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"The Tangled Web": The Right Of Self-Defense  
Against Non-State Actors In The *Armed  
Activities Case*

STEPHANIE A. BARBOUR  
ZOE A. SALZMAN  
New York University

**Faculty Director:** Benedict Kingsbury

**Co-Directors:** Philip Alston and J.H.H. Weiler

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**Institute for International Law and Justice**

New York University School of Law  
40 Washington Square South, VH 314  
New York, NY 10012

Website: [www.iilj.org](http://www.iilj.org)

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ZOE A. SALZMAN

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New York University School of Law  
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**"THE TANGLED WEB": THE RIGHT OF SELF-DEFENSE AGAINST NON-STATE ACTORS IN THE  
*ARMED ACTIVITIES CASE***

Stephanie A. Barbour & Zoe A. Salzman\*

**Abstract**

This article examines the issue of the right of States to use self-defense against non-State actors that is raised by the International Court of Justice's judgment in the case of *Armed Activities on the Territory of the Congo (DRC v. Uganda)*. This article begins with a doctrinal examination of the Court's self-defense analysis, focusing on the questions of armed attack by non-State armed groups and the requirement of attribution to a State. It suggests that the Court struggled with its self-defense analysis because of the difficult questions raised by the application of the international law on self-defense to non-State actors in control of an ungoverned territory. It posits that in such a situation, requiring attribution to a State is an inapposite test, which ought to be rejected in favor of holding non-State actors directly responsible. The article concludes by setting forth a prognosis for the future of international law if actors, such as the International Court of Justice, continue to miss opportunities such as the one presented in *Armed Activities* to engage with these questions.

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\* Stephanie A. Barbour, LL.M. (International Legal Studies) New York University 2007; LL.B. University of Dublin Trinity College 2006.

Zoe A. Salzman, Candidate for LL.M. (International Legal Studies) New York University School of Law 2008, Institute for International Law and Justice Fellow; J.D. New York University School of Law 2007.

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## **"THE TANGLED WEB": THE RIGHT OF SELF-DEFENSE AGAINST NON-STATE ACTORS IN THE ARMED ACTIVITIES CASE**

### **I) INTRODUCTION**

A central issue in *Armed Activities on the Territory of the Congo* (“*Armed Activities*”),<sup>1</sup> wherein the Democratic Republic of the Congo (“the DRC” or “the Congo”) brought suit against its neighbor Uganda in the International Court of Justice (“ICJ” or “the Court”), was Uganda’s defense that it was entitled to intervene in the DRC in self-defense. Uganda argued that it was acting in self-defense against the rebel forces launching attacks against it from within the neighbouring territory of the DRC. At the core of the case, therefore, was the right of a State to intervene in another State’s territory in self-defense against non-State actors<sup>2</sup> located therein. The name of the case itself, *Armed Activities on the Territory of the Congo*, suggests the limited involvement of the government of the DRC in the armed activities between irregular forces and the official Ugandan armed forces.

The conflict in the DRC is characterized by the presence of a vast array of rebel groups that control significant portions of the DRC’s territory<sup>3</sup> and are sometimes allied with neighboring States involved in the conflict.<sup>4</sup> One expert describes the situation in the Congo as “warlordism fueled by immiseration and xenophobia.”<sup>5</sup> Even in the wake of the Lusaka Peace Accords (the ceasefire agreement to which several rebel groups were signatories that ended open hostilities and set a timetable for the withdrawal of Ugandan forces from the Congo) and this case, the situation remains dangerously unstable due to the presence of irregular forces.<sup>6</sup> The

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<sup>1</sup> See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment, I.C.J. Rep. 2005 (Dec. 19) [hereinafter “Judgment”].

<sup>2</sup> The term “non-State actors” is broad and has been used to describe paramilitaries, irregular forces, armed bands, ethnic militias, warlord armies, separatist forces, guerilla groups and so on. See Michael T. Klare, *The Deadly Connection: Paramilitary Bands, Small Arms Diffusion, and State Failure*, in WHEN STATES FAIL: CAUSES AND CONSEQUENCES 116, 117 (Robert I. Rotberg ed., 2004). Terrorists have also lately come to be considered part of this group, although there was a time when they were considered internal domestic actors and therefore slightly apart from other non-State actors. See JACKSON NYAMUYA MAOGOTO, *BATTLING TERRORISM: LEGAL PERSPECTIVES ON THE USE OF FORCE AND THE WAR ON TERROR* 52 (Ashgate 2005). Although the term can also refer to non-governmental civil society organizations and international organizations, which are not “state” in nature, this article uses the term “non-State actors” to refer to the irregular forces or rebel groups of the kind operating within the DRC.

<sup>3</sup> In its judgment, the Court devotes a lengthy paragraph to explaining who these groups are and their allegiances. See Judgment, para. 27.

<sup>4</sup> Judgment, para 126; see also René Lemarchand, *The Democratic Republic of the Congo: From Failure to Potential Reconstruction*, in STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR 29, 40 (Robert I. Rotberg ed., 2003) (“In 2001, at least six states were militarily involved, officially or unofficially: Rwanda, Uganda, and Burundi on the side of the rebellion, and Angola, Zimbabwe, and Namibia on the side of the Kabila government in Kinshasa.”).

<sup>5</sup> Lemarchand, *supra* note 4, at 59.

<sup>6</sup> Although the war officially ended in 2003, “rebel militias continue to rape and murder, especially in the country’s East . . . Government troops commit atrocities as well.” Simon Robinson, *Inside Congo*, TIME, Jan. 29, 2007, at 42. The Human Rights Council recently reviewed a report (E/CN.4/2006/113) by the Independent Expert on the situation of human rights in the Democratic Republic of the Congo which stated that “. . . militias and other armed groups, both Congolese and foreign, as well as the Armed Forces of the Democratic Republic of the Congo

conflict in the DRC is a tug of war for control over its territory by these groups – particularly over the country’s vast natural resources.<sup>7</sup> Since 1998, four million people have died as a result of the violence. The *Armed Activities* case is thus a “tangled web”<sup>8</sup> that attempts to address claims of invasion, occupation of territory, massive human rights violations, and despoliation of natural resources, all complicated by the presence of non-State actors.

This case suggests that armed conflicts are increasingly characterized by the presence of a fundamentally different kind of non-State actor than the armed groups of the Cold War era, such as the Nicaraguan Contras. While those groups were generally aligned along the ideological divide and were often closely controlled by States, we suggest that the world is currently witnessing the rise of unaffiliated non-State actors, capable of acting in concert with States when it is advantageous to do so, but increasingly acting independently.

In this article, we argue that the international law on the use of force in self-defense and state responsibility was not designed to address independent non-State actors in control of a significant portion of a State’s territory. The Court in *Armed Activities* refused to engage with this new reality, thus avoiding answering the difficult questions raised by State failure and non-State actors in international law, and producing a confusing doctrinal analysis on the application of the law of self-defense to the facts of the case. This article argues that the *Armed Activities* opinion is symptomatic of deep problems in the application of the traditional international law of self-defense to conflicts dominated by non-State actors, especially when those actors have seized control of territory within a weak or failed State. Our diagnosis of these problems demonstrates that the Court is struggling to apply a rigid and outdated self-defense analysis that does not adequately address this type of conflict. Our prognosis suggests that blind adherence to the State system is no longer possible; international law must begin to engage with the reality of conflicts that are characterized by State failure and non-State actors that are largely uncontrolled by any State. Faced head on, the dilemma is between continuing the sham of attribution to States that are not responsible for the irregular forces within their territory and contemplating new solutions that preserve the inherent right of self-defense of States enshrined in the Charter. The solution we proffer – expanding the self-defence paradigm to include non-State actor responsibility – can be identified as a move away from an overly rigid, state-centric international legal system, to address these new world realities.

This article proceeds as follows. Part II briefly outlines the arguments of the parties before the Court and the facts of the case that are relevant for our analysis. Part III provides a

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(FARDC) and the Mai-Mai, are committing atrocities and other massive human rights violations with impunity.” The report also cites as a main cause of concern, “the steady deterioration of law and order in Ituri (Orientale province) following repeated attacks by the armed militias.” See Press Release, Human Rights Council, Council Reviews Human Rights in Democratic People’s Republic of Korea, Burundi, Democratic Republic of Congo and Myanmar, U.N. Doc. HR/HRC/06/49/Rev.1 (27 Sept., 2006). In October 2007, fresh violence broke out in the province of Kivu between the government and local militias and another rebel force refusing to disarm, displacing over 370,000 people. See *Thousands Flee amid Congo Clashes*, BBC NEWS (20 Oct., 2007), available at <http://news.bbc.co.uk/2/hi/africa/7054699.stm>.

<sup>7</sup> This includes the country’s gold, diamond, uranium, copper and coltan mines. See Klare, *supra* note 2, at 118.

<sup>8</sup> Judgment, Sep. Op. of Kooijmans J., para. 11 (questioning “Is it possible to extract from this tangled web one element, to isolate it, to subject it to legal analysis and to arrive at a legal assessment as to its consequences for the relations between only two of the parties involved?”).

detailed doctrinal analysis of the Court's self-defense analysis, focusing particularly on the threshold for armed attack committed by non-State actors and attribution thereof to a State. This analysis illustrates the complexity in applying a traditional self-defense analysis to non-State actors and the uncertainty in this area of the law. Part IV moves beyond this doctrinal critique to examine the broader normative problems of the application of international law on the use of force in self-defense against non-State actors, especially those in control of ungoverned territory. Part V concludes, setting forth a prognosis for international law, given the proliferation of conflicts involving non-State actors, if the uncertainty in this area of international law is not remedied.

## **II) FACTS AND ARGUMENTS BEFORE THE COURT IN *ARMED ACTIVITIES***

The case brought by the DRC against Uganda addressed but one narrow sliver of an enormously complicated conflict. A conflagration of epic proportions has raged in the Great Lakes region of East Africa for over a decade, with most of the warring taking place on the soil of the DRC. In 1996, an insurrection in the DRC by rebels led by Laurent Kabila and supported by Rwanda and Uganda led to the toppling of the then president, the notorious kleptocratic dictator Mobutu Sese Seko, and the installation of Kabila as President. In 1998, after Kabila attempted to reduce Uganda's and Rwanda's influence in the DRC, another major rebellion against Kabila's government began, involving no fewer than six regional neighbours on either side of the conflict. The Lusaka Accords negotiated in 1999 by the UN failed to bring an end to the violence. Despite the ethnic nature of the various rebel groups, by 2001, the war in the DRC had the distinct character of a proxy war being fought between Uganda, Rwanda, and Burundi backing the insurgency on the one hand, and Angola, Namibia, and Zimbabwe backing the Kabila government on the other. In January 2001, Kabila was assassinated during a failed coup attempt, whereupon he was succeeded by his son Joseph. As a consequence of these frequent hostilities, millions have died and been displaced and the DRC is fragmented into several parts, each controlled by different, highly fluid, alliances of actors.<sup>9</sup>

This chaos was still on-going in 1999, when the ICJ began to address the DRC's suit against Uganda for its role in wreaking havoc in the Congo. The claims made by the parties in the case illustrate the extent of non-State actor involvement in this conflict. The DRC brought the case, challenging Uganda's military control over one-third of the 900,000 square mile Congolese territory between 1998 and 2003<sup>10</sup> – a territory around the size of Germany.<sup>11</sup> The DRC claimed that Uganda had committed acts of armed aggression and had supported rebel groups (the MLC and the RCD)<sup>12</sup> in operations aimed at destabilizing the Congo. Uganda counterclaimed that the DRC had exercised force in violation of Article 2(4) of the U.N. Charter and in violation of the Lusaka Peace Agreement. Uganda argued that the DRC had consented to its military presence

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<sup>9</sup> Lemarchand, *supra* note 4, at 29-30.

<sup>10</sup> Judgment, para. 107.

<sup>11</sup> See Judgment, Sep. Op. of Simma J., para. 2.

<sup>12</sup> The "Congo Liberation Movement" ("Mouvement de libération du Congo") and the "Congolese Rally for Democracy" ("Rassemblement congolais pour la démocratie"). In this article, we shall not distinguish between the rebel factions except where necessary, as the legal issues raised are pertinent to all of these irregular forces.

until September 11, 1998. After that date, Uganda asserted that it acted in self-defense to prevent further rebel attacks against it from within the DRC.<sup>13</sup>

Uganda argued that its actions were justified by self-defense because: first, the combined forces of the DRC, the Sudan and anti-Ugandan rebels massed along Uganda's border threatened Uganda's territorial integrity; second, the DRC had directly commanded and supported the armed groups' attacks on Uganda; third, the DRC had tolerated the use of its territory by the armed groups as a base for attacks on Uganda.<sup>14</sup> Relying on the *Corfu Channel* case, Uganda argued that every State has "not only a duty to refrain from providing any support to groups carrying out subversive or terrorist activities against another State, but also a duty of vigilance to ensure that such activities are not tolerated."<sup>15</sup> This was a novel argument; traditionally, acquiescence gives rise only to delictual consequences under the law of state responsibility rather than an entitlement to use force in self-defense.<sup>16</sup>

Rejecting both Uganda's consent and self-defense arguments, the Court concluded that "[t]he unlawful military presence 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. . . ."<sup>17</sup> The Court found that Uganda had failed to show that the rebel attacks could be attributed to the DRC, therefore Uganda had not satisfied the requirements of Article 51 of the U.N. Charter. The Court also indicated that even if Uganda had been entitled to self-defense, its attacks had violated the requirements of necessity and proportionality.<sup>18</sup>

### III) THE COURT'S ANALYSIS OF THE SELF-DEFENSE ISSUES IN *ARMED ACTIVITIES*

Part III provides a detailed examination of the Court's self-defense analysis in *Armed Activities*. We begin by examining the difficulty of framing the issue of self-defense against non-State actors in control of territory within the traditional international law framework. We move on to closely examine the Court's armed attack and attribution analysis, which demonstrates the tension between the traditional doctrine and the facts of this case. Finally, we examine the Court's discussion of anticipatory self-defense analysis and necessity and proportionality, concluding that this analysis is symptomatic of the Court's attempt to reconcile the self-defense doctrine with conflicting, emerging state practice.

This Part argues that the Court struggled to apply the standards of the international law on self-defense to non-State actors, illustrating a normative gap concerning non-State actors in international law.<sup>19</sup> It appears that deep structural flaws in international law caused the Court to

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<sup>13</sup> Judgment, para. 108.

<sup>14</sup> See e.g. *Counter-Memorial of Uganda*, (April 21, 2001), para. 52-53, available at <http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>.

<sup>15</sup> Judgment, para. 177; see also Margaret E. McGuinness, *Case Concerning Armed Activities on the Territory of the Congo: The ICJ Finds Uganda Acted Unlawfully and Order Reparations*, AM. SOC'Y INT'L L. INSIGHT, Jan. 9, 2005, available at <http://www.asil.org/insights/2006/01/insights060109.html>.

<sup>16</sup> Phoebe N. Okowa, *Case Concerning Armed Activities on the Territory of the Congo: (Democratic Republic of the Congo v. Uganda)*, 55 INT'L & COM. L.Q. 742 (2006).

<sup>17</sup> Judgment, para. 165.

<sup>18</sup> Judgment, para 147.

<sup>19</sup> See LIESBETH ZEGVELD, *ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 97 et seq.* (Cambridge University Press, 2002).



shoehorn its analysis into a legal framework that is ill-equipped to deal with the “tangled web” of facts and responsibility in this case.<sup>20</sup>

**a. The Difficulty of Framing the Case in International Law**

The goals of the law of self-defense were traditionally to permit States to repel an attack, to reassert control over territory, and to prevent future attacks (this last, usually within a continuum of hostilities).<sup>21</sup> In *Armed Activities*, however, the Court was implicitly pronouncing on the use of force by one State through irregular forces attempting to overthrow another State.<sup>22</sup> Despite the weight of this issue, the Court attempted to confine it within a narrow legal framework that is inadequate for a conflict where the bulk of the fighting was done by rebels,<sup>23</sup> sometimes acting on behalf of States not party to the case.<sup>24</sup> In a similar fashion, the Court’s determination that Uganda was an Occupying Power in Ituri province bearing responsibility for the human rights violations committed by rebels there between 1998 and 2003 seems like another strained attempt to fit non-State actors into the State system.<sup>25</sup>

As discussed in more detail below, the Court’s decision in *Armed Activities* to restrict the concept of ‘armed attack’ to attacks committed by, or attributable to, a State means that “there is very little effective protection against States violating the prohibition of the use of force, as long as they do not resort to an armed attack.”<sup>26</sup> Attacks carried out by non-State actors that are *not* attributable to a State, *Armed Activities* seems to say, are not armed attacks within the scope of Article 51, and therefore they do not entitle the victim State to respond with force in self-defense. The decision signals the inability of international law, as currently structured, to adequately address conflicts involving non-State actors – especially when those non-State actors have gained control of territory due to a State’s weakness or failure.

The DRC is a failed state, one of “those countries whose governments have weakened to the point that they can no longer provide public goods, such as territorial integrity, economic infrastructure, and physical security.”<sup>27</sup> The DRC exemplifies the most telling characteristics of

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<sup>20</sup> Judgment, Sep. Op. of Kooijmans J., para. 11 (questioning “Is it possible to extract from this tangled web one element, to isolate it, to subject it to legal analysis and to arrive at a legal assessment as to its consequences for the relations between only two of the parties involved?”).

<sup>21</sup> André de Hoogh, *The ‘Armed Activities’ Case: Unasked questions, proper answers*, HAGUE JUSTICE PORTAL (30 June, 2006), available at [www.frompeacetojjustice.nl](http://www.frompeacetojjustice.nl).

<sup>22</sup> *Id.* De Hoogh further argues that in the climate of current ‘regime change’ campaigns, e.g. United States invasion of Iraq, the Court should have clarified the goals of self-defense and stated that this cannot be such a goal.

<sup>23</sup> Okowa, *supra* note 16, at 745 (referring to consistency with *Iran Hostages* etc).

<sup>24</sup> *Id.*, at 746 (arguing that these States were also relevant actors in the conflict and the role of these States should have been an inescapable finding in any adjudication on the matter.); see also Judgment, Dissenting Op. of Kateka J., para. 28 (criticizing the Court’s observations on Sudan’s involvement in airlifting rebels to attack Uganda as one example where the Court’s analysis was inadequate); see also *id.* at para. 30 (Judge Kateka is also vociferous over what he perceives as the Court conflating Uganda with Rwanda).

<sup>25</sup> Judgment, para. 178.

<sup>26</sup> Albrecht Randelzhofer, *Article 51*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 791 (Bruno Simma ed., 2002).

<sup>27</sup> Note, Ben N. Dunlap, *State Failure and the Use of Force in the Age of Global Terror*, 27 B.C. INT’L & COMP. LAW. REV. 453, 454 (2004); Gerland B. Helman & Steven R. Ratner, *Saving Failed States*, FOREIGN POL’Y, Dec 1992, at 3. *But cf. generally* Ralph Wilde, *The Skewed Responsibility Narrative of the ‘Failed States’ Concept*, 9 ILSA J. INT’L & COMP. L. 425 (2003).

state failure, including the inability to deliver human security,<sup>28</sup> the emergence of armed bands,<sup>29</sup> and the loss of “authority over sections of territory.”<sup>30</sup> The rebels’ grasp over portions of the DRC is undeniably firmer than that of the government – so much influence is wielded by rebel groups that private mining companies reportedly pay taxes to Jean-Pierre Bemba’s MLC rather than to the government.<sup>31</sup>

In discussing the extensive involvement of the Security Council in the region, the Court seemed fully cognizant of the fact that the DRC does not have full control over its territory, and is, in fact, a failed state.<sup>32</sup> Still, the Court did not directly address “[t]he practical dilemma that governmental failure creates for neighboring States, especially when the resulting political and security vacuum is exploited by groups with an anti-social agenda.”<sup>33</sup> The Court’s finding that “neither [Uganda nor the DRC] was capable of putting an end to all the rebel activities despite

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<sup>28</sup> Robert I. Rotberg, *Failed States, Collapsed States, Weak States: Causes and Indicators*, in *WHEN STATES FAIL: CAUSES AND CONSEQUENCES 3* (Robert I. Rotberg ed., 2004).

<sup>29</sup> Failed States are havens for rebel groups and, as former Secretary-General Kofi Annan has recognized, in today’s armed conflicts “the violence is frequently perpetrated by non-state actors, including irregular forces and privately financed militias”. U.N. SECURITY COUNCIL, REPORT OF THE SECRETARY-GENERAL TO THE SECURITY COUNCIL ON THE PROTECTION OF CIVILIANS IN ARMED CONFLICT, UN doc. S/1999/957 (Sept. 8 1999), at 2. *See also* Klare, *supra* note 2, at 117; Rotberg, *supra* note 28, at 9 (explaining the connection between failed States and armed groups:

A nation-state also fails when it loses legitimacy— when it forfeits the “mandate of heaven.” Its nominal borders become irrelevant. Groups within the nominal borders seek autonomous control within one or more parts of the national territory, or sometimes even across its international borders.... Citizens then naturally turn more and more to the kinds of sectional and community loyalties that are their main recourse in time of insecurity and their main default source of economic opportunity. They transfer their allegiances to clan and group leaders, some of whom become warlords. These warlords or other local strongmen can derive support from external as well as indigenous supporters. In the wilder, more marginalized corners of failed states, terror can breed along with the prevailing anarchy that naturally accompanies state breakdown and failure.)

<sup>30</sup> Rotberg, *supra* note 28, at 5. *Cf.* Judgment, Sep. Op. of Kooijmans J., para. 5 (describing the situation in the DRC as “...regimes under constant threat from armed movements often operating from the territory of neighboring States, whose governments sometimes support such movements but often merely tolerate them since they do not have the means to control or repel them.”). Other evidence offered as specific examples of the DRC’s collapse are the failure to maintain basic navigational aids on arterial waterways. *See* Rotberg, *supra* note 28, at 7; Lemarchand, *supra* note 4, at 29, 39:

[T]he Democratic Republic of the Congo (DRC) — this former Belgian colony was not just a failed state in 2002; it was the epitome of the failed state, whose descent into hell has loose a congeries of rival factions fighting proxy wars on behalf of six African states. In a sense, statelessness conveys a more realistic picture of the rampant anarchy in many parts of the country. Carved into four semi-autonomous territorial enclaves, three of which were under the sway of rebel movements, it was the most fragmented and violent battleground in the continent.)

The DRC is also ranked second in *The Failed States Index 2006* produced by FOREIGN POLICY and the Fund for Peace.

<sup>31</sup> Lemarchand, *supra* note 4, at 56.

<sup>32</sup> Judgment, para. 150.

<sup>33</sup> Okowa, *supra* note 16, at 750; *see also* Judgment, Dissenting Op. of Kateka J., para. 20 (opining that the Court recognized that “the root cause of the conflict was the use of Congolese territory by armed bands, seeking to destabilize or overthrow neighbouring governments.”). This seems to find support in the mention of disarmament of armed groups *before* the withdrawal of Ugandan troops in the *Lusaka Agreement*. *See* Judgment, Dissenting Op. of Kateka J., para. 22. Moreover, the DRC’s consent to Uganda’s presence in the DRC for joint operations against rebels had the effect of inviting further erosion of the authority of the DRC government, demonstrating the legal consequences that may flow from a State’s loss of control of its territory to non-State actors. *See* Judgment, para. 53.

their efforts”<sup>34</sup> recognized this power vacuum, but did not address the legal consequence of the DRC’s state failure.

The Court’s reluctance to address the applicability of the international law on self-defense to non-State actors in control of ungoverned territory is most likely attributable to the fact that “[t]he system of international judicial dispute settlement is premised on the existence of a series of bilateral inter-State disputes . . .”<sup>35</sup> The International Court of Justice, in particular, is not designed to adjudicate disputes that involve non-State actors, as only States can be parties to cases before the Court.<sup>36</sup> The Court’s difficulty in applying a traditional self-defense analysis to a conflict involving non-State actors in control of territory is not judicial error; rather, as the ensuing analysis demonstrates, this opinion is symptomatic of the deep uncertainties in this area of international law. It is far from clear how non-State actors can, or should, fit into a system that was designed to regulate disputes between States.

### **b. The Restrictive Reading of the Armed Attack Threshold**

As the Court noted in *Paramilitary Activities (Nicaragua v. United States)*, Article 51 of the U.N. Charter conditions the exercise of the right of self-defense upon the occurrence of an armed attack.<sup>37</sup> As our examination of the *Armed Activities* opinion will show, the Court did not perform a traditional armed attack analysis in this case because it read the term restrictively, to apply only to acts of States and acts attributable to States. In *Oil Platforms*, on the other hand, a case that involved only States, the Court performed both an armed attack analysis and a separate attribution analysis, requiring that “the United States . . . show that attacks had been made upon it for which Iran was responsible; *and* that those attacks were of such a nature as to be qualified as ‘armed attacks’ . . .”<sup>38</sup> Because it did not perform an independent armed attack analysis, the *Armed Activities* Court left unresolved an issue that has plagued the international community since *Paramilitary Activities*: whether the use of force by non-State actors can ever rise to the level of an armed attack regardless of whether it is attributable to a State. This uncertainty is complicated by evolving State practice that suggests that non-State actors *can* commit armed attacks within the scope of Article 51.<sup>39</sup>

Although the concept of armed attack is not defined in the Charter and “. . . a generally recognized definition of ‘armed attack’ is yet to be found,”<sup>40</sup> in past cases, the Court has defined the concept as both quantitative and as qualitative.

The concept of armed attack is quantitative because the State must show that the use of force in question has attained “the threshold of an armed attack.”<sup>41</sup> One way to measure this

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<sup>34</sup> Judgment, para. 303.

<sup>35</sup> Judgment, Sep. Op. of Kooijmans, J., para. 11.

<sup>36</sup> See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Art. 34(1).

<sup>37</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986 (June 27), para. 211 [hereinafter *Paramilitary Activities*, Judgment].

<sup>38</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)* Merits, Judgment, I.C.J. Reports 2003 (November 6), para. 51 [hereinafter *Oil Platforms*, Judgment] (emphasis added).

<sup>39</sup> See S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>40</sup> Randelzhofer, *supra* note 26, at 796.

<sup>41</sup> Randelzhofer, *supra* note 26, at 793.

quantitative aspect of an armed attack, according to the *Paramilitary Activities* Court, is to examine its “scale and effects.”<sup>42</sup> The scale and effects of some uses of force will simply not be significant enough to amount to an armed attack under Article 51.<sup>43</sup> To qualify as an armed attack, therefore, an attack must be “of a certain scale . . . serious, not trivial.”<sup>44</sup>

The Court has also suggested that a series of small attacks by irregular forces can amount, collectively, to an armed attack.<sup>45</sup> As Yoram Dinstein describes it, “a series of pin-prick assaults might be weighed in its totality and count as an armed attack.”<sup>46</sup> Other authors conclude, however, that while this cumulative theory of armed attack finds support from several States, including the U.S., the U.K. and Israel, it has been “consistently rejected” by the Security Council.<sup>47</sup>

The Court has also defined the concept of armed attack to include a qualitative intent requirement.<sup>48</sup> In *Oil Platforms*, the Court concluded that the United States had failed to prove that its ships were the intended targets of the attacks.<sup>49</sup> As a result, it found that the U.S. had no right to self-defense, reasoning that attacks directed at another State do not entitle the accidental victim to self-defense.<sup>50</sup>

The *Armed Activities* Court might therefore have considered whether, by their scale and effects or cumulatively, the attacks allegedly suffered by Uganda rose to the threshold of armed attack.<sup>51</sup> It might also have considered whether Uganda was the intended victim of the attacks. No such analysis is ever performed by the Court in this case, because it defined the concept of armed attack *not* to include attacks conducted by non-State actors – unless attributable to a State.

The Court also did not address whether a trans-border attack launched by non-State actors against a State might amount to an illegal use of force falling short of an armed attack that would trigger the right to take proportionate defensive measures.<sup>52</sup> However, the problem with

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<sup>42</sup> *Paramilitary Activities*, Judgment, para. 195.

<sup>43</sup> *Oil Platforms*, Judgment, paras. 62-64.

<sup>44</sup> Victor Kattan, *Israel, Hezbollah and the Conflict in Lebanon: an Act of Aggression or Self-Defense*, 14 HUM. RTS. BRIEF 26, 27 (2006).

<sup>45</sup> *Paramilitary Activities*, Judgment, para. 231 (emphasis added); see also CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 125 (2ed. Oxford University Press 2004).

<sup>46</sup> YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 202 (4ed., Cambridge University Press 2005).

<sup>47</sup> Alex Conte, *The War on Terror: Self-Defence or Aggression?*, in THE CHALLENGE OF CONFLICT: INTERNATIONAL LAW RESPONDS 393, 400 (Ustina Dolgopol & Judith Gardam, eds., Martinus Nijhoff Publishers 2006).

<sup>48</sup> See GRAY, *supra* note 45, at 119.

<sup>49</sup> *Oil Platforms*, Judgment, para. 64 (noting that the missile in question was not technologically capable of targeting the *Sea Isle City* specifically, that another ship attacked (the *Texaco Caribbean*) was not flying a U.S. flag, and that there was no evidence that Iranian mine-laying targeted the U.S. rather than Iraq).

<sup>50</sup> *Oil Platforms*, Judgment, para. 64; see also GRAY, *supra* note 45, at 119.

<sup>51</sup> Cf. *Paramilitary Activities*, Judgment, para. 202.

<sup>52</sup> See the suggestion of Judge Simma in *Oil Platforms* that “the permissibility of strictly defensive military action taken against attacks [falling short of armed attack] cannot be denied. What we see in such instances is an unlawful use of force “short of” an armed attack (“aggression armée”) within the meaning of Article 51, as indeed ‘the most grave form of the use of force.’ Against such smaller-scale use of force, defensive action by force also ‘short of’ Article 51 is to be regarded as lawful. In other words, I would suggest a distinction between (full-scale) self-defence within the meaning of Article 51 against an “armed attack” within the meaning of the same Charter provision on the one hand and, on the other, the case of hostile action, for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defence expressly reserved in the United Nations Charter.” *Oil Platforms*, Sep. Op. of Simma J., para.

this view is that whatever response an *illegal* attack (as opposed to an *armed* attack) may permit does not negate “. . . [t]he obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.”<sup>53</sup>

Instead, the *Armed Activities* Court focused on the Definition of Aggression laid out in General Assembly Resolution 3314 (XXIX) (just as it did in *Paramilitary Activities*<sup>54</sup>) to clarify the meaning of armed attack.<sup>55</sup> Article 3(g) of the Resolution provides that

the sending by or on behalf of a State or armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein

constitutes an act of aggression. In *Paramilitary Activities*, the Court concluded that an act of aggression also constituted an armed attack.<sup>56</sup> Uganda argued, therefore, that the DRC was responsible for “sending” the rebels into Uganda, alleging that the Congolese armed forces coordinated and supported the rebel attacks against Uganda.<sup>57</sup>

The *Paramilitary Activities* Court seems to have concluded, however, that a State’s “assistance to rebels in the form of the provision of weapons or logistical or other support” did

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12 (footnotes omitted). See also A. VERDROSS-B. SIMMA, *UNIVERSELLES VÖLKERRECHT: THEORIE UND PRAXIS*, para. 472 (3rd ed., 1984).

<sup>53</sup> In *Paramilitary Activities*, the Court held that: “These violations cannot be justified either by collective self-defence for which, as the Court has recognized, the necessary circumstances are lacking, nor by any right of the United States to take counter-measures involving the use of force in the event of intervention by Nicaragua in El Salvador, since no such right exists under the applicable international law.” Judgment, *Paramilitary Activities*, para. 252 (emphasis added). Article 50 of INTERNATIONAL LAW COMMISSION, ARTICLES ON STATE RESPONSIBILITY (2005) echoes this sentiment, providing that “Countermeasures shall not affect . . . [t]he obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.” Randelzhofer, *supra* note 26, at 793 (citing *Paramilitary Activities*, Judgment, para. 210); see also DINSTEIN, *supra* note 46, at 193; THOMAS FRANCK, *RECOURSE TO FORCE* 131 (Cambridge University Press 2002). These limitations have led some authors to suggest other legal justifications for victim States that seek to use force against non-State actors - including “necessity,” (Oscar Schachter, *The Lawful Use of Force by a State Against Terrorists in Another Country*, in *TERRORISM & POLITICAL VIOLENCE* 243, 256 (Henry H. Han ed., Oceana Publications 1993), arguing that the Articles on State Responsibility allow States to invoke necessity “in response to dangers from non-State entities or individuals.” Citation omitted.) and “extra-territorial law enforcement,” (DINSTEIN, *supra* note 46, at 247, “[E]xtra-territorial law enforcement” is a form of self-defense “taken by one State within the territory of another without the latter’s consent . . . [when the latter is] unwilling or unable to prevent repetition of that armed attack.” Examples of extra-territorial law enforcement include Turkish incursions into Iraq to fight Kurdish armed bands during the 1990s, the Israeli incursion into Lebanon in 1982, and, the most famous example of all, the *Caroline* case; see also Judgment, Sep. Op. of Kooijmans J., para. 31).

However, Article 26 of the ARTICLES ON STATE RESPONSIBILITY provides that: “Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.” If we conceive of the U.N. Charter’s prohibition on the use of force and Article 51’s limited self-defence exception as peremptory norms of international law, then it may be that necessity does nothing to solve the dilemmas which this article has raised; See also DINSTEIN, *supra* note 46, at 193. Moreover, re-naming the use of force “extra-territorial law enforcement” instead of self-defense does not get us very far.

<sup>54</sup> See *Paramilitary Activities*, Judgment, para. 195.

<sup>55</sup> See Judgment, para. 146.

<sup>56</sup> *Paramilitary Activities*, Judgment, para. 195.

<sup>57</sup> *Counter-Memorial of Uganda*, (April 21, 2001), *supra* note 14, at para. 366.

not constitute an armed attack<sup>58</sup> because it did not meet Article 3(g)'s definition of "sending" or "substantial involvement."<sup>59</sup>

Uganda also argued, therefore, that the Court should reconsider its holding in *Paramilitary Activities* that Article 3(g)'s "substantial involvement therein" language "strongly indicates that the formulation extends to the provision of logistical support."<sup>60</sup>

Indeed, the *Paramilitary Activities* opinion seemed to leave open the possibility that the provision of weapons and logistical support could rise to such a level as to constitute the State's "substantial involvement" in the rebel attack.<sup>61</sup> Judge Schwebel took this view in his dissenting opinion in *Paramilitary Activities*, arguing that the Court did not properly appreciate the Resolution's use of the very different terms "sending" and "substantial involvement."<sup>62</sup>

On the one hand, the view may be taken that a sufficiently high level of State support for non-State actors could constitute an armed attack by that State.<sup>63</sup> Yet it can also be argued that "the drafting history of the resolution does not support [Judge Schwebel's] construction"<sup>64</sup> and that state practice suggests that the provision of weapons and logistical support do not amount to an armed attack.<sup>65</sup> Christine Gray notes that in *Paramilitary Activities*, the Court "did not expressly go into the issue of whether a lesser degree of state involvement, such as acquiescence or even inability to control armed bands operating on its territory, could ever be enough to constitute an armed attack, but it seems implicit in its judgment that armed attack is narrower than this."<sup>66</sup>

The Court's decision in *Armed Activities* did not clearly resolve this debate, concluding solely that "[t]he attacks did not emanate from armed bands or irregulars *sent* by the DRC or on behalf of the DRC, within the sense of Article 3(g). . ."<sup>67</sup> This restrictive understanding of armed attack is at odds with the many commentators and evolving State practice that suggest that non-State actors are capable of carrying out an armed attack, regardless of attribution to a State.<sup>68</sup> The Court avoided this issue, concluding that because

the legal and factual circumstances for the exercise of a right to self-defence by Uganda against the DRC were not present . . . the Court has no need to respond to the contentions of the Parties as to whether and under what conditions

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<sup>58</sup> See *Paramilitary Activities*, Judgment, para. 195.

<sup>59</sup> See Randelzhofer, *supra* note 26, at 800.

<sup>60</sup> *Counter-Memorial of Uganda*, *supra* note 14, para. 346; see also *id.*, para. 359 (arguing that an armed attack includes sending and sponsoring through provision of weapons, training or financial assistance); *id.*, para. 367 (same).

<sup>61</sup> See *Paramilitary Activities*, Judgment, para. 195.

<sup>62</sup> See *Paramilitary Activities*, Dissenting Op. of Schwebel, J., para. 170.

<sup>63</sup> See, e.g., MAOGOTO, *supra* note 2, at 167.

<sup>64</sup> GRAY, *supra* note 45, at 109.

<sup>65</sup> *Id.*, at 110-11.

<sup>66</sup> *Id.*, at 111.

<sup>67</sup> Judgment, para. 146 (emphasis added).

<sup>68</sup> DINSTEIN, *supra* note 46, at 187; MAOGOTO, *supra* note 2, at 165. For a deeper discussion of this argument, see *infra* Part IV(a)(ii).

contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.<sup>69</sup>

It remains unclear, therefore, whether the use of force by non-State actors alone could ever justify self-defence. Moreover, as the next section will demonstrate, the Court's focus on attribution also failed to address the uncertainties of the effective control doctrine and its continued viability in cases like this, which are characterized by unaffiliated non-State actors and weak States.

**c. The Failure of the Effective Control Doctrine in the Attribution Analysis**

The Court's focus on the attribution of rebel activities to a State continued a trend seen in several of the Court's recent judgments involving questions of the use of force.<sup>70</sup> The Court struggled, however, to effectively encompass the prominence of non-State actors in the DRC conflict within its approach to the attribution question. This section demonstrates that the Court's application of the effective control doctrine is cursory, suggesting that the Court was in fact aware that the test of effective control was inapposite in a case characterized by largely unaffiliated non-State actors located in a weak State.

The effective control test sets a high threshold for the attribution of attacks by non-State actors to a State. In *Paramilitary Activities*, the ICJ stated that an armed attack was attributable to a State when committed by irregular forces "sent by or on behalf of a State,"<sup>71</sup> over whom the State exercised "effective control."<sup>72</sup> The Court required Nicaragua to prove that the actions of the Contras "reflected strategy and tactics wholly devised by the United States."<sup>73</sup> As it was not shown that the United States "actually exercised such a degree of control in all fields as to justify treating the Contras as acting on its behalf," the actions of the Contras could not be attributed to the United States.<sup>74</sup> The effective control test thus requires that the State "direct and control the activities of the terrorists [non-State actors] – or at least expressly sanction and adopt their actions – before their acts will be attributable to that state."<sup>75</sup>

The effective control test has been sharply criticized. The International Criminal Tribunal for the former Yugoslavia (ICTY) has described the test as against law and logic, arguing that it

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<sup>69</sup> Judgment, para. 147. The Court's restrictive reading is not, however, without support. See Randelzhofer, *supra* note 26, at 802. Attribution to a State protects the importance of territorial sovereignty of States. Schachter, *supra* note 53, at 248.

<sup>70</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Rep. 2004 (July 9) [hereinafter *Wall Advisory Opinion*]; *Oil Platforms*, Judgment. The trend continues in a case decided after *Armed Activities*. See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007.

<sup>71</sup> *Paramilitary Activities*, Judgment, para. 195

<sup>72</sup> *Id.*, para. 115; see DINSTEIN, *supra* note 46, at 203.

<sup>73</sup> *Paramilitary Activities*, Judgment, para. 109.

<sup>74</sup> *Id.*, para. 109.

<sup>75</sup> Greg Travalio & John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT'L L. 97, 104 (2003); see also Schachter, *supra* note 53, at 249 (notes a lack of "any express disagreement by governments to the Court's implicit premise that a State cannot be invaded under the principle of self-defence unless that State had responsibility for the armed attack precipitating the defence.").

is at variance with judicial and state practice that permits various degrees of control to result in a finding of attribution, according to the factual circumstances of each case.<sup>76</sup> In *Tadic*, therefore, the ICTY held that attribution to a State for the purposes of proving individual criminal responsibility requires only that the State in question had *overall control* over irregular forces.<sup>77</sup> Acts performed by members of irregular forces directed by a foreign State may be considered “acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.”<sup>78</sup> In the recent *Advisory Opinion on the Wall*, Judges Buergenthal, Higgins and Kooijmans, writing separately, were similarly critical of the effective control test.<sup>79</sup>

Despite this questioning, the Court did not address the continued viability of the effective control test in *Armed Activities*. The Court did not closely examine the level of State control over the rebel forces and instead seemed to summarily dismiss Uganda’s claims. Uganda had argued that “the DRC has been used by the enemies of Uganda as a base and launching pad for attacks against Uganda [as] successive governments of the DRC have not been in effective control of all the territory.”<sup>80</sup> Uganda further argued, however, that the DRC and the Sudan were supplying and equipping the rebels<sup>81</sup> and that FAC (the Congolese armed forces) incorporated “anti-Ugandan rebel groups and Interahamwe militia.”<sup>82</sup> The Court rejected Uganda’s evidence of Sudanese support,<sup>83</sup> found no evidence of Congolese support,<sup>84</sup> and rejected Uganda’s incorporation argument.<sup>85</sup>

The Court took a similar approach when considering the DRC’s counter-claim that Uganda had effective control over the MLC.<sup>86</sup> Although the Court accepted that Uganda had given assistance to the MLC, it found that it had not received any probative evidence that “Uganda controlled, or could control, the manner in which Mr. Bemba put such assistance to use,” nor was there proof that Uganda had created the MLC.<sup>87</sup> With only this veiled reference to the effective control test, the Court hastily concluded that “no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries.”<sup>88</sup>

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<sup>76</sup> See DINSTEIN, *supra* note 46, at 203.

<sup>77</sup> Prosecutor v. Tadic, Appeal Judgment, Case No. IT-94-1-A ICTY (Jul. 15, 1999) paras. 116-45. [Hereinafter: *Tadic*].

<sup>78</sup> *Tadic*, para. 145.

<sup>79</sup> See generally *Wall*, Advisory Opinion, Sep. Op. of Simma, Higgins & Buergenthal JJ.

<sup>80</sup> Judgment, para.109.

<sup>81</sup> *Id.*, para. 120.

<sup>82</sup> *Id.*, para. 138.

<sup>83</sup> *Id.*, paras.121-25.

<sup>84</sup> *Id.*, para. 134.

<sup>85</sup> *Id.*, para. 139.

<sup>86</sup> See *Memorial of the Democratic Republic of Congo* (6 July 2000), para. 4.28 (describing Uganda’s support of the rebel groups as “soutien actif” and “un soutien militaire direct”) & para. 4.35 (describing it as a “collaboration active”), available at <http://www.icj-cij.org/docket/files/116/8321.pdf>.

<sup>87</sup> Judgment, para. 160.

<sup>88</sup> *Id.* The Court went on to hold, however, that Uganda’s support and training of the MLC violated the principle of non-intervention contained in the GA Resolution Concerning Friendly Relations. *Id.*, para. 162-63 (After quoting from the *Declaration on Friendly Relations*, the Court finds:

The Court considers that the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda were not to overthrow



The reason for the Court's unwillingness to explicitly apply the effective control doctrine in this case may be explained by the Court's awareness that it was dealing with a very different kind of non-State actor than the Contras, who were clearly aligned with a State. Indeed, there are fundamental distinctions that can be drawn between *Armed Activities* and *Paramilitary Activities*. In *Paramilitary Activities*, the Court did not find that effective control existed, despite much clearer evidence of the links between the United States and the Contras than was possible in *Armed Activities*, where the rebel groups acted with a greater degree of autonomy. Indeed, Uganda recognized that the DRC's alliance with certain anti-Ugandan rebel groups was only initiated between May and July, 1998.<sup>89</sup> Capable of exacting taxes in territories under their control<sup>90</sup> and so powerful that they were signatories to the Lusaka Peace Agreement,<sup>91</sup> these rebel groups exhibited much more autonomy than the Contras did,<sup>92</sup> making the notion of effective control by a State simply malapropos to the facts of this case.

The effective control test is an "all-or-nothing" approach to state responsibility that leaves no room for the more complex forms of state involvement illustrated by this case.<sup>93</sup> In *Paramilitary Activities*, the absence of sufficient proof to demonstrate that the Contras were the *de facto* agents of the U.S. government meant that the United States escaped any responsibility for the Contras' actions.<sup>94</sup> Thus, critics argue that this test allows States that assist terrorist and other armed groups to evade responsibility.<sup>95</sup> Judge Kateka, dissenting in *Armed Activities*, argued that continued use of a standard that calls for "substantial involvement" encourages impunity.<sup>96</sup>

The provision of training, logistics and support to irregular forces by a State may not meet the effective control test,<sup>97</sup> but this substantial level of support should not only engage the responsibility of the State for its illegal support, but also incur its responsibility for the actions of those irregular forces. As Schacter states:

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President Kabila, and were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war.)

The Court affirmed its holding in *Paramilitary Activities* that acts which breach the principle of non-intervention "will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations." *Id.*, para. 164 (referring to *Paramilitary Activities*, Judgment, para. 209).

<sup>89</sup> Judgment, para. 37.

<sup>90</sup> Lemarchand, *supra* note 4, at 56.

<sup>91</sup> See Judgment, para. 53.

<sup>92</sup> See *Paramilitary Activities*, at para. 115 ("... United States participation, even if preponderant or decisive, in the financing, organizing, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself. . . for the purpose of attributing to the United States the acts committed by the *contras*. . .").

<sup>93</sup> Cf. MAOGOTO, *supra* note 2, at 158 (criticizing application of the test in *Paramilitary Activities*).

<sup>94</sup> MAOGOTO, *supra* note 2, at 158 (citation omitted). The Court also found that Nicaragua could not be held responsible for the flow of arms from its territory to armed groups in El Salvador. See *Paramilitary Activities*, at para. 160.

<sup>95</sup> MAOGOTO, *supra* note 2, at 156 (citing Abraham Sofaer, *The Sixth Annual Waldemar A. Solf. Lecture*, 101); see also DINSTEIN, *supra* note 46, at 202 (arguing the Court's statements are sweeping and ought to be narrowed).

<sup>96</sup> Judgment, Dissenting Op. of Kateka J., para. 34.

<sup>97</sup> Alberto Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. Proceedings 297 (1987); MAOGOTO, *supra* note 2, at 157.

When a government provides weapons, technical advice, transportation, aid, and encouragement to terrorists [non-State actors] on a substantial scale it is not unreasonable to conclude that the armed attack is imputable to that government.<sup>98</sup>

This position has gained prominence in the wake of the September 11, 2001 attacks against the United States and the propagation of the so-called Bush Doctrine that posits that States that “harbor and support” terrorists are in breach of their international obligations.<sup>99</sup> Nevertheless, in *Armed Activities*, the Court appeared to reject these developments and seemed to continue to employ the high threshold of the effective control analysis.

The Court’s discomfort with the effective control test suggests that the Court ought perhaps to consider a different understanding of attribution. Uganda took precisely such a view in its first counter-claim, arguing that “since 1994, it has been the victim of military operations and other destabilizing activities carried out by hostile armed groups based in the DRC . . . and either *supported* or *tolerated* by successive Congolese governments.”<sup>100</sup> Uganda contended that States have a duty not to support or tolerate the use of their territory for acts contrary to the rights of others States. Uganda relied on the *Corfu Channel Case*, which established the “State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”<sup>101</sup> This argument relies on a different understanding of attribution, under which acts are attributable to a State if the State has encouraged, directly supported, planned or prepared, or “was reluctant to impede these acts.”<sup>102</sup> The notion of tolerance or acquiescence as the standard for attribution is not unknown in the law of State responsibility,<sup>103</sup> although “mere tolerance” of terrorists on a State’s soil is generally not enough to trigger state responsibility.<sup>104</sup>

The Court considered the acquiescence argument at length in its examination of Uganda’s counter-claim, noting “that this is a different issue from the question of active support for the rebels. . . .”<sup>105</sup> The Court concluded that

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<sup>98</sup> Schachter, *supra* note 53, at 249.

<sup>99</sup> PRESIDENT OF THE UNITED STATES OF AMERICA, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>.

<sup>100</sup> Judgment, para. 276 (emphasis added).

<sup>101</sup> *Corfu Channel (United Kingdom v. People’s Republic of Albania)*, Merits, Judgment, I.C.J. Rep. 1949 (April 9), at 22 [hereinafter *Corfu Channel*, Judgment].

<sup>102</sup> Randelzhofer, *supra* note 26, at 802.

<sup>103</sup> INTERNATIONAL LAW COMMISSION, COMMENTARIES: ARTICLES OF STATE RESPONSIBILITY, at Art 2., para 4 (2005) [hereinafter COMMENTARIES, ARTICLES OF STATE RESPONSIBILITY]:

(For example in the *Corfu Channel* case, the International Court of Justice held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence. In the *Diplomatic and Consular Staff* case, the Court concluded that the responsibility of Iran was entailed by the inaction of its authorities which failed to take appropriate steps, in circumstances where such steps were evidently called for. In other cases it may be the combination of an action and an omission which is the basis for responsibility.) (citations omitted).

<sup>104</sup> Michael J. Glennon, *The Fog of War: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL’Y 539, 543 (2002). For a more detailed analysis of the law of state responsibility on this point, see *infra* Part IV(b).

<sup>105</sup> Judgment, para. 300. In response to Uganda’s counterclaims, the DRC had argued that “Uganda has failed to demonstrate not only that rebel groups were its *de facto* agents, but also that the DRC had *planned, prepared or*

Neither Zaire nor Uganda were in a position to put an end to [the rebel groups'] activities . . . the Court cannot conclude that the absence of action by Zaire's Government against the rebel groups in the border area is tantamount to 'tolerating' or 'acquiescing' in their activities.<sup>106</sup>

In striking contrast to this detailed analysis of the acquiescence argument in the context of Uganda's counter-claim, the Court did not address the acquiescence argument at all in its attribution analysis with respect to Uganda's self-defense claim<sup>107</sup> This is especially odd because acquiescence is a principle enshrined in the 1970 General Assembly's Friendly Relations Declaration, upon which the Court relied in finding Uganda in violation of the principle of non-intervention.<sup>108</sup> The Friendly Relations Declaration makes it clear that "mere acquiescence" in terrorist activity emanating from its soil amounts to a violation of a State's international obligations,<sup>109</sup> requiring "positive action on the part of the state so as not to acquiesce in or tolerate terrorist [non-State actor] activities originating from within its territory."<sup>110</sup> In ruling on the DRC's claim that Uganda had violated the principle of non-intervention, the Court appeared to use the principle of non-intervention as a lower threshold than that of the effective control test. The Court did not, however, apply this formulation to Uganda's self-defense claim once it had found that the actions of rebel forces in the Congo could not be attributed to the DRC or the Sudan.

But even a lower attribution threshold seems inappropriate with respect to the facts of this case, where rebel forces were operating out of a State characterized by "the almost complete absence of governmental authority in the whole or part of the territory."<sup>111</sup> Requiring attribution

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*participated in any attack* or that the DRC had provided support to Ugandan irregular forces" – but failed to address the tolerance argument. Judgment, para. 284 (emphasis added).

<sup>106</sup> Judgment, para. 301.

<sup>107</sup> Judgment, Sep. Op. of Kooijmans J., para 23 (criticizing the Court's implicit rejection of the acquiescence argument in its attribution analysis); *see also id.* paras. 20-21.

<sup>108</sup> Judgment, paras 162-163.

<sup>109</sup> The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, para. 1 (Oct. 24, 1970) states that:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.

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

... Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

Though a resolution of the General Assembly, the Declaration Concerning Friendly Relations ought to be considered an authoritative interpretation of the UN Charter in light of the fact of the drafting committee's mandate to restate the fundamental principles of international law. *See* Scott Malzahn, *State Responsibility and Support of International Terrorism: Customary Norms of State Responsibility*, 26 HASTINGS INT'L & COMP. L. REV. 83, 100-1 (2002); MAOGOTO, *supra* note 2, at 153.

<sup>110</sup> MAOGOTO, *supra* note 2, at 159; *see also* Judgment, Dissenting Op. of Kateka J., para. 36 (pointing to the principle of States not using armed bands in support of his opinion that there was a right of self-defence even without attribution to DRC).

<sup>111</sup> Judgment, Sep. Op. of Simma J., para. 12; *see also* Sep. Op. of Kooijmans J., para. 30.

to a State where non-State actors control territory and sometimes act as the *de facto* government would generate absurd results, as

[a] special situation arises, if a State is not reluctant but incapable of impeding acts of terrorism committed by making use of its territory. Although such terrorist acts are not attributable to the State, the State victim of the acts is not precluded from reacting by military means against the terrorists within the territory of the other State. Otherwise, a so-called failed State would turn out to be a safe haven for terrorists, certainly not what Arts. 2(4) and 51 of the Charter are aiming at.<sup>112</sup>

The Court in *Armed Activities* seemed to struggle inordinately with the question of attribution – failing to distinguish its analysis on this point from the armed attack analysis, employing an extremely vague effective control analysis and inexplicably addressing the acquiescence argument only in examining Uganda’s counter-claim. The Court failed to consider whether, even if acquiescence is not a violation of a State’s international obligations, it might nevertheless constitute a basis for self-defense, or whether attacks by rebel groups could amount to an armed attack permitting a response in self-defence, even absent attribution to a State.<sup>113</sup> The judgment both seems to unnecessarily confuse the law on attribution and, in the words of Judge Kooijmans, to have “missed a chance to fine-tune the position [the Court] took twenty years ago in Nicaragua”<sup>114</sup> with respect to the applicability of the effective control test in a conflict dominated by non-State actors exercising control over large portions of a weak State’s territory.

**d. The Court’s Struggle to Address Emerging State Practice Concerning the Right of Self-Defense Against Non-State Actors**

The Court’s difficulty in applying the traditional law on self-defense to the facts of this case is further illustrated by its struggle to address emerging state practice on this issue. As discussed in the previous sections, the Court resorted to a strained armed attack and attribution analysis rather than adopting Judge Kooijmans’ solution of rejecting Uganda’s claim as lacking necessity and proportionality – in apparent contradiction of an emerging state practice that supports the proportionate use of self-defense against non-State actors. In addition, the Court explicitly condemned the doctrine of anticipatory self-defense – despite the fact that this issue was not raised by the facts or the pleadings of the case – again in an apparent attempt to repudiate emerging state practice on this front.

***i. The Rejection of Self-Defense against Non-State Actors: the Treatment of the Necessity and Proportionality of Uganda’s Use of Force***

The Court’s struggle with the armed attack threshold and the attribution analysis could have been avoided had the Court resolved this case on the narrower ground that Uganda’s

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<sup>112</sup> Randelzhofer, *supra* note 26, at 802. Although these remarks are about terrorism, we believe the concern is broadly applicable to all non-State actors in control of ungoverned territory.

<sup>113</sup> Judgment, Sep. Op. of Kooijmans J., para 26.

<sup>114</sup> *Id.*, para 26.

operations, even if in response to an armed attack, failed to meet the necessity and proportionality requirements. Dissenting Judge Kooijmans resolved the case in this way, concluding that Ugandan actions could not “by any stretch of the imagination” be considered necessary and proportionate to protecting Uganda’s border from rebel attacks.<sup>115</sup> Nevertheless, the Court only briefly mentioned that “the taking of airports and towns many hundreds of kilometers from Uganda’s border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.”<sup>116</sup> The Court’s refusal to adopt this seemingly more simple approach may be explained by the Court’s unwillingness to recognize any right of self-defense against non-State actors, absent attribution to a State.

Had the majority followed Judge Kooijmans’ approach, the opinion would probably have been more in line with current state practice.<sup>117</sup> State practice is in fact increasingly tolerant of state incursions into the territory of another State that provides a safe haven for irregular forces – so long as those incursions are proportionate.<sup>118</sup> For example, when Turkish forces entered Iraqi territory in the mid-nineties to attack Kurdish insurgents using Iraq as a base to attack Turkey, the Security Council did not respond to Iraq’s complaints.<sup>119</sup> The divergence between state practice and the Court’s approach in this case is illustrative of the Court’s struggle to apply a traditional self-defense analysis to the changing nature of armed conflict.

#### *ii. The Condemnation of Anticipatory Self-Defense against Non-State Actors*

Although the issue of anticipatory (or pre-emptive) self-defense was not raised by the facts or the positions of the parties in this case, the Court nevertheless addressed the issue, rejecting an expansion of the doctrine of self-defense to include a right to anticipatory self-defense against the threat of an armed attack by non-State actors.<sup>120</sup> Thus, despite the Court’s recognition that Uganda had actually suffered attacks by the rebel groups,<sup>121</sup> the Court’s self-

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<sup>115</sup> Judgment, Sep. Op. of Kooijmans J., para. 34; *see also* Judgment, Sep. Op. of Simma J., paras. 14-15 (agreeing with Kooijmans that the Court should have found Uganda’s actions unlawful because they were disproportionate and unnecessary, not because they were not attributable to the DRC).

<sup>116</sup> Judgment, para. 147.

<sup>117</sup> Other problems are apparent with the Court’s self-defense analysis, such as its seeming inability to separate the argument concerning consent of the DRC to the presence of Uganda on its territory from the self-defense argument – the Court seems to rest its findings on *both* of these matters on a belief that Uganda used aggressive force that could not be considered necessary or proportionate to its objectives. *See* Judgment, paras. 92-105. Here, the Court chose to devote the first six paragraphs of the section on self-defense to the analysis of a claim that it had just rejected in the previous section. Partly this may have to do with the Court’s rejection of Uganda’s understanding of the timing of events; once the Court had determined that Congolese consent ceased at the beginning of August 1998, it decided to consider whether Uganda was acting in self-defense prior to September 11, 1998 – although Uganda itself had only argued self-defense *after* September 11, 1998. *See* Judgment, paras. 114-18.

However, in other, less ambiguous, areas of the law governing the use of force, the Court’s analysis seemed sound. *See* for example, the Court’s treatment of Uganda’s failure to report its use of force in self-defense to the Security Council – *see* Judgment, para. 145.

<sup>118</sup> *See* FRANCK, *supra* note 53, at 63-65.

<sup>119</sup> *Id.*, at 63.

<sup>120</sup> Judgment, para. 143.

<sup>121</sup> *See id.*, para. 132.

defense analysis inexplicably began with the observation that Uganda's military objectives in intervening in the DRC were "essentially preventative."<sup>122</sup>

Under the theory of anticipatory self-defense, States have a right to invoke their right to self-defense in the face of an emerging threat, rather than having to wait for an actual armed attack to occur.<sup>123</sup> The rise of the non-State actor's prominence in present day conflicts, especially in the "war on terrorism," has led to calls for a turn towards a preemptive approach, allowing States to use force offensively under Article 51 to address terrorist threats.<sup>124</sup> The United States is the primary promoter of this theory, arguing that "[g]iven the goals of rogue states and terrorists, the US can no longer rely on a reactive posture as we have in the past . . . We cannot let our enemies strike first . . . The doctrine of self-defense needs to be revised in the light of modern conditions."<sup>125</sup> States remain generally reluctant, however, to invoke the doctrine of anticipatory self-defense, indicating "the doubtful status of this justification for the use of force."<sup>126</sup>

*Armed Activities* seemed to take pains to indicate to States that the fact that a State is fighting a shadowy, ill-defined non-State actor enemy will not justify an expansion of the doctrine of self-defense to include anticipatory operations. The Court has proven wary of the doctrine of anticipatory self-defense in past cases, including *Paramilitary Activities*, *Oil Platforms*, and the *Advisory Opinion on the Wall*.<sup>127</sup> The Court's implicit concern in *Armed Activities* seems to have been that introducing "[a] broad right of anticipatory self-defence premised on a new standard of 'emerging threat' would introduce dangerous uncertainties relating to the determination of potential threats justifying pre-emptive action."<sup>128</sup> Anticipatory self-defense also raises the threat of "opportunistic interventions justified as anticipatory self-defence."<sup>129</sup> The Court seems to have made a deliberate attempt to curtail the expansion of self-defense in ways that are inconsistent with the U.N. Charter's rationale to limit the ability of States to resort to the use of force.<sup>130</sup> Given its difficulty in dealing with the use of self-defense against non-State actors who have already carried out armed attacks, the Court may have been concerned that any broadening of the right of self-defense would only further complicate this

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<sup>122</sup> Judgment, para. 143; see also W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 535 (2006) (interpreting the Court's decision, authors Reisman and Armstrong similarly claim "None of the 'legitimate security interests' in the five points in 'Safe Haven' involves a response to an armed attack.").

<sup>123</sup> DINSTEIN, *supra* note 46, at 182.

<sup>124</sup> MAOGOTO, *supra* note 2, at 115. See also *id.*, at 119.

<sup>125</sup> PRESIDENT OF THE UNITED STATES OF AMERICA, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002), *supra* note 99.

<sup>126</sup> GRAY, *supra* note 45, at 130. See also *id.*, at 177.

<sup>127</sup> See Reisman & Armstrong, *supra* note 122, at 533-34; Michael T. Wawrzycki, Comment, *The Waning Power of Shared Responsibility in International Law: the Evolving Effect of U.S. Hegemony*, 14 TUL. J. INT'L & COMP. L. 579, 602 (2006) ("It is thus indisputable that the requirement of an "armed attack" is a requirement to self-defense under contemporary customary international law. Therefore, Preemptive Self-Defense cannot be supported by customary law.").

<sup>128</sup> MAOGOTO, *supra* note 2, at 131.

<sup>129</sup> *Id.*

<sup>130</sup> See *id.*

already murky area of international law, introducing vague concepts that are particularly unsuited for judicial determination.

To sum up, our analysis of the Court's self-defense analysis in this Part indicates that the *Armed Activities* judgment displayed a "lack of balance in attributing responsibility" that is unlikely to promote peace in the Great Lakes Region<sup>131</sup> or clarify the law of self-defense as applied to non-State actors in control of territory. As a result, this opinion is likely to only further muddy the waters of an already complex area of international law. The elephant in the room of this opinion is the unanswered question "whether, even if not attributable to the DRC, such [rebel] activities could have been repelled by Uganda through engaging these groups also on Congolese territory."<sup>132</sup> The Court also failed to perform a genuine effective control analysis, opening up questions as to whether the *Paramilitary Activities* test remains good law.<sup>133</sup> Even the critical judges did not satisfactorily address the question of attribution,<sup>134</sup> failing to explain why, if self-defense is invoked against other States, it could justify retaliation against a non-State actor rather than against the State.<sup>135</sup> The Court's unsatisfactory analysis suggests that the Court is struggling with legal developments in the law of self-defense since the Security Council Resolutions authorizing the U.S. invasion of Afghanistan in response to the September 11, 2001 terrorist attacks.<sup>136</sup>

#### **IV) THE OBSTACLE IN *ARMED ACTIVITIES*: UNCERTAINTY IN INTERNATIONAL LAW CONCERNING NON-STATE ACTORS AND THE USE OF FORCE**

This Part of our critique of the *Armed Activities* judgment endeavors to explore the fundamental problems raised by the application of the international law on the use of self-defense against non-State actors. As discussed in Part III, the Court's opinion seems convoluted because of its reluctance to address the relationship between the international law of self-defense and non-State actors in control of ungoverned territory. In this section, we aim to diagnose in greater depth the obstacles encountered in dealing with non-State actors under the international law of self-defense. We begin by arguing that attribution is impossible when non-State actors are located in a failed or weak State that is simply unable to control them. Indeed, evolving customary international law suggests that attribution to a State is no longer required and that non-State actors can independently commit armed attacks within the meaning of Article 51. If we dispose of the requirement of attribution to a State, however, then the international law on self-defense comes into conflict with the international law on state responsibility, implicitly allowing a State to violate the territorial sovereignty of a State that is not "responsible" for the acts of non-State actors within its territory. We suggest, however, that when non-State actors

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<sup>131</sup> Okowa, *supra* note 16, at 752 (pointing in particular to the Court's finding that only Uganda had breached of the orders for provisional measures).

<sup>132</sup> Judgment, Sep. Op. of Simma J., para. 7

<sup>133</sup> Okowa, *supra* note 16, at 752 (noting that the decision is also regressive in terms of the progress made in *Paramilitary Activities* on questions involving the control of territory since the *South-West Africa* and *Nuclear Tests* cases.).

<sup>134</sup> De Hoogh, *supra* note 21.

<sup>135</sup> *Id.*

<sup>136</sup> S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

control territory, the State's territorial integrity is already compromised beyond the point where a lawful use of force in self-defence by another State could be viewed as a violation of territorial integrity of the host State. Thus, we argue that there is no obstacle to holding non-State actors directly responsible for their actions in a situation where they control ungoverned regions of a weak State.

**a. International Law's Current Inability to Cope with Non-State Actor Control of Territory**

The reality of the dispute in *Armed Activities* was that the government of the DRC was critically weak, so much so as to be virtually failed in the eastern portions of the country. In this part, we argue that a State's failure, combined with the presence of powerful non-State actors in control of territory, make any form of attribution to the State impossible. We demonstrate that, in fact, evolving customary international law suggests that non-State actors can commit armed attacks within the meaning of Article 51, without attribution thereof to a State.

A State's status as weak, failing, or in collapse may raise numerous concerns about its state responsibility, its ability to uphold international treaty obligations, and naturally, its ability to maintain international peace and security in its corner of the world; "the collapse of a State anywhere in the world is seen as a matter for the international community, since the international system as a whole is seen to be no longer functioning."<sup>137</sup> In the DRC, for example, the control of one-third of the territory of the Congo by non-State actors has had profound implications as,

Between the revival of the Lusaka accords and the reconstitution of Congolese statehood lie a huge distance and some formidable hurdles: the restoration of a legitimate government, the reassertion of Congolese sovereignty, and the reconstruction of a disciplined and efficient military.<sup>138</sup>

The very fact that rebel groups were signatories to the Lusaka Peace Accords<sup>139</sup> illustrates the degree of influence and control they wield in the region and demonstrates that they are not *merely* State proxies. Rather, peace is achievable in the DRC "[o]nly by giving sustained attention to the organization of a broad, cross-cutting inter-Congolese dialogue, involving rebel groups."<sup>140</sup> Thus, it is essential – both from a pragmatic perspective and to attain clarity in the law – that international law confront the obstacles raised by non-State actor controlled territory.

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<sup>137</sup> Daniel Thürer, *The "failed State" and international law*, International Review of the Red Cross, No. 836 731-61 (31 December, 1999), at Part II (based partly on a previous study and translated by the International Committee of the Red Cross – "Der Wegfall effektiver Staatsgewalt: der 'Failed State', published in 34 BERICHTER DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 9 (1995) (noting in regard to the disintegration of States, that the international community considers that the "invocation of human rights and the right to self-determination authorizes them to intervene in matters of international affairs... with the object of restoring the State authority needed for the proper functioning of international law.").

<sup>138</sup> Lemarchand, *supra* note 4, at 69 (emphasis added).

<sup>139</sup> See Judgment, para. 53.

<sup>140</sup> Lemarchand, *supra* note 4, at 71. Such an endeavour would also have to include key measures like a "transitional power-sharing agreement designed to bring "dissident" elements into the government, provisions for disarming the militias, the reorganization of the armed forces [etc.]" *Id.* at 72.



*i. The Impossibility of Attribution to a Failed State*

One of Uganda's chief arguments was that the "political and administrative vacuum" in the East of the DRC was such that Uganda's presence was necessary to ensure its own territorial integrity.<sup>141</sup> The Court seemed to accept this fact, making repeated references to the decisive role of armed militias and the lack of Congolese control in some parts of the country; yet it curiously avoided drawing any legal implications from this fact. Instead, the Court propped up a weak attribution analysis to avoid any hint that the DRC is a failed State, with resulting legal consequences. This approach may protect the DRC's sovereignty, but it is legally inaccurate as attribution to a failed state is impossible.

A failed State is signified first and foremost by the loss of territorial control by the government.<sup>142</sup> International obligations generally apply to the entire territory of a State,<sup>143</sup> but the ICJ has held that "physical control of a territory and not sovereignty or legitimacy of title is the basis of State liability for acts affecting other States."<sup>144</sup> Conflict situations which result in the loss of control of a part of the territory by a State must therefore be distinguished from those conflict situations where a degree of effective control over the entire territory is maintained, as was the case during Northern Ireland's "Troubles".<sup>145</sup> In the *Corfu Channel Case* (which Uganda relied on in its *Armed Activities* submissions), the ICJ emphasized the importance of physical control by Albania of her territorial waters in finding Albania responsible for the mines located there.<sup>146</sup>

In a situation of state failure or collapse, however, it may become *impossibilitas facti* for a State to exercise control over a part or all of its territory or the non-State actors in it, as in the DRC. In such a scenario, not only will the attribution test always fail, but its application only serves to mischaracterize the problem. While a failed State necessarily retains some "legal capacity," it

cannot be held liable for any breaches if it no longer has institutions or officials authorized to act on its behalf. In particular, the State cannot be held responsible for not having prevented offences against international law committed by private individuals.<sup>147</sup>

The Court's attribution analysis in *Armed Activities* was therefore inapposite because attribution of non-State activities to a failed State is not possible.<sup>148</sup> Moreover, as we will show, customary

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<sup>141</sup> Okowa, *supra* note 16, at 744.

<sup>142</sup> Although there are many other criteria – see Part III(e) *supra*.

<sup>143</sup> Vienna Convention on the Law of Treaties, Article 29 (1969) ("unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.").

<sup>144</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion, para. 118; see also ZEGVELD, *supra* note 19, at 180 (various international human rights, humanitarian and criminal treaties place obligations on States to control the acts of armed opposition groups, but the scope and content of these obligations reaches only "those parts of the territory where it exercises a degree of control.").

<sup>145</sup> ZEGVELD, *supra* note 19, at 207-08.

<sup>146</sup> *Corfu Channel Case*, Judgment, at 18; MAOGOTO, *supra* note 2, at 154.

<sup>147</sup> Thürer, *supra* note 137, at Part II, *Responsibility under International Law* (citation omitted).

<sup>148</sup> Dunlap, *supra* note 27 (arguing that the threat of armed attack posed by terrorists cannot be attributed to failed states, such as to Afghanistan for al Qaeda).

international law suggests that attribution is no longer required: non-State actors can commit armed attacks within the meaning of Article 51, even if those acts are not imputable to a State.

*ii. The Customary International Law on Attacks by Non-State Actors*

As discussed in Part III, the Court has repeatedly suggested that non-State actors cannot carry out an armed attack within the meaning of Article 51, unless their actions are attributable to a State, as “Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of an armed attack *by one State against another State*.”<sup>149</sup> Both the literal language of Article 51 and customary international law suggest, however, that the Court’s reading of Article 51 is incorrect.

Read literally, Article 51 does not textually require that an armed attack be launched by another State.<sup>150</sup> The only limitation in Article 51 is that only a State can be the victim of an armed attack.<sup>151</sup> In addition, the language of Article 51 specifically describes States’ right of self-defense as “inherent,” suggesting that the Court may not be able to diminish that right by restricting it to attacks conducted by a State because “[t]he 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.”<sup>152</sup>

There is an element of legal realism to this argument.<sup>153</sup> As Judge Kooijmans concluded, “[i]t would be unreasonable to deny the attacked State the right to self-defense merely because there is no attacker State, and the Charter does not so require.”<sup>154</sup> If a State is the victim of an armed attack, it will use force to defend itself, regardless of whether the attacker is a State or a non-State actor based within a State that is unwilling or unable to prevent such attacks. Although Article 51 was drafted at a time when it was hoped that the international community would intervene to protect States from such attacks, this promise has largely remained unfulfilled.<sup>155</sup> As a result, it may be both unfair and unrealistic to require States to forego their right to self-defense in the face of an armed attack by non-State actors.<sup>156</sup>

Moreover, customary international law seems to reject the Court’s restrictive reading of Article 51. Judge Simma argued that there is both state practice and *opinio juris* permitting self-defense in response to armed attacks by non-State actors.<sup>157</sup> The Security Council Resolutions (1368 and 1373) passed in the aftermath of the September 11, 2001 terrorist attacks “cannot but be read as affirmations of the view that large-scale attacks by non-state actors can qualify as

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<sup>149</sup> *Wall*, Advisory Opinion, para. 139 (emphasis added).

<sup>150</sup> Judgment, Sep. Op. of Kooijmans, J., para. 28; see also Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT’L & COMP. L.Q. 963, 969-70 (2006).

<sup>151</sup> DINSTEIN, *supra* note 46, at 204.

<sup>152</sup> Wilmshurst, *supra* note 150, at 969 (emphasis added); see also Judgment, Sep. Op. of Kooijmans J., para. 29 (“if the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its *inherent* right of self-defence.”) (emphasis in original).

<sup>153</sup> FRANCK, *supra* note 53, at 67.

<sup>154</sup> Judgment, Sep. Op. of Kooijmans J., para. 30.

<sup>155</sup> See MAOGOTO, *supra* note 2, at 170-71.

<sup>156</sup> See *id.*

<sup>157</sup> Judgment, Sep. Op. of Simma J., para. 11.

‘armed attacks’ within the meaning of Article 51.”<sup>158</sup> Resolution 1368 “clearly confirms the right of victim states to” use military force in self-defense against States that harbor or facilitate terrorists.<sup>159</sup> The result of these post-September 11 developments is a strengthening of Article 51 as a “Grundnorm governing the unilateral use of force by states against armed violence,” of which the necessary corollary is a broadening of the concept of armed attack to include attacks by non-State actors.<sup>160</sup>

It is possible to argue, on the other hand, that the Resolutions did not have this significant an impact, as there “is [still] no general support . . . for a wide right to use force against terrorist camps in a third state.”<sup>161</sup> For example, the Security Council rejected Israel’s self-defense justification for its October 2003 raid into Syria, allegedly aimed at destroying a terrorist training camp located there.<sup>162</sup> Many States continue to believe “that a State cannot be invaded under the principle of self-defence unless that State had responsibility for the armed attack precipitating the defence.”<sup>163</sup> The Resolutions may be confined to their facts given that “there was already significant evidence of a degree of responsibility of a State (Afghanistan) for the continuing ability of the terrorists to carry out attacks.”<sup>164</sup> It is also possible to read the Resolutions as still requiring attribution to a State, as both refer explicitly to the responsibility of States that harbor terrorists.<sup>165</sup>

While there may not yet be a clear norm of customary international law allowing States to use self-defense against non-State actors regardless of attribution, the law seems to be shifting in this direction.<sup>166</sup> Broadening our understanding of armed attack as it relates to attacks by non-State actors may be preferable to the creation of unwritten exceptions under the U.N. Charter. Such an understanding does not further erode the prohibition on the use of force under Article 2(4), but simply opens a broader spectrum of justifications for what continues to be unlawful conduct under Article 2(4).<sup>167</sup> The U.N. Charter is a living, breathing document that can adapt “in order to meet new concerns in present day circumstances . . . to retain a relevance to new forms of violence.”<sup>168</sup>

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<sup>158</sup> Judgment, Sep. Op. of Simma J., para. 11; *see also* Judgment, Sep. Op. of Kooijmans J., para. 28 (the Court’s restrictive reading of Article 51 “no longer seems to be shared by the Security Council.”); MAOGOTO, *supra* note 2, at 166.

<sup>159</sup> FRANCK, *supra* note 53, at 54.

<sup>160</sup> Carsten Stahn, *Terrorist Acts as “Armed Attack”: The Right to Self-Defence, Article 51(1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER FORUM OF WORLD AFFAIRS, 35, 37 (2003).

<sup>161</sup> GRAY, *supra* note 45, at 175.

<sup>162</sup> *Id.*

<sup>163</sup> Schachter, *supra* note 53, at 249.

<sup>164</sup> Wilmshurst, *supra* note 150, at 972 n. 24.

<sup>165</sup> S.C. Res. 1386 para. 3 (Sept. 12, 2001); S.C. Res. 1371 para. 2 (Sept. 28, 2001).

<sup>166</sup> Judgment, Sep. Op. of Simma J., para. 11. Simma says that these developments “were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter provisions, particularly the “Bush doctrine” justifying the pre-emptive use of force.” *Id.*, para. 11 (footnote omitted).

<sup>167</sup> MAOGOTO, *supra* note 2, at 172.

<sup>168</sup> Nico J. Shrivjer, *Responding to International Terrorism: Moving the Frontiers of International Law for “Enduring Freedom”?*, 48 NETH. INT’L L. REV. 271, 285 (2001) (in the context of the expansion of attribution of an

This new understanding would allow a State that is the victim of a large-scale armed attack by non-State actors to use self-defense in the territory of another State, provided that “that State is unable or unwilling to deal with the non-state actors itself, and that it is necessary to use force from outside to deal with the threat in circumstances where the consent of the territorial state cannot be obtained.”<sup>169</sup> Force would have to be directed primarily against the non-State actors and “against the Government of the State in which the attacker is found . . . only in so far as it is necessary to avert or end the attack.”<sup>170</sup> This understanding is especially compelling in situations like the DRC, where non-State actors are launching attacks from the territory of a failed State that is simply unable to control them.

This section has demonstrated that the Court’s attribution analysis in *Armed Activities* was erroneous because attribution of non-State activities to a failed State like the DRC is simply not possible.<sup>171</sup> Moreover, we have suggested that evolving customary international law also suggests that attribution is no longer required in order for a State to act in self-defense against non-State actors. Despite the appealing simplicity of this reasoning, however, the elimination of the attribution requirement raises further problems, as the next section will demonstrate.

#### **b. The Clash between Self-Defense and State Responsibility**

If we eliminate the attribution requirement in a case involving State failure combined with non-State actor control of territory, we are left to deal with a clash between the law on self-defense, which (under this approach) would allow a victim State like Uganda to intervene in a host State like the DRC, and the law of state responsibility, which holds that a State like the DRC cannot suffer a violation of its territorial integrity because of acts for which it is not responsible. In an attempt to resolve this clash between self-defense and state responsibility, we explore the possibility of adopting a strict liability approach to state responsibility. We ultimately conclude, however, that the paradigm of state responsibility must evolve to encompass an independent concept of non-State actor responsibility.

##### ***i. State Responsibility and its Relationship to the Inherent Right of Self-defense***

A new understanding of armed attack and an elimination of the requirement of attribution to a State will bring the victim State’s inherent right to self-defense<sup>172</sup> directly into conflict with the concept of state responsibility. The problem is that “an attack against a non-state actor within

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armed attack to encompass support for an organization to individual terrorists, who then engage in acts of destruction).

<sup>169</sup> Wilmschurst, *supra* note 150, at 969.

<sup>170</sup> *Id.*

<sup>171</sup> Dunlap, *supra* note 27 (arguing that the threat of armed attack posed by terrorists cannot be attributed to failed states, such as to Afghanistan for al Qaeda).

<sup>172</sup> U.N. Charter, art. 51; *see also Legality of the Threat or Use by a State of Nuclear Weapons*, Advisory Opinion, I.C.J. Rep. 1996 (July 8), para. 96 (self-defense is “the fundamental right of every State to survival.”). Dinstein challenges this emphasis on the “inherent” nature of the State’s right to self-defense, arguing that it is incorrect to conceive of self-defense as somehow inherent in the concept of State sovereignty because sovereignty is an evolving concept: “The contemporary right to employ inter-State force in self-defense is no more ‘inherent’ in sovereignty than the discredited right to resort to force at all times.” DINSTEIN, *supra* note 46, at 180

a State will inevitably constitute the use of force on the territorial State,”<sup>173</sup> whose only fault lies in being used by the non-State actors as a “springboard” for launching their attack<sup>174</sup> – an act for which it bears no responsibility.

Attribution to a State is an entrenched concept in the law of state responsibility.<sup>175</sup> The concept of state responsibility extends to omissions that result in the breach of a State’s international obligations<sup>176</sup> and state responsibility can be engaged for the acts of non-State actors located within its borders when certain threshold levels are met.<sup>177</sup> According to the International Law Commission’s Articles on State Responsibility, conduct by a “group acting on the instructions of, or under the direction and control of” a State can be attributed to that State, as can conduct by a group “exercising elements of governmental authority in the absence or default of the official authorities.”<sup>178</sup> Nevertheless, the Commentaries to the Articles caution against a broad application of these rules, noting that “[i]n the absence of a specific undertaking or guarantee (which would be a *lex specialis*), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter.”<sup>179</sup> An ILC report from the session in which the Articles were adopted also notes that a terrorist threat coming from a failed state would not meet the state attribution requirement of Article 2 of the Articles.<sup>180</sup>

Under the Articles, therefore, a State can be held responsible for an omission if it “is in some way *subjectively* to blame,”<sup>181</sup> if it has acted intentionally or negligently.<sup>182</sup> A State “is responsible for any failure to take *reasonable steps* to prevent the use of its territory as a base for attacks on other States.”<sup>183</sup> Thus, in *Armed Activities*, Uganda argued that the DRC acted negligently by tolerating/acquiescing in the presence of anti-Ugandan rebels in its territory. The State is required to exercise “due diligence” by undertaking all “appropriate measures to prevent and repress the injurious acts of armed opposition groups. Appropriate measures are those

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<sup>173</sup> Wilmschurst, *supra* note 150, at 969 -71.

<sup>174</sup> See DINSTEIN, *supra* note 46, at 205.

<sup>175</sup> See COMMENTARIES ON THE ARTICLES OF STATE RESPONSIBILITY, at art. 2, § 2; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Rep. 1980 (May 24) [hereinafter *Diplomatic and Consular Staff*, Judgment]

<sup>176</sup> DIXON, TEXTBOOK ON INTERNATIONAL LAW 230 (5<sup>th</sup> ed., Oxford University Press, 2005).

<sup>177</sup> See generally *Corfu Channel*, Judgment; *Diplomatic and Consular Staff*, Judgment.; see also MAOGOTO, *supra* note 2, at 154-55.

<sup>178</sup> International Law Commission, *Report of the International Law Commission on the Work of its Fifty-Third Session*, UN GAOR, 55<sup>th</sup> Sess, at 45, UN Doc A/58/10 (2001) [hereinafter “ILC Report”], including (i) acts carried out on the instructions of a State organ or under its direction or control, see ARTICLES OF STATE RESPONSIBILITY, *supra* note 53, at art. 8, (ii) conduct involving elements of governmental authority, carried out in the absence of the official authorities, see *id.*, at art. 9, (iii) in the special case of responsibility in defined circumstances for the conduct of insurrectional movements, see *id.*, at art. 10, and (iv) in cases of conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own, *id.*, at art. 11.

<sup>179</sup> COMMENTARIES ON THE ARTICLES OF STATE RESPONSIBILITY, at 83 (Ch. II) (citation omitted).

<sup>180</sup> ILC Report, *supra* note 178. Article 2 of the Articles states that: “There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and...”

<sup>181</sup> DIXON, *supra* note 176, at 230 (emphasis added).

<sup>182</sup> *Id.*, at 230.

<sup>183</sup> Wilmschurst, *supra* note 150, at 969-71 (emphasis added); see also ZEGVELD, *supra* note 19, at 180 (“international practice, human rights treaties and to a lesser extent international humanitarian and criminal law treaties, in certain circumstances, oblige the state to prevent and repress acts of armed opposition groups operating on its territory.”).

measures which the state can reasonably be required to take in view of its own capabilities and the situation.”<sup>184</sup>

The problem is that the Articles don’t address the other aspect of a situation like *Armed Activities*, where the State is not tolerating or acquiescing in the activities of non-State actors within its territory, but is too weak or has simply been unsuccessful at suppressing such activity. As a result, the Articles seemingly requiring the victim State to “patiently endure painful blows, only because no sovereign State is to blame for the turn of events.”<sup>185</sup>

This problem could be solved by adopting a strict liability approach to state responsibility for non-State actor activity.<sup>186</sup> Strict liability eliminates the difficulties of attributing non-State actor activity to a State, allowing a State to be held responsible for a “mere failure to control the activities of armed bands.”<sup>187</sup> The strict liability approach would thus hold States responsible for *all* armed attacks launched from their territory, regardless of the State’s level of support for such attacks or the State’s efforts to repress them. States such as Israel and Portugal have in fact argued that a State’s “failure to prevent, or mere acquiescence in, the activities of armed bands” justified self-defense and incurred state responsibility.<sup>188</sup>

Although a strict liability approach avoids the difficulties of attribution, it is a nevertheless a problematic doctrine. It accepts, perhaps unfairly, that a State’s territorial sovereignty can be violated because of acts that the State did not commit and was powerless to prevent. Strict liability would apply equally to a weak State like the DRC and to a strong State that is actively, albeit unsuccessfully, trying to suppress non-State actors within its borders. Moreover, even where the government is weak, the State is a distinct entity from the government and “[t]he state’s rights and obligations are not affected by lack of territorial control by the government or even by the temporary absence of the government.”<sup>189</sup> The unfairness of the strict liability approach suggests that we may need to evolve the paradigm of state responsibility to include the concept of non-State actor responsibility.

### *ii. Non-State Actor Responsibility – Evolving the Paradigm*

The unfairness inherent in holding a State responsible for acts it was powerless to prevent suggests that perhaps a modification of the paradigm itself is required through the development of a concept of non-State actor responsibility. This would allow victim States to act directly against the non-State actors, without finding a particular State responsible.<sup>190</sup> If non-State actors are capable of legally launching an armed attack,<sup>191</sup> then logic suggests that they ought to be capable of being held legally responsible for that attack.

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<sup>184</sup> ZEGVELD, *supra* note 19, at 182 (citation omitted); *see also* DINSTEIN, *supra* note 46, at 206. In the *Armed Activities*, Uganda relied on the *Corfu Channel* case to argue that the DRC had a duty not to knowingly allow, or tolerate, the use of its territory for attacks against Uganda. *See* Judgment, paras. 276-77.

<sup>185</sup> DINSTEIN, *supra* note 46, at 245.

<sup>186</sup> DIXON, *supra* note 176, at 230.

<sup>187</sup> Judgment, Sep. Op. of Kooijmans J., para. 26.

<sup>188</sup> GRAY, *supra* note 45, at 112.

<sup>189</sup> ZEGVELD, *supra* note 19, at 165.

<sup>190</sup> *Cf.* DINSTEIN, *supra* note 46, at 245.

<sup>191</sup> *Id.*, at 206-07.

Although “international bodies *do not regard armed opposition groups as responsible actors*, exercising political and military authority over other persons,”<sup>192</sup> the idea of non-State actor responsibility is growing. This response recognizes that international law, as currently structured, does “not take sufficient account of the consequences of the breakdown of the traditional State system of the nineteenth century . . . International responsibility can be attributed to entities which are not deemed States.”<sup>193</sup> State practice suggests “that armed opposition groups can be held accountable for violations of international law . . . according to standards in international treaties and customary law.”<sup>194</sup> Support for the idea of non-State actor responsibility can also be gleaned from other areas of international law that have already adapted to address the phenomenon of non-State actors. International humanitarian law, for example, has already incorporated provisions to deal with non-State actors’ involvement in armed conflict.<sup>195</sup>

One way to define the concept of non-State actor responsibility is to apply the Articles of State Responsibility “by analogy to armed opposition groups exhibiting *state-like features*.”<sup>196</sup> Armed opposition groups often resemble States, “both being collective entities with a certain degree of organization . . . [both] pursue the exercise of political power and commonly aim to become the new government or form a new state.”<sup>197</sup> Moreover, at least some armed opposition groups have “organs” like States.<sup>198</sup>

Indeed, holding groups that act as *de facto* governments responsible is an idea embedded in the ILC Articles on State Responsibility. Article 9 makes it clear that:

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.<sup>199</sup>

It is undeniable that some of the rebel groups in the DRC acted as the *de facto* government in many of the areas at issue in *Armed Activities*, as two of the rebel groups were powerful enough

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<sup>192</sup> ZEGVELD, *supra* note 19, at 92-93 (emphasis added).

<sup>193</sup> Shabtai Rosenne, *State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility*, 30 N.Y.U. J. INT’L L. & POL. 145, 165-66 (1997).

<sup>194</sup> ZEGVELD, *supra* note 19, at 151.

<sup>195</sup> Armed opposition groups are under some limited humanitarian obligations; for example, international practice generally forbids them from killing outside of combat, inflicting inhumane treatment (such as torture), and attacking civilians – Common Article 3; Additional Protocol II.

<sup>196</sup> ZEGVELD, *supra* note 19, at 154 (emphasis added).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> ARTICLES ON STATE RESPONSIBILITY, *supra* note 53, at art. 9 (emphasis added). Protocol II to the Geneva Conventions also provides for the extension of the reach of international humanitarian law obligations to non-State actors when those “armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Protocol II, art. 1, 1125 U.N.T.S.. See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 713 (2004).

to be signatories to the Lusaka Peace Agreement<sup>200</sup> and some apparently collect taxes in the territory under their control.<sup>201</sup>

This analogy does not, however, apply to all non-State actors. These groups vary in size, power, and degrees of success. It may not be possible to hold “small armed opposition groups lacking a clear organizational structure”<sup>202</sup> responsible in the same way as a State. We may need, therefore, to determine “whether groups should fulfill some set of minimum objective conditions, say as to their size and power, to qualify as international legal persons” capable of incurring legal responsibility.<sup>203</sup>

In addition to this definitional difficulty, a significant obstacle to the development of any law on this point comes from States’ reluctance to recognize armed opposition groups as legal entities.<sup>204</sup> Holding non-State actors directly responsible for their acts amounts, to some degree, to “[c]onferring international legal personality upon armed groups [and] . . . recognizing the existence of another authority within the states territory, at the expense of the existing government.”<sup>205</sup>

More fundamentally, the concept of non-State actor responsibility leaves unaddressed the violation of the State’s territory. Even if the non-State actor is held directly responsible, the fact remains that the non-State actor must necessarily be located within a State’s territory, which will be physically invaded if we allow the victim State to use self-defense against the non-State actor.

This problem may be solved if we question international law’s “heavy focus on the territorial state”<sup>206</sup> by reasoning that if non-State actors have gained control of parts of a State’s territory, that State’s territorial sovereignty has already been impinged. In other words, if a State fails to maintain “full authority in its internal legal order . . . it loses any claim to remain the only legal subject representing the internal legal order on the international level.”<sup>207</sup> Once non-State actors have usurped State control to the point where the State can no longer be held responsible for the acts of the non-State actors, then the State may have forfeited its right to territorial inviolability.<sup>208</sup> The two concepts are not mutually exclusive; both “state and group accountability exist, at least to some degree, next to each other and are complementary.”<sup>209</sup>

As this section has demonstrated, disposing of the requirement of attribution to a State in situations where the non-State actors wield a marked degree of autonomy and control of territory seems to bring the law on self-defense into conflict with state responsibility. We have suggested, however, that this conflict can be resolved either by adopting a strict liability approach to attacks emanating from a State’s territory or by evolving the paradigm to include a conception of non-State actor responsibility. Strict liability or non-State actor responsibility may resolve the clash

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<sup>200</sup> See Judgment, para. 33.

<sup>201</sup> Lemarchand, *supra* note 4, at 56.

<sup>202</sup> ZEGVELD, *supra* note 19, at 155.

<sup>203</sup> *Id.*, at 134.

<sup>204</sup> See *id.*, at 134.

<sup>205</sup> *Id.*, at 163.

<sup>206</sup> *Id.*, at 226.

<sup>207</sup> *Id.*

<sup>208</sup> Cf. Okowa, *supra* note 16, at 750-51 (arguing that Uganda cannot have violated the rule of non-intervention because the irregular forces were operating as the *de facto* government in the Eastern region of the DRC.).

<sup>209</sup> ZEGVELD, *supra* note 19, at 225.



between state responsibility and self-defense, but they leave unaddressed the problem of infringement of the host State's territory. We have suggested, however, that this infringement may be acceptable in situations where the State's territorial integrity has already been undermined by the control of territory by non-State actors, as in the DRC.

**c. Consequences of Non-State Actor Responsibility – the Law of Self-Defense and Beyond**

While we ultimately believe that international law must begin to grapple with the difficult issues that we have raised, we do not claim that non-State actor responsibility is a panacea for all of the uncertainty in the application of international law to non-State actors. In this section, therefore, we recognize that the concept of non-State actor responsibility carries with it some deeply troubling implications. It is beyond the scope of this article to suggest how these implications can be resolved, but it is clear that they must be kept in mind as the international community seeks to grapple with the uncertainties of the use of self-defense against non-State actors.

There are negative consequences associated with according legal significance to the responsibility of armed non-State actors and perhaps even more troubling consequences arising from a legal recognition of the fact that a State is not in control of a portion of its territory. The absence of a government or the lack of territorial control may result in: (i) the temporary impossibility of the operation of treaties; (ii) the suspension of treaties; and (iii) force majeure precluding wrongfulness of the State's violations of treaties.<sup>210</sup> Moreover, as suggested above, States may have a right to defend against attackers from a State where there is no governmental control.<sup>211</sup> These consequences raise concerns about the political independence and territorial inviolability of the failed or critically weak State if international law sanctions the forceful intervention of other States to deal with the armed attacks, or, even more troublingly, the *threat* of an armed attack.

These concerns can be rejected, as suggested above, for several reasons intrinsic to the phenomenon of failed States. First, States have the inherent right of self-defense irrespective of whether an armed attack emanates from a failed State or a strong one. Second, as lack of territorial control is the essence of a failed or critically weak State, a military response to its consequences does not appear to violate the principle of territorial integrity. Third, the political independence of a failed State may often be compromised to the point where it cannot be further eroded by the intervention of another State.<sup>212</sup> The erosion of the State by the presence of non-State actors seems to preempt any further decay of state sovereignty that would be caused by another State responding in self-defense to attacks launched from the uncontrolled territory.

A more troubling consequence, however, is the possibility that recognition of the statehood of a sovereign who has not maintained territorial control could be withdrawn by other

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<sup>210</sup> *Id.*, at 210.

<sup>211</sup> Judgment, Sep. Op. of Kooijmans J., para. 30-31.

<sup>212</sup> Susan E. Rice, *US Foreign Assistance and Failed States*, Working Paper for the Brookings Website, at <http://www.brook.edu/views/papers/rice/20021125.htm> (Nov, 26, 2002) (defining failed states as "countries in which the central government does not exert effective control over, nor is it able to deliver vital services to, significant parts of its own territory due to conflict, ineffective governance or state collapse.").

States.<sup>213</sup> Non-recognition of a State is a rare occurrence in international law and is usually precipitated only by the transition of the State into a new entity or entities.<sup>214</sup> Another possibility is the recognition of new States.<sup>215</sup> In the DRC, in fact, some of the rebel groups have transitioned into political parties,<sup>216</sup> leading some to suggest the formal recognition of the three distinct areas of the DRC in the control of different groups as new States.<sup>217</sup> If States were to begin to withdraw their recognition on the basis that the State in question no longer exercises sovereign authority, or if the international community begins to recognize new States on this basis, it could open the door to political manipulation – especially in the context of the DRC, where numerous States and rebel groups have an interest in gaining control of the Congo’s rich natural resources.<sup>218</sup>

In the face of these prospects, the Court in *Armed Activities* seems to have responded with a strong reassertion of the DRC’s statehood, through non-recognition of non-State actors. This response avoids the above-mentioned possible fallouts by invoking “the old-established practice and theory whereby the identity and continuity of the State cannot be called in question through any temporary lose of unified an effective authority.”<sup>219</sup> We have suggested, however, that this unwillingness to recognize the role of non-State actors in this case produces wholly unsatisfactory results and avoids resolving deep uncertainties on the application of the law of self-defense against non-State actors. Rather than avoid these issues, we have proposed that the international community, including the ICJ, should begin to consider alternative responses that seek to mitigate the dangers discussed above, while addressing the issues raised by non-State actors in control of territory. In the following Part (V), we conclude by setting forth a prognosis for the future of international law if international actors, such as the ICJ, continue to avoid these difficult questions.

## V) CONSEQUENCES OF IGNORING THE PROBLEM: A PROGNOSIS FOR INTERNATIONAL LAW

As this article has illustrated, the problem of how international law should respond to non-State actors who engage in the use of force against States is riddled with uncertainty and complexity. This state of affairs is likely to persist as conflicts characterized by weak States and increasingly independent non-State actors, such as the one in the DRC, proliferate. In the final Part of this article, we offer a prognosis for the future of the international legal landscape and

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<sup>213</sup> Dunlap, *supra* note 27.

<sup>214</sup> E.g. decolonisation or the break-up of a bloc State into several independent States such as the SFRY in the 1990s.

<sup>215</sup> Jeffrey Herbst, *Let Them Fail: State Failure in Theory and Practice*, in *WHEN STATES FAIL: CAUSES AND CONSEQUENCES* 302, 314 (Robert I. Rotberg ed., 2004).

<sup>216</sup> In July 2006 these rebel groups turned political parties even participated in the first elections held in the DRC in forty years, which were largely hailed as free and fair by international monitors. *See International Delegation Observes Historic Democratic Republic of Congo Elections*, 31 Jul 2006, PRESS RELEASE, THE CARTER CENTER.

<sup>217</sup> Lemarchand, *supra* note 4.

<sup>218</sup> Indeed, Herbst went so far as to suggest that it should have been recognized (by the United States in particular) that Zaire under Mobutu was a failed State, and recognition of its statehood ought to have been withdrawn. Herbst, *supra* note 215, at 313.

<sup>219</sup> Thürer, *supra* note 137, at Part II.

attempt to flag some issues that the international legal community must begin to address in order to close the normative gap surrounding non-State actors.

Conflicts between States and non-State actors are proliferating, from Hezbollah's war with Israel, to incursions by the Janjaweed militia of Sudan into Chad, and the possibility of a Turkish operation against PKK elements located in northern Iraq. Non-State actor aggression is likely to increase as globalization increases the ability of non-State groups to organize, communicate, acquire sophisticated weaponry,<sup>220</sup> and mount transborder attacks,<sup>221</sup> as the September 11, 2001 attacks and the Great Lakes conflagration all too clearly demonstrate. Predicted shortages of basic natural resources such as water and oil are also likely to result in "resource wars" dominated by non-State actors.<sup>222</sup>

This proliferation of non-State actor conflicts foretells of non-State actors increasingly using transboundary force without alignment to any State interests. As *Armed Activities* demonstrates, States seem to be losing their ability to control non-State actors within their territories as the latter grow more independent and States grow weaker. States will have to decide whether to deal with non-State actors, as in the Lusaka Agreement, without knowing whether this sort of practical political recognition of non-State actor *de facto* control of territory carries consequences in international law.

In addition to the rise of powerful, unaffiliated non-State actors, we are simultaneously facing increased incentives for States to use non-State actors as their proxies, preserving their own impunity. The Court's restrictive interpretation of the application of Article 51 to non-State actors in *Armed Activities* has left "black holes" in the law,<sup>223</sup> creating incentives for States to engage in "surrogate warfare" through non-State actors<sup>224</sup> and fight their wars through rebel groups as in the DRC. Surrogate warfare can be used by States to circumvent and weaken the international prohibition on the use of force upon which the United Nations system is premised. It is also likely to further aggravate conflicts such as the one in the Great Lakes region. Using a non-State actor to conduct attacks on neighboring States insulates States – such as the Sudan, Rwanda, and Chad – from international responsibility. Non-State actors are also not explicitly bound by the same restrictions on the use of force (*in bello* or *ad bellum*), suggesting that non-State actors might be able to wage war more effectively, and more brutally, than some States. Humanitarian concerns suggest that we ought to promote the extension of international law in order to regulate the conduct of all parties to a conflict.<sup>225</sup> There is also the threat that these

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<sup>220</sup> See *id.*, at text accompanying fn. 113-117.

<sup>221</sup> Brooks, *supra* note 199, at 709.

<sup>222</sup> Cf. Klare, *supra* note 2, at 120-21 (noting that rebel groups in countries like Sierra Leone and the DRC finance their activities through their control over lucrative natural resources); Michael T. Klare, *The Coming Resource Wars* (March 07, 2006), available at [http://www.tompaine.com/articles/2006/03/07/the\\_coming\\_resource\\_wars.php](http://www.tompaine.com/articles/2006/03/07/the_coming_resource_wars.php) (citing British Defense Secretary John Reid's warning that global climate change and dwindling natural resources "will make scarce resources, clean water, viable agricultural land even scarcer . . . [and this will] make the emergence of violent conflict more rather than less likely.").

<sup>223</sup> See Judgment, Sep. Op. of Simma J., para. 41.

<sup>224</sup> See FRANCK, *supra* note 53, at 50 ("The decision to limit the right of self-defense to situations where there had been an 'armed attack' also sadly failed to anticipate, let alone address, the imminent rise in surrogate warfare prompted by rogue states and international terrorists.").

<sup>225</sup> See ZEGVELD, *supra* note 19, at 134. The deaths of some four million people since 1998 as a result of the conflict indicate the urgent need to curb this conflict. See Robinson, *supra* note 6.

increasingly autonomous non-State actors will use force to gain recognition and legitimacy, coercing their way into transitional governments.<sup>226</sup>

Our analysis of the complex questions raised by the *Armed Activities* opinion suggests a divorce between the law and the political reality,<sup>227</sup> potentially creating incentives for States to act outside the law. Because international law does not currently address the problem of non-State actors in control of territory, States will seek answers to this problem outside the international legal system. If the Court continues to deny States the inherent right of self-defense against non-State actors launching attacks from other States, States may turn away from the international dispute resolution system and towards self-help countermeasures. The danger of promulgating decisions that are out of line with the needs of the law's subjects suggests that the reality of those needs may come to eclipse the judicial decisions – a problem that is especially acute in cases involving issues of national security and defense.<sup>228</sup> When States turn away from the law, the law itself suffers.<sup>229</sup> If our understanding of the law is incapable of evolving, we risk creating unwritten exceptions to the law, potentially eroding the force of legal prohibitions, such as the prohibition on the use of force.<sup>230</sup>

Ignoring the problem also creates problems for the internal coherency of international law and, ultimately, the fragmentation of international law.<sup>231</sup> To a large extent, the role of non-State actors has already been formalized in many fields of international law, including international humanitarian law,<sup>232</sup> international treaties regulating terrorism,<sup>233</sup> and customary international law.<sup>234</sup> While some international tribunals (the ICTY, ICTR, and IACHR) have required that non-State groups meet certain levels of organization and have engaged in military operations in order to qualify as a “Party” to the conflict, other international bodies (the Security Council and the Commission on Human Rights) “have applied Common Article 3 to a wide range of groups apparently lacking any real effectiveness.”<sup>235</sup> In these areas, therefore, “[t]here is widespread international practice demonstrating that armed opposition groups can be held accountable for violations of international law.”<sup>236</sup> The application of international law to non-State actors is thus inconsistent, potentially creating dangerous incentives for both States and non-State actors, as

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<sup>226</sup> See Jeremy L. Levitt, *Illegal Peace? An Inquiry into the Legality of Power-Sharing with Warlords and Rebels in Africa*, 27 MICH. J. INT'L. L. 495 (2006).

<sup>227</sup> See Martti Koskeniemi, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (Reissue with new epilogue, Cambridge University Press, 2005).

<sup>228</sup> Philippe Weckel, *Emploi de la force et lutte contre le terrorisme*, in CUSTOMARY INTERNATIONAL LAW ON THE USE OF FORCE 293, 295 (Enzo Cannizzaro & Paolo Palchetti, eds., Martinus Nijhoff Publishers 2005).

<sup>229</sup> FRANCK, *supra* note 53, at 178 (“When law permits or even requires behavior that is widely held to be unfair, immoral or unjust, it is not only persons but also the law that suffers. So, too, if law prohibits that which is widely believed to be just and moral. Consequently, it is in the law’s self-interest to serve the bridging function.”).

<sup>230</sup> MAOGOTO, *supra* note 2, at 172.

<sup>231</sup> See International Law Commission, Report of its fifty-sixth Session, *Report of the study group on the fragmentation of international law*, at 283-303, Supp. No. 10, U.N. Doc. A/59/10 (2004).

<sup>232</sup> Common Article 3; Additional Protocol II.

<sup>233</sup> See *inter alia* International Convention against the Taking of Hostages, 1316 U.N.T.S. 205 (1979); Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 974 U.N.T.S. 178 (1971).

<sup>234</sup> See Parts IV(a)(ii) and (b) *supra*.

<sup>235</sup> ZEGVELD, *supra* note 19, at 135.

<sup>236</sup> *Id.*, at 151.

well as weakening the internal logic of the law. This fragmentation in the law is both a consequence and a symptom of the law's current inability to address non-State actors satisfactorily.<sup>237</sup>

As we have seen, there are serious structural flaws inherent in the nature of international law contributing to the void surrounding the issues of non-State actors and uncontrolled territories that are not easy to overcome. So far, the relevant actors – not only the Court, but also regional and international organizations and other States – have failed to fill this void by addressing these issues. We suggest, however, that these issues are unlikely to disappear, as conflicts involving powerful non-State actors, often in control of territory, seem to be increasing. While there are no clear-cut solutions, only by beginning to probe the complexity of the problem can international law hope to meet this challenge.

Regardless of the pitfalls of permitting preemptive force in self-defense against suspected terrorist or other armed non-State groups emanating from a failed or weak State,<sup>238</sup> a view of international law that does not support the use of force against such actors after they have committed such an attack is wearing thin. International law should entertain new approaches that attempt to strike a balance between an inflexible state-centric system and a total erosion of state sovereignty. International law might recognize State failure and non-State actor control of territory as legal phenomena, while simultaneously limiting the legal consequences of such a determination, such as precluding unilateral withdrawal of state recognition. For example, international law could acknowledge that territory is under the control of non-State actors solely to permit a finding of legal use of force in self-defense in response to attacks launched by these armed groups. The prospect of endowing non-State actors with even this limited form of international responsibility naturally has profound implications for the State's sovereignty and territorial integrity. When non-State actors are able to exercise *de facto* control over territory, however, we have posited that these state attributes are already so compromised that impinging them to cope with the realities of non-State actors governing territory may be justified.

Blind adherence to the State system has become an “intellectual logjam,”<sup>239</sup> creating a legal regime that encourages States to make war through proxy non-State actors and to judge for themselves when they can intervene in territory controlled by non-State actors. It simultaneously threatens the rise of powerful, non-State actors that cannot be controlled by States or the international organizations designed to regulate States. While we cannot say how these difficult issues will ultimately be resolved, the first step must be “to provide the intellectual space necessary for persons living in failed states to present alternatives by declaring that the international community is not blindly wedded to the state system.”<sup>240</sup>

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<sup>237</sup> Cf. Martti Koskeniemi, *International Legislation Today: Limits and Possibilities*, 23 WIS. INT'L L.J. 61, 83 (2005) (“Fragmentation emerges, not as a technical problem but as a conscious challenge to what seem like unacceptable features of the old law.”).

<sup>238</sup> See Glennon, *supra* note 104, at 541-45; Dunlap, *supra* note 27.

<sup>239</sup> Herbst, *supra* note 215, at 312.

<sup>240</sup> *Id.*, at 312.