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The Development of the Right of
Self-Defence:
In the Aftermath of September 11

Master thesis
20 points

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1 Summary

The incidents of September 11, 2001, and the US response raised several important issues under international law regarding the use of force. The attacks against the World Trade Center and Pentagon were crimes against humanity as well as violation of the use of force in the United Nations Charter Article 2(4). Instead of Chapter VII measures through the Security Council, the US asserted that its use of force in Afghanistan constituted a lawful exercise of self-defence according to Article 51 in the United Nations Charter and customary law. According to the Nicaragua Case one must consider the scale of actions that might constitute an “armed attack” to be able to define whether September 11 attacks constituted “armed attacks”. At the low end of the scale are the use of force actions, such as non state actors operating in isolated incidents, for example terrorist attacks and conventional criminal acts. For sure it is an obscure connection of the hijackers with the Al Qaeda and with the Al Qaeda with the unrecognised government of Taliban. As such, these incidents clearly were not taken directly by the government of one state against the United States. What the US did was to make no distinction between terrorism and those who harbour them, which has been consented silently by the international community. On the other hand the scale of actions was certainly a kind to that of a military attack. The destruction were worse than Pearl Harbour and United States deaths on the same scale in a single day requires going back to the US’ civil war. According to International Law every State has an obligation to do what is necessary to prevent its territory from being used for launching terrorist attacks on another state’s territory. When terrorist activities for which a state is responsible are of sufficient magnitude, they may constitute a use of force against territorial integrity as well as an “aggression” and even amount to an “armed attack”. The US response might also suggest a new development of the right of anticipatory self-defence, which is indicated by the US’ letter to the Security Council, October 7. The Security Council Resolutions 1368 and 1373 did not constitute “necessary measures to maintain international security” according to Article 51. To freeze financial assets could hardly be enough to maintain international peace and security and it is up to the international community to decide the extension of “inherent” right of self-defence. Article 51 was meant to be of a temporary nature.

2 Abbreviation

Art	Article
FRD	Declaration of International Law Concerning Friendly Relations & Co-operation Among States in Accordance with the Charter of The United Nations
GA	General Assambly
ICJ	International Court of Justice
Res	Resolution
SC	Security Council
UK	United Kingdom
UN	United Nation
US	United States
WTC	World Trade Center

3 Prologue

This thesis has been written at the United Nations Headquarter in New York where I started as an intern autumn 2001. During that time I experienced September 11 and also the receiving of the Nobel Peace Prize. It was the most eventful and also frightening time of my life and I was determined to write my final thesis about the aftermath of September 11, where I could derive advantage from my position at the UN Headquarter. This is the result. I have discussed my analysis with people working at the United Nations and I want to thank everyone who has contributed to the result of this thesis. Especially I want to thank Ms. Jennifer Sarvary, Associate peacekeeper Operator, Department of Peacekeeping Operations, at the United Nations, who has encourage me both as an intern and also as a student. Ms. Sarvary has also helped me brainstorming and given me advice during the writing process. Without my former boss, Mr. Paul Hoeffel, chief at the DPI/NGO section I would never have the opportunity to be located in the library at the United Nations Headquarter in New York. Finally I want to thank Mr. Hans Corell, Undersecretary General for Legal Affairs and Legal Councillor, who gave me the idea of the content of this thesis and who I interviewed regarding specific questions.

The outbreak of war is a metajuristic phenomenon....Its legal significance consists merely in the fact that ...the international law of peace is displayed by the international law of war.

Arthur Nussbaum¹

¹ Nussabaum, Arthur, *Just War – A Legal Concept?*, 42 Mich. L. Rev. 453, 477 (1943).

4 Introduction

On September 11, 2001, nineteen persons of non-United State nationality boarded four US commercial passenger jets in Boston, Washington and Newark and, once airborne, allegedly hijacked the aircraft and crashed them into the World Trade Center (hereinafter WTC), the Pentagon and the Pennsylvanian countryside.² Thereafter, the United States confirmed information that detailed certain evidence that connected these people to a terrorist group based in Afghanistan, Al Qaeda, and headed by a Saudi expatriate, Osama bin Laden.³ The US demanded that the de facto government in Afghanistan, the Taleban, should turn over the leaders of Al Qaeda to the US and provide the US with full access to the camps to confirm their closure.⁴ The Taleban declined to do so and the US informed on October 7 the UN Security Council (hereinafter SC) that it was exercising its "inherent right of individual and collective self-defence" by actions "against Al Qaeda terrorist training camps and military installations of the Taleban regime in Afghanistan".⁵ On the same day the US together with United Kingdom launched cruise missiles and long-range bombers against Al Qaeda and Taleban targets in Afghanistan.⁶

The incidents of September 11 and the US response raises several important issues under international law regarding the use of force. The attacks against the WTC and Pentagon were crimes against humanity as well as violation of the use of force in the UN Charter Article 2(4). Because the US asserted that its use of force in Afghanistan constituted a lawful exercise of self-defence, the first issue becomes whether the requirement in Art. 51 of the UN Charter that there first must be an "armed attack" against the US has been met. More specifically, is there an "armed attack" within the meaning of Art. 51 when a terrorist organization provides funds and other support to individuals to travel to a country, enabling them to hijack aircraft of that country's registration and in turn crash the aircraft into buildings in that country? Consequently, if the attacks against the WTC and Pentagon do not qualify as "armed attack" they sure are a breach of the use of force, but this do not justify armed countermeasures by the US. Art. 51 and the right of self-defence gives the member states limited powers to defend themselves

² Firestone David and Canedy Dana, *FBI Documents Detail the Movements of 19 Men Believed to Be Hijackers*, New York Times, Sept. 15, 2001, at A3.

³ See press release, 10 Downing Street Newsroom, Responsibility for the Terrorist Atrocities in the United States, Oct. 7, www.un.org.

⁴ Murphy Sean D., *Contemporary Practice of the United States Relating to International Law*, 96 A.J.I.L 237, p. 243.

⁵ Letter from the Permanent UN Representative of the United States to the President of the UN Security Council, Oct 7, 2001, U.N. Doc. S/2001/946 (Oct.7, 2001) (hereinafter US Letter). The US Letter noted that it had been the victim of massive and brutal attacks that were specifically designed to maximize the loss of life; resulting in the death of more than 5 000 persons, including nationals of 81 countries, as well as the destruction of four civilian aircraft, the World Trade Center towers and a section of the Pentagon.

⁶ Tyler Patrick E, *U.S. and Britain Strike Afghanistan, Aiming at Bases and Terrorist Camps: Bush Warns: Taleban will pay a price*, New York Times, Oct. 8, 2001, at A1.

against a continuing "armed attack" until such time that the SC intervenes to restore peace. It most certainly does not create any right to initiate retaliatory violence and further does not nullify the obligation under Art. 2(4).⁷

The content of the right to self-defence is not defined. Article 51 of the UN Charter stipulates that acts of self-defence must be reported to the SC and is only of temporary nature "until the Security Council has taken the measures necessary to maintain international peace and security"⁸. What the expressions "armed attack" and "necessary measures" exactly mean is unclear. The perpetrator is ordinarily a foreign State, but could also be another organization as we have seen in September 11.⁹ Besides Article 51, the right of self-defence exists in customary international law, which is an informal, unwritten body of rules derived from the practice and opinions of states. The International Court of Justice (ICJ) has ruled that the claim of a right to use force in self-defence must be supported by credible evidence of an armed attack and of the attacker's identity.¹⁰ The future will decide whether the US-led armed initiative in Afghanistan is illegal or not.

4.1 Purpose

The thesis aims to suggest a new development regarding the right of self-defence after September 11. The **purpose** of this thesis is to provide a legal analysis of the notion "armed attack" in the light of the events of September 11 and to examine the "inherent right" of self-defence. Furthermore the thesis will try to suggest a coherence between the notions "terrorist attack" and "armed attack". This treatment will hopefully contribute to a better understanding of legal issues concerning the right to self-defence today when the aggressor no longer has to be a state, but an international organization, active in many countries.

The thesis aims to analyze if the US armed forces actually initiated actions designed to prevent and deter further attacks and whether the US used proportionate and necessary force against the Talebans. Could it legally be such a thing as war between a sovereign state and a group of terrorists? Did the SC through resolutions 1368 and 1373 initiate such action, which is necessary to set aside the only temporary Art. 51? Why did the terrorist attacks of September 11 set in forth Art. 51 when previous terrorist attacks did not? And what is a "terrorist attack"? A legalistic answer to these issues will be suggested in this thesis. After September 11 these concepts will have a different meaning and dimensions then before the attacks.

4.2 Disposition and limitations

⁷ Ravindran Pratap, *US-led military initiative in Afghanistan – Ironing out the legal wrinkles*, Businessline, Islamabad, Jan. 28, 2002, p. 3.

⁸ Art. 51 in the UN Charter, see Chapter 4.4.

⁹ Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 186.

¹⁰ Yoxall Thomas, *Iraq and Article 51: A correct Use of Limited Authority*, 25 Int'l Law, 967, p. 1113.

This thesis proposes to examine a few of the most important and interesting problems in international law associated with the September 11 attacks, namely the four corollaries in Art. 51. First the thesis provides an independent analysis of the resolutions. Thereafter the notion of use of force and "armed attack" will be examined and an answer to the question if the terrorist attacks of September 11 constitutes an "armed attack" will be discussed. Thereafter the conditions for a justified countermeasure will be defined, which is the second corollary in the right of self-defence. The arguments for an anticipatory right to self-defence will thereafter be examined, in the light of the *Nicaragua Case*. The thesis will provide an analysis of the SC's part in Art. 51 and finally a comparison between an "armed attack" and a "terrorist attack" will be suggested. Only the most relevant legal issues that need to be analysed for answering the legal questions will be brought up, which will exclude the remedy questions put in if US's actions would violate the UN Charter.

4.3 Methods and materials

When writing this thesis a descriptive and analytical judicial **method** has been used. The materials consist mainly of UN Documents, including SC Resolutions and recommendations by the General Assembly, especially the Security Council's Resolutions 1368 and 1373, which have diligently been used. Articles in Legal periodicals have been useful. For more general descriptions regarding the development in international law, literature like Dinstein, *War, Aggression and self-defence* and Cassesse, *The Current Legal Regulation of the Use of Force*, have been useful. Case law documents have also helped in the overall discussions such as, *Nicaragua Case* and the *Gulf war*, 1991. Furthermore the interview with the Legal Counsellor at the United Nations, Mr. Hans Corell has contributed to the analysis and the content as a whole.

5 The Development after September 11

5.1 Background

The events of September 11 were an appalling crime against humanity. The hijackers themselves are beyond punishment or revenge, but others behind them are equally guilty of massmurder.¹¹ The attacks were roundly condemned as an act of war.¹² President George W. Bush declared that the United States would make no distinction between those who made the attack and those states, which harbour them.¹³ This declaration would later on be bare in mind as the *Bush Doctrine*. Congress granted the president broad authority to use the armed forces of the United States to prevent future acts of terrorism. The Bush doctrine placed an affirmative duty on the government of the world not only to abstain from supporting terrorism, also to assist the United States in policing terrorism. The UN SC responded to the September 11 terrorist attacks on the United States by setting up a Terrorism Task Force.¹⁴

5.2 Resolution 1368

An unanimous resolution, passed the day after the attack on the US, put the SC on record as "recognizing the inherent right of individual or collective self-defence in accordance with the UN Charter", while condemning "in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001."¹⁵ The resolution recognized a right to respond in self-defence. The attacks were classified by the SC as "a threat to international peace and security", even though the attacker was not a state. The SC expresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibility under the UN Charter.¹⁶ Measures had to be taken in accordance with Art. 41 and 42, to maintain or restore international peace and security. Such measures under Art. 39 of Chapter VII were, in fact, taken sixteen days later.¹⁷ For the first time in history the SC took actions against a non-state actor under Articles 41 and 42 in

¹¹ Holdstock, Douglas, *Reacting to terrorism*, British Medical Journal, London, October 13, 2001, p. 822.

¹² S.J. Res. 22, (declaring that the United States is entitled to respond to the attacks under international law and referring to a war against terrorism); Address before a joint session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37, Weekly Comp. Pres. Doc. 1347, September 20, 2001

¹³ Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations in Afghanistan, 37 Weekly Comp. Pres. Doc. 1432, 1432, Oct 7, 2001.

¹⁴ Murphy Sean D., *Contemporary Practice of the United States Relating to International Law*, 96 A.J.I.L 237, p. 243.

¹⁵ S/Res/ 1368 (September 12, 2001), see www.un.org.

¹⁶ S/Res/1368, Ibid.

¹⁷ S/Res/ 1373 (Sept. 28, 2001).

accordance with Art. 51, in exercise of a state's "inherent right of self-defence".¹⁸

Resolution 1368 makes even clearer, in the context of condemning the September 11 attack on the US, the responsibility for terrorism of "sponsors of these terrorist attacks" including those "supporting or harbouring the perpetrators"¹⁹. The September 11 attack was not launched by the Taleban, but they were supporting and harbouring Osama Bin Laden and his network.

5.3 Resolution 1373

In Resolution 1373 the SC adopted a number of provisions concerning the freezing of terrorist assets. The SC reaffirmed the principles established by the GA in its Declaration of International Law Concerning Friendly Relations and Co-operation Among State in Accordance with the Charter of the United Nations (hereinafter FRD) of October 1970 and SC Resolution 1189 of 13 Aug 1998, where it was stated that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.²⁰

Actions were taken under Chapter VII in the UN Charter, financial assets were freezed and it is stated that the SC "decides that all States shall take the necessary steps to prevent the commission of terrorist acts". The resolution gave the United States the "inherent right of self-defence to bring to account those who perpetrated this attack".²¹

The use of force under this resolution will unlikely ever be tested in court. The US or another permanent member of the SC with veto could easily reject any further resolution that might seek to clarify or rescind resolution 1373. The US could always argue that whenever and wherever it decides that force is necessary to prevent the commission of terrorist acts. Journalists have been criticized the resolution by saying "Diplomats who drafted the text, which passed surprisingly quickly, now admit they did not take into consideration all the possible consequences of the resolution".²²

Interesting in this context is that neither of the resolutions did explicitly authorize the use of military force against Afghanistan. SC has two times before under Chapter VII authorised military force against a member state. The first time was in June 1950, when the SC authorized the use of force

¹⁸ Franck Thomas M., *Editorial Comments: Terrorism and the Right of Self-Defense*, 95 A.J.I.L 839, Oct. 2001, p. 840.

¹⁹ S/Res/1368.

²⁰ G.A/Res/ 2625.

²¹ S/Res/1373.

²² Byers Michael, *Unleashing force*, The World Today, London , December 2001, volume 57, p

against North Korea.²³ November 29, 1990 the SC passed Resolution 678, pursuant to Chapter VII.²⁴ The SC authorised the use of military force against Iraq and gave Iraq until January 15 to comply with all previous UN resolutions concerning the invasion of Kuwait. The resolution did not require an attack immediately following the January 15 deadline. Resolution 678 simply set January 15, 1991, as the day after which military actions was justified. The drafting and passing of Resolution 678 in reliance on Chapter VII of the UN Charter, rather than relying solely on Art. 51, reflected wisdom on behalf of the US and the other supporting states. One other unlikeness to resolutions 1268, 1373 is that resolution 678 did not referred specifically to Art. 51. The US however relied mainly on Art. 51, the broad self-defense and collective security provision, in justifying both enforcement of the economic trade embargo and the sending of forces to Saudi-Arabia.²⁵

5.4 Interpretations of the resolutions

Resolution 1368 reiterates the right to self-defence by a state specifically against "terrorist attacks"²⁶. The SC clearly identifies international terrorism as a threat to international peace and security against which individual or collective self-defence may be exercised. In the language of Art. 51, which, in authorizing a victim state to act in self-defence, does not limit this inherent right to attacks by another state. The right to expressly accorded in response to an armed attack and not to any particular kind of attacker.

Resolution 1368 did not specify either the attacker or those who harbour them. In the absence of such clear identification of the perpetrator and sponsor, what authority is there for the exercise of Art. 51's inherent right of self-defence? Resolution 1373, too, fails to identify the wrongdoer. It applies mandatory economic, fiscal, and diplomatic sanctions against persons defined as those who finance, plan, facilitate or commit terrorist acts, without defining which groups are included in the category. Some critics therefore assert that neither Resolution specifically authorizes action against either Al Qaeda or the Taliban.

This critique conflates two related challenges. One is directed to the lack of factual evidence of Al Qaeda's and the Taliban's culpability. The other argues that in law, the right to use force in self-defence arises only after the evidentiary test has been met by proof accepted as adequate by the appropriate institutions of the international system.²⁷

²³ S/Res/ 88 (Nov. 8, 1950), S/Res/82 (June 25, 1950), S/Res/83(June27, 1950), S/Res/ 84 (July 7, 1950), S/Res/85 (July 31 1950). It must be emphasized that Soviet Union was absent during the SC's voting.

²⁴ S/Res/678 (Nov. 29 1990)

²⁵ Yoxall Thomas, *Iraq and Article 51: A correct Use of Limited Authority*, 25 Int'l Law. 967, p. 1009.

²⁶ S/Res/1368 (Sept. 12, 2001).

²⁷ Franck Thomas M., *Editorial Comments: Terrorism and the right of Self-Defence*, 95 A.J.I.L., p. 842.

5.4.1 Enough value of evidence ?

The reading of Article 51 does not mean that the question of evidence is irrelevant in law. It does mean, however, that the right of a state to defend itself against an attack is not subordinated in law to a prior requirement to demonstrate to the satisfaction of the SC that it is acting against the party guilty of the attack. The law does have an evidentiary requirement, but it arises after, not before, the right of self-defence is exercised. Thus, if a state claiming to be implementing its inherent right of self-defence were to attack an innocent party, the remedy would be the same as for any other aggression in violation of Art. 2(4). The innocent party would have the right of self-defence under Art. 51. It could also appeal to the SC to institute collective measures against its attacker under Chapter VII.²⁸

Any other reading of Art. 51 would base the right of self-defence not on a victim State's inherent powers of self-preservation, but upon its ability, in the days following an attack, to convince the fifteen members of the SC that it has indeed correctly identified its attacker. As a matter of strategic practice, any attacked is very likely to make an intense effort to demonstrate the culpability of its adversary, limited only by inhibitions regarding the operational effect of sharing intelligence methods. As a matter of law, however, there is no requirement whatever that a State receives the blessing of the SC before responding to an armed attack. Were this not so, how many states would deliberately agree to subordinate their security to the SC assessment of the probity of the evidence on which they based their defensive strategy of self-preservation.²⁹

5.5 *The letter from the US' Ambassador to the UN*

In fact, the first reference to Article 51, Afghanistan and the Al-Qaeda organisation – although not to bin Laden – were made in a letter dated October 7, 2001, from Mr. John D Negroponte³⁰, which stated...In accordance with Art. 51 of the Charter of the UN, I wish, on behalf of my government, to report that the USA, together with other States, has initiated actions in the exercise of its inherent right of individuals and collective self-defence following the armed attacks that were carried out against the US on September 11, 2001.”

The letter went on by saying ”Since September 11, my government has obtained clear and compelling information that the Al-Qaeda organisation, which is supported by the Taleban regime in Afghanistan, had a central role in the attacks. There is still much we do not know. Our inquiry is in its early stages. We may find that our self-defence requires further actions with respect to other organisations and other states”. It added ”In response to these attacks, and in accordance with the inherent right of individual and

²⁸ Brownlie Ian, *International law and the use of force by states*, p. 406 f.

²⁹ Franck, Thomas M., *Editorial Comments: Terrorism and the right of Self-Defence*, 95 A.J.I.L., p. 843.

³⁰ UN Document, www.un.org, S/2001/946 (Oct. 7, 2001).

collective self-defence, the US armed forces have initiated actions designed to prevent and deter further attacks.” Mr. Nergoponte continues by saying that the attacks on 11 September was an ongoing threat to the US and its nationals posed by the Al-Qaeda organization and this has been made possible by the decision of the Taleban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. The Letter continues by saying: ”Despite every effort by the US and the international community, the Taleban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target US’s nationals and interests in the US and abroad”.

It must be emphasised that this letter is not a legal document. The SC has made no comments regarding this letter. Sensational is that this letter could be a warning to other countries supporting terrorism, that they might be attacked next.

6 The Right of Self-Defence – Content and Scope

6.1 Significance

The doctrine of self-defence was born 1837 when an American Steamboat was captured by British forces in Upper Canada. The ship was used to ferry recruits, supplies and arms to a group of some 1,000 Canadian rebels. A British unit crossed the boarder into the United States, set the boat on fire and let it drift until it was destroyed falling over the Niagara Falls. In that operation one American Citizen was killed and one convicted was brought to trial in New York. His defence was that the force was an act of self-defence and he was eventually acquitted. The defence claimed that, since the vessel was being used to supply the rebels on the Canadian side of the river, this was a necessary and proportionate act of self-defence. The US accepted the argument, and the modern law of self-defence was born.³¹

The development of the right of self-defence has to be viewed against the background of the general development of international law towards the prohibition of war and the use of force. The content and scope of the right of self-defence were relatively unclear and extended well into the sphere of self-help. At the beginning of the 20th century, when the freedom to resort war became more and more restricted, the right of self-defence gained significance. This development first culminated in the conclusion of the Kellog-Brand Pact in 1928.³² This Pact comprised only three articles, including one of a technical nature. War remained lawful in the name of self-defence, as an instrument of international policy or outside the span of the reciprocal relations of the contracting parties.³³ Consequently, it was only in the exercise of the right of self-defence that war could still be lawful. The course of legal development subsequent to the Second World War led to a further increase in the importance of the right of self-defence. Today the right of individual or collective self-defence is invoked with regard to almost every use of military force.³⁴

The prohibition of the use of force embodied in Art. 2(4) not only proscribes war, but any threat of force in general. The UN Charter contains only two exceptions to the prohibition of force, namely SC enforcement actions pursuant to Chapter VII, and the right to individual and collective self-defence laid down in Art. 51.³⁵ As the system of collective security has been of little practical significance, international legal practise since 1945 has continued be determined by the unilateral use of force by states. Art. 51 in the UN Charter has therefore an exclusive position in international law,

³¹ Bowett D.W, *Self-Defence in International Law*, Pareger, New York, 1958, p. 11 and Moore, *Digest of International Law* (1909), 412; 7 id., p. 919.

³² Dinstein Yoram, *War, Aggression and Self-Defence*, p.83.

³³ Dinstein Yoram, *War, Aggression and the Use of Force*.p.83.

³⁴ Simma Bruno, *The Charter of the UN: A commentary*, 1994, p. 663.

³⁵ Brownlie Ian, *International law and the use of force by states*, 1963, p. 361-363.

allowing individual states the threat or use of force under the conditions stipulated there. The right of self-defence laid down in Art. 51 is the only exception to the prohibition of force of practical significance, has therefore become the main pillar on which disputes concerning the lawfulness of the use of force in inter-state usually concentrate.³⁶

6.2 Relation of Art. 2(4) and Art. 51

September 11 attacks were, without any doubt a violence of the fundamental principle of the ban of use of force. This principle is regulated in Art. 2(4) in the UN Charter but existed before the UN Charter was adopted. Art 2(4) reads as follows:

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

Art 2(4) shall not be considered on its own, but in close relation to Art. 51, which recognizes the inherent right of individual or collective self-defence if an armed attack occurs against a State. The drafters of the Charter intended to restrict the inherent right of self-defence in the most seriously cases, namely that of an armed attack and by limiting it to the period in which the SC did not yet act.³⁷ One has to bear in mind that the Charter was drafted from the pre-atomic area and since then weapons have been developed that makes the prohibition to start war mere necessary than ever. This makes Art. 2(4) even more important. Any war involves the risk of developments leading to a nuclear war.³⁸

The prohibition of use of force in general will be violated when a state use violence against another state. The level of an "armed attack" is more serious than Art.2(4), since Art. 51 come into force and the right to legitimate military countermeasures. If the use of force does not qualify as an "armed attack", a state may not use military actions. Art. 51 introduce an exception of the ban of use of force by allowing Member States to employ force in self-defence in the event of an armed attack.³⁹ Art. 51 describe the right of self-defence as both individual and collective in nature. The legislative history shows that the whole clause governing self-defence was inserted in the Charter with a view to confirm the legitimacy of regional security arrangements.⁴⁰ However Art. 51 have become the main pillar of the law of self-defence both individual and collective.

³⁶ Simma Bruno, *The Charter of the UN: A commentary*, 1994, p. 663.

³⁷ Brownlie Ian, *International law and the use of force by states*, 1963, p. 361-363, see also Simma Bruno, *The Charter of the UN: A commentary*, 1994, p. 663-665.

³⁸ Cassesse Antonio, *The current legal regulation of the use of force*, 1 NethILR 1986, p. 12 f.

³⁹ Simma Bruno, *The Charter of the UN: A commentary*, 1994, p. 120.

⁴⁰ L.M. Goodrich, E.Hambro and A.P. Simons, *Charter of the United Nations*, p. 342-344.

Art 2(4) was included in the Charter because the drafters feared that the system of standby collective security forces envisaged in Art. 43, to be deployed by the SC, might not come into being and that, accordingly, states would have to continue to rely on their "inherent" right of self-defence. There is somehow a right for a state to take security in their own hands and of willing allies.⁴¹ As soon as a state use force without any justification from Art. 51, they violate Art. 2(4).

6.2.1 Non-intervention

In addition to this prohibition on the use of force, there is an obligation under customary international law not to intervene in the affairs of another state, including through the use of armed force.⁴² In particular, the law on non-intervention has been shaped since the U.N. Charter by three prominent General Assembly resolutions, which provide that armed intervention by a state is contrary to the promotion of fundamental human rights and self-determination. The FRD provides in part:

*No State or group of State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economical, and cultural elements are in violation of international law.*⁴³

The GA Resolutions are not legally binding documents, but in the Nicaragua Case the FRD was considered to state an obligation under customary international law.⁴⁴

6.3 The question of qualification of Art. 51

The right of self-defence proclaims as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nation, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take any time such action as it deems necessary in order to maintain or restore international peace and security.

Because of the pre-eminent position of the SC within the Charter system, the affected state can in that situation merely call upon the SC to qualify the violations of Art. 2(4) as constituting a breach of the peace and to decide on measures pursuant to Arts. 41 or 42. The State, which considers itself the

⁴¹ Franck, Thomas F., *Editorial Comments: Terrorism and the Right of Self-Defense*, 95 A.J.I.L., October 2001, p. 839.

⁴² Brownlie Ian, *International law and the use of force by states*, 1963, p.44.

⁴³ G.A/Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, Annex, at 121, U.N. Doc. A/8028, 1971, see also Simma Bruno, *The Charter of the UN: A commentary*, 1994, p. 126.

⁴⁴ Military and Paramilitary Activities in and against Nicaragua (Nicar. V. U.S.), Merits, 1986 ICJ REP. 14 (Judgements of June 27),(hereinafter the Nicaragua Case) p. 96 para. 179.

victim of an excessive act of self-defence, has by violating the prohibition of the use of force, at least provided the primary cause for the response.⁴⁵ The claim of self-defence can be challenged by its adversary, by the UN or by some of its members, but at least as a first step, the State which uses force should declare unilaterally that it is doing so in the exercise of its right of self-defence, before a third party of a supposedly impartial kind, like the SC, can pronounce on the case.

One might imagine that every State, which decides to use force, would immediately try to legitimise this infringement of Art. 2(4), by appealing to the exception of Art. 51 and informing the SC of the measures it is taking: by doing so it would have little to lose, even if the SC had to reject its claim, since, whether the State notifies the SC of its actions or not, the Council may on its own initiative set in motion the measures foreseen by Chapter VII against it. This is not the case. The SC has been very reluctant to qualify a military attack as an armed attack and thereby the countermeasures according to international law would not be justified.⁴⁶

There is no definition of the circumstances in which the right of self-defence may be exercised. There are many different opinions about the content and scope of these provisions. The prohibition to not use force against another State is universal validity, since the rule also is considered to be a rule of international law.⁴⁷

6.4 Art. 51 and the "inherent" right of self-defence

The reference to the self-defence being a "natural" right (French) or "inherent" (English) right, raises the question of whether Art. 51 refers back to the state of international law before the Charter, or if it is to be read more narrowly in connection with the general ban laid down in Art. 2(4); the use of the words "armed attack" leads to an association between the exception of self-defence and one of the situations contemplated by Art. 39 of the Charter and later clarified by Resolution A/3314 (XXXIX) of 14th December 1974.⁴⁸

According to the predominant point of view, the designation in Art. 51 of the "inherent" right of self-defence mean that, contrary to what the wording of Art. 51 might suggest it is also vested in states other than UN members.⁴⁹ Whereas nothing can be drawn from the preparatory works, this view is supported with the prevailing doctrine. In that it restricts the right of self-

⁴⁵ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p.665.

⁴⁶ Cassese Antonio, *The current legal regulation of the use of force*, 1 NethILR 1986, p. 17.

⁴⁷ Malanczuk Peter, *Akehurst's Modern Introduction to International Law*, Seventh Edition, p. 309 and Cassese A, *The current legal regulation of the use of force*, 1986 Netherlands, p. 3-4.

⁴⁸ G.A/Res/3314 December 1974, Cassese, A, *The current legal regulation of the use of force*, 1 NethILR 1986, p. 17.

⁴⁹ Brownlie Ian, *International law and the use of force by state*, Oxford 1991, p. 273.

defence to cases of armed attack, goes a step further by acknowledging the right in response to an armed attack, which is only directly imminent.⁵⁰ The content and scope of the customary right of self-defence are unclear and extend far into self-help in such a way that its continuing existence would, to a considerable extent, reintroduce the unilateral use of force by states, the substantial abolition of which is intended by the UN Charter.⁵¹ It follows from the Nicaragua case⁵² that the right to self-defence cannot be asserted against acts not reaching the threshold of an armed attack.

With the right of self-defence embodied in Art. 51 restricted to the case of an armed attack, and with no further exception to Art. 2(4) allowing for the use of force by the individual state, the exercise of force for the enforcement of a vested right or for the purpose of ending another state's unlawful behaviour is prohibited. Not even arbitral awards or judgements by the ICJ may be enforced by means of forcible self-help. Of particular importance is that reprisals, once the most frequently used form of force, are today likewise only admissible in so far as it does not involve the use of armed force.⁵³

In the Nicaragua Case the ICJ referred to the use in Art. 51 of the term "inherent" right and the mention of this right in the FRD, has acknowledged the existence under customary law of a right to self-defence, comprising individual as well as collective self-defence.⁵⁴ The Court takes the content and scope of this customary right to correspond almost completely to the right of self-defence under Art. 51 of the Charter. At the time when UN Charter entered into force the traditional right of self-defence covered not only the case of an armed attack, but also many areas of self-help. As a rule of customary law, that right could only have been replaced or amended if, as from a certain moment in time, its voidness or modified existence had been commonly assumed, so that a new rule of law could emerge, based upon the uniform practise of states. Such a development however cannot be claimed to have occurred with regard to the right of self-defence. Though the founding members of the UN had at first waived the broad concept of self-defence by adopting Art. 51, subsequent state practise did not confirm that position in such a way as to amount to a uniform pattern of behaviour. Since 1945, various states, occasionally with the approval of others, have invoked a wide concept of self-defence under customary law allegedly not restricted by Art. 51 and have carried out actions involving the use of force which were not directed against armed attacks.

⁵⁰ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p. 666.

⁵¹ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p. 667.

⁵² See more about the *Nicaragua Case* in Chapter 4.4.

⁵³ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p.667, see also the ICJ judgement in the *Corfu Channel Case* where the ICJ made it clear that, except in the case of self-defence pursuant to Art. 51 of the Charter, the prohibition of the use of force also bans the use of military force in the form of a reprisal, ICJ Reports, 1949, pp. 4 f. The prohibition of armed reprisals is also expressed in the FRD (GA Res. 2625 (XXV)): States have a duty to refrain from acts of reprisals involving the use of force.

⁵⁴ *Nicaragua Case*, p. 121.

Owing to its inconsistency, this state practice was not capable of restricting the scope of Art. 51 itself. It has though prevented the narrow reading of Art. 51 from becoming established in customary law. Yet the continuing existence of the wide customary law is of practical impact merely for the few non-members of the UN. As regards UN Members, it stands that Art. 51 including its restriction to the armed attack, superseded and replaced the traditional right of self-defence.⁵⁵

6.5 The procedural aspect of Art. 51

The only procedural condition for the use of self-defence is that the SC must be immediately notified of any measures taken. But the fundamental conditions are not specified at all, only indirectly indicated in the first sentence of the article.⁵⁶ The fact is however that when states claim to act in self-defence they only very rarely inform the SC of the measures they take, as Art.51 says they should. The procedure, which Art.51 most probably suggests is that the state should report the action undertaken to the SC in a special act referring to the exception of self-defence, presumably backed up by arguments aimed at establishing the existence of the required conditions. The SC could either find that the conditions were present, or undertake collective action under the terms of Chapter VII or else, it could declare that the conditions were not present, in which case it would take action against the State, which had used force under the cover of self-defence and violated Art. 2(4). However a less formal procedure would also fit Art. 51 equally well. Without a notification the State, which refers a complaint to the SC could submit its plea of self-defence either in its letter to the President or during the course of the debate.⁵⁷

Up to September 11, the Council has never pronounced a country invoking self-defence to be acting lawfully, only unlawfully. Historically the SC has repeatedly rejected pleas of self-defence made by Israel to justify incursions made either against military installations of neighbouring States, or against bases used by the Palestinian organizations to launch offensives against its territory or territory occupied by it. Self-defence has also been invoked in Africa by colonial States in the attempt to justify acts of force against rebels based in the territory of their neighbours, and resolutions have been passed in sufficiently clear terms to be seen as rejections of the plea of self-defence. For example Portugal pleaded self-defence in reply to a complaint made by Senegal in 1969 and was nevertheless condemned by the SC.⁵⁸ It is here more usual for states using force to justify their action by claiming the right to substitute their neighbour in view of the latter's incapacity to ensure respect for their rights in its territory.⁵⁹

⁵⁵ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p.678.

⁵⁶ Cassese, A, *The current legal regulation of the use of force*, 1 NethILR 1986, p. 17.

⁵⁷ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p. 678 f.

⁵⁸ S/Res/273 (Dec. 9, 1969)

⁵⁹ Cassese Antonio, *The current legal regulation of the use of force*, 1 NethILR 1986, p. 17.

7 The Notion of "Armed Attack"

7.1 Definition

Is an armed attack the only occasion on which a State may react with armed force? Is self-defence permitted also in cases of nonviolence but illegal enforcement of interests? These issues were brought up in 1928 in the Kellogg-Brand Pact. When the UN Charter later on was drafted, self-defence was constructed as an exception from the ban of use of force. How the words "armed attack" should be interpreted remains though unresolved.⁶⁰

There is no other link in the Charter to the words "armed attack" as Art. 51 refers to. Art 2(4) deals with "use of force" and Art. 39 deals with "aggression". The use of the phrase "armed attack" in Art. 51 is not unintended. The framers of the UN Charter preferred that expression to the term "aggression", which appears elsewhere in the Charter⁶¹. The exercise of the right of self-defence, in conformity with the Article, is confined to a response to an armed attack.

The French version of the Article clarifies its thrust by speaking of "une agression armée". Under the Charter, a State is permitted to use force in self-defence only in response to aggression, which is armed. The requirement of an armed attack as a condition of legitimate self-defence, in accordance with Art. 51, precludes not only threats. Recourse to self-defence under the Article is not vindicated by any violation of international law short of an armed attack. Even declaration of war, if it is evident to all that they are unaccompanied by deeds, are not enough.⁶²

An armed attack needs not to be a massive military operation. Low intensity fighting, conducted on a relatively small scale, may also be deemed an armed attack. There is no cause to remove small scale attacks from the spectrum of armed attacks. Art. 51 in no way limit itself to especially large direct or important attacks.⁶³ An armed attack means an illegal armed attack even a small border incident. There are however countermeasures that do not come up to the level of an armed attack, but surely the level of use of force. In the Nicaragua case the ICJ did not specify what counter-measures, short of self-defence, are permissible. It carefully refrained from ruling out the possibility that such counter measures may involve the use of force by the

⁶⁰ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p. 668.

⁶¹ See in the contexts of the Purposes of the United Nations Article 1(1), collective security (Article 39) and regional arrangements (Article 53(1)).

⁶² Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 184 and Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p.678.

⁶³ Hargrove J.L., *The Nicaragua Judgement and the Future of the Law of Force and Self-Defence*, 81 A.J.I.L. 135, p. 139, 1987.

victim state. It was strongly suggested in the Judgement that these counter measures may include the acts of force.⁶⁴

The foremost target of an armed attack is the territory of a foreign State or any section thereof including water, land, air, persons and property, within the affected area. Another obvious target is a military unit belonging to the armed forces of the victim State. Taking forcible measures against any public, independent of military or civilian installation of the victim State, located outside the national territory, may also amount to an armed attack.

7.2 The first implication of an “armed attack”

It is important to pinpoint the exact moment at which an armed attack begins to take place; this is also the moment when forcible countermeasures become legitimate as self-defence.

Verification of the precise instant at which an armed attack commences is almost equivalent to an identification of the aggressor and the victim State respectively. When confronted with claims of armed attack or self-defence the international community tends to look for deceptively uncomplicated criteria designed to establish the starting point of the armed attack. The most simplistic touchstone is that of the first shot, namely finding out which State was the first to open fire.⁶⁵

Could a state resort to force in self-defence, even before its territory is penetrated by another state? Suppose that the US launches inter-continental missiles against Sweden and Sweden’s radar immediately detects the launching. In the few minutes before the blow in Sweden’s territory, Sweden activates its armed forces and a Swedish submarine torpedoes a US warship cruising in the ocean. Although a US target is the first to be hit, they are regarded as the initiator (since they launched the missile first) of an armed attack, whereas Sweden ought to be able to invoke self-defence. Once the button on a gun is pressed or a trigger is pulled, the act is complete. Another example of a situation where an armed attack not need to be started by the State responsible for the opening of fire, happens when for example US send a Carrier Striking Force en route to the point from which it mounted a notorious attack and Sweden success in sinking the submarine, before reaching the destination and before aircrafts got away from the ship. No armed attack has occurred by sinking the ship.⁶⁶

7.3 “Aggression” and “Armed Attack”

⁶⁴ Hargrove J.L., *The Nicaragua Judgement and the Future of the Law of Force and Self-Defence*, 81 A.J.I.L., 1987., p. 110, see more about the distinction between “armed attack” and the “use of force” in Chapter 4.4.

⁶⁵ Dinstein Yoram, *War, Aggression and the Use of Force*, p. 187.

⁶⁶ Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 189.

An armed attack is a type of aggression.⁶⁷ Aggression is defined in Resolution A/3314⁶⁸ and includes not only armed attack, but also acts which involve the deployment of force but not necessary its use (blockade) and conducts when one State allows its territory to be used by third party.⁶⁹ However, the Definition does not cover the threat of force.⁷⁰

The Definition of Aggression is a recommendation and not binding law. In the preparatory work of the Definition it follows that "aggression" was not coincide with "armed attack".⁷¹ In the special committee that worked out the Definition, the US, supported by other Western states, strongly opposed tendencies to include the "armed attack".⁷² Like the Soviet Union they also expressed the view that the notions "armed attack" and "act of aggression" are not identical. The uncertainties regarding the scope and content of both terms apart, it is submitted that armed attack is the narrower of the two.

Art 2 of the GA's Definition of Aggression refers to the first use of force as only prima facie evidence of aggression. This is a judicious approach that regulates the opening of fire to the level of a presumption of an armed attack. While the burden of proof shifts to the State firing the first shot, that State is not estopped from demonstrating that the action came in response to steps (taken by the opponent), which were far and away more decisive as a turning point in the process leading from peace to war. In many cases the opening of fire is an unreliable test of responsibility for an armed attack. The most elementary example pertains to a full scale invasion of one country by another.⁷³

7.3.1 Invasion and Cross-Border Shooting

A number of circumstances where an aggression takes place are defined in Art. 3(a) and 3(b). It may start when an army storms, with blazing guns another State's frontline. An invasion may also be effected by armed forces moving across the State's frontier, while holding their fire.⁷⁴ Should that come to pass, the State may shoot first, in an attempt to drive out the advancing aggressors echelons. When large armed formations of a foreign State cross an international frontier, without the consent of the local government, they must deem to have unleashed an armed attack.⁷⁵ The opening of fire by a State's border guards may also amount to a legitimate measure of self-defence, in response to an aggressor's armed attack. These cases represent the classic cases of armed attacks, provided that the military

⁶⁷ Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 183.

⁶⁸ G.A. Res. No. 3314 (XXIX), 29(1) R.G.A. 142 (1974).

⁶⁹ Cassese A, *The current legal regulation of the use of force*, 1 NethILR 1986, p. 21-22.

⁷⁰ Supra, note 68, 143 (Articles 2-4).

⁷¹ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p. 668.

⁷² Statements made by the US representative, UN Doc. A/AC.134/SC.113, SC.105, p. 17 and SC.108, p. 43 and statements made by the UK representative, UN Doc. A/AC.134/SC.113.

⁷³ Dinstein Yoram, *War, Aggression and self-defence*, p. 187-188.

⁷⁴ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p.670.

⁷⁵ Brownlie Ian, *International law and the use of force by states*, Oxford 1963, p. 367.

actions are on a certain scale and have a major effect and are not considered mere frontier accidents.⁷⁶

7.3.2 Attack on State Position Abroad and Blockade

The blocking of a state's port or coast by the armed forces of another state is deemed an act of aggression according to Art. 3(c). At least if maintained effectively, the blockade is also to be considered an armed attack, regardless of whether the obstruction is carried out by land or air forces.

Art. 3(d) stipulates that attacks by a state's armed forces on the land, sea or air forces or on the civilian air fleets of another state belong to the category of acts of aggression. In each of these circumstances an armed attack is involved as well, provided that the use of force is not to be considerable insignificant. The expression "fleets" were chosen advisedly so as to exclude from the purview of the Definition the use of force by for example Afghanistan against a single or a few commercial US aircrafts, especially when they enter Afghanistan jurisdiction.⁷⁷

Warship and combat aircraft do have the right to defend themselves when assaulted by foreign forces on the high sea or in international airspace. An armed attack may also be found when military units of a state abroad are assailed by forces of the territorial state or a third state.⁷⁸ Art. 3(d) does not include attack on nationals abroad as example of an act of aggression. In order to justify military rescue operations to help nationals who themselves in difficulties in other country, there has been no shortage of attempts in the literature international law to declare the use of force by a state on its territory against foreign nationals to be armed attack against the latter's home state.⁷⁹

7.3.3 Military forces on third state's territory

An armed attack may commence from within the territory of the target State. A military unit based in another State's territory may open fire on that State's personnel or installations.⁸⁰ Another legitimate use of force could be illustrated when a country have military forces stationed by permission for a limited space of time, on another State's soil. When the agreed upon period comes to an end and the forces is unwilling to move, the permitting State may pull them out. The refusal to withdraw from a State amounts to an act of aggression under Art 3(e) of the GA's Definition. The factual situation may be legally analyzed as a constructive armed attack.⁸¹ For the purpose of responding to an armed attack, the state acting in self-defence is allowed to trespass on foreign territory, even when the attack cannot be attributed to the

⁷⁶ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p. 670.

⁷⁷ Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 196.

⁷⁸ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p.672.

⁷⁹ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p.672.

⁸⁰ Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 195.

⁸¹ Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 187-188.

state from whose territory it is proceeding.⁸² It does not follow from the fact that the right of self-defence pursuant to Art. 51 is restricted to the case of an armed attack that defensive measures may only affect the attacker.⁸³

The State subjected to an armed attack is entitled to resort to self-defence measures against the aggressor, regardless of the geographic point where the attack was delivered.⁸⁴ An armed attack need not even be cross-border in nature; it does not have to be perpetrated beyond the frontiers of the Aggressor State. If force is used by United States against Afghani installations (such as military base or an embassy) legitimately situated in the US, this may constitute an armed attack, and Afghanistan would be entitled to exercise its right of self-defence against the US.⁸⁵

7.3.4 Indirect force

As mentioned before it is recognized today that indirect force is covered by the prohibition of the use of force. It is however still unclear if assistance to private, unofficial groups, is in breach of Art. 2(4). The same is true of the question to whether and to what extent the indirect use of force would be classified as constituting an armed attack. It is widely accepted that at least certain kind of forms of indirect force fall under the definition of armed attack. In Art. 3(g) certain forms of assistance to the private use of force as acts of aggression.⁸⁶ When the Definitions of Aggression were drafted Soviet Union and its allies denied an existence of a right of self-defence against indirect aggression, tolerated the inclusion of the example in the list of acts of aggression and concentrated their efforts on keeping the scope of Art. 3(g) as narrow as possible. During the Soviet invasion in Afghanistan, the line of arguments by Soviet Union indicated that the concept of indirect armed attack now has been accepted by states which previously tended to view it with reserve.⁸⁷

7.4 The distinction between "armed attack" and the "use of force"

Maybe the most important case regarding the content of an armed attack and the right of self-defence is the Nicaragua Case in 1986. When it comes to the distinction between "armed attack" and the "use of force" the Nicaragua case has a significant status quo. The Court rejected the United States' contention that it had the right to mine Nicaraguan harbours and train Contra rebels who were fighting against the Sandanista government.⁸⁸ The US had supported the contras by equipping and aiding military and paramilitary against Nicaragua. The US argued that it had taken action against Nicaragua together with Central American countries such as Honduras in collective

⁸² Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 223-224.

⁸³ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p. 673.

⁸⁴ Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 195.

⁸⁵ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p. 673.

⁸⁶ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p.673.

⁸⁷ Cassese, A, *The current legal regulation of the use of force*, 1 NethILR 1986, pp. 453-77.

⁸⁸ Nicaragua case, p. 14 and 123 (para. 238).

self-defence because Nicaragua had allegedly trained and leftist rebels, which were fighting the Honduran government.⁸⁹

The ICJ ruled that the claim of a right to use force in self-defence must be supported by credible evidence of an armed attack and of the attacker's identity.⁹⁰ The Court quoted Art. 3(g) of the Definition of Aggression⁹¹, which it took to reflect customary international law and found that "assistance to rebels in form of the provision of weapons or logistical or other support", did not constitute an armed attack.⁹² Here includes training, financing, equipping and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua.⁹³

To the question whether the sending of armed bands (here by the Nicaraguan government) into the territory of another State (in this case El Salvador) may count as an armed attack and thereby could justify the use of force in self-defence, the ICJ stated that it did not constitute an armed attack but may nevertheless involve a use of force.⁹⁴ At the same time the Court found it necessary to distinguish the gravest forms of the use of force from other less grave forms. Such assistance could be regarded as an unlawful threat or use of force, or intervention in the internal or external affairs of a state, but not as an "armed attack" against a state.⁹⁵

With regard to the requirement of an armed attack the ICJ considers that Art. 51 and the right of self-defence under customary law coincide.⁹⁶ Since it was not relevant for the decision on the case before it, the Court leaves open the question as to what countermeasures a State affected by an intervention not constituting an armed attack may lawfully resort to, and whether those countermeasures may include the use of force.

To the question whether the US had a right to collective self-defence the Court continued by stating:

for one state to use force against another, on the grounds that that State has committed a wrongful act against a third state, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a state in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack. In the view of the Court, under international law in force today-whether customary international law or that of the UN

⁸⁹ Myint ,Zan, *Attacks force a rethink of international law* ; The Bangkok Post; Oct 5, 2001, p. 1.

⁹⁰ Nicaragua Case, pp. 119-21, 127, paras.230-34 and pp. 248-49 (June 27).

⁹¹ See here Chapter 7.3.4.

⁹² G.A. Res. 3314, UN GAOR, 29th Sess., Supp. No. 31, Annex, at 142, UN Doc. A/9631 (1975).

⁹³ Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 192.

⁹⁴ Nicaragua Case, p.103.

⁹⁵ Nicaragua Case, p. 103 and p. 146-149, para. 292.

⁹⁶ This applies both to individual and collective self-defence, ICJ Reports 1986, supra note. 94, p. 110, para. 210.

*system- States do not have a right of collective armed response to acts which do not constitute an armed attack.*⁹⁷

The US was also in breach of its obligation under customary international law not to violate the sovereignty of another state; that by laying mines and failing to make known their location.⁹⁸

One striking difference between an armed attack and the use of force is that when non self-defence counter measures are employed, there is no counterpart to collective self-defence. The options of response to forcible measures short of an armed attack are, in consequence, reduced considerably. Moreover, since the Court did not brand as an armed attack the supply of weapons and logistical support to rebels against a foreign State, a no-man's land unfolds between the type of military assistance that a third State can legitimately provide and the direct exercise of collective self-defence in response of an armed attack.⁹⁹

7.4.1 The development after Nicaragua Case

Applying the facts of the Nicaragua case to the law, the Court found that the US had violated use of force norms by the mining of Nicaraguan ports, the destruction of Nicaraguan oil installations, and the training, arming and equipping of Nicaraguan rebels.¹⁰⁰ In the case of sending armed bands a sufficiently close link exists between the state and the private groups, so that the latter's position is nearly that of de facto state organs. IF the aggressive acts carried out by those organized armed bands are moreover of the required gravity, it seems perfectly justified to hold the sending state responsible for an armed attack. The sending of private groups is substantial involvement to come within the notion of an armed attack. To provide rebels with weapons was not sufficient for the assumption of an armed attack.¹⁰¹

Further, the Court found that the US was not acting in collective self-defence (by assisting El Salvador) because the "intermittent flow of arms... routed via the territory of Nicaragua to the armed opposition" in El Salvador, even if imputable to the government of Nicaragua, was not on a scale of any significance, even if it were, the court is unable to consider that in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that state.¹⁰² The court also found probative the fact that the US failed to notify the SC that it was exercising a right of collective self-defence.¹⁰³ The Nicaragua Case is groundbreaking regarding the distinction between "use of force" and "armed attack" and many claims of self-defence since then has been unjustified for not fulfil the conditions.

⁹⁷ Nicaragua Case, p. 110, para. 211.

⁹⁸ Nicaragua Case, pp. 33-34, para. 46.

⁹⁹ Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 193-194.

¹⁰⁰ Nicaragua case, p. 118.

¹⁰¹ Nicaragua Case, p. 104.

¹⁰² Nicaragua Case, p. 119.

¹⁰³ Nicaragua Case, p. 121.

When the United States imposed quarantine on Cuba in 1962, subsequent to the installation of Soviet missiles on the island, this could not be reconciled with the provision of Article 51.¹⁰⁴ The installations of missiles so close to American shores did pose a certain threat to the United States. Yet, in the absence of an armed attack, no recourse could be made to the exceptional right of self-defence, and the general interdiction of the use of inter-State force prevailed.¹⁰⁵

When Israeli aircraft raided an Iraqi nuclear reactor (under construction) in 1981, the legal justification of the act should have rested on the state of war, which was in progress between the two countries. Had Israel been at peace with Iraq, the bombing of the site would have been prohibited, since it did not qualify as a legitimate act of self-defence consonant with Article 51.¹⁰⁶ This is the position *de lege lata*, despite the understandable apprehension existing at the time that nuclear devices, if produced by Iraq, might ultimately be delivered against Israeli targets.

In the Tehran case of 1980, the ICJ used the phrase "armed attack" when discussing the takeover by Iranian militants of the US embassy in Tehran, and the seizure of the embassy staff as hostages, in November 1979. The allusion to an armed attack is particularly significant in the light of the ill fated American attempt, in April 1980, to bring about the rescue of the hostages by military means. The legality of the rescue mission was not an issue before the Court. Yet, the judgement registered the American plea that the operation had been carried in exercise of the right of self-defence, with a view to extricating the victims of an armed attack against the US embassy. In his Dissenting Opinions in the Nicaragua Case, Judge Schweber called that plea a sound legal evaluation of the rescue attempt.¹⁰⁷

¹⁰⁴ Q. Wright, *The Cuban Quarantine*, 57 A.J.I.L. 546, 560-562 (1963).

¹⁰⁵ S/Res/144 (Sept. 17, 1960).

¹⁰⁶ S/Res/487 (June 19, 1981).

¹⁰⁷ Lambert Joseph J, *Terrorism and hostages in International Law – a commentary on the hostages convention*, p. 3.

8 Anticipatory self-defence

8.1 Imminent threat of an "armed attack"

There is no consensus in international legal doctrine over the point in time from which measures of self-defence against an armed attack may be taken. In particular those authors who interpret Art. 51 as merely confirming the pre-existing right of self-defence consider anticipatory measures of self-defence to be admissible under the conditions set up by Webster in the Caroline Case, when the *necessity of that self-defence is instant, overwhelming and leaving no choice of means and no moment for deliberation.*¹⁰⁸

According to the wordings in Article 51, the right to self-defence exists solely when an armed attack occurs. In the Nicaragua Case the ICJ based its decision on the norms of customary international law concerning self-defence as a sequel to an armed attack. However, the Court stressed that this was due to the circumstances of the case, and it passed no judgement on the issue of the lawfulness of a response to the imminent threat of armed attack.¹⁰⁹

The injured state may only use force against force. Article 2(4) should be read, as prohibiting the first use of military power and in resistance against an armed attack the use of force is allowed by virtue of Article 51, but a State may not initiate the use of force.¹¹⁰

Some authors disagree with this point of view.¹¹¹ In their opinion the State has, under specific circumstances, the right to start war, namely if its vital interests are illegally threatened.¹¹² They argue that a State might have compelling reasons to protect its interests by a morally justified use of force. They refer to the steady and repeatedly stress on the requirements of justice, on respect for the obligations of treaties and international law, and on the principle of the sovereign equality of all its Members. This is a very strict interpretation of the use of force and is so far only a minority point of view.¹¹³

8.2 Narrowly interpretation of "armed attack"

There is no consensus in international legal doctrine over the point in time from which measures of self-defence against an armed attack may be taken.

¹⁰⁸ Moore J.B, *Digest of International Law*, 1906, p. 412.

¹⁰⁹ Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 183.

¹¹⁰ Cassese Antonio, *The current legal regulation of the use of force*, Netherlands, 1986, p. 6 and Dinstein Yoram, *War, Aggression and Self-defence*, p. 187.

¹¹¹ Stone, *Aggression and World Order*, London, 1958, pp. 43, 95.

¹¹² Cassese Antonio, *The current legal regulation of the use of forc*, p. 5.

¹¹³ Cassese Antonio, *The current legal regulation of the use of force*, p. 6.

The majority point of view interprets Art. 51 narrowly and argues that an armed attack must have already occurred before force can be used in self-defence. There is no right of anticipatory self-defence against an imminent danger of attack.¹¹⁴ It is a general rule in international law that exceptions to a principle shall be interpreted restrictively. Art. 51 is an exception of Art. 2(4) in the Charter. Furthermore Art. 53 in the Charter provides that parties to regional arrangements may take enforcement action against a renewal of aggressive policy and it might seem unnecessary with a permitted anticipatory self-defence in Art. 51 if Art. 53 generally state the same.

Art. 51 simply resort to counter-force, but it comes as a reaction to the use of force by the other party. When a state feels threatened by an armed attack, all that it is free to do according to the UN Charter, is making the necessary military preparations for repulsing the hostile action and bring the matter to the attention of the SC. The course of action may easily fail to inspire confidence in the successful resolution of the crisis. The military preparations can easily prove inadequate, either as deterrence or as a shock absorber. The option of a preemptive use of force is excluded by Article 51 (although it may come within the ambit of legitimate self-defence under customary international law).¹¹⁵

8.2.1 The objective and purpose of the UN Charter

The objective of the UN Charter is however to minimize the unilateral use of force and since the imminence of an armed attack cannot usually be assessed by means of objective criteria, any decision on this point would necessarily have to be left to the discretion of the state concerned. The result would be a risk of an abuse of that discretion which would de facto undermine the restriction to one particular case of the right of self-defence.¹¹⁶ It is also significant that the North Atlantic Treaty based on Art 51 provide only for defence against armed attack and not for defence against imminent danger of armed attack.¹¹⁷ Self-defence is so far only permissible only after the armed attack has already been launched. The ICJ did not pronounce upon anticipatory self-defence at all in the Nicaragua Judgement.

The second sentence of Art. 51 stipulates that measures taken in self-defence are to be immediately reported to the SC. These provisions are evidence of the fact that the right of self-defence embodied in Art. 51 is only meant to be of subsidiary nature. But since the SC has, for a long time, been far from performing its intended function, self-defence has become the regular course of action. It must be emphasised that the principle of proportionality is of outstanding legal importance for the right of self-defence. Lawful self-

¹¹⁴ Simma Bruno, *The Charter of the United Nations: A Commentary*, 1994, p. 675.

¹¹⁵ Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 184.

¹¹⁶ Simma Bruno, *The Charter of the United Nations: A Commentary*, 1994, p. 676.

¹¹⁷ Malanczuk Peter, *Akehurst's Modern introduction to international law*, 7th revised edition, 312.

defence is restricted to the repulse of an armed attack and must not entail retaliatory or punitive actions.¹¹⁸

8.3 Customary law and anticipatory self-defence

There is a strong school of thought maintaining that Article 51 highlights one form of self-defence and customary international law highlights another.¹¹⁹ This approach has gained the support of Judge Schweber who, in his Dissenting Opinion in the Nicaragua case, rejected a reading of the text, which would imply that the right of self-defence under Article 51 exists, if and only if an armed attack occurs.¹²⁰

8.3.1 The Webster formula

According to Sir Humphrey Waldock it would be absurd to require that the defending State should sustain and absorb a devastating blow, only to prove an immaculate conception of self-defence. As Sir Waldock phrased it 1842 in the Caroline case:

*Where there is convincing evidence not merely of threats and potential danger, but of an armed attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier.*¹²¹

It was suggested that a state may use force in defence of a large range of interests, even when there is neither an actual armed attack nor an imminent danger of one.¹²² This view is reminiscent of nineteenth century ideas of vital interests.¹²³ The Webster formula, which was used in the Caroline case, has still significance even though supporters represent a minority view among publicists.¹²⁴ Webster required the British Government to show the existence of:

*"necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of United States at all, did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it"*¹²⁵

¹¹⁸ Simma Bruno, *The Charter of the United Nations: A Commentary*, 1994, p. 677.

¹¹⁹ Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 185.

¹²⁰ Nicaragua Case, p. 94 and 347.

¹²¹ Waldock C.H.M., *The Reugulation of the Use of Force by Individual States in International Law*, 81 R.C.A.D.I. 451, p. 498, 1952.

¹²² Bowett D.W., *Self-Defence in International Law*, Pareger, New York, 1958, Chapter 5 and 6.

¹²³ Higgins R, *The Development of International Law through the Political Organs of the United Nations*, 1963, 216-21.

¹²⁴ Cassese A, *The current legal regulation of the use of force*, 1 NethILR 1986, p. 498.

¹²⁵ Waldock C.H.M., *The Regulation of the Use of Force by Individual States in International Law*, 81 R.C.A.D.I. 451, p. 498 f., 1952.

It is nearly impossible to practice the concept of proportionality to such action. In practise rules of engagement are based upon the armed attack model.¹²⁶ As a matter of political reality, actions, which are anticipatory in the sense that they are not in reaction to a prior attack but are claimed to be in anticipatory self-defence, have other political objectives. Without such other attraction, the risk would not be worth taking. Proportionality is an important aspect of the right of self-defence and should not be ignored. The US practise in the matter of armed reprisals has shown a certain blurring of the distinction between proportionate self-defence and reprisals. This more flexible practise has related to the use of force in response to attacks launched from bases in foreign states unable or unwilling to prevent the use of their territory as a base for aggressive operations against neighbouring States. However, the distinction of principle between acts of reprisal and self-defence has not been challenged.¹²⁷

There is not the slightest suggestion in Art. 51 that the occurrence of an armed attack represents only one set of circumstances in which self-defence may be exercised. In fact, if that is what the framers of the Charter had in mind, the crafting of Article 51 makes little sense.¹²⁸ What is the point in stating the obvious, while omitting a reference to the ambiguous conditions of preventive war? Preventive war in self-defence (if legitimate in the UN Charter) would require regulation by *lex scripta* more acutely than a response to an armed attack, since the opportunities for abuse are incomparably greater. Not only does Article 51 fail to intimate that preventive war is allowably, but the critical tasks assigned to the SC are restricted to the exclusive setting of counter-force employed in response to an armed attack. Surely, if preventive war in self-defence is justified (on the basis of probable cause rather than an actual use of force), it ought to be exposed to no less – if possible, even closer – supervision by the SC.¹²⁹

Interesting in this discussion is the Cuban missile crises 1968. The US did not invoke any right of anticipatory self-defence in order to justify the quarantine imposed on Cuba. The US realised that such an attitude would have created a precedent, which the Soviet Union could have used against US missile sites in Europe. Indeed, on the same reasoning, virtually every state in the world could have claimed to be threatened by a build-up of arms in a neighbouring state and could have resorted to preventive war. It is true that the facts of the Cuban missiles crises are not a good example of the typical situation contemplated by supporters of the doctrine of anticipatory self-defence, because a communist attack was probably not imminent, but the question of opinion and degree, and any rule founded on such a criterion is bound to be subjective and capable of abuse.¹³⁰

¹²⁶ Simma Bruno, *The Charter of the United Nations: A Commentary*, 1994, pp. 675-676.

¹²⁷ Cassese A, *The current legal regulation of the use of force*, 1 NethILR 1986, p. 499.

¹²⁸ Brownlie Ian, *International law and the use of force by states*, Oxford 1991, p. 276.

¹²⁹ Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, pp. 185-186.

¹³⁰ Brownlie Ian, *International law and the use of force by states*, 1963, p. 313.

The proposition that UN Member States are barred by the Charter from invoking self-defence in response to a mere threat of force, is applicable in every situation. It is sometimes put forward that the destructive potential of nuclear weapons is so enormous as to call into question any and all received rules of international law regarding the trans-boundary use of force. But the inference that Article 51 is only operative under conditions of conventional warfare cannot be substantiated.¹³¹

In contrast, when Israel destroyed an Iraqi nuclear reactor in 1981, its claim of self-defence was firmly rejected by other states. Since a nuclear attack had not been imminent, the requirement of necessity and proportionality were not fulfilled. Any right to engage in anticipatory acts of self-defence remained tightly constrained.¹³²

¹³¹ Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, pp. 185-186.

¹³² S/Res/487 (June 19, 1981).

9 Limits on the right of Self-defence

9.1 The SC's role to maintain peace and security

The authority of using force in self-defence is limited in two ways: first, the state acting in self-defence must observe the principle of proportionality¹³³, secondly, it has to report immediately to the SC the measures taken, and it has to discontinue them as soon as the SC itself has taken the measures necessary for the maintenance of international peace.¹³⁴

In the UN Charter the SC has the primary responsibility for the maintenance of international peace and security. That is why, according to Art. 51 the right of self-defence may be used only until the SC has taken the necessary measures. In resolution 1368 the SC recognized the applicability of this right in the context of the September 11 attack. However, on September 28, the SC invoked Chapter VII to require states to impose mandatory controls on the financing of terrorist groups, and to prohibit states from "providing any form support" to terrorists. Does the imposition of these measures under Chapter VII supersede the attacked state's right to use force in self-defence?¹³⁵

Article 51 set forth that the right of self-defence may be exercised "until the SC has taken measures necessary to maintain international peace and security". Whenever the SC decrees in a binding manner a withdrawal of forces or a cease-fire, the legal position is unequivocal, every State is obligated to act as the SC ordains and it can no longer invoke self-defence. If the SC is paralysed and fails to take any measures necessary to maintain international peace and security, the legal position is equally obvious, a State exercising the right of self-defence may persist in the use of force.¹³⁶ But what is the legal status if the SC follows the middle of the road and refrains from issuing detailed instructions to the parties, merely calling upon them say, to conduct negotiations aimed at settling their dispute? Does such a resolution terminate the entitlement of a State to rely on self-defence?

It is clear that it is not enough for the SC to adopt just any resolution, in order to divest States of the right to continue to resort force in self-defence against an armed attack.¹³⁷ Even when the SC imposes economic sanctions in response to aggression, such measures by themselves cannot override the right of self-defence. The only resolution that will engender that result is a legally binding decision, whereby the cessation of the real defensive action becomes imperative. Short of such a measure, the state engaged in self-

¹³³ See further Chapter 9.2.

¹³⁴ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p. 664, see more about the SC measures needed in Chapter 8..

¹³⁵ Franck, Thomas M., *Editorial Comments: Terrorism and the right of Self-Defence*, 95 A.J.I.L., p. 841.

¹³⁶ Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 208.

¹³⁷ Shachter Oscar, *United Nations Law in the Gulf Conflicts*, 85 A.J.I.L., 1991, pp.453, 458.

defence is not obligated to desist from the use of force. However, the defending state still acts at its own risk, perhaps more so than before. Continued hostilities may precipitate a decision by the SC against a self-proclaimed victim of an armed attack.¹³⁸

The SC has after September 11 immediately through resolution 1368 condemned the attacks against US and ascertained that the US had right to self-defence. It is clear that it is not enough to adopt any resolution, in order to divest Member States of the right to continue to resort to force in self-defence. Through resolution 1373 the SC imposed economical sanctions in response to aggression. Such measures by themselves cannot override the right of self-defence.¹³⁹ What is worth taken into consideration is that there is no single reference to Afghanistan or Osama bin Laden in neither of the resolutions. Nor did Resolution 1373 affirm resolution 1368 of September 12 authorise armed action by the US and its allies. All the resolution did was to affirm the Charter's right to individual and collective self-defence and direct member States to combat threats to international peace and security caused by terrorism "in accordance with the Charter".¹⁴⁰

When Iraq invaded Kuwait the SC began to adopt the necessary measures there where some discussions concerning the SC's actions and whether the US continued to have the right to self-defence under Art. 51. As is shown by the wordings above the question has to be answered negative.¹⁴¹

9.1.1 Chapter VII measures

As the majority point of view, the use of force by a state is either a delict against which the UN must take action, or a lawful act, either because it is performed at the request (Art. 42) or at least with the authorization (Art 53(1)) of the SC, or because it is a reaction to a previous act of force and as such lawful until such a time as the security Council decides on the question. The classification of different uses of force as lawful or unlawful is therefore central to the system of the Charter. The particular aim of the present article is to establish how, in the context of Art. 51 alone, UN practise has answered this question of classification, and if it has been able to specify the conditions necessary for the exception of self-defence to apply.

Art. 39 of the UN Charter authorizes the SC to declare that a certain international situation amounts to a threat to the peace. Article 41 authorizes the SC to adopt sanctions short of military force, and Article 42 authorises UN to send land, air and sea forces against an aggressor state.

¹³⁸ Bowett D.W, *Self-Defence in International Law*, Pareger, New York, 1958, p. 196 and Dinstein Yoram, *War, Aggression and Self-Defence*, 1988, p. 208.

¹³⁹ Rostow, E.V., *Until What? Enforcement Action or Collective Self-defence?*, 85 A.J.I.L. 506, 1991, pp. 512-513.

¹⁴⁰ Ravindran Pratap, *US-led military initiative in Afghanistan – Ironing out the legal wrinkles*, Businessline, Islamabad, Jan. 28, 2002, p. 2.

¹⁴¹ Rostow, E.V., *Until What? Enforcement Action or Collective Self-defence?*, 85 A.J.I.L. 506, 1991, pp. 512-513.

In Chapter VII of the UN Charter, the SC is allowed to use force against unlawful force. The UN might be expected to act in its own right as a body, that is using forces of its own; since it has none. Art. 43 and the following articles provide for forces to be put at its disposal by the member States. In case of need these troops will act in the name of the organization; any act of force the perform will be attributed to the U.N. alone and not to the individual state. The UN has also the possibility of using its members' forces in a less centralized manner: that is, it may simply set things in motion, leaving it to the member State to carry out military operations (under its control) against a State which has violated Art 2(4).¹⁴²

Such actions, which follow the strict letter and requirements of Chapter VII of the United Nations Charter, have never taken place. The US-lead action, under the auspices of the United Nations, against North Korea in 1950 and against Iraq-occupied Kuwait in 1990 can only be described partly as enforcement actions.¹⁴³

When could a Chapter VII measure be used? The justification applies in the absence of a secure basis for a plea of self-defence of collective self-defence and on occasions when a regime as such has been designated a threat to the peace of the region. It has been used much by the United States and was a prominent element in the official explanations of the blockade of Cuban waters in 1962 and the invasions of Grenada in 1983. The role of the regional arrangements as a handy instrument for the relative legitimating of policies is not to be underestimated.¹⁴⁴

After the Iraqi invasion of Kuwait, the SC affirmed the inherent right to use force in individual or collective self-defence.¹⁴⁵ Four months later the SC authorized the member states "to use all necessary means" to repel the Iraqi forces¹⁴⁶, that resolution reaffirmed the SC's earlier affirmation of the victim's right to act in self-defence, clearly implying that Chapter VII measures taken under Council authority could supplement and coexist with the inherent right of a state and its allies to defend against an armed attack. This serves to give Art. 51 the sensible interpretation that a victim of an armed attack retains its autonomous right of self-defence at least until further collective measures authorized by the Council have had the effect of restoring international peace and security.¹⁴⁷

9.2 Proportionality, immediacy and necessity

¹⁴² Cassese Antonio, *The Current Legal Regulation of the Use of Force*, Netherlands, 1986, p. 10.

¹⁴³ Myint Zan, *Attacks force a rethink of international law* ; The Bangkok Post; Oct 5, 2001, p. 3.

¹⁴⁴ Cassese Antonio, *The current legal regulation of the use of force*, 1 NethILR 1986, p. 502.

¹⁴⁵ S/Res/661, preamble, (Aug. 6, 1990).

¹⁴⁶ S/Res/678, para. 2, (Nov. 29, 1990).

¹⁴⁷ Franck Thomas M., *Editorial Comments: Terrorism and the right of Self-Defence*, 95 A.J.I.L., pp. 841-842.

The American Secretary of State, Daniel Webster, claimed in the Caroline Case that the British action could have been justified if the British Government could demonstrate the existence of necessity of self-defence, instant overwhelming, leaving no choice of means, and no moment for deliberation. This statement has been frequently used in doctrine as well as in Court when discussing self-defence. The Caroline ruling still exists. Self-defence must be necessary, immediate and proportionate to the seriousness of the armed attack. The principle of necessity means that no other peaceful alternative measures are available or effective.¹⁴⁸ Necessity comes to the fore when war is begun following an isolated armed attack. Before the defending state opens full scale military attack it is obliged to verify that a reasonable settlement of the conflict in an amicable way is not attainable.¹⁴⁹

The principle of immediacy requires that the act of self-defence must be taken immediately subsequent to the armed attack. The purpose of this requirement is to prevent abuse and military aggression under the pretext of self-defence long after hostilities have ceased. But the requirement of immediacy must take the individual circumstances into account, such as geographic distance.¹⁵⁰

Although the language of Art. 51 does not explicitly include the requirement of proportionality, the UN has determined it to be an implicit element of the provision.¹⁵¹ Any act of individual or collective security must not exceed the level of force that the invading country has implemented against the reacting state. An inherently flexible criterion, it has been regarded as inserting a standard of reasonableness to the doctrine of self-defence. When on the spot reaction or defensive armed reprisals are involved, proportionality points at symmetry or an approximation in scale and effects between the unlawful force and the lawful counter-force. To measure proportionality in these settings, a comparison must be made between the quantum of force and counter-force used, as well as the casualties and damage sustained. Such a comparison could only be drawn a posteriori, weighting in the balance the acts of force and counter-force in their totality, from the first to the last moment of fighting.¹⁵²

Proportionality in this sense albeit appropriate for the purposes of on the spot reaction and defensive armed reprisals is unsuited for an investigation of the legitimacy of a war of self-defence. The absence of correspondence between the original injury and the ensuing conflagration is conspicuous when war is waged in response to an isolated armed attack. By its nature war is virtually bound to be disproportionate to any measure short of war.¹⁵³ The

¹⁴⁸ Simma Bruno, *The Charter of the United Nations: A commentary*, ed. 1994, p. 677.

¹⁴⁹ Dinstein Yoram, *War, Aggression and Self-defence*, Second Edition, 1994, p. 231.

¹⁵⁰ Malanczuk Peter, *Akehurst's Modern Introduction to International Law*, Seventh Edition, p. 317.

¹⁵¹ Schachter Oscar, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. Rev. 113, 1986, p. 120-121

¹⁵² Dinstein Yoram, *War, Aggression and Self-defence*, Second Edition, 1994, p. 231.

¹⁵³ Brownlie Ian, *International law and the use of force by states*, 1963. pp. 372-376.

scale of counterforce used by the victim state in a war of self-defence will be far in excess of the magnitude of the original force employed in a will surpass the destructive effects of the initial use of unlawful force. Proportionality as an approximation of the overall force employed (or damage forced) by the two opposing sides, cannot be the yardstick for determining the legality of a war of self-defence caused by an isolated armed attack.¹⁵⁴

War as a measure of self-defence is legitimate in response to an armed attack short of war, only if vindicated by the critical character of the attack. There is no similarity between a minor skirmish and an artillery duel in which hundreds of cannons are thundering. It is possible to say that in certain situations quantity turns into quality. Only when it is established that the original armed attack was serious enough, is the attacked State free to launch war. Whether a war of self-defence is conducted as a counter war or in response to an isolated armed attack, once it is legitimately started, it can be fought to the finish (despite any ultimate lack of proportionality). In a report to the International Law Commission:

*It would be mistaken to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimension disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the defensive action, and not the forms, substance and strength of the action itself.*¹⁵⁵

9.2.1 State practice regarding proportionality

The principle of proportionality has been frequently mentioned in the strikes against Afghanistan, but its application presents particular problems.¹⁵⁶ For example, insofar as it refers to the proportionality of a response to a grievance, there is obvious difficulty in using the attacks of September 11 as any kind of reference point for discussing the character or scale of coalition action.¹⁵⁷ There are however many conflicts that have been struggled with the problem of proportionate counter-measures taken by the injured state.

In 1982 the United Kingdom was involved in the Falklands War, where their actions were considered to be proportionate, necessary and immediate. Although a month passed before British forces were prepared to counterattack, in view of geographic distance, Britain's response was immediate by ordering the Royal Navy to leave for the area of conflict. Most claims of self-defence arise in circumstances that are less clear out. Their contribution to the ongoing development of customary international law turns on whether they are widely accepted by other states.¹⁵⁸

¹⁵⁴ Dinstein Yoram, *War, Agression and Self-defence*, Second Edition, 1994, p. 232.

¹⁵⁵ Report of the International Law Commission, 43rd Session, p. 69 (mimeographed, 1991).

¹⁵⁶ Myint Zan, *Attacks force a rethink of international law* ; The Bankok Post; Oct 5, 2001, p. 1.

¹⁵⁷ Roberts Adam, *Apply the Law of War in an Anti-Terror War, Too*, International Herald Tribune, Paris, October 4, 2001, p. 9.

¹⁵⁸ S/Res/502 (April 3, 1981), S/Res/505 (May 26, 1982)

In 1976 Israeli commandos stormed a hijacked plane in Entebbe, Uganda, killing the Palestinian hijackers and rescuing the passengers and crew. Many of the passengers were Israeli but Israel itself had not been attacked. They had never asked for Uganda's permission of the raid.¹⁵⁹ However, most states tacitly approved of what Israel had done. The requirements of necessity and proportionality were, as a result, loosened somewhat with regard to the rescue of nationals abroad.

All these cases led to court cases and official inquiries, which concluded that certain elementary rules should have been observed. In each case, failure to observe such rules resulted in the intervention losing legitimacy and public support.¹⁶⁰

In Nicaragua Case no decision in respect of necessity, proportionality and immediacy was required *stricto sensu*.¹⁶¹ But the Court commented that the condition of necessity was not fulfilled, inasmuch as the US commenced its activities several months after the presumed armed attack had occurred and when the main danger could be eliminated in a different manner. The condition of proportionality was not met either, according to the Judgement, in view of the relative scale of the initial measures and counter-measures. It must be noted, however, that Judge Schwebel strongly disagreed with these factual findings in the dissenting opinions.¹⁶²

¹⁵⁹ Lambert Joseph, *Terrorism and hostages in international law*, 1990, 2.p.

¹⁶⁰ Roberts Adam, *Apply the Law of War in an Anti-Terror War, Too*, International Herald Tribune, Paris, October 4, 2001, p. 9.

¹⁶¹ Nicaragua Case, p. 122.

¹⁶² Nicaragua Case, pp. 362-369.

10 The notion of "terrorist attack"

10.1 The essential elements in "terrorism"

There is no consensus regarding the definition of "terrorism". In resolution 1368 the SC refers to "terrorist attacks", but did no definition or comparison of "armed attack" and "terrorist attack". Neither could the UN reach consensus regarding a definition after September 11. International law does not address acts of individual terrorists; it addresses states that are implicated in such terrorist activities.¹⁶³ The attempts by the perpetrators to justify their acts as "wars of national liberation" or classify themselves as "freedom fighters" is totally rejected by most civilized nations. Since terrorism represents the use of unrestrained psychological extra-legal force typically directed against innocent victims, it is in complete disregard of fundamental human rights, contrary to international law and floats the letter and the spirit of the UN Charter and other relevant multilateral treaties.¹⁶⁴

Terrorism is a rather new phenomenon. It was not until late 1960's that terrorism became a permanent fixture of international life and since then the acts has increased considerable. One contributing factor is the role of certain states. An increasing number of nations sponsoring terrorist operations as a form of secret or undeclared warfare that is inconvenient internationally to designate as such. Because modern weapons are so expensive, these states, ideologically inclined to fight nations they perceive as enemies.¹⁶⁵

There are however some elements in common when legally speaking "terrorism". The concept of terrorist violence or threat of violence clearly embraces criminal, unlawful, politically subversive and anarchic act, such as, piracy, hijacking of aircrafts, taking hostage and other offences of an international character. The perpetrators could be a state as long as individuals and private groups. The strategic objective is often geographic expansion of political control and the terrorist network is often state sponsored.

The intended outcome of the terrorist attack is to cause fear, extortion, radical political change and measures jeopardizing fundamental human freedoms. The targets are frequently human beings and property and often there is a special focus on heads of states, diplomats and public officials, military targets in non-combat peacekeeping roles. Through threats and actual use of violence including bombing, kidnapping, hostage taking and murder the terrorists try to spread fear among the targeted population.¹⁶⁶ The employment of violence encouraged or assisted by sovereign states to

¹⁶³ Henkins Louis, *International law: Politics and values*, 1995 Netherlands, p. 125.

¹⁶⁴ Murphy John F, *State support of international terrorism, Legal Political and Economic Dimension*, 1989, London, p. 517 f.

¹⁶⁵ Lambert Joseph., *Terrorism and hostages in international law*, 1990, p. 1.

¹⁶⁶ Murphy John F, *State support of international terrorism, Legal Political and Economic Dimension*, 1989, London, p. 514 f.

attain political objectives by acts in violation of law intended to create overwhelming fear in a target population larger than the civilian or military victim attacked.

There are a series of "terrorist" conventions that regard as criminal offences acts that jeopardize safety on board aircraft, hijacking of aircraft,¹⁶⁷ sabotage of aircraft,¹⁶⁸ and attacks against a state or "infrastructure" facilities using explosive using explosive devices.¹⁶⁹ The purpose of those conventions is to create procedures for submitting to prosecution an offender and his accomplices, as long as those who organize or direct offenders. What is needed is a terrorist convention that covers all terrorist offences, with a clear definition of what constitute a terrorist attack and who is a terrorist.¹⁷⁰

Since state sponsors of terrorists are engaged in operations without having to be held accountable for their actions, they are not usually subject to reprisals by the target state.¹⁷¹ For sure the US has been a prime target of terrorism both at home and abroad. For instance, in 1993 Middle east terrorists bombed the WTC, killing six people and injuring more than 1000 and plotted to attack NY landmarks including the UN Headquarter. In 1995 American perpetrators, with ties to citizen paramilitary militias the UK, like the US, has also been a principal target of terrorism.¹⁷²

10.2 Individual and State terrorism

Two basic types of terrorist actors may be identified, "individual" terrorism and "state" terrorism. Individual terrorists is used by groups, nationalists, separatists, liberation fighters, etc. Because of its many manifestations, it is difficult to generalize on this aspect of terrorism without sacrificing accuracy. Individual terrorism is terrorism "from below" rather than terrorism committed by organs of the state. In contrast to individual terrorism stands the concept "state" terrorism.¹⁷³ This kind of terrorism refers to acts of terror, such as torture, killings, mass arrest, etc, which are conducted by the organs of the State against its own population, whether the entire population or a minority community. While individual terrorism is usually anti-state the purpose of state terrorism is to enforce the authority and power of the state. Example of state terrorism are the activities of the Nazis, the Stalinist repression in the USSR, the rule of Pol Pot in Kampuchea in the 1970s and the treatment of the desapirados of Latin

¹⁶⁷ See here Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1979, 22 U.S.T. 1641, 10 I.L.M. 133.

¹⁶⁸ See Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177.

¹⁶⁹ See International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1988, S.TREATY DOC. NO. 106-6. 37 I.L.M.251.

¹⁷⁰ Corell Hans, interview May 4, 2002, UN Headquarter, New York.

¹⁷¹ Yonah Alexander, *State-sponsored terrorism*, Harvard International Review, Volume 7, No. 6, 1986, pp. 21-23.

¹⁷² Murphy John F., *State support of international terrorism, Legal Political and Economic Dimension*, 1989, London, p. 520.

¹⁷³ Lambert Joseph, *Terrorism and hostages in international law*, 1990, p. 15.

America.¹⁷⁴ Many developing countries maintain that state terrorism is the predominant cause of individual terrorism and should be dealt with as the first necessary step towards eliminating individual terrorism.¹⁷⁵

10.3 Self-defence as a respond to terrorism

Ian Brownlie suggested already 1963 that it is very doubtful if "armed attack" applies to the case of aid to revolutionary groups and forms of annoyance, which do not involve offensive operations by the forces of a state. Sporadic operations by armed bands would also seem to fall outside the concept of armed attack.¹⁷⁶ Today, when terrorist acts seem to be more and more common, the question arises as to whether the right of self-defence extends to military responses to terrorist acts, particularly, since most such responses will violate the territorial integrity of a state that is not itself directly responsible. Even when the state concerned is directly implicated in terrorism, acts on self-defence directly against it have received at best a mixed response.

Prior assertions that terrorist attacks constituted an "armed attack" justifying a robust exercise of self-defence have not met widespread acceptance by the global community. In 1982, Israel invoked a right of self-defence to justify an incursion deep into Lebanon for purposes of eliminating the ability of the Palestinian Liberation Organization (PLO) to conduct terrorist actions in northern Israel, but that justification met with criticism both from the SC and the GA.¹⁷⁷ In 1985 when Israeli planes bombed PLO headquarter in Tunisia as a response to PLO terrorist attacks, the SC condemned the action by a vote of fourteen to zero (the US abstained).

10.3.1 The bombing of Libya

Events involving Libya and the US in 1986 highlight some of the difficulties of developing and applying international norms to terrorist activities. Declaring that the Libyan Government was responsible for terrorist attacks in Europe, including the bombing of a nightclub in Berlin, the US responded by bombing targets in Libyan territory.¹⁷⁸ Although the GA condemned the US bombing¹⁷⁹, a UN SC resolution to that effect failed owing to the negative votes of three of the permanent members (France, the UK and the US).¹⁸⁰ President Reagan described the attack as fully consistent with Art.

¹⁷⁴ Yonah Alexander, *State-sponsored terrorism*, Harvard International Review, Volume 7, No. 6, 1986, pp. 21-23.

¹⁷⁵ Lambert Joseph, *Terrorism and hostages in international law*, 1990, p. 19.

¹⁷⁶ Brownlie Ian, *International law and the use of force by states*, 1963, p. 278-279.

¹⁷⁷ Yehuda Blum, Permanent Representative of Israel to the UN, Speech before the SC, UN SCOR, 36th Sess., Supp. 21, UN Doc. S/PV.2292 (1981). See also SC Resolution 508, S/RES/508 (1982) and GA Resolution, A/ES7/L.8 (1982).

¹⁷⁸ Byers Michael, *Unleashing force*, The World Today, London, December 2001, volume 57, p. 21 and 22.

¹⁷⁹ A/RES/573 (1985).

¹⁸⁰ Leich Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 80 A.J.I.L. 612, 1986, p. 633-36.

51 in the UN Charter, presumably because the terrorist acts constituted an armed attack justifying the bombing as a use of force in self-defence.¹⁸¹ The bombing of Libya was widely condemned and the claimed justifications widely rejected.¹⁸²

10.3.2 Assassination attempt on George Bush

In 1993, the US forced launched a missile attack on intelligence headquarter of the Iraqi secret service, declaring the attack to be in response to an Iraqi plot to assassinate ex-President George Bush while on a visit to Kuwait. The US claimed self-defence on the basis that the attack on the ex-president was tantamount to an attack on the US itself. The US did not seek authorization for its action from the SC, nor did it claim to be acting under previous resolutions. Instead, US officials claimed that the attack was a necessary and proportional response in self-defence against the attempted Iraqi attack on George Bush. It is dubious that the assassination was an armed attack and the response was hardly necessary and proportionate. A terrorist activity such as was there charged was not an armed attack on the US within the meaning of Art. 51 and the law governing permissible response to such terrorism ought not to be sought in the law of self-defence under that article.¹⁸³

10.3.3 Embassy Bombings in Africa

On August 7 1998, two bombs exploded nearly simultaneously outside the American embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. The explosion killed twelve Americans and over two hundred Kenyans and Tanzanians, and caused severe damage to the embassy buildings and other buildings around the blast sites. A suspect apprehended in Pakistan linked the attack to a fundamental Islamic terror network financed by millionaire Saudi expatriate Osama Bin Laden.¹⁸⁴ Investigations confirmed that Osama Bin Laden and his network were responsible for the bombings. In response, the Clinton administration ordered a unilateral military strike against terrorist training camps in Afghanistan and a chemical plant in the Sudan thought to manufacture components of chemical weapons for bin Laden. The strikes were explicitly calculated to defuse an imminent terrorist threat to American interests and to deter future terrorist acts. In addition to this one-strike military response, indictments issued against fifteen named conspirators (including bin Laden) and foreign governments in cooperation

¹⁸¹ President Reagan's statement also referred to the US attack as a preemptive action. However that term was apparently not being used in its ordinary meaning of anticipatory self-defence, but in a broader sense of general deterrence. Presidential Statement of 14 April 1986, in *Department of State Selected Documents* (1986), No. 20.

¹⁸² GA Res. 41/38 XII. A resolution of condemnation in the SC received nine votes, but was vetoed by the US, France and the UK.

¹⁸³ Phillips James A., *Not just Osama, but Saddam as well*, Heritage Foundation Press Room Commentary, October 18, 2001, see also www.heritage.org/press/Commentary/ed101801a.cfm.

¹⁸⁴ Johnston David, *U.S says Suspect Does Not Admit Role in Bombings or Ties to Saudi*, New York Times, Aug 18, 1998, at A7.

apprehended suspects with American officials.¹⁸⁵ A number of governments expressed concern about the fact that the territorial integrity of sovereign states was violated in an attempt to target, not the states themselves, but terrorists believed to be present there.¹⁸⁶

10.3.4 September 11 attacks

As seen this is not the first time the US respond to a terrorist attack under defence of Art 51 and the right of self-defence. The differences between September 11 attacks and the previous are the enormous extent of human lives and the causing of fear across the US. The incident temporary halt all civilian air traffic and closed the New York stock exchange for six days, which has never happened before. The destruction was as dramatic as the Japanese attack on Pearl Harbour on December 7, 1941. The death toll from the incidents was worse than Pearl Harbour, to find US deaths on the same scale in a single day requires going back to the US civil war.¹⁸⁷

A small group, who did not in any sense operate as normal military or paramilitary unit, and who were engaged in isolated incidents, committed September 11 attacks.¹⁸⁸ They apparently were armed with nothing more than "box cutters", not weapons one could normally associate with military or paramilitary units. To the extent that we must seek to equate their actions "with an actual armed attack by regular forces", these persons did not engage in an armed attack in any conventional sense. Rather, they boarded civilian aircraft in the US, hijacked the aircraft and crashed them in the US.¹⁸⁹

It is doubtful whether the government in Afghanistan directly did provide the terrorists with plane tickets, funds for flight lessons and the box cutters used to hijack the planes. Even if they did, is such support enough to constitute an armed attack?¹⁹⁰ Active, not passive support – an actual – sending of armed bands or "substantial involvements therein" is necessary to meet the armed attack requirement according to the Nicaragua ruling.

¹⁸⁵ *Responding to Terrorism*, Harvard Law Review, vol. 115:1217, 2002, p. 1221.

¹⁸⁶ S/Res/1189 (Aug 13, 1998)

¹⁸⁷ Murphy Sean D., *Terrorism and the concept of "armed attack" in Article 51 of the UN Charter*, 43 HVILJ 41, 2002, p. 47.

¹⁸⁸ Hinkins Louis, *International law: Politics and values*, 1995, p. 126. "It is difficult to make an "armed attack" out of limited, isolated terrorist attack or even a few sporadic ones. It is difficult to accept a general bombing as a "necessary" and "proportionate" response to a terrorist attack. It is difficult to justify such a response if one balances competing state values or even competing human values."

¹⁸⁹ Gaja Giorgio, *In what sense was there an armed attack?*, European Journal of International Law Discussion Forum, www.ejil.org/forum_WTC/ny-gaja.htm.

¹⁹⁰ Glennon Michael J, *The fog of law: Self-defence, inherence, and incoherence in article 51 of the UN Charter*, 25 HVJLPP 539, 2002, p. 541-543, and also Murphy Sean D., *Terrorism and the concept of "armed attack" in Article 51 of the UN Charter*, 43 HVILJ 41, 2002, p. 46-48.

The US immediately perceived the incidents as a military attack. President Bush declared a national emergency and called to active duty the reserves of the US armed forces. On September 18, the US Congress adopted a joint resolution authorising the President to use "all necessary and appropriate force against those nations, organisations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001.¹⁹¹ The US broadened the claim of self-defence to include the state of Afghanistan.¹⁹² Although it would normally still be contentious, this is less of a stretch from pre-existing international law that a claimed right to attack terrorists who simply happen to be within the territory of another state. For this reason this particularly claim, and the modification of customary law inherent within it, had a much better chance of securing the expressed or tacit support of a large number of other states.¹⁹³

The US adopted a two prolonged legal strategy. First, it has expanded its focus to include the Taliban. Giving refuge to Bin Laden and Al Qaeda and refusing to hand him over the Taliban alleged to have deliberately facilitated and endorsed his acts. Moreover, their continued presence as the de facto government of Afghanistan was viewed as a threat, in and of itself, of even more terrorism.¹⁹⁴

The US interpretation of the incidents as an armed attack was largely accepted by other nations, contrary to the previous terrorist attacks. While the two UN SC resolutions did not authorize the use of force by the US, they both affirmed, in the context of such incidents, the inherent right of individual and collective self-defence and the need "to combat by all means" the threats to international peace and security caused by terrorist acts.¹⁹⁵ Also the NATO agreed that if it could be determined that the incidents were directed from abroad it should be regarded as an action covered by Art. 5.

The Draft Articles on State Responsibility prepared by the International Law Commission strengthen SC's decision. A State¹⁹⁶ is responsible for the consequences of permitting its territory to be used to injure another State.¹⁹⁷

¹⁹¹ Murphy Sean D., *Terrorism and the concept of "armed attack" in Article 51 of the UN Charter*, 43 HVILJ 41, 2002, p. 47.

¹⁹² S/2001/946 (Oct.7, 2001).

¹⁹³ Byers Michael, *Unleashing force*, The World Today, London, December 2001, volume 57, p. 21 and 22.

¹⁹⁴ Woodward Bob, *Bin Laden said to own the Taliban: Bush is told he gave regime \$100 Million*, Washington Post, Oct. 11, 2001, at A1.

¹⁹⁵ S/Res/1368 and S/Res/ 1373.

¹⁹⁶ The US did not recognize the Taleban regime as the government of Afghanistan and had no diplomatic relations with the Taleban. The US demands and the Taleban's rejection of those demands were communicated through the government of Pakistan, see here Chandrasekaran Rajv, *Taliban Refuses to Surrender bin Laden: US Develops Options for Military Action*, Washington Post, Sept. 19, 2001, at A1.

¹⁹⁷ International Law Commission, *State Responsibility: Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading, General Principles, pt. 1, Art. 11*, UN Doc. A/CN.4/L.602/Revs.1,2 (2001).

Hereby the Taleban clearly fit that designation and thus in effect adopted Al Qaeda's conduct as its own.

In this regard, it is worth to notice that in the aftermath of the September 11 incidents, the GA condemned the heinous acts of terrorism, but neither characterized those acts as "attacks" nor recognized a right to respond in self-defence. Instead, the GA called for "international cooperation to bring to justice the perpetrators, organizers and sponsors of the incidents", a formulation that suggests that the actions were regarded more as conventional crimes than as an armed attack. Neither the SC nor the GA did characterize the acts as armed attack under Art. 51. The SC did "recognize the inherent right of self-defence", but they did not authorize force as they did in the Kuwait crisis.¹⁹⁸

¹⁹⁸ G.A. Res. 1, UN GAOR, 56th Sess., 1st plen.mtg., Agenda Item 8# 3, UN Doc, A/RES/56/1 (2001).

11 Conclusion

As already mentioned the UN Charter contains only two exceptions to the prohibition of force, namely SC enforcement actions pursuant to Chapter VII, and the right to individual and collective self-defence laid down in Art. 51. As the system of collective security has been of little practical significance, international legal practise since 1945, contrary to the intentions of the authors of the Charter, has continued to be determined by the unilateral use of force by state, which was shown after September 11. The US chose use of force and Art. 51 instead of Chapter VII. measures through the SC. The right of self-defence has therefore become the pivotal point upon which disputes concerning the lawfulness of the use of force in inter-state relations usually concentrate.

11.1 September 11 attack, terrorist attack and "armed attack"?

If the ICJ's decision in the Nicaragua case still stands, then in an analysis under Art. 51, one must consider the scale of actions that might constitute an armed attack. At the low end of the scale "use of force" are actions such as the provision of arms to the nationals of a state who are seeking to overthrow their government, so called "individual" terrorism. At the other end "armed attack" are actions such as armies crossing borders, as well as a state sending armed irregulars who "carry out acts of armed force against another state of such sufficient gravity as to amount to an actual armed attack by regular forces".¹⁹⁹ Where do the incidents of September 11 fall on this scale?

The argument for placing them on the low end of the scale might be that the hijackers were not the type of "armed bands, groups or irregulars that the ICJ in the Nicaragua Case seemed to have in mind. Rather, they were small groups or persons, who did not in any sense, operate as normal military, and who were engaged in isolated incidents. Further they apparently were armed with nothing more than "box cutters", not weapons. To the extent that we must seek to equate their actions "with an actual armed attack by regular forces", these persons did not engage in an armed attack in any conventional sense. Rather, they boarded civilian aircraft in the US, hijacked the aircraft and crashed them in the US. If the government in Afghanistan did directly provide the terrorists with plane tickets, funds for flight lessons and the box cutters used to hijack the planes, such state support would still not constitute an armed attack according to Nicaragua case. Active, not passive support – an actual – sending of armed bands or "substantial involvements" therein is necessary to meet the armed attack requirement.

In short, the argument would be that this was not an "armed attack", which is perhaps characterized as a conventional criminal act. It is worth to notice that in the aftermath of the September 11 incidents, the GA condemned the heinous acts of terrorism, but neither characterized those acts as "attacks"

¹⁹⁹ Nicaragua Case, p. 103.

nor recognized a right to respond in self-defence. Instead, the GA called for "international cooperation to bring to justice the perpetrators, organizers and sponsors of the incidents".²⁰⁰ Neither the SC nor the GA did characterize the acts as armed attack under Art. 51. The SC did "recognize the inherent right of self-defence", but they did not authorize force as they did in the Kuwait crisis.

The last argument for September 11 attacks to not constitute an "armed attack" is the obscure connections of the hijackers with the Al Qaeda, and of Al Qaeda with the unrecognised government of Taliban. As such, these incidents clearly were not taken directly by the government of one state against the US. Arguably, therefore, the acts are better viewed as conventional crimes by certain persons, not as a use of force by another state. Noteworthy is the approach of the US in fighting terrorism, refusing to distinguish between terrorism and those who harbour them, which has come to be called the "Bush doctrine". Through the military actions against Afghanistan the US outlawed that force could be used against states that only passively provide a safe harbour for terrorists and avoid substantial involvement in the terrorists' activities. Al Qaeda is not state sponsored by the government in Afghanistan, It is the other way around, Osama bin Laden sponsored the Talebans with weapons and training.

Yet there is more convincing argument that the September 11 incidents constituted an "armed attack" against the US. First, the scale of the incident was certainly a kind to that of a military attack. The destruction of famous twin towers in the heart of New York and the Pentagon were worse than Pearl Harbour, US deaths on the same scale in a single day requires going back to the US civil war. The repercussions from the incidents were severe, ranging from intense fear across the US. Second, the US immediately perceived the incidents as a military attack and the US Congress adopted a joint resolution authorising the President to use "all necessary and appropriate force against those nations, organisations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001."²⁰¹ As noted before, the US reported to the UN SC that it was the victim of armed attacks by Al-Qaeda, which were made possible by the Taleban, and that the US was responding in self-defence.²⁰² This letter was neither commented by any nations.

Third the US interpretation of the incidents as an armed attack was largely accepted by other nations. While the two UN SC resolutions did not authorize the use of force they both affirmed, in the context of such incidents, the inherent right of individual and collective self-defence and the need "to combat by all means" the threats to international peace and security caused by terrorist acts.²⁰³

²⁰⁰ G.A. Res. 1, UN GAOR, 56th Sess., 1st plen.mtg., Agenda Item 8# 3, UN Doc, A/RES/56/1 (2001).

²⁰¹ See Proclamation No. 7463, 66 Fed. Reg. 48, 199, Sept. 18, 2001.

²⁰² S/2001/946 (Oct.7, 2001).

²⁰³ S/Res/1368 and S/Res/1373.

There is no need to view the September 11 incidents as presenting a choice between being regarded either as criminal act or as a use of force amounting to an armed attack. An act of aggression and a crime against humanity can be viewed both as criminal acts entailing individual responsibilities and as violations of use of force and human right norms implicating state responsibility.

Is there any state practise supporting the view that terrorist bombings can constitute an armed attack? The closest link is to the incident 1998, after the bombings of US embassies in Kenya and Tanzania, killing nearly 300 people, the US invoked its right to self-defence and launched cruise missiles against training camps in Afghanistan and against a Sudanese pharmaceutical plant allegedly serving as chemical weapons facility. Some states condemned the attacks but neither the GA nor the SC condemned the attacks.²⁰⁴ The League of Arab States condemned the attack on Sudan, but was silent regarding the attack on Afghanistan.

The fact that the incident was not undertaken directly by a foreign government cannot be viewed as disqualifying them from constituting an armed attack. There is nothing in Art. 51 of the UN Charter that requires the exercise of self-defence to turn on whether an armed attack was committed directly by another state. Indeed, Art. 51 is silent on who or what might commit an armed attack justifying self-defence. The pre-eminent precedent regarding self-defence the Caroline incident stands not just for Webster's proposition that self-defence is only appropriate in cases of necessary, "instant, overwhelming, leaving no choice of means, and no moment of deliberation", but also for the proposition that self-defence is permissible as a reaction to attacks by non-governmental entities (in that case, support by US nationals for a rebellion in Canada. To the extent that Art. 51 preserves an inherent right of self-defence, that right prior to the adoption of the UN Charter included the right to respond to attacks from wherever they may come. Moreover, assuming that a close connection between Al Qaeda and the Taleban does exist, and given the Taleban's refusal to surrender bin Laden even in the aftermath of this incident of September 11 are imputable to the de facto government of Afghanistan. In this regard the recent provisionally adopted articles on state responsibility by the ICJ provide framework for analysis. Depending on the fact one might find the de facto government responsible because of the omission of its organs or officials in allowing Al Qaeda to operate from Afghanistan even after its known involvement in terrorist acts prior to the September 11 incidents, because the de facto government by default essentially allowed Al Qaeda to exercise governmental functions in projecting force abroad or because after the September 11 incidents the de facto government declined to extradite Al Qaeda operatives.

²⁰⁴ Murphy Sean D., *Contemporary Practice of the United States Relating to International Law*, 93 A.J.I.L 161, 1999 p. 164-165.

Every state is required to do what is necessary to prevent its territory from being used for launching terrorist attacks on another state's territory. A state's failure to take such steps, any encouragements or donation by a state of such activities in its territory, surely state sponsorship of terrorist activities against another state, are clear and serious violation of international law. When terrorist activities for which a state is responsible are of sufficient magnitude, they may constitute a use of force against territorial integrity of the target state in violation of Art. 2(4) of the Charter, and in some circumstances may amount to an armed attack.²⁰⁵ Complicated legal issues arise when terrorist activities are of unknown provenance, and especially when there is an attack of personnel of one state in the territory of another state.

11.2 Anticipatory self-defence as a response to terrorism?

It has been argued that the US may now be employing similar legal strategies in an effort to develop a right of anticipatory self-defence. When Israel destroyed the Iraqi nuclear reactor, its claim of self-defence was firmly rejected because a nuclear attack was not imminent. In fact, under current international law, even an imminent attack is unlikely to allow pre-emptive action. States have been very reluctant to claim a right of anticipatory self-defence. In short, there is little evidence for a right of anticipatory self-defence in present day customary international law.

This does not mean that this aspect of the law will remain unchanged. In his letter of October 7, Ambassador Negroponte did more than invoke the right of self-defence with regard to Afghanistan. He also wrote: *We may find that our self-defence requires further actions with respect to other organizations and other states. The US is clearly contemplating widespread military actions of a preventive character that it would justify as anticipatory self-defence.*

Negroponte's letter may be the first step in securing advanced support for an extension of the right of self-defence to encompass this previously excluded sphere. Indeed, the letter attracted little comments from other states – an omission that could, with time, be regarded as acquiescence in yet another change in customary international law.

Indeed there is a changing character of the right of self-defence, but the question whether anticipatory self-defence is now legally allowed is so far unresolved. Resolution 1373 in particular may be of enormous significance in years to come. Broadly interpreted, it could have the effect of suspending indefinitely much of the international law governing the use of force. Although the decision not to rely on Resolution 1373 indicates that the US is having second thoughts about the wisdom of what was agreed, it remains to be seen whether Russia or China, or indeed the US, will take this view once consensus on the use of force disappears.

²⁰⁵ Hinkins Louis, *International law: Politics and values*, 1995, p. 125.

The extension of the right of self-defence to include action against states actively supporting or willingly harbouring terrorists raises difficult issues of evidence and authority. Who decides that there is sufficient evidence of state complicity to justify the use of military force? Is the Art 51 requirements that self-defence measures be reported to the SC sufficient protection against incautious or opportunistic behaviour, especially given the rive of the states most able to engage in such measures have the capacity to veto any resolution directed against them? These issues become only more difficult in the context of an extension of the right of self-defence to include pre-empive actions. No terrorist attacks in the history has been defined as armed attack and thereby have not justified the use of force against a country harbouring terrorists. Why did the WTC event change this point of view? This armed attack did not take place in a conventional sense in that no armies, navies or airplanes crossed borders. The attack emerges from within the United States itself when 19 individual hijacked four planes and rammed them into the centres of American capital and military power.

The fact that NATO invoked the articles in their regional defence treaties stating that an attack against one member of the alliance is an attack against all, points out the gravity of the acts that have been perpetrated in the United States. It also shows the novelty of the development of international law.²⁰⁶ In Britain the legal advisers to Prime Minister Tony Blair suggested that the only justification under international law is if US and Britain argue that they are acting in self-defence. During the Kosovo war, there was huge debate over whether the NATO bombing of Serbia was a breach of international law. Furthermore the advisers said that the difficulties are that the Taleban did not attack the US, they are harbouring a wanted man and a terrorist organization. The question then arises whether that is enough according to Art. 51 and the right to self-defence against an attacker.²⁰⁷

On balance, viewing the September 11 incidents as constituting an armed attack is fully consistent with the animating principle of Art. 51, which was to allow states to exercise an inherent right to respond to acts that strike at a heart of a state's national security. While the notion of armed attack in 1945 no doubt was closely associated with the idea of armies crossing boarders, the Nicaragua case recognized in the 1980s that an armed attack could arise in other ways, such as the sending of armed groups into a state. Today, our appreciation of these non-traditional means of engaging in an armed attack must also comprehend the pernicious methods of terrorist organizations. However, the standards embodied in the Nicaragua Case's scale remain obscure and will need to develop throught state practise and judicial review.

²⁰⁶ Myint Zan, *Attacks force a rethink of international law* ; The Bangkok Post; Oct 5, 2001, p. 2.

²⁰⁷ MacAskill Ewen, *On the brink of the war: Law: Legal warning on assault aims: No 10 told to cite self-defence*, The Guardian, Manchester (UK); Oct. 4, 2001 p. 8.

11.3 Has SC taken necessary measures according to Art. 51 ?

Through resolution 1368 the SC invoked mandatory measures under Chapter VII. The resolution specifically reaffirmed the inherent right of individual and collective self-defence as recognized by the Charter of the United Nations.²⁰⁸ That the SC, in invoking collective measures, should ensure that these not be construed as rescinding the inherent right of self-defence is hardly surprising, since these new measures mandated on September 28, useful as they might be, clearly were not intended by themselves to deal decisively with the threat to international peace and security posed by Al Qaeda and its Taliban defenders. Why did the US not use the resolution to defend its use of force against Afghanistan?

The fact that China and Russia could also invoke the authorisation of the use of force in the resolution probably explains why the US did not use it. The US may have doubts about establishing a precedent by relying on a resolution that could strengthen the argument in favour of subsequent action by other states. It is a *reductio ad absurdum* of the Charter to construe it to require an attacked state automatically to cease taking whatever armed measures are lawfully available to it whenever the SC passes a resolution invoking economic and legal steps in support of those measures.

Even if there is a changing view in international law and through SC resolution and the consent of the international community the right to self-defence is only temporary, until the SC takes measures, which they did through Resolution 1373 where suspected terrorists assets were barred. After SC has taken measures the state has no inherent right of self-defence. The question then arise whether SC Resolution 1373 did enough to constitute "necessary measures to maintain international security" according to Art. 51? The answer needs to be negative. To freeze financial assets could hardly be enough to maintain international security.

It is impossible to use the principle of proportionality in a situation like September 11. The question will never arise whether US has violated the principle of proportionality. US used military countermeasures against a state that harbour terrorists. Is that illegal? Since the US got the international community's support for its action one must consider the action legal. Without no doubt the US acted as immediate as possible. One month must be consider a reasonable time and an action needed to be done since the world community feared another terrorist attack. The event of September 11 have set in motion a significant loosening of the legal constraints on the use of force. Only time will tell whether these changes to international law are themselves a necessary and proportionate response to the shifting threats of an all too dangerous world. International law seems to have developed to dramatically has changed. states that support terror groups may now themselves be legally attacked.

²⁰⁸ S/Res/1373.

As a result of the legal strategies adopted by the US, coupled with heightened concern about terrorism world-wide, the right of self-defence now includes military responses against states which actively support or willingly harbour terrorist groups who have already attacked the responding state. And in accordance with a longstanding consensus, self-defence can be either individual or collective, enabling states that have been attacked by terrorists to call on other states to participate. When evidence of state sponsored terrorism is clear and strong, there are difficult legal issues as to permissible response.

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