Terrorism, Non-State Actors and State Self-Defence

- A Study on the Legal Aspects of State Self-Defence in Relation to International Terrorism

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Executive Summary

This study explores the legal aspects of State self-defence against non-State actor terrorism. Using hard legal positivism as the guiding philosophy, *jus ad bellum* and *jus in bello* is studied for armed inter-State conflicts as well as conflicts between States and non-State actors. The study calls for democratic States to establish an objective definition of terrorism, looking at the means rather than the aims of the belligerent non-State actor. If the means to reaching the aims imply targeting mainly civilians, the violent actions of the non-State actor should be deemed terrorism. It is argued that if the international community is ever to be able to combat terrorism efficiently, a common and universal definition of terrorism is needed.

Keywords: *international law, terrorism, hard legal positivism, State self-defence*
Acknowledgments

I am highly indebted to LL.D. Marie-Hélène Boccara for her guidance, support, suggestions, intellectual discussion and keen interest in this study during my work. Thank you!

I am grateful to the library staff at the Stockholm University Library and The Anna Lindh Library of the Swedish National Defence College for their assistance.

I wish to express my sincere thanks to my friends who read the manuscript and made several helpful comments and suggestions.

Of course, for the shortcomings of the study only I am responsible.

For her love, encouragement and support, I owe a great debt of gratitude to Sharon, whose word is law.
If you are a terror to many, then beware of many.

*Decimus Magnus Ausonius (ca 310-395)*
### Abbreviations

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<tr>
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<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
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<td>BYIL</td>
<td>British Yearbook of International Law</td>
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<td>EJIL</td>
<td>European Journal of International Law</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>JPR</td>
<td>Journal of Peace Research</td>
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<td>NJIL</td>
<td>Nordic Journal of International Law</td>
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<td>NYIL</td>
<td>Netherlands Yearbook of International Law</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>YJIL</td>
<td>Yale Journal of International Law</td>
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PART I

1. Introduction

On September 17th 2008 the Danish Command ship HDMS Absalon, part of an international counter-piracy mission, captured ten pirates in two speed boats in the Gulf of Aden outside the coast of Somalia. Many heavy weapons such as automatic rifles and rocket launchers were seized. The crew on Absalon had no initial instructions on how to proceed with the captured pirates. There were three alternatives. The first option was taking the pirates to Denmark and initiating legal actions against them there. This option faced heavy resistance in Denmark from some political parties and part of the public. The second option was to hand the pirates over to the Somali authorities. However, there is no functioning government in Somalia since 1991 when President Siad Barre was ejected. Turning the pirates over to some local war-lord would also violate international conventions prohibiting the expulsion of any person to a country where there would be a risk for that person’s life. The third option was to release the pirates without taking any legal action. Danish authorities assessed the alternatives. No other country around the Gulf of Aden wanted to prosecute the prisoners and there was no legal ground for prosecution under Danish law. After about a week, the third option was chosen and the pirates were released.

The above situation illuminates some of the difficult issues that are – or could be – regulated by international law. Most States today manage to solve their differences by peaceful means, but when extending the arena of stakeholders to involving non-democratic States or non-State actors such as terrorist groups, this creates more serious challenges to international law. These challenges are what motivate the present study. How does a State defend itself against an armed opponent that is bound by no international conventions? An opponent that might be hiding amongst innocent civilians, in schools, religious buildings or even hospitals, from where they attack civilians in the State defending itself? Is it permissible to find and kill the opponent, even though he/she is not wearing uniform or carrying arms openly? Would it be allowed to arrest and prosecute members of the opposing force? Regular enemy combatants cannot be brought to trial since being a soldier is not a crime in itself, but must be released as the violence ceases. Thus, many legal questions are raised when States are confronted with non-State actor violence.
International law lacks formalism compared to the national judicial systems, such as binding judgments and executive instances; there is no supreme authority or global police force, nor a judicial court with universal jurisdiction, although there has been a serious attempt since 1945 to place limitations upon unilateral use of force by States. Another distinctive feature of international law compared to national law is the discussion, or dispute, on what really constitutes binding law, depending on what judicial philosophy one departs from. One could argue that many international documents that some judicial philosophies find binding, others find to be nothing but mere ambitious goals, at best.

International law started developing long ago. The early Romans made a distinction between bellum justum (“just war”) and bellum injustum (“unjust war”). Rome in fact considered itself in permanent war with any state which it didn’t had a peace agreement with. The regulation of warfare was however not merely restricted to the European arena. For example in China, Sun Tzu wrote “The Art of War”, a veritable war manual, some 2000 years ago. In “The Laws”, Plato claimed that peace was ”only a fiction” and that ”all states by nature are fighting an undeclared war against every other state”. As the Roman Empire slowly disappeared, a great number of feudal lords and monarchs replaced it, exercising power over certain territories and conducting never-ending armed conflicts against other feudal kingdoms. One example of this era is Niccolò Machiavelli’s ”The Prince”, a guide for a prince or ruler on how to maintain power and exercise control.

Some aspects of international maritime law were codified as early as the 13\textsuperscript{th} century in Barcelona, and an agreement regarding the treatment of prisoners was made in 1528 between France, England and the Holy Roman Empire. However, modern international law only began to develop as nation States emerged at the end of the Middle Ages. In 1625, Hugo Grotius made a substantial contribution to the development of international law with the treatise ”On the Law of War and Peace”, introducing a formalistic approach to war. Thomas Hobbes also undermined the power of feudal kings by writing that when a sovereign ruler turned from being a protector into an oppressor, the people had the right to oust him from

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3 Id. at p. 21.
5 Machiavelli, Niccolò (1532) Il Principe (The Prince).
6 Neff (2005) p. 73.
power. Another major development in the formalisation of warfare came with Emmerich de Vattel’s publication of Le Droit de Gens (“The Law of Nations”) in 1758. War, and military life, was increasingly professionalized, and this had several effects – such as e.g. reduced involvement and suffering of the civilian population. The idea of war changed from an institute of justice to ”an instrument for the advancement of rival national interests.” States now had standing armies, ready to engage in battle. As Carl von Clausewitz so famously put it, wars were now an ”absolute” and a ”continuance of policy by other means”.

In the 19th century, most of the world had been parcelled up into States with borders claimed by various States; war still inflicted heavy casualties and several initiatives were taken to reduce the devastating effects of armed conflicts. For example, the International Committee of the Red Cross was founded in the 1860s. The first Geneva Convention was signed in 1864, introducing legal protection for the immunity of medical personnel. In 1899, a legally binding treaty was put in place at the First Hague Peace Conference; the rules of this treaty were then updated and re-codified at the Second Hague Peace Conference in 1907. These Hague Conventions were, as Yoram Dinstein explains, the first steps in somewhat curtailing the freedom of war in international law. The Hague rules e.g. prohibited ”unnecessary suffering” and said States did not have ”unlimited” means to inflict damages on the opponent. Specific, context-independent rules of conduct were put into place. For example, naval bombardments of civilian areas were outlawed and more extensive rules for the protection of war prisoners were introduced. As Stephen Neff describes, ”the basic humanity of enemy soldiers would be recognised at all times.” An early form of the rule of distinction could be seen, where war was to be waged against the enemy’s armed forces and military targets solely and not against its civilian population nor civilian objects. Civilians were to be excluded from wars, as victims as well as participants. The general rule made it forbidden for civilians to participate in war; any civilian engaging in combat would run the

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12 *Id.* at p. 162.
13 von Clausewitz, Carl, ”On War”, at 87, as quoted by Neff (2005) p. 197.
14 Neff (2005) p. 188.
15 *Id.* at p. 187.
18 *Id.* at p. 187.
19 *Id.* at p. 189.
risk of being seen as a criminal or even murderer.\textsuperscript{21} A conference in Brussels in 1874 discussed the issue on who was entitled to engage in battles. It concluded that this right was entitled to armed forces (without defining "armed forces") but also civilians if certain requirements were met.\textsuperscript{22}

The First World War showed there were no legal barriers to waging a total war; thus, the League of Nations was established to bring about an international rule of law.\textsuperscript{23} Peace would be the normal state of international relations and war would be the exception, instead of the opposite.\textsuperscript{24} As we know, the League of Nations failed. As the United Nations emerged in 1945, it banned all resorts to armed force, with just two exceptions. The first was self-defence for cases of emergency action against aggression; the second was community law-enforcement action.\textsuperscript{25} The UN Charter Article 2(4) prevents use of armed force between the members of the United Nations;\textsuperscript{26} this was a confirmation of the 1928 Briand-Kellogg Pact, which had introduced a \textit{jus contra bellum} as the general rule in international law.\textsuperscript{27} In conclusion, \textit{jus ad bellum} has moved from a situation where initiating war was the legitimate right of any sovereign ruler, to a situation where war has been extensively regulated and almost completely banned. Some examples of this legal development include the above-mentioned Hague and Geneva Conventions that in various ways regulate warfare, \textit{jus in bello}.

As international law is based on the relationship between States, it is also necessary to briefly mention some issues in regards to States and statehood. Certain objective requirements for statehood under international law needs to be met before an aspiring State can and will be recognized by other States, thus achieving statehood.\textsuperscript{28} These requirements include having a permanent population, which lives in a certain defined territory that is effectively controlled by a government that has capacity to enter into relations with other States. These oft-quoted requirements can be found in Article I of the 1933 Montevideo Convention.\textsuperscript{29} The convention only had about 20 signatories at its creation, but as been

\begin{itemize}
\item \textsuperscript{21} Neff (2005) p. 190.
\item \textsuperscript{22} Id. at p. 209.
\item \textsuperscript{23} Id. at p. 279.
\item \textsuperscript{24} Id. at p. 279.
\item \textsuperscript{25} Id. at p. 315.
\item \textsuperscript{26} Dinstein (2001) pp. 91-92.
\item \textsuperscript{27} Kellogg-Briand Pact 1928 http://www.yale.edu/lawweb/avalon/imt/kbpact.htm [Accessed February 11\textsuperscript{th} 2009].
\item \textsuperscript{28} Crawford, James (2006) \textit{The Creation of States in International Law}, Oxford University Press, Great Britain, p. 36.
\item \textsuperscript{29} Article I of the 1933 Montevideo Convention states: "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.” Montevideo Convention on the Rights and Duties of States, December 26, 1933.
\end{itemize}
pointed out, the convention is a restatement of customary international law as it codifies already existing legal norms; thus it is universally binding.\footnote{http://www.cfr.org/publication/15897/montevideo_convention_on_the_rights_and_duties_of_states.html [Accessed February 11th 2009].}

Naturally, there is a correlate; a State can also cease to exist. For example, it can be dissolved and split into several countries, such as Czechoslovakia, Yugoslavia and the United Arab Republic. Another situation is debellatio; this happens when one State occupies the complete territory of another State and defeats all resistance as well as destroying the national government.\footnote{Harris, D.J. (ed.) (2004) \textit{Cases and Materials on International Law}, 6$^{th}$ ed. Sweet and Maxwell, London, p. 99.}

When a government has an effective control over a defined territory and population, the State exists \textit{de facto}, even if other States choose not to recognize it. Recognizing a State that does not exist \textit{de facto} is often due to political circumstances. A State’s claim to have satisfied the accepted criteria for sovereign statehood is conditional upon the diplomatic recognition of other States.\footnote{Dinstein (2001) p. 46.} It is important to note, however, that even if a majority of States recognize a nation as a sovereign State, this recognition is not binding on third-party States.

A basic purpose of an international normative system is to organize the international society of States,\footnote{Boccara (2007) p. 37.} in order to promote peace, stability and order, which results in predictability.\footnote{See e.g. article 2(3) in the UN Charter, as quoted in D’Amato, Anthony et al (1990) \textit{Basic Documents in International Law and World Order}. West Publishing Co, St. Paul. See also Boccara (2007) p. 41.} Further goals include preserving the system of sovereign States, chief holders of rights and duties – such as the supreme jurisdiction over its subjects and territory and the monopoly to use violence\footnote{Bull, The Anarchical Society, quoted in Boccara (2007) p. 35.} - as well as the aim to impose a legal control on violence. The very foundations of the international system apply to States; self-governance, the non-use of aggressive force, territorial sovereignty and integrity, political independence and the peaceful resolution of settlements.\footnote{Chadwick, Elizabeth (1996) \textit{Self-Determination, Terrorism and The International Humanitarian Law of Armed Conflict}. Martinus Nijhoff Publishers, The Hague, p. 24.}

Many of the legal sources in international law stem from the early post WWII-era, a time when war and armed conflicts mainly took place between States. However, the past few decades, armed inter-State conflicts have decreased in frequency while conflicts between States and non-State actors have increased in frequency.\footnote{Neff (2005), p. 358 and Harbom, Lotta and Wallensteen, Peter (2007) “Armed Conflict, 1989—2006.”}
Conventions that are applied in times of inter-State conflicts, such as the Hague Conventions, Geneva Conventions and the UN Charter, cannot be easily applied to State conflicts with non-State actors. States are bound by the above-mentioned conventions; terrorist groups are not. This creates an asymmetric legal situation, as “terrorists can engage in State-like violence without bearing the burden of State-like responsibility”. Thus, it is not always obvious what rules to apply regarding e.g. *jus ad bellum* and *jus in bello* when States clash with non-State actors. For example, terrorists frequently target civilians, and often also use their own civilians as human shields when perpetrating their attacks, which obscure the State self-defence as States are legally bound not to target or injure civilians.

The present study has certain limitations that need to be taken into account when considering the study and its contribution. One example is that all information needs interpretation, which means that the author risks implementing his views in regards to cultural bias. There are no truths, only facts – and even they differ when looked at in various lights.

This study examines some of the legal aspects of State self-defence against international terrorism. Thus, it does not analyse the legal issues that arise when States handle domestic terrorism, such as e.g. wiretapping, infiltration and detention.

The term non-State actor could, when discussing terrorism, encompass both network groups such as al-Qaeda, as well as actors and groups that hold territory and constitute a form of quasi-States, such as FARC in Colombia, LTTE on Sri Lanka, PKK in northern Iraq, Hezbollah in southern Lebanon and Hamas in the Gaza Strip. This thesis will focus on the latter camp of groups.

However, some of the abovementioned limitations may constitute interesting avenues for further research.

### 1.1. Purpose

The purpose of the paper is to make a conceptual study of the legal situation regarding State self-defence against non-State actor international terrorism. This includes defining terrorism and ascertaining what legal sources that might be relevant when States are confronting terrorism. The principal questions addressed in this study are accordingly:

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40 FARC and LTTE are abbreviations of "Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo" and "Liberation Tigers of Tamil Eelam", respectively.
1. What, if any, is the legal basis for armed retaliations and other actions that a State carry out when defending itself against terrorism?
2. Is it possible to determine the conditions when violent actions constitute terrorism?

This study will then evaluate, interpret and apply various norms that could help highlight these questions.

### 1.2. Normative Theory

The following section, normative theory, will give the theoretical starting points of this study by presenting the adopted normative doctrine and basic norm, as well as discussing the normative sources used for this study. Prior to this, however, some of the most important judicial philosophies will be elaborated upon in order to give the reader a deeper knowledge of the doctrines and their respective differences.

Michael Hechter has defined norms as “rules for conduct that provide standards by which behaviour is approved or disapproved”. 41 As norms are decrees, they can be morally but not legally binding – it is the normative source that decides whether a norm, such as a UNGA resolution, is legally binding.

At this point, it may be useful to define what normative theory is, and how to differ it from descriptive legal theory. Descriptive (positive) legal theory seeks to explain what the law is, why it is that way and how law affects society, while normative legal theories are concerned with morality, or what the law ought to be; as Raymond Wacks describes it, “descriptive legal theories are about facts, normative legal theories are about values”. 42

One cannot discuss legal and normative theory in international law without mentioning Martti Koskenniemi’s 1989 doctoral thesis, From Apology to Utopia. 43 This dissertation has had an immense impact on the legal debate and has become a universal point of reference. In it, Koskenniemi pits natural law (norms coming from a higher, possibly divine, intellect) against positivism (norms coming from the State usus), and claims that any

position taken in-between these two opposites tend to be logically unfeasible. Law is either apologetic (defending State *usus*, as positivism does) or utopian (like natural law, lacking links to reality). Law is either post-rationalizing (describing State actions) or but a feeble moral missing concrete elements. Koskenniemi’s conclusion is that international law has no possibilities of functioning consistently entirely in reality.44

Examples of doctrines following the rule-oriented approach include positivism and realism. Natural law departs from the assumption that law can be derived from a higher intellect. It emphasises systemic values and general principles. An early proponent was Hugo Grotius. Natural law was challenged by positivists such as David Hume, Jeremy Bentham and Immanuel Kant, but had a renaissance after the World War II. For example, the UN Declaration of Human Rights was based on the ideas of natural law; as were the arguments of prosecutor Robert Jackson in the Nuremberg Trials.45

Positivism – also called legal positivism – is rule-oriented but emphasises on treaties and customs. It believes all science should be empirical, that is, be based on experiences. Law is an expression of State *opinio juris* and *usus*. Legal science should focus on *de lege lata*; i.e. on how the legal system works, rather than how it should work. The trinity of population, territory and governmental control makes for a State. This is important to positivists, as they view States as the sole constituents of the international legal community, as well as they are sole creators and addressees of international law; i.e States are the only actors having an international legal personality. This is a focal point for the critics of positivism, as well as the presumption that law can be objectively determined.

There are several schools of thought – also known as doctrines or judicial philosophies46 - as to what creates international law47 and how to interpret it. Some schools put more weight into State actions (*usus*), others stress the importance of the legal opinions (*opinio iuris*)48 of the States as expressed in e.g. the UN General Assembly. Koskenniemi divides the doctrines of international law into four main factions; the rule-oriented approach,

46 The terms “schools of thought”, “judicial philosophies” and “doctrines” have - in my opinion - equal meaning. I do not seek to confer any deeper meaning, value or position by my choice and use of these terms and I will use them interchangeably throughout this paper.
47 When using the term “international law” in this paper, “international public law” is implied.
48 The full term is *opinio juris sive necessitatis*, meaning “a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.” Dinstein, Yoram (2004) *The Conduct of Hostilities under the Law of International Armed Conflict*. Cambridge University Press, United Kingdom, p. 5.
the policy-oriented approach, the idealistic approach and the sceptical approach. The rule-oriented approach asserts that “law is normatively strong but restricted in scope”, rendering it utopian as law is studied isolated from the legal reality. The policy-oriented approach, where “law is normatively weak but wide in scope”, says that only State interest, will and behaviour affect international law, and is thus called apologetic. Koskenniemi says that the sceptical approach entails that “law is both normatively weak and materially restricted”, while in the idealistic approach, “law is both normatively strong and materially wide”. Of these four major doctrines, the policy-oriented approach is considered to be the dominant one amongst international law scholars. The four factions in Koskenniemi’s framework are elaborated upon below. The first faction, the rule-oriented approach, has several sub-doctrines, such as positivism and realism. There is both hard legal positivism and soft legal positivism, of which the latter is by far the most influential today. Hard legal positivism was formulated by the German jurist Lassa Oppenheim (1858-1919) in the early 1900s, departing from the traditional legal positivist doctrine. It puts great emphasis on a formal handling of the legal sources and realism in regards to international relations. Oppenheim strongly rejected natural law-based theories and maintained that only the free will of States could create law. Hard legal positivism has been dismissed by critics as “amoral, apolitical and atheoretical”, as it has sought to separate law from morals and from politics, although others assert that “the positivist separation of law from moral argument and from politics is

50 Id. at p. 155.
51 Id. at p. 155.
52 Id. at p. 156.
53 Id. at p. 156.
54 Id. at p. 156.
55 Id. at p. 171, as referred to in Boccara (2007) p. 39.
60 ”Hard legal positivists” are also sometimes referred to as ”exclusive legal positivists”; this paper will use the former term.
itself a moral and political position.”  

Some leading advocates of hard legal positivism are Joseph Raz and Prosper Weil.

Another important rule-oriented doctrine is Realism, led by Georg Schwarzenberger. It insists that only rules are binding – and these rules must be established by objective criteria. A main instrument and goal of state policy is military force. The role of international organisations is minor. “Soft law” is no law according to realism. The term “soft law” refers to quasi-legal instruments that are not concluded as treaties and therefore not covered by the Vienna Convention on the Law of Treaties, thus not becoming legally binding, or at least having a considerably “weaker” binding force than traditional law. Examples include most resolutions and declarations by the UN General Assembly or various “guidelines” and “codes of conducts” issued by the European Community.

The second camp in Koskenniemi’s framework is the sceptical approach. One example of this is Functionalism, also known as Scepticism. This is a doctrine which denies the relevance of international norms in that part of foreign policy which concern the ”vital interests” of the States. Hans Morgenthau, inspired by Lassa Oppenheim, is seen as the founder of functionalism. Functionalism emphasise realpolitik, power balance and power politics. It also includes non-State actors such as international organisations in its analytical framework; these organisations have an increasing responsibility of formulating and implementing policies. Furthermore, compared to realism, economic instruments rather than military force are utilised to achieve the main goals.

The third group is the idealistic approach. The Idealistic doctrine argues for a disarmed world and a strong United Nations, often departing from a Third World-perspective. It asserts to have neither a rule- nor a policy-approach (but Koskenniemi claim they do, in disguise). Some known advocates of idealism are Alejandro Alvarez, Mohammed Bedjaoui, Richard Falk, Saul Mendlovitz, Grenville Clark and Louis Sohn. The idea of a strong UN with an almost universal federalist power has led critics to label idealism as utopian.
The policy-oriented approach is the fourth group in Koskenniemi’s framework, and the most important doctrine within this group is the New Haven School. It focuses on "policies" and "goals" instead of rules or norms, and wants to promote social welfare, democracy, human rights and international security (international law should be formulated in such a way that it serves "human dignity"). The New Haven School emerged as a reaction against the positivist doctrine; some important advocates include Myres McDougal and Rosalyn Higgins. New Haven scholars want to regulate, rather than outlaw, armed conflicts. The New Haven doctrine has been criticised on several issues; subjectivity, its power policy approach, the difficulty in predicting outcomes and that it mixes law with political science.

A few more judicial philosophies worth mentioning in addition to the abovementioned doctrines are Legal Realism, Legal Pluralism and Critical Legal Studies. Legal Realism, also known as Scandinavian Legal Realism due to its part-origin of Uppsala, is a nihilist theory. It suggests that no values objectively exist, and thus, there cannot objectively be any legal order. Axel Hägerström for example thought "rights" and "duties" to be metaphysics and Roscoe Pound e.g. considered law "social engineering". Other well-known legal realists include Vilhelm Lundstedt, Alf Ross and Karl Olivecrona.

Legal Pluralism is a judicial philosophy that studies the function of law in complex societies. In a pluralistic legal system, States are only one relevant factor, apart from e.g. IGOs/NGOs, in the law-making process.

Finally, the Critical Legal Studies doctrine should be mentioned. It wants to "deconstruct" law. It claims that international law always had problems uniting the legal binding force of norms (soft arguments) with State sovereignty and actual power (hard arguments). David Kennedy is a strong supporter of Critical Legal Studies, and it can be argued Koskenniemi belongs to this doctrine as well, even though he – judging from reading his works - denies the very existence of international law. Critical Legal Studies has also led to offshoot doctrines such as Feminist Theory and Critical Race Theory, which will not be further elaborated upon in the present study.

1.2.1. Normative Sources

As mentioned above, scholars from various schools of thought differ on what constitutes binding international law. For example, conventions and treaties such as the Hague and Geneva Conventions are seen as legally binding by most scholars while some reject e.g.

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UNGA resolutions as having any legal effect. A treaty - which also can be called Convention, Charter, Protocol et cetera - is a written agreement concluded between two or more States that is governed by international law.72 One of the core values of public international law is that no treaty can bind third States without their explicit consent.

UN General Assembly resolutions are not law-creating, as they are nothing more than non-mandatory recommendations.73 Alvarez, departing from the idealist doctrine, claims much of international law emerge through custom.74 Nonetheless, as Marie-Hélène Boccara notes, soft law tend to be characterized by wishful thinking of, at best, de lege ferenda;75 she quotes Akehurst on that "an assertion that something ought to be the law is obviously not evidence that it is the law; indeed it may even be interpreted as evidence that it is not the law".76 The UN General Assembly is simply not a legislative body.77

Do UN Security Council resolutions create binding international law? First of all, most UNSC resolutions are adopted under Chapter VI of the UN Charter and are thereby non-binding normative recommendations. Second of all, even binding Chapter VII resolutions are special compared to normal e.g. bilateral treaties. As been observed, the objective of making a treaty is to create binding norms between the signing parties, while the objective of a UNSC resolution is to enforce already existing norms on an ad hoc basis.78 Article 25 of the UN Charter states that: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”79 Thus, UNSC resolutions are binding ad hoc and do not create customary law. It is worth noting that the UNSC is not a judicial body.

Article 53 of the 1969 Vienna Convention addresses jus cogens, i.e. peremptory norms.80 A peremptory norm is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified

75 Boccara (2007) p. 73.
77 Article 10 in the UN Charter clearly states that the UNGA “may discuss any questions” […] and “may make recommendations”. The same wording can be found in Article 11, clause 1: “may make recommendations”. Chapter IV, Article 10 and 11, Charter of the United Nations http://www.un.org/aboutun/charter/chapter4.shtml [accessed February 11th 2009]. See also Article 14 of the UN Charter.
only by a subsequent norm of general international law having the same character.\(^81\) If a treaty conflicts with *jus cogens* (e.g. freedom from slavery and torture) it becomes void.\(^82\) There is no set agreement regarding exactly what norms constitutes *jus cogens* – or how a norm can be elevated to *jus cogens* - but some common examples include the prohibition of genocide, slavery, torture, maritime piracy and wars of aggression.\(^83\) As there is no authoritative body concerning *jus cogens*, various international stakeholders often disagree over whether a certain case violates a peremptory norm; States often reserve the right to interpret the concept of *jus cogens* for themselves. Some courts, such as the International Criminal Tribunal for the Former Yugoslavia, have however for example stated that there is universal jurisdiction over torture.\(^84\)

To find out whether a country is in breach of a certain international law, one must first establish whether the country is a contracting party to the legal instrument in question. For example, while the 1949 Geneva Convention has been ratified almost universally, the 1977 Geneva Protocol Additional I\(^85\) has far less contracting parties, and some of them have reservations against certain parts of the Protocol.

All judicial philosophies agree *opinio iuris* (State legal opinion) combined with *usus* (custom, i.e. State actions) creates customary law, i.e. international law. As Dinstein puts it, "customary international law comes into practise when there is evidence of a general practise accepted as law".\(^86\) However, the proponents of judicial philosophies differ on what constitutes *opinio iuris* and *usus*. The more recent liberal progressive schools for example believe that a UN General Assembly vote, *opinio iuris*, automatically implies *usus* and that these UNGA resolutions consequently hold norm-creating capacity. The hard legal positivist school has more stringent requirements for what comprises *opinio iuris* and *usus*. Since this school demands more, it thus also recognises less already existing documents as legally binding than do the liberal – progressive – schools. As Göran Lysén points out, a rule of


\(^{84}\) The rationale behind universal jurisdiction over torture is that “the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind”. Prosecutor v. Furundžija (2002).

\(^{85}\) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. [accessed December 28\(^{86}\) 2008]

\(^{86}\) Dinstein (2001) p. 87.
customary international law only binds the States recognising it but not those States which have opposed the rule; accordingly, “a majority of States in general cannot bind a minority”.87

Having decided what norms are considered binding, how does one justify and interpret them? One way is to find a basic norm, superior to all others. The concept of a basic norm was introduced by Hans Kelsen (1881-1973). He thought one should examine law in a scientific way, by e.g. separating law from morals and separating what “is” (sein) from what “ought to be” (sollen).88 Law should be understood as a hierarchical system of norms, where the Grundnorm, the basic norm, was at the very top, binding and validating all subordinate norms. The Grundnorm differs from all other norms as it hasn’t evolved by a norm-creating decision. The content of the basic norm could be anything. The basic norm had the same function as H.L.A. Hart’s ”Rule of recognition”, namely to determine what de lege lata is.89 Kelsen’s ideas generated a spirited debate and was criticized by many scholars, such as F A Hayek in The Constitution of Liberty.90 For example, one cannot identify the basic norm; Kelsen himself never gave the answer to where the basic norm originated from.

Although Kelsen found international law to be a ”primitive” system, he nevertheless thought it to be hierarchically superior to national law.91 According to François Rigaux, Kelsen found the norm pacta sunt servanda to be the basic norm of international customary law.92 This basic norm certainly makes sense from the perspective of hard legal positivism, for which State consent is actually the foundation of international relations. Kelsen’s basic norm for international law as a whole was defined as follows:

"States – that is, the governments of the States – in their mutual relations ought to behave in such a way"; or: ”Coercion of State against State ought to be exercised under the conditions and in the manner, that conforms with the custom constituted by the actual behaviour of the States.”93

As this study departs from hard legal positivism, a basic norm to legitimise international law is superfluous – rules found in a legally accepted document are legitimate per se and apply

89 H.L.A. Hart is short for Herbert Lionel Adolphus Hart.
Still, this study will try to draw inspiration from the idea of a basic norm as put forward by Boccara, "promotion of sustainable and long term international peace and security", a basic norm implying a higher norm than that of the individual State, with "a more substantial possibility to objectively verify on the ground without being caught up in the subjective assessments of moral values". Boccara adapted the basic norm on the claim that the purpose and aim of international law is to promote long term international peace and security, referring e.g. to universally binding legal sources such as the UN Charter, whose Article 1(1) states that the main objective of the UN is to promote "international peace and security", aided by the UN Member States who are legally bound to achieve this objective. Boccara used the adapted basic norm in an effort to avoid "falling into the hands of subjectivity", moralistic wishful thinking and ad hoc politics, instead using it to interpreting lower level norms, legitimising the international legal system and validating the norm’s content.

The ambition of this study is consequently to depart from hard legal positivism, while also using one element of Boccara’s idea of a basic norm as inspiration when deciding whether State actions against terrorism are in line with Article 1(1) of the UN Charter.

1.2.2. Adopted Approach

The normative point of departure is Article 38(1) in the ICJ Statute. It outlines the sources the Court uses to solve disputes; (a) treaties and (b) customary law are recognized as primary sources. As Boccara points out, customary law is considered a "hard law" source. The ICJ Article 38(1)(c) lists general principles; these are used to interpret treaties and customary law. Finally, Article 38(1)(d) concerns judgments and verdicts from earlier ICJ cases. These verdicts are valid and normative, but as they only have binding effects on the disputing parties in each individual case, the judgments are just guidelines for future cases.

In international law, there are several institutions that various legal doctrines consider to be normative, such as e.g. conventions, treaties, general principles, customary law,

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94 Erga omnes is legal terminology describing obligations or rights toward all, e.g. obligations owed by States towards the community of states as a whole. [http://www.britannica.com/EBchecked/topic/930543/erga-omnes], [accessed December 14th 2008]
96 Id. at p. 47.
99 Id. at p. 26.
100 Id. at p. 69.
101 Id. at p. 69.
UNGA resolutions and UNSC votes. The present study consider conventions, treaties and customary law as legally binding and generally applicable sources, with the requirements of *opinio juris* and *usus* as stated above. UNGA resolutions will be viewed as political statements, with a legal value equivalent to "hot air", while UNSC votes adopted under Chapter VII are considered binding *ad hoc*, but they do not create new customary law. In the event that UNGA resolutions are referred to, it will be to illustrate legal problems - not as normatively binding sources.

As mentioned above, all doctrines in international law concur that *opinio iuris* (State legal opinion) combined with *usus* (custom, i.e. State actions) creates customary law. However, they differ on e.g. what really constitutes "State legal opinion"; whether it's enough with statements from state representatives such as diplomats, legal advisors, politicians, UNGA resolutions or else. For various reasons however, it might be hard to identify the legal opinion of a State, this "great fiction through which everybody endeavours to live at the expense of everybody else" as Frédéric Bastiat puts it.\(^\text{102}\) It has been suggested that *opinio iuris* can be generated from treaties, when these are implemented as State practice, *usus*.\(^\text{103}\) Practice, in turn, will for this study be interpreted as acts that States undertake on the ground, either as practice forming custom to be supplemented with binding *opinio juris* later on (thus creating customary law) or as a result of a repeated pattern of declared *opinio juris* stated in legally binding documents.\(^\text{104}\)

The approach of this study will be the traditional hard legal positivist doctrine. It derives the authority of international law from State consent, expressed through treaty or custom.\(^\text{105}\) As State consent is the basis for them respecting and adhering to international law, and the possibilities of enforcing rules on non-compliant States are rather limited, States can hardly be expected to voluntarily adhering to those rules in international law that they have not acquiesced – or outright opposed - to be binding upon themselves.\(^\text{106}\)

Many of the other doctrines, such as soft positivism,\(^\text{107}\) try to expand some rules in international law to be binding for States that have not even agreed to them. Furthermore, the present author considers many legal doctrines such as Idealism outright apologetic of repressive régimes. The aim of international law should be to organise the international

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\(^\text{102}\) L’État at [http://bastiat.org/fr/1_Etat.html](http://bastiat.org/fr/1_Etat.html) ("L’État, c’est la grande fiction à travers laquelle tout le monde s’efforce de vivre aux dépens de tout le monde.")

\(^\text{103}\) Boccarà (2007) p. 75.

\(^\text{104}\) *Id.* at p. 81.


\(^\text{107}\) Another term for "soft legal positivism" is "inclusivist positivism".
society, thus furthering security, and it can be argued that this can best be promoted by
democratic countries, which will be elaborated further upon below. According to
Oppenheim, autocracies often go to war as the dictators tend to base their policies on force.
Oppenheim drew up a minimal architecture of international law, to give legal shape to
institutions such as war, diplomacy and balance of power by using tools such as treaties,
claims and protests. He labelled the international society of mutually recognized States
"Family of Nations", and said there needs to be balance of powers, akin to status quo,
between the members, as this was the only guarantee for independence and equality of smaller
States. He claimed that "the progress of International Law is intimately connected with the
victory everywhere of constitutional government over autocratic government, or [...]
democracy over autocracy." Some present-day scholars claim democratic, free countries are less prone to
wage war against other democratic, free countries. This has been called "the idea of a
democratic peace", over the period 1816-1992, democracies have become less and less
likely to engage in, or threaten each other with, military force. Different ideas have been
given as to why democracies tend to have a more peaceful relationship with their neighbours.
Steve Chan, for example, suggests democracies "externalize their domestic political norms of
tolerance and compromise in their foreign relations". Michael Doyle says it's the
abundance of existing institutions, such as "opposition parties, periodic elections, and the

109 In the 1921 posthumous third edition of Oppenheim's International Law, a seventh moral was added,
"concerning the importance for international law of the triumph of constitutional government over autocracy". Kingsbury (2002) p. 407. Oppenheim also wrote: "Unless Germany be utterly defeated, the spirit of militarism, which is not compatible with a League of Nations, will remain a menace to the world [...] A military State submits to International Law only so long as it serves its interests, but violates International Law, and particularly International Law concerning war, wherever and whenever this law stands in the way of its military aims." Oppenheim (1919) The League of Nations and Its Problems, quoted from Kingsbury (2002)
112 Oppenheim (1921) International Law, Volume 1 (3rd ed)
113 For an overview, see Gowa (1999) pp. 4-5. Also see Rummel, Rudolph (1979) War, Power, and Peace: Vol 4
of Understanding Conflict and War. Sage: Beverly Hills; Rummel (1995) "Democracies are less warlike than
114 Klabbers, Jan (2000) "Book Review", Ballots and Bullets. Nordic Journal of International Law, Volume 69,
pp. 215-218.
115 Id. at pp. 215-218. See also Singer, David (1979) The Correlates of War, Vol 1, Research Origins and
presence of a legislature” that prevents leaders in democracies from engaging in international military conflicts. Michael Mosseau asserts that democracies tend to resolve conflicts with compromises, and that’s why democratic nations are about 30 times less likely to initiate interstate wars than other types of régimes.

The democratic peace concept has however been criticised by other scholars such as Joanne Gowa, who suggests it’s merely a Cold War phenomenon, as it did not exist during the pre-WWI period. Gowa says that “the advent of relative peace between democratic states after 1945 can be interpreted as a product of the interest patterns that the advent of the Cold War induced” and asserts that "the democratic peace seems to be a by-product of a now extinct period in world politics". Gowa’s findings and use of data have, in turn, been criticised by other scholars, such as Boccara, who points out that none of the wars Gowa refers to “were actually war between democracies”. Boccara draws the conclusion that the dominant perception of most scholars is that democratic countries tend to have a more peaceful relationship with other States, particularly democratic ones; she also suggests that democratic States have peaceful spillover effects that has a constructive impact on promoting long term international peace and security.

Thus, for the purpose of this thesis, it makes sense to depart from a normative doctrine that, in the view of the present author, protects the interests of democratic States. Hard legal positivism obscures non-democratic States to force their will on democratic States by e.g. votes in the UN organs such as the UN General Assembly (which is a non-democratic institution, as many of the elements of the majority are not democratic) or the UN Security Council; as Iain Cameron has pointed out, the UNSC is not democratically elected and democratic countries seldom constitute the Council majority. Naturally, vice versa, hard legal positivism could block democratic States from imposing conditions on non-democratic States, thus shielding these from international legal action. Yet, it is the view of the present

121 Id. at p. 114.
124 Id. at p. 151.
125 Id. at p. 152.
author that preserving status quo and safeguarding democratic States from being outnumbered and legally attacked by non-democratic States is a price worth paying. The UNGA has, for most of its existence, been but a debate club for various autocratic régimes teaming up in blocks, regularly chastising democratic countries and often working not for but in direct opposition to the very word of the UN Charter’s idea of peaceful resolution of disputes (an example of which was the repeated issuing of support for ”armed struggle”127 which took place during the Cold War era). Chapter VI of the UN Charter specifically concerns the “peaceful settlement of disputes”:

“1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”128

States can vote in favour of UN resolutions as they know they are not obliged to obey them,129 thus some UN activities have been labelled a “hermeneutical playhouse”.130 Nevertheless, many of the abovementioned legal doctrines view with great favour UN institutions such as the General Assembly, even though the Assembly resolutions are ”neither legally binding nor law-creating, but at worst mainly formalized finger-pointing, evidently and consequently making such resolutions irrelevant in relation to any aspect of customary law”.131 Obviously, this development carries with it certain risks; public international law is only sustainable and relevant as a legal system so long as it keeps in sync with vital State interests,132 such as the protection of the State citizens.

Soft legal positivism accepts that some rules and principles are legally binding only by virtue of their value or moral; hard legal positivism look at the formal rules to decide what is legally binding.133 Consequently, hard legal positivism emphasises State consent for rules to be legally binding, and has a restrictive stance in what State actions that could generate legally binding rules.134 After all, the very relevance and authority of international

128 Chapter VI, Article 33, clause 1, Charter of the United Nations [accessed February 13th 2009].
law can be deduced to State consent.\textsuperscript{135} This consent is, in the view of hard legal positivism, expressed by States signing and ratifying treaties and conventions.\textsuperscript{136}

It is the obligation of every State to defend and secure the personal safety of each individual citizen. This is somewhat in line with the ideas of Immanuel Kant, Thomas Hobbes and Jean-Jacques Rosseau,\textsuperscript{137} that there is a social contract between the individual citizens and the State; the citizens give up a bit of their freedom in exchange for order and stability. A prerequisite however is that all other citizens approve this imagined contract as well, since undesired effects otherwise might arise. A similar notion of a social contract was put forward by Robert Nozick, who argued that humans have certain unconditional liberties and rights, and that it’s one of few duties of a minimal State to guarantee these rights, through a monopoly of force within its territory and thereby protecting all those living therein.\textsuperscript{138} Nozick recognises an extensive individual right to self-defence, such as the right to carry guns, but thinks that this right should, at least in part, be transferred to the minimal State.\textsuperscript{139}

The study will depart in an outline of the legal situation regarding inter-State conflicts, and move on to studying the legal aspects of the asymmetric legal situation of a conflict between a State and a non-State actor.

The process, by which I seek to find the legal aspects of State defence against international terrorism, may be summed up in the following points:

1. Acquaintance with the various and most influential accounts of legal aspects of warfare;
2. Superficial investigation into the legal issues of combating terrorism;
3. Application of the adopted approach, using hard legal positivism, when making the analysis
4. Formulating conclusions

\textsuperscript{139} Id. at pp. 16-17.
1.2.3. In Sum

Concluding the methodological approach, this study will adopt the traditional hard legal positivist doctrine, as it is, in the present author’s view, the best in protecting the rights of States against various threats. Elements of Boccara’s idea of a basic norm, “promotion of sustainable and long term international peace and security”, complement the hard legal positivist doctrine.

Departing from the hard legal positivist school of thought restricts the amount of legal documents considered legally binding. Examples of binding rules are specified in the Statute of the ICJ Article 38; international conventions and customary law. Using the hard legal positivist school also means excluding e.g. UN General Assembly resolutions as normatively binding and only using general principles of law as well as legal doctrine as means to interpret the international conventions and customary law. Furthermore, as specified in Article 38(1)(d) with reference to Article 59 – decisions by the ICJ are only binding in each specific case. Regarding the normative sources such as conventions, treaties and customary law are considered valid and binding with the requirements of opinio juris and usus as stated earlier.

UNSC votes adopted under Chapter VII are considered binding ad hoc, but they do not create new customary law.

1.3. Content Overview

Part I of the study concerns Normative Theory. Part II studies the legal situation, de lege lata, of inter-State conflicts, while Part III focuses on the legal situation of State defence against non-State actor international terrorism.

PART II

2. Legal Aspects of Armed Inter-State Conflicts

Before looking at the legal framework in relation to State defence against non-State actor terrorism, one must first have an understanding of the legal aspects regarding armed inter-

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142 Customary law “results from a general and consistent practice of States which is followed by them from a sense of legal obligation” (Restatement Third, of the Foreign Relations Law of the United States, 1987 § 102 (2), as quoted in Stenhammar (2008) p. 22).
State conflicts. This is necessary in order to comprehend the current situation when States face terrorism. The framework of international law is, due to the historical conditions and circumstances elaborated upon in the introduction of the present study, built around the concept of inter-State conflicts. Thus, this chapter will discuss some of the issues involved when armed inter-State conflicts occur, elaborating on *jus ad bellum* as well as *jus in bello*. Furthermore, an attempt will be made to define concepts such as war, State self-defence and what actually constitutes a State.

### 2.1. The Prohibition – and the Exception – to Use Force

War, not peace, is the standard situation or point of departure in international relations. Aggressive war is forbidden both by customary and conventional law but wars continue to erupt from time to time. Kelsen says that an armed response “is permitted only as a reaction against an illegal act, a delict, and only when directed against the State responsible for this delict.” The UN Charter prohibition of force is exclusively applicable on inter-State conflicts. As almost all States are signatories to the UN Charter, this treaty is of great importance. The Charter itself claims to be a universal treaty, superior to all other treaties. Article 2(4) of the Charter prohibits the use of armed force between the members of the United Nations:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

However, there is an exception in Article 51, which allows self-defence:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council.”

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Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

Self-defence boils down to self-help; when certain conditions under international law are met, a State – acting on its own or together with other countries – may “respond with lawful force to unlawful force.” Thus, the self-defence can be exercised individually, by a single State, or collectively, by several States in accordance with Article 51 in the UN Charter. Collective self-defence has however been used less than a dozen times.

Notwithstanding that any UN member has the right to self-defence according to Article 51, even non-members have a right to self-defence according to international customary law. Thomas Franck explains that:

“When a right is denied, it is natural to turn to the authority that is the source of that right in the expectation that it will be enforced. When that expectation is not met, there is moral force to the argument that those aggrieved by the failure should themselves be allowed to enforce their legal entitlement as best as they can. In international law, the issue of legality of countermeasures and self-help arises when, a state having refused to carry out its legal responsibilities and the international system having failed to enforce the law, another state, victimized by that failure, takes countermeasures to protect its interests.”

Self-defence as stated in Article 51 is only permitted when an “armed attack” occurs. It does not matter whether the use of force is primitive or sophisticated but it needs to have sufficient gravity for it to constitute an “armed attack”, in accordance with the principle *de minimis non curat lex*. All States agree that there is a right to self-defence against armed attacks, but differ on what constitutes an armed attack; for example, whether assistance of rebels qualifies as an armed attack. Depending on the scale and effects of the action of the rebels or armed bands, performing it on behalf of another State, the action might be classified as an armed attack. In 1974, the UN General Assembly adopted a descriptive declaration called the “Definition of Aggression”. Among other things, the declaration gave the example of an act

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150 Gray (2000) p. 120.
153 Dinstein (2001) p. 174 *De minimis non curat lex* means “The law is not interested in trivial matters”; something is simply unworthy of the law’s attention.
155 *Id.* at p. 99 and p. 124.
of aggression as “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.” 157

The victim State then needs to declare that it has been attacked, 158 before resorting to using force in self-defence in response to the armed attack. The victim State “acts at its own discretion but also at its own risk.” 159 The State is also obliged to report to the Security Council; the State’s right of self-defence is only temporary until the Security Council has taken measures to restore international peace and security. 160 If the Council however fails to take effective measures, the “temporary” right to self-defence is extended. The Council can decide on several issues; e.g. impose a general cease-fire, demand withdrawal to the original lines or determine that the State purportedly acting in self-defence is in reality the aggressor. 161 However, as Dinstein notes, for most of its existence, the UN Security Council has been unable to identify the aggressor in most conflicts; 162 the end of the Cold War has not changed this situation considerably. 163 This can be attributed to political considerations. As Judge Schwebel once pointed out, the Security Council is “a political organ which acts for political reasons. It may take legal considerations into account but, unlike a court, it is not bound to apply them.” 164 Nevertheless, when the Security Council adopts a mandatory decision under Chapter VII, such as economic sanctions, it is binding on all UN Member states. 165

The amount of force needed for the self-defence naturally varies according to the actual situation. If a State is invaded by another State, then the invaded State might see no other option but armed counter-force in self-defence. There are three conditions that relate to these kind of situations: Necessity, proportionality and immediacy. 166 All States agree that these conditions, which can be traced back to the 1837 Caroline incident, constitute the basic core of self-defence; 167 Gray also claims these three conditions, although not part of the UN Charter, are part of customary international law. 168 The Caroline affair took place during the

157 A/RES/29/3314, Article 3(g).
159 Dinstein (2001) p. 188.
161 Dinstein (2001) p. 188.
162 Id. at p. 188.
163 Id. at p. 188.
164 Id. at p. 277.
165 Id. at p. 188. See also Articles 24-25 and Article 42 of the UN Charter. http://www.un.org/aboutun/charter/
168 Id. at p. 106.
1837 rebellion of Canadians against British rule. Some Canadian rebels had taken refuge on an island in the Niagara River, close to the United States. Sympathisers from the United States supplied the rebels with arms and provisions using the steamboat Caroline. On December 29, 1837, British forces crossed the international border, seized the Caroline, set her on fire and cast her adrift down the Niagara Falls. One US American was also killed during the operation, which, the killing notwithstanding, caused great outrage in the United States against the British. Both governments later exchanged several notes, between US Secretary of State, Daniel Webster, and the United Kingdom Privy Counsellor Lord Ashburton. It was in these notes that the principles of necessity, proportionality and immediacy were discussed.

Proportionality involves issues such as counter-force used as well as casualties and damage sustained, but it does not imply equivalence; that the defending State is restricted to e.g. using the same weapons as the attacker or wounding an equal number of opponents compared to what it has lost itself; it simply means that the response must not be excessive. One is allowed to use the force necessary to subjugate and halt the attacks of the enemy. Whether the use of nuclear weapons is excessive per se, for example when used against conventional weapons, was discussed in the well-known “ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons”:

“There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such [...] (but) the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”

Proportionality implies that the military gain must outweigh the negative effects. Deciding on legal proportionality can, as Dinstein notes, only take place a posteriori. Furthermore,
there needs to be a rather immediate response from the State that has been attacked. This immediacy however stretches a time period of at least several months. For obvious reasons, such as geographical distance, it might take a few months for the attacked State to respond military against the attack. Furthermore, the aim of the response must be to halt and repel further attacks; the response must not be retaliatory or punitive.\textsuperscript{177}

### 2.1.1. Humanitarian Intervention: The Kosovo Example

\textit{Jus in bello} entails both rights and duties; whereas the latter cannot be evaded, an international actor can choose not to exercise its rights.\textsuperscript{178} For example, a State in war can choose to retain diplomatic relations and mutual trade with the State it has engaged in war. As with regards to humanitarian intervention, it has no support in the UN Charter, nor has it been put forward as legal doctrine by States.\textsuperscript{179} Still, States have resorted to armed actions claiming these actions counted as humanitarian interventions. These actions are most likely in breach of the international law of armed conflict. For example, there was no univocal legal basis for the 1999 NATO attacks on Serbia.\textsuperscript{180} Between March 24\textsuperscript{th} and June 10\textsuperscript{th} 1999, NATO fighter jets bombed targets in The Federal Republic of Yugoslavia (nowadays-Serbia). The spoken aim of NATO was for all Serbian forces to retreat from Kosovo, to ensure the safe return of Kosovar Albanian refugees and to establish an international military presence in the area. Serbia replied that its military forces were needed to protect the Serbian minority in the area from the Kosovo Liberation Army. The UN Security Council had not adopted any resolution in support of the NATO campaign. As mentioned earlier, genocide is illegal under international law as an peremptory norm (\textit{jus cogens}) – and some commentators had claimed that Serbia was perpetrating a genocide against the Kosovar Albanians – but even if this had been true, NATO did not have a legal right to bomb Serbia claiming it to be a humanitarian intervention.

From the hard legal positivist perspective, the NATO action was questionable due to several factors. There was no binding resolution in the specific case from the UNSC, nor were there conventions or treaties that sanctioned the NATO attacks. Furthermore, as mentioned earlier, there is no legal treaty that lists peremptory norms such as “the prohibition

\begin{itemize}
\item \textsuperscript{177} Gray (2000) p. 106; namely USA and Lebanon in 1958, UK and Jordan in 1958, UK and South Arabian Federation in 1964, USA and Vietnam during 1961-75, USSR and Hungary in 1956, Czechoslovakia in 1968, Afghanistan in 1979 and France and Chad in 1983-84. Gray however acknowledges that there is no definite list; others commentators e.g. have added the UN-authorized actions in Korea and Iraq as other examples.
\item \textsuperscript{178} Dinstein (2001) p. 18.
\item \textsuperscript{179} Gray (2000) p. 26.
\item \textsuperscript{180} Id. at p. 32.
\end{itemize}
of genocide” which could then have justified a humanitarian intervention. Consequently, the NATO attacks were in breach of international law.

2.1.2. Anticipatory Self-Defence

Anticipatory self-defence is when a State claims the right to use force even before its territory or nationals have been attacked.\textsuperscript{181} Commentators differ as to whether anticipatory self-defence is legal; most States reject it.\textsuperscript{182} Abraham D. Sofaer has identified four key factors for justifying pre-emptive strikes:

1. The nature and magnitude of the threat involved;
2. The likelihood that the threat will be realized unless pre-emptive action is taken;
3. The availability and exhaustion of alternatives to using force; and
4. Whether using pre-emptive force is consistent with the terms and purposes of the UN Charter and other applicable international agreements.\textsuperscript{183}

Anticipatory self-defence has been used but a small number of times the past few decades, such as when Israel attacked the Iraqi nuclear reactor of Osirak.\textsuperscript{184} The Iraqi government purchased the reactor from France in the late 1970s. Israel feared that the nuclear reactor would be used in an Iraqi nuclear weapons program and that it would be operational during the summer of 1981. On June 7th 1981, a squadron of Israeli fighter jets attacked and destroyed Osirak.\textsuperscript{185} The attack was widely condemned by the international community, including the United Nations Security Council.\textsuperscript{186} Israel claimed anticipatory self-defence and said the attack was justifiable under Article 51 of the UN Charter, in addition to the fact that Israel and Iraq had been in a state of war since the Arab-Israeli war of 1948, with renewed fighting in 1967. The Iraqi nuclear program was set back considerably by the attack.

Another oft-quoted example of anticipatory self-defence is the outbreak of the Six-Day War between Israel and its neighbouring countries in 1967. On May 19, 1967, Egypt expelled the United Nations Emergency Force (UNEF) observers, who had acted as a buffer

\textsuperscript{181} Gray (2000) p. 112.
\textsuperscript{182} Id. at p. 112.
in the Sinai since the Suez Crisis of 1956, and deployed some 100,000 Egyptian soldiers in the Sinai Peninsula. Egypt also closed the Straits of Tiran to Israeli shipping, an act that Israel earlier had stated it considered *casus belli* as it regarded the Straits to be international waters. On May 26th, 1967, Egyptian President Nasser made a speech to Arab Trade Unionists, announcing:

“If Israel embarks on an aggression against Syria or Egypt, the battle against Israel will be a general one and not confined to one spot on the Syrian or Egyptian borders. The battle will be a general one and our basic objective will be to destroy Israel.”


2.2. The Rules of War

There is no universal definition of war, nor is it always apparent when war commences and ends and when self-defence may take place. Melvin Small and David J. Singer defines war as a clash involving one or several members of the international community which leads to a minimum of 1,000 battle fatalities amongst these members. Dinstein says there is no binding definition of war, but quotes Oppenheim’s definition as an interesting point of departure: “War is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases”. Dinstein calls this a definition of “total war” and divides Oppenheim’s proposition into four elements; (i) there has to be a contention between at least two States; (ii) the use of the armed forces of those States is required; (iii) the purpose must be to overpower the enemy and (iv) both parties are expected to have symmetrical, yet drastically opposed,

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goals. Neff defines war as a violent conflict between communities against foreign peoples; furthermore it is a rule-governed activity that has clear boundaries between times of war and times of peace. This study will however use the definition of war as put forward by Dinstein:

War is a hostile interaction between two or more States; either in a technical or in a material sense. War in the technical sense is a formal status produced by a declaration of war. War in the material sense is generated by actual use of armed force, which must be comprehensive on the part of at least one party to the conflict.

There are both inter-State wars (between two or more States) and intra-State wars (a civil war within a single State); Dinstein explains that civil wars are not as regulated as inter-State wars. Again, the boundary between intra-State and inter-State war is not always crystal clear. Sometimes, a civil war (an intra-State war) develops into an inter-State war as one of the belligerent parties secedes into an independent State.

As Dinstein notes, whereas it takes two States to conclude and preserve peace, it takes but one to initiate a war. A war may commence in two ways, either technically (de jure, when a State issues a declaration of war) or in the material sense (de facto, when actual armed actions commence). Whenever there is a war in the material sense, the laws of warfare are applicable, such as Article 2 of the 1949 Geneva Convention for the Protection of War Victims:

[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

States often, but not always, sign a peace treaty to end a war. These treaties are governed by the general law of treaties.

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196 Id. at p. 5.
197 Id. at p. 15; as he also discusses, there might be a status mixtus inbetween war and peace, see p 15, but that is beyond the scope of the present thesis.
The major conventions in relation to *jus in bello* are the UN Charter, the Hague Conventions and the Geneva Conventions. Combined, they constitute international humanitarian law, although Dinstein suggests referring to them as LOIAC, the law of international armed conflict. "Geneva law" - the Geneva Conventions - mainly concern humanitarian law, such as relief to wounded and sick soldiers, treatment of prisoners of war and victims of armed conflicts (thus, their nickname "the Red Cross Conventions"). Geneva law was updated and re-codified in 1949 as four new conventions replaced the previous ones; "Hague Law" - the Hague treaties of 1907 - concern the conduct of hostilities between contenders, whether on land, sea or air. The sections include for example the "Pacific Settlement of International Disputes", "Laws and Customs of War on Land", rules on Maritime Warfare and what bullets, projectiles and chemical weapons that may be used, and how. Hague law has seen new conventions in e.g. 1972, 1980, 1993 and 1997 that concerns various weapons. As of 2006, the Geneva Conventions had been ratified by 194 countries, thus gaining an almost universal acceptance. In addition, in 1977, two amendment protocols to the Geneva Conventions were added; these have been ratified by some 160 countries although many of them have objected to vast and important parts of Protocol I. The Protocol I of the 1977 Geneva Convention applies not only in times of war but also for other times of international armed conflicts.

**2.2.1. Civilians and Combatants**

There are rules defining the combatants of any international armed conflict. Combatants fall into two categories; either they are members of the armed forces of the belligerent party, or they simply take active parts in the hostilities. The requirements for someone to qualify as a legal combatant have been codified and can be found in the annex to the Hague Conventions of 1899 (II) in Section I, Chapter I, Article 1:

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204 *Id.* at p. 10.
209 *Id.* at p. 11.
210 *Id.* at p. 16.
“Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination ‘army.’”

These four conditions of lawful combatancy, which can also be found in Article 4A(2) of the 1949 Geneva Convention (III)212, “are considered to embody the customary law of war on land.”213 For example, the killing of prisoners of war is forbidden.214

This “rule of distinction” between lawful and unlawful combatants is still valid – and it’s an important one, since lawful combatants enjoy certain privileges as set out in the Geneva and Hague conventions. The rule of distinction includes factors such as intent and expected result, meaning that attacks against legitimate targets may be permitted even if collateral damage to civilians might occur.

All of the abovementioned four conditions of lawful combatancy are cumulative; in other words, they all need to be met for someone to qualify as a legal combatant.215 One current example is the Palestinian militants operating out of the Gaza strip. Although having a chain of command, they often use civilian Palestinian built-up areas as launching pads for artillery grenades and Qassam rockets, in order to strike Israeli civilian areas and cities such as Sderot adjacent to the Gaza Strip. These attacks are clearly not in accordance with the laws and customs of war as specified in the referred-to Hague Convention article above, which means that the militants are not lawful combatants. Another example is the modus operandi of the Lebanese Shiite Hezbollah militia during the 2006 armed conflict with Israel. Hezbollah hid Katyusha rocket launchers in civilian areas – from where they fired rockets against Israel - and sometimes wore civilian clothes, mixing in with...

214 Part VI, Section I, Art 130, Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 [accessed December 28th 2008]. http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e63bb/6fcaf854a3517b75ac125641e004a9e68
the civilian population.\textsuperscript{216} Again, the breaches of the four cumulative requirements as set in Article 1 (Section I, Chapter I) of the Annex to the 1899 Hague Conventions (II) meant that the majority of the Hezbollah operatives did not qualify as legal combatants. Using civilian areas as launching pads is, in addition, a war crime,\textsuperscript{217} just like the fact that both Qassam rockets and Katyusha rockets have been launched with the spoken intention of harming civilians (in addition to the fact that they are indiscriminate weapons as they are not precise and not capable of accurate targeting).

Another case in point is the covert operations used by the intelligence services or special units of some States. In these operations, soldiers move into enemy territory to arrest or engage the enemy; in order to remain undetected, the soldiers wear civilian clothing. This is against the requirement of Section I, Chapter I, Article 1, clause 2 of the Hague Convention of 1899 (II) which says that armed forces should have a fixed distinctive emblem in order to be recognized as legal combatants.\textsuperscript{218} There is however an exception to the rule in Article 44(3) of the Geneva Protocol I (1977), which says that “there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly.”\textsuperscript{219} Nevertheless, as mentioned above, Protocol I has considerably fewer contracting parties than the Geneva Conventions. Un-uniformed combatants are problematic for several reasons. For example, it makes it hard to discriminate between combatants and non-combatants, which might endanger civilians as they could be perceived as potential enemy combatants. Targeting specific individuals is permissible, as all combatants can be lawfully targeted.\textsuperscript{220} Dinstein however claims that the attacking forces always must be wearing uniforms.\textsuperscript{221}

A major aim of the rules of war is to reduce the suffering of people, especially civilians; part of this is to make war something solely waged between the combatants of the belligerent parties.\textsuperscript{222} This became even more evident after the “total wars” of the 20th century.

\begin{thebibliography}{9}
\bibitem{217} Dinstein (2004) p. 130.
\bibitem{219} \url{http://www.icrc.org/ihl.nsf/WebART/470-750054?OpenDocument}
\bibitem{220} Dinstein (2004) p. 94.
\bibitem{221} Id. at p. 95.
\bibitem{222} Id. at p. 27.
\end{thebibliography}
that *inter alia* obliterated cities such as Dresden, Coventry and Hiroshima.\(^{223}\) If the lines between civilians and combatants are blurred, then civilians may suffer as they might be suspected to be covert combatants.\(^{224}\) Civilians are prohibited from actively participating in the hostilities; if they do, they lose their protected status as civilians.\(^{225}\) A person who claims to be a civilian but engages in nightly military raids is neither a civilian nor a combatant but an unlawful combatant. This means he or she can be lawfully targeted by the enemy but cannot claim the privileges entitled to either civilians or lawful combatants.\(^{226}\) Civilians who are not part of the military forces or partake in hostilities are non-combatants, although civilians who willingly work for the armed forces expose themselves to danger.\(^{227}\) Direct and deliberate attacks against civilians are forbidden; so are indiscriminate attacks where insufficient caution is taken.\(^{228}\) It is strictly forbidden for the military to fire blindly into enemy territory, perform random aerial bombing when missing the original target, bombing with impaired visibility if lacking instruments for target identification, and to fire imprecise missiles close to civilian objects.\(^{229}\) Advance warning must, according to Article 26 of the Hague Convention (IV), be given before attacks that might affect the civilian population, allowing the civilians to leave an area before it is attacked.\(^{230}\) Examples of advance warning may be e.g. the dropping of leaflets, making radio/TV broadcasts or calling those that might be affected. Naturally, modern communications techniques did not exist at the time when many important international conventions on these matters were created; therefore, States may interpret the requirements to a certain degree. As Steven Ratner notes:

“[…] the drafters probably never imagined a conflict like the war on terror or combatants like al-Qaeda. The conventions were always primarily concerned with wars between states. That can leave some of the protections enshrined in the laws feeling a little old-fashioned today. It seems slightly absurd to worry too much about captured terrorists’ tobacco rations or the fate of a prisoner’s horse, as the conventions do.”\(^{231}\)


\(^{225}\) Id. at p. 27.


\(^{227}\) Id. at p. 113.


\(^{229}\) Id. at p. 118.

\(^{230}\) Hague Convention of 1907 (Convention IV), Section II, Chapter I, Art. 26, [http://www.icrc.org/ihl.nsf/0/1d726425f6955ace125641e00386f6d6](http://www.icrc.org/ihl.nsf/0/1d726425f6955ace125641e00386f6d6) [accessed December 26th 2008].

“The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.” See also Dinstein (2004) p. 127.

A lawful combatant can retire and become a civilian just as a civilian can become a lawful combatant; as Dinstein points out, “every combatant is a former civilian”. However, a person cannot be both a civilian and a combatant at the same time, nor be constantly shifting between the two categories. A combatant can also withdraw from hostilities by becoming hors de combat. This can happen by choice (e.g. laying down arms and surrendering) or circumstance (by e.g. getting sick or wounded). Wounding or killing an enemy combatant that has laid down his arms is strictly illegal. Soldiers on furlough – temporary leave of absence from duty – are not legitimate targets even when wearing uniforms when en route to or from their military bases, especially since they move through civilian environs.

As mentioned earlier, civilians are to be excluded for modern warfare and States always need to distinguish between military and non-military targets. Nevertheless, it is often hard to make a clear distinction between civilian and military objects. As Dinstein points out, few industrial plants, electricity plants and airports are strictly civilian, just like TV and radio stations. However, as Michael Hoffman notes, civilians may become targets when they extend direct aid to military efforts, e.g. by working in munitions plants.

Cultural property and places of worship are protected civilian objects; however, if for example a church is used by a sniper, or a school is used military by the adverse party, it becomes a military object.

Attacks against undefended civilian areas such as towns, villages and buildings are prohibited; hospitals enjoy a special status of protection. It’s worth noting that if the defending military force places its weapons in civilian areas hoping it will then avoid being attacked, this constitutes a war crime; this also includes using civilians as ”human shields” to protect military targets. This prohibition is also clear from customary international law. Politicians are excluded as legal targets, unless they are commander-in-chief or stay at military targets. Policemen can only be attacked if integrated into the armed forces. The belligerent parties must also inform each other about fatalities, according to Article 16 of the

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233 Id. at p. 28.
234 Id. at p. 28.
235 Id. at p. 145.
236 Id. at pp. 96-97.
239 Id. at p. 100.
240 Id. at p. 130.
241 Id. at p. 131.
242 Id. at p. 99.
Geneva Convention (I). Finally, the taking of hostages, whether civilians or combatants, is prohibited according to Article 34 of the Geneva Convention (IV).

It is important to note, that violations of the rules of war does not equal war crimes.

2.3. Conclusion

This section has discussed what constitutes a State and several aspects related to war; what it is, how it commences and ends, and what legal issues that arise when war occurs. It has also given a brief overview over the main conventions in the law of international armed conflict. Furthermore, the legal requirements for a person to qualify as a lawful combatant have been outlined. This comprehension of the legal situation in regards to inter-State armed conflicts will further the understanding and better put into context some of the issues raised in the next section; the legal aspects of asymmetric armed conflicts.

PART III

3. Legal Aspects of Asymmetric Conflicts

This chapter will examine the legal issues that arise when States are confronted with non-State actor violence, such as attacks from international terrorist groups. This creates an asymmetric legal situation, as States are sometimes bound by convention while terrorist groups are not. The chapter will start by trying to find definitions for non-state actors as well as terrorism, and move on to study the legal implications that arise in asymmetric conflicts.

3.1. Definition of Non-State Actor

The proliferation of non-State actors has reduced the clout of the traditional nation States on the international arena and posed a challenge to, and further complicated, international relations as international law and norms traditionally were codified in a world where nation States were the prime legal subjects. Especially the prevalence of numerous armed groups has complicated traditional conflict management and resolution.

There are several kinds of non-State actors on the international arena. For example, there are some 40,000 international NGO’s (non-governmental organisations). With the exception of ICRC – the International Committee of the Red Cross – NGO’s are not subjects of international law such as States are. Multinational corporations, MNC’s, are also international non-State actors, just like international media and several religious organisations. Many criminal organisations such as drug cartels also constitute non-State actors. Some non-State actors claim to represent a people, aspiring to create a new nation-State. However, the focus of the current paper is non-State actors such as armed groups operating without direct State control, especially terrorist organisations.

As mentioned above, the trinity of population, territory and a government in control makes for a State. It is important to keep in mind, that although most States fit this category, not all do; e.g. Somalia does not fulfil the three criteria since there is no effective national government. Other nations, such as Kosovo, slowly develop and move into the nation-State category, with or without international support – and with or without proper legal proceedings.

### 3.2. The Concept of Terrorism

Terrorism has brought new issues to international law. Since 1945, a large majority of the armed conflicts in the world occurred in struggles within rather than between countries. During the same time period, some 90% of all casualties in internal struggles have been civilian. Many of the victims have been claimed due to acts of terrorism. However, neither the United Nations Security Council nor the UN General Assembly ever managed to agree on a definition of terrorism. The UNGA did adopt Resolution 3314, XXIX of December 14 1974, which in Articles 3(f) and 3(g) condemns “subversion and all forms of indirect intervention.” This resolution was aimed at States harbouring or sponsoring terrorists. The issue of terrorism has been discussed in several forums and UNSC resolutions, such as UNSC S-RES1566 which in a way tries to define the concept of terrorism as:

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247 The word “terrorism” is derived from the Latin word *terrere*, meaning “to frighten”.
249 Id. at p. 367.
“criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act.”

As Tal Becker points out, this was not however a legal definition of terrorism, “nor was it necessarily intended to serve that role.”

Elizabeth Chadwick says that instigators of terrorism can be individuals, groups or governments, as part of a political or ideological strategy. The very word “terrorism” is politically and emotionally charged, making it more difficult deciding on a universal definition. Boaz Ganor has defined terrorism as the “deliberate use of violence aimed against civilians in order to achieve political ends.” Using violence to achieve political ends might constitute terrorism, depending on whether the violence is legitimate; who directs the violence, on what target and for what ends. Becker argues that there have been common characteristics involving four main factors in most proposal for definitions; “the goals, the means, the perpetrators and the victims of terrorist attacks.” Becker defines an act as terrorism as when:

“[… ] a non–State actor unlawfully and intentionally causes death or serious injury to any person, or serious damage to property, when the purpose of this conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

A common saying in the international debate about terrorism is that “one man’s terrorist is another man’s freedom fighter.” Ganor refutes this rationale:

“The aims of terrorism and guerrilla warfare may well be identical; but they are distinguished from each other by the targets of their operations. The guerrilla fighter’s targets are military ones, while the terrorist deliberately targets civilians. By this definition, a terrorist organization can no longer claim to be ‘freedom fighters’ because they are fighting for national liberation. Even if its declared

254 Chadwick, Elizabeth (1996) p. 3.
257 Id. at p. 117.
ultimate goals are legitimate, an organization that deliberately targets civilians is a terrorist organization."^258

If a common definition of terrorism has been hard to achieve, the purpose of terrorism is obvious to most people. Michael Walzer, for example, says that the purpose of terrorism is:

“…to destroy the morale of a nation or a class, to undercut its solidarity; its method is the random number of innocent people. Randomness is the crucial feature of terrorist activity. If one wishes fear to spread and intensify over time, it is not desirable to kill specific people identified in some particular way with a regime, a party or a policy. Death must come by chance…”^259

Becker argues that terrorism is unique and especially frightening as it carries several exceptional features; the theatrical component of terrorist attacks, the likelihood of repetition and the lack of remorse.^260

Deciding what constitutes terrorism and what legitimate actions that can be pursued in e.g. a war of national liberation is not an issue of different views of opinion. It is to set a common legal framework and make all actors abide by it.

### 3.3. Combating Terrorism

What are the legal basics for States defending themselves against terrorism? The framework of international law assumes inter-State relations. However, terrorist groups are not signatories to the conventions that govern international relations.

There is no rule in customary international law regarding anti-terrorism operations.^261 Self-defence has been claimed numerous times by States defending – or claiming to be defending – themselves against terrorism; often as a combination of the protection of nationals abroad and anticipatory self-defence.^262

Neff observes several levels of civil disturbance.^263 The first one is isolated, sporadic events of violence. These are governed by the domestic criminal law. The next level is an internal armed conflict. The applicable law here is Article 3 of the Geneva Conventions. The third level is when rebels de facto control parts of the State territory. This is governed by

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Protocol II of 1977. The fourth level, national liberation struggles, are governed by the Geneva conventions and the fifth level is inter-State war.

As Chadwick points out, “an analysis of the context and motivations underlying terrorist acts must occur in order to place alleged terrorist offences within appropriate juridical frameworks, appropriately.”

3.3.1. Belligerent Reprisals

The self-defence can materialise in the form of a belligerent reprisal. Usually, such an action would be contrary to *jus in bello* – the laws governing the conduct of armed conflict - but the action is nevertheless justified because it is taken by one party to an armed conflict against another party in response to the latter’s violation of the *jus in bello.*

There are five conditions in customary international law that regulate belligerent reprisals:

1) Protests must be given to the enemy, notifying him about the breach of international law of armed conflict (unless protests would be ”apparently fruitless” from the outset)
2) A warning must be issued before the reprisal
3) The reprisal must be proportionate to the original breach of international law of armed conflict
4) The decision must not be taken by an individual combatant; it can only be taken by a higher authority
5) Once the enemy desists from further breaches of the international law of armed conflicts, the reprisals must cease

Belligerent reprisals must not detrimentally affect human rights, the environment, historical monuments and the like. There are numerous examples of States resorting to belligerent reprisals in self-defence against terrorism. After several Libyan State-sponsored terrorist attacks in Europe, such the 1986 disco bombing in Berlin which killed two American servicemen and wounded many others, the USA responded with attacking military targets in Libya. Israel has performed strikes on similar reasons against Beirut airport in 1968 and Tunis in 1985. After the Lebanese-based group PFLP carried out several hijackings of Israeli

airplanes in 1968 in Athens and Rome, killing or injuring several Israeli civilians, Israel struck back on December 28th 1968, destroying 13 airplanes on Beirut International Airport.\textsuperscript{270} In 1985, PLO killed three Israeli civilians off the coast of Cyprus. In an belligerent reprisal, Israel then bombed the PLO headquarter in Tunis.

Another well-known case was the \textit{Achille Lauro} terrorist attack in 1985,\textsuperscript{271} after which US airplanes intercepted an airplane carrying the fleeing terrorists and forced it to land on a NATO base in Sicily, Italy.\textsuperscript{272} The US went further and attacked Iraq in 1993 and Sudan as well as Afghanistan in 1998, claiming to be acting in response to past attacks or to deter future attacks.\textsuperscript{273} Some argue that the UN Security Council seem to have moved to accept “reasonable” reprisals.\textsuperscript{274}

Dinstein says that “each measure of counter-force should be put to the test whether it amounts to legitimate self-defence (in response to an armed attack), satisfying the requirements of necessity, proportionality and immediacy.”\textsuperscript{275} Israel, a country for which belligerent reprisals has been a core policy for many years, has often been criticised on the issue of proportionality. This is perhaps due to the fact that Israel has preferred to use a single extensive armed operation in response to many smaller pinprick assaults that have taken place over a longer stretch of time. However, as Gray points out, repeated cross-border incursions might be seen as an accumulation of events, which then justify an otherwise disproportionate response; in other words, that States may chose not to “response to each incursion in isolation but to the whole series of incursions as collectively amounting to an armed attack.”\textsuperscript{276}

\textbf{3.3.2. State-Sponsored Terrorism}

As aggressive wars have been outlawed in international law, some countries have decided to continue to wage wars via proxies. However, as Dinstein has noted:

“There is no real difference between the activation of a country’s regular armed forces and a military operation carried out at one remove, pulling the strings of a terrorist organization (not formally associated with the governmental apparatus) […] Not one iota is diminished from the full implications of international responsibility, if it is established that the terrorists were in fact acting on behalf of that State.”\textsuperscript{277}

\textsuperscript{271} Franck (2002) p. 88.
\textsuperscript{273} \textit{Id.} at pp. 202-204.
\textsuperscript{274} Dinstein (2001) p. 201.
\textsuperscript{275} \textit{Id.} at p. 203.
\textsuperscript{277} Dinstein (2001) p. 183.
Irregular forces can be e.g. guerrillas, partisans and resistance movements.\textsuperscript{278} A State must not permit its territory to be used as a sanctuary for terrorists whose aim is to attack civilian or military targets in another country. If a State supports these irregular forces such as armed bands and terrorists, it shares the responsibility of any armed attack performed.\textsuperscript{279} In fact, these terrorists may then in some instances be seen as \textit{de facto} organs of that host State. It depends on to what level the host State tolerates or even supports the terrorists in question.\textsuperscript{280}

For example, when Portugal failed to prevent armed groups from the then-Portuguese colony of Angola attacking targets in Congo, Portugal’s failure was condemned by the UN Security Council, calling the events “armed attacks”.\textsuperscript{281}

The level of State-sponsored terrorism naturally varies. Some States support terrorism through financial aid, ideological support or military assistance; other States operate terrorism by initiating, directing and performing “terrorist activities through external groups”.\textsuperscript{282} In some instances, States also perpetrate terrorist acts abroad “through their own official bodies” such as agents from the security forces or intelligence services; “[…] in other words, states intentionally attacking civilians in other countries in order to achieve political aims without declaring war.”\textsuperscript{283}

Just as State A has the right to exercise self-defence against an armed attack from State B, State A has an equal right to defend itself against terrorists operating from within State B.\textsuperscript{284} As Ruth Wedgwood explains, “if a host country permits the use of its territory as a staging area for terrorist attacks when it could shut those operations down, and refused to take action, the host government cannot expect to insulate its territory against measures of self-defence.”\textsuperscript{285}

\begin{flushright}
\textsuperscript{278} Dinstein (2004) p. 35.  \\
\textsuperscript{279} Dinstein (2001) pp. 181-182.  \\
\textsuperscript{280} Dinstein (2001) p. 214.  \\
\textsuperscript{281} Id. at p. 214.  \\
\textsuperscript{282} Ganor (2002) p. 299.  \\
\textsuperscript{283} Id. at p. 299. Also see Becker (2006) p. 78.  \\
\textsuperscript{284} Becker (2006) p. 216.  \\
\end{flushright}
3.3.3. Applicable Law: Domestic or International

When fighting terrorism, States can choose either the sovereign-right approach (also called the criminal law strategy) or the belligerent-right approach.\(^\text{286}\) The first option is governed by domestic criminal law while the second option is regulated by the laws of war.\(^\text{287}\) States operating under the criminal-law strategy can only exercise it within their territorial boundaries, and there are restrictions imposed by international humanitarian law;\(^\text{288}\) for example, prisoners have the right to a fair trial within reasonable time.\(^\text{289}\) States choosing the belligerent-right approach face other dilemmas. No trials are required – or even permitted - as membership of the opposing belligerent force is not in itself a wrongful act, and belligerents can be kept under detention as prisoners of war. However, POW status gives privileges and these prisoners have a right to release after the termination of hostilities.\(^\text{290}\) As Neff explains, some States operate in both modes, sometimes simultaneously.\(^\text{291}\) For example, Israel introduced a policy of targeted killings in 1972 after the terrorist events of the Munich Olympics, and during the Second Intifadah of 2000-2005, the same hybrid approach was used.\(^\text{292}\) The US mainly followed the criminal-right approach up until 2001,\(^\text{293}\) when it started treating captured persons in Afghanistan as belligerents instead of criminals.\(^\text{294}\) However, the US argued that the captured al-Qaeda persons did not meet the requirements of "lawful belligerents" and thus weren’t to be granted the normal POW privileges specified by the Geneva Convention.\(^\text{295}\) Instead, some unlawful combatants were subjected to administrative detention without trial, and without prisoner-of-war privileges.\(^\text{296}\) The detainees thus ended up in an awkward middle position, as neither international human rights law (for criminal defendants) nor international law (Geneva convention for POWs) was applied to them.\(^\text{297}\) As more countries are faced with terrorism, the legal system will have to adapt. Israel, for example, passed a new legislation for these cases. "The Detention of Unlawful Combatants

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\(^{286}\) Neff (2005) p. 382.
\(^{287}\) Id. at pp. 382-383.
\(^{288}\) Id. at p. 383.
\(^{289}\) Id. at p. 390.
\(^{290}\) Id. at p. 384.
\(^{291}\) Id. at p. 386.
\(^{293}\) Neff (2005) p. 386.
\(^{294}\) Id. at p. 391.
\(^{295}\) Id. at p. 391.
\(^{297}\) Neff (2005) p. 392.
Law” defines an unlawful combatant as anyone taking part – directly or indirectly – in hostilities against Israel, and is not entitled to prisoner of war-status under Geneva Convention (III). An unlawful combatant can be brought to trial under criminal law, but also held in detention as long as hostilities by the force to which he belongs has not been terminated.

Suicide terrorism raises several important legal questions. Naturally, it is impossible to prosecute a successful suicide bomber. However, a person – civilian or combatant – who prepares to execute a suicide mission but is thwarted can still be subject to detention or prosecution. Although the general principle says that nobody can be punished for an offence he has not committed, attempted murder or unlawful homicide (the killing in a non-combat situation) is still a punishable offence. The instigators of suicide terrorism can also be persecuted, no matter their role; financing the suicide terror attack, assembling the explosive device as well as indoctrinating or transporting the person carrying out the attack. Depending on the context, the State defending itself may have to choose whether it wants to treat persons aiding suicide terrorism as combatants or mere criminals.

3.4. Extra-Territorial Law-Enforcement

Dinstein suggests using the idiom “extra-territorial law enforcement” when discussing State self-defence against armed bands and terrorists within the territory of another State. This law enforcement, Dinstein proposes, should only be allowed for State A when State B is unable or unwilling to “prevent repetition of that armed attack.” One example of this extra-territorial law enforcement was the Israeli incursion into Lebanon in 1982 in hunt for Palestinian guerrillas. As the government of Lebanon was unable to end the strong Palestinian military presence, the Israelis sent a large force into southern Lebanon to deal with it. The Lebanese representative to the UN said that Lebanon “in no way” could be held accountable for PLO actions since the PLO bases from which attacks originated were not under the control of the Lebanese government. Israel was harshly criticized in the UNGA for its incursion.

299 Id. at p. 32.
300 Id. at p. 33.
301 Id. at p. 33.
303 Id. at p. 217.
304 Id. at p 218. Colombian incursions into Venezuela in “hot pursuit” of FARC guerrillas might also be an example of a State using incursions in self-defence.
Another example of extra-territorial law enforcement is the Turkish incursion into northern Iraq in 1995, in hunt for Kurdish guerrillas; this time, there was no reaction from the UNGA or the UNSC.\(^\text{308}\) This might have been attributable to lack of sympathy with Saddam Hussein or evidence of growing acceptance that States may use proportionate force to fight terrorist groups in neighbouring States that provide a safe haven.\(^\text{309}\) Also, when the USA responded to the 1998 bombings of its embassies in Kenya and Tanzania, by attacking targets in Afghanistan and Sudan, there was no criticism from UN organs.\(^\text{310}\)

After the terrorist attacks in the United States on September 11\(^{\text{th}}\) 2001, the US threatened to attack Afghanistan if its government didn’t close down the terrorist camps on Afghan soil; the UNSC acknowledged the right of the US to use force in self-defence against this threat to international peace and security.\(^\text{311}\)

Dinstein sets some conditions for when extra-territorial law enforcement would be permitted. The incursion must be reactive to a perpetrated attack; it can not be anticipatory of a future attack.\(^\text{312}\) Furthermore, the attacked State must have evidence that a repeated attack can be expected, so that the State incursion is not purely punitive. Also, the condition of immediaecy requires a quick response, in order for the cause (armed terrorist attack) and effect (State self-defence) are clear for everyone to see.\(^\text{313}\) Finally, there must be no alternative means but an incursion, and this must be “demonstrated beyond reasonable doubt.”\(^\text{314}\) If the State decides to use counter-force, it may not hurt the civilian population nor the armed forces and installations of the other State, under the condition of proportionality.\(^\text{315}\)

### 3.4.1. Protection of Nationals Abroad

An essential duty for any State is the protection of its nationals, whether at home or abroad. However, rescuing citizens on foreign soil is only allowed under certain circumstances. There must be an imminent threat of injury to nationals; furthermore, there must also be a failure or inability on the part of the territorial sovereign to protect them and lastly, the operation must be strictly confined to the object of protecting them against injury.\(^\text{316}\) An example of a State


\(^{308}\) Id. at p. 63.

\(^{309}\) Id. at p. 63.

\(^{310}\) Id. at p. 66 and p. 95.

\(^{311}\) Id. at p. 66.


\(^{313}\) Id. at p. 220.

\(^{314}\) Id. at p. 220.

\(^{315}\) Id. at p. 220.

\(^{316}\) Id. at p. 204 and Gray (2000) p. 110-111.
fulfilling these three conditions was the Israeli rescue mission at Entebbe Airport in 1976.\textsuperscript{317} A plane travelling with 248 passengers from Tel Aviv to Paris via Athens was hijacked on June 27\textsuperscript{th}, 1976 by terrorists from the PFLP and the German group “Revolutionäre Zellen”.\textsuperscript{318} The plane was taken, via Libya, to Entebbe Airport in Uganda. The terrorists then sorted the hostages into Jews and non-Jews, releasing the latter group. The French crew decided to stay with the Jewish hostages; for a week, about 100 hostages in total were held in the transit hall. The Ugandan President Idi Amin supported the terrorists. On the night of July 4\textsuperscript{th}, an Israeli commando raid took the terrorists by surprise, killing all seven of them. Three hostages and one commando soldier were killed during the operation; the rest of the civilians and soldiers were able to return to Israel safely. As Ugandan soldiers opened fire on the Israelis, the commando soldiers returned the fire. A total of 45 Ugandan soldiers were killed at Entebbe. Uganda later asked the United Nations to condemn the raid, as a violation of Ugandan sovereignty. The UN Security Council however declined to adopt any resolution on the matter. As Franck explains, “even in this instance, there was no agreement as to whether a state might use force to protect its citizens’ lives overseas, in situations where neither their host-state nor the international system had been able to offer effective protection.”\textsuperscript{319}

It is however rather uncommon that States have used force to rescue nationals in a foreign State without consent from that very State. Only a few States have practiced this since the Second World War;\textsuperscript{320} all have invoked the right to self-defence as at least a partial justification for their action,\textsuperscript{321} considering Article 51 in the UN Charter to protect not only its territory but also its nationals abroad. Sometimes, rescue missions may have to take place in “failed States”; countries where the government has broken down. Apart from the above example of the Israeli rescue mission at Entebbe, the US (Granada and Panama), Belgium, the United Kingdom and Russia (Georgia) have claimed self-defence when using force to protect its nationals abroad.\textsuperscript{322} In a few cases, there has been implied consent, such as the US interventions into Liberia 1990, the Central African Republic in 1996 and Sierre Leone in 1997. These States did not object or report it to the UN Security Council – perhaps due to lack of effective government - nor did other States object.\textsuperscript{323} Franck says that:

\begin{itemize}
\item \textsuperscript{317} Dinstein (2001) p. 205. For the facts about the Entebbe episode, see Franck (2002) p. 82-85.
\item \textsuperscript{318} PFLP is an abbreviation of The Popular Front for the Liberation of Palestine.
\item \textsuperscript{319} Franck (2002) p. 84.
\item \textsuperscript{320} Gray (2000) p. 108.
\item \textsuperscript{321} Id. at p. 109.
\item \textsuperscript{322} Id. at p. 109.
\item \textsuperscript{323} Id. at p. 111.
\end{itemize}
“[...] if the UN itself, for political reasons, is incapable of acting, then some use of force by a state may be accepted as legitimate self-defence within the meaning of Article 51. Military action is more likely to be condoned if the threat to citizens is demonstrably real and grave, if the motive of the intervening state is perceived as genuinely protective, and if the intervention is proportionate and of short duration and likely to achieve its purpose with minimal collateral damage. In practice, whether an action is deemed lawful or not has come to depend on the special circumstances of each case, as demonstrated to, and perceived by, the political and legal institutions of the international system. Of course, in any debate on the use of force, some states will respond solely to the factor of ideology, political alignment, national self-interest, or historical imperatives. Many others, however, will consider evidence of the circumstances and manner in which force was deployed” […] “in a broader interpretation of practice, the system may be said to have adapted the concept of self-defense, under Article 51 to include a right to use force in response to an attack against nationals, providing there is clear evidence of extreme necessity and the means chosen are proportionate.”324

As Franck explains, the development on the ground has extended the interpretation of Article 51 to the right to use force in defence of the State citizens. Some of the requirements are that the threat against the State nationals needs to be “real and grave” and the action of the defending State needs to be proportionate, of short duration and cause minimal collateral damage.

4. Concluding Analysis

The present study departs from the judicial philosophy of hard legal positivism, which is characterised by formalism in regards to legal sources and realism in regards to international relations.325 As Fredrik Stenhammar notes, the normative threshold for international law is often hard to identify, with vaguely defined rules that leaves great room for interpretation.326 That is precisely why hard legal positivism is a useful tool. It emphasises legal rules not on the merit of their material value but on formal criteria.327 Stenhammar gives the example of the prohibition against torture; it cannot be considered a jus cogens-rule simply on the ground that it would be desirable.328 State consent is a core prerequisite; what States have agreed to, they can also be expected to follow. The authority of international law can thus be deduced to State consent.329 Soft legal positivists have a much more extensive - and relativistic - view on what generates new international law, such as that UNGA resolutions should be considered

326 Id. at p. 1.
327 Id. at p. 5.
329 Id. at p. 10.
binding; furthermore they aspire to apply normative binding rules to States that have not consented to these very rules. As Lysén argues, “hasty and ‘fluffy’ declarations do not change political realities, and their effect is limited and may sometimes be contra-productive.”

These collectivistic tendencies, emphasising “consensus” and “community values”, aim to reduce the sovereignty of independent States by referring to “the enlightened international community”, without really defining who has the right to represent this international community. When enquired about this, people often refer to the United Nations. The problem, however, is that the UN is not a democratic organisation. While the goal of the organisation is to promote international peace and security, the lion’s share of the UN members are not democratic countries or free societies. As non-democratic countries empirically have an adverse effect on international peace and security, this in turn makes it impossible to promote the goals of the UN. The result of soft legal positivism is that a majority of non-democratic States, under the pretension to be acting for the best interest of the international community, can force their will on a minority of democratic States. Stenhammar writes that “the slide from the consent of individual States to a collective consensus reflects negatively on the legitimacy of international legal norms and thereby augurs ill for their future adherence.”

*Jus ad bellum* and *jus in bello* has been increasingly codified during the last two centuries; the reason being predictability and stability in international relations, which in turn should promote the chances for peace. Increased codification through e.g. treaties and conventions between sovereign States is a positive development from a hard legal positivistic perspective. When treaties such as the Hague and Geneva Conventions were created, it was in order to set unambiguous rules for all belligerent parties, whether they were States or insurgents. Nevertheless, wars still occur, despite tools such as the Geneva conventions, but these were never intended to completely prevent war, only to shield the innocent; limiting civilian casualties and protecting soldiers from unnecessary harm. Eliminating enemy soldiers during wars is of course permissible and often expected - a necessary evil - but the “deliberate targeting of civilians is absolutely forbidden.” As Ratner points out however, “when bullets start flying, rules get broken;” the professionalism, training and sense of ethics of the army in question will affect to what degree it adheres to the Geneva Conventions.

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330 Lysén (1997) p. 34.
332 Id. at p. 17.
International law has however yet to define core issues in the field of terrorism, such as actually agreeing on a common definition of terrorism. This is a problem from the hard legal positivistic viewpoint, not the least because terrorism has developed into a serious problem for many States, causing among other things great costs due to increased security measures. As there is no common definition, the debate has been reduced to a political one; meanwhile, the terrorists has for many years used this legal loophole to continue their barbaric activities against civilians without real resistance from – and sometimes even with the support of – the international community.

The purpose of terrorism is to strike fear amongst the civilian population. Terror hits different parts of the world almost on a daily basis. Using terror as part of the political or ideological strategy is common among several armed non-State actors, for several reasons; it is a cheap, efficient way that even has the backing of many States. Terrorists are often indistinguishable from the civilian population from where they operate. Often, the terrorists are private individuals who operate transnationally in the shadows, working in diffuse networks rather than hierarchical organisations. All of these factors complicate the legal issues. As Becker says, “traditionally the law knew in what direction to place the blame”.335 This is no longer as valid as before as the applicable conventions mainly concerns inter-State conflicts.

States play a critical role when it comes to the success of failure of terrorists. Depending on whether States tolerate and support terrorism – or work against it – international terrorists are more or less likely to prosper. Citizens expect their States to protect them from terrorist acts but the States act in a regulative framework that was crafted for a different age. A new legal landscape is called for, that is adapted to the new realities. As the problem of terrorism today is international, so the solution must be. A common definition of terrorism needs to be reached so that States could start combating terrorism more efficiently. Unquestionably, the legislation against international terrorism needs to be both balanced and efficient, so that the very freedoms and rights enjoyed in a free society are not jeopardised. It is the belief of the present author that the lack of a common definition of terrorism has enabled democratic and non-democratic countries alike to violate human rights of ordinary citizens in the otherwise just battle against terrorism that has increased during the past few decades. Another obvious risk of not having a clear and universal definition of terrorism is

that governments increasingly will find e.g. the Hague and Geneva conventions obsolete or quaint if these are respected by fewer and fewer belligerent parties.

As the United Nations is unlikely to reach a universal definition of, and making a credible action plan against, terrorism – besides from the fact that the United Nations is an unsuitable forum due to e.g. the democratic deficit as elaborated upon above – its falls on the shoulders of democratic countries to do this. Some bilateral agreements are already in place regarding the fight against terrorism but they usually cover only a few areas which render them less effective. The democratic countries should, through a treaty, not only define what constitutes terrorism but also how to help combat it; cutting the financing of terrorism and stopping the indoctrination, recruitment, training and free movement of terrorists. Another example is extradition, which today can be quite unfeasible. Tough sanctions should be levied on those countries bound to the treaty who fail to adhere to it; these sanctions would deter States sponsoring terrorism to join. Slowly, the treaty would grow to encompass more countries, which would constantly make life harder for the terrorists and those ever-fewer decreasing States who support them. This treaty is naturally far short of creating a “League of Democracies” but would, in line with the basic norm from which the present study has drawn inspiration, help promote sustainable and long term international peace and security, by fighting terrorism in a more efficient way.

This study has attempted to describe the legal implications when States defend themselves against armed non-State actors. Another purpose of the study was to determine the conditions when violent actions constitute terrorism. Hard legal positivism was adopted as the guiding framework. Contrary to common belief, defining the conditions when violent actions constitute terrorism does not have to be a subjective judgment of whether a combatant is a guerrilla freedom fighter or terrorist. It’s sufficient to observe whether the combatant attacks enemy combatants or civilians; this is a quite objective criteria. The goals of those carrying out guerilla warfare and terrorism might be the same – e.g. revolution, anarchy or national liberation – but the means to reach the aims differ; the guerrilla attack military targets while terrorists attack civilian targets. Can countries then be held responsible for carrying out “terrorist acts”? The answer is in the negative. As Ganor explains:

“The term ‘terrorism’ is superfluous when describing the actions of sovereign states – not because states are on a higher moral level, but because, according to the international conventions, any deliberate attack upon civilians in wartime by regular military forces is already defined as a war crime. Should such an attack be carried out during peacetime, the act is defined by convention as a ‘crime against
Thus, terrorism is politically motivated, intended to influence governments to act or refrain from acting – in other words influencing the governmental policy. The agents of terrorism are never States but always non-State actors, even though they might be backed by States. The terrorist violence is directed at non-combatants such as civilians, who are not prepared to defend themselves against this violence, as the very purpose of terrorism is to create a fearful state of mind not only of the persons attacked but also on the wider audience that watches the terrorist attack via e.g. media.

If non-State actor groups calling themselves “freedom fighters” would abide by international law – for example by not targeting civilians - it would thus reduce the possibility of their opponents labelling them “terrorists”. In other words, it would greatly facilitate the differentiation between legal combatants fighting using legitimate means, and illegal combatants using means of terror. Non-State actor fighters not fulfilling the requirements of legal combatants subject themselves to the risk of not being treated as such. This implies that the State defending itself may choose whether it will categorize the illegal combatants as prisoners-of-war or just simple criminals, subject to the domestic penal system.

It is also clear to the present author that if the non-State actor chooses to use civilian areas as the battle ground, it also bears full legal and moral responsibility for any civilian casualties that may result thereof. Consequently, protected objects such as schools, hospitals, religious buildings and ambulances will lose their protected status if used by the non-State actor combatants.

If terrorism is to be eradicated – or reduced to a tolerable degree – a crucial goal of the international community of States must be to define what terrorism is, otherwise it will be quite difficult to combat it efficiently on a global level. Without a definition, no responsibility will be imposed on those countries that support terrorism; nor will it be possible to create and enforce global agreements against terrorism.

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