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Use of Force by International/Regional Non-State Actors: No Armed Attack, No Self-Defence

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Abstract

Contemporary literature on the use of force has been saturated with arguments and counter arguments relating to the extant regime of the use of force as it should relate to non-state actors. The discussions have however proceeded on the assumption that the problem of the unregulated use of force by non-state entities is limited to group of persons – unorganised non-state actors – pursuing legitimate or non-legitimate agenda. The arguments seems to overlook the existence of a group of States (organised non-state actors) – international organisations – which pose even greater threat to the Charter paradigm of the use of force than unorganised non-state actors. This article discusses the Charter regime on the use of force with particular attention to organised non-state actors and the challenges they posed to the prohibition of the use of force.

Keywords: force , states, non-state, security, organisations.

A. Introduction

The recurrent debate over the use of force in international relations assumed an unprecedented momentum after the 9/11 terrorists attacks on the United States. The intensity of discussions revolved around the challenges of non-state actors within the dynamics of the prohibition of force in international relations. Though arguments concerning how and when states can respond to attacks by non-state actors operating from the territory of another state, with the active or passive support of that state, had been around before 9/11, it was at the peripheral until the events of 9/11. Hitherto, it was largely accepted that non-state actors were not capable of delivering the United Nations Charter doses of 'armed attack' and thus, not within the purview of the prohibition of the use of force for the purpose of self-defence, except the attacks fell within one of the narrow stipulations of the International Court of Justice (ICJ) in the *Military and Paramilitary Activities in and Against Nicaragua.*[1]

The 9/11 attack led to an unprecedented call for a reconsideration of the UN Charter prohibition of the use of force or to the reinterpretation of its exceptions

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1 *Nicaragua v. the United States, Merits*, ICJ Reps 1986, p. 14, discussed below (the Nicaragua case).

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in order to accommodate attacks by non-state actors. In the meantime, the gap between the law – the UN Charter and the jurisprudence of the ICJ – and state practice is broadening with each event of attack by non-state actors.

The post-9/11 conception favours the rights of states to lawfully respond in self-defence to armed attack by non-state actors. This conception which is gaining current in legal literature was arguably bolstered by the United Nations Security Council (UNSC) Resolutions 1368 (2001) and 1373 (2001). The Resolutions were passed by the UNSC just after the 9/11 attacks. The Resolutions recognized the inherent right of individual or collective self-defence in accordance with the UN Charter, without linking the attack with any possible state involvement.

A major loophole in the ensuing debate is its focus only on unorganized non-state actors, like terrorists groups, without considering the possibility of the attacking non-state actor being an organized non-state actor – international organization. The possibility of a state seeking to defend itself against attacks by organized non-state actors is not unlikely, given the spate of armed interventions by international organizations. Should such a possibility occur would the law treat international agencies as non-state actors incapable of delivering armed attack and deny the defending state its legal right to self-defence under Article 51?

While focusing on this question, this paper discusses the UN Charter prohibition of the use of force as it applies to international organizations which have the ability to deploy force from the armed forces of its member states. The paper takes cognizance of the fact that international organizations had, and would in future continue to deploy force in a state ostensibly for the purpose of collective security or other equally vague purposes, with or without the authorization of the UNSC. It also takes cognizance of the shortcomings of the UNSC and the non-functioning collective security system of the Charter, which seems to have goaded some states and international agencies into taking unilateral actions in self-defence or for the amorphous excuses of humanitarian intervention. The paper argues that the position of the law that only states are capable of 'armed attack', is a sort of a legal *carte blanche* to international agencies to use force against states without committing armed attack and thus giving to a group of states an avenue to use force against another state in circumstances in which they are not so entitled in their individual capacities.[2]

For the Charter prohibition of force to retain its significance therefore, the paper urges the need to bridge the hiatus between the law and the emerging practice of states, which seems to result from the desperation of states to protect themselves, albeit through self-help outside the domain of law. It argues that the law must shift from its present restricted approach to a broader one that fully comprehends the realities of the activities of non-state actors. For the more laid back the law is, the more the arguments and innovations designed at sidelining it,

2 See L. Henkin, 'The Reports of the Death of Article 2(4) are Greatly Exaggerated', 65 *AJIL*, 544, 546 (1971) (arguing that "there have been a few instances of groups claiming the right to do together what the Charter forbids them singly....").

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gain credence, and the more precarious the peaceful co-existence of states would be.

B. Prohibition of the Use of Force

The prohibition of the use of force in international relations as contained in Article 2(4) of the Charter is the most widely discussed provision of the United Nations Charter, and arguably the most controversial. The ICJ regards Article 2(4) as the cornerstone of the United Nations Charter.[3] The article prohibits the use of force against the territorial integrity and political independence of states. It basically outlawed the unilateral use of force.[4] However, Article 2(4) is not an absolute prohibition, states are entitled to use force in self-defence under Article 51. Force could also be used for enforcement measures under the collective security regime of the United Nations Charter. For the latter purpose, force could be used under the direct supervision, control and command of the United Nations Security Council under Chapter VII, or by states and international agencies, acting under Security Council authorization. Other than these, there is yet no other permissible legal justification for the use of force.[5] This is where the Charter is unique; its prohibition covers war and any other use of force that undermines the territorial integrity and political independence of states. This two-prong approach is wide enough to cover all aspects of cross-border use of force by one state in another. Even if force was not directed at the territorial integrity of the latter state *per se* but at terrorists operating in the state, it is still unlawful and yet violates Article 2(4).

In contemporary international law, however, Article 2(4) seems to have lost its steam, as could be seen by the various exceptions sought to be accommodated within its prohibition and the increasing practice of some states and international organizations, which undermines the prohibition. The diminishing regime of Article 2(4) has been attributed to several factors. Some of which are:

> the mistaken original assumption of Big-Power unanimity; the changing character of war the loopholes for 'self-defense' and 'regional' action; the lack of impartial means to find and characterize facts; the disposition of nations to take law into their own hands and distort and mangle it to their own purpose.[6]

The failure of the collective security system and the activities of non-state actors have also played a major role in this regard. It is as a result of this precarious state

3 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* Judgement of December 19, 2005, p. 53, para 148 (*DRC v. Uganda*).

4 A. Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretative Method', 22(4) *Leiden Journal of International Law*, 651, 656, (2009).

5 This view is supported in C. Chinkin, 'The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) under International Law', 49(4) *ICLQ* 910, 917, (2000).

6 Henkin, *supra*, note 2.

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of the prohibition that Article 2(4) has been pronounced dead,[7] though yet to be so certified.

C. Authorization to Use Force

There are two lawful exceptions to this provision: use of force for individual or collective self-defence – Article 51; use of force for the purpose of application of enforcement measures of the United Nations Security Council – Chapter VII of the Charter.

I. Article 51 of the United Nations Charter

Article 51 of the Charter affirmed that states have an 'inherent right' of individual or collective self-defence if 'an armed attack' occurred against a member of the United Nations. Articles 2(4) and 51 are therefore delicately and intricately connected in many respects. First the latter, being an exception to the former, must be read within the four-corners of the former. States are therefore legally constrained by both articles, "which together form a comprehensive legal limit upon the use of international force".[8]The right to self-defence presupposes the existence of armed attack[9] which a state is repelling in self-defence, provided the defence is necessary and its means are proportionate. But while such vital elements as necessity and proportionality are omitted from Article 51, the article limits the exercise of the right to the existence of 'armed attack', without defining the nature and source of the 'armed attack' needed to activate the Article 51 right.[10] The determination of the real meaning of 'armed attack' has thus become a particularly difficult task and a point of controversy, in view of rising state practice in relation to the phenomenon rise in the use of force against states by non-state actors and the plain textual interpretation of Article 51 by the ICJ.

The duty to define armed attack and clarify the ambit of Article 51 naturally falls on the ICJ. Following the view of the General Assembly of the UN,[11] the summary of the view of the Court is that an, 'armed attack' that meets the Arti-

7 T.M Franck, 'Who Killed Article 2(4)? Or: the Changing Norms Governing the Use of Force by States', 64(4) *AJIL* 809, 809 (1970), A. Clarke Arend, 'International Law and the Recourse to Force: A Shift in Paradigms', 27 Stan. *J Int'l L* 1 (1990-1992). Cf. L. Henkin, *Ibid* (challenging the thesis of T.M); C. Henderson, 'The Bush Doctrine: From Theory to Practice', 9(1) J.C & S.C 3, 7 (2004) (contending that contrary to the claim that Article 2(4) is dead, it remains in effect, as states do not freely breach its provisions without justifying their actions).

8 S. Chee Mook, 'Is Anticipatory Self-Defence Lawful?' 9(1) *Cov. L.J 1*, 5 (2004).

9 See Separate Opinion of Judge Kooljmans, *DRC v. Uganda,* at p. 6, para 28 (affirming that Article 51, "conditions the exercise of the inherent right to self-defence on a previous attack".).

10 "... 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". – The *Nicaragua* case, at p. 94, para 176.

11 In Article 3 of the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX) of December 14, 1974, aggression was defined to include: (a) direct armed invasion of another state by a state; (b) the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another state of such a gravity as to amount to acts of armed attack.

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cle 51 requirement must be one which: (a) proceeded directly from a state; or (b) is carried out by irregulars sent by a state. In the case of the latter, the attack must be of such a nature that if carried out by the regular forces of a state may constitute armed attack. In the *Nicaragua* case, the Court reasoned that acts which can be treated as constituting armed attack must be understood as including, not merely actions by regular armed forces across an international border, but also the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to an actual armed attack conducted by regular forces, or its substantial involvement therein.[12] In the Court's opinion:

> the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces....[13]

The Court followed this view in *DRC v. Uganda*;[14] the case *Concerning the Oil Platforms*;[15] and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[16] In the three cases, the Court declared that a state cannot justify using force in self-defence against attacks carried out by non-state actors.

It could however be seen that the tenure of the position of the Court is being seriously challenged by contemporary issues on the use of force, which lend credence to the opposing view – (a) the contemporary wave of use of force against states by non-state actors; (b) the corresponding rise in the instances in which states have had to use force against non-state actors outside the domain of law. The opposing view proceeds on the premise that the ICJ is confining the definition of armed attack to a past era. It has been argued that the Court should break away from its traditional view in the light of the exigencies of contemporary international life. In *DRC v. Uganda*, Judge Simma reasoned that though a restrictive reading of Article 51 might well have reflected the prevailing interpretation of international law on self-defence for a long time, the Court ought to have reconsidered its position in the light of more recent developments, not only in state practice, but also with regard to the rising favourable *opinio juris*.[17] To buttress his point, the Judge argued that the terrorist attacks of September 11 2001 triggered far more favourable acceptance of claims that Article 51 also covers defensive measures against terrorist groups.[18] The Judge further reasoned that UNSC Resolutions 1368 and 1373 affirmed the view that large-scale attacks by

12 *Nicaragua* case, at p. 103, para 195.
13 *Nicaragua* case, at p. 104, para 195.
14 *DRC v. Uganda* at p. 53, para 146.
15 *(Islamic Republic of Iran v. United States*), ICJ Rep, p. 161 at p. 187, para 51 (the *Oil Platform* case).
16 ICJ Rep 2004, 136 (the *Wall Opinion*).
17 Separate Opinion of Judge B. Simma at p. 337, para 11.
18 *Ibid.*

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non-state actors can qualify as 'armed attacks' within the meaning of Article 51,[19] even if the attacks cannot be attributed to the state, from which the terrorists operated. He thought it would be unreasonable to deny the attacked state the right to self-defence merely because there is no attacker state.[20] On his part, Judge Kooljmans, reasoned that there is nothing in Article 51 that prevents a victim state from exercising its *inherent* right of self-defence,[21] against the activities of armed bands present in the territory of another state. The Judge thought the Court should have reviewed the threshold set out in its jurisprudence because it was no longer in conformity with contemporary international law.[22] In a previous Opinion, Judge Kooljmans had argued that UNSC Resolutions 1368 and 1373 introduced a new element into the exercise of the inherent right of self-defence and urged the Court to take that element into consideration to reverse the restricted interpretation.[23]

The latter view is supported by some degree of state practice: the US deployment of force in Afghanistan in the wake of the 9/11 terrorists attack; the Israeli attack on Lebanon, in response to Hamas attacks; the Pakistani use of force against the PKK within the Iraqi territory; the United States bombing of Baghdad in 1993 for a supposed plot by Saddam Hussein to assassinate the ex-President Bush; missile attacks against Afghanistan and Sudan by the US in response to the October 7, 1998 terrorists attacks on US embassies in Kenya and Tanzania.[24] Also, evidence of state practice in this regard have variously been established before the ICJ – the *Nicaragua* case; the *DRC* case; and the *Wall Advisory Opinion*. All these cases contain evidence of state's responses to armed attacks by non-state actors. In view of the above, it is being argued, though with doubtful validity, that the rising state practice of activating the right to self-defence in response to armed activities against trans-boundary non-state actors has formed a customary law parallel to the text of Article 51. In this connection Raphael Van Steenberghe argues that:

> The correct interpretation of recent state practice amounts to considering that the latter evidences a clear tendency towards allowing states to act in self-defence in response to attacks, even if these attacks are committed only by non-state actors. Such a tendency had already emerged in 2001 from the wide support given to Operation Enduring Freedom. As a result, one should

19 *Ibid.*

20 *Ibid* at p. 337, para 12.

21 Separate Opinion of Judge Kooljmans, *DRC v. Uganda*, at p. 7 para 29. See also Separate Opinion of R. Higgins in the *Wall Opinion,* p. 215, para 33 (stating that there is "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".).

22 *DRC v. Uganda*, at p. 6, Para 25 and p. 8 para 35.

23 Separate Opinion of Judge Kooljmans in the *Wall Opinion* at p. 230, para 37.

24 Other cases are: the 1958 French invasion of Tunisia for allegedly aiding and abetting Algeria rebels to carry out attacks in French territory; the 1968 Israeli use of force against Jordan on the allegation that Jordan was assisting armed infiltrators in carrying out terrorism against Israel. For various other instances, see T. Ruys & S. Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence', 10(3) *J.C & S.L* 289, 292- 293 (2005).

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> conclude more precisely, if one does not analyse the recent state practice separately – that is, without taking into account Enduring Freedom – that this practice actually confirms the evolution of the law of self-defence. In other words, in view of recent state practice, which supplements Enduring Freedom, private armed attacks nowadays seem to be enough to trigger the right of self-defence of the victim state.[25]

The premise of state practice, despite UNSC Resolutions 1368 and 1373, hardly has the *opinio juris* to back up the claim to a juridical status that could place it at par with the law as it stands: the Charter provisions and the authoritative interpretation of the Court.[26] It may as well be that when the instances where states have refrained from invoking Article 51 in response to attacks by non-state actors are weighed against the instances in which states have done the opposite, it may be that state practice in favour of the restrictive view is equally robust. Importantly, also, is the large number of states that still subscribe to the narrow stipulation of the Court. This is evidenced in various GA Resolutions and the wide condemnation that follow the use of force outside the narrow understanding of Charter provisions. Of great significance in this regard, are the criticisms of the US invasion of Iraq.[27]

One other way some authors have approached the controversy is to seek to take the argument outside the regime of Article 51. This category of writers de-emphasizes the requirement of 'armed attack' by focusing on the target of the armed activity of the state using force. To them a state can successfully use force against non-state actors in the territory of another state without breaching the territorial integrity and political independence of the latter state. In this connection Kimberly distinguished the use of force in self-defence against non-state terrorist actors which only targets the non-state actors and their bases of operation in a host state, from the use of force against a host state.[28] By implication when the target is only the non-state actor, the armed action would not breach Article 2(4) and the strict adherence to Article 51 would not arise, as technically speaking, the state would not need to justify its actions. It needs not say that it was acting in self-defence, since there had been no armed attack against the host state – Article 2(4) was not breached.

This argument overlooks the fact that the right of a state to its territorial integrity is analogous to those classes of municipal law actions that are said to be actionable *per se*. The mere forceful entry by a state into the territory of another

25 R. Van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?' 23(1) *Leiden J of Int'l L*, 183, 207 (2010).

26 Though we have our reservations about the interpretation of the Court and hope that the Court heeds the call for reconsideration at the earliest opportunity, this article assumes the correctness of the Court's position. It is however not necessary to state our reservations here, as this is beyond the scope of this work.

27 See Lord Steyn, 'The Legality of the Invasion of Iraq', *European Human Rights Law Review* 1, 7 (2010).

28 K. Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorists Actors', 56(1) *ICLQ* 141, 142 (2007).

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state, without the latter's consent has already breached the territorial integrity of that state, though not its political independence. The proponents of the above view are like the Shakespearean Shylock, who thought he could extract a pound of flesh without spilling blood. We may consider chasing a mouse, which has caused damage in our property, right into our neighbour's living room without his consent. Should our neighbour not have a right to sue in trespass? Perhaps not, after all, we only went for the mouse and not our neighbour's property. The Israeli raid on Entebbe was targeted solely at the terrorists that took its nationals hostage, but it was as much a breach of the territorial integrity of Uganda as was the similar raid carried out by Egypt in Cyprus. As the failed Egyptian attempt showed, no state would tolerate the use of force by another state within its territory without its consent.[29]

Therefore, the argument that there is an emerging right under international law to use force in self-defence directly against non-state terrorist actors, irrespective of the host state's non-involvement in the terrorist attacks, though desirable, is at the moment not tenable. As stated by Kimberly, the argument, "not only fails to 'excuse' the violation of the territorial State's sovereignty, it fails to address the issue at all".[30]

Non-involvement of the host state should however not excuse passivity. Where a state decides to sit back and do nothing about the use of its territory as a base to launch attacks against another state, that former risks defensive actions from the victim state, albeit unlawful. It is a fundamental rule of international law that every state is obligated not to knowingly allow its territory to be used for acts contrary to the rights of other states.[31] In this wise, if the approach of the Court in the *United States Diplomatic and Consular Staff in Tehran*,[32] is anything to go by, it seems a state could become responsible for the acts of non-state actors within its territory for which it was not initially connected, if it refuses or neglects to take meaningful steps to prevent or stop the actors from using its territory as a base. In that case, the American Embassy in Tehran had been attacked and its personnel held hostage by militants in Iran. The actions of the militants were subsequently approved and adopted by the Iranian government, both in words and in deeds.[33] The ICJ held that Iran became responsible for the conducts of the militants by its endorsement of the actions of the militants and for its policy of not ending the hostage taking.

In summary, the position as it stands is that states are not entitled to self-defence in the absence of the Article 51 understanding of 'armed attack' – the attack must proceed from a state, or from a band actively supported by a state for the ICJ conception of armed attack to be met.

29 See T. Ruys, 'The "Protection of Nationals" Doctrine Revisited', 13(2) *J.C & S.L* 233, 251 (2008).

30 Kimberly, *supra* at 147.

31 The *Corfu Channel* case, 1949 ICJ Rep p. 4 at 22. In the *case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment of April 20, 2010, the ICJ affirmed that a state is obligated to use all means at its disposal to avoid activities within its territory, or in any area under its jurisdiction, causing significant damage in another state.

32 ICJ Rep. 1980 p. 3, para 32.

33 *Ibid* pp. 33-37, para, 69- 79.

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II. The Chapter VII Authorization of the Use of Force

Force may be used against a state under the collective security system of the UN Charter. Unlike Article 51, the use of force under this head does not arise as an inherent right of any state. Rather, it is contractual in nature; a product of the contractual undertaking of members of the United Nations to forfeit the protection afforded them by Article 2(4), should their actions fall within the stipulated criteria for collective action under Chapter VII – breach of peace, threat to peace or act of aggression.[34] And it is the UNSC that has the mandate to determine this.

For military action under Chapter VII to occur, however, the UNSC must, in accordance with Articles 40 and 41: (i) have exhausted all measures not involving the use of force; (ii) have made an enforcement order which is now sought to be enforced by military action after exhausting all other preventive or corrective measures. These are in consonance with the structure and language of Chapter VII. Aside the fact that the possibility of using force came later in time to the use of peaceful means, Article 44 specifically commenced with the word 'when'. This is in contrast with the language of Articles 39, 41 and 42 which used the words, 'shall' and 'may'. When compared in their contexts, it appears that the word 'when' was deliberately used to emphasize that force was provided as a last resort, after painstaking consideration, when all peaceful measures must have failed to resolve the conflict. It also appears that the language of Article 44 does not carry the urgency and mandatory character of Articles 39, 41 and 42.

When the UNSC has decided to use force, two avenues are provided for the implementation of its decisions. The first would be for it to call to action military forces made available to it under Article 43; the second is for it to call on its members to implement the decision directly or indirectly through international organizations, following Article 48(2). In its original conception, the UN Charter envisaged a centralized system of collective security in which the UNSC would possess readily available forces for the purpose of undertaking military enforcement actions under its authority and control.[35] Since the first did not materialize, the UNSC has basically relied on the second – the goodwill of its members and international organizations in which they belong – "willing coalitions of States"[36] – to take action on its behalf.

This situation is not without some backlashes on the Charter prohibition on the use of force. This may manifest in two ways. The first is the danger of such states or international agencies exceeding the UNSC mandate. This is not a far-fetched possibility in view of the broad language in which authorizing Resolutions are usually couched. The Resolutions usually permit the use of "all measures necessary".[37] This creates the opportunity for the UNSC mandate to be exploited for

34 Article 39 of the Charter.

35 Article 43 of the Charter.

36 G. Wilson, 'The Legal, Military and Political Consequences of the "Coalition of the Willing" Approach to UN Military Enforcement Action', 12(2) *J.C. & S.L.* 295, 318 (2007).

37 See Security Council Resolution 794 of December 3, 1992; Resolution 678 (1990); see R. McLaughin, 'The Legal Regime Applicable to use of Lethal Force when Operating under a United Nations Security Council Chapter VII Mandate Authorizing "All Necessary Means"', 12(3) *J.C & S.L.* 389 (2007).

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other purposes. For instance, if the claim by the US and its allies that the invasion of Iraq was to enforce UNSC Resolutions, 1441 (2002), 678 (1990) and 687 (1991) was tenable, the other question would be whether the Resolutions authorized a regime change. It could thus be argued that by the overthrow of the government of Iraq, the coalition exceeded its mandate. The implication would be that if US-led action had been justified by the said resolutions, initially, it ceased to be from the point the mandate was exceeded. It thus became a clear case of aggression against the territorial integrity and political independence of Iraq. Exceeded authorization was also the ground on which the illegal but 'legitimate' NATO intervention in FRY was variously seen to breach Articles 2(4) and 53 of the Charter. [38] The second is the danger of international agencies hiding behind the collective security system to commit aggression against a state.

International organizations do not have a self-contained right to use force under the Charter. It is clear from the text of Article 48(2) that international organizations have no greater mandate than states in the enforcements of UNSC enforcement measures. International organizations are permitted to act upon the same terms as states acting individually. It is therefore important to counteract the erroneous view that the mandate of international organizations to deploy force is contained in Chapter VIII, particularly Article 52. Commenting on this notion T.M Franck noted:

> A particularly significant part in this development has been played by regional organizations. Articles 52 and 53 of the Charter have been interpreted to legitimate the use of force by regional organizations in their collective self-interest, and, specifically, the role and primacy of regional organizations in settling disputes between their members. These exceptions to Article 2(4) and their application in practice have played an important, perhaps the most important, role in the growth of international violence over these past twenty-five years.... Their [regional organisations]activities have been effectively beyond the reach of the law of the larger community.... Intended to supplement the U.N. peacekeeping system, the regional organizations have too often instead become instruments of violence, eroding the Article 2(4) injunction.[39]

The notion that regional organizations have a self-contained right under Chapter VIII is wrong and misleading; it creates the erroneous impression that international (regional) organizations can use force without the permission of the SC. This flies in the face of the Charter regulation of the use of force.[40]

38 See T. Gazzini, 'NATO's Role in the Collective Security System', 8(2) J.C & SL 231, 234 (2000).

39 Franck, *supra,* note 7, at p. 822.

40 This, perhaps, explains why UNSC authorization is always a vital issue when force is used outside the direct control of the UNSC. K. Samuels, '*Jus ad Bellum* and Civil Conflicts: A Case Study of the International Community's Approach to Violence in the Conflict in Sierra Leone', 8(2) *J.C. & S.L* 315, 335 (2003); J. Charney, 'The Use of Force Against Terrorism and International Law', 95 *AJIL* 835, 835 (2001).

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Article 52 provides:

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, PROVIDED that such arrangements or agencies and their activities are not disapproved by the secretariat and are consistent with the purposes and principles of the United Nations.
2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements …

A calm reading of this article and indeed the entire provisions of Chapter VIII would reveal regional organizations are no more than the tools by which the UNSC would maintain international peace and security. It is nowhere suggested, expressly or impliedly, that regional organizations could rely on Chapter VIII to act as a parallel body to the UNSC in regional affairs. They are not only to act in accordance with the "purposes and principles of the United Nations",[41] but also to make every effort to achieve pacific settlement of local disputes before referring matters to the UNSC, which would assess the situation and authorize enforcement actions in deserving cases. Of course the purpose and principles of the UN is the promotion of pacific settlement, which excludes the use of force in a manner not stipulated in the Charter. Hence regional organizations shall, failing pacific settlement, report to the UNSC in order to seek and obtain authorization for measures to be taken, if necessary.

In consequence, a regional organization which deploys force without the permission of the UNSC, except in collective self-defence under Article 51, acts in defiance of the Charter. The Charter could not have given to regional organizations more powers than those possessed by the UNSC. If the power of the UNSC to act is constrained by the existence of the tripod requirements mentioned above, regional organizations could not have been excused from those constraints, as none is mentioned in Chapter VIII.

The corollary of the point being made is that an international organization needs not show that it qualifies as a regional organization for it to be able to partake in enforcement actions, if it has the military wherewithal to so do.[42] Otherwise, the international organizations upon which the UNSC could call upon for the enforcement of its measures would be restricted to regional organizations, a description to which not all organizations fit. This will tactically exclude organiza-

41 B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* 1, 3 (1999) (stating that Article 2(4) cannot be contracted out of at the regional level). This is also the essence of the superiority provision of Article 103 of the Charter.

42 See Gazzini, *supra*, note 38 at 249 for a discussion of the concept of regional organization within the operation of Chapter VIII.

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tions, such as NATO, which will have to prove that it falls within the conception of regional organizations.[43]

However, it is the messy state of the collective security system of the Charter and the menace of veto power[44] that have foisted upon the international sphere, the desperation to employ self-help contrary to Charter stipulation. In the words of T.M Franck:

> For security, nations have increasingly fallen back on their own resources and on military and regional alliances. .... As Chapter VII was seen to rust, increasing use began to be made of Articles 51, 52, and 53, which set out the rights of states themselves, under certain exceptional circumstances, to resort to various kinds of force outside the United Nations framework, until today, through practice, the exceptions have overwhelmed the rule and transformed the system.[45]

The precarious state of the collective security system is complicated not only by the fact that most violations have been committed by international organizations led by a veto carrying member of the UNSC but also that some of them do receive *ex post factum* authorization of UNSC.[46]

Whatever the tone and complexion of the debate, the truth is that, on the extant text of the Charter, "it would be impossible to find consensus ... around any set of proposals for military intervention which acknowledged the validity of any intervention not authorized by the UNSC ..."[47] The bottom line, as rightly pointed out by some commentators, is that the view that there is a right to use force outside the confines of the UN Charter, weakens the international prohibition of the use of force, which is the centrepiece of the international legal order.[48] This, according to the proponents of this view, is because the source of this prohibition, being the UN Charter, any theory of the use of force must be focused on the Charter.[49]

43 For what this may entail, see Franck, *supra,* note 7.

44 This works in two directions: the UNSC may be unable to order coercive enforcement measures due to the veto of a member in the same way that it may be unable to condemn an unlawful use of force. This was indeed the fate of the Draft Resolution submitted to the UNSC to condemn halt NATO airstrikes in FRY. See Gazzini, *supra*, note 38 at 234.

45 Franck, *supra,* note 7 at 811.

46 A device which has also been favoured by the General Assembly of the United Nations which has affirmed the power of regional organizations to undertake intervention and seek retrospective legitimacy from the SC. See A. Hehir, 'The Responsibility to Protect: Sound and Fury Signifying Nothing', 24(2) *International Relations*, 218, 220 (2010).

47 See the ICISS Report in A. Hehir, *ibid* at p. 225; **t**he NATO intervention in Kosovo has remained controversial. See C. Greenwood, 'International Law and the NATO Intervention in Kosovo', 49(4) *ICLQ* 926 (2000); V. Lowe, 'International Legal Issues Arising in the Kosovo Crisis', 49(4) *ICLQ*, 934, 941 (2000); Simma, *supra* note 41 at p. 22, all of which hold that the intervention was illegal.

48 See C. Henderson, 'Defending Humanity: When Force is Justified and Why' (Publication Review) 14(3) J.C & S.L. 529, 534 (2009).

49 C. Henderson, *ibid.*

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While arguments and counter arguments rage on, it is self-evident that theory and practice can never converge in the aspect of international relations. If for no other reason, the depth into which human rights and humanitarian law have cut into the area makes it even more difficult for a purely dispassionate argument, from the point of view of Charter provisions, to be generally embraced. This is hopelessly complicated by the failure of the collective security system and the perennial lack of consensus of the big five; with veto power being a clog on the ability of the UNSC to act effectively, as much as it constrains its ability to act speedily.

It is arguable, perhaps with moral justification, that to fill this gap, international organizations are entitled to use force in what may be termed 'illegal but legitimate' intervention. Rightly or wrongly, the 2003 NATO intervention in former Yugoslavia though legally questionable brought the situation under control while the UNSC was yet involved in horse trading. Same were the interventions by ECOWAS through (ECOMOG) in Sierra Leone and Liberia, which also occurred without prior UNSC authorization.[50]

The successes of these rather unlawful uses of force, which in some cases, were approved *ex post facto* by the UNSC, have further weakened the collective security system and lent credence to the unilateral use of force by international organizations so much so that organizations not originally set up for the purpose of humanitarian interventions involving the use of force have now taken up that role. ECOWAS has been involved in several military actions – Liberia, Sierra Leone, and Cote Ivoire – for which it was not created. NATO was originally set up for the purpose of collective self-defence of its members; from December 1992 however, NATO forces became authorized to participate in peacekeeping operations and coercive military activities in order to enforce Chapter VII mandatory resolutions on a case-by-case basis.[51] The EU has carried out a number of military missions including, operation *Concordia* in the Former Yugoslav Republic of Macedonia, *Artemis* in the Democratic Republic of the Congo and *Althea* in Bosnia and Herzegovina.[52]

Against this background, we shall now seek to discover how the law responds to attacks by these organized non-state actors.

D. No Armed Attack, No Self-Defence

The position of international law, as could be gathered from the jurisprudence of the ICJ stated above, is that the notion of armed attack is not entirely judged by the gravity of the attack but mainly by the entity carrying out the attack. For there to be 'armed attack' for the purpose of Article 51, the attack must have been

50 In the case of Liberia, it took the UNSC about 16 months to retrospectively approve ECONOG's intervention under Chapter VII. For Sierra Leone it took 28 months. See generally, A. Adekeye, *Building Peace in West Africa*. 100 (Boulder, Colorado: Lynne Rienner Publishers, Inc. 2002).

51 Gazzini, *supra* note 38 at 233-234.

52 A. Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice', 19(1) *EJIL* 67, 71 (2008).

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carried out by a state. Where this is the case, the victim state is entitled, subject to the rule of proportionality, to rely on Article 51 to defend herself. Where, on the other hand, an attack – such as the 9/11 terrorist attack on the United States – has occurred against a state, that state is not lawfully entitled to activate its Article 51 rights against a state from which the non-state perpetrator merely received assistance, except the attack was carried out under the direction and or control of such a state that it would have amounted to armed attack had it been carried out by the regular Forces of that state. Therefore a state can avail itself of the right to self-defence only where there has been a direct or indirect armed attack by another state. All other forms of attack do not entitle a state to unilaterally respond in self-defence; though they may amount to a breach of the peace for which the Security Council is empowered to act under Chapter VII.[53]

In view of this, the rising wave of the extra-charter use of force by international organizations creates as much cause for worry, as it has implications for the Charter prohibition on the use of force. A few of such occurrences are worth mentioning here: the Warsaw Pact Alliance invasion of Czechoslovakia in 1968; the 1983 invasion of Grenada by the Organization of Eastern Caribbean States and the United States; ECOWAS' ECOMOG forces in Sierra Leone, Liberia and Cote Ivoire;[54] are all indications of the chances of international organizations engaging in dangerous extra-charter use of force.[55] The situation is complicated by the fact that regional organizations believe they could "take the law into their own hands, to act militarily without Security Council approval even in the absence of an actual armed attack".[56]

The question is, can such organizations be guilty of 'armed attack' to which the victim state can legally respond in self-defence? This seems farfetched in view of the prevailing trend of international law in this sphere.[57] Just as in the response of states to attacks by unorganized non-state actors, an aggrieved state would have to seek solutions outside the domain of law, since the law does not reckon with non-state actors for the purpose of Article 51. One option open to an aggrieved state, therefore, may be to pursue remedies against each member of the organization. There are a few instances of this. In May 1999, a United States' aircraft, under the auspices of NATO, accidentally bombed the Chinese Embassy in Belgrade. Although NATO immediately expressed its regret over the matter, it was the United States that entered into bilateral negotiations with, and paid com-

53 See the Declaration of Judge Koroma in *DRC v. Uganda*, at p. 9.

54 There are many other such organizations capable of deploring armed force in another state. See *inter alia*: Treaty of Friendship Cooperation and Mutual Defence (the Warsaw Pact) signed at Warsaw on May 14, 1955 by eight former communist states in Eastern Europe. See 119 UNTS 24 (1955); 49 *AJIL* Supp. 194 (1955). Following the collapse of the Soviet Union and the eventual overthrow of communist governments in other member states, this Pact became weakened as some members abandoned it for NATO; Inter-American Treaty of Reciprocal Assistance of September 2, 1947. See 21 UNTS 93 (1948); 43 *AJIL* Supp. 53 (1949); Pact of the League of Arab States of March 22, 1945, 70 UNTS 248, 39 *AJIL* Supp. 266 (1945).

55 See Clarke Arend, *supra* note 7.

56 Franck, *supra* note 7, at p. 824.

57 As discussed above.

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pensations to, China.[58] Also, in consequence of NATO bombings in former FRY,[59] FRY brought proceedings against each of the NATO states that participated in the bombings. The common cause of action against each of the respondents states arose from their role in the intervention of NATO in former Yugoslavia. The applicant had to seek individual remedies against the respondents, because it was not possible to hold NATO responsible for the breaches alleged. In other words, NATO, as an entity, has no obligation not to use force against another state under the Charter. The Court did not have the opportunity to determine whether it would have been possible to directly sue NATO. The issue may, perhaps, have been raised had any of the cases made it to the merit stage.

For the purpose of self-defence however, apart from the practical difficulties that would militate against a state such as FRY, had it decided to use force in self-defence against the participating NATO states individually, there is also the difficulty of FRY proving that the bombings carried out by NATO were done under the authority of each or any of these states; or that NATO is an organ of each or any of the states.[60]

These are the tests which have been formulated by the ICJ. In the *case Concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide*,[61] the Court postulated that for the international responsibility of a state to be engaged, the conducts called in question must be attributable to that state. Conducts are attributable to a state if the conducts: (a) are committed by persons or entities whose conducts are necessarily attributable to it as the instruments of its action; or (b) were committed by persons who, while not organs of the state alleged to have committed the conducts, did nevertheless act on the instructions of, or under the direction or control of that state.[62]

The Court considered the first to be well established and one of the cornerstones of the law of states responsibilities. As for the relevant state organs, the Court relied on Article 4 of the ILC Articles on State Responsibility, stating that:

58 Gazzini, *supra*, note 38. There is also the recent incident of September 2010, when the United States was reported to have apologized for NATO strikes in Pakistan, one of which killed three Pakistani soldiers in Western Kurram Region.

59 *Legality of the Use of Force (Serbia and Montenegro v. Portugal)* Preliminary Objections, ICJ Rep. 2004, p. 1160; *Serbia and Montenegro v. Netherlands,* Preliminary Objections, ICJ Rep. 2004, p. 1011; *Serbia and Montenegro v. Italy,* Preliminary Objections, ICJ Rep. 2004, p. 865; *Serbia and Montenegro v. Germany,* Preliminary Objections, ICJ Rep. 2004, p. 720; *Serbia and Montenegro v. France,* Preliminary Objections, ICJ Rep. 2004, p. 575; *Serbia and Montenegro v. Canada,* Preliminary Objections, ICJ Rep. 2004, p. 429; *Serbia and Montenegro v. Belgium,* Preliminary Objections, ICJ Rep. 2004, p. 279; *Legality of the Use of Force (Yugoslavia v. United States of America)* Provisional Measures, ICJ Rep 1996, p. 916; *Yugoslavia v. Spain,* Provisional Measures, ICJ Rep 1996, p. 761; *Serbia and Montenegro v. United Kingdom,* Preliminary Objections, ICJ Rep. 2004, p. 1307.

60 As was the case with the Warsaw Pact alliance, which operated as an appendage of the Soviet Ministry of Defence, without an organizational structure of its own. See G.E. Curtis (Ed.), *Czechoslovakia: A Country Study* (Washington, D.C., Library of Congress 1992) cited *in* The Warsaw Pact (online) <www.shsu.edu/-his_ncp/WarPact.html> (accessed 05 October 2010).

61 (*Bosnia Herzegovina v. Serbia and Montenegro*) Judgment of February 29, 2007.

62 *Ibid at* p 136-137, para 379-384.

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i. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
ii. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Accordingly, in *DRC v. Uganda*, the Court held that the conduct of the Uganda Peoples' Defence Forces (UPDF) as a whole is clearly attributable to Uganda, being the conduct of a state organ, because, "the conduct of any organ of a State must be regarded as an act of that State". [63] Therefore, a claimant state must prove that an international organization is recognized by the municipal laws of its members as an internal organ. It would thus be impossible to engage the international obligations of such states under the first parameter because states hardly make a practice of naming international organizations as their internal organs.

On the second parameter, the ICJ has emphasized that it is essential to go beyond legal status alone in order to grasp the reality of the relationship between the persons (or entity) and the state to which they are so closely attached as to appear to be nothing more than its agent. The Court reasoned that any other solution would allow states to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.[64] The legal transplant contemplated by the Court here, is not very helpful. This is because, in the *Genocide* case, the ICJ reasoned that going beyond legal status implicates the further question of whether it is possible, in principle, to attribute to a state, conduct of persons (or entities) who, while they do not have the legal status of state organs, in fact, acted under such strict control by a state that they must be treated as its organs for purposes of the necessary attribution leading to the state's responsibility for an internationally wrongful act.[65] Relying on the *Nicaragua* case, the Court found the necessary elements for the strict control to be of 'dependence' on the side of the non-state entity and 'control' on the side of the state. Accordingly, the acts of an international organization can be attributed to a state if: (a) the organization depended on the state for the conduct called into question; (b) the state exerted control over the organization. This follows Article 8 of the ILC Articles on State Responsibility, which provides:

> 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 acting on the instructions of, or under the direction or control of,that State in carrying out the conduct.

63 *Supra* at p. 242, para 213.
64 *Supra* at p.140 para 391.
65 *Ibid.*

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A victim state would have great difficulty proving the dependence and control test due to the high degree of proof required, and which degree of proof has been quite difficult to attain in any particular case. This is even so, giving the observation of James Crawford, that it is necessary to establish the existence of a 'real link' between the state and non-state agents. And that such a conduct will be attributable if the state directed or controlled the specific operation and the conduct complained of was an 'integral part' of that operation. Peripheral or incidental conduct falls beyond the scope of Article 8.[66] Remarkably, the Court has continuously affirmed that it requires nothing short of 'complete dependence' in the relationship between the non-state entity and the state, for the acts of the former to become those of the latter.[67] It is very unlikely that a claimant state would be able to prove 'complete dependence' because it would require the proof of strategic operational details between the entity and the state. The reason for this high threshold, as explained by the Court in the *Genocide* case, is because it is exceptional to equate persons or entities with state organs when they do not have that status under internal law. [68] Absent legal status therefore, there must be complete dependence.

Accordingly, in the *Nicaragua* case, the Court held that "there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf".[69] It further affirmed that the evidence available to it was insufficient to demonstrate that the *contras* had complete dependence on United States aid, and as such unable to determine that the *contra* force may be equated, for legal purposes, with the forces of the United States.[70] For the same reason, FRY was not internationally responsible for the conduct of the persons or entities that committed the acts of genocide at Srebrenica. This was so notwithstanding that there were powerful political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the army of the Republika Srpska (VRS), which was alleged to have committed the acts.[71]

The high threshold set by the Court was criticized by Judge Awn Shawkat Al-Khasawneh thus:

> When, however, the shared objective is the commission of international crimes, to require both control over the non-State actors and the specific operations in the context of which international crimes were committed is too high a threshold. The inherent danger in such an approach is that it gives

66 J. Crawford, 'The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries', (2001) 110-113 cited *in* N. A. Shah, *Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law's Response to Terrorism*, 12(1) *J.C& S.L* 95, 109 (2007).

67 The *Genocide* case, at p. 141, para 393; *Nicaragua* case at p. 63, para 111;

68 *Ibid.*

69 *Nicaragua* case at p. 62 para 109.

70 *Ibid* at p. 62-63, para 110.

71 *Genocide* case at p. 141, para 393-394.

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> States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore.[72]

A broader test was followed by the Appeals Chambers of the ICTY in the *Celebici* case, where it reasoned that:

> the 'overall control' test could thus be fulfilled even if the armed forces acting on behalf of the 'controlling state' had autonomous choices of means and tactics although participating in a common strategy along with the controlling State.[73]

The ICTY jurisprudence should however be read within the limits of its competence. As rightly observed by Ruys *et al*.:

> It must be admitted that the ICTY's competence is limited to establishing individual criminal responsibility and that the facts of the case were considerably different from those in the *Nicaragua case*. Furthermore, the Tribunal was more concerned to establish whether Bosnian Serb forces were under the control of Yugoslavia in order to internationalise the armed conflict. Hence, it is uncertain whether the 'overall control' test of *Tadic* has replaced the previously adopted effective control standard by the ICJ. In any event, the ICTY has endorsed the standard of the ICJ in cases where the controlling state is not the territorial state and the armed private groups perform their attacks abroad.[74]

On the whole, the claim that international agencies have a right to use force under Chapter VIII, not only exists outside the domain of law, it places the Charter paradigm of the use of force at the mercies of the agency. This is so because such use of force does not fall within the moderation of the law – international agencies claiming a right to use force under Chapter VIII are neither constrained by the requirements of Article 51 nor the procedural hurdles in Chapter VII. On top of these is that, should any international agencies, not being states but capable of armed attack, decide to assemble the armies of its members against a state, the latter state cannot lawfully respond in self-defence unless the twin parameters of dependence and control are proved.

E. Conclusion

There have been several attempts (informed by the precarious international environment as dominated by threat from weapons of mass destruction and non-state actors) to interpretatively reinvent Articles 2(4) and 51. These innovative interpretations seem to overlook the extent of the textual elasticity of the provi-

72 Dissenting Opinion of Judge Awn Shawkat Al-Khasawnee in the *Genocide* case, at p. 256 para 39.
73 *Prosecutor v. Delalic*, ICTY Appeals Chambers, 20 February 2001, para 47.
74 Ruys & Verhoeven, *supra,* note 24 at p. 301.

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sions. These are all backlashes of the realization that it may perhaps take another world war for states to be united again for even the slightest revision or amendment of the UN Charter to be achieved. The consensus and sense of compulsion that drove the 1945 efforts have been consumed in the flurry of new but disuniting challenges of modern international space. The international community is therefore confronted with novel challenges which require novel solutions. Novel exigencies requiring novel laws: law must grow with growth; progress is the hallmark of a living law.

Concerning the use of force, the law has failed to grow with the exigencies of the time and this has invariably increased the vulnerability of states to armed attack while withholding from them their most potent means of self preservation – self-defence. In consequence, states are finding incentives and justifications to use force outside the domain of law, when their legitimate interests are threatened by armed attack, particularly from non-state actors, which equally operate outside the domain of law. This has created an upset in the balance between the prohibition of the use of force and the exceptions thereto, as well as portends grave danger, not only for the Charter prohibition of the use of force but also for the principle of sovereign equality. The reason being that, where the law, under which the weak seek solace, diminishes in its dignity and respect, the strong would naturally become oppressive. With the exception of the *United States Diplomatic and Consular Staff in Tehran* and *Corfu Channel* cases, all other cases implicating the use of force were brought by weaker states,[75] which could not have been able to match their alleged aggressors arms to arms. Although the *United States Diplomatic and Consular Staff in Tehran* and *Corfu Channel* cases were brought by the US and UK respectively, these cases were in a different category. In none of the cases, did the applicants allege the use of force within their territory. Rather in the events leading to each of the cases, the applicants had resorted to self-help – an expression of their military supremacy.

It is however, difficult to blame those states, which genuinely feeling threatened, resorted to using force outside the domain of law. Their choices may have been influenced by the realization that the law would not guarantee their survival – the fulcrum of the controversies surrounding the use of force in self-defence. According to Martti Koskenniemi:

> Article 51 was enacted to protect the State, surely it cannot be so interpreted as to bring about the destruction of the State, with the result that normative assessment will always be conditioned by the deformalized criterion of what constitutes a threat.[76]

If as shown above, the law, as it stands, does not protect the interests of a state which is being attacked by non-state actors, such a state is justified in taking

75 *DRC v. Uganda*; the *Nicaragua* case, the *Wall Opinion,* the *Oil Platform* case and the *Legality of the Use of Force* cases*, supra,* note 100.

76 M. Koskenniemi, 'International Legislation Today: Limits and Possibilities', 23(1) *Wisconsin International Law Journal,* 61, 79 (2005).

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steps to protect itself, even if it means breaking the law.[77] A glaring example of this is the event leading to the Israeli attack on an alleged training camp for 'Palestinian terrorists' in Syria in October 2003. Before the attack Israel had lodged a complaint with the Security Council in 2003, claiming that Lebanon and Syria had been unwilling to restrain Hezbollah and warning that serious consequences would result if Hezbollah was allowed to continue carrying out attacks.[78] The fact that Israel brought the matter to the SC indicated an Israel that was willing to follow the path of the law, had its interests been protected through that means. Of course, nations know the consequence of resting their survival upon the assurances of an organization like the UN. Did Ethiopia not rest its hopes upon the assurances of the League of Nations when she was invaded and annexed Italy in October 1935? Did the League not abandon Ethiopia to the insatiable aggressive tendencies of Italy?[79] Of course, it did.

The current state of the law has created a system within which a certain entity could use force against a state, without a corresponding right in that state to lawfully challenge its aggressor by force. Neither is there hope for a successful suit for reparation, since the entity is not a state, notwithstanding that it is a powerful international organization. The unlawful uses of force by non-state actors – organized or unorganized – is not going to change; what could change is the law that the states against which these entities use force cannot lawfully respond in self-defence. For change to occur, the Court must accept that non-state actors, more so, international organizations, are indeed capable of provoking Article 51. With specific regard to international organizations, whenever the opportunity presents itself, the Court should be ready to hold that their activities constitute armed attack, if it so finds; and hold the state members of the organization jointly and severally responsible. To achieve this, the Court must focus on the scale of the armed activity rather than on the entity carrying out the attack. The relevant questions should be: has there been armed attack? If yes; is the means of defence by defending state proportional to the attack? Judge Kooijmans came close to this view when he reasoned that the finding that an allegation of armed attack by a particular state cannot be substantiated and therefore not attributable to it, has no direct legal relevance for the question whether a state (Uganda) is entitled to exercise its right of self-defence.[80]

The fact that the Court has held the contrary view over time does not mean that it cannot modify its view to fit into the garment of present day realities, neither does it mean that the alternate view to which the provisions is also susceptible is wrong. After all, the Court has been variously called upon, even in individual opinions of its judges, to overrule its current position. By extending definition of armed attack to cover attacks by non-state actors, the Court would be bringing

77 In the *Genocide* case, Para 43 the ICJ admitted that "a party … may be justified in taking certain measures which it considers to be 'necessary' for the protection of its essential security interests".

78 See Ruys & Verhoeven, *supra,* note 24, at 295.

79 See Appeal to the League of Nations by his Imperial Majesty, Haile Selassie I, June 1936, Geneva, Switzerland. <www.nazret.com/history/him_geneva.php> accessed 21 December 20100.

80 Separate Opinion of Judge Kooijmans in *DRC v. Uganda,* at p. 10, para 32.

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into the domain of law all instances of necessary responses to activities of non-state actors. This would reduce the incentives for self-help as well as create a warning mechanism to states, which may as well hide under the current system to evade the prohibition.

It may be argued that this would exacerbate the desire of states to use force in self-defence for even minor frontier non-state assault. It is unlikely that there would be more incidents of use of force in non-state actor-provoked self-defence than have occurred under the present understanding of 'armed attack'. What is likely is that when states are permitted to do within the domain of law, what they would have done outside the domain of law, they would strive to keep their actions within the confines of the law and thus strive to conform to such other tenets of the law as proportionality and necessity. The corollary would be that states would be unwilling to host or participate in attacks by non-state actors against another, for fear of lawful exercise of self-defence by the victim state.

In the final analysis, rather than resigning to the misfortune of pronouncing the death of Article 2(4) and perceiving that it mocks us from its grave,[81] we should believe that it lives, even if we have to place it on oxygen support. As enviably put by Louis Henkin:

its condition is grave indeed, its maladies are not necessarily terminal. There is yet time to prescribe, transplant, salvage, to keep alive at all cost the principal norm of international law in our time.[82]

Despite the strength of arguments or practices justifying counter-textual and counter-logical[83] exceptions to Article 2(4), it must be realized that an abandonment of "the Charter as a guide to their … behaviour … [by states] would be a catastrophe, signalling the complete breakdown of the state system as a system of peace".[84] It is by keeping it alive with a constant reminder to allied and foes that:

> the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members […can…] be constantly and scrupulously respected.[85]

For "The Charter system cannot work if it is optional".[86]

81 Franck, *supra* note 7, at 809 ; Clarke Arend, *supra* note 7.
82 Henkin, *supra,* note 2, at 544.
83 To borrow the words of Y. Dinstein, *War, Aggression and Self-defence*, 83-84 (Cambridge University Press, 2005).
84 E. Rostow, 'The Legality of the International Use of Force by and from States', 10 *Yale J Int'l L* 286, 290 (1985).
85 *United States Diplomatic and Consular Staff in Tehran, supra*, p. 43 para 92.
86 V. Lowe, '"Clear and Present Danger": Responses to Terrorism', 54(1) *ICLQ*, 185, 194 (2005).