically referred to in the literature on the ILC Draft Articles.[37]

Also, the above analysis indicates some inconsistency in the ICJ's approach to the problem. Some misunderstanding may result from the broad interpretation given by the ICJ to the concept of the use of force. This is due to the fact that, in its jurisprudence, the ICJ interprets this particular concept much more extensively that of armed attack. Indeed, it was in defining the use of force that the ICJ ruled that assistance granted by a state to non-state actors, while not itself constituting an armed attack, might "be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other states".[38] Hence, according to the ICJ, a state's assistance to a non-state actor alone may amount to the use of force by that state without the need to attribute the armed activities of the non-state actor to the state or, indeed, when no such attribution is possible.

The ICJ appears to endorse that position in its *Armed Activities* judgement by ruling that, while armed activities of the non-state actor cannot be attributed to Uganda and hence no armed attack occurred, Uganda nevertheless violated the prohibition on the use of force and the principle of non-intervention by supporting

[35] *Ibidem*, para. 160.

[36] Nollkaemper, *supra* note 8, p. 148.

[37] *See, e.g.*, Bodansky, Crook, *supra* note 17, p. 780; H.P. Aust, *Through the Prism of Diversity – The Articles on State Responsibility in the Light of the ILC Fragmentation Report*, 49 German Yearbook of International Law 165 (2006), p. 177; in the broader context see: U. Linderfalk, *State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System*, 78 Nordic Journal of International Law 53 (2009).

[38] *Military and Paramilitary…*, para. 195.

that non-state actor through the provision of training and weapons.[39] The position adopted in this particular case by the ICJ is, however, less explicit than that taken in its judgement on Nicaragua, as the ICJ refers here not only to assistance to non-state actors but also generally to other armed activities and concludes that Uganda "(...) by engaging in military activities against the Democratic Republic of Congo on the latter's territory, by occupying *Ituri* and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention".[40]

It must nevertheless be stated that an interpretative approach which, on the one hand, advocates the attribution of activities of a non-state actor to a state (which is a condition for an armed attack to be recognized as such) and, on the other hand, departs from the rules of attribution and defines state assistance to a non-state actor as the use of armed force exhibits inconsistency and as such must be viewed critically.

The above approach corresponds to an established – yet also prone to criticism – position of the ICJ that assigns different meanings to the concepts of use of force and of armed attack.[41] What is also striking, and difficult to accept, in the *Armed Activities* judgement is that, while there was a grave violation of the prohibition on the use of force,[42] the ICJ nevertheless rejected the Democratic Republic of Congo's claim that such use of force amounted to aggression. This was subject to criticism by Judges Elaraby and Simma in their separate opinions.[43] The position taken by the ICJ led to a situation where even though the prohibition on the use of force as prescribed by Article 2(4) of the UN Charter was gravely violated, the state affected by such violation could not exercise the right of self-defence under Article 51 of the UN Charter because no armed attack occurred.

It must be emphatically stated that while support to a non-state actor alone constitutes a breach of the prohibition of intervention, there is no violation of the prohibition on the use of force if the degree of that support is such as not to allow for the attribution of armed activities of the actor to a state. Conversely, armed activities that may be attributed to a state would constitute both an unlawful use

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[39] *Armed Activities…*, paras. 161-165.

[40] *Ibidem*, para. 345(1).

[41] On the doctrinal criticism in this regard see: Kowalski, *supra* note 2, pp. 65-70.

[42] "The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter", *Armed Activities…,* para. 165.

[43] Respectively: *Armed Activities…*, Separate Opinion of Judge *Elaraby*, passim; Separate Opinion of Judge *Simma*, paras. 2-3.

of force and (subject to the *ratione materiae* prerequisites) an armed attack within the meaning of Article 51 of the UN Charter. The principle of non-intervention clearly includes armed intervention; this is, however, where the prohibition of intervention overlaps with the prohibition on the use of force. Meinhard Schröder said of the principle of non-intervention: "(...) it seems correct to say that the practical importance of the principle today must be seen in fields which go beyond Art. 2(4) of the Charter".[44] It appears that, in this particular context, not only the meaning of the principle of intervention needs to be given practical consideration, but it is also necessary to state emphatically that cases involving the use of force should be determined using specific rules governing the use of force rather than the more general principle of non-intervention.[45]

Consider the following example demonstrating how the definition of state support to a non-state actor as to the use of armed force – i.e. the one adopted by the ICJ – can lead, because of its inconsistency, to misunderstandings in interpretation. Judge Mohamed Shahabuddeen, in interpreting the ICJ judgement on *Nicaragua* in his separate opinion to the much-debated judgement of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case of 1999,[46] mistakenly holds that the United States violated the prohibition on the use of force by attributing to it the activities of the *Contras* (see particularly paragraphs 7–14), whereas the ICJ actually held that the United States violated the prohibition on the use of force through its own action, which was to support the *Contras*.[47]

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[44] M. Schröder, *Principle of Non-Intervention*, [in:] R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3, North Holland, Amsterdam: 1997, p. 619.

[45] See also the view expressed by Georges Abi-Saab, who in the context of 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation amongst States in Accordance with the Charter of the United Nations (Resolution 2625(XXV); 24.10.1970), stated: "Concerning the act of intervention, the 1970 Declaration mentions numerous examples relating to the use of force (...). In fact, to continue to include them under the principle of non-intervention while they are already covered by the principle of the prohibition of the threat or use of force, causes confusion"; G. Abi-Saab, *Some Thoughts on the Principle of Non-Intervention*, in: K. Wellens (ed.), *International Law: Theory and Practice*, Martinus Nijhoff Publishers, The Hague: 1998, p. 232.

[46] *The Prosecutor v. Duško Tadić*, Case No.: IT-94-1-A, Appeals Chamber, Judgement of 15 July 1999; available at: www.un.org/icty/cases-e/index-e.htm (last accessed on 1 August 2010).

[47] In a different context, this point is also made by Antonio Cassese. A. Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18(4) European Journal of International Law 649 (2007), p. 664.

The approach discussed above, in which support provided by a state to a non-state actor alone determines the existence of an armed attack by that state (i.e. the approach that marks a departure from the attribution), would lead to a very broad definition of the concept of armed attack in objective terms (*ratione materiae*). Also, it seems that the approach lacks consistency as the attribution still must be taken into account while assessing the sufficient degree of state involvement. By contrast, the nature and degree of state involvement for armed activities of a non-state actor – which in itself constitutes a violation of the principle of non-intervention – plays a key role in attributing armed activities of a non-state actor to a state. Therefore – let us repeat – there are two necessary elements for those activities to be defined as armed attack within the meaning of Article 51 of the UN Charter: firstly, military activities of a non-state actor must be assessed according to the objective criteria of armed attack (i.e. *ratione materiae*) and, secondly, it must be considered whether such activities of a non-state actor may be attributed to a state, i.e. whether the subjective criterion (i.e. *ratione personae*) is fulfilled. Indeed, according to Albrecht Randelzhofer "[a]cts of terrorism committed by private groups or organizations as such are not armed attacks within the meaning of Article 51 of the UN Charter. But if large scale acts of terrorism of private groups are attributable to a state they are an armed attack in the sense of Article 51."[48]

3. TRADITIONAL STANDARDS OF ATTRIBUTION

The traditional standard of attribution applicable in the context of linking military activities of a non-state actor with a state is based on the principle reflected in Article 8 of the ILC Draft Articles. This principle requires that a state exercises certain degree of control over a non-state actor, who must act under its direction, instigation or control. The most pertinent question is, again, that of determining the necessary degree of control exercised by a state over the activities of non-state actors. Article 8 of the ILC Draft Articles is not in itself conclusive in this respect.[49] Yet, in accordance with the interpretative approach adopted by the ICJ in its judgement of 1986 in the *Nicaragua* case, the armed activities of a non-state actor may be attributed to a state only if that state exercises effective control over

[48] Randelzhofer, *supra* note 1, p. 802; *cf.* Becker, *supra* note 19, p. 184.

[49] *Concurring,* A.J.J. de Hoogh, *Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadić Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia*, 72 British Yearbook of International Law 255 (2001), p. 290.

specific activities; conversely, general (overall) control over a non-state actor – exercised not only through the provision of financing, supplies and training (which alone would need to be considered insufficient) but also through the co-ordination of, or assistance with, the general planning of the armed activities of that non-state actor – is insufficient for attribution.[50]

This restrictive (or "unrealistic" as famously labelled by Judge Jennings[51]) standard has been subject to doctrinal criticism.[52] It appears legitimate to claim, in the light of the practice of states over the years since the ICJ judgement on *Nicaragua* and especially after 11 September 2001, that nowadays states accept the recourse to the right of self-defence also beyond the effective control standard.[53] One possible explanation of that situation is that the stress has been shifted from the standard of effective control to that of overall control, which would only require proving that, in addition to support itself, there was certain coordination of, or assistance with, the planning of operations of a non-state actor. This is particularly exemplified by the ICTY judgement of 1999 in the *Tadić* case, in which the ICTY criticized the effective control standard established by the ICJ and expressly advocated the adoption of the overall control standard. The ICTY based its considerations on careful analysis of states' practice.[54] This famous polemics of sorts between two international courts, which was continued in the ICJ judgement of 2007 on the crime of genocide,[55] is clearly symptomatic of the fragmentation of international law.[56] In the *Genocide* judgement, the ICJ upheld the effective control test claiming its customary status, yet it failed to deliver the desirable justification.[57] One must concur with Antonio Cassese who stated that "[t]he 'effective

[50] *Military and Paramilitary…*, para. 115; *cf.* para. 195; see also: *The Prosecutor v. Duško Tadić …*, para. 131 and 137.

[51] *Military and Paramilitary…*, Dissenting Opinion of Judge *Jennings*, 543.

[52] *See, e.g.*, Randelzhofer, *supra* note 1, p. 801.

[53] Ch.J. Tams, *The Use of Force against Terrorists*, 20(2) European Journal of International Law 359 (2009), pp. 378-381.

[54] The adequateness of the case-law referred to by the ICTY in *Tadić* may, however, cause serious doubts; see in this respect M. Milanović, *State Responsibility for Genocide*, 17(3) European Journal of International Law 553 (2006), pp. 585-587; polemically: Cassese, *supra* note 46, p. 658.

[55] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007.

[56] M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, 13 April 2006, UN Doc. A/CN.4/L.682 i Add 1, para. 49-52; Martti Koskenniemi points to this polemics as an illustration of the "fragmentation through conflicting interpretations of general law".

[57] *Application of the Convention…*, paras. 398-407.

control' test may or may not be persuasive. What matters, however, is to establish whether it is based on either customary law (resulting from state practice, case law and opinio juris) or, absent any specific rule of customary law, on general principles of state responsibility or even general principles of international law. It is, however, a fact that the [ICJ] in *Nicaragua* set out that test without explaining or clarifying the grounds on which it was based. No reference is made by the [ICJ] either to state practice or to other authorities."[58]

There are, however, doubts regarding the sufficiency of the overall control standard. The doubts concern situations where the international responsibility for armed activities of an organized non-state actor cannot be attributed to another state using either the effective or overall control standards. It is highly disputed whether the overall control standard could be applied to the Operation Enduring Freedom as well as to the Second Lebanon War of 2006, both having gained widespread acceptance by international community as self-defence.[59] What is more, in no way would the overall control standard provide a solution to the situation where a state is unwilling or unable (it is practically impossible to make a distinction between the two) to prevent an attack from its territory. In other words, a state is not involved in military actions of a non-state actor (or the degree of involvement is insufficient for attribution, even if the overall control standard is used), or is unwilling or unable to prevent the use of its territory by that non-state actor to prepare or carry out an armed attack. Would then the state attacked by the non-state actor be entitled to respond with the use of armed force in self-defence under Article 51 of the UN Charter? If we unconditionally assume that the answer is negative, this would lead to a highly unsatisfactory and unrealistic situation in which a non-state actor which carries out an armed attack from the territory of another state would be protected by the sovereignty of that state whereas the attacked state would be deprived of the possibility of lawful armed response. The emergence of organized terrorist groups operating from the territories of other states makes this problem poignantly relevant today.[60] In consequence, it is necessary to give consideration to other principles set out in the ILC Draft Articles regarding the attribution of actions of non-state actors to a state.

This refers to three situations covered by Articles 9 – 11 of the ILC Draft Articles. Article 9 governs the attribution to a state of the conduct of a non-state

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[58] Cassese, *supra* note 46, p. 653.

[59] See detailed reconstruction in this respect: G. Wettberg, *The International Legality of Self-Defence Against Non-State Actors: State Practice from the U.N. Charter to the Present*, Peter Lang, Frankfurt am Main: 2007, pp. 114-123 (with regard to Lebanon) and pp. 159-163 (with regard to Afghanistan).

[60] Kowalski, *supra* note 2, p. 75.

actor exercising elements of the governmental authority in the absence or default of the official authorities. Article 10 concerns the conduct of an insurrectional or other movement which becomes the new government of a state, while Article 11 – which, in a way, complements the rules of attribution set out in Chapter II of the Draft Articles – provides that conduct which is not attributable to a state under the preceding articles is nevertheless considered an act of that state if it acknowledges the conduct in question as its own.

It must be first of all remarked that the situation covered by Article 10 of the ILC Draft Articles is fundamentally different from the situations discussed here. Namely, this is the only instance in which a non-state actor may evolve into a government of a state. The attribution of previous actions of such a non-state actor to a state does not provoke controversy. Article 11 of the ILC Draft Articles is similarly of little practical importance within the context discussed here, as it is difficult to assume that a state would recognize armed (terrorist) acts of a non-state actor against another state as its own, thereby exposing itself to a lawful armed response in exercise of the right of self-defence.[61] The intent of a state in supporting a non-state actor, which carries out armed actions against other states, is exactly the opposite: to hide behind a non-state actor and avoid international responsibility. The principle in question will be of even less practical use in the situation where a state is unwilling or unable to prevent the use of its territory by a non-state actor for the purpose of carrying out an armed action. Furthermore, as emphasised by the ILC, "(...) the act of acknowledgement and adoption, whether it takes the form of words or conduct, must be clear and unequivocal", and there is a need to distinguish "(...) cases of acknowledgement and adoption from cases of mere support or endorsement".[62] Therefore, the thesis raised by Sean D. Murphy that the refusal of the Taliban *de facto* government of Afghanistan to extradite al-Qaeda leaders after September 11 provided evidence that it recognized the actions of al-Qaeda as its own within the meaning of Article 11 of the ILC Draft Articles must be rejected as mistaken.[63]

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[61] *Cf.* C. Stahn, *International Law at the Crossroads? The Impact of September 11*, 62 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 183 (2002), pp. 220-221.

[62] Draft Articles..., p. 53.

[63] S.D. Murphy, *Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter*, 43 Harvard International Law Journal 41 (2002), p. 51; *also cf.* Y. Dinstein, *War, Aggression and Self-Defence, (4. ed.)*, Cambridge University Press, Cambridge: 2005, pp. 236-237.

What requires deeper consideration is the possibility of applying Article 9 of the ILC Draft Articles.[64] It must be concurred that it is a "somewhat neglected rule of state responsibility", the one that has never achieved broader practical application or been treated with more depth in doctrine.[65] The article in question is concerned directly with exceptional circumstances in which there is an absence or default of the official authorities. The ILC stresses in its commentary that this is the case when there is complete or partial collapse of state authority, the latter case referring to, for example, loss of control over part of the territory.[66] These are the types of situations that occur frequently in the context discussed here. Firstly, armed action against other states may be launched from the territory of a failing state in which state authority has collapsed, as in the case of Somalia. Secondly, a non-state actor may operate in a part of the territory of a given state and use it to initiate armed action against other states while remaining beyond the control of the official authorities. As the state has no power to prevent their activities, it may be assumed to be in a state of partial collapse. Hezbollah controlling southern Lebanon and the PKK operating in northern Iraq beyond the control of the official authorities can serve as examples here.

However, an absence or default of state authority is only one of the three prerequisites for actions of a non-state actor to be attributed to a state under Article 9 of the ILC Draft Articles. The other two prerequisites are, firstly, an effective link between those actions and the exercise of elements of the governmental authority and, secondly, the occurrence of the circumstances that call for the exercise of those elements of authority by non-state actors. The ILC states in its commentary that the second of the above-mentioned prerequisites conveys a normative element that the circumstances must be such as to justify the attempt of a non-state actor to exercise police or other functions in the absence of any constituted authority.[67] Although vague to a certain extent, these statements certainly appear to rule out the possibility of applying the principle contained in Article 9 of the ILC Draft Articles to armed actions taken by a non-state actor on its own behalf against another state and often carried out outside the territory of the state to which they

[64] Art. 9: "The conduct of a person or group of persons shall be considered an act of a state under international law if the person or 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 elements of authority"; Draft Articles…, p. 49.

[65] T. Ruys, *Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-Defense Against Hezbollah*, 43 Stanford Journal of International Law 285 (2007), p. 287.

[66] Draft Articles…, p. 49.

[67] *Ibidem*.

were purportedly to be attributed. Marko Milanović aptly commented that "[t]his type of attribution does not deal with the actions of an entity outside the territory of the state, which does not purport to exercise governmental functions on behalf of that state, but on its own behalf".[68] Giorgio Gaja states similarly that "[t]he conditions set out in this draft article are unlikely to be fulfilled by a terrorist group".[69] In the light of the above arguments, one cannot concur with the occasionally expressed views that Article 9 of the ILC Draft Articles could provide grounds for holding Taliban-ruled Afghanistan accountable for the al-Qaeda attacks of 11 September 2001[70] or attributing to Lebanon Hezbollah's armed actions that sparked the Second Lebanon War of 2006.[71]

4. A NON-STATE ACTOR AS AN AUTONOMOUS SOURCE OF ARMED ATTACK

Another possible explanation regarding the recent states' practice under which "the contemporary law has come to recognize a right of self-defence against terrorist attacks even where these cannot be attributed to another state under traditional test"[72] is to accept a non-state actor as an autonomous source of armed attack under Article 51 of the UN Charter. Thus, for an attacked state to lawfully use armed force against a non-state actor in the exercise of its right of self-defence, one would need to interpret Article 51 of the UN Charter as not requiring the attribution of an armed attack to a state. In other words, this would imply that armed attack as defined by Article 51 of the UN Charter may be perpetrated also by a non-state actor and, in consequence, the self-defence action of the attacked state may be directed against that actor.

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[68] Milanović, *supra* note 53, p. 586.

[69] G. Gaja, *In What Sense was There an "Armed Attack"?,* European Journal of International Law, Discussion Forum: The Attack on the World Trade Center: Legal Responses, available at: www.ejil.org (last accessed on 1 August 2010); *also cf.* R. Wolfrum, *State Responsibility for Private Actors: An Old Problem of Renewed Relevance*, in: M. Ragazzi (ed.), *International Responsibility Today*, Koninklijke Brill, The Hague: 2005, p. 427: Rüdiger Wolfrum stresses that "(...) the scenario referred to in Article 9 of the Commission's draft is restricted to emergency situations, that is when states should act but are unable to act and private persons step in."

[70] Murphy, *supra* note 63, p. 50.

[71] Ruys, *supra* note 65, pp. 285-290.

[72] Ch.J. Tams, *The Use of Force against Terrorists: A Rejoinder to Federico Sperotto and Kimberley N. Trapp*, 20(4) European Journal of International Law 1057 (2009), p. 1059.

Such interpretation is possible considering that Article 51 of the UN Charter does not stipulate *expressis verbis* that an armed attack must be carried out by a state. What is more, if the teleological approach is used, it could be argued that the purpose of Article 51 of the UN Charter is to ensure protection to an attacked state by allowing it to carry out a legitimate action in self-defence regardless of the source of the attack.[73] While such interpretation undoubtedly marks a departure from the traditional stance on this issue,[74] it can be argued that it simply brings the suitably flexible provisions of the UN Charter into alignment with new threats from non-state actors and, as commented by Jochen A. Frowein in connection with the events of 11 September 2001, the UN Charter has once again proved wiser than previously thought.[75] Indeed, it was after 11 September 2001 that this view gained wider currency in the doctrine. The position advanced in a 2005 study by independent UK think-tank Chatham House on the use of force in self-defence is symptomatic in this context.[76] One of the principles set out in the study, namely principle six, states categorically: "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", while a commentary adds that "[t]here is no reason to limit a state's right to protect itself to an attack by another state. The right of self-defence is a right to use force to avert an attack. The source of the attack, whether a state or a non-state actor, is irrelevant to the existence of the right".[77] A similarly categorical stance is represented, e.g., by Jerzy Kranz, who

[73] *Cf., e.g.*, A. Zimmermann, *The Second Lebanon War: Jus ad bellum, jus in bello and the Issue of Proportionality*, Max Planck Yearbook of United Nations Law 99 (2007), p. 117.

[74] Judge Pieter Kooijmans mentioned in this context the "generally accepted interpretation for more than 50 years"; *Legal Consequences…*, Separate Opinion of Judge Kooijmans, para. 35.

[75] J.A. Frowein, *Der Terrorismus als Herausforderung für das Völkerrecht*, 62 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 879 (2002), p. 887; Jochen A. Frowein stated: "Man mag sagen, dass hier wieder einmal der Text der Satzung der Vereinten Nationen weiser ist, als die Interpreten bisher erkannt hatten. Der Text spricht eben nicht von einer 'armed attack', die von einem Staat ausgeht"; *also cf.* J.A. Frowein, *Comment: State Responsibility and Peace*, in: G. Nolte (ed.), *Peace through International Law: The Role of the International Law Commission*, Springer, Berlin: 2009, p. 49.

[76] E. Wilmshurst (ed.), *The Chatham House Principles of International Law on the Use of Force by States in Self-Defence*, 55 International and Comparative Law Quarterly (2006), pp. 963-972; the study was elaborated by: Franklin Berman, Daniel Bethlehem, James Gow, Vaughan Lowe, Adam Roberts, Philippe Sands, Malcolm Shaw, Gerry Simpson, Colin Warbrick, Nicholas Wheeler, Elizabeth Wilmshurst and Michael Wood.

[77] *Ibidem*.

believes that the UN Charter and Security Council Resolutions 1368 and 1373 certainly do not require that an armed attack be an act of a state.[78]

Indeed, the stance taken by the UN Security Council after the events of 11 September 2001, as expressed in the above-cited Resolutions 1368 (2001) and 1373 (2001), provides a serious argument for concluding that non-state actors can indeed be an autonomous source of an armed attack within the meaning of Article 51 of the UN Charter. The UN Security Council recognized, in the preambles to those Resolutions, the right to self-defence against terrorist acts without dealing with the question whether such acts are attributable to a state.[79] In addition, NATO adopted a similar stance in response to the events of 11 September 2001 by invoking Article 5 of the Washington Treaty (containing a reference to Article 51 of the UN Charter), which states that an armed attack against one or more of the Allies is considered an attack against them all.[80] Rather than dwelling on the question of who was the source of the attack, NATO instead used the expression "attack directed from abroad".[81] The indication of the source of the attack was likewise missing in the reaction of the Organization of American States to 11 September 2001, in which it invoked the Inter-American Treaty of Reciprocal Assistance of 1947,[82] a document that also closely refers to Article 51 of the UN Charter.[83]

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[78] J. Kranz, *War, Peace or Appeasement?*, Völkerrechtliche Dilemmata bei der Anwendung militärischer Gewalt zu Beginn des 21. Jahrhunderts, Instytut Wydawniczy EuroPrawo, Warszawa: 2009, pp. 62 and 130.

[79] Resolution 1368 (2001), third recital of the preamble: "Recognizing the inherent right of individual or collective self-defence in accordance with the Charter" and Resolution 1373 (2001), fourth recital of the preamble: "Recognizing the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)."

[80] Statement by the North Atlantic Council, Press Release (2001) 124, 12 September 2001, ILM 40 (2001), 1267.

[81] *Ibidem*, "(...) if it is determined that this attack was directed from abroad against the United States".

[82] 21 UNTS 77.

[83] Resolution on Terrorist Threat to the Americas, OEA/Ser.F/II.24 RC.24/RES.1/01, 21 September 2001, ILM 40 (2001), 1273; para. 1 of the Resolution states „that these terrorist attacks against the United States of America are attacks against all American states and that in accordance with all the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and the principle of continental solidarity, all states Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state, and to maintain the peace and security of the continent."

These three examples of the reaction of the international community to the events of 11 September 2001 are cited by all authors who advocate the recognition of a non-state actor as an autonomous source of an armed attack within the meaning of Article 51 of the UN Charter.[84] What is significant in this context is the uniformity with which the international community has responded by consenting to the exercise of self-defence and how it contrasts with its past responses which, while diverse, were fundamentally critical of the use of force by states against non-state actors.[85] The international community responded in a similarly approving fashion when Israel (invoking the right of self-defence under Article 51 of the UN Charter) used force in response to the armed activities of Hezbollah in 2006.[86] This is particularly in contrast to the overwhelmingly critical response to actions previously taken by Israel against terrorist non-state actors in the territories of other states.[87] The Second Lebanon War can therefore be seen to provide further argument that a non-state actor is in practice considered an autonomous source of an armed attack within the meaning of Article 51 of the UN Charter.

The ICJ has, however, opposed such an extensive interpretation of Article 51 of the UN Charter. It did so in its 2004 Advisory Opinion on the *Wall*, in which it mentioned briefly but explicitly that Article 51 of the UN Charter "recognizes the existence of an inherent right of self-defence in case of armed attack by one state against another state".[88] The ICJ avoided therefore to comment more broadly on the stance taken by the UN Security Council in its Resolutions 1368 (2001) and 1373 (2001). The ICJ reiterated – although in rather ambiguous way – its position in the *Armed Activities* judgement of 2005 by stating that it saw 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".[89] Worth noting in this context are arguments raised – aptly – by some of the ICJ judges in their separate opinions appended

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[84] *Representatively see, e.g.,* Dinstein, *supra* note 63, pp. 206-208.

[85] For examples of past responses, prior to 11 September 2001, see, e.g.: Ch. Wandscher, *Internationaler Terrorismus und Selbstverteidigungsrecht*, Duncker & Humblot, Berlin: 2006, pp. 140-149.

[86] For detailed analysis see Wettberg, *supra* note 59, pp. 114-123 and the sources referred to.

[87] *Ibidem*, p. 115.

[88] *Legal Consequences…*, para. 139.

[89] *Armed Activities…*, para. 147; cf. Karin Oellers-Frahm's view, that the fact the ICJ refrained here from the clear-cut acknowledgment of state-to-state character of self-defence, while alluding to the development of international law, may be understood as signalling, that the ICJ is about to change its position in this respect in favour of the acceptance of a non-state actor as an autonomous source of armed attack: K. Oellers-Frahm, *Der IGH und*

to the above-cited 2004 Advisory Opinion on the *Wall* and the *Armed Activities* judgement of 2005. Namely, they criticized the ICJ for its failure to take a stance on such different interpretation of Article 51 of the UN Charter in the face of the emergence of new threats.[90] The ICJ has clearly and repeatedly missed the chance to systematize this particular aspect of contemporary international law. That such systematization is needed has been demonstrated by the Second Lebanon War of 2006 and the above-mentioned response to it by the international community.

Nevertheless, the stance taken by the ICJ, as discussed above, deserves support as, contrary to what some authors would like to think, it cannot be reduced just to "an error in thinking".[91] While Article 51 of the UN Charter alone does not provide *expressis verbis* that an armed attack must be perpetrated by a state, it should be interpreted as such when read in conjunction with other provisions of the UN Charter governing the use of armed force, in particular its Article 2(4).[92] Namely, Article 2(4) expressly prohibits the use of force by states in "their international relations", and it is in this manner that Article 51 of the UN Charter, which is one of the two exceptions from that prohibition (the other being the collective security system), should be interpreted.[93] The design of Article 51 alone substantiates such interpretation by linking the right of self-defence to collective security mechanisms and thereby confirming that the right of self-defence forms an integral part of the *ius contra bellum* regime established under the UN Charter. As aptly stated by Kimberly N. Trapp, the inter-state reading of the right to self-defence "is the only one which is consistent with the logic of the UN Charter".[94]

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die "Lücke" zwischen Gewaltverbot und Selbstverteidigungsrecht – Neues im Fall "Kongo gegen Uganda"?, Zeitschrift für Europarechtliche Studien 1/2007, pp. 83-84; see also Tams, *supra* note 53, p. 384.

[90] See the separate opinions of Judge Kooijmans (paras. 35-36) and Judge Higgins (paras. 33-35) to the 2004 Advisory Opinion on the *Wall* and separate opinions of Judge Kooijmans (paras. 22-32) and Judge Simma (paras. 4-15) to the *Armed Activities* judgement of 2005.

[91] D. Janse, *International Terrorism and Self-Defence*, 36 Israel Yearbook on Human Rights 149 (2006), p. 171. Moreover, Janse, while referring to the reluctance to accept a non-state actor as an autonomous source of armed attack under Art. 51 of the UN Charter, adds: "The true reason for this reluctance is most likely due to political and strategic factors, and not something which is based on strict legal reasoning", *Ibidem*, p. 173.

[92] Gaja, *supra* note 69.

[93] *See, e.g.*, K. Oellers-Frahm, *The International Court of Justice and Art. 51 of the UN Charter*, in: K. Dicke et al. (eds.), *Weltinnenrecht: Liber amicorum Jost Delbrück*, Duncker & Humblot, Berlin: 2005, p. 513.

[94] K.N. Trapp, *The Use of Force against Terrorists: A Reply to Christian J. Tams*, 20(4) European Journal of International Law 1049 (2009), p. 1049; although in her approach to the discussed problem, Trapp seems to depart from this assumption; on the approach (*see*

The interpretation of an armed attack solely as an act of a state is all the more obvious if the use of force, aggression and armed attack concepts are regarded as closely interrelated, in which case any unlawful use of armed force constitutes an armed attack.[95] Yet, even assuming – what one is obliged to do under international law as it is now – that the concept of armed attack is interpreted more narrowly, i.e. as falling within the concept of aggression, it must nevertheless be concluded that an armed attack, being a form of aggression which itself is an act of a state according to Resolution 3314, may be perpetrated only by a state.[96] Therefore, systemic interpretation points to a state as the only source of an armed attack within the meaning of Article 51 of the UN Charter. This is further supported by the *travaux préparatoires* of the UN Charter, in which Article 51 is expressly regarded as referring to inter-state relationships.[97]

If a teleological approach is applied to interpretation, it must be concurred that while the purpose of Article 51 of the UN Charter is to provide effective protection to the attacked state through the exercise of the right of self-defence against the aggressor, the fundamental purpose of the UN Charter is to maintain international peace and security. As an exception to the prohibition on the use of force, Article 51 of the UN Charter ought to be interpreted narrowly. Meanwhile, a departure from the requirement to attribute an armed attack to a state entails such an expansion of states' right to use armed force unilaterally that it appears to result in depreciating the very prohibition on the use of armed force. This is particularly visible in the way the concept of armed attack is being expanded to include an act of terrorism. The potential for abuse – by states taking arbitrary actions and infringing the rights of weaker states – is thereby created.

Also, it is difficult to accept the argument that the present-day practice of states clearly demonstrates that non-state actors are recognized as an autonomous source of an armed attack within the meaning of Article 51 of the UN Charter.

Ibidem, pp. 1051-1054); see also: K.N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right to Self-Defence against Non-State Terrorist Actors*, 56 International and Comparative Law Quarterly 141 (2007), pp. 141 et seq.; for a convincing and detailed critique of the approach see Tams, *supra* note 72, pp. 1059-1062.

[95] *See,* Green, *supra* note 2, pp. 147-163; the Author persuasively advocates the view, that "the 'armed attack as a grave use of force' criterion as set out by the ICJ is unhelpful"; similarly: Kowalski, *supra* note 2, pp. 65-70.

[96] Gaja, *supra* note 69.

[97] Th. Bruha, Ch.J. Tams, *Self-Defence Against Terrorist Attacks. Considerations in the Light of the ICJ's 'Israeli Wall' Opinion*, in: K. Dicke et al. (eds.), Weltinnenrecht: Liber amicorum Jost Delbrück, Duncker & Humblot, Berlin: 2005, p. 94; generally on the preparatory work on Art. 51 of the UN Charter see: S. Alexandrov, *Self-Defence Against the Use of Force in International Law*, Kluwer Law International, The Hague: 1996, pp. 77 et seq.

Note must be taken that while the UN Security Council indeed avoided addressing the question of attributing an armed attack to a state in its Resolutions 1368 (2001) and 1373 (2001), it would be difficult to accept that the affirmation of the right of self-defence – which, let us stress, is contained only in the preambles to those Resolutions – alone gives a decisive answer to that question.[98] Notably, the UN Security Council Resolutions consistently employ the term "terrorist attack" and there is not a single reference to armed attack.[99] While without doubt prejudging the recognition of a terrorist attack (act) as an armed attack, the position of the UN Security Council does not make it conclusive that a non-state actor (terrorist organization) is an autonomous source of an armed attack and as such can be an autonomous target of an armed response in self-defence. These are two different questions that must be addressed separately.

The conclusion that non-state actors are an autonomous source of an armed attack does not find support either in the above-cited UN Security Council Resolutions or in the above-discussed position of, respectively, NATO and the Organization of American States (for the simple reason that they do not address the question of the source of an armed attack). What is more, the explicit reference in paragraph 3 of Resolution 1368 (2001)[100] to the perpetrators, organizers and sponsors of terrorist attacks and the warning that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors or these acts will be held accountable, provides an argument for the recognition, under certain circumstances, of "those that facilitate or harbour terrorists as armed attackers against whom, subject to the UN Charter and international law, military force may be used in self-defence".[101] The only point of contention that would need to

[98] *Similarly, e.g.,* J. Kammerhofer, *Uncertainties of the Law on Self-Defence in the United Nations Charter*, XXXV Netherlands Yearbook of International Law 143 (2004), p. 181; Gaja, *supra* note 69.

[99] C. Stahn, *Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say*, European Journal of International Law, Discussion Forum: The Attack on the World Trade Center: Legal Responses, 4; available at: www.ejil.org (last accessed on 1 August 2010).

[100] Resolution 1368 (2001) in para. 3 states: "[The Security Council] calls on all states to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable." Moreover, as pointed out by Christine Gray, both the US and the UK, while addressing the SC (respectively UN Docs. S/2001/946 and S/2001/947), broadly referred to the links between *al-Qaeda* and the *Taliban*; Gray, *supra* note 4, pp. 200-201.

[101] Th.M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, Cambridge University Press, Cambridge: 2002, pp. 54.

be addressed would be the degree of substantial involvement (within the meaning of article 3(g) of Resolution 3314) of a state in the acts of armed force (terrorist acts) of a non-state actor that would be necessary for those acts to be attributed to that state. Therefore, what clearly follows from state practice that emerged after 11 September 2001 and was affirmed in the face of the Second Lebanon War of 2006 is that the standard of attribution of armed acts of non-state actors to a state must be expanded (lowered) with reference to the effective control standard or even the overall control standard.[102]

Last but not least, it must be pointed out that the non-attribution of a non-state actor's armed activities to a state gives rise to a very serious problem of how to justify the violation of the territorial sovereignty of a state, on territory of which another state carries out an armed operation in self-defence against a non-state actor. This is an issue of key importance given the fact that the territory of a state is accorded special protection under international law, as evidenced by the prohibition on extraterritorial action by other states without clear legal basis. Such basis may possibly be seen to arise from the state's failure to fulfil its obligation under international law that requires it to prevent the use of its territory for the purpose of using force against other states.[103] However, there are serious doubts whether that positive obligation, although clearly well established under international law,[104] may alone provide grounds for violating the territorial sovereignty of another state. That is why that particular construct should be regarded as a means of expanding the standard of attribution of acts of a non-state actor to a state that is unwilling or unable to prevent those acts, rather than a justification for violating the territorial sovereignty of a state, on territory of which another state uses force in self-defence against a non-state actor. This issue will be more broadly addressed in the following section.

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[102] *Cf.* K. Schmalenbach, *The Right of Self-Defence and the 'War on Terrorism' One Year after September 11*, 3(9) German Law Journal (2002), paras. 20-21.

[103] *Cf.* Oellers-Frahm, *supra* note 89, pp. 85 et seq.; N. Lubell, *Extraterritorial Use of Force Against Non-State Actors*, Oxford University Press, Oxford: 2010, pp. 36-42.

[104] *See, e.g.*, *Corfu Channel Case*, Judgment of April 9th, 1949, I.C.J. Reports 1949, 22; 1970 Declaration on Principles of International Law…; see also K. Zemanek, *Self-Defence against Terrorism: Reflexions on an Unprecedented Situation*, in: F.M. Mariño Menéndez (ed.), *El Derecho internacional en los albores del siglo XXI*, Editorial Trotta Madrid: 2002, p. 703.

5. EXPANDING THE STANDARD OF ATTRIBUTION

The possibility of attributing the armed activities of a non-state actor to a state in the situation where the armed actions may not be attributed to a state using the standard of effective control or even of overall control because of the state's insufficient involvement or to a state which is unwilling or unable to prevent them seems nevertheless to be possible. It must be sought beyond the ILC Draft Articles, as there is no doubt that principles governing the attribution of the acts of non-state actors to states are not limited only to those contained in the Draft Articles.[105] Incidentally, as stressed above, such option is sanctioned by the ILC itself through reference in Article 55 to the *lex specialis* principle. The doctrine of states' positive obligations developed under the human rights protection treaty-based systems may serve as a telling example here.[106]

As argued above, it may be assumed that a *lex specialis* situation emerges in relation to the general principles governing the international responsibility of states also in the context of *jus ad bellum* norms, and especially of the right of self-defence alone. This would entail a modification to those general principles with regard to providing for an extended standard of attribution to a state of a non-state actor's armed activities.

What inevitably needs to be distinguished here is the difference between the expansion of the standard of attribution to a state of a non-state actor's armed activities and the recognition that the international responsibility of a state derives from a breach of its positive obligation to prevent the use of its territory for the perpetration of internationally wrongful acts. Under the latter approach, a state would be held responsible for omission. While not directly responsible for activities of a non-state actor, a state would therefore be held to account for its failure to respond to those acts.[107] Accordingly, "such state responsibility has an inherent limitation in that it requires a primary obligation to intervene."[108] In the context discussed, international law clearly imposes the obligation of positive action on the state to prevent breaches of international law by a non-state

[105] *Cf.* Wolfrum, *supra* note 69, p. 425.

[106] The doctrine of positive obligations has been elaborated and being extensively applied by the European Court of Human Rights under the 1950 European Convention on Human Rights, *see, e.g.*, C. Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention*, Springer, Berlin: 2003; A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford University Press, Oxford: 2004.

[107] Wolfrum, *supra* note 69, p. 425.

[108] *Ibidem*.

actor operating on or from its territory. One can therefore speak of the state's positive obligation to effectively exercise its territorial sovereignty. However, in spite of the state's responsibility for violation of international law consisting in a breach of its positive obligation, no armed response may be directed against that state in self-defence, as it has not committed an armed attack.[109] In consequence, for the right of self-defence to be exercised, stress must be laid on attributing the armed activities of a non-state actor to a specific state, which – provided that the objective prerequisites are met as well (sufficient gravity; armed character) – would result in determining those activities as an armed attack.

The approach based on an extension of the regular standards of attribution beyond the ILC Draft Articles has been recently suggested by Christian J. Tams.[110] The extended standard "most closely resembling international rules against 'aiding and abetting' illegal conduct"[111] remains, however, rather limited. The author invokes also Article 16 of the ILC Draft Articles in this regard. Christian J. Tams perceives aiding and abetting as a special standard of attribution to a state of armed activities of a non-state actor. As such, this approach, which is solidly based on inter-state reading of the right to self-defence and seeks to establish a broader standard of attribution in order to meet modern state practise, should be welcomed and regarded as plausible. Nonetheless, the approach brings about the discussion again to the problematic determination of the degree of state involvement (aiding and abetting) allowing for attribution. What is more, it does not cover whatsoever a situation in which a state is unwilling or unable to prevent armed activities of a non-state actor operating on or from its territory. Christian J. Tams considers this as an advantage as the approach "broadens the forms of support which trigger a territorial state's responsibility, but does not lose sight of its intention".[112] Yet, this may be perceived conversely. Firstly, the approach does not address the failing state scenarios. Secondly, it is based on the somehow unrealistic assumption of the feasibility to differentiate between those states unwilling to prevent and those unable to prevent armed attacks by non-state actors. As such, the suggested standard seems not flexible enough.

In order to establish a standard of attribution, which would be extended enough, it is worth to consider the state's positive obligation to effectively exercise its territorial sovereignty in the context of the prohibition on the use of armed force. Such obligation would represent an expansion of the standard of attribution

[109] *Cf.* Kranz, *supra* note 78, pp. 133-153.
[110] Tams, *supra* note 53, pp. 384-387.
[111] *Ibidem*, p. 385.
[112] *Ibidem*, p. 386.

that would go beyond the ILC Draft Articles and apply exclusively to armed actions of an organized non-state actor. The reason for this interpretation is that the prohibition on the use of armed force by a state should be regarded not only as a negative obligation of a state not to take any armed action against another state, but also as a positive obligation to restrain any non-state actor from carrying out any armed activities using that state's territory. Under the approach proposed, the responsibility for armed activities carried out by an organized non-state actor operating from the territory of a state which is unwilling or unable to prevent them could be attributed to that state on grounds of omission, the latter understood as the state's failure in discharging its positive obligation to prevent an organized non-state actor from using its territory for armed activities against another state.

The adoption of this approach would therefore give rise to the attribution of a non-state actor's armed activities to a state. If, at the same time, armed activities met the objective criteria (sufficient gravity; armed character), their attribution to the state would constitute the fulfilment of the subjective criterion (a state as a source of an armed attack), thus providing a basis for their classification as an armed attack within the meaning of Article 51 of the UN Charter. In such a situation, it would appear lawful – subject to restrictions deriving from the principles of necessity and proportionality – for the attacked state to invoke the right of self-defence under Article 51 of the UN Charter. The requirements of necessity and proportionality would, however, result in restricting self-defence only to armed actions directed against an organized non-state actor – unless, of course, a given state used armed force on the side of the non-state actor attacked in the exercise of the right of self-defence.

Note should be taken, however, that the approach proposed above is inconsistent with the jurisprudence of the ICJ concerning the attribution of an armed attack to a state. The ICJ had an opportunity to speak on this issue in its *Armed Activities* judgement, but it decided there were no grounds to hold the Democratic Republic of Congo accountable for its failure to take measures against armed groups using its territory to carry out armed actions against Uganda. The ICJ merely stated that based on evidence provided for, the failure to take action against those armed groups was not tantamount to tolerating or acquiescing in their activities.[113]

[113] *Armed Activities…*, para. 301; approvingly: Zimmermann, *supra* note 73, p. 121.

CONCLUSION

The approach presented above does appear to provide evidence that the right of self-defence may be interpreted vis-à-vis the principles governing the international responsibility of states in such a way as to adapt the *jus ad bellum* norms to new challenges while keeping their inter-state nature and thus preserving all systemic guarantees.[114] The extended standard of attribution generated by the primary rules of the *jus ad bellum* and based on a state's positive obligation under the prohibition of the use of force is coming up to meet the recent practice of states in addressing terrorists attacks. Also, this approach slots in the current trend under which – to use Christian J. Tams' words – "debate has shifted towards issues of necessity and proportionality (i.e. the scope of self-defence measures)".[115] Indeed, attribution itself does not prejudge the lawfulness of the exercise of the right to self-defence, as principles of necessity and proportionality still form the central part in the process. Also, the strict application of these principles offers the sound safeguard against potential abuse. Thus, it might be still appropriately claimed that – as the Institut de droit international put it in two initial paragraphs of its 2007 resolution on self-defence – "Art. 51 of the United Nations Charter as supplemented by customary international law adequately governs the exercise of the right of individual and collective self-defence" and that "[n]ecessity and proportionality are essential components of the normative framework of self-defence."[116]

It must further be stressed that the above deliberations are concerned exclusively with the question of attributing armed activities to a state, particularly if perpetrated by a non-state actor, with the concept of an armed attack being expanded to include a terrorist act. In the situation where such attribution is possible, and thereby the subjective prerequisite is fulfilled in addition to the objective one, the attacked state would be entitled to respond with armed force in the exercise of its right of self-defence. In consequence, the state's response would constitute a lawful use of force in response to a terrorist attack and, as such, the use of force in self-defence will be a means of countering international terrorism. However, it must be stressed emphatically that this is an exceptional situation, just as exceptional as the right of self-defence as a means of enforcing international law. Indeed, international terrorism is, and must be, countered otherwise than by the use of force. One

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[114] *Cf.* Oellers-Frahm, *supra* note 93, pp. 516-517.

[115] Tams, *supra* note 53, p. 381

[116] Institut de droit international, *Resolution on Present Problems of the Use of Armed Force in International Law – Self-defence*, 27 October 2007; available at: www.idi-iil.org (last accessed on 1 August 2010).

question that remains – but lies beyond this study – is to what extent the principles of international responsibility are adequate in addressing the problem of state responsibility for supporting international terrorism where such support takes the form of measures that do not qualify as an armed attack and therefore cannot be addressed by armed force.[117]

[117] On this issue see generally, e.g.: Becker, *supra* note 19; R.P. Barnidge, *Non-state Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle*, T.M.C. Asser Press, The Hague: 2008; M. Lehto, *Indirect Responsibility for Terrorist Acts: Redefinition of the Concept of Terrorism Beyond Violent Acts*, Martinus Nijhoff Publishers, Leiden: 2009.