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- A Study of the Use of Military Force  
against the Contemporary Terror  
Threat

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# Abstract

The “war on terror” is very much a topic of the day. The main threat against the western society is said to no longer be armies controlled by belligerent states but non state actors, which by means of new technology have the potential of launching large scale attacks equivalent to attacks carried out by states.

This thesis examines the means available in the military fight against terrorism and their respective suitability for the task. The traditional regulation of the use of force as stated by the UN Charter severely restricts a state’s right to use force on the territory of another absent an armed attack attributable to the latter. In this regard “the war on terror” challenges the traditional state centred international order. A major challenge to international law is how to respond to new situations, the success of which might depend on the degree of innovativeness employed by the subjects of international law. Here the US answer to international terrorism, the so called Bush Doctrine represents a very innovative line of reasoning.

In this thesis an attempt is made to highlight the interconnections between different parts of the international order for the purpose of illuminating the importance of seeing the larger picture when it comes to understanding relevant legal provision, but also when deciding how to best respond to new challenges. Conclusions drawn are - even if terrorism ultimately is a political and social phenomenon military means can be a useful and necessary tool in the fight against it. It is however important to keep in mind that while the international system provides for military force to be used against non-state actors, it does not do so unrestrictedly. Further, armed measures are not in themselves sufficient and to be truly effective the fight against terrorism must also address its root causes - as it in the long run seems to be an impossible mission, and an unsuitable solution, to eliminate all potential terrorists with military force. Further, the exercise of armed force abides by the principle of proportionality and necessity and must be weighed against other principles and values of the international order as to make sure that the use of force “fits into” the larger legal picture. One of the most crucial issues is which of collective action and unilateral action that are best suited to address the terror threat. In the opinion of the author the collective security system is superior as it represents a more democratic model and provides for a parcel of measures to be undertaken which potentially can answer to the different aspects of terrorism.

This thesis does not offer a final conclusive solution as to how one best deals with international terrorism, but hopefully I have managed to shed some light on the body of international law which governs the war on terror and to describe some of the problems involved, and also indicated which solution that ought to be the most beneficial for the international community, or perhaps the least prejudicial for the same.

# 1 Introduction

The introductory part of this thesis starts of with a presentation of the subject. Thereafter the purpose and the limitations made will be outlined followed by a presentation of the sources used. Finally, an attempt is made to highlight some of the problems posited to the role of international law in times of change.

## 1.1 Presentation of the Subject

There are some dates which forever engrave themselves in the memory of mankind and the 11th September of 2001 is destined to join that “selected” group.<sup>1</sup> This was the day when a monument of western civilisation was destroyed by alien commandos, using private jets as guided missiles against symbolic US targets.<sup>2</sup> A barrier was torn down as the world faced a trans-national terrorist attack of never before seen magnitude against the world’s most powerful state - however, the incident also drew attention to an existing barrier between the western civilisation and influential groups in the Muslim community and the third world.

Terrorism is not a novelty and armed terrorist-like organisations have been around for a long time, and are likely to be so for as long as there are groups who *objectively are* being treated unfairly or are being exploited, or *subjectively feel* that they have been so. Hence it is not surprising that terrorism also today, more than five years after the 9/11 incident, is a topic of the day. On the 10th of August 2006 the British police claimed to have averted a large scale terrorist plan, aimed at the hijacking and destruction of several passenger jets bound for the United States from London airport Heathrow. A scheme that undetected could have become a new 9/11. A spokesman for the Scotland Yard commented the incident in the following words - “We are confident that we have disrupted a plan by terrorists to cause untold death and destruction and to commit, quite frankly, mass murder”.<sup>3</sup> Further, in the summer of 2006 Israel embarked upon a military

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<sup>1</sup> See Bring, *En rätt till väpnat självförsvar mot internationell terrorism?*, published in Kungl. Krigsvetenskapsakademins handlingar och Tidskrift 6, Häftet 2001, annex to Bring, FN-Stadgan och världspolitiken, Om folkrättens roll i en föränderlig värld, (2002).

<sup>2</sup> On the 11 September 2001 four commercial passenger jets were hijacked by private suicide commandos with the intention of using them as weapons against representative US targets. Two jets were steered into the Twin Tower of the World Trade Center, resulting in the total collapse of the towers and the death of almost 3000 individuals. A third one was crashed into the Pentagon headquarters near Washington DC, and the fourth, which failed in reaching its goal, toppled down into Pennsylvanian soil. For information about the incidents see BBC’s webpage at: <http://news.bbc.co.uk/2/hi/science/nature/4904188.stm>, see also CNN’s webpage at: <http://www.cnn.com/SPECIALS/2001/trade.center/victims/main.html>, both of which contain many useful links (both last visited 17 august 2006). See also:

[http://en.wikipedia.org/wiki/September\\_11,\\_2001\\_attacks](http://en.wikipedia.org/wiki/September_11,_2001_attacks) (last visited 17 August 2006)

<sup>3</sup> For information see BBC homepage at [http://news.bbc.co.uk/2/hi/uk\\_news/4778575.stm](http://news.bbc.co.uk/2/hi/uk_news/4778575.stm) (last visited 15 August 2006).

fight against the Hezbollah on Lebanese soil.<sup>4</sup> A situation which left the people of Lebanon, and in many ways the Lebanon Government, stuck in between. In the opinion of the author this situation is comparable to the intervention in Afghanistan - as a common denominator of conclusive importance in both situations was the believed existence of a threat against the intervening state, and further, while neither the Afghanistan *de facto* government nor the Lebanese government have been proven directly complicit in specific terrorist acts both had connections to the responsible terror organisation, which also posited great influence over respective state.<sup>5</sup> Then of course there is the seemingly hopeless situation in Iraq, and lately the intervention in Somalia where the US action is part of the war against terrorism.

The 9/11 attacks were not the first terrorist strikes against the United States. The World Trade Center had once before been attacked in 1993, in 1998 the US embassies in Kenya and Tanzania were targeted and in 2000 the USS Cole in Yemen was attacked.<sup>6</sup> Even so the 9/11 attack and its aftermath has been said to represent a new paradigm in the international law relating to the use of force. While previous attacks were labelled criminal acts carried out by private entities, the 9/11 attacks have been proclaimed to be acts of war. According to Brown what we have here is a new “hybrid” of crime and war, which has “shattered” the traditional paradigm according to which international law relating to force, aggression, and armed attacks, are reserved for the relationship between states.<sup>7</sup> However, it is a matter of controversy whether the law actually has changed, and if so what it has become.<sup>8</sup>

It has yet not been possible to achieve consensus between states as to the best tactic to fight terrorism, a problematic situation which is reflected in the work of the United Nations. Within the UN body, according to Luck, the international civil servants seem to wish that international terrorism simply would go away or that someone else would take care of it. Although

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<sup>4</sup> For the US list of terrorist organisations see <http://www.state.gov/s/ct/rls/fs/37191.htm> (last visited 16 August 2006). For US background sheet on terrorist groups see <http://www.state.gov/s/ct/rls/rpt/fto/2801.htm> (last visited 16 August 2006). The European Union has up to this date not put Hezbollah on its list of terrorist organisations despite US pressure. For information see <http://www.alertnet.org/thenews/newsdesk/BRU004839.htm> (last visited 16 August 2006). The EU’s terrorist list available at <http://www.statewatch.org/news/2005/mar/terr-list2.pdf> (last visited 16 August 2006). See also EU webpage at <http://europa.eu/scadplus/leg/en/lvb/l33208.htm> (last visited 16 August 2006).

<sup>5</sup> The Hezbollah has a strong influence in Lebanon. The great influence of Hezbollah in the southern part of Lebanon has led to that it is commonly referred to as “a state in the state”. Regarding the Al-Qaeda position in Afghanistan it has been said to be so strong that in fact the Al-Qaeda was not a private organisation supported the Taliban regime but the very opposite, a private organisation upholding the Taliban regime. The criteria for state attribution is found in ILC’s Draft on State Attribution. See also the judgement of the ICJ in the case of *Nicaragua v. the United States*.

<sup>6</sup> Members of the Al-Qaeda network are believed to have been involved in all these cases.

<sup>7</sup> Brown, p. 2.

<sup>8</sup> See articles of Quénivet and Krisch.

attempts were made in the world body to ratchet up both its normative and operational opposition to terrorism in the 1990s and again after 9/11 there is no effective operation scheme.<sup>9</sup>

According to the traditional state-centred model of international law only states can violate the prohibition on the use of force or engage in aggression. This model might be ill-equipped to deal with the reality of today however, given the capacity and structure of contemporary terrorist networks, as these in many instances are as powerful and capable of launching large scale attacks as states. Another important factor in relation to terrorists is that they do not abide by the “law” of mutual deterrence. A state may hesitate to use force against another as in doing so it risks contra-attacks against its territory, economic interests or population, factors which do not normally apply to terrorist organisations. Since the 1990’s the US has been talking about so called “rouge states”, which are argued to be states which harbour and/or sponsor terrorism around the globe, display no regard for international law, rejects human rights and are willing to gamble with the lives of their own people.<sup>10</sup> Hence it is not surprising that following the attacks of 9/11 President Bush proclaimed that America “would make no distinction between the terrorists who committed these acts and those who harbour them”,<sup>11</sup> a statement which against the backdrop of international law at its best can be described as “innovative”.

It seems that of the conventional grounds of justification discussed in relation to the military intervention in Afghanistan, self-defence is the most probable one, and as evident from official statements made by the Permanent Representatives of the United States and the United Kingdom this is the ground most relied upon by the intervening states.<sup>12</sup> A choice that might be explained by the fact that, as Stahn quite simply has put it: there were no other justifications at hand.<sup>13</sup> Even so it is far from obvious if there

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<sup>9</sup> Luck, p. 95

<sup>10</sup> The National Security Strategy of the United States of America, available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited 3 November 2006).

<sup>11</sup> President Bush’s Remarks, Wash Post A2 (Sept 12, 2001). Similar remarks have been made also by the American vice President Cheney. Louise Fenner, Cheney: Terrorists, Those Who Harbour Them, Face “Full Wrath” of U.S., interview on NBC’s Meet the Press (Sept 16 2001) available online at <http://usinfo.state.gov/topical/pol/terror/01091610.htm>. This information was obtained from Travaglio and Altenburg, p. 101.

<sup>12</sup> See UN Doc.S/2001/1946 of October 7, 2001: “[I]n accordance with the inherent right of individual and collective self-defence, the United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Quaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.” See also UN Doc. S/2001/947 of October 7, 2001: “These forces have now been employed in the exercise of the inherent right of individual and collective self-defence, recognized in Art. 51, following the outrage of 11 September, to avert the continuing threat of attacks from the same source. My Government presented information to the United Kingdom Parliament on 4 October which showed that Usama bin Laden and his Al-Quaeda terrorist organisation have the capability to execute major attacks, claimed credit for past attacks on United States targets, and have been engaged in a concerted campaign against the United States and its allies. One of the stated aims is the murder of United States citizens and attacks on the allies of the United States.”

<sup>13</sup> Stahn, p. 211

really was a right to self-defence in relation to Afghanistan, at least one generous enough as to embrace the US action.

However, self-defence is not the only basis of justification which has been discussed in relation to Afghanistan. It has been argued that the action undertaken was justified as humanitarian intervention, a concept that in itself is subject to much controversy and which definitely, if it exists, requires the motives to be humanitarian considerations. Reference has also been made to the existence of a “state of necessity”,<sup>14</sup> which constitutes “a ground for precluding the wrongfulness” under article 25 of the International Law Commission’s Draft Articles on State Responsibility.<sup>15</sup> However, as Stahn rightly observes, this argument cannot justify the use of armed force, like the US operation in Afghanistan, as article 26 of the ILC’s Draft excludes violations of norms of a peremptory character from possible justification or excuse.<sup>16</sup>

In the opinion of the author, one could almost get the impression that not even the supporters of the military action embarked upon in Afghanistan are capable of singling out one clear legal ground of justification. They seem to rely on several different factors, which do not by themselves suffice to establish a legal justification, but which taken together makes it seem reasonable that Afghanistan is the bad guy, the US is the good one, and hence the latter has the right to intervene militarily in the former. States worldwide and the UN Security Council agreed that something had to be done and that peaceful means did not suffer - the US was clearly a victim and had to be allowed to strike back. Thus the question of if and to what extent Afghanistan had been complicit in the attack was reduced to a subsidiary nature. A line of reasoning which seems to be more about what is deemed just and less about what is actually in accordance with international law.

The aim of the author is to paint an impartial picture. Unfortunately many writers on the subject seem to lack even an ambition to rise above impartiality. This is particularly true regarding writers pro-military intervention, and also for the American Governmental administration. The best explanation for this is perhaps that their argumentation challenges the existing system and as such must be more convincing and therefore cannot harbour “weaknesses” or question marks. As an illustration I will quote a statement made by the American President George W. Bush addressed to

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<sup>14</sup> Stahn, p. 212 who refers to Ulrich Fastenrath, *Ein Verteidigungskrieg läßt sich nicht vorab begrenzen*, *Frankfurter gemeine Zeitung*, 11 November 2001, 8, justifying U.S led strikes against Afghanistan on the basis of a state of necessity.

<sup>15</sup> See article 25 of the Drafts Articles on State responsibility (2001), Report of the ILC on the work of its 53<sup>rd</sup> Session (23 April – 1 June and 2 June – 10 August 2001), UN Doc. A/56/10, available at: [http://www.un.org/law/ilc/texts/State\\_responsibility/responsibility\\_articles\(e\).pdf#pagemod e=book-works](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf#pagemod e=book-works).

<sup>16</sup> Article 26 of the ILC Draft reads: “Nothing in this Chapter precludes the wrongfulness of any act of a state which is not in conformity with an obligation arising under a peremptory norm of general international law”.



the American Congress following the events of 9/11 that - “Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated. Americans are asking, why do they hate us? They hate what we see right here in this chamber ...a democratically elected government. Their leaders are self-appointed. They hate our freedoms ...our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other”.<sup>17</sup> Essentially there seem to be a lack of distinction between the law as it is, *lex lata*, and the law as the American governmental administration wishes it to be, *lex ferenda*. (A lack of impartiality is of course also a characteristic of terrorist leaders, but these do not publish their opinions in recognised legal journals or in speeches made in respectable inter-state forums, and more importantly, they are regarded as fundamentalists why potential consumers of their ideas, at least in the western world, are on their guard.)

## 1.2 Purpose and Limitations

The legal foundation for the war against terrorism is far from solid - which is prejudicial for the international order. The constant risk of new terror acts, demanding reactions, underlines the urgency of the matter.

International terrorism generates many questions of legal as well as political character, and is also interesting from an ethical and moral perspective. Ultimately terrorism is a political and social phenomenon why a long term solution ought to require also political and social measures, addressing the root causes. However, this does not mean that terrorism cannot or should not be discussed from a legal standpoint or that armed force against it is inherently unsuitable. The intention of the author is to examine the possible ways that international terrorism can be fought within the existing international legal system. The alternatives are:

1. the action undertaken does not infringe the prohibition on the use of force as stated in article 2.4 of the UN Charter,
2. the action undertaken qualifies as self-defence under article 51 of the UN Charter, and
3. the action undertaken has been authorized by the UN Security Council in accordance with Chapter 7 of the UN Charter.

The ambition is to take a closer look at the substantive law governing respective alternative and to examine their respective suitability as a means to fight terrorism. Finally, the thesis will examine the Bush Doctrine - the US answer to international terrorism. The question is how to define and comprehend the Doctrine. It is far from crystal clear whether it should be

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<sup>17</sup>“Address to a Joint Session of Congress and the American People”, a speech delivered by George W. Bush to the United States Congress, 20 September 2001. Transcript by White House Office of the Press Secretary. Available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited 14 August 2006)

seen as a potential fourth alternative to be added to the list outlined above or if it is something else - possibly an “extra-judicial” option operating outside the framework of international law and instead resting on moral grounds.

I have chosen to include my thoughts, and the conclusions I have drawn in all parts of the thesis.

Before moving on I wish to make one last comment about the limitations made. If one finds the contemporary system to be inadequate and incapable of dealing with the reality of today a natural next step is to ask what international law properly ought to be. However, time and space limitations do not allow an examination of both and when choosing between an examination *de lege lata* or *de lege ferenda*, the choice falls on the former. A decision based on the well known maxim that constructive criticism requires a good knowledge of the contemporary system.

## 1.3 International Law

This section contains a run-through of the sources used in this thesis followed by a short description of the challenge that contemporary terrorism posits to the international system.

### 1.3.1 The Sources

The Charter of the United Nations holds the framework of rules governing the international community. Its provisions are drafted in a broad enough way to allow different interpretations why one might need to engage in treaty interpretation. A suitable approach is offered by the teleological school of thought which adopts a wider perspective than other schools of interpretation, and according to which a treaty provision should be interpreted against the backdrop of the treaty’s object and purpose.<sup>18</sup>

The Charter provisions relating to the use of force and self-defence is also part of customary international law and hence binding also for non-UN members. While this may be important in theory, as it shows the widespread acceptance of the provisions, it essentially lacks practical importance given the vast amount of states party to the UN Charter.<sup>19</sup>

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<sup>18</sup> Shaw, p. 839

<sup>19</sup> 192 states are currently members of the United Nations. A list is found at UN webpage at: <http://www.un.org/Overview/unmember.html> (last visited 17 August 2006). However, see the decision of the International Court of Justice in *Nicaragua v. the United States* where the US argued that the UN Charter was not applicable in the court process by means of a regional treaty provision. A line of argumentation which was accepted by the Court which based its decision on international customary law, notwithstanding the fact that both parties to the dispute were members of the United Nations. However, the fact that the ICJ agreed that it was restricted from basing its judgement upon the UN Charter did not mean that the parties were not legally obliged to follow the Charter provisions, it simply meant that the Court could not make a finding based upon its provisions.

Other relevant UN documents are resolutions adopted by the UN General Assembly and the Security Council. In contrary to the latter the former are not in themselves binding, but their substance are when their content reflect customary international law.<sup>20</sup>

Another source is made out of the decisions of the International Court of Justice. While according to article 59 of the Statute of the Court the decisions of the Court have no binding force except as between the parties and in respect of the case under consideration, the Court is known to follow its previous rulings and in this manner insert a measure of certainty into the process. Further, states in dispute and legal writers commonly refer to judgements of the International Court of Justice, and its precedent the Permanent Court of Justice, as authoritative decisions.<sup>21</sup>

A last source to be mentioned is the work of legal writers. Article 38 of the Statute of the International Court of Justice includes “the teachings of the most highly qualified publicists of various nations” as a subsidiary means for the determination of rules of law. According to Shaw the general influence of textbooks writers has somewhat declined and today “textbooks are used as a method of discovering what the law is on any particular point rather than as the fount or source of actual rules”.<sup>22</sup> It is mainly in this capacity that the work of writers is employed in this thesis. However, the line between what the law is and what the law ought to be according to the individual writer becomes increasingly fine in relation to areas where the content of the legal regulation is disputed.

### 1.3.2 Some Further Remarks on Customary Law

Customary law is created through the occurrence of state practice and *opinio juris*, whereof the latter according to Shaw best can be described as “a process whereby states behave in a certain way in the belief that such behaviour is law or is becoming law”. The ICJ has described the formation of a customary rule in the following way:

For a new customary rule to be formed, not only must the acts concerned “amount to a settled practice”, but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is “evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*”.<sup>23</sup>

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<sup>20</sup> See Article 25 of the UN Charter

<sup>21</sup> Shaw, p. 103

<sup>22</sup> Shaw, p. 106

<sup>23</sup> This quotation is taken from the case of *Nicaragua v. The United States* (ICJ Reports 1986, pp. 108-9; 76 ILR, pp. 442-3) were the Court referred to its own judgment in the *North Sea Continental Shelf* cases (ICJ Reports, 1969, p. 44; 41 ILR, p. 73).

*Jus cogens* rules are customary peremptory rules, which in excess to the previously mentioned prerequisites also require a second *opinio juris* that the rule is mandatory. The Vienna Convention on the Law of Treaties describes a peremptory norm of general international law to be “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.<sup>24</sup> Hence, no derogation is allowed, and treaty provisions which are in contradiction of a peremptory norm are declared void.<sup>25</sup> One example of a *jus cogens* rule is the prohibition on the use of force taken together with its exception, the right to self-defence.

### 1.3.3 The Challenges

The rise in power of terrorist networks challenges international law, as it creates situations which were hardly conceivable at the time of the creation of the UN Charter. As stated by Shaw “[t]he rise of international terrorism has posited new challenges to the system as states and international organisations struggle to deal with this phenomenon while retaining respect for the sovereignty of states and for human rights”.<sup>26</sup>

The law of any society, on a national or international level, must to function properly reflect the norms and values held by the individuals making up the society and must to survive avoid becoming detached from reality.<sup>27</sup> Shaw argues that one of the biggest challenges of international law is “how to incorporate new standards of behaviour and new realities of life into the already existing framework, so that, on the one hand, the law remains relevant and, on the other, the system itself is not to vigorously disrupted”.<sup>28</sup>

In one way international law can be said to safeguard the *status quo* of the international community as it protects already existing states and their territories - an order in which some states are more influential and powerful than others. International law can be said to confront dominant states with a “dilemma”, as it on the one hand offers these states a “perfect tool” for the stabilization of their dominance and on the other places restrictions on their powers, which are not allowed to be used freely.<sup>29</sup>

State sovereignty implies that all states are equal before the law, in the sense that their actions should be judged according to the same standards as other

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<sup>24</sup> Article 53 of the Vienna Convention on the Law of Treaties reads: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

<sup>25</sup> Ibid.

<sup>26</sup> Shaw, p. 42

<sup>27</sup> Shaw, p. 42

<sup>28</sup> Shaw, p. 42

<sup>29</sup> Krisch, p. 378

states' actions.<sup>30</sup> However, the political strength, influence, and also raw power of some states can render the legal debate a bit detached from reality. Actions and statements by states as to rights and obligations are not necessarily meant to apply equally to all. These statements are more about what is just and morally acceptable in a specific situation, or beneficial for the own state, than about the content of the law in general. State practice and proclamations are only interesting from a legal standpoint if they are intended to have *legal* repercussions, this is the way in which international customary law can be separated from mere custom that are actions performed out of courtesy or as an act of friendship. There are those who harbour the opinion that the motives of a statement is irrelevant and that it is the objective occurrence of a statement which is important, not the reasons for it. Indeed this is an appealing alternative in as much as it avoids the troublesome task of identifying the subjective motives of a state. However, this line of reasoning, in the opinion of the author, diminishes international law as without the requirement of an *opinio juris* international law could be formed not through well-reasoned choices but by actions motivated by a spur of a moment or the abuse of power.

### 1.3.4 The Impact of 9/11

Even if the 9/11 generated a flood of statements supporting a right of military intervention in Afghanistan the author finds it hard to believe that states would be prepared to accept a general right of intervention as wide and permissive. The thoughts of the author on this subject can best be described by the words of Cassese, which were stated in relation to the discussion about the existence or non-existence of a right of anticipatory self-defence, but which in the opinion of the author expresses a line of thought which can be used to describe the retreat to force as between states also in relation to other situations

it is more judicious to consider such action as *legally prohibited*, while admittedly knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds and the community will eventually condone them or mete out lenient condemnation (emphasis in original).<sup>31</sup>

As already explained the prohibition on the use of force (together with the right to self-defence) has the character of *jus cogens*. The reformation of such a rule requires a double *opinio juris* why against the backcloth of what has been stated above it is rather safe to argue that the law has not changed.

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<sup>30</sup> Bring, p. 41

<sup>31</sup> Cassese, pp. 310-311

## 2 Relevant Concepts

This section contains a short survey of concepts important for the overall understanding of this thesis.

### 2.1 State Sovereignty, Territorial Integrity, and Internal Affairs

Sovereignty implies that a state is supreme internally, which includes a freedom of choice of political system and supremacy over its own territory, whereof the latter could be said to be at the very core of domestic jurisdiction.<sup>32</sup>

Like any prohibition the prohibition on the use of force derives its meaning from the values that it is intended to safeguard, which in this case is the protection of already existing states and their territories. As argued by Bring, the most central norm of the UN Charter is the prohibition on the use of war as a means of changing the *status quo*.<sup>33</sup> This has not always been so, however, not even a century ago a legal writer proclaimed the right to start a war as “a right inherent in sovereignty itself”.<sup>34</sup>

According to Bring, sovereignty is commonly said to imply that a state both formally and legally “is neither superior nor inferior vis-à-vis another state”.<sup>35</sup> While this sounds noble it also seems a bit unrealistic. A factor that plays a significant role in reality is the veto power belonging to each of the five permanent members of the UN Security Council.<sup>36</sup> Further, the International Monetary Fund (IMF) and World Bank institutions reflect the different economic powers of participating states, and the Non-proliferation of Nuclear Weapons regime (NPT) allowed only the five permanent members of the UN Security Council to maintain their arsenals of nuclear weapons. In relation to military intervention Benvenisti writes that “the international recognition of the spheres of influence belonging to the US (“the Monroe Doctrine”) and the USSR (“the Brezhnev Doctrine”) respectively were reflected in the relative toleration in the respective military interventions in Central and South America and in Central and Eastern Europe.”<sup>37</sup> Hence, some states are superior to others even in the United Nations systems and in other international bodies, and are so also in theory. In a way the superiority of the more powerful can be said to be built in and preserved by the organisations’ charters.

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<sup>32</sup> Shaw, p. 574

<sup>33</sup> Bring, p. 68

<sup>34</sup> See Bring p. 68 who refers to Amos, S. Hershey, *The Essentials of International Public Law*, New York 1912 and 1918, p. 349.

<sup>35</sup> Bring, p. 40 referring to G J H van Hoof, *Rethinking the Sources of International Law*, Deventer 1983, p. 63.

<sup>36</sup> See article 27.3 of the UN Charter.

<sup>37</sup> Benvenisti, p 694

## 2.2 The Non-Existence of a Definition on International Terrorism

A number of effective conventions deal with different forms of terrorism. Each contains a definition of the specific terrorist acts which come within the ambit of the specific convention - a not completely satisfactory situation which has arisen as a result of the tendency to design each convention on terrorism as a reaction to the latest terrorist deed, making it difficult for a "stable definition" to take form.<sup>38</sup> As a result we are left with a shattered picture, where different bits of terrorism are regulated separately, but where a *general* definition on the international level is lacking. In fact, a single definition cannot be found either in conventional international law or customary law.<sup>39</sup>

The focus of this thesis is set upon terrorist acts as potential armed attacks and threats to or breaches of international peace and security. It is terrorism in its capacity of large scale attacks *equivalent to attacks carried out by states* that is of interest why the absence of a universal definition of the crime of terrorism is not necessarily an obstacle.

### 2.2.1 State terrorism

A distinction is commonly made between terrorism carried out by private entities and "state terrorism", notwithstanding that the latter is not recognised in international law.<sup>40</sup> As this thesis deals with international terrorism performed by *non-state entities* it is not necessary to here dig deep into the issue, however, some short remarks on the subject will be made. Terrorist-like actions performed by states do not, unlike private terrorist actions, "suffer" from the notion that the international legal order is based on a state-centred model. If a state carries out an attack of a sufficient magnitude against another it has violated the prohibition on the use of force, irrespectively of the purpose or object. Quéniwet summarizes the thoughts of legal writers as "on the one hand, they point to the necessity of agreeing on

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<sup>38</sup> Quéniwet, p. 563

<sup>39</sup> Malzahn, p. 88. However, progress has recently been made as The World Summit in New York in September 2005 was marked by a momentous event in the history of the United Nations counter-terrorism effort as world leaders unequivocally condemned terrorism "in all its forms and manifestations, committed by whomever, wherever and for whatever purposes" and described it as "one of the most serious threats to international peace and security." Further, the participating states resolved to conclude work on the draft comprehensive convention on international terrorism, including a legal definition of terrorist acts, during the sixtieth session of the General Assembly. An achievement which would mark the culmination of many years of negotiation and debate on various proposals, including those contained in former Secretary-General Kofi Annan's report, "In Larger Freedom." This information is taken from the UN webpage at:

<http://www.un.org/sc/ctc/unaction.shtml>. Excerpts from the report on the 2005 World Summit Outcome is available at: [http://www.un.org/terrorism/summit\\_outcome.htm](http://www.un.org/terrorism/summit_outcome.htm).

<sup>40</sup> Quéniwet, p. 565

a definition of state terrorism and, on the other, they assert that all acts that could be considered as state terrorism are proscribed anyhow”.<sup>41</sup>

## 2.3 Non-State Actors

When we talk about a paradigm shift perhaps what we are talking about is the gained strength of private entities and their capabilities comparable to those of states - and how to react and respond to this.

The role of terrorist organisations in international law, their obligations and possibly also rights, depends on whether they are classified as subjects of international law enjoying legal personality. Even if the last decades have seen a relaxation of the traditional exclusive focus of international law on inter-state relations the situations in which individuals encounter direct responsibility are still limited. Taking account of the reality of today this could be problematic as the international legal system fails in adequately addressing the fact that private actors are in many instances as powerful, influential and importantly as capable of causing trans-border major harm as many states. The strength of contemporary terror networks combined with their other traits such as the non-existence of a territory to defend and their mobility has been described as involving a “strategic advantage”, as the traditional view would allow a terrorist group to launch an attack and retreat to another state’s territory, where the attacked state cannot “touch” it unless responsibility for the attack in some way could be attributed to the “host” state, which of course is an unsatisfactory solution for a victim state.

In relation to liberation movements Bring argues that if such an organisation was to achieve a statute and an organisation which enabled it to function as an actor on the international level, with relationships to states and other international organisations, it will *de facto*, and possibly also *de jure*, be regarded as a subject of international law.<sup>42</sup> As a consequence of the recognition as a legal subject the organisation ought to have an obligation to respect at least the most fundamental principles that governs the relations between states, such as the prohibition on the use of force.<sup>43</sup> It is plausible to apply a kindred line of reasoning to major terrorist organisations. These organisations have the power and logistics to act *de facto* as a state in relation to the use of force why it seems reasonable to argue that they also *de jure* can be regarded as subjects of international law in relation to the prohibition on the use of force. The US seems reluctant however to speak in terms of terrorists as subjects of international law, one plausible explanation being that recognising duties of non-state actors would imply that they had also rights, why the discussion is dodged in favour of morally based argumentation.

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<sup>41</sup> Quénivet, p. 565

<sup>42</sup> One plausible example is the PLO which has won international recognition and has observer status in the United Nations.

<sup>43</sup> Bring, p. 198



# 3 The Prohibition on the Use of Force

This section deals with the question whether a state which undertakes trans-border military action in some way can avoid being caught by the prohibition.

## 3.1 The Prohibition

The prohibition is found in article 2.4 of the UN Charter under the “Purposes and Principles of the United Nations” and is also part of customary law, it reads

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

The reference to the “use of force” is important as it implies that not only situations which satisfy the technical requirements of a state of war come within the ambit of the prohibition.<sup>44</sup> The “war on terror” is not a war in the traditional meaning of the word but could perhaps be described as a new kind of “war”.

The article can be read in two ways - the prohibition is only concerned with the objective occurrence of an act of force why the purpose and object are irrelevant, or, there are two prerequisites making up the prohibition requiring an act of force which must be directed against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. This section is divided in subsections whereof the first deals exclusively with the concept of “force” and “armed force”, leaving aside the potential importance of the purpose or object. The following subsection deals with the phrase “against the territorial integrity or political independence of any state”.

## 3.2 “Force”

Do all actions involving military facilities such as arms, tanks, military planes or ships qualify as force under article 2.4 of the UN Charter? Interstate coercive action can be placed on a scale of gravity. “Aggression” shares the top ranking with the concept of “armed attack”, as the Definition of Aggression proclaims aggression to be “the most serious and dangerous form of the illegal use of force” and the International Court of Justice in its judgement in the case of *Nicaragua v. the United States* could be said to

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<sup>44</sup> Shaw, p. 1018.

largely have equated the definition of aggression with the concept of “armed attack” within the meaning of article 51 of the UN Charter.<sup>45</sup> It is commonly agreed that all acts that are in breach of the prohibition on the use of force do not *per se* trigger a right to self-defence as stated in article 51 of the UN Charter. The “bar” is considered to be placed higher in relation to the latter – why all acts qualifying as aggression by necessity also qualify as the “lesser” concept of “armed force”. Guidance as to what actions that constitutes aggression is offered by article 3 which contains an, according to the following article 4, non-exhaustive list of actions constituting aggression.

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Against the backcloth of article 3 and the variety of situations enumerated and taking account of its non-exhaustive character it seems difficult, if not

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<sup>45</sup> Stahn, p. 213. See also the Definition of Aggression annexed to General assembly resolution 3314 (XXIX) of 14 December 1975, UN Doc. A/9631 (1974), in AJIL, Vol. 69 (1975), 480 see also the famous case of *Nicaragua v. the United States* (Merits) decided by the International Court of Justice, para. 195.

impossible, to find a situation *directly* involving military facilities which do not come within the ambit of armed force.

### **3.2.1 Disposal of Territory**

In relation to the “war against terror” it is commonly argued that responsibility should and could be attributed to a state also in relation to situation which stays at the mere “harbouring” of terrorists (an issue which will be returned to below under the section dealing with host states). A connection can here be made to the wording of article 3(f) above that “[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State” qualify as an act of aggression. A parallel can here be seen to neutral states in times of war, which despite their proclaimed neutral status allows a state party to the war to dispose itself of its territory. However, the article speaks of the placing of its territory at the disposal of another *state* which uses it for perpetrating an act of *aggression* against another state - why one should not overestimate its support for the war on terror. Still it can be used as an argument to support the assertion that the placing of ones territory at the disposal of a terrorist organisation, so that it potentially can be used as the origin of an attack, is not in any way an “innocent” activity.

## **3.3 “Against the Territorial Integrity or Political Independence of Any State”**

The next step is to examine whether there is also a second prerequisite relating to the purpose and object of an act. Can armed activities which are not intended to change the territorial map of a state or to influence its political system be said to escape the prohibition?

### **3.3.1 An Extensive or Restrictive Interpretation**

Article 2.4 could be interpreted either extensively or restrictively. As Shaw has put it, it is a question of whether the words of this phrase should be interpreted as to permit force that would not contravene the clause, or as reinforcing and adding strength to the primary prohibition.<sup>46</sup>

According to an extensive interpretation, military force which is neither aimed against the territorial integrity or the political independence of a state, or is in any other manner inconsistent with the principles and purposes of the UN Charter, is not prohibited. While this more “generous” alternative is practical in being flexible and as such better suited to meet new challenges, it has the inherent and considerable disadvantage of opening up for abuse. Another question is whether it in reality is possible to launch a military

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<sup>46</sup> Shaw, p. 1021

operation so selective in scope that it manages to stay clear of causing any damage to state or civilian property or to individuals.

According to the restrictive interpretation, article 2.4 should be read as an almost absolute prohibition on the use of force - and the mentioning of territorial integrity, political independence, and the purposes and principles of the UN is not intended as qualifications of the main rule, but rather as elaborations of the underlying thought which is an almost absolute prohibition on the use of force. This is indeed the interpretation which has the support of a majority of the United Nations members.<sup>47</sup> Further, given that one of the main objects of the Charter is to restrict the unilateral use of force as to save the world from the “scourge of war” the restrictive interpretation seems to be the most adequate.

### 3.3.2 State Practice

The famous Israeli rescue operation undertaken to free hostages held by Palestinian and other terrorists at Entebbe, Uganda, generated an inconclusive debate in the Security Council - some states argued that as Uganda refused to take action in order to free the hostages, and on the contrary helped the hijackers, Israel acted in accordance with a right of international law when it rescued Israeli citizens. However, there were also those who believed that Israel through its actions was guilty of aggression or that it had engaged in an excessive use of force. In 1993, following an attempt to assassinate the former American president Bush, the US launching of missiles against the headquarters of the Iraqi military intelligence of Baghdad was proclaimed to be undertaken as a means of protecting US nationals in the future. In general targeted operations abroad have received a mixed judgement why it is rather hard to draw any coherent conclusion.<sup>48</sup> Perhaps the already quoted words of Cassese once again by means of analogy can describe the situation - the judgement of these actions will depend on the circumstances of the specific situation and will sometimes be “justified on moral and political grounds and the community will eventually condone them or mete out lenient condemnation”, and sometimes they will be condemned, but as a matter of law force as between states is prohibited, absent an armed attack.<sup>49</sup>

That states resorts to force do not necessarily *per se* weaken the prohibition. If a state attempts to justify an act of force by means of self-defence the prohibition can quite contrary be argued to have been strengthened – as a

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<sup>47</sup> Bring, p. 72. See also Shaw who writes that “the weight of opinion probably suggests” that the phrase “against the territorial integrity or political independence of any state” should be seen as reinforcing the primary prohibition, i.e. the international use of force, Shaw, p. 1021.

<sup>48</sup> Shaw, p. 1034

<sup>49</sup> Supra footnote 34.

state through seeking justification acknowledges that its action in itself is contrary to international law.<sup>50</sup>

### 3.4 Conclusion

According to the wording of the existing legal framework and the traditional interpretation of the same a state which uses force against another, without acting on a right to self-defence – is in breach of international law. Further, given the fundamental character of the prohibition and having in mind the larger picture into which the prohibition of force must be “fitted” and the considerable risk for abuse the author recognises the dangers in and unsuitability of bending the existing system as to comprehend a more liberal use of unilateral force.

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<sup>50</sup> Following an attack on US servicemen situated in Berlin allegedly perpetrated by individuals working for the Lebanese government, the US conducted a bombing raid on Libya and in doing so claimed to be acting in accordance with a right to self-defence, see President Reagan’s statement, *The Times*, 16 April 1986, p. 6. Shaw, p. 1033. The US also claimed to act on a right of self-defence in relation to Nicaragua, in the *Nicaragua* case, where the International Court of Justice proclaimed that the invocation of a right to self-defence in situations involving the use of force on the territory of another state does, if anything, offer support to the prohibition on the use of force.

## 4 Self-defence

Proclamations and statements by state representatives as well as writers sometimes almost make it seem that a state has the right to defend itself with military means as soon as it is the victim of any breach of the international legal order, and in doing so is free to use any facilities and may go as far as it, according to its own subjective perception, deem necessary to eliminate any threat: present, future or even theoretical. This view has no or little support in international law, however. This section examines the concept of self-defence, to which extent it can be said to govern also situations involving non-state actors and its suitability as a means of fighting terrorism.

### 4.1 Article 51 of the UN Charter

The right to self-defence is stated in article 51 of the UN Charter, which reads:

Nothing in the present Charter shall impair the *inherent* right of individual or collective self-defence if an *armed attack occurs* against a member of the United Nations, until the Security Council has taken 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 at any time such action as it deems necessary in order to maintain or restore international peace and security (emphasis added).<sup>51</sup>

The use of the word “inherent” implies that this right also is part of customary law.<sup>52</sup> The phrase “if an armed attack *occurs*” has been interpreted as requiring the occurrence of an actual armed attack. However, there is a rather widespread opinion that such a right exists also at the prospect of an imminent attack, the typical school example being the observation of movements of enemy troops by land, air or sea.<sup>53</sup>

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<sup>51</sup> Article 52 of the UN Charter.

<sup>52</sup> This is also apparent in the judgement by the International Court of Justice in the case *Nicaragua v. United States* where the Court concluded that a rule of the same content could exist both in treaty form and in international customary law. The fact that a rule had been codified in a treaty did not mean that the rule no longer continued to exist in customary law. In these instances the two copies of the rule would reasonably be very similar, however, they would not by necessity have to be identical, see *Nicaragua v. United States* (Military and Paramilitary Activities in and against Nicaragua) [76.1]

<sup>53</sup> See Travalio and Altenburg, at p. 102. Relating to Article 51; “This Article assumes that international law presently requires either an armed attack, or at least the prospect of an imminent armed attack ..., before a state may respond militarily against the territorial integrity or political independence of another state.”

## 4.2 Customary Prerequisites

According to a statement by the American Secretary of State in relation to the *Caroline* incident a right to resort to force required “a necessity of self-defence, instant overwhelming, leaving no choice of means, and no moment for deliberation”. Further, the action undertaken must not be unreasonable or extensive, “since the act, justified by the *necessity* of self-defence, must be *limited by that necessity*, and clearly kept within it” (emphasis added). These principles were accepted by the British government at the time and are regarded as part of contemporary customary international law.<sup>54</sup> Another prerequisite of great importance for the legality of self-defence is the proportionality of the action undertaken.

## 4.3 Anticipatory Self-Defence

The question of the legality of anticipatory self-defence has not been decided by any competent international organ.<sup>55</sup> Such a right would allow a state, that with *certainty* is a soon to be victim to act on beforehand. According to this line of reasoning a state should not have to act a “sitting duck” and be forced to suffer substantial losses before it is allowed to start defending itself. This line of reasoning argues that it has support in the famous *Caroline* case (which will be more thoroughly dealt with below). On the other hand this alternative is connected with a considerable risk for abuse, and also, difficulties regarding the burden of proof and required evidence.

## 4.4 Terrorist Acts as “Armed Attacks”

It is commonly argued that since the Second World War there has been a “privatisation” of international law, meaning that individuals and non-state entities can have rights and obligations under international law. For example the individual criminal responsibility of private persons has been recognised since the Nuremberg Tribunals, and organisations such as the PLO have observer status in the United Nations General Assembly.<sup>56</sup> However, according to Shaw the “object theory in this regard maintains that individuals constitute only the subject-matter of intended legal regulations as such” and that only states, and possibly international organisations, are subjects of international law”.<sup>57</sup>

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<sup>54</sup> See Shaw who refers to the statement by the American Legal Adviser to the US Department and DUSPIL, 1975, p. 17, in Shaw, p. 1025. The statements made in connection to the *Caroline* incident were made in relation to the existence of a state of “necessity”, see the emphasis made above, but have subsequently come to apply to the concept of self-defence.

<sup>55</sup> The ICJ in its judgement in the *Nicaragua* case stated that it abstained from expressing any view as to the existence of a right to act in the case of an imminent threat of an attack as the issue was not raised in the case, see ICJ Reports, 1986, pp. 14, 103; 76 ILR, p. 437.

<sup>56</sup> See Bring, p. 198

<sup>57</sup> Shaw, p. 232 who refers to O’Connell, *International Law*, pp. 106-107.

A relevant question is - if a private organisation acts like a state ought it not have corresponding duties?<sup>58</sup> Or more specific, if a non-state entity launches an attack against a state ought not then the victim state be allowed the right to defend itself correspondingly? The object of article 51 is to offer a victim state protection in the case of a large scale attack. The state is granted a right to “self-help” when having to wait for the collective security system to “kick in” in reality would mean that the victim state was forced to accept a substantial threat against the own state. The achievement of an adequate level of protection may, as Stahn has pointed out, “require the use of force against armed groups, irrespective of whether or not they are linked to a specific state.”<sup>59</sup> The granting of a means of remedy in the case of an armed threat is reconcilable with the object of the United Nations and is preserved and protected through its charter - why a teleological interpretation would support an interpretation according to which the scale and impact of the attack overrides the identity of the perpetrators.<sup>60</sup> It seems reasonable and satisfactory that an attacked state should have a right to defend itself irrespectively of the identity of the attacker, just like it is reasonable that an individual who is attacked by another individual has a legal right to self-defence. Hence, the author recognises the reason and logic in attaching decisive importance to the magnitude and the international dimension of an attack.

It is rather uncontroversial that the argumentation outlined is applicable when self-defence is exercised in the way traditionally intended, i.e. at the time of an attack in order to avert a real concrete threat. However, problems arise in relation to the use of force after an attack has been fulfilled - as it is disputed whether or not there exists a right to anticipatory self-defence and as retribution is strictly forbidden. Further, it is problematic also in another way which will be explained next.

## 4.5 Host States

Terrorists have no territory of their own - still they must have a physical presence somewhere and are thus inclined to reside on the territory of states, save the highly unlikely scenario that a terrorist organisation operates exclusively from the high sea or some other “space” over which no state enjoys sovereignty.<sup>61</sup> Hence the effective elimination of a terrorist threat often requires the use of force on the territory of a “host” state, like Afghanistan or Lebanon.

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<sup>58</sup> See page 19 above.

<sup>59</sup> Stahn, p. 213

<sup>60</sup> Stahn, p. 213

<sup>61</sup> As put by two American writes “they must store weapons somewhere; they must train and house their fighters somewhere; they must develop their plans somewhere; and their leaders must sleep somewhere” and “these activities must occur on the territory of some *state*”. Travalio and Altenburg, pp. 97-98.



In line with the argumentation outlined above it is rather safe to argue that private entities can launch armed attacks which could trigger a right to self-defence. However, problems arise when deciding under what more specific circumstance the terrorists can be lawfully targeted, such as *where* they can be targeted.

Even if the concept of self-defence is a well recognised principle of international law, it remains an exception to the strong main rule that force as between states is prohibited. The prohibition is part of a bigger parcel and reinforces fundamental principles such as the sovereign equality and the territorial and political integrity of all states, and the right to use force must be weighed against these cornerstones. States can through its actions loose or vindicate its right to respect for its sovereignty. If a state itself launches an attack it clearly does so, but what about states that in some way is indirectly connected with a terror threat? A host state's involvement can vary from mere harbouring, perhaps even unaware of its "guests", to active support of a more general nature, to actively taking part in the execution of a specific terrorist act.

The attachment of responsibility to a state for the actions of a private actor traditionally requires that the actions can be attributed to the state.<sup>62</sup> The rules for attributing responsibility are found in the International Law Commission's Draft on State Responsibility which has picked up on the decision of the International Court of Justice in the *Nicaragua case*<sup>63</sup>. Further, the Friendly Relations Declaration states that; "[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or *acquiescing in organized activities within its territory* directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force" (emphasis added). A duty which was repeated in the 1994 Declaration On measures To Eliminate Terrorism. Both instruments are

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<sup>62</sup> Stahn, p. 215, the sources of Stahn in found in footnote 159.

<sup>63</sup> See the judgement were the Court stated that "United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well have been committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed." (Emphasis added) See para 116 of the decision. The concept of effective control has subsequently been challenged by the notion of "overall control". A concept of attribution which was forwarded by the Yugoslav War Crimes Tribunal in the *Tadic case*, 38 ILM, 1999, pp. 1518, 1541.

commonly regarded as part of international customary law and hence binding upon all states.<sup>64</sup>

If one is to use Afghanistan as an example it is clear that it violated a norm of international law through its relationship with the Al-Qaeda. The Security Council has on numerous occasions, also predating 9/11, demanded Afghanistan to deny the Al-Qaeda access to a free-zone on Afghan territory. However, to say that the fact that Afghanistan is guilty of violating an obligation not to harbour the Al-Qaeda automatically implies a right to intervene militarily in Afghanistan is to leap to conclusions. A state can be responsible for its behaviour in relation to a terror organisation without also being responsible for all actions undertaken by the same. If a state harbours a terrorist organisation it is responsible for a breach of international law, however, it has not automatically committed an armed attack. At least this seems to be the view most reconcilable with the traditional and well established view as outlined by the ICJ in the case of *Nicaragua v. the United States* and by the International Law Commission in its Draft Articles. This line of argumentation gives at hand that terrorists are out of bounds once they have retreated to a state uninvolved in a completed attack, which of course is highly unsatisfactory for a victim state. However, one should bear in mind that strictly speaking the same is true also regarding attacks performed by states. Self-defence is intended as a means to address and avert an ongoing attack or threat and should not in any case be used as an excuse for retribution once the attack is completed and a threat no longer exists. However, if a threat is still present and new attacks are to be expected, military facilities of a state perpetrator can be targeted while the same property belonging to a private terrorist organisation but located on the territory of an uninvolved state would be out of bounds.

#### **4.5.1 Drawing Arguments From the Caroline Case**

The already mentioned *Caroline* incident is interesting not only for its fundamental importance for the concept of self-defence in more general terms, but also because of the specific circumstances of the incident. Firstly, the target of the British manoeuvre was a vessel operated by private activists, and secondly, the defence action took place in an American port, which is interesting as the American state had no formal connection to the activists.

In its judgement in the *Nicaragua* case the ICJ stated that a provision could exist both in treaty form and in the body of international law that is based on custom simultaneously. Further, while possible that the two sets of rules could be exactly identical they did not by necessity have to be so.<sup>65</sup> It is

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<sup>64</sup> See Brown, p. 6.

<sup>65</sup> The Court placed emphasis on the fact that article 51 of the UN Charter speaks of the “inherent right” of individual or collective self-defence, “which nothing in the present Charter shall impair”. The Court went on to find that “[a]rticle 51 is only meaningful on the basis that there is a “natural” or “inherent” right of self-defence”, and it is hard to see how this can be other than of customary nature”, see para 174-179 of the judgement. Today most

commonly argued by writers who are pro-anticipatory self-defence that the use of the word “inherent” in article 51 implies that a right of anticipatory self-defence could exist - either because such a right existed in 1945 at the time of the adoption of the UN Charter and that the Charter encapsulated and preserved that right, or because, even if the Charter does not provide for anticipatory self-defence, such a right existed at the time of the drafting of the Charter and continued to exist in parallel in customary law. A similar line of argumentation is interesting also in relation to self-defence against private entities on the territory of a host state. In the *Caroline* case the representative of the US agreed to that the UK could have a right to destroy private property located on its territory. The question could be asked whether this argumentation could be used in support of the existence of a right to use self-defence against private entities on the territory of a host state. It seems that even if this line of reasoning is in contradiction of the conventional interpretation of the UN Charter it is again relevant in relation to the Bush Doctrine, which claims the existence of a more generous right to fight terrorists than what is provided for by the traditional interpretation of the UN Charter. The key to the outcome of the *Caroline* incident seems to be the necessity involved in the situation, and indeed the necessity of the situation is at the very heart of the Bush Doctrine.

## **4.6 Security Council Authorisation of the Right to Use Force in Self-Defence**

The attack(s) on the 11th September of 2001 generated a strong response, not only from states but also from the Security Council.

### **4.6.1 Security Council Classifications**

The Security Council acted very promptly after the attack. Already on the following day resolution 1368 was adopted where the Council in the preamble reaffirmed “the inherent right of individual and collective self-defence in accordance with the Charter of the United Nations”. Through resolution 1368 the Council moved forward its positions, as even if self-defence before had been claimed by states to exist in relation to private terror attacks the Council while condemning the attacks had up to now declined from mentioning a right to self-defence.<sup>66</sup> The reference to

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of the world’s states are members of the United Nations, even so the question of international customary law could be used instead of the Charter provisions to decide a dispute by the ICJ, as happened in the *Nicaragua* case, where the ICJ based their decision upon customary law and not the UN Charter provisions, as its jurisdiction over the dispute only allowed it to base its judgement on such law.

<sup>66</sup> Following the 1998 attacks against the US embassies in Nairobi, Kenya and Dar-es-Salaam, Tanzania, the United States officially claimed to rely upon a right of self-defence, as stated in article 51 of the UN Charter, as a ground for legal justification for its missile strikes against Afghanistan and Sudan. In a letter dated 20 August 1998 the United States notified the Security Council that the attacks carried out against Afghanistan and Sudan were done so “pursuant to the right to self-defence confirmed by Article 51 of the Charter of the United Nations”, see UN Doc. S/1998/780 (1998). The Council condemned the

individual and collective self defence was repeated in the preamble of the following resolution 1373, which was enacted by an unanimous Security Council on the 28 September the same year.<sup>67</sup>

#### 4.6.2 The Significance of the Connection Made

The next question to examine is - what is, if any, the importance of the connection made between terrorism and a right to self-defence? Is it an intended authorisation of self-defence in relation to Afghanistan, and if so, what legal consequences would such an intention have? Three remarks will here be made. Firstly, the statement was made in the preamble and not in an operative paragraph. Secondly, does the authorisation of self-defence fall on the Council's table? Finally, it says nothing of to whom this right applies neither does it name the allowed target of an operation of self-defence.

Regarding the fact that the reaffirmation was made in the preamble it should be noted that the Council had once before in its resolution 661 (1990) reaffirmed the right to self-defence in relation to the Iraqi invasion of Kuwait, and did so in the preamble and not in the operative paragraphs. In the opinion of the author the interesting part lies in answering why the reaffirmation was placed in the preamble - a question which best can be answered by answering question number two.

The first step is to ask if the Security Council has the authority to "give" a right of self-defence when there is no such right according to existing international law. The reason why the question is put in this way is that if the legal preconditions for the use of self-defence are met there is no need for any further "authorisation", if a state has a right to self-defence it does not need the permission of the Council to "activate" the right. The Council is not the judge of whether or not there exists such a right in a specific situation - which of course in itself speaks against the Council having the authority to "give" a right of self-defence.<sup>68</sup> In the opinion of the author the placement can best explained by the fact that the Council recognised that it has no authority over the (non-)existence of a right to self-defence, but still was eager to make a proclamation of support.

The Council is an executive body with the authority to take binding decisions, however, it is not a law making body. Notwithstanding the fact that the Council is not the judge over legal issues and does not formally have the power to act above the law, it has done so before. In relation to the already mentioned *Lockerbie* incident the Security Council, after

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attack but declined to make a connection between self-defence and the terrorist deed. See SC Resolution 1189 (1998) of 13 August 1998.

<sup>67</sup> All Security Council Resolutions are available on-line on the UN webpage at: <http://www.un.org/Docs/sc/>.

<sup>68</sup> Another thing is that a state who has embarked upon an operation of self-defence must report this immediately to the Security Council, in accordance with article 51 of the United Nations Charter. Further, the right of self-defence does only exist "until the Security Council has taken measures necessary to maintain international peace and security".

recognising that a threat to international peace and security existed, chose to ignore the legal rights belonging to Libya in relation to the extradition of the Libyan nationals believed to be the perpetrators of the attack.

It is also interesting to note that the alleged “reaffirmation” is remarkably vague. A right of self-defence requires the existence of an actual armed attack, or at least the imminent threat of one, why it is interesting to note that the Council made no finding as to the existence of an armed attack, instead they used the phrase “terrorist attack”. The vagueness of the resolution following 9/11 is even more evident when compared to Security Council resolution 661 (1990) adopted in relation to the Iraq invasion of Kuwait. In this resolution the Security Council affirmed in the preamble; the inherent right of individual or collective self-defence, in response to the *armed attack by Iraq against Kuwait*, in accordance with article 51 of the UN Charter” (emphasis added). Another thing worth noticing is the non-existence of a named perpetrator against whom self-defence could be directed and also the non-mentioning of a specific state entitled to such a right. This is remarkable as self-defence traditionally only can be performed against a state responsible for an armed attack. Regarding the absence of a named state to who the alleged right would belong, it could be argued that it is implied that it belongs to United States, more serious is the absence of a named state which can be held legally responsible.

The question can be asked whether the Council’s reluctance to name the perpetrator in its resolution is based upon the fact that the Taliban regime was not recognised as the legitimate government of Afghanistan. However, the Security Council had before the 9/11 attacks specifically named the Taliban regime as responsible for actions contrary to the international system, and there is little doubt that it was the *de facto* government of Afghanistan. Hence, it seems that this could have been done also this time. One possible explanation for the reluctance to name the Taliban regime is the difficulties involved in attaching by way of traditionally accepted legal means responsibility to Afghanistan.

Even if the Council has no authority to make the exercise of self-defence legal in contradiction of international law its decisions cannot be ignored. The Council has been allocated the primary responsibility for international peace and security and it is the principal political organ of the United Nations, why the Council plays an important role as a moulder of opinion. Further, the Council is the executive organ of the United Nations and the only body which has a worldwide right to adopt legally binding decisions and the power to authorise the use of force, why its opinions are of great importance in practice.

## 4.7 Analysis

While it is rather safe to argue that a state has the right to defend itself after a terror attack the granting of a right to strike back against a private perpetrator on the territory of a host state and to violate that state’s territorial

sovereignty is problematic against the backdrop of fundamental principles of international law.

Self-defence is typically unilateral conduct the intention of which is to enable a state to strike back when it itself is attacked. Self-defence must be necessary, it must not be excessive and it is limited in scope and time to the aversion of a specific attack. It is not an institute suitable or intended for larger political or social changes. Neither is it designed to be a part of a larger reformation scheme, why it is inheritably unsuitable to address an often latent terrorist threats with its roots in political and social conditions.

The wording and construction of article 51 also supports the idea of self-defence as a means of self-help accessible when there is a need for fast action to avert an existing threat, but that as soon as the Security Council is ready to act it will take over to restore international peace and security. This follows from the wording of article 51 that the right to self defence “shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”.

The success of the system depends on that all actors play their intended part. If a victim state is going to step back safely and re-assured it must be confident that the threat against the own state really is being eliminated. Judge Jennings addressed the issue in his dissenting opinion in the *Nicaragua* case by proclaiming his concerns that “it seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill the gap, is absent”.<sup>69</sup>

#### **4.7.1 Conclusion**

Self-defence could be an appropriate solution in relation to a distinct terrorist attack that must be averted to avoid severe damages to the own state. However, the characteristics of major terrorist organisation with an infrastructure, weapon arsenal and man power equivalent to that of a state - which permeates a whole country - requires also other measures of a non-military nature to be taken. Further, while self-defence exercised at the time of an ongoing terrorist attack is unproblematic from a legal perspective the targeting of the perpetrators when they have retreated to the territory of a host state lacks clear legal support. In the opinion of the author, given terrorism’s character of ultimately being a social and political phenomenon and its continuance in time, self-defence is generally not well suited as a means of remedy.

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<sup>69</sup> Shaw, p. 1025, ICJ Reports, 1986, pp. 543-4; 76 ILR, p. 877

# 5 Security Council

## Authorisation of the Use of Force

This section examines the work and authority of the Security Council in relation to international terrorism.

### 5.1 The Collective Security System

The primary reason for the establishment of the United Nations in 1945 was to create an international body which could safeguard international peace and security – the intention being that never again was the world to suffer from the “scourge of war”.<sup>70</sup> The maintenance of peace and security figures under the “Purposes and Principles of the United Nations” and is thereafter mentioned or referred to in several Charter provisions. The system was intended to be both comprehensive in scope and universal in application.<sup>71</sup> While self-defence is said to be *unilateral* conduct, actions falling under the UN Security System is commonly referred to as *collective* conduct, since as Shaw writes the intention was that “a wronged state was to be protected by all, and a wrongdoer punished by all”.<sup>72</sup> Through the provisions of Chapter 7 the member states delegated to the organisation the authority to undertake not only non-military, but also military measures in order to maintain the sought objects.

The practical implementation of the collective security system has worked stiffly, the main reason being the veto power which, according to article 27.3 of the Charter, belongs to all permanent members of the Security Council.<sup>73</sup> A single negative vote of one of the permanent members suffices to veto any Security Council Resolution, save with regard to procedural matters.<sup>74</sup> During the Cold War the Council was “paralysed”, as the two

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<sup>70</sup> See the Preamble of the UN Charter.

<sup>71</sup> Shaw, p. 1119

<sup>72</sup> Shaw, p. 1119

<sup>73</sup> The permanent members of the Security Council are the Republic of China, France, The Union of Soviet Socialist Republics (this seat is now occupied by Russia), the United Kingdom of Great Britain and Northern Ireland, and the United States of America, see article 23.1 of the UN Charter. Relating to the Russian position the following information is found on the UN webpage; “The Union of Soviet Socialist Republics was an original Member of the United Nations from 24 October 1945. In a letter dated 24 December 1991, Boris Yeltsin, the President of the Russian Federation, informed the Secretary-General that the membership of the Soviet Union in the Security Council and all other United Nations organs was being continued by the Russian Federation with the support of the 11 member countries of the Commonwealth of Independent States.” See UN webpage at: <http://www.un.org/Overview/unmember.html> (last visited 17 August 2006).

<sup>74</sup> See article 27 paragraph 2 and 3 of the UN Charter.

Super Powers, the United States and the Soviet Union, stood against each other each armed with a veto. This led to a shift of attention from the Council to the General Assembly in the 1950s as the frequent use of the veto led to a perception of the reduced effectiveness of the Council.<sup>75</sup> After the end of the Cold War progress has been made and hope has been raised of a powerful Council functioning as intended. As said, the Collective Security System has been suffering from tardiness - on the other hand, the history since 1945 shows how the system has been saved from a complete failure by way of flexibility and textual interpretation.<sup>76</sup>

## 5.2 The Role of the Security Council

The intended role of the Council is that of an efficient executive body functioning continuously. By means of article 24.1 of the Charter the members of the United Nations conferred upon the Security Council “the primary responsibility for the maintenance of international peace and security”, and agreed that the Council in “carrying out its duties under this responsibility” would be acting “on their behalf”.<sup>77</sup> According to paragraph 1 of article 23 of the Charter

The Security Council shall consist of fifteen Members of the United Nations. *The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members* of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, *due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution* (emphasis added).

Another Charter provision which is of importance for this thesis is article 27 which contains the voting rules applying to the decisions of the Council, it reads

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

Hence the UN Charter mirrors the inequalities of strength belonging to states in two ways, firstly by giving the permanent five a right to veto, and

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<sup>75</sup> Shaw, p. 1151

<sup>76</sup> Shaw, p. 1119

<sup>77</sup> See also articles 23, 25 and 28 of the UN Charter.



secondly, even if the filling of the remaining ten seats shall be made with due regard to the achievement of an equitable geographical distribution, the same regard shall be paid to the “contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization”, which benefits rich and powerful states with resources to place at the United Nations disposal.

## **5.3 The Internal Affairs of Member States and the UN Security Council**

The traditional standing regarding matters occurring within the borders of a state having no trans-national effects has been that they concern only that state. A perception which finds support in article 2.7 of the UN Charter which states that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state”. Considering that the United Nations is designed to safeguard *international* peace and security it is easy to see why matters falling within the domestic affairs of a state are out of bounds and the door is closed for actions under the UN regime. However, that door can be opened by turning the key found in article 39 of the Charter. This follows from the continuation of article 2.7 which states that the principle of non-interference in domestic affairs shall “not prejudice the application of enforcement measures under Chapter VII”. The classification of a situation as a threat to or breach of international peace and security enables the UN Security Council to authorize intervention, also by military means. This possibility has been commonly used by the Security Council in recent years to justify UN involvement in what traditionally has been regarded as strictly internal matters. Hence the Council has moved forward its positions, however, it is arguable whether or not the signatories to the UN Charter back in 1945 intended "international peace and security" to be so broad in scope as to justify such intervention.<sup>78</sup> On the other hand, as already stated above, the history since 1945 shows how the system has been saved from a complete failure by way of flexibility and textual interpretation.<sup>79</sup>

### **5.3.1 International Terrorism as a Threat to International Peace and Security**

Especially in relation to situations involving humanitarian crisis a relaxation has been made and humanitarian considerations are seen as the concern of the international community in its entirety and not just for the national state, especially if there is a risk that the situation will “spill over” the national borders.<sup>80</sup> In relation to international terrorism the Council has on several

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<sup>78</sup> Heath, p. 278 see further footnote 87.

<sup>79</sup> Shaw, p. 1119

<sup>80</sup> The Council action in relation to the Iraqi Kurds in 1991, and the military interventions in Somalia, Bosnia and Haiti were all based on the assumption that humanitarian disasters due to an internal situation created by the own government or civil wars constituted a threat to international peace and security, see Benvenisti, p. 685. In relation to the Iraqi Kurds see

occasions, also pre-dating 9/11, classified terrorist acts as threats to international peace and security. In its resolution 731 adopted in relation to the *Lockerbie* incident and Libya's non-compliance with a request for extradition regarding the Libyan citizens believed to have carried out the attack, the Security Council referred to "acts of terrorism that constitute threats to international peace and security". In a later resolution, adopted with regard to Sudan, the Security Council reaffirmed that "the suppression of acts of international terrorism, including those in which states are involved, is essential for the maintenance of international peace and security". Then 9/11 happened, and as Shaw writes, the attacks carried out that day took the process onto a "higher level".<sup>81</sup> Already on the day following the attack the Council adopted resolution 1368 noting that it was "[d]etermined to combat by all means threats to international peace and security caused by terrorist acts". Further, the Council unequivocally condemned the attack and proclaimed that it regarded it "like any act of international terrorism, as a threat to international peace and security. In the following resolution 1373 this position was reaffirmed by the Council. Acting under Chapter VII of the UN Charter, the Council went on to adopt a series of binding decisions. Indeed it is hard to argue against that international terrorism can constitute a threat to international peace and security, especially in the light of the 9/11 events.

## 5.4 Fighting International Terrorism Collectively

Considering that terrorism ultimately is a social and political phenomenon its elimination ought to require also non military measures during a longer period of time. The Security Council has the authority to demand for non-military as well as military measures to be taken and can adopt binding decisions ordering for measures such as embargoes and the sending of impartial weaponry inspections. The UN also has a variety of organs with different spheres of interest why action taken under the UN regime can be composed as a parcel of measures, seeing to the different needs and musts involved in a specific situation.<sup>82</sup>

## 5.5 Analysis

The Council has been allocated the principal responsibility for the maintenance of international peace and security by the UN Charter. In its capacity of the primary political body of the UN has the authority to enact

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Security Council Resolution 688 (1991): "Gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions, which *threaten international peace and security in the region*". (Emphasis added) See also SC Res. 794 (1992) (Somalia), SC Res. 816 (1993) (Bosnia), SC Res. 940 (1994) (Haiti).

<sup>81</sup> Shaw, p. 1051

<sup>82</sup> For information see the UN webpage, [www.un.org](http://www.un.org).

binding decisions based on political considerations. While the Charter places restrictions on the Council's authority to intervene in domestic matters, article 2.7 still allows for such interference *if* international peace and security is threatened. It is today uncontroversial to argue that international terrorism is recognised as being such a threat. Shortly put, it can be said that the Charter is a legal document which grants the Council a *legal* right to adopt *legally* binding decisions based on *political* considerations.

As will be seen in the following section which deals with the Bush Doctrine, the argumentation outlined by those in favour of a right to fight terrorism unilaterally with military means, are often quick to stress that international terrorism is not a threat just to a targeted state but to all states and the whole of the international community and its peaceful continuation. While this line of argumentation is forwarded to highlight the importance and urgency of the matter, it can be turned against the Doctrine's advocates. The proper guardian of international peace and security is the UN – the very object and purpose of the UN is to safeguard international peace and security - which fulfils this duty through its executive organ the Security Council.

The decision making process of the Council is essentially based on a democratic model. It is composed of representatives of states from different parts of the world. Action taken under the UN flag enjoys a larger amount of strength and respect as it shows that it has a united force of states behind it, which are representatives for the world community, even if the composition of the Council recognises and rewards the interests of the most powerful states. Further, the veto power should not be underestimated, especially as these states are allowed to veto any resolution, even resolutions which directly involves the interests of the own state.

Military action may be a necessary part of the elimination of a major terror threat, but it must also to be truly effective, be combined with other measures. One of the strengths of the collective security system is that military measures can be combined with further efforts and demands, as the Charter provides for military action to be forwarded as a part of a bigger parcel of measures. The Council has the authority to adopt binding resolutions ordering for non-military as well as military action. It should be stressed that the Security Council does not have unrestricted powers, however. For example it is rather safe to argue that not even the Council has the right to replace a government of a state even if it is kindly disposed towards terrorists. What the Security Council legally has the power to do, is to try to force a state to comply with the rules and principles of the international order.

As stated in the introduction to this thesis despite the attempts made in the United Nations to “ratchet up” both its normative and operational opposition to terrorism in the 1990's and again after 9/11, there is no effective

operation scheme.<sup>83</sup> It is important that the efforts soon will bear fruit as it otherwise will be difficult to convince states with the power and muscles to act alone to not do so in the absence of a real alternative.

## **5.6 Conclusion**

In theory the collective security system and the Security Council is excellently suited to address the terror threat as the Council has a wide range of measures - military and non-military – to choose from and as such can match the measures taken against the specific nature of any problem. Further, as the Council can adopt legally binding decisions based on political considerations it can insert an amount of flexibility into the fight on terror. Unfortunately, in practice internal disagreement, the veto power and states reluctance to back-up the United Nations with supplies and troops makes it inefficient.

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<sup>83</sup> Luck, p. 95

# 6 The Bush Doctrine

We have been told on several occasions, mainly by the American president George W. Bush and other US representatives, that we are at war with international terrorism.<sup>84</sup> However, it is not a war in the conventional meaning of the word. What seems to be at heart of these proclamations is the determination to fight terrorism with all means necessary, against whomever and wherever that the US deems necessary. In its capacity of being the official policy forwarded by the world's most powerful state it cannot be ignored.

## 6.1 Introducing the Doctrine

The policy was first made public in a speech by the American President George W. Bush on the 1st of June 2002 at the military school of West Point. It challenges the traditional international order and its regulation of the sovereign equality of states, the use of force and the doctrine of self-defence and is made out to be the solution in times of terror by claiming to offer an alternative to a Security Council made ineffective by internal disagreement and to give remedy to a world of passive onlookers and rouge states.

The Doctrine places great weight upon the military superiority of the US and emphasises military pre-emption, unilateral action, and a strong commitment to extending democracy, liberty and security to all regions of the world. It is based on the assumption that a powerful state, with the capacity to act on an international level has a right and possibly also an obligation to do so, when its own interests, or international peace and security is threatened. In an insecure world, with a constant terrorist threat lurking, the US has the muscles and the motivation to act, and hence asserts the authority to do so, unilaterally and pre-emptively.<sup>85</sup>

The threat against the western society is argued to no longer be states with great armies, but “shadowy networks of individuals” which “can bring chaos and suffering to” the American shores “for less than it costs to purchase a single tank”.<sup>86</sup> The unpredictability and invisibility of the enemy implies that as a “matter of common sense and self-defence America will act against such emerging threats before they are fully formed”. Further, while

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<sup>84</sup> See Travalio and Altenburg, p. 97 See speech by the American President George W. Bush available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited 14 August 2006)

<sup>85</sup> Benvenisti, p. 677

<sup>86</sup> See the *National Security Strategy of the United States of America*, available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited 3 November 2006).

at it, “the United States will use this moment of opportunity to extend the benefits of freedom across the globe”.<sup>87</sup>

The policy was formalized in an official document entitled “The National Security Strategy of the United States of America”, consisting of nine parts outlining the US strategy, not only regarding military measures, but also on state co-operation, weapons of mass destruction and economic growth etc.<sup>88</sup> *Simply put* there are two ways of looking at this policy - according to one, the US represents the knight in shining armour, which unselfishly has set out to defend justice and freedom, using its military superiority to free the world from dictators and to spread democracy. The other image is that of a lawless hegemon, obstructing the work of the United Nations in order to act unilaterally when it sees fit, but *only* when it does so. But maybe there is also a third picture, which can be painted more in grey than in black or white.

### 6.1.1 What is New and Problematic?

The Doctrine is eye-raising for two reasons in particular. Firstly, it does not abide by the principle of all states sovereign equality, as it does not respect the traditionally fundamental principle that all states enjoy exclusive sovereignty over activities taking place within their territorial borders. Secondly, the UN Charter is based on the premise that the Security Council is the prime guardian of international peace and security, and that trans-boarder unilateral state action is exclusively reserved for the case of an armed attack. This second observation is related to the question of whom that has the right to act on behalf of the world community. Another problematic issue is the difficulties involved in defining the Bush Doctrine. Is it just a national security strategy, applying exclusively to the US, and if so, how does it fit into the framework of international law?

### 6.1.2 Defining the Doctrine and its Subjects

The Bush Doctrine is not easily defined, on the one hand, it is rather easy to see resemblances with the concept of self-defence, as it allows the intervening state to defend its own interest, but does so even in the absence of a concrete armed attack (or the prospect of an imminent attack) and hence extends far beyond the traditional concept. In fact both the US and the UK claimed to act in accordance with a right to self-defence in relation to Afghanistan, as evident from the fact that both states informed the Security Council of their plans of action in accordance with article 51 of the UN Charter.<sup>89</sup>

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<sup>87</sup> See the *National Security Strategy of the United States of America*, available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited 3 November 2006).

<sup>88</sup> The document is available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited 3 November 2006).

<sup>89</sup> For the respective notifications made to the Security Council see UN Doc.S/2001/1946 of October 7, 2001: “[I]n accordance with the inherent right of individual and collective self-defence, the United States armed forces have initiated actions designed to prevent and deter

A next question to address is - which are the subjects that enjoy a right of intervention according to the Doctrine? The most reliable bet seems to be that the Doctrine is limited to the US, or potentially to the permanent five of the Security Council. It should here be said that the National Security Strategy speaks exclusively of the US, but perhaps the role could be taken by any of the other permanent five of the Security Council, given their privileged and important role in the international community, presupposing that they have the means and will to act.<sup>90</sup> Benvenisti describes the US position as “the US views itself as the prime if not the only provider of global stability and security”.<sup>91</sup> Against this backcloth the Doctrine can be seen as an attempt to establish the US role as the world administer of justice. The claim is problematic, however, in that it seems that the intended role of the US is not just one of a world *police*, but also that of the *prosecutor* and *judge*.

## 6.2 Arguments of Justification

Perhaps a better title for this section is- how old thoughts can be re-used in support of the US line of action, or maybe - how old thoughts can illustrate and explain the US perception that its superiority in strength *per se* makes it inherently suitable as a world police.

### 6.2.1 The Reverse Side of the Sovereignty Medal

Benvenisti describes the Bush Doctrine in the following words - “if the US finds the efforts of a certain foreign government to fight terrorists on its territory as insufficient or ineffective, it has the full authority to interpose and even act in its stead.”<sup>92</sup> Scholars have invoked the following statement by Judge Huber in the famous *Island of Palmas* case as support for the notion that while sovereignty gives states rights, it also involves responsibilities. “Territorial sovereignty”, argued Huber, “involves the exclusive right to display the activities of a state. This right has a corollary duty: the obligation to protect within the territory the right of other states, in particular their right to integrity and inviolability in peace and in war.”<sup>93</sup>

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further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.” See also UN Doc. S/2001/947 of October 7, 2001: “These forces have now been employed in the exercise of the inherent right of individual and collective self-defence, recognized in Art. 51, following the outrage of 11 September, to avert the continuing threat of attacks from the same source. My Government presented information to the United Kingdom Parliament on 4 October which showed that Usama bin Laden and his Al-Qaeda terrorist organisation have the capability to execute major attacks, claimed credit for past attacks on United States targets, and have been engaged in a concerted campaign against the United States and its allies. One of the stated aims is the murder of United States citizens and attacks on the allies of the United States.”

<sup>90</sup> See Benvenisti

<sup>91</sup> Benvenisti, p. 689

<sup>92</sup> Benvenisti, p. 691

<sup>93</sup> Benvenisti, p. 692 footnote 44

The principle of territorial sovereignty served, according to Huber, “to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian”.<sup>94</sup> According to this view, which is reflected in the contemporary law on state responsibility, global risks and responsibilities are allocated so that each state is responsible for controlling activities taking place within its territorial borders. However, as Benvenisti observes, there is no unanimity that the allocation of global risks and responsibilities by means of territorial borders is still effective today. This order fails in recognising that there might be states which cannot or will not adequately deal with risks to the global security.<sup>95</sup> States which in this way fail to live up to Huber’s vision of the collective effort to guarantee a minimum protection for all, do not, according to the Bush Doctrine, deserve full sovereignty. Hence, other states are allowed to intervene physically in a state which has failed the test if this is necessary to avert a threat.

While the proposition that sovereignty implies duties as well as rights is rather easily swallowed, the US claim to act against states which do not fulfil their responsibilities extends far beyond what traditionally has been regarded as being in accordance with international law. According to the US proposition, a state that do not fulfil its duties, by being unable or unwilling to suppress activities prejudicial for the international community taking place within its territorial borders, has lost its right to respect for its territorial integrity. While the international legal order recognises that the non-fulfilment of obligations can result in counter-measures being adopted by other states, even in the absence of an armed attack for which the state can be held responsible, the legal counter-measures available to a state, that wishes to send a message to a faulting state, do not allow for the use of force as a means of remedy but are restricted to non-forceful measures.<sup>96</sup>

## 6.2.2 Hobbes and the Sovereign

When I first read the American Security Strategy and tried to comprehend the self-perception represented therein I found myself thinking of Hobbes and his theory of the sovereign. According to Hobbes the only way to escape a lawless inferno is to lay unrestricted power upon an almighty sovereign. The sovereign must have the ability and will to uphold a state of physical peace and order and to protect the own citizens against dangers - an assignment for which the sovereign only answers to God. The theory contains a trait of paternalism which is reflected in the later political conservatism<sup>97</sup> - which has a strong influence in the United States. How the US views itself and its role bears a significant resemblance to how Hobbes perceived the sovereign national ruler – as the presumption that the US way is the right way is regarded as an unquestionable truth for which no

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<sup>94</sup> Benvenisti, p. 692 footnote 47

<sup>95</sup> Benvenisti, p. 692

<sup>96</sup> See the ILC’s Draft Articles on States Responsibility.

<sup>97</sup> Nergelius, p. 27 ff.



evidence is warranted and the power and will to act is seen as evidence enough for that doing so is right.

As said the sovereign answers only to God and the theory presupposes the non-existence of controlling body. On the international level there is no legislature and no system of courts and thus as Shaw has put it “there is no identifiable institution either to establish rules, or to clarify them or to see that those who break them are punished”.<sup>98</sup> Hence, the environment in which the US operates bears similarities the one of a “Hobberian” sovereign.

## 6.3 The Risks

There are inherent risks involved in one state taking the part of an almighty upholder of order. In order to illustrate this point the argumentation of the International Court of Justice in the famous *Corfu Channel* case will be examined and thereafter a few words will be said about the problems in relation to the rule of law.

### 6.3.1 The Corfu Channel Case

This subsection takes a closer look on the argumentation of the International Court of Justice in the *Corfu Channel* case regarding the role of powerful states in relation to the prohibition on the use of force.

#### 6.3.1.1 Background

The Albanian part of the channel had been mined by unknown perpetrators and a British vessel passing through had been damaged by an exploding mine. Following the incident British subjects engaged in minesweeping in the Albanian part of the channel in order to secure evidence to be used in judicial proceedings. A British claim was made that their subjects had been acting in accordance with a right of intervention. The purpose of the British action undertaken in the channel was not to take (permanent) control over Albanian territory, neither was the intention to alter the political structure or leadership of Albania, why it seems that the territorial and political *status quo* of the channel was unthreatened. Further, neither Albanian territory nor Albanian property were caused permanent damages. Even so, the British subjects had been trespassing upon territory over which Albania owned territorial sovereignty.

#### 6.3.1.2 The Reasoning of the Court

In its judgement the International Court of Justice stated that

the alleged right of intervention [was] the manifestation of a policy of force, such as has, in the past given rise to the most *serious abuses* and such as cannot [...] find a place in international law (emphasis added).

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<sup>98</sup> Shaw, p. 3

The Court made it clear that “weaker” states should not have to accept intervention by “stronger” states. The Court noted that to allow a British operation of this kind on Albanian territory would be even less admissible as

For, from the nature of things it would be reserved for the most powerful states, and might easily lead to perverting the administration of international justice itself.

The Court proclaimed the very essence of international relations to be the respect by independent states of each other’s territorial sovereignty. As evident from the first quote, great weight was placed on the considerable risk for abuse that a right like the one claimed by the United Kingdom would involve, and indeed this risk is no lesser just because the intervening state has set out to fight terrorists, instead of mines, on foreign soil. In both cases the intervening state is seeking to secure its own interests. However there appears to be a rather widespread conception that terrorism is so inherently vicious, and constitutes such a serious and real threat to the whole western society that it deserves “special treatment” and hence states are allowed to go further in the fight against terror. In the opinion of the author however, the warning lights shines just as bright on the fight against terrorism in relation to the risk of abuse and the “perverting [of] the administration of international justice itself”, especially considering that the fight against terror to is reserved for the most powerful states.

### **6.3.2 The Rule of Law**

The only international body with the power to restrict unilateral conduct by way of legally binding resolutions and to compel a state to act according to its will is the Security Council, which upon the determination of a threat to the peace, a breach of the peace, or an act of aggression can impose sanctions against a state.<sup>99</sup> The privileged role of the US in the Security Council is problematic in relation to the rule of law as it has the power to veto any resolution, even the resolutions which directly involve its own conduct or interests. The veto power belonging to the US, taken together with the fact that one of the strongest arguments in favour of the Doctrine is that the Security Council is ineffective and unable to act fast and sufficient enough is problematic – as the latter fact in much is due to internal disagreements between the permanent five. This raises the obvious question whether a state should be able to justify its action by means of the deadlock of a situation which it itself has created. It is commonly argued that there is a general principle of international law that a state must always act in good faith, and the just mentioned combination of a right to veto and the making use of an ineffective Security Council, does not seem to be so.<sup>100</sup>

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<sup>99</sup> See Chapter 7 of the UN Charter.

<sup>100</sup> The principle of good faith has been described by the International Court of Justice in the *Nuclear Test* cases as being: One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this

## 6.4 The (Re-)Use of Conventional Legal Terms and the Importance of a “Watchdog”

By claiming to recognise the concepts of necessity and proportionality, it seems that the US is trying to take familiar and well-recognised concepts of international law, and use them in order to gain legitimacy for the own actions. In the opinion of the author necessity and proportionality are in themselves excellent choices to build upon. If all actions were undertaken with due respect to these, it would be a huge step forward. Still, the problem remains of how to “define” necessity and proportionality - should it be subjectively or objectively defined? The whole point of measuring an act against the concepts of necessity and proportionality must reasonably be to add an amount of objectivity to the process. To say that the actions undertaken must abide by the necessity of a situation and to what that is proportional becomes meaningless if it is left to the actor to decide when the criteria are met. Benvenisti, while favouring a right to act pre-emptively and unilaterally, stresses the importance of review of measures undertaken.<sup>101</sup> Question is who that is to be the “watchdog” making sure that one state is not abusing its powers? The jurisdiction of International Court of Justice can easily be dismissed of, and anyhow, the Court has no authority to see to the implementation of its judgements. The other possible control body is the Security Council, where the United States enjoys a right of veto - and so the wheel has come to a circle and we are back at the issue of inequalities in strength as between states.

## 6.5 Conclusion

Unfortunately I have not been able to find an answer to the question of what the Doctrine is. The question formulated in the beginning – whether it is a fourth alternative to the other three options examined in this thesis – remains unanswered. What can be said is that it seems to be a morally based standpoint which at the moment lacks a solid legal foundation. Perhaps time will offer an answer to the question asked and perhaps the international legal order in the future will evolve as to comprehend and offer support to the Doctrine – we will have to wait and see.

Another question to be answered is the Doctrine’s suitability as a means for fighting international terrorism. One of the benefits of accepting the Doctrine as such is that it can offer a solution to a deadlock situation. Another positive aspect is that the US National Security Strategy provides

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co-operation in many fields is becoming increasingly essential, see ICJ Reports, 1974, pp. 253, 267; 57 ILR, pp. 398, 412. Shaw describes the principle of good faith as “a background principle informing and shaping the observance of existing rules of international law and in addition constraining the manner in which those rules may legitimately be exercised, see Shaw, p. 98.

<sup>101</sup> Benvenisti, p. 689.

for also non-military measures to be taken, for example regarding state-cooperation in relation to weapons of mass destruction and economic growth which makes it is more suited to deal with terrorism - as a political and social phenomenon - than for example self-defence.<sup>102</sup> On the other hand it potentially reduces international law to mere muscle power and involves a great risk for abuse, a matter which is underlined by the non-existence of a competent watch-dog. The history books shows what this kind of unilateral and unrestricted power can give rise to in terms of abuse and violence, why in the opinion of the author one should think twice about the hard earned lesson history has given us before accepting the US claim as a valid alternative.

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<sup>102</sup> The document is available at <http://www.whitehouse.gov.nsc.nss.pdf> (last visited 3 November 2006).

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