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# HAGUE INTERNATIONAL TRIBUNALS

# The *Armed Activities* Case and Non-state Actors in Self-Defence Law

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**Abstract**
In the *Armed Activities on the Territory of the Congo* case the International Court of Justice has – for the first time in its history – found a state to have violated the prohibition of the use of force in Article 2(4) of the UN Charter. For the first time also, the Court has discussed the scope of self-defence directly under Article 51. In this article the focus lies on this aspect of a wide-ranging judgment. In finding that Uganda had violated the Charter, the Court kept to its *jurisprudence constante*; it did not bow to 'post-11 September' pressure to extend the logic of Article 51 to private actors. This article discusses the merits of the scholarly claims for both sides, but warns of drawing conclusions for the Court's future jurisprudence – the apparent unity among judges may have to do more with the case rather than the wider issue.

**Key words**
*Armed Activities* case; attribution of conduct; International Court of Justice; non-state actors; self-defence

## 1. INTRODUCTION

In the past few years the International Court of Justice (ICJ) has had ample opportunity to pronounce on the politically sensitive, but fundamental, prohibition of the threat or use of force under the UN Charter and its justification as self-defence, after having been relatively silent[1] on the issue ever since its landmark decision in *Nicaragua*.[2] In this 'post-post-Cold War era' parties seemed to have started to trust the Court with such weighty issues. Until the 19 December 2005 judgment in *Armed Activities on the Territory of the Congo*,[3] however, all previous attempts to engage the Court in a discussion of the *jus contra bellum* have in some form or another been 'circumvented'.

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1. C. Gray, 'The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after *Nicaragua*', (2003) 14 EJIL 867.
2. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14.
3. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment of 19 December 2005 (not yet published, available at www.icj-cij.org).

In *Nicaragua*, of course, the jurisdiction of the Court was restricted to customary international law and a bilateral treaty of friendship, commerce, and navigation (FCN treaty), which did not hinder it from nonetheless taking a stand on the interpretation of the Charter.[4] The Court touched on the issue of self-defence under the Charter in *Nuclear Weapons*,[5] but the case was not really about the prohibition and the justification itself. The cases brought by the then Federal Republic of Yugoslavia against ten states members of NATO (*Legality of Use of Force*)[6] were based on jurisdictional grounds too shaky to be considered viable, but the issues that the Court would have been faced had the cases come to the merits stage would have been positively frightening in their scope. In the merits judgment in *Oil Platforms*, decided in November 2003,[7] the jurisdiction of the Court was again severely restricted to the interpretation of an FCN treaty. The Court was not discouraged by jurisdictional matters from incidentally discussing self-defence law in its interpretation of Article XX(1)(d) of the FCN treaty.[8] Again, however, the finding of the Court was directed at the FCN treaty, not the Charter. The Court's latest advisory opinion saw it practising 'argumentative economy' again. In *Wall*, it felt that the situation was such 'that Article 51 of the Charter has no relevance in this case',[9] which in its own way is a statement on the state of the law as the Court sees it.

Now the present judgment is different and it can rightly be described as 'historic'. For the first time in the ICJ's history, a state has been found to have violated the prohibition of the use of force contained in Article 2(4)[10] – a direct violation of the single most important provision of this single most important treaty of international law. For the first time, the Court has discussed the scope of self-defence directly under Article 51.

The present case was brought by the Democratic Republic of the Congo (DRC) against Uganda by an application of 23 June 1999. The same day the DRC brought before the ICJ two other cases alleging similar violations arising from the same situation, one against Rwanda and one against Burundi. Only the present case survived

4. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, [1984] ICJ Rep. 392, at 424, para. 73; see *Nicaragua* case, *supra* note 2, at 31, paras. 42–56, at 92, paras. 172–182. I submit that the *Corfu Channel* case could have been about the prohibition of force, but the judges were still caught in the mental categories of the pre-Charter world (*Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 4; J. Kammerhofer, 'Uncertainties of the Law on Self-Defence in the United Nations Charter', (2005) 35 *Netherlands Yearbook of International Law* 2004 143, at 152 (n. 30)).
5. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, at 244, paras. 37–44.
6. See, e.g., *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment of 15 December 2004 (not yet published, available at www.icj-cij.org).
7. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Judgment of 6 November 2003, [2003] ICJ Rep. 161. The jurisdiction of the Court was restricted to the FCN treaty by the 1996 judgment on preliminary objections: *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 12 December 1996, [1996] ICJ Rep. 803.
8. J. Kammerhofer, 'Oil's Well That Ends Well? Critical Comments on the Merits Judgment in the *Oil Platforms* Case', (2004) 17 LJIL 695, at 701–6.
9. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 June 2004, [2004] ICJ Rep. 136, at 194, para. 139.
10. *Armed Activities* case, *supra* note 3, at para. 165. Articles without indication of their source are from the UN Charter; the term 'Charter' refers exclusively to the UN Charter.

on the Court's list to be decided on the merits.[11] The Applicant in the present case alleged that Uganda had *inter alia* violated the prohibition of the use of force 'by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces operating there'.[12] There were other allegations, most notably of violations of international humanitarian law and human rights law as well as of the 'illegal exploitation of Congolese natural resources',[13] but the issues of whether the Respondent had breached the prohibition or whether its use of force was justified – at one period or another and for one reason or another – formed the core of the present case. Uganda, not content with justifying its actions, raised a counter-claim in its Counter-Memorial of 20 April 2001, alleging that it 'ha[d] been the victim of military operations and other destabilizing activities carried out by hostile armed groups either supported or tolerated by successive Congolese governments'.[14]

To the east the DRC is bordered from north to south by Sudan, Uganda, Rwanda, Burundi, Tanzania, and Zambia. The eastern part of the DRC does not have a good transport infrastructure and together with the great distance from Kinshasa (around 1,800 km), this makes the region extremely difficult to control. For a long time various armed opposition groups have used this region as sanctuary and base camp, both those fighting the current government in Kinshasa and those fighting one of the governments of the adjoining states; between 1997 and 2003 this instability increased considerably. In fact, the situation in *Armed Activities* was uncannily like that in *Nicaragua*, except for the number of people involved and the area covered. In both cases a relatively little-developed border area was used by various actors (both private and governmental) for activities against other actors on both sides of the border.

Before the Court the issues were narrower than the situation on the ground. The Applicant accused the Respondent of using its regular army against it; it also accused the Respondent of violating the prohibition by 'supporting' various anti-Kinshasa rebel groups. The Respondent, in both its defence and its counter-claim, accused the Applicant of 'supporting' or 'tolerating' other rebel groups that fought Kampala, of allowing a third state (Sudan) to use its territory for actions against the Respondent

11. The cases against Burundi and Rwanda were discontinued on 30 January 2001 after the DRC requested the Court to do so (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi)*, Order of 30 January 2001, [2001] ICJ Rep. 3; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Order of 30 January 2001, [2001] ICJ Rep. 6). On 28 May 2002, the DRC filed a new application instituting proceedings against Rwanda, but in its judgment on jurisdiction and admissibility of 3 February 2006, the Court found that it had no jurisdiction to entertain this dispute (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006 (not yet published, available at www.icj-cij.org)).
12. *Mémoire de la République democratique du Congo, Juillet 2000* (2000), Vol. I, at 273 (no official translation yet, English version from: *Armed Activities* case, *supra* note 3, at para. 24).
13. CR 2005/13 (Translation) at 37. This topic was wholly new before the Court, as counsel for DRC noted in their oral pleadings (CR 2005/5 at 15, para. 1), but the interesting questions of the exploitation of natural resources – while a central issue in the Great Lakes conflict – will not concern me in this article.
14. *Armed Activities* case, *supra* note 3, at para. 276; Counter-Memorial submitted by the Republic of Uganda, 21 April 2001, (2001) Vol. I, at 217.

and, implicitly, of using direct force against its army in the DRC, which, it argued, was using justified force against which the use of force cannot be justified. In legal terms, both parties stood accused of using force against each other, both directly and indirectly, and thereby to have violated Article 2(4), while both claimed to have acted in self-defence under Article 51 against the other party's previous armed attack and that their use of force was thus justified.

In this case the biggest issues with which the Court had to grapple were how to ascertain the facts and how it would deal with the difficulty that in the murky situation in the eastern DRC no one – not even the parties themselves – can know exactly who did what to whom. It was faced with two problems. First, it had to develop 'rules of evidence' for this type of situation and apply the guidelines it had developed in the *Nicaragua* judgment.[15] Second, it had to deal with the singular lack of reliable information about the situation before the Court in this case. I do not propose to elaborate on these issues in this article, but they are of great practical importance, for I believe that nothing can so profoundly change the outcome of a merits judgment as the quality and quantity of evidence and its weighing by the Court.

It can be argued that the Court's approach to the ascertainment of facts was in a sense not 'adequate' to the situation on the ground. There is no doubt that the decision of the tribunal – the individual norm binding on the parties – extends to the facts subsumed under the law, but it seemed that the Court felt that it had to pronounce on the issue, even if the evidence presented was meagre. The Court is not equipped for elaborate factual inquiries; it has no large research staff and no police force to assist it, and its processes are not designed for this type of procedure. As mentioned above, I doubt very much that any *anybody* would be able to clarify such extraordinarily murky situations. Thus the Court had to rely on documents, on reports by the United Nations and other neutral entities, and on the assertions and admissions of the parties.

Another preliminary point concerns the consequences of the absence of evidence. If a tribunal cannot prove a fact, that fact *per definitionem* is not established before that tribunal. If the facts on which a claimant's case rests cannot be proven, the case fails; if the facts on which a defendant bases his defence cannot be proven, the defence fails. The situation in *Armed Activities* and *Oil Platforms* was somewhat similar. On the one hand, the facts that Iran and the DRC sought to be proven, i.e. the actions of the US Navy in the Persian Gulf[16] and of the Ugandan regular army (UPDF) in the eastern DRC,[17] respectively, were largely admitted by the Respondent and therefore not object of the Court's inquiry. On the other hand, the facts sought to be proven by the US and Uganda in their defence against the claim and in their counter-claims, that is, Iran's various military activities and the support of rebels by the DRC, respectively, were denied by the Applicant[18] and in

15. *Nicaragua* case, *supra* note 2, at 38, paras. 57–74; *Armed Activities* case, *supra* note 3, at paras. 58–61.
16. *Oil Platforms* case, *supra* note 7, at 184, para. 45.
17. *Armed Activities* case, *supra* note 3, at paras. 72–91.
18. *Oil Platforms* case, *supra* note 7, at 186, para. 50; *Armed Activities* case, *supra* note 3, at para. 133.

both cases the Court did largely find the denied facts as not established.[19] (The same applies to the denial by Uganda that its army participated in an airborne attack at Kitona.)[20]

## 2. The Court's reasoning in deciding the issue

The legal situation with respect to the Applicant's first claim and the Respondent's first counterclaim – concerning the use of force – is relatively complicated, and the Court's reasoning is not clearly structured. To a certain extent the argumentative structure of the judgment clouds certain key issues of self-defence law. I think that partly these omissions were intentional exercises of the Court's 'argumentative economy' not to discuss law it does not absolutely have to discuss in order to render a judgment or give an opinion, like the exact status of the toleration of rebels under self-defence law[21] or the question of anticipatory self-defence.[22] Partly, however, the rather strange division between ascertainment of fact, restatement of the claims of the parties, and application of the law, as well as the new factual and legal debate apropos the first counter-claim, which concerns the very same facts as the first claim and where the defence on the claim to a large extent *is* the counter-claim, unintentionally makes the Court's task more difficult than it ought to be. The distinction between claim and defence on the one hand and counter-claim and defence on the other makes a coherent look at the use of force and the self-defence situation impossible, for the timing of events – which is crucial to 'self-defence' as justification of the use of force – cannot be and was not clearly established by the Court.

The relevant part of the judgment[23] starts by making findings of fact regarding 'the first submission of the DRC, the defences offered by Uganda, and the first submissions of Uganda as regards its counter-claims'.[24] The Court tries to establish how each party acted at least during the period 1997–2003 (and, concerning the counter-claim, even pre-1997), but even thus restricted it would have been a mammoth task. In order further to restrict the breadth of its inquiry into the facts of the case, it refers to one of the two objections offered by the Respondent for its actions at this early stage: Uganda claimed and the DRC acknowledged that Ugandan troops were present on DRC territory with the consent of the Applicant, at least for part of the time.

Consent to the presence of foreign troops means that their presence in a state's territory – and at least some of the military actions the troops engage in – is not a use of force in the sense employed by Article 2(4). The *objectio* 'consent' is thus not a justification of behaviour fulfilling the *actus reus* condition of the prohibition of the threat or use of force, but the state behaviour 'troops present with consent' does not

19. *Oil Platforms* case, *supra* note 7, at 189, para. 57, at 190, para. 61, at 191, para. 64, at 195, para. 71; *Armed Activities* case, *supra* note 3, at paras. 131–135, 146.
20. *Armed Activities* case, *supra* note 3, at paras. 62–71.
21. Ibid., at para. 301.
22. Ibid., at para. 143.
23. Ibid., at paras. 42–165, 276–305.
24. Ibid., at para. 57.

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even fulfil Article 2(4)'s terms and thus does not even need to be 'justified'.[25] If troops were present and acting with the consent of the Applicant, the Court writes, it need not establish the facts, but only the temporal and material scope of the consent.[26]

Any use of force beyond the consent given by the Applicant, however, needs to be justified, and Uganda claims that any period or action not covered by consent was done in the exercise of its right to self-defence under Article 51 of the Charter.[27] This was the core task of the Court in this judgment: to establish the facts and apply the law in deciding whether and how Uganda had used force against the DRC, and whether and how that use could be justified as self-defence.

The Court looks at two situations of the use of force. First, the DRC alleged that Uganda had participated in an airborne operation at Kitona (in the western DRC) – the Court does not find the evidence for that allegation convincing (paragraphs 62–71). Second, it was agreed between the parties that Uganda used its troops to invade, hold, and occupy portions of the eastern DRC and supported anti-Kinshasa rebel groups operating in that area.[28] The Court at this point in the judgment looks only at the extent of Uganda's penetration into the DRC (paragraphs 72–91).

As it had done in *Oil Platforms*,[29] the Court first establishes whether the actions of the Respondent can be justified as self-defence (paragraphs 106–147) before it actually applies the prohibition of the use of force (and related prohibitions) to the facts as established (paragraphs 153–165). I would argue that it would be better if it were first to establish the fulfilment of the *actus reus* condition of the prohibition under Article 2(4) UN Charter (and not have the reader make a preliminary determination *sub silentio*) before proceeding to the question of whether this prima facie unlawful act can be justified as self-defence.

What arguments did the Court use in examining Uganda's plea of self-defence? It asked the one question to which a positive answer is a *necessary condition* to the exercise of that right: was Uganda the object of an armed attack by the state against which it used force? Again it did not ask the question very clearly. It starts by clarifying that the Respondent's early actions in border areas, where UPDF forces were previously stationed with the Applicant's consent, shall not be distinguished in its analysis from later actions farther from the border, because the extended Ugandan actions in August 1998 could not possibly be subsumed under the terms of the consent given earlier.[30] The Court feels that only a global 'focus' is adequate for the plea of self-defence:

> For these purposes, the Court will not examine whether each individual military action by the UPDF could have been characterized as action in self-defence, unless it can be

25. In a recent article I have tentatively distinguished the notions of 'exception' and 'justification' as a matter of legal theory (see Kammerhofer, *supra* note 4, at 194–6).
26. See, e.g., *Armed Activities* case, *supra* note 3, at paras. 42–54, 92–105.
27. *Armed Activities* case, *supra* note 3, at paras. 92, 108.
28. Most notably the Mouvement de libération du Congo (MLC) and the Rassemblement congolais pour la démocratie (RDC) (*Armed Activities* case, *supra* note 3, at para. 41).
29. *Oil Platforms* case, *supra* note 7, at 183, paras. 43–78, at 199, paras. 79–99; Kammerhofer, *supra* note 8, at 696–700.
30. *Armed Activities* case, *supra* note 3, para. 111.

shown, as a general proposition, that Uganda was entitled to act in self-defence in the DRC in the period from August 1998 till June 2003.[31]

Consonant with the two lines of Uganda's defence, the judgment next examines the respective factors that could be considered an armed attack within the meaning of Article 51. First, the role and actions of Sudan in the conflict, in particular its alleged co-operation with and support for the DRC and anti-Ugandan rebel groups, most notably the Allied Democratic Forces (ADF), is analysed (paragraphs 120–130). The Respondent claimed that the ADF was being supplied and equipped by both the DRC and Sudan, and the Court writes that, 'in order to ascertain whether Uganda was entitled to engage in military action on Congolese territory in self-defence, it is first necessary to examine the reliability of these claims'.[32] This turn of phrase seems to point at the possibility of the partial responsibility of Sudan for the ADF's actions, including the classification as armed attack. The ICJ, however, once again is not satisfied by the evidence brought by the party claiming a fact; it finds that it is not established that there was Sudanese support for these non-state groups. Nor, indeed, is the Court satisfied that Uganda has sufficiently proved that 'that there was an agreement between the DRC and Sudan to participate in or support military action against Uganda'.[33]

More notably and of wider importance is a series of pronouncements *obiter* of what would *not* have given rise to a right of self-defence on the Respondent's part had it proved that the DRC and/or Sudan had acted thus. Even if it were proved, for example, that Sudan airlifted insurgents from (Sudan-based) groups to fight anti-Kinshasa rebel groups in the eastern DRC, 'the DRC was entitled so to have acted. This invitation [to airlift] could not *of itself* have entitled Uganda to use force in self-defence'.[34] Also, had Uganda proved that Sudan was transporting Congolese soldiers, this 'cannot entitle Uganda to use force in self-defence'.[35] The reason for these pronouncements is that apparently the Court has determined – prematurely, one could argue – that the DRC's actions against Ugandan forces could be justified as self-defence. The presence of Ugandan troops on foreign soil without the host state's consent is usually prohibited, but at this stage the Court has not determined that Uganda had committed an armed attack against which the DRC may use measures in self-defence. Only in the counter-claim does it explicitly say that the DRC was entitled to use force against Uganda (presumably in self-defence);[36] at this stage, however, its statement that 'a State may invite another State to assist it in using force in self-defence'[37] and its argument that the alleged co-operation between the DRC

31. Ibid., para. 118. This sentence is relevant as an *obiter dictum*, for it shows that the Court sees the relevant 'focus' of self-defence as one encompassing the whole factual situation, rather than single actions. I think that the 'focus' or 'zoom' of self-defence is one of the uncertain elements of Article 51; Kammerhofer, *supra* note 4, at 175–8.
32. *Armed Activities* case, *supra* note 3, at para. 120.
33. Ibid., at para. 130.
34. Ibid., at para. 126 (emphasis added).
35. Ibid., at para. 127.
36. Ibid., at para. 304.
37. Ibid., at para. 128.

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and Sudan would be justified as individual and collective self-defence, respectively, is made without the benefit of the Court having made such a determination.

In a second step, the Court focuses on the question of the 'connection' between the ADF and the DRC, and the latter's support for the former (paragraphs 131–137). While there is evidence of certain attacks on Uganda in June–August 1998, the DRC claims that the non-state group ADF alone is responsible for them. Again, in the eyes of the Court Uganda was not able to prove any form of support by the DRC. Thus the conclusion as to whether Uganda's use of force is justified as self-defence is obvious (paragraphs 141–147). Because '[t]he attacks did not emanate from armed bands or irregulars *sent by the DRC or on behalf of the DRC*'[38] there was no armed attack in the sense employed by Article 51 against which the Respondent could have exercised the right of self-defence.

Before we proceed to discuss the Court's findings on the use of force, one sentence of the Court's finding on self-defence may cause some confusion and needs to be mentioned at this stage. In concluding the negative response to Uganda's plea of self-defence the Court explains,

> For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence *against large-scale attacks by irregular forces*.[39]

The Court at that point in the judgment does exactly what it says it is not going to discuss – it finds that only those actions by private groups that can be attributed to a state can be responded against as self-defence under Article 51. Thus it answers in the negative the contentions it vows not to respond to.

In making its findings on the Ugandan use of force vis-à-vis the DRC (paragraphs 148–165), the Court distinguishes between Uganda's direct use of force – use of force utilizing its own armed forces – and the indirect use of force by way of the support for anti-Kinshasa rebel groups. While the presence of UPDF forces on DRC territory without Kinshasa's consent was admitted by the Respondent and while the subsumption of this fact to Article 2(4) is unproblematic (paragraph 153), the legal classification of the support for, and of the actions of, the rebel groups is much more problematic.

In a first step the Court finds that while Uganda did indeed support dissident armed groups, they could neither be called an organ (Article 4 Articles on Responsibility of States for Internationally Wrongful Acts 2001 (ASR)),[40] nor could be said to be exercising elements of governmental authority on Uganda's behalf (Article 5 ASR), nor could the rebels' actions be attributed to Uganda as being 'in fact acting on the instructions of, or under the direction or control of' the latter (Article 8 ASR). The Court observes that in respect to the Article 8 connection between the Mouvement

38. Ibid., at para. 146 (emphasis added).
39. Ibid., at para. 147 (emphasis added).
40. General Assembly, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/RES/56/83 (2001) (hereinafter ASR), Annex.

de libération du Congo (MLC) and the Rassemblement congolais pour la démocratie (RDC), on the one hand, and Uganda, on the other hand, the lack of evidence regarding 'control' means that it need not discuss whether the tests are met (as it had to in *Nicaragua*).[41]

In a second step it considers how the support that Uganda afforded to the rebel groups could be classified on its own, given that the rebel actions are not considered as committed by Uganda, and given that the support was given in the light of current and expected rebel behaviour. In a short passage the Court finds that the training and support itself violate international law (paragraphs 161–165). Basing itself upon the Friendly Relations Declaration and customary international law, it finds that support for rebel groups in another state is a violation of the prohibition of intervention and – again referring to *Nicaragua* – that 'acts which breach the principle of non-intervention "will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations"'.[42]

The first counter-claim brought by Uganda essentially claimed that the DRC had supported rebel groups and had thus violated Article 2(4). Thus the Respondent's defence and its counter-claim were united in fact and law and the latter was bound to fail with the former. The Court in the relevant part of its judgment (paragraphs 291–305) once again discusses the involvement of the DRC with rebel groups, but – owing to the wider temporal scope of the counter-claim – divides its examination of the DRC's behaviour into three periods: (i) prior to the May 1997 change of government in Kinshasa; (ii) from May 1997 to the break with Uganda in July 1998; and (iii) from July 1998 onwards, which formed the Court's focus in deciding on Uganda's plea of self-defence in the first submission of the Applicant's claim.

Regarding the first period, the Court finds that once again the evidence for support for the ADF by the (then) Zairean government is lacking. However, Uganda had also claimed that Zaire was under a duty of vigilance not to tolerate rebel activities, a duty also mentioned in the Friendly Relations Declaration. The Court acknowledges this duty, although at this stage it does not connect it to self-defence in any way; that is, it does not discuss whether a breach of that duty would give rise to the right of self-defence, as counsel for Uganda had claimed.[43] But in the light of the circumstances the Court did not think that the 'absence of action by Zaire's Government against the rebel groups in the border area is tantamount to "tolerating" or "acquiescing" in their activities'.[44] Regarding the second period, the Court finds that there is lack of evidence of support for the ADF, and that the DRC actually co-operated with Uganda in fighting the rebels.

The Court's treatment of the third period completes the argument relating to self-defence regarding the first submission of the Applicant. The Court finds that the DRC was at that time engaged in self-defence against the Respondent and that,

41. *Armed Activities* case, *supra* note 3, at para. 160; *Nicaragua* case, *supra* note 2, at 62, paras. 109–115.
42. *Armed Activities* case, *supra* note 3, at para. 164; citing *Nicaragua* case, *supra* note 2, at 109, para. 209.
43. CR 2005/14 at 36.
44. *Armed Activities* case, *supra* note 3, at para. 301.

consequently, 'any military action taken by the DRC against Uganda during this period could not be deemed wrongful since it would be justified as action taken in self-defence'.[45] Even so, the Court concludes, the evidence for support by the DRC for anti-Uganda insurgents was found not to suffice. Here again we have the temporal confusion mentioned above: if the DRC had not been acting in self-defence, its forceful actions would not have been justified, which, in turn, depends upon whether it had supported the rebels. Thus the second argument is not an alternative, subordinate claim in the sense that even if the DRC were not acting in self-defence the support could in any case not be proven, but the latter argument needs to be upheld in order to found the former: if the DRC had first committed an armed attack by rebel force, so to speak, (unless the support were 'only' a use of force and no armed attack), then Uganda would have been justified in using force and the DRC's counter-force could not have been justified, since there is no self-defence against self-defence.

## 3. Non-state groups and armed attack

The problem I have made the focus of this article is the 'status' of non-state armed groups in the law on self-defence. In other words, the question that needs to be discussed is this: given that private actors employ military force against a state, when is the latter justified under Article 51 in exercising its right of self-defence and against whom would it be justified in using force? I shall enquire into what is valid international law on this issue – and whether there is any international law on this issue – and compare my findings with the judgment of 19 December 2005. I shall evaluate whether what the Court regards as law is actually law and whether one can apply the law to the situation as the Court sees it.

### 3.1. Can armed attacks be committed by private actors?

I propose to discuss the relationship of the Charter's self-defence law with non-state actors in two steps. First, I shall discuss whether an armed attack in the sense employed by Article 51 can be committed by a non-state actor. Second – if the first question be answered in the negative – I shall discuss the kind of 'connection' required between a state and a non-state actor in order to ascribe forcible actions of the latter to the former as an armed attack (section 3.2).

Article 51 requires that the right of self-defence be only exercised 'if an armed attack occurs'. This is the only authentic content of Article 51; self-defence is allowed simply 'if an armed attack occurs'. What this 'armed attack' is, and by whom it can be caused, is not detailed in the Charter, and this is the reason why most of the discussion of the law of self-defence focuses on this 'key notion'.[46] This simplicity of formulation is the main argument of the group of scholars I have called 'the

45. Ibid., at para. 304 (emphasis added).
46. K. Kersting, '"Act of aggression" und "armed attack". Anmerkungen zur Aggressionsdefinition der UN', (1981) 23 *Neue Zeitschrift für Wehrrecht* 130, at 133–4; A. Randelzhofer, 'Article 51', in B. Simma (ed.), *The Charter of the United Nations. A Commentary* (2002), 788, at 794.

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minority'. The minority opinion is that an armed attack in the sense employed by Article 51 can be committed by private actors, because Article 51 plainly does not speak of an armed attack *by a state*, only of an armed attack 'without specifying who must be the perpetrator of the attack'.[47]

*3.1.1. Theories dispensing with the requirement of a connection*

To think this theory through to the end would mean that there need not be any connection between a state and the private actors; the defender may use force even if the host state had utilized effective means against the private group, because the host's behaviour is irrelevant for the defender's entitlement to use force. Yoram Dinstein, one of the scholars most often cited in the present proceedings, can be interpreted as supporting this extreme position.[48] Also, Judges Kooijmans and Simma[49] in their separate opinions implicitly seem to hold that view.

Yoram Dinstein's arguments are ultimately based on the allegation that the incursion of armed groups 'is an extraordinary case demanding, and getting, an extraordinary solution in international law'[50] as well as the assumption that Secretary of State Webster's statement after the *Caroline* incident is the pertinent law on the issue,[51] which is not corroborated in any way. In effect, we are asked to believe that a statement on the law on the use of force made in 1842 is still correct despite the developments over the last 165 years.

Judge Kooijmans's argument has the same effect, but sees the applicable law as having recently changed (or as being in a process of change). In his separate opinion in *Wall*, he points to 'the generally accepted interpretation [of Article 51] for more than 50 years'[52] of excluding private actors from causing armed attacks. There, however, as well as in his separate opinion in the present case (joined in substance by Judge Simma), he sees the Charter as changed by the events of and since 11 September 2001 through the adoption of S/RES/1368 (2001) and S/RES/1373 (2001). I submit that all that these two resolutions do, however, is to '[r]ecogniz[e] the inherent right of individual or collective self-defence in accordance with the Charter'[53] in their preambles. The resolutions do not say that all, some, or any of the actions taken in response to the terrorist actions of 11 September 2001 are justified as acts of self-defence, or that this pronouncement wishes to change the Charter in this respect. The Council did not recognize the right of self-defence to act against private actors without attribution to a state, but only generally reaffirmed the right of self-defence irrespective of context.[54] The mentioning of the right of self-defence

47. E. Miller, 'Self-Defence, International Law, and the Six Day War', (1985) 20 Israel Law Review 49, at 57; C. Kreß, Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater (1995), 207; *Wall*, supra note 9, at 242, para. 6 (Judge Buergenthal, Declaration), at 215, para. 33 (Judge Higgins, Separate Opinion).
48. Y. Dinstein, *War, Aggression and Self-Defence* (2005).
49. *Armed Activities* case, *supra* note 3 (Judge Kooijmans, Separate Opinion, Judge Simma, Separate Opinion).
50. Dinstein, *supra* note 48, at 245.
51. Ibid., at 249–51.
52. *Wall*, *supra* note 9, at 230, para. 35 (Judge Kooijmans, Separate Opinion).
53. UN Doc. S/RES/1368 (2001), at preambular para. 3.
54. Yet this interpretation of the two resolutions seems to find its adherents in recent literature: Randelzhofer, *supra* note 46, at 802 (MN 35); C. Stahn, '"Nicaragua is Dead, Long Live Nicaragua" – The Right to Self-Defence

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can therefore not be understood as a pronouncement by the Council on how it believes the law is shaped, but must be read merely as a reminder that states do indeed have the right of self-defence if an armed attack occurs.

With respect, that 'Security Council resolutions 1368 (2001) and 1373 (2001) *cannot but be read* as affirmations of the view that large-scale attacks by non-State actors can qualify as "armed attacks" within the meaning of Article 51',[55] means to draw an erroneous conclusion. That these general and detached pronouncements by the Council in a preambular paragraph 'cannot but be read' as adoption by the Council of a controversial minority viewpoint on the law on the use of force – even taking into account the particular circumstances prevailing in New York City at the time of the adoption – would seem to be a highly unlikely interpretation of these two resolutions.

Even if the Council had propounded that non-state armed groups (or terrorists) can commit armed attacks, this could not have changed the Charter law on self-defence. The Council is not authorized under international law to change the Charter, because the meta-law on law creation requires different behaviour, will, and form. The Council also has no power authoritatively to determine whether an action (or a category of actions) is lawful under Article 51[56] in the sense of an authentic 'interpretation' qua norm, because this would require a new norm of the same kind as the one authentically 'interpreted'. Lastly, interpretation properly speaking is powerless to change the norm or narrow its frame of possible meanings, because it is cognition, not creation. Polemically speaking, within the frame of possible meanings of the text of Article 51, the Council's opinion on its content is no more authoritative than that of any scholar writing on the subject. The trend[57] to ascribe to the Council powers of 'authorizing' self-defence ascribes powers to the Council it does not have.

As with Dinstein, the logical conclusion from the separate opinions of Judges Kooijmans and Simma is that there is no need for any connection between state actions or omissions and non-state actors in self-defence law. While the major part of the minority requires at least 'toleration' by the host state (*infra*)[58] the two opinions 'cannot but be read as affirmations of the view that large-scale attacks by non-State actors [alone] can qualify as "armed attacks" within the meaning of Article 51'.[59] Judge Kooijmans, like Dinstein, does not give a specific legal basis as to why his interpretation of Article 51 should be preferred to the majority view. Any view on how the law is shaped must contain a justification, some proof that what is claimed is actually positive international law. The separate opinion does not expand on this crucial point.

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under Art. 51 UN Charter and International Terrorism', in C. Walter et al. (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (2004), 827, at 834; C. J. Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the *Wall* Case', (2005) 16 EJIL 963, at 972.

55. *Armed Activities* case, *supra* note 3, para. 11 (Judge Simma, Separate Opinion) (emphasis added).
56. It may, however, by virtue of 'measures necessary to maintain international peace and security' (Art. 51, first sentence, second clause), cause the justification to cease.
57. T. M. Franck, *Recourse to Force. State Actions against Threats and Armed Attacks* (2002), 54.
58. *Armed Activities* case, *supra* note 3, paras. 33–38 (Judge Kateka, Separate Opinion).
59. Ibid., para. 11 (Judge Simma, Separate Opinion).

Judge Simma, on the other hand, follows Judge Kooijmans's arguments, but adds that the reconsideration of the law of self-defence in favour of an inclusion of non-state groups in the *ratione personae* dimension of 'armed attack' ought to be based on 'more recent developments not only in State practice but also with regard to accompanying *opinio juris*'.[60] This is a plea either that customary international law has changed the Charter in this respect, or that it ought to be interpreted with reference to recent practice and/or opinions. My argument is that neither argument is an adequate basis. A treaty such as the Charter remains valid as long as it is not changed by meta-law on treaty-making, for any change of a norm means the loss of the validity of the old norm and the creation of a new norm with changed content.[61] Thus any force for change needs to have the force of derogation – the question is: does customary international law have the power to derogate from international treaty law? The additional question in our particular case is: does the 'recent' (post-11 September 2001) practice and alleged change in *opinio* mean that Article 51 is derogated from and has been exchanged for Article $51_A$?

The other plea is for a reinterpretation of the Charter in the light of recent factual developments ('practice'). Interpretation, however, is the cognition of the possible meanings of a norm; the norm itself – in this case the text of Article 51 – stands. A norm can have several possible meanings;[62] the inclusion *vel non* of non-state activities in the term 'armed attack' could be one of the possible meanings. If that were so – if the possible meanings were to include non-state activities – the choice among the possible meanings *cannot* be made in a final sense. The indeterminacy is built-in; the possible meanings cannot be reduced because the norm itself is not its meanings. A reduction of possible meanings would be a change of the norm. In other words: interpretation does not change what the norm is. I have grave theoretical doubts as to the normative effects of subsequent 'developments'.[63]

### *3.1.2. Theories establishing some connection*

Very few scholars hold that the behaviour of the 'host state' does not matter at all. Indeed, most minority scholars – that is those arguing for the right of self-defence against an 'armed attack' not attributable to a state – require at least some 'connection' of the private group to *some* behaviour of *some* state. Yet the essential, but often not clearly articulated, difference between the 'some connection' theories and the attribution of behaviour to a state (section 3.2) is that the connection does not result in the private actor's behaviour being counted as the (host) state's behaviour. A multitude of such theories exist, but they are usually not clearly distinguished from each other. In this section, I shall focus on a few elements of connection that have been discussed in the proceedings of this case or in the judgment: 'toleration or acquiescence', 'state complicity' and 'logistical or other support' or 'assistance'.

60. Ibid., para. 11.
61. H. Kelsen, *Allgemeine Theorie der Normen* (1979), 91.
62. H. Kelsen, *Reine Rechtslehre* (1960), 348, ch. 45 d.
63. Kammerhofer, *supra* note 4, at 146–9.

1. The connection via 'toleration' and 'state complicity' has a long history and is part and parcel of the doctrine on 'armed bands'. The doctrine is epitomized, perhaps, by the long-standing and continued reference to the facts of, and the later diplomatic correspondence regarding, the *Caroline* incident.[64] In this episode the United Kingdom was the target of non-state armed groups to a degree organized and formed on the territory of the United States (but not supported by that state). The target state employed military force against members of these groups on the territory of the host state. That these facts were subsumed under 'self-defence' – rather than the specific formulations to describe 'self-defence' in the later diplomatic exchanges – makes it a precedent for scholars proposing to establish a connection between toleration or incapacity of the host state on the one hand and self-defence on the other.

Toleration of non-state activities against another state is frequently regarded as contrary to international law. In *Corfu Channel*, the Court pronounced that it is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States',[65] and it is echoed by the Friendly Relations Declaration[66] in this respect. In the present case the Court stated that the relevant passages of the latter document were reflective of customary international law.[67]

The rather unspecific notion of 'state complicity' in 'unfriendly' acts – presumably not of a level that allows one to attribute the private actions to the state that is complicit – would *a fortiori* also suffice to be able to speak of a violation of international law. Toleration of armed groups' (terrorists') activities on a state's soil, if these activities are directed against another state, is unlawful under current international law. The Court argues that non-attributable behaviour may very well constitute unlawful intervention or a use of force.[68] They could even be considered as an act of aggression.[69]

This first step seems relatively clear: the state violates a duty not to do *p*, in the prohibitions on the use of force or intervention, either by not preventing *x* from occurring or by colluding with others who do perform *p*. In other words, the host state uses force against the target state, or intervenes in the target state, by not preventing private individuals performing actions which would have been a use of force or intervention *had the host state done them*. But here we face the first difficulty. Not only has the state not fulfilled the *actus reus* condition of the prohibition, but the behaviour of other 'entities' is not attributed to it (legally made a behaviour of that state). I submit that it is highly questionable whether the prohibition on the

64. H. Miller (ed.), *Treaties and Other International Acts of the United States of America* (1934) Vol. IV. For an overview and discussion of the *Caroline* incident, see R. Y. Jennings, 'The *Caroline* and *McLeod* cases', (1938) 32 AJIL 82.
65. *Corfu Channel* case, *supra* note 4, at 22.
66. UN Doc. A/RES/2625 (XXV) (1970).
67. *Armed Activities* case, *supra* note 3, at para. 162.
68. *Nicaragua* case, *supra* note 2, at 108, para. 206, at 109, para. 209; *Armed Activities* case, *supra* note 3, at paras. 161–165.
69. M. R. García-Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States* (1962), 119. The Definition of Aggression (UN Doc. A/RES/3314 (XXIX) (1974), Annex) speaks of a state 'allowing its territory . . . to be used by [another] state' (Article 3(f)), but in contradistinction to the non-attributable acts of private individuals, the non-attributable acts of states vis-à-vis other states may incur the responsibility of the latter state (e.g. Article 16 ASR).

use of force can be said to include the prohibition of support to groups, or whether the host state can be said to 'intervene' merely by allowing the use of its territory by non-state actors. In all these cases, the *actus reus* is a prohibition of certain positive behaviours, not an obligation to ensure a certain result (to hinder a certain result from occurring).

However, even if the prohibitions of the use of force, of intervention, or of aggression were violated by such acts of toleration and 'complicity', the crucial point is their connection to the law on self-defence. Some authors as well as counsel for Uganda[70] have claimed that the mere tolerance of rebel forces on a state's territory, or 'easily proven complicity,'[71] makes that state liable to actions of self-defence. How do they purport to achieve this result? It is precisely the breach of certain norms of international law that makes the host state's actions an armed attack: 'Ausschlaggebend ist vielmehr, ob den Basenstaat wegen Nichtverhinderung der Gewaltakte die völkerrechtliche Verantwortlichkeit trifft. Ist [sie] zu bejahen, so darf der Basenstaat als Angreifer angesehen werden.'[72] In other words, through the breach of the obligations mentioned above the state incurs being liable to measures of self-defence, because it is seen as having committed the armed attack itself.

Now this is a very tenuous connection, and I have found no real basis for it. Perhaps it is the expression of a natural-law doctrine,[73] for it seems that self-defence is fashioned into a sanction, a 'sanction' not to be found in the law: any state breaching certain norms of international law suffer that sanction, irrespective of whether the law (the Charter) prescribes it. As Manuel García-Mora puts it: 'at most, toleration of armed bands by a state constitutes an act of aggression, which, under the Charter, does not warrant the exercise of the right of self-defense'.[74] The construct fails on two counts, for not only is the right of self-defence predicated on the occurrence of an armed attack – not a use of force, an unlawful intervention, or even an act of aggression – but the 'legal consequences of an internationally wrongful act'[75] (qua sanction) serve a fundamentally different role from that of self-defence. The former is a response *to the breach*, the latter is the justification of repulsive measure during the occurrence of certain activities. I would argue, therefore, that the 'state complicity' doctrine (toleration included) cannot establish a sufficient connection of state and private behaviour – at least not a connection that would stand up to the attribution of acts proper (section 3.2).

The Court does discuss the 'duty of vigilance' in the present case. However, it does not do so in the context of self-defence; it is only concerned with the question of whether Uganda's counter-claim is founded in fact and law. The Respondent's

70. CR 2005/7 at 30, paras. 77–80; CR 2005/14 at 35.
71. I. Brownlie, 'International Law and the Activities of Armed Bands', (1958) 7 *International and Comparative Law Quarterly* 712, at 731.
72. 'The deciding factor is whether the host state incurs [state] responsibility under international law for failing to prevent the forcible acts. If that is so, the host state can be regarded as the attacker.' Kreß, *supra* note 47, at 150. All translations are by the author where no official translation exists or where no other translation is given.
73. R. Ago, 'Fourth Report on State Responsibility', UN Doc. A.CN.4/264, UN Doc. A.CN.4/264/Add.1, (1974) 24 *Yearbook of the International Law Commission 1972*, Vol. II 95, at 121–2.
74. García-Mora, *supra* note 69, at 119.
75. Article 28 ASR.

counter-claim is largely rejected on the facts.[76] Judging from the Court's treatment of Uganda's support of non-state actors[77] I would predict that even had it succeeded in establishing toleration as a violation of international law, it would only have found toleration a violation, rather than establishing an entitlement to use force in self-defence.

2. In the DRC's Reply, it held that 'les deux parties admettent que, en principe, *le soutien apporté à des forces irrégulières* peut, dans certaines circonstances, équivaloir à une agression armée'.[78] Equally, the notion of 'support' was discussed in *Nicaragua* as an ostensible alternative to attribution of the irregular forces' actions to a state.[79] Support for armed groups suffices for their actions to be counted as an armed attack of the supporting state, it is argued.

When a state's *support* for rebel groups – however that support may be shaped – is invoked as a justification for action against that state, the terms of the debate shift subtly. The subtlety of the shift belies its importance, for we have left the realm of the *actus reus* conditions for the exercise of self-defence. We are now engaging in epistemological speculation: what facts can prove to us that an armed attack is taking place? The well-known passage in Judge Jennings's dissenting opinion in *Nicaragua* makes one aware that there is a problem of confounding a connection with the proof of its existence:

> It may readily be agreed that the mere provision of arms cannot be said to amount to an armed attack. But the provision of arms may, nevertheless, be a very important element in what might be thought to amount to armed attack, where it is coupled with other kinds of involvement.[80]

Judge Jennings is not contradicting himself, for while the judgment saw assistance as necessarily excluded from constituting an armed attack, he considered 'assistance' as a kind of *proof*. In his view, the link would be established if proof of supply of arms were supplemented, as it were, with proof of other involvement. For this reason, the connection via 'support' or 'assistance' alone is mostly confounded with the proof for the standards of attribution now codified in Articles 4–11 ASR.

Neither of the two alternative forms of 'connection' of (host) state conduct to the activities of armed groups is satisfactory. These alternatives tend towards the marginalization of a connection, that is, towards an 'absolute responsibility' of sorts – notwithstanding that the valid exercise of the right of self-defence is a categorically different question from the responsibility of a state under international law. The 'state complicity' doctrine in particular does not differ from the theories requiring no connection; both will be criticized in section 3.1.3. The question of the role of

76. *Armed Activities* case, *supra* note 3, at paras. 300–304.
77. Ibid., at paras. 155–165.
78. '[T]he two parties admit that, in principle, *the support granted to irregular forces* can, in certain circumstances, be considered an armed attack.' Réplique de la République démocratique du Congo, Mai 2002 Vol. I (2002), 206 (Sect. 3.120) (no official translation yet; emphasis added).
79. 'But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands . . . but also assistance to rebels in the form of . . . support.' *Nicaragua* case, *supra* note 2, at 103, para. 195.
80. *Nicaragua* case, *supra* note 2, at 543 (Judge Jennings, Dissenting Opinion).

'support' or 'assistance' is one of their constituting evidence for something. I would venture to suggest that they attempt to prove that private groups' actions can be attributed to a state (section 3.2).

*3.1.3. Why these dogmatic constructs are not tenable under the UN Charter*

Article 51 of the Charter, of course, does not expressly stipulate that self-defence may be exercised only if a state armed attack occurs, in other words that human behaviour in one way or another needs to be attributed to a state for it to count as armed attack.[81] But I would submit that in the state-centred 'climate' of Chapter VII the burden of proof lies squarely on those wishing to extend the right vis-à-vis non-state actors. We must ask: what proof is there that 'armed attack' is not confined to state activity? I would argue that there is a good – though not a watertight[82] – argument why the term 'armed attack', as used in Article 51, refers only to behaviour attributable to a state. The Court's support of this position in *Nicaragua*,[83] *Wall*,[84] and *Armed Activities*[85] at least leads us to expect it to decide in a similar manner should the question come before it again.

Because the employment of military force *solely* against individuals (for example, staying on *res nullius*) is not a use of force and thus prohibited by Article 2(4), such an employment of force need not be justified by self-defence. If, however, an individual is staying on the territory of state A, the employment of military means against that individual *on the territory of* state A by state B is a use of force *against state A*. The use of force impinges on A, whether or not B wishes to target A. As soon as A's territorial integrity (inviolability) is affected by military means, B has fulfilled the *actus reus* of the prohibition of the use of force vis-à-vis A, for 'the employment of force *on the territory* of another state is equivalent to the employment of force *against* the other state'.[86] The defender's actions need to be justified as self-defence exclusively vis-à-vis the host state, hence the host state needs to be in the process of committing an armed attack.[87] Thus, an 'armed attack' as used in Article 51 can only be an act attributable to a state.[88]

Even if Article 51's 'armed attack' was more than just state attack, self-defence can be employed as justification of the use of force only vis-à-vis the attacker. Even if the law were shaped thus, even if armed attacks could be committed by individuals and states alike, the defence could only encompass actions against the attacker. Since, in

81. As a matter of legal theory all behaviour needs to be attributed by law to 'natural' or 'juridical' persons (H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (1934), 52–6). See section 3.2.
82. I have previously pointed out the high level of uncertainty in this area of self-defence law: Kammerhofer, *supra* note 4, at 179–87.
83. *Nicaragua* case, *supra* note 2, at 104, para. 195. In this paragraph, the Court also mentions Article 3 of the Definition of Aggression (*supra* note 69) and uses it as a tool to elucidate the *ratione materiae* dimension of 'armed attack'.
84. *Wall*, *supra* note 9, at 194, para. 139.
85. *Armed Activities* case, *supra* note 3, at para. 148.
86. H. Kelsen, *Principles of International Law* (1952), 60 (emphasis added).
87. T. Ruys and S. Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence', (2005) 10 *Journal of Conflict and Security Law* 289, at 312.
88. *Armed Activities* case, *supra* note 3, at paras. 146, 160.

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the case of a non-state armed group, the prohibition of the use of force is necessarily violated vis-à-vis the host state as well, it would have had to have committed an armed attack as well. Claus Kreß's argument, that some other international legal wrong becomes an armed attack if it is somehow connected to the private group's 'armed attack', is not particularly effective. A state's international wrong does not become an armed attack by being connected to a 'private' armed attack – if the law were to consider private groups' military activities as armed attack, which it does not.[89]

This is the trend towards some sort of absolute responsibility with enhanced legal consequences in some scholars' writings; it is the trend towards the merger of self-defence and necessity (Article 25 ASR),[90] which the Charter does not recognize as a justification of the use of force, and whose scope was limited by Article 25(1)(b) ASR in effect excluding this invocation as a justification for the use of force.[91]

### 3.2. The proper standard of attribution of private acts to a state as armed attack

Are the norms on attribution in the law on state responsibility 'applicable' to the attribution of behaviour to a state as armed attack in the sense employed by Article 51? What do I mean by 'applicable' in this respect? It is the question of by what legal 'route' a behaviour classified as 'armed attack' is made a particular state's armed attack. The rules of attribution developed (or codified) by the International Law Commission (ILC) in its Articles on State Responsibility 2001 have sometimes simply been assumed to be the correct route. There is, however, a need to discuss and argue on the question of whether the law of state responsibility is properly used in this connection, not only because there have been weighty voices arguing for[92] and against[93] construing the connection thus, but also because the case can be made that the connection of an armed attack to a state is not quite the same as the attribution

89. Ibid., at para. 146. The Court uses the term 'armed attack' in inverted commas when referring to non-state actors, which could mean that it thought that only state acts can be seen as armed attack properly speaking.
90. R. Ago, 'Eighth Report on State Responsibility', UN Doc. A/CN.4/318/Add.5–7, (1982) 32 *Yearbook of the International Law Commission 1980*,Vol. II, Part One 51, at 61, para. 106; Kreß, *supra* note 47, at 208.
91. Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, in International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session 23 April to 1 June and 2 July to 10 August 2001*, UN Doc. A/56/10 (2001), 29 (ASR Commentary (2001)) at 205–6 (*ad* Article 25, para. 21).
92. F. A. Boyle, 'Determining US Responsibility for Contra Operations under International Law. Appraisals of the ICJ's Decision: *Nicaragua v. United States* (Merits)', (1987) 81 AJIL 86, at 87; T. J. Farer, 'Drawing the Right Line. Appraisals of the ICJ's Decision: *Nicaragua v. United States* (Merits)', (1987) 81 AJIL 112, at 113; F. M. Higginbotham, 'International Law, the Use of Force in Self-Defence and the South African Conflict', (1987) 25 *Columbia Journal of Transnational Law* 529, at 548; Ruys and Verhoeven, *supra* note 87, at 300 (although, in effect, not exclusively); D. Schindler, 'Die Grenzen des völkerrechtlichen Gewaltverbotes', in D. Schindler and K. Hailbronner (eds.), *Die Grenzen des völkerrechtlichen Gewaltverbotes* (1986), 11, at 35.
93. This was the position of Uganda in the present case; Rejoinder submitted by the Republic of Uganda, 6 December 2002 (2002) 118, para. 272; CR 2005/7 30, para. 78. C. Kreß is also critical of the approach; Kreß, *supra* note 47, at 149–50 (giving further references).

of an 'internationally wrongful act' to a state.[94] It remains to be seen how much the legal relationship differs.

The Court in *Armed Activities* explicitly refers to 'state responsibility'-type attribution, for example in connection with the responsibility of Uganda for the violation of human rights law and humanitarian law by its regular armed forces.[95] It can be argued that the combined return of paragraphs 131–135 and 146 (and indirectly also of paragraph 160) is that it regards the relevant provisions of the Articles on State Responsibility as the standard to be applied in the connection of private armed groups' behaviour to a state as armed attack in the sense employed by Article 51.[96] Already in *Nicaragua* it indirectly applied rules of attribution in connection with the law on self-defence;[97] it argued that 'it still remains to be proved that this aid is *imputable to the authorities* of the latter country'[98] and used the standard of 'control'[99] over non-state actors, now enshrined in Article 8 ASR.

We must face a difficult debate, for there are some very good arguments on either side. The rules of state responsibility 'relate' only to the question of what 'internationally wrongful acts'[100] are and what legal consequences arise from their occurrence. Thus the rules in Articles 4–11 ASR establish the connection only between a state and an illegal act. In other words: attribution in the ASR requires an illegal act, that is the violation of a prohibition or obligation.[101] Can an 'armed attack' – as the behaviour required to trigger self-defence action – therefore be seen as the *actus reus* condition of a prohibition; does Article 51 prohibit armed attacks in any sense?

On the face of it, the answer seems clear: armed attacks are not illegal, because Article 51 does not prohibit them – a state does not incur state responsibility for armed attacks *themselves*, even though the same actions may very well violate the prohibitions of the use of force or aggression. Armed attacks may in a sense be akin to factual occurrences (like a natural disaster) merely a condition for the possibility of the exercise of self-defence. The Respondent in the present case had argued in this manner: 'Article 8 [ASR] is not . . . concerned with self-defence, and does not have the effect of placing constraints upon the provisions of the UN Charter.'[102] It referred to the ASR's self-constraint with respect to the Charter, for example to Article 59 ASR, which contains a 'without prejudice clause' vis-à-vis the Charter; or to the ILC's commentary on Article 21, 'leaving questions of the

94. 'The purpose of this chapter is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining its international responsibility.' ASR Commentary, *supra* note 91, at 83 (*ad* Chapter II, para. 7).
95. *Armed Activities* case, *supra* note 3, at paras. 213–14.
96. At the end of para. 146, it concludes, 'The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-*attributable* to the DRC.' *Armed Activities* case, *supra* note 3, at para. 146 (emphasis added).
97. *Nicaragua* case, *supra* note 2, at 70, paras. 126–60, 230.
98. Ibid., at 84, para. 155 (emphasis added).
99. ASR Commentary, *supra* note 91, at 105–6 (*ad* Article 8, para. 4); *Nicaragua* case, *supra* note 2, at 62, 64, paras. 109, 115).
100. Article 1 ASR.
101. The ILC's commentary does, however, not restrict attribution to the purpose of state responsibility for illegal behaviour (ASR Commentary, *supra* note 91, at 80–4 (*ad* Part One, Chapter II)).
102. Rejoinder Uganda, *supra* note 93, at 118, para. 272.

extent and application of self-defence to the applicable primary rules referred to in the Charter'.[103] Article 103 of the Charter can also be mentioned in this respect.[104]

But 'the face of it' is a deceptive point of view. The problem of two 'interpretations' (in quotes, for they are not an interpretation properly speaking – the frame of meaning is not the issue) that pervade this complex issue can be exemplified by using Hans Kelsen's writings on international law, on the one hand, and on legal theory, on the other. In discussing the role, nature, and content of Article 51 in several publications,[105] he seems to be saying that in his view Article 51 does not contain a prohibition – unlike, for example, Article 39[106] – because it is seen as a limitation of the function of the United Nations.[107] However, it was equally clear to Kelsen that the exercise of self-defence (properly so called) is predicated on an illegal act (which can *as such* be attributed to a state under Articles 4–11 ASR): 'self-defense means the use of force . . . as a reaction against an illegal use of force'.[108]

More perplexingly, however, at least early Kelsenian theory of law constructs prohibitions precisely by stipulating (obligating or permitting) a *Rechtsfolge* (legal consequence), viewed as sanction, on condition of a *Tatbestand* (*actus reus*), which is considered 'inappropriate' behaviour. According to Kelsen, the law prohibits behaviour or enjoins contrary behaviour by attaching sanctions to the 'unwanted' behaviour, that is, by *making the behaviour the condition for the possibility of sanctions.*[109] This is a crucial element of the Pure Theory of Law: the principle of imputation in the normative realm as opposed to the natural-sciences principle of (effective) causality.[110] In its application to the present debate, it can – despite Kelsen's protestations – be interpreted as a prohibition on a reading sympathetic to the Pure Theory: armed attacks are prohibited precisely by attaching the sanction of self-defence, a behaviour regarded as evil (proved by the fact that the actions justifiable by self-defence are by necessity *prohibited* in the first place), that has to be tolerated by the attacker.

But, to heap problem on problem, is self-defence in any sense of the word a sanction? Again, a simple (traditional) reading of Article 51 would say 'no' – and Kelsen agrees (*supra*). A state using self-defence does not punish anyone; self-defence is only a defensive mechanism, allowing the *repulsion* of an armed attack, not its

103. ASR Commentary, *supra* note 91, at 180 (*ad* Article 21, para. 6).
104. Ironically, the same argument can be used in favour of the applicability of the ASR: no *specific* regime exists to establish the connection, therefore (the *lex specialis* clause of Article 55 ASR being inapplicable) the rules of attribution in the ASR apply (Ruys and Verhoeven, *supra* note 87, at 300).
105. H. Kelsen, *The Law of the United Nations. A Critical Analysis of its Fundamental Problems* (1950), 791; Kelsen, *supra* note 86, at 58–62; H. Kelsen, *Collective Security under International Law* (1956), 26–8, 59–62.
106. Kelsen, *supra* note 86, at 54.
107. Kelsen, *supra* note 105, at 769.
108. Ibid., at 59.
109. See, e.g., Kelsen, *supra* note 81, at 30–1. The norm of the type 'If *behaviour* then OUGHT (i.e. obligation, permission) *sanction*' is considered as primary norm, while the norm that can be derived from this, the typical section of a domestic criminal statute, i.e. the simple prohibition of the type '*Behaviour* OUGHT (i.e. prohibition, obligation)', is relegated to the rank of secondary norm (Kelsen, *supra* note 61, at 43–4 (ch. 15)). Cf. also, with respect to a construction of Article 39 in this sense, Kelsen, *supra* note 105, at 728.
110. H. Kelsen, 'Causality and Retribution', in H. Kelsen, *What is Justice* (1957), 303; Kelsen, *supra* note 62, at 79 (chs. 18–22).

punishment[111] or in order to enforce the Charter.[112] Thus also, reprisals using force are not covered by Article 51, reprisals having been considered as means of law enforcement.[113] And yet, again, there is a good reason for assuming that an illegal act is a precondition for the exercise of self-defence, irrespective of the interpretation of Article 51 as 'primary norm' in the Kelsenian sense, independently of the categorization *vel non* of self-defence as a sanction in response to 'armed attack'. It seems as if a breach of Article 2(4) on the part of the attacker is still a precondition for the presence of an armed attack, yet not in a necessary identity (≡), but of a 'co-incidental' identity. In *Nicaragua*, the Court stated categorically, 'But the Court does not believe that the concept of "armed attack" includes . . . assistance to rebels . . . Such assistance *may* be regarded as a threat or use of force'.[114] The Court's argument is that whereas a state act of assisting rebels cannot be an 'armed attack', but may well constitute 'use of force', the two concepts cannot be identical.

The Court in *Nicaragua*, in discussing the *ratione materiae* dimension of 'armed attack', saw it as a strong, a qualified, form of the use of force.[115] The question is, can an armed attack ever not be also a use of force in the technical sense of Article 2(4)? This is a very important question, because there simply is no answer in the norms – the Charter's terms 'if an armed attack occurs' are simply not precise enough. The difference in wording between the prohibition and the exception may indicate different frames of meanings, but do not necessarily do so. The set: 'threat or use of force' may very well include a subset: 'armed attack'. An argument can be added, adding yet another nuisance to the 'non-illegal-act' theory. What about the maxim 'no self-defence against self-defence'? If armed attacks are not a violation of international law, there is no hindrance against privileging self-defence action, and self-defence (even thus justified – and precisely also because it is justified and hence not illegal) can be defended against, with the armed-attack requirement being fulfilled also by self-defence action.

A different argument transcends this debate. Any (factual, human) behaviour *must* be attributed to a subject of a normative order in order for the behaviour to be 'included' in that normative order. As Kelsen has shown in his path-breaking work on the nature of subjects of law, in particular on the state and also on the individual, the law creates its own subjects by referring to human behaviour in norms.[116] It is, in other words, *only* through the legal referral in norms that legal subjects – subjects in the *legal* sense – are 'created' (qua established as relevant) by the law. From a legal (norm-scientific) view, factual human behaviour needs to be – and is always – attributed or attributable to subjects. It is just that we see it more clearly in international law: legal subjects such as states cannot act 'themselves'; human beings act for it. But to stop here is wrong (inconsistent), since for Kelsen – on a pure

111. Kammerhofer, *supra* note 4, at 197–202.
112. Contra: Ruys and Verhoeven, *supra* note 87, at 299.
113. ASR Commentary, *supra* note 91, at 324–8 (*ad* Part Three, Chapter II).
114. *Nicaragua* case, *supra* note 2, at 103, para. 195 (emphasis added). Higginbotham, *supra* note 92, at 546.
115. *Nicaragua* case, *supra* note 2, at 104, para. 195, at 110, para. 210.
116. H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (1920); H. Kelsen, *Der soziologische und der juristische Staatsbegriff* (1922); Kelsen, *supra* note 81; Kelsen, *supra* note 62.

theory of law concerned with establishing a real *normative* science independent of sociology, politics, and psychology – the 'individual' as subject of law needs human (factual) behaviour as much attributed to it as a corporation or a state:

> Die sogenannte physische Person ist somit nicht ein Mensch, sondern die personifizierte Einheit der ein und denselben Menschen verpflichtenden und ermächtigenden Rechtsnormen. Es ist nicht eine natürliche Realität, sondern eine juristische . . . Konstruktion, ein Hilfsbegriff in der Darstellung rechtlich relevanter Tatbestände. In diesem Sinne ist die sogenannte *physische Person eine juristische Person.*[117]

Kelsen continues:

> Es ist stets die Handlung oder Unterlassung eines bestimmten Menschen, die als Handlung oder Unterlassung der Körperschaft gedeutet, auf die juristische Person bezogen, ihr zugeschrieben wird. . . . Das Problem der Körperschaft als einer handelnden Person ist . . . unter welchen Bedingungen das Verhalten eines Menschen als das einer Körperschaft als juristischer Person gedeutet, auf die juristische Person bezogen, ihr *zugeschrieben* werden kann . . .[118]

Yet the result is that *in any case*, attribution is a necessary requirement of legal theory: armed attacks need to be attributed to a state, irrespective of whether Articles 4–11 ASR are properly applicable. The problem that arises, however, is that the loss of such a direct connection by way of the doubts raised against the proper applicability of the ASR leads to the loss of a convenient guiding text – a text that can be pragmatically referred to, that can be held on to by those wishing to cognize the law.[119] Attribution may very well work in the same way in all cases (the content of the standard may be the same), but it has become *uncertain* whether the ASR's rules are or fulfil that standard.

The pragmatic question is what the concrete standard for the attribution of an armed attack to a state is. It has two faces: (i) the norm-ontological question of the general standard – what is the content of the norms of attribution?; and (ii) the epistemological question – which factual occurrences fulfil or prove the fulfilment of the abstract norms *sub* (i)? And it is precisely at this point where the pragmatic importance of the question and the uncertainty of the answer collide to produce

117. 'The so-called natural person, then, is not a human being, but the personified unity of the legal norms that obligate or authorise one and the same human. It is not a natural reality, but a juridical . . . construction, an auxiliary concept in the portrayal of legally relevant facts. In this sense the so-called *natural person is a juridical person*.' Kelsen, *supra* note 62, at 178 (ch. 33 b) (emphasis added).

118. 'It is always the action or omission of a certain human being which is interpreted as action or omission of a corporeal entity [corporation], which is related to the juridical person, which is attributed to it. . . . The problem of a corporeal entity as an acting person is . . . under which conditions the behaviour of a human being can be interpreted as the behaviour of a corporeal entity as juridical person, can be related to the juridical person, can be *attributed* to the juridical person . . .' Kelsen, *supra* note 62, at 180 (ch. 33 c) (emphasis added).

119. The ASR, like the Vienna Convention on the Law of Treaties (VCLT) before them, have an important pragmatic effect, in that traditional discourse is exempted from the theoretical search for a basis, from the re-creation of where the norms come from, from the proof of the precise formulation of the law. Traditional (pragmatic) lawyers thus can refer to them as if they were set in stone, while having the luxury of being able to avoid theoretical questions about their content. Any questioning of the relevance of and justification for the *lex posterior* maxim in international law, for example, can be smashed down by saying: 'But it is laid down in Article 30 VCLT!' I have questioned this approach in a recent research paper: J. Kammerhofer, 'Unearthing Structural Uncertainty through neo-Kelsenian Consistency: Conflicts of Norms in International Law' (2005), at http://www.esil-sedi.org/english/pdf/Kammerhofer.pdf.

confusion. The debate does not distinguish between what is the standard and what is the proof – they seem inextricably linked. Judge Jennings's dictum in his dissenting opinion in *Nicaragua* is one of the few voices making the distinction. When he writes, in the passage already cited above, that 'the provision of arms may ... be a very important *element*',[120] the behaviour 'provision of arms' is not meant as a proposal as to how the standard of attribution is shaped, but as an opinion on what actions contribute to the fulfilment of the standard.

At the most abstract level, the attribution of behaviour of non-state armed groups (groups that cannot be considered to be organs of the state) is assumed to occur if there is a relationship of control by the state over the activity. On this level of abstraction the judgments in *Nicaragua* and *Tadić*[121] and the pleadings in *Bosnia Genocide*[122] are of the same opinion. As soon as one seeks to go into greater detail, the opinions diverge.[123] However, I would submit that the question of the abstract content is not such an important issue in practice – but is in theory.

First, there are two elements involved in making an armed attack out of private behaviour: not only do actions by human beings have to be attributed to a state (*ratione personae* element), but the actions by the human beings thus attributed to the state need to be considered an armed attack 'if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces'[124] (*ratione materiae* element). While both elements are either fulfilled or not, they are very easily confused, with the intensity of the group's actions seemingly influencing the quality of the attribution required. In *Nicaragua* the Court can be said to have argued for a stronger connection vis-à-vis 'armed attack' than vis-à-vis 'intervention' or 'threat or use of force'; in other words, the state must do less to have a private act considered as its own intervention than as its aggression or armed attack. The tenor of the judgment in this case, however, is that attribution is not gradual.

Second, however, while attribution – as the norm-ontological standard – remains fixed, it is the question of proof and of the flexibility of the evidence required that creates the impression of flexibility. It is the standards of proof – in this case before the Court – that lie at the heart of the present case. As I have pointed out above, how can a court with such limited facilities for fact-finding ever proceed to establish such a massive 'amount' of fact? This practical–procedural problem has very real effects for its practice of adjudication, for it contributes to the uncertainty as to what standard of proof the Court requires. If a court does not have specific rules of evidence, it

120. *Nicaragua* case, *supra* note 2, at 543 (Judge Jennings, Dissenting Opinion) (emphasis added).
121. ICTY, *Prosecutor v. Tadić*, Opinion and Judgement, Case No. IT-94–1-T, T.Ch., 7 May 1997, at 205, para. 585, at 207, para. 588, at 210, para. 585; ICTY, *Prosecutor* v. *Tadić*, Judgement, Case No. IT-94–1-T, A.Ch., 15 July 1999, at 49, para. 120, at 56, para. 131, at 60, para. 141.
122. See, e.g., CR 2006/8 at 33–39, paras. 60–75; CR 2006/16 at 33–40, paras. 94–119.
123. A. de Hoogh's important 2002 paper discusses at length the question of the various standards subsumable under 'control': A. J. J. de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the *Tadić* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia', (2002) 72 *British Yearbook of International Law 2001*, at 255.
124. *Nicaragua* case, *supra* note 2, at 103, para. 195.

is free in its assessment of what the parties present to it (*freie Beweiswürdigung*).[125] That is the case here, and that means that any fact may prove any legal point. This may include making 'financial support' for armed bands evidence of a connection of 'control' and hence of attribution of the armed bands' activities – but it also may not.[126] The Court may hold anew in every case, and it may even consider that the same facts prove one violation but do not prove the other. The judgment – as positive individual norm – is always primarily a decision, the sense of an act of will. The act of will creates the norm; its function as member of the normative order having to conform to the meta-law of law creation comes second.[127] Before the Court, any rules of evidence are not part of the meta-law of law creation and the Court is completely free to make up its own mind.

## 4. Conclusion

Grim-visaged war hath smooth'd his wrinkled front[128]

This is a judgment international lawyers can be happy with, at least regarding its pronouncements on the use of force. The Court has stuck to its *jurisprudence constante*, and it has made it clear that it does not follow the post-11 September 2001 trend to expand the ambit of Article 51. As in the judgment in *Oil Platforms*, it has again stated 'its view on the legal limits on the use of force at a moment when these limits find themselves under the greatest stress'.[129] This time, however, it has made the pronouncements on the UN Charter's *jus ad bellum* in the correct jurisdictional environment, and it has done so reasonably clearly, even though there are elements of linguistic indeterminacy.[130]

This judgment, however, sees the members of the Court as divided on these rules – and especially on the role of non-state actors in self-defence – as the rest of the scholarly community. To be sure, the *dispositif* shows greater unity on the issue than in the past;[131] to be sure, only Judge ad hoc Kateka gave a dissenting opinion; to be sure, the critical voices regarding this issue in the individual opinions were restricted to Judges Kooijmans and Simma, and Judge ad hoc Kateka, with (then) Judge Higgins and Judge Buergenthal (other possible candidates for dissenting voices) choosing not to submit an individual opinion. However, there is a clear minority of *critique*, and choosing to remain silent does not necessarily mean that one agrees wholeheartedly with how the Court argued the case. It will be interesting to see whether the Court will continue to maintain its position and argue similar cases similarly in the future.

125. Ibid., at 40, para. 60; R. Kolb, 'General Principles of Procedural Law', in A. Zimmermann, C. Tomuschat, and K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice. A Commentary* (2006), 793 at 818.
126. *Nicaragua* case, *supra* note 2, at 104, para. 195.
127. Kammerhofer, *supra* note 119, at 21–5.
128. Shakespeare, *Richard III*, Act 3 Scene 1.
129. *Oil Platforms* case, *supra* note 7, at 325 (Judge Simma, Separate Opinion).
130. *Armed Activities* case, *supra* note 3, at para. 147.
131. Ibid., at para. 345(1).

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If the dissent against the majority view, voiced in the individual opinions, wants to attack the opinion that had dominated scholarly views 'for more than 50 years'[132] it has an immense 'argumentative task' ahead. All the judges who disagreed with the Court on the law on self-defence criticize the Court for not providing enough substantial argument, but keep their criticism short as well. They remind us that 'It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require',[133] but this is a political motivation for a future change in the law, rather than reasoning to show how and by what means the law has changed. Unfortunately, their individual opinions do not substantiate their alternative view.

But this may turn out to be a good thing, because if I had to choose between a judgment where one does not even get half the story from the judgment itself and one where the dissent holds back to such a degree as to appear in telegraph style I would prefer the latter. In this judgment, one does indeed get the whole story from the judgment, and the story is one of reassurance, of calm. The Charter remains the centre of our legal world-view, the International Court of Justice tells us, and its primary goal of avoiding 'the scourge of war' remains our guiding light in the interpretation of the Charter. This interpretation may well not be true, and we may well be incapable of correctly conceiving the law, but the message instils the calm rationality that is so often lacking in the present-day discourse, a discourse in a permanent rhetorical hype alleging a permanent state of exception.[134]

132. *Wall*, *supra* note 9, at 230, para. 35 (Judge Kooijmans, Separate Opinion).
133. *Armed Activities* case, *supra* note 3, para. 30 (Judge Kooijmans, Separate Opinion).
134. C. Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (1922), 13.