Call for Jus Ad Bellum for Non-International Use of Force

Elijah Oluwatoyin Okebukola*

I. The Extent of the Operation of the Article 2(4) Jus ad Bellum Regime to Non-International Armed Conflict

FOR THE PURPOSES of the present discourse, non-international use of force occurs in the context of a non-international armed conflict (NIAC) and therefore differs from acts of violence that do not reach the threshold of armed conflict. In considering the relationship of Article 2(4) of the UN Charter (UNC) to NIACs, the definition of NIAC must be briefly drawn out. In the most basic terms, the armed conflicts fought by or against non-state actors (NSTACs) are NIACs. NIACs are distinguished from international armed conflicts (IACs) by the parties involved.

When the conflict is between a state and NSTACs or between NSTACs, it is classified as a NIAC. For the purpose of differentiating inter-state use of force in an IAC from non-international use of force in a NIAC, it is important to point out that the geographical spread or location of the conflict does not affect the classification of the conflict. For example, the Boko Haram conflict which is taking place in the territories of Nigeria, Cameroon, and Chad remains a NIAC despite involving the territories of more than one state.

In addition, the participation of more than one state in a conflict does not necessarily make it an IAC unless one state is engaged in armed conflict against the other. Where the states are jointly combating a NSTAC the conflict is a NIAC despite the involvement of several states. Using the Boko Haram example again, the involvement of the governments of Nigeria, Chad and Cameroon in the conflict does not make it an IAC since they are working together to fight the

* Head, Department of Public and International Law; Manager, Refugee and International Humanitarian Law Programme; Nasarawa State University, Keffi, Nigeria elijah.okebukola@nsuklaw.edu.ng. I am grateful to the reviewers for their helpful comments. Any error or mistake in the article is mine.

NSTACs participating in the conflict. In this scenario, the multiple states engaged in a NIAC are not engaged in the use of force against themselves. As demonstrated below, the *jus ad bellum* regime created by the UNC only applies to states. It does not extend to NIACs.

The trajectory of *jus ad bellum* in international law has two highly significant periods. First, there was a period when states had absolute discretion in determining recourse to armed conflict;[1] and second, the present regime of Article 2(4) of the UNC. Between these periods, there have been some notable developments including the theological circumscription of resort to war under the *bellum justum* theory;[2] prohibition of recourse to armed force provision in 1907 Hague Convention II on Limitation of Employment of Force for Recovery of Contract Debts[3]; limitations on resort to war imposed by Covenant of the League of Nations (CLN) 1919[4]; and the condemnation of war in the General Treaty for the Renunciation of War 1928.[5]

The present *jus ad bellum* regime derived from the UNC is configured as a tripod consisting of settlement of disputes by peaceful means; prohibition of the use of force; and illegality of any use of force that is not permitted by the UNC. It is the combination of the three pillars of the tripod that make prohibition of the use of force practicable and acceptable to states. The first leg of the tripod entails an obligation on states to "settle their international disputes by peaceful means in such a manner that international peace and security, and. justice, are not endangered."[6] The second requires states to "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."[7] The third allows force whether as a matter of "individual or collective

1 Josef Mrazek, 'Prohibition of the Use and Threat of Force: Self-Defence and Self-Help in International Law' (1989) 27 Can YB Int'l L 81, 81.

2 This is commonly referred to as the just war theory.

3 Article 1 prohibited "recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals."

4 Article 12 Covenant of the League of Nations (CLN) imposed an obligation to peacefully settle disputes. This obligation was emphasised in Articles 13, 14 and 15 CLN. Failure to allow the League institutions to adjust the dispute makes the erring State liable to actions taken pursuant to Article 16 CLN. Under this provision war in disregard of Articles 12, 13 or 15 CLN shall ipso facto be deemed to be an act of war against all other Members of the League.

5 This treaty is also known as the Kellogg-Briand Pact (KBP). Article 1 of the KBP condemned recourse to war and renounced it as an instrument of national policy. Note also that technically the KBP is still in force and was relied on by the Nuremberg Tribunal as the basis for ruling that customary international law had prior to 1939 recognised the crime of aggressive war.

6 Article 2(3) UNC.

7 Article 2(4) UNC.

self-defence if an armed attack occurs against a Member of the United Nations",[8] or by authorisation of the Security Council of the UN under Chapter VII of the UNC,[9] or by authorisation of a regional body in keeping to Chapter VIII of the UNC,[10] or special circumstances under Articles 106 and 107 of the UNC.

The second leg of the tripod as encapsulated in Article 2(4) of the UNC forms the central linchpin for the tripodal context of contemporary *jus ad bellum*.[11] It restates customary international law relating to use of force.[12] The UNC principle that states must refrain from the threat or use of force has been reinforced by other international instruments.[13] For example, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States; the 1974 Definition of Aggression[14]; the Helsinki Final Act 1975; and The Declaration on Enhancing the Effectiveness of the Principle of Refraining from the use of Force, 1987.[15]

As noted by the International Law Commission in 1963, the provisions of Article 2(4) "together with other provisions of the UN Charter, authoritatively declares the modern customary law regarding the threat or use of force."[16] The relationship between Article 2(4) and customary international law was further clarified by the International Court Justice (ICJ) in the *Nicaragua* case.[17] In that case, the ICJ held that the use of force rules in general and customary international law are identical with the provisions of the UNC.[18] The UNC itself seems to recognise, or at least project, the customary nature of the prohibition on the use of force by extending the protection and obligation of the principle to non-member states.[19]

As a principle of customary international law, the prohibition on the threat or use of force which is codified in Article 2(4) UNC is binding on states that are not party to the UNC. This is momentous in two major respects. First, the principle will continue to be binding on a state that withdraws its membership of the UNC and second, it is binding on a new state even if it does not become a party to the UNC.

The significance of Article 2(4) is heightened by not only being a reflection of

8 Article 51 UNC.
9 Articles 39, 41, 42 UNC.
10 Article 53 UNC.
11 See generally, Christine Gray, *International Law and the Use of Force* (Oxford University Press 2008).
12 Ian Brownlie, *International Law and the Use of Force by States* (1963) 264.
13 Mrazek (n 1) 81.
14 UNGA Res 3314 XXIX.
15 UNGA Res 22 XLII.
16 ILC Yearbook, 1966, 1966–II, 247 para 1.
17 *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v *United States of America*) [1986] ICJ Rep. 14 para 93.
18 ibid.
19 Article 2(6) UNC.

customary international law but also possessing a *jus cogens* character. As the ILC put it, "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*."[20] The nature of Article 2(4) as jus cogens is not dependent or determined by whether it is a rule of treaty or customary international law.[21]

Legal scholars have questioned the importance or significance of the *jus cogens* nature of Article 2(4) since its provisions already reflect customary international law. As one commentator on the *Nicaragua* case put it:

"Once the Court established that non-use of force had become customary law, it did not need *jus cogens* to apply this rule to the United States. Evidence that the United States accepted this norm would have sufficed. What additional work did *jus cogens* do in the opinion?"[22]

One answer to this question is that being a norm of *jus cogens*, it creates obligations *erga omnes*.

Furthermore, it does not permit derogation and can only be changed by another peremptory norm of international law.[23] It cannot be easily circumvented. For example, an economically or militarily strong state cannot enter into a treaty with a weaker state on the basis that if the weaker does not perform its obligations, it will be invaded by the military forces of the strong state. Such a treaty provision would be a derogation of the prohibition of the use of force in the context of the tripodal *jus ad bellum* regime of the UNC.

States have adapted to the Article 2(4) *jus ad bellum* regime by engaging in fewer international armed conflicts, submitting their disputes to peaceful settlement mechanisms, and seeking to justify use of force by reference to provisions of the UNC. Between 1946 and 2010 there were approximately 46 international armed conflicts and 216 non-international armed conflicts out of about a total of 260 armed conflicts in the period under consideration.[24] In the same period, 297 cases have been brought or submitted before the ICJ for judicial determination.[25] Out

[20] ILC Yearbook, 1966, 1966–II, 247 para 1.

[21] Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 Aust YBIL 82, 103.

[22] Paul B. Stephan, *Political Economy of Jus Cogens, The Symposium: Foreign State Immunity at Home and Abroad*, vol 44 (2011) 1091.

[23] Article 53 Vienna Convention on the Law of Treaties.

[24] 'Overview of UCDP Data' (*Uppsala Universitet Department of Peace and Conflict Research*, 2014) <http://www.pcr.uu.se/data/overview_ucdp_data> (accessed 12/09/2017); see also Meredith Reid Sarkees and Frank Wayman, 'Resort to War: 1816 – 2007' (*CQ Press*, 2010) <http://cow.dss.ucdavis.edu/data-sets/COW-war> (accessed 29/11/2015).

[25] A dispute is brought before the Court by a unilateral application filed by one State against another State. A dispute is submitted to the Court on the basis of a special agreement between States. See 'Cases' (*International Court of Justice, 2017*) <http://www.icj-cij.org/en/cases> (ac-

of this number 274 were contentious cases,[26] while 23 were requests for advisory opinions.[27] Out of these cases, 161 were entered in the General List.[28]

In addition to judicial settlement by the ICJ, there has also been an increase in number of disputes between states that are settled by means of peaceful settlement mechanisms.[29] For example, between January 1995 and July 2015, 497 disputes were submitted for resolution by the Dispute Settlement Body (DSB) of the World Trade Organisation (WTO).[30] Each of these 497 disputes results from the conduct of a state which is considered to be unacceptable by another.

Between the WTO and ICJ, about 794 disputes have been submitted for peaceful settlement. Countries have been known to go to war for all kinds of reasons, therefore each of the 297 matters submitted to the ICJ and 497 disputes submitted to the DSB is potentially an armed conflict situation. Yet, rather than resort to war, states are increasingly seeking peaceful means of resolving their differences.

It may seem that the existence of so many cases before judicial, quasi-judicial, and non-judicial mechanisms is indicative of a problem, namely the abundant bouquet of reasons for states to have contentious disputes. While it may be true that there are so many reasons for modern states to have grievances, the volume of cases processed through peaceful determination mechanisms at the ICJ and other fora suggests an adaptation of state behaviour to the *jus ad bellum* regime created by the UNC. Under this UNC *jus ad bellum* regime, the legitimate reasons for resorting to force are so constricted that even where the dispute relates to the alleged illegal use or threat of force,[31] states are still required to settle such disputes peacefully.

cessed 12/09/2017).

[26] 'Contentious Cases' (*International Court of Justice, 2017*) <http://www.icj-cij.org/en/contentious-cases> (accessed 12/09/2017).

[27] 'Advisory Proceedings' (*International Court of Justice, 2017*) <http://www.icj-cij.org/en/advisory-proceedings> (accessed 12/09/2017)

[28] 'Cases' (*International Court of Justice, 2017*) <http://www.icj-cij.org/en/cases> (accessed 12/09/2017).

[29] See for example, August Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration' in I. Buffard and others (eds), *International Law between Universalism and Fragmentation* (2008). See also Anne Peters, 'International Dispute Settlement: A Network of Cooperational Duties' (2003) 14 European Journal of International Law 1, where it is argued that international law of dispute settlement is transcending the phase of mere cooperation, as identified by Wolfgang Friedman, and is displaying characteristics of a network.

[30] 'Chronological list of disputed cases' (*World Trade Organisation*, 2017) <https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>. (accessed 29/11/2015).

[31] Dispute in this sense refers to 'a disagreement over a point of law or fact, a conflict of legal views or of interests'. This is the definition given by the PCIJ in the *Mavrommatis Palestine Concessions* (Jurisdiction) case PCIJ, Series A, No. 2, 1924, 11.

The use of countermeasures may ostensibly suggest that illegal use of force may be permissible for a prior illegal use of force.[32] However, in the extant *jus ad bellum* regime, countermeasures in the form of forceful reprisals are prohibited and "recourse to countermeasures not involving the threat or use of force is in itself a peaceful means of settling a dispute arising from an internationally wrongful act."[33]

The most important reason for the existence of the UNC *jus ad bellum* regime is the promotion and protection of international peace and security. Indeed, every other objective of the UNC is dependent on the reality of peace and security. Recourse to peaceful settlement mechanisms is therefore consistent with the core objective of the UNC as well as the *jus ad bellum* regime built on that objective. Certainly, the peaceful settlement mechanisms now adopted by states are far from perfect. Their imperfections are especially glaring in terms of the duration for concluding matters and implementing decisions.[34]

Indeed, it would appear more expedient for a militarily strong state to invade a weaker state rather than go through the time-consuming rigours of peaceful settlement mechanisms. Notwithstanding these imperfections, states have no legal and legitimate choice to resort to threat or use of force except they are acting in consonance with the exceptions to Article 2(4) which are recognised by the UNC. They are therefore constrained to increasingly resort to the peaceful settlement mechanisms despite the shortcomings of the mechanisms. The exceptions to use of force created by the UNC do not release parties from the obligation to settle disputes peacefully. In all, the tripodal *jus ad bellum* regime of the UNC relates to inter-state use of force.

Article 2(4) of the UNC and the entire tripodal UNC *jus ad bellum* regime

[32] Countermeasures entail acts that are ordinarily illegal but are taken to be permissible when carried out in reaction to an earlier or prior illegal act of the state against which they are directed or done.

[33] Bruno Simma, 'Counter-measures and Dispute Settlement: A Plea for a Different Balance' (1994) 5 European Journal of International Law 102, 103. As noted in the *Gabčíkovo–Nagymaros Project* case [1997] 116 ILR 1, 89, "In order to be justifiable, a countermeasure must meet certain conditions ... In the first place, it must be taken in response to a previous international wrongful act of another state and must be directed against that state ... Secondly, the injured state must have called upon the state committing the wrongful act to discontinue its wrongful conduct or to make reparation for it ... In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question ... [and] its purpose must be to induce the wrongdoing state to comply with its obligations under international law, and … the measure must therefore be reversible."

[34] See for example The Registry, 'The International Court of Justice Handbook' <http://www.icj-cij.org/files/publications/handbook-of-the-court-en.pdf> (accessed 29/11/2015) at p. 50 where it is stated that it takes an average of 4 years from the institution of proceedings to the delivery of final judgment.

applies to use or threat of force by one state against another. Thus, the rights and duties imposed by the tripodal UNC *jus ad bellum* regime do not apply to NSTACs. *Jus ad bellum,* therefore, only arises for consideration in an IAC situation. The non-applicability of UNC *jus ad bellum* to NSTACs is brought to the fore by the Rome Statute of the International Criminal Court (ICCSt) which recognises the violation of Article 2(4) as a crime of aggression.[35] The crime of aggression as contemplated by the ICCSt can be committed by state agents but not agents of NSTACs.[36] Interestingly, apart from the crime of aggression, every other crime within the remit of the ICC can be committed by NSTACs or their agents who will bear individual criminal responsibility.

Essentially, the lawfulness or otherwise of a NIAC is largely determined by the law of the state against which the NSTAC is engaging in armed conflict. Outside the nebulous area of international terrorism,[37] international law is largely silent on the legality of resort to force in NIACs. In the face of this silence, the incidence of NIACs is increasing and the number of NSTACs involved in these conflicts is multiplying. Among others, this creates sovereignty issues as discussed later in this article.

Although the legality of the use of force in a non-international situation is a matter for domestic law, the incident of non-international armed conflict affects the peace and security of the international community. The impact on international peace and security is justification for suggesting that non-international use of force needs to be subjected to international legal control.

There are various reasons for engaging in armed conflict. The Uppsala Conflict Data Program (UCDP) terms these reasons incompatibilities.[38] Incompatibilities refer to "a disagreement between at least two parties where their demands cannot be met by the same resources at the same time."[39] It is hypothesised in this article that in order to achieve the objective of suggesting a *jus ad bellum* for non-international use of force, it is necessary to identify the incompatibilities that lead to NIACs. The legal effectiveness of the suggested *jus ad bellum* will be largely dependent on its capacity to address the incompatibilities that inform non-international use of force.

35 Article 8 bis Rome Statute of the International Criminal Court.

36 ibid.

37 See generally, John Arquilla, 'The End of War as We Knew It? Insurgency, Counterinsurgency and Lessons from the Forgotten History of Early Terror Networks' (2007) 28 Third World Quarterly 369 for the proposition that insurgency and terror are frequently blended.

38 'Definitions' (*Uppsala Universitet Department of Peace and Conflict Research*, 2014) <http://www.pcr.uu.se/research/ucdp/definitions/#incompatibility_2> (accessed 29/11/2015).

39 'Frequently Asked Questions' (*Uppsala Universitet Department of Peace and Conflict Research*, 2014) <http://www.pcr.uu.se/research/ucdp/faq/#What_is_an_incompatibility_> (accessed 29/11/2015).

II. Incompatibilities Leading to Non-International Use of Force

Invariably, NSTACs are involved in NIAC and the use of force that precedes and accompanies it. In comparison to states, there are more NSTACs involved in the non-international use of force. The table below shows the sheer number of NSTACs involved in recent, and some ongoing, NIACs worldwide.[40] The attempt to identify incompatibilities resulting in NIAC will therefore include the perspectives of NSTACs. Although there are fewer states than NSTACs involved in NIACs, NIACs either take place on the territory of states or have state participants.

The situation is therefore such that notwithstanding the number of NSTACs involved, every NIAC touches and is of direct concern to, at a minimum, the state on whose territory the conflict is taking place. Moreover, states are fundamental to the creation of international legal rules and the suggested *jus ad bellum* for non-international use of force can only be formulated by states.[41] Therefore, incompatibilities leading to NIAC will also be viewed from the perspective of states.

The UCDP identifies incompatibilities concerning either government, territory, or both.[42] While fully agreeing with the categories identified by the UCDP, there is an additional category of resource incompatibility. This does not quite fit into incompatibility over government and territory. For the present purposes, there are incompatible claims to government where a group moves to change either the entire political system of a state or the configuration of government in a manner unacceptable to the ruling government. Government incompatibility occurs where a party or parties to the NIAC disputes the validity or legitimacy of the government of a state. This incompatibility relates to the political authority and governance of a state.

Incompatible claims to territory arise where a group moves to secede, control a piece of territory or change the status of the territory.[43] In the case of territory incompatibility, a positive outcome for the challenger would be the loss of territory by a state. The lost territory may become part of an existing state or form part of a new state or just be a territory without the status or recognition of statehood.

[40] The table is extrapolated from 'List of Ongoing Conflicts' (*Wars in the World*, 2017) <http://www.warsintheworld.com/?page=static1258254223> and correlated with 'UCDP Conflict Encyclopedia (UCDP database)' (*Uppsala Universitet Department of Peace and Conflict Research*, 2014) <www.pcr.uu.se/research/ucdp/database>, especially UCDP/PRIO Armed Conflict Dataset; 'Wars since 1900' (*The Polynational War Memorial*, 2017) <http://www.war-memorial.net/wars_all.asp?q=3>.

[41] States can make laws that are binding on non-state actors. An obvious example is in the case of international criminal law and international humanitarian law where individuals and groups have obligations.

[42] 'Frequently Asked Questions' (*Uppsala Universitet Department of Peace and Conflict Research*, 2014) <http://www.pcr.uu.se/research/ucdp/faq/#What_is_an_incompatibility_> (accessed 29/11/2015).

[43] 'Definitions' (*Uppsala Universitet Department of Peace and Conflict Research*, 2014) <http://www.pcr.uu.se/research/ucdp/definitions/#incompatibility_2> (accessed 29/11/2015).

Incompatibility concerning territory and government are not mutually exclusive and indeed frequently occur in conflict situations.

Incompatible claims to resources occur where a group lays claims to the resources located within the territory of a state. Such claims may relate to all or part of the resources in issue. The group may require an increased share of the resources or control of the disbursement of the resources. In all three categories, the reasonableness or legitimacy of the claims is not considered in identifying the prevailing incompatibility. The following case studies of some NIACs illustrate the different categories of incompatibility.

A. Case Study 1: The First Chechen War

Following the dissolution of the Soviet Union in 1991, 15 constituent republics became independent states with their own governments while Chechnya remained within the Russian Federation but as an autonomous constituent unit of the Federation. Following some violent political struggles within Chechnya, Chechnya declared full independence from Moscow in 1993 as the Chechen Republic of Ichkeria (ChRI). In December 1994, forces of the Russian Federation launched an attack against ChRI. While Moscow fought to keep the Russian Federation whole,[44] the ChRI wanted a self-governing state independent of the Russian Federation. This conflict became known as the First Chechen war.[45] It ended in 1996, leading to the withdrawal of Russian troops from Chechnya and a "final decision on the status of Chechnya vis-a-vis the Russian Federation was postponed until 2000."[46]

This case study identifies a competition for political control of Chechnya. Government is therefore the category of incompatibility. It is not a competition for territory as such because a defined territory was already in existence and the separatists only wanted to independently govern that territory.

B. Case Study 2: The Caucasus Emirate Conflict

About three years after the end of the First Chechen War, the Islamic International Brigade (IIB), an NSTAC based in Chechnya, invaded Dagestan.[47] This led to the Second Chechen War. Russian Federation forces subsequently ousted IIB from Dagestan and by April 2009 withdrew from Chechnya leaving the local authorities in Chechnya to deal with the low-level insurgency that continued

[44] Rajan Menon and Graham E. Fuller, 'Russia's Ruinous Chechen War' (2000) 79 Foreign Affairs 32, 40.

[45] For a general background see, Kimberly L. Jones, 'From Moscow to Makhachkala: The People in Between' (2013) 41 Fordham Urb LJ 35.

[46] Jakob Rigi, 'Chaos, Conspiracy, and Spectacle: The Russian War against Chechnya' (2004) 48 Social Analysis: The International Journal of Social and Cultural Practice 143, 145.

[47] Dagestan is another constituent unit of the Russian Federation.

at that time.

In October 2007, a leader of the Chechen rebels, Doku Umarov, proclaimed himself as the Emir of the new "Caucasus Emirate" which would be an Islamic State spanning several federating units (Chechnya, Dagestan, Kabardino-Balkaria) in the Russian North Caucasus.[48] The fighting associated with this situation is the Caucasus Emirate Conflict. Territory is the main incompatibility in this case study. The anti-Russian NSTACs intend to take territory from the Russian State. Since the NSTACs also intended to govern the territory if they had succeeded in taking it over from the Russian State, government incompatibility also arises in this case study.

C. Case Study 3: Turkey vs Kurdistan Workers' Party (PKK)

The Kurdistan Workers' Party (PKK) was formed in the late 1970s. PKK commenced hostilities against the Turkish government in 1984 in order to actualise the carving out of an independent Kurdish State.[49] Turkey generally considered PKK as a terrorist organisation and refused to negotiate with it. In 1999, however, a PKK leader, Abdullah Öcalan, was dramatically captured by Turkey in Nairobi, Kenya and jailed for treason.[50] Since then there have been apparent talks between Turkey and PKK.

This is also a case of incompatibility relating to territory. PKK wants to take away territory that presently belongs to Turkey. Although PKK intends to make the desired territory an independent state, the incompatibility does not primarily relate to government.

D. Case Study 4: Sri Lanka vs Liberation Tigers of Tamil Eelam (LTTE)

The majority Sinhalese, which are primarily Buddhist, and the minority Tamils, which are primarily Hindus, are two major ethnic groups in Sri Lanka. The Sinhalese elite, created several laws that were detrimental to Tamil representation and interests.[51] For example the *Official Language Act, No. 33 of 1956 (Sinhala Only*

[48] Sven Chojnacki, Maurice Herchenbach and Gregor Reisch, 'Perspectives on War: Disentangling Distinct Phenomena: Wars and Military Interventions, 1990–2008' (2009) 27 Sicherheit und Frieden (S+F) / Security and Peace 242, 244.

[49] For some historical background see generally, Richard Falk, 'Problems and Prospects for the Kurdish Struggle for Self-Determination after the End of the Gulf and Cold Wars' (1993–1994) 15 Mich J Int'l L 591.

[50] Michael M. Gunter, 'The Continuing Kurdish Problem in Turkey after Öcalan's Capture' (2000) 21 Third World Quarterly 849.

[51] Houchang Hassan-Yari, 'Third World Avoidable Crisis: Mismanaging National Legitimate Grievances' (2004) 1 Int'l Stud J 63.

Act),[52] is said to have signalled the beginning of deeply entrenched disunity.[53] Tamils demanded non-discrimination and equal status for the Tamil language and culture. These demands became radicalised and cumulated in the agitation for an independent Tamil State under the governance of the LTTE.[54] Hostilities were punctuated by periods of demonstrable signs that the conflict could end through the peaceful settlement mechanism of negotiation.[55] The conflict, however, came to an obvious end in 2009 with the decimation of the LTTE.

The dispute here primarily relates to the political control of territory already predominantly occupied by the Tamil. The incompatibility therefore relates more to government than to territory. On the other hand, if the dispute is viewed from the perspective that the territory the Tamils sought to exercise political control over is one within Sri Lanka, then the incompatibility relates to both territory and government.

E. Case Study 5: The Cabinda Conflict

Angola is a non-contiguous state and is separated from its oil-rich Cabinda Province by the Democratic Republic of the Congo.[56] Cabinda, then referred to as Portuguese Congo, was a separate administrative entity from Portuguese West Africa as Angola was then known.[57] The Portuguese colonial authorities subsequently amalgamated Cabinda with Angola. Following the execution of the Alvor Agreement,[58] Angolan independence was established and Cabinda was designated as part of Angola. The Front for the Liberation of the Enclave of Cabinda-Forças Armadas de Cabinda (FLEC-FAC) however contested Angolan authority and proclaimed the Republic of Cabinda as an independent country in August 1975. A ceasefire agreement was signed with some FLEC representatives

[52] It provided that the Sinhala language was official language in the operation of government departments and other public services.

[53] Lakshman Marasinghe, 'The British Colonial Contribution to Disunity in Sri Lanka' (1994) 6 Sri Lanka J Int'l L 81, 86.

[54] Peter Chalk and David M. Rothenberg, 'Tigers Abroad: How the LTTE Diaspora Supports the Conflict in Sri Lanka, The Conflict & Security' (2008) 9 Geo J Int'l Aff 97, 99.

[55] Rajat Ganguly, 'Sri Lanka's Ethnic Conflict: At a Crossroad between Peace and War' (2004) 25 Third World Quarterly 903.

[56] Justus Reid Morrison Weiner, Diane, 'Legal Implications of Safe Passage Reconciling a Viable Palestinian State with Israel's Security Requirements' (2006) 22 Conn J Int'l L 233, 307.

[57] See Treaty of Simulambuco, 1885.

[58] For this, Angola's three national liberation movements (People's Movement for the Liberation of Angola (MPLA), National Liberation Front of Angola (FNLA) and National Union for the Total Independence of Angola (UNITA)) met with the colonial power in Alvor, Portugal.

in 2006 but has been rejected by some other factions.[59]

The incompatibility here relates more to the political control of Cabinda than the acquisition of territory. The territory known as Cabinda was already in existence. The problem between the Angolan government and FLEC was essentially about the governance structure of Cabinda. This is a clear case of government incompatibility.

F. Case Study 6: Niger Delta Conflict

Nigeria's oil and gas deposits are located in the Niger Delta and there are several large and small groups of NSTACs agitating for total control, or at least, a fair share of the revenues from the oil and gas deposits. The first recorded Niger Delta agitator was Isaac Boro who formed the Niger Delta Volunteer Force (NDVF) in 1966 to fight the Federal Government of Nigeria for a more equitable share of oil revenues.

From low intensity engagement in the 1980s, groups in the Niger Delta increased the intensity of their confrontation. In general, the collective demand of these groups related to the distribution of oil revenues and environmental restoration.[60] In addition to armed groups, many civil society groups are engaged in advocacy for equitable control and distribution of oil revenue accruing from the Niger Delta conflict.[61] The resource control element of the Niger Delta conflict is essentially the "demand for ownership and control of natural resources to be vested (wholly or, at least, partly) in the constituent states of the Nigerian federation or communities where they are naturally located; and not, as presently, exclusively in the federal government."[62]

In 2009, the Federal Government proclaimed a general amnesty for Niger Delta militants. The amnesty included financial commitments to the Niger Delta including formal education for former militants. The amnesty was widely received by the groups and there has been relative quiet in the Niger Delta.

This conflict does not relate to territory and government as much as it relates to resource control. Indeed, the avowed position of the NSTACs involved is that the resources should be controlled by the communities where they are located.

[59] Ceasefire negotiations were carried out with António Bento Bembe in his capacity as president of the Cabindan Forum for Dialogue and Peace.

[60] See Uwafiokun Idemudia and Uwem E. Ite, 'Demystifying the Niger Delta Conflict: Towards an Integrated Explanation' (2006) 33 Review of African Political Economy 391, where centralisation of oil revenue is identified as a major cause of the Niger Delta conflict.

[61] See generally Augustine Ikelegbe, 'Civil Society, Oil and Conflict in the Niger Delta Region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle' (2001) 39 The Journal of Modern African Studies 437.

[62] Kaniye S. A. Ebeku, 'Oil, Niger Delta and the New Development Initiative: Some Reflections from Socio-Legal Perspective International Humanitarian Law' (2007) 19 Sri Lanka J Int'l L 1, 14.

Therefore, this is not a government incompatibility because political control is not a main demand of the fighting groups nor are they contesting territory with the federal government. It therefore falls under a category of incompatibility that is outside the UCDP list.

III. Legal Justifications Offered for Non-International Use of Force

Apart from factual claims of entitlement over government, territory or resources, parties to non-international armed conflict frequently attempt to legally justify their non-international use of force. In the case of almost all conflicts involving NSTACs, the actual or perceived right to self-determination features prominently in proffering a legal justification for non-international use of force.

Self-determination has long been recognised as a legal right in relation to decolonisation,[63] and some of the earliest attempts to justify use of force on the basis of self-determination related to struggles for independence from colonial rule. The UN General Assembly has by resolution confirmed the right to self-determination in the colonial context.[64] The ICJ has also confirmed this right, in the *Namibia*,[65] and *Western Sahara* Advisory Opinions.[66] The *erga omnes* character of self-determination was emphasised by the ICJ in the *East Timor* case.[67] It is doubtful that Article 2(4) relates to these colonial conflicts. They are, therefore, ostensibly within the situations being presently considered. However, colonial conflicts are considered to be IACs and for this reason, fall outside the scope of the present inquiry.

Outside the colonial context, self-determination stands as a right applicable to peoples within a sovereign state. The right to self-determination is expressly recognised by the UNC.[68] Article 1(2) UNC identifies self-determination as one of the purposes of the UN. Article 55 asserts self-determination as a context for creating conditions of stability and well-being for peaceful and friendly relations. This will further the attainment of important political, social and economic goals that inure to the benefit of the peoples in the state.

Self-determination is also provided for in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic,

[63] Gaetano Pentassuglia, 'State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View' (2002) 9 International Journal on Minority and Group Rights 303, 305.

[64] Resolution 1514 (XV) of 1960 and Resolution 1541 (XV) of 1960.

[65] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep. 16.

[66] *Western Sahara* [1975] ICJ Rep. 31.

[67] *East Timor (Portugal v Australia)* [1995] ICJ Rep. 90, 102.

[68] Articles 1(2) and 55 UNC.

Social and Cultural Rights (ICESCR).[69] These two instruments recognise the right to freely determine political status. Other instruments that recognise the right of peoples to self-determination include the 1975 Helsinki Final Act,[70] and the 1981 African Charter on Human and Peoples' Rights.[71] These instruments apply to peoples in non-colonial situations.[72] The totality of the legal provisions on self-determination lead to the point that there is an external and internal aspect to self-determination.

The external aspect of self-determination relates to the right to freely determine the political status of a community. External self-determination appertains to the international status of a people.[73] It relates to the right to constitute a state or to become part of an existing state.[74] So, in a case of government or territory incompatibility, NSTACs may claim to be fighting for external self-determination. It is frequently argued that the right to self-determination is extinguished upon attainment of political independence.[75] This view of self-determination is erroneous to the extent that it does take cognisance of the internal aspects of self-determination, for example "the participation of the people in the governance of states."[76]

The internal aspect concerns the liberty to determine the economic, political, social and cultural existence or status of a community within the framework of a given state. Essentially, internal self-determination puts the people forward "as the ultimate authority within the State."[77] This internal aspect may be broad enough to include the rights of minorities within the state.[78] The NSTACs in the first five case studies above can claim to be desirous of exercising their right to the external aspect of self-determination, while the NSTACs in the sixth case study may rely on

[69] Article 1(1) ICCPR and ICESCR provides that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

[70] Principle VIII.

[71] Article 20.

[72] Pentassuglia, 'State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View' 9 Int'l J on Minority & Group Rts 303, 306.

[73] Salvatore Senese, 'External and Internal Self-Determination' (1989) 16 Social Justice 19.

[74] ibid.

[75] J. V. Cole Rowland, 'Revolutions in the Maghreb—resisting authoritarianism and accessing the right to self-determination and democratic governance' (2012) 45 The Comparative and International Law Journal of Southern Africa 389, 390.

[76] ibid.

[77] Patrick Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 The International and Comparative Law Quarterly 867, 869.

[78] ibid 868, where self-determination and minority rights are discussed as the 'two sides of the same coin'.

the internal aspect of self-determination.

While it may be argued that the NSTACs in the above case studies can rely on self-determination as justification for using force to address their individual incompatibilities, in the reality of municipal and international law, a state has the sovereignty to administer its territories and the peoples. This entails the powers to make and enforce its laws. National sovereignty is "one of the most well established principles of international law."[79] Just as self-determination may give rights to peoples, sovereignty gives rights to states.[80] As of right, the state exercises sole authority over a territory and its population.[81] Again, just like self-determination, sovereignty has internal and external constructs. Internally, it consists of the state's "ultimate authority to take decisions within its space."[82] Externally, it consists of the recognition by all subjects of international law that a state has "the right to do what it wants within its space without interference."[83] This will include the right to use force to resist or quell a rebellion against the sovereign authority to determine the operations of government, delimitation of territory and use of resources.

In the exercise of sovereignty, states ensure that their municipal laws contain provisions against treason and similar violence against the state. These anti-treason laws will necessarily apply against NSTACs conducting armed conflict against the state. Therefore, the exercise of sovereignty implies that only the state can determine the matters relating to government, territory and resources. Sovereignty allows the state, and only those permitted by the state, to use force within its territory.[84] It follows that NSTACs seeking to address incompatibilities by use of non-international force are challenging the sovereign right of the state.

The question then arises as to the lawfulness or otherwise of using force against the state for the purpose of secession or other demonstrations of self-determination. Interestingly, international law does not grant a right to secession,[85] nor does it prohibit secession.[86] The conclusion, therefore, is that there is no legal

[79] L. C. Green, 'Enforcement of International Humanitarian Law and Threats to National Sovereignty' (2003) 8 J Conflict Security Law 101.

[80] Alexander Wendt and Daniel Friedheim, 'Hierarchy under anarchy: Informal empire and the East German state' in Thomas J. Biersteker and Cynthia Weber (eds), *State Sovereignty as Social Construct* (Cambridge University Press 1996) 240.

[81] Neil MacFarlane and Natalie Sabanadze, 'Sovereignty and self-determination: Where are we?' (2013) 68 International Journal 609, 611.

[82] ibid.

[83] ibid.

[84] ibid.

[85] Peter Hilpold, 'The Kosovo Case and International Law: Looking for Applicable Theories' (2009) 8 Chi J Int'l L 47.

[86] ibid.

right to secession.[87] This non-prohibition of secession becomes problematic when aligned with the non-prohibition of the use of force in non-international situations as nothing in international law stops secessionists from using force.[88] It would therefore mean that when a NSTAC commences or instigates a NIAC it would not be violating any rule of international law prohibiting intra-state use of force. In this context, it instructive that states have a power to prevent secession or resist any use of force within its territory.[89] There is therefore a legal impasse involving conflicting rights or powers. This manifests in perpetual tension between the right to self-determination and the territorial integrity of states.

The normative conflict will take a different dimension where no state is involved in the non-international use of force. Instead of having a conflict between self-determination and sovereignty, the NSTACs involved will rely on opposing claims to self-determination. The international legal problem arising from this scenario does not stem from the legal validity of the claims of the parties but the legal probability of the claims. Any attempt to control the use of non-international force must therefore, as a minimum, balance the conflicting rights of sovereignty versus self-determination or self-determination versus self-determination.

Whether the justification for non-international use of force is self-determination or sovereignty, the factual reality is that NIAC is a matter that touches on the peace and security of the international community. It can therefore be subjected to international legal control. Given that international law is presently silent on the control of non-international use of force, the subsequent part of this article seeks to open up the discourse for the development of a *jus ad bellum* regime in NIACs.

[87] See generally, David Copp, 'International Law and Morality in the Theory of Secession' (1998) 2 The Journal of Ethics 219, which discusses the morality of secession. It suffices for this article that such moral arguments or discussions are not relevant to the legal question.

[88] Article 2(4) UNC does not apply to NSTACs.

[89] Hilpold (n 85).

IV. Opening the Discourse on Legal Control of Non-International Use of Force

The main essence of the tripodal UNC *jus ad bellum* regime is to maintain international peace and security. Given the apparent success of UNC *jus ad bellum* in relation to international use of force, the international community may work towards adapting a similar regime for non-international use of force situations. Establishing the *jus ad bellum* for non-international use of force has the obvious problem of controlling the sovereign right of the state to use force within its own territory.

This problem may be resolved by reference to the reality of limitations to sovereignty. A manifest limitation to sovereignty is contained in the provisions of the UNC which recognise the authority of the UN to intervene in a matter which is essentially within the domestic jurisdiction of a state provided the matter relates to action with respect to threats to the peace, breaches of the peace, and acts of aggression.[90] The import of this provision of the UNC is to uphold the notion of sovereignty but allow it to yield to "an overarching normative trend defined by visions of world peace, stability, and human rights."[91] In sum, the right of the state to non-international use of force can be subject to legal control.

In this context, the legal control of sovereignty stems from the recognition that an abusive use of force against individuals and groups will not only violate the human rights of the victims but may also destabilise the state and ultimately jeopardise world peace.[92] In addition, the sovereign right of the state to act and use force within its territory is subject to the recognition that individuals and groups within the state may have rights and duties under international law.[93]

Unlike the state that has a recognised right of non-international use of force, the NSTAC has no such right. *Jus ad bellum* for non-international use of force therefore stands the risk of not only conferring legitimacy on the non-international use of force by NSTACs but also encouraging NSTACs to be quick to resort to force in exercise of a perceived right. Thus an international attempt to control the non-international use of force must clearly restate that international law does not confer a right of use of force on NSTACs. This absence of a right of non-international use of force does not mean that states do not recognise that NSTACs

[90] See Article 2(7) and Chapter VII of the UNC.

[91] S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2000) 42.

[92] See, for example, Malgosia Fitzmaurice, 'The New Developments Regarding the Saami Peoples of the North' (2009) 16 Int'l J on Minority & Group Rts 67, for an extensive discussion of the human rights protection of indigenous people within a state.

[93] Generally on the overarching normative trend of mutual inclusion of sovereignty and the rights of individuals (or groups) see Gaetano Pentassuglia (n 72).

in fact apply non-international use of force, nor does it mean that states do not sometimes recognise the outcome of non-international use of force by NSTACs.

The tension between self-determination and national sovereignty does not necessarily lead to use of force. However, where there is resort to use of force, a conflict arises between the claimed right to self-determination, the certain rights of sovereignty and the overriding international community interest of peace and security. Where the tension is between opposing claims to self-determination and there is resort to use of force, conflict arises between each claim to self-determination and the overriding international community interest of peace and security. In devising a *jus ad bellum* regime for non-international use of force, these conflicting claims must be resolved.

In resolving the conflicting claims, the lesser right should yield to the greater.[94] In a conflict between NSTACs and state(s), which is the superior right: self-determination, sovereignty, or peace and security? In a conflict between NSTACs, which is the superior right: each opposing claim to self-determination, or peace and security? Based on the supposition that rights spring from the recognition of definite interests,[95] the right of the international community will be collocated with its interests. In the answer to both questions as to superiority of rights, the right of the international community to peace and security is superior to sovereignty and self-determination.

In another vein, "[t]he right to self-determination answers the question 'who is to decide?' not 'what is the best decision?'"[96] Self-determination may or may not be the best decision in certain circumstances. In effect, the utility of self-determination is subjective. For example, in Case Study 2 above, the IIB wanted a self-governing state that is independent of the Russian Federation. Yet within the Chechen territory, there were people that felt more inclined to remain a part of the Russian Federation. In all ramifications, it is more of a procedural norm.[97] It is therefore "neither absolute nor unconditional."[98] Although armed conflicts resulting from self-determination claims may be limited and localised to a state's territory,[99] the threat to international peace and security is not diminished because

[94] Theodore S. Woolsey, 'Self-Determination' (1919) 13 The American Journal of International Law 302, 303.

[95] Philip Marshall Brown, 'The Rights of States under International Law' (1916) 26 The Yale Law Journal 85, 93.

[96] Avishai Margalit and Joseph Raz, 'National Self-Determination' (1990) 87 The Journal of Philosophy 439, 454.

[97] Jan Klabbers, 'The Right to Be Taken Seriously: Self-Determination in International Law' (2006) 28 Human Rights Quarterly 186, 205.

[98] Margalit and Raz (n 96) 461.

[99] Tom J. Farer, 'The Ethics of Intervention in Self-Determination Struggles' (2003) 25 Human Rights Quarterly 382, 391.

a conflict is localised. Self-determination is to be applied "with due regard to the balancing of results good and bad, rather than with relentless disregard of consequences".[100]

Each claim to self-determination requires a complex analysis and judgment on the merits of individual claims.[101] Notwithstanding the bona fides or correctness of a right to self-determination, the claim must be exercised in a manner consistent with international peace and security. "Exercising fully a given right of self-determination need not imply separate statehood or the dismemberment of an existing territorial State."[102] Where the right is exercised in a manner inconsistent with international peace and security, then the state may resort to the non-international use of force.

In a similar vein, the notion of sovereignty also raises the question 'who is to decide'? It does not guarantee that the best decision will be taken. Certainly, it is inescapable that the sovereigns will use coercion to resist NSTACs that seek to use violence to address incompatibilities.[103] However, in using coercion to exercise sovereign rights, the conduct of the state must be consistent with international peace and security. The right to self-determination and the rights of sovereignty have costs.[104] However, these costs must not be at the price of peace and security.

Using the model of the *jus ad bellum* regime created by the UNC, the requirement for consistency with international peace and security can translate into a prohibition of the non-international use of force by NSTACs in addressing incompatibilities. As a corollary, states would also be prohibited from the non-international use of force against NSTACs whose actions are consistent with international peace and security. While this proposition could be the central pillar of *jus ad bellum* in non-international situations, it would stand to benefit from an obligation to settle incompatibilities by peaceful means.

V. Conclusion

NIACs arising from or accompanying non-international use of force remain one of the most glaring shortcomings of the present international legal order. This shortcoming is exacerbated by the glaring absence of legal control. It is a weak argument to say that such legal control cannot or should not be devised merely because it does not presently exist. This article has proposed that the legal

[100] Woolsey (n 94) 305.

[101] Michael Freeman, 'The Right to Self-Determination in International Politics: Six Theories in Search of a Policy' (1999) 25 Review of International Studies 355, 368.

[102] Falk (n 49) 595.

[103] W. Michael Reisman, 'Criteria for the Lawful Use of Force in International Law Special Feature—Restraints on the Unilateral Use of Force: A Colloquy' (1984) 10 Yale J Int'l L 279, 279.

[104] Freeman (n 101) 368.

control of non-international use of force operates as the required *jus ad bellum* in non-international situations. *Jus ad bellum* for non-international situations will significantly contribute to the maintenance of international peace and security.