



FACULTY OF LAW
University of Lund

Alexandra Trossling

Self-Defence Against Terrorism

- before and after 11 September 2001 -

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Ulf Linderfalk

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Summary

The first condition for the legal use of force in self-defence is that the state exercising this right is the victim of an armed attack. Typically, an armed attack is carried out across the frontier of the aggressor state into the territory of the victim state. Armed attacks can also be launched from third states, as well as not involve the territory of any other state than the aggressor state. Defence must be the objective when force is used in self-defence. Self-defence in the face of an imminent armed attack may be justifiable, but a doctrine of pre-emptive self-defence may cause states to accelerate their arms development or launch a pre-emptive strike of its own simply to avoid being pre-empted by another state. Article 51 of the UN Charter does not specify that the armed attack has to originate from a state; this may however be understood as an implied condition since the UN Charter is a treaty and as such only binding on the states-signatories. The acts of self-defence undertaken in the Caroline incident were directed at non-state actors. To claim a general right to attack a terrorist group on the territory of another state is however quite controversial. The principle of non-intervention prohibits a state to in any way intervene into the affairs of another state. For a right of self-defence to exist, there must be state responsibility. Private conduct can normally not be attributed to a state but there are situations in which a state can become responsible under international law. Articles 8 and 11 of the ILC Articles on State Responsibility attribute to states acts which the state directed or controlled and acts which have subsequently been endorsed by a state. These rules confirm previous ICJ practice in Nicaragua, Tadic and Tehran Hostages cases. The duty to report the intention to use self-defence to the Security Council is compulsory, and failure to comply would preclude a state from invoking self-defence. The prohibition of the use of force, as formulated in article 2.4 of the UN Charter is an integral part of customary law and binding on all states. Article 51 does not regulate all aspects of the right of self-defence, and customary law may be seen as a complement regarding some of these aspects.

The United States immediately perceived the 11 September events as an armed attack, an act of war. The Security Council received a report from the United States stating that it was the victim of armed attacks by al Qaeda and that the US would respond in self-defence. The American interpretation of the terrorist attacks as armed attacks was largely accepted by other states, and the North Atlantic Council also regarded the terrorist acts as an armed attack. Since the attack on 11 September was completed when Operation Enduring Freedom was launched the US would have to prove that the 11 September attack was part of a set of attacks and that the threat of future attacks was real and imminent. Without evidence of more direct Taliban involvement in specific al Qaeda actions, there is no responsibility for an armed attack on behalf of the state of Afghanistan, and consequently self-defence may not be directed at that state.

Security Council Resolutions 1368 and 1373 reaffirm the inherent right to self-defence. The Security Council does not however speak of an armed attack but refers to the 11 September events as terrorist attacks, not expressly linking this concept to the reference to the right to self-defence. The members of the Security Council, the members of NATO, and every other state which has not objected to the use of self-defence may seem to have accepted that the right of self-defence now arises not only following armed attacks by states, but also by terrorist organizations. Expanding the right of self-defence may however create more problems than solutions, if it is at all possible. Before 11 September, few states were willing to accept a right of forceful self-defence against a state where there was no complicity in the terrorist acts by the state. As a response to attacks subsequent to 11 September, Security Council resolutions have not made any reference to the right of self-defence and have stressed the importance of peaceful means of combating terrorism, and this can be seen as a strong indication that the right to use force against completed terrorist attacks remains exceptional and that there is no right of pre-emptive self-defence.

The prohibition of the use of force is *jus cogens* and as an exception to this prohibition, the right of self-defence should be regarded as part of *jus cogens*. Since the UN Charter articles 2.4 and 51 represent a codification of existing *jus cogens*, alterations of them will have to be in line with the customary *jus cogens* or they will be void ab initio. Consequently, any alterations and interpretations widening the scope of article 51 may be very unlikely to occur, especially in a short period of time. If one regards the right to self-defence as *jus cogens*, article 51, or for that matter article 2.4, may of course not be interpreted contrary to the content of the customary *jus cogens* rule. If the right of self-defence is not *jus cogens*, subsequent state practice may widen the scope of article 51, but a considerable amount of state practice would be needed to substantiate such an interpretation.

Global terrorism is a new phenomenon, and as such it poses new problems to the international community. The Security Council has acknowledged that terrorism is a threat to peace and security and thus action can be taken under Chapter VII. Existing conventions on terrorism do not encompass the use of force, but treat terrorism as a crime for which the perpetrators must be held accountable. A thirteenth global convention, the International Convention for the Suppression of Acts of Nuclear Terrorism, was adopted by the General Assembly in April 2005, and a Draft Comprehensive Convention on International Terrorism is currently being drafted.

1 Introduction

What happened on 11 September 2001 and subsequently changed the world. The events had an emotional impact, and certainly a political one. National laws have been changed to adapt to the threat of terrorism, but have the terrorist attacks of 11 September also had an impact on international law and more specifically the right of self-defence? This Master thesis is an attempt to answer the questions whether the 11 September events gave rise to a right of self-defence in accordance with applicable international law; whether the subsequent Operation Enduring Freedom was a legal response; and whether the law of self-defence may have been altered since that time and how this alteration may have come about.

1.1 Self-defence

The essence of self-defence is self-help. This self-help may take different forms: non-forcible measures, such as the severing of diplomatic relations, or forcible measures in which case the measures must meet the conditions of self-defence. In the days when recourse to war was free, states needed no legal justification to engage in hostilities and the concept of self-defence was a mere political excuse for the use of force.¹ The evolution of the legal concept of self-defence is intimately connected with the development of a prohibition of the use of force.

Thus, article 51 of the UN Charter states that

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. [...]

Article 51 must be read in conjunction with article 2.4 of the Charter², which propagates the general prohibition of inter-state force:

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.

Article 51 establishes an exception to this norm by allowing states to resort to force in the case of an armed attack upon them. Article 2.4 is in turn indivisible from article 2.3:³

¹ Dinstein 'War, Aggression and Self-Defence' p 160

² Dinstein 'War, Aggression and Self-Defence' p 161

³ Dinstein 'War, Aggression and Self-Defence' p 82

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

The legality of the use of force by one state is inseparably linked to the illegal use of force by another state. The use of force by the opposing parties to a conflict cannot be simultaneously lawful – if one state is rightfully exercising its right to self-defence, then the other must be engaged in an unlawful armed attack in violation of the prohibition of the use of force. Self-defence is invoked to justify conduct which would otherwise be unlawful. It may imply an admission of conduct as well as an admittance of the wrongfulness of that conduct if self-defence cannot be justified.⁴ Self-defence is a right, not a duty. The resort to counterforce by a state subjected to an armed attack is optional.

⁴ Nicaragua v US (ICJ 1986) para. 74; hereinafter referred to as ‘Nicaragua’

2 Self-defence before 11 September

The prohibition of the use of force, as formulated in article 2.4 of the UN Charter, is an integral part of customary law and binding on all states.⁵ There may however be slight differences between the customary and conventional regulations of the use of force, especially regarding the right of self-defence.⁶ Article 51 of the Charter itself refers to an 'inherent' right of self-defence, which the Court in Nicaragua interpreted as a reference to pre-existing customary law.⁷ Article 51 does not regulate all aspects of the right of self-defence, and customary law may be seen as a complement regarding some of these aspects.

The different prerequisites for self-defence will be examined separately below.

2.1 Armed Attack

The first condition for the legal use of force in self-defence is that the state exercising this right is the victim of an armed attack. This is a restriction compared to other articles in the UN Charter, which refer to aggression⁸, and the article is deliberately construed to be restrictive.⁹ While the term aggression can be stretched to comprise mere threats, an armed attack requires aggression of a certain scale and does not include threats.

There is no mention in article 51 that the author of the armed attack must be a state in order for the act of aggression to qualify as an armed attack. This condition may nevertheless be inferred from the fact that the regulation is part of the UN Charter, which is an agreement between states, and as such not binding on other entities than the states parties to the Charter.

Typically, an armed attack is carried out across the frontier of the aggressor state into the territory of the victim state. The crossing of borders during the armed attack is not necessary – frontiers may have been crossed at a previous stage and the armed attack may very well be launched from within the target state.¹⁰ Armed attacks can also be launched from third states, as well as not involve the territory of any other state than the aggressor state. The latter was the case in the hostile take-over by Iranians of the American embassy in Tehran in 1979. The ICJ in the Tehran Hostages case characterized the event as an armed attack.¹¹

⁵ Nicaragua (merits) para 187, 188

⁶ Nicaragua (merits) para 174, 175

⁷ Nicaragua (merits) para 176. This interpretation contrasts with interpretations made by some scholars along the lines of the right being a *jus naturale*, or being inherent in state sovereignty. See Dinstein pp 163-165

⁸ See UN Charter articles 1.1, 39 and 53.1

⁹ Dinstein 'War, Aggression and Self-Defence' p 166

¹⁰ Dinstein 'War, Aggression and Self-Defence' p 176

¹¹ US v Iran (ICJ 1980) para 57, 91; hereinafter referred to as 'Tehran Hostages'

The choice of arms is of less relevance – the weapons used may be of varying sophistication and standard. If an offensive is carried out causing fatalities, it could be classified as an armed attack regardless of the weapons used to accomplish it.¹² To be considered an armed attack the use of force must cause serious damage to property and/or human casualties.¹³ Support for the conception that not every act of aggression amounts to an armed attack can be found in article 2 of the General Assembly Definition of Aggression¹⁴, which provides:

The first use of force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

This definition is a de minimus clause and what is true of aggression should be all the more valid with reference to an armed attack.¹⁵ There is obviously a threshold of significance that needs to be crossed in order for an act of aggression, and indeed an armed attack, to be deemed to have occurred. The Definition of Aggression also lists acts that, when of a significant scale, give rise to a right to self-defence. These acts include invasion and bombardment of territory, blockade of ports, attacks on air, sea or land forces, and the “sending [...] 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.”¹⁶

The International Court of Justice in the Nicaragua case provided an authoritative interpretation of the right to self-defence and the concept of armed attack. The Court found it necessary to distinguish between the gravest forms of aggression, i.e. those constituting an armed attack, and other less grave forms of use of force.¹⁷ The Court emphasized the requirement that the use of force must be on a significant scale in order to amount to an armed attack. According to the International Court of Justice, there is general consensus as to which acts can be considered armed attacks. These acts include not only action by regular forces across an international border, but also “the sending by and on behalf of a State of armed bands, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to [...] an actual armed attack conducted by regular forces, or its substantial involvement therein”.¹⁸ This

¹² Dinstein ‘War, Aggression and Self-Defence’ p 167

¹³ Dinstein ‘War, Aggression and Self-Defence’ p 174

¹⁴ General Assembly Definition of Aggression; Annexed to GA Res 3314 (XXIX 1974); hereinafter referred to as the ‘Definition of Aggression’

¹⁵ Dinstein ‘War, Aggression and Self-Defence’ p 117

¹⁶ Definition of Aggression article 3

¹⁷ Nicaragua para 191

¹⁸ Definition of Aggression article 3g

is considered to reflect customary international law.¹⁹ This customary law prohibition of armed attacks may apply when a State sends armed bands rather than its regular army across the border of another State, and these armed bands perform operations, which if performed by a regular army, would have been classified as an armed attack. The concept of armed attack does however not include provision of weapons, logistical or other support. These actions may amount to threat or use of force, or intervention, but not an armed attack capable of triggering the right to self-defence.²⁰

The part of the Court's judgement in which it declared that provision of arms or logistical or other support cannot amount to an armed attack was strongly criticized by Judges Schwebel and Jennings in their dissenting opinions. Schwebel considered the Court's definition of armed attack too narrow and consequently narrowing the right of self-defence too much.²¹ Jennings pointed out that the provision of arms may be an important element in what might amount to an armed attack if coupled with other elements of involvement.²² Neither Schwebel nor Jennings adduced any evidence in state practice that mere provision of arms and logistical support had ever been considered an armed attack. In short, the Courts judgement was in fact in line with state practice.²³

Defence must be the objective when force is used in self-defence. The aim must be to stop an ongoing attack or, as described below, an attack that is imminent.

2.1.1 Imminent Armed Attack

When an attack has occurred, the object of self-defence must be to deter further attacks. In the absence of an on-going or imminent armed attack, or if the purpose of the armed self-defence is to punish the aggressor, it is to be considered an armed reprisal, or if the force is significant, an armed attack.²⁴ The International Court of Justice has in both the Nicaragua and the Corfu Channel cases²⁵ indicated that armed reprisals are unlawful, and the General Assembly has resolved that armed reprisals are unlawful and states must refrain from using them since they do not aim at deterring an ongoing attack or to liberate occupied territory.²⁶ This is also confirmed in article 50.1a of the ILC Articles on State Responsibility.²⁷

¹⁹ Nicaragua para 195

²⁰ Nicaragua para 195

²¹ Gray 'International Law and the Use of Force' p 110

²² Nicaragua, J Jennings Dissenting Opinion para 543

²³ Gray 'International Law and the Use of Force' p 110

²⁴ O'Connell 'Lawful Self-defence to Terrorism' p 893

²⁵ Nicaragua para 191, Corfu Channel Case (UK v Albania 1949 ICJ 4) para 108-109; hereinafter referred to as 'Corfu Channel'

²⁶ General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations; Res 2625 (XXV 1970)

²⁷ ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001); hereinafter referred to as 'ILC Articles on State Responsibility'

2.1.1.1 The Caroline Doctrine

The condition that self-defence be used only to deter an ongoing attack may sometimes be modified. In accordance with the Caroline Doctrine, there are conditions under which self-defence may be initiated although an attack is not yet 'going on'.²⁸

The Caroline incident occurred in 1837, when a rebellion against the Crown in Canada instilled sympathy and acts of support from a large number of American citizens. The rebellion was suppressed and many of the insurgents fled across the border to America, where they set up a provisional government to support the Canadian insurrection. The rebels were supplied with ammunition from the territory of the State of New York, a transport in which the vessel Caroline was instrumental. US government made efforts to restrain the supporters of the rebellion and their provision of material support to the Canadian insurrection, but were unsuccessful. The British forces on the Canadian side crossed to the American side, boarded the Caroline, which was soon abandoned, where after the British boarding party set fire to the vessel, towed it into the current of the river, where it subsequently went over the falls. Two Americans were killed in the incident. American Secretary of State Webster called upon the British government to show "[n]ecessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."²⁹ The Americans expressed doubt as to whether the above conditions were met by the British, who on their side were convinced that the boarding and successive events on board the Caroline did indeed live up to the required conditions. Had there been time to notify the US government and await its attempts to prevent or stop the American support, the unilateral action taken by the British would have been unlawful.³⁰ In 1842 The American Secretary of State accepted a British apology and no redress was arranged. Consequently, according to the Caroline Doctrine, a state would be allowed to act unilaterally against a terrorist act emanating from another state's territory, if it were clear that either the responsible state could not respond to prevent the terrorist act due to lack of time, or the responsible state could not, even with due notice, prevent the attack from occurring. Any lawful unilateral action would have to be conducted so as to minimize the damage caused to the state on whose territory the defence action took place.³¹ A more modern example of anticipatory self-defence deemed lawful is the Israeli use of armed self-defence against Egypt in 1967: According to Israel, there was evidence that Egypt was planning to launch an attack against Israel, and using anticipatory self-defence, Israel destroyed Egyptian fighter planes in formation. Subsequent evidence suggests that Israel knew Egypt

²⁸ In its commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts (art 25), the ILC points out that the Caroline incident was not in fact about self-defence, but concerned a plea of necessity. This may very well be true, but since reference has been made to Caroline in cases of self-defence for over 150 years, the parameters given in the Caroline incident may be seen as customary law supported by numerous instances of state practice and *opinio juris* of states.

²⁹ Reisman 'International Legal Responses to Terrorism' pp 44-45

³⁰ Reisman 'International Legal Responses to Terrorism' p 46

³¹ Reisman 'International Legal Responses to Terrorism' p 47

was not planning to attack Israel, and if so, the Israeli use of self-defence would be unlawful.³² However, if there is a plan for an attack on another state and that plan is in the course of implementation, self-defence may begin.³³

The defending state needs to show by clear and convincing evidence that the attacks are planned and underway.³⁴

2.1.2 Pre-emptive Self-defence

Self-defence in the face of an imminent armed attack may be justifiable. Moving the time aspect one step, or several as it may be, forward is a whole other question. A claim to a right of pre-emptive self-defence would involve acts of self-defence against actors who have not yet implemented their plans of armed attack, and also actors who may not even have actual plans, but merely possess the arms necessary to perpetrate such attacks.

In 1986, the US Department of State under George Schultz, purported a right for a state to use force in self-defence if that state had reason to believe that another state, which had already used force in the past, was planning to do so again in the near future.³⁵ This rationale was used to justify the US bombing of Libya in 1986, but was not accepted as an appropriate interpretation of the UN Charter by the international community. The General Assembly passed Resolution 41/38, in which it condemned the United States.³⁶ In the Security Council, a draft resolution condemning the United States was tabled, and failed because it was vetoed by France, Great Britain and the US itself.³⁷

In 2002 this 'Schultz-doctrine' was taken a step further by President George Bush announcing his doctrine of pre-emptive self-defence. The US hereby maintained a right to strike to eliminate weapons that might be used against American interests or be supplied to terrorists.³⁸

This is a highly controversial claim, since there is no support for it in customary law, and there is no indication that the international community sees a right of pre-emptive self-defence as necessary.³⁹ The acceptance of such a rule would have negative effects clearly outweighing the good of possibly deterring potential terrorist attacks. A doctrine of pre-emptive self-defence may cause states to accelerate their arms development or launch a pre-emptive strike of its own simply to avoid being pre-empted by another state. A doctrine of pre-emptive self-defence simply expands the exception

³² O'Connell 'Lawful Self-defence to Terrorism' p 894

³³ O'Connell 'Lawful Self-defence to Terrorism' p 894

³⁴ For an elaboration on the evidentiary requirements, see Lobel 'The Use of Force to Respond to Terrorist Attacks: the Bombing of Sudan and Afghanistan' pp547-555; O'Connell 'Evidence of Terror'

³⁵ Quigley, *The Afghanistan War and self-defence* p 558

³⁶ GA Res 41/38 (1986)

³⁷ UN Doc S/PV 2682 (1986)

³⁸ Travalio, Altenburg 'Terrorism, State Responsibility, and the Use of Military Force' p 117

³⁹ Travalio, Altenburg 'Terrorism, State Responsibility, and the Use of Military Force' p 118

to the prohibition of the use of force in article 2.4 of the UN Charter to such an extent that it becomes virtually meaningless.

2.2 State Responsibility

Article 51 of the UN Charter does not specify that the armed attack has to originate from a state. Indeed, some argue that an armed attack can be perpetrated not only by states, but also by non-state entities such as terrorist organizations and that these non-state armed attacks would give a right to self-defence in accordance with article 51 of the UN Charter.⁴⁰ However, the condition that an armed attack must originate from a state may be taken as implicit: article 51 is an exception to the general prohibition of the use of force between states contained in article 2.4, and as a treaty, the UN Charter can legally bind only states-parties to it. From article 1 of the Definition of Aggression it is clear that aggression has to originate from a state:

Aggression is the use of armed force by a State against the sovereignty; territorial integrity or political independence of another State [...]

The acts of self-defence undertaken in the Caroline incident were directed at non-state actors. The raid was conducted on US territory although the United States as such were not responsible for the acts of the supporters of the Canadian insurrection. To claim a general right to attack a terrorist group on the territory of another state is however quite controversial. The principle of non-intervention prohibits a state to in any way intervene into the affairs of another state. The wording of article 2.4 of the UN Charter “[...]use of force against the territorial integrity or political independence of a State [...]” has led some to claim that as long as the use of force is not directed at the territorial integrity or political independence of the target state, i.e. attempts to occupy territory etc., then the use of force on the territory of another state would be in accordance with the UN Charter.⁴¹ The General Assembly Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States⁴² from 1965 clarifies that “[n]o state has the right to intervene, directly or indirectly, for any reason whatsoever, in the external or internal affairs of any other state.” Consequently, armed intervention and all other forms of interference or attempted threats against the personality of a state or against its political, economic and cultural elements, are condemned.⁴³

This was reaffirmed in the 1970 Friendly Relations Declaration, with the addition that such interventions are not only condemned, but a violation of international law. In the Corfu Channel case⁴⁴, the International Court of

⁴⁰ Printer ‘The Use of Force against Non-State Actors under International Law: an Analysis of the US Predator Strike in Yemen’ p 351

⁴¹ Paust ‘Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond’ p 536

⁴² General Assembly Res 2131 (XX)

⁴³ Shaw ‘International Law’ p 1021

⁴⁴ Corfu Channel para 35

Justice stated that to allow a derogation from the territorial sovereignty of a state would create a right reserved for the most powerful states. In the Court's view, the essence of international relations lie in the "respect by independent states of each other's territorial sovereignty".⁴⁵ Thus, for a right of self-defence to arise, the armed attack must have been carried out by a state. States are naturally responsible for acts undertaken by its official organs, even when authority is exceeded or instructions are contravened.⁴⁶ Where terrorism is concerned, states are often not directly involved in the acts, but there are conditions under which a state can be held responsible even without direct participation.

2.2.1 The ILC Articles on State Responsibility

The ILC Articles on the Responsibility of States for Internationally Wrongful Acts were adopted by the General Assembly in 2001.⁴⁷ The articles that come into question when it comes to ascribing responsibility to a state for actions in which it is not directly involved are articles 8-11. Out of those, articles 8 and 11 are the ones most likely to be quoted in cases of state-connected terrorism, and they are considered to reflect customary law.

Article 8

Conduct directed or controlled by a State

The conduct of a person or a group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the control of, that State in carrying out the conduct.

The conduct of private subjects is generally not attributable to a state. There are however situations in which the specific relationship between the State and the private subject is such as to engage the responsibility of the state.⁴⁸ According to article 8, this occurs when a private subject has been given instructions by a state organ or official, or when the state is in fact controlling the acts of the private subject. This attribution to a state of conduct authorized by it is widely accepted; the most common situation being that in which individuals or groups of individuals, not part of State police or armed forces, are sent to perform specific tasks abroad.⁴⁹ The conduct will be attributed to the state only if the state controlled or directed the conduct in question.

The conditions for attribution given in article 8 are disjunctive: it is sufficient that one of them be established for state responsibility to occur.⁵⁰ However, the control, direction or instruction must relate to the conduct allegedly amounting to an internationally wrongful act. Actions of

⁴⁵ Shaw 'International Law' p. 1022

⁴⁶ ILC Articles on State Responsibility art 4, 5, 7

⁴⁷ General Assembly Res56/83 (2002)

⁴⁸ ILC Commentary to Draft Articles on the Responsibility of States for Internationally Wrongful Acts, hereinafter 'ILC Commentary' p 103

⁴⁹ ILC Commentary p 104

⁵⁰ ILC Commentary p 108

individuals or groups under the control of the State will meet the conditions for attribution even if particular instructions were ignored. Article 8 also covers the actions of groups not possessing separate legal personality.

Purely private conduct can normally not be attributed to a state but there are situations in which a state can become responsible under international law. Article 11 regulates the situation where there is no initial involvement by the state, but the unlawful action undertaken by non-state actors is consequently accepted by the state, whereby it assumes responsibility for the act.

Article 11

Conduct acknowledged and adopted by a State as its own
Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

The words ‘acknowledges and adopts’ were chosen to distinguish cases of mere support and endorsement.⁵¹ In general, mere acknowledgement or verbal approval of conduct is not enough to make an act attributable to a state. The word ‘adoption’ implies that the conduct must be acknowledged by the state as its own; a clear indication to this effect is required.⁵²

2.2.2 The Nicaragua Case

The Nicaragua case was adjudicated in 1986. The judgement contributes to the clarification of the concept of ‘armed attack’ as mentioned above, but also provides explanations as to the conditions under which a state becomes responsible for an armed attack even when not directly involved. The factual question was whether the US could be held responsible for an armed attack against Nicaragua in which several groups with varying degrees of connection to the US had taken part.

First of all, the Court established whether the individuals involved in the armed attack were actual US officials; if so, their acts would be imputable to the United States. The Court then proceeded to discuss whether individuals not having the status of US officials, but were paid and acting under the instructions of US organs (UCLAs), could involve the responsibility of the State. The Court then determined whether other individuals (contras) had acted in such a manner and were so closely linked that their acts would be attributable to the US. The Court thus distinguished between three types of individuals: Those who had the status of officials; those who were not formally officials, but were paid and directly supervised and instructed by the US to carry out specific tasks (UCLAs); those who were not formally

⁵¹ ILC Commentary p 121

⁵² ILC Commentary p 121-122

officials, but could never the less engage state responsibility having acted as de facto State agents (contras).

The UCLAs had been supplied with speedboats, guns and ammunition by the US administration, and although it was not proved that US military personnel directly participated in the actions in question, American state agents did participate in the planning, direction, support and execution of the operations. Therefore, the Court considered the attacks performed by the UCLAs imputable to the United States.⁵³

With respect to the third category of individuals, those belonging to the contras, the Court developed the doctrine of effective control:

What the Court has to determine at this point is whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.⁵⁴

The Court concluded that even though the United States participated in the financing, training, organizing and equipping of the contras, and in selecting its targets and planning operations, this was not sufficient in itself to make acts committed by the contras attributable to the United States. Despite the far-reaching support lent by the United States to the contras, there was not enough evidence to prove that the United States had effective control over the specific operations in the course of which the alleged violations were committed.⁵⁵

2.2.3 The Tadic Case

In the Tadic case⁵⁶, the ICTY Appeals Chamber had to determine whether the connection between the Bosnian Serb armed forces and the Federal Republic of Yugoslavia was such as to render the FRY responsible for the acts of the Bosnian Serb forces.

According to the Appeals Chamber, the control and agency tests used by the ICJ in Nicaragua are not persuasive.⁵⁷ The Appeals Chamber referred to the ILC Articles, specifically article 8, under which individuals, regardless of them not being considered organs of the state according to domestic law, can act on behalf of a state and consequently induce state responsibility for those acts. The requirement of international law is that the state exercises control over the individual. The degree of control necessary may vary according to the circumstances of each case. The Appeals Chamber failed to see why every situation should require an equally high threshold as held by

⁵³ Nicaragua para. 86

⁵⁴ Nicaragua para. 109

⁵⁵ Nicaragua para. 114

⁵⁶ International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Case No 94-1-A; hereinafter referred to as 'Tadic'

⁵⁷ Tadic para 115

the Court in Nicaragua.⁵⁸ Three situations were envisaged by the Appeals Chamber: Individuals may be engaged by a state to perform specific illegal acts in the territory of another state. In this situation it would be necessary to show that the state in question issued specific instructions concerning the commission of the illegal act so that the individual could be considered a de facto state agent, or that the state publicly gave its retroactive approval. Generic authority over the individual would not be sufficient to engage international responsibility for the state. When unlawful acts are committed by an unorganized group of individuals the situation would be the same - apart from a measure of authority, specific instructions or ex post facto public endorsement are required from the state.⁵⁹

The above situations should, according to the Appeals Chamber, be distinguished from situations in which individuals making up an organized and hierarchically structured group, such as military unit, or armed bands of irregulars or rebels, commit the illegal acts. For the attribution to a state of acts committed by such a group, it should be sufficient that the group as a whole was under the overall control of the state.⁶⁰ In the view of the Appeals Chamber, an organized group, if it is under the overall control of a state, must engage the responsibility of that state whether or not each individual action was imposed, requested or directed by the state. State responsibility is the objective corollary of the overall control by the state exercised over a group. International law renders a state responsible for acts performed by its organs (even if acting ultra vires), and for acts performed by individuals making up organized groups subject to the state's control regardless of whether specific instructions have been issued to those individuals.⁶¹

According to the Appeals Chamber, state practice is not entirely in line with the effective control test laid down by the Court in Nicaragua. State practice has upheld the Nicaragua standard with regard to individuals or unorganized groups of individuals, but has applied a different test with regard to military or paramilitary groups.⁶² In cases concerning military or paramilitary groups courts have departed from the notion of effective control set out by the ICJ.⁶³ It is not sufficient for an organized group to be financially or militarily assisted by a state. This is confirmed by practice concerning national liberation movements - states which have provided organizations such as the PLO, SWAPO and ANC with a territorial base or with economic and military assistance have not been attributed international responsibility by other states including those states against which the movements were fighting.⁶⁴ In order to attribute the acts of a military or paramilitary group to a state, it must be proved that the state has overall control of the group not

⁵⁸ Tadic para 117

⁵⁹ Tadic para 118

⁶⁰ Tadic para 120

⁶¹ Tadic para 121-123

⁶² Tadic para 124

⁶³ The ICTY refers to Stephens case, US v Mexico Report of International Arbitral Awards vol IV pp 266-267; Kenneth P. Yeager case, Kenneth P. Yeager v Islamic republic of Iran 17 Iran-US Claims Tribunal Reports 1987 vol IV p 92; Loizidou v Turkey, European Court of Human Rights 40/1993/435/514

⁶⁴ Tadic para 130

only by financing and equipping it, but also by coordinating or helping in the overall planning of its military activity. It is however not necessary that the state issue instructions for the commission of specific acts. As regards unorganized individuals, specific instructions or ex post facto approval has been required.⁶⁵ When a state has a role in “organising, coordinating or planning the military actions in addition to financing, training and equipping or providing operational support”, the control required may be deemed to exist.⁶⁶ If, as in Nicaragua, the controlling state is not the territorial state where the armed clashes occur, or where the armed units perform their acts, more extensive and compelling evidence is required to show that a state is genuinely in control by directing or helping to plan the unlawful actions.⁶⁷ This is also true when the general situation in the potentially responsible state is one of weakened authority and disorder even when this state is the territorial state of the illegal acts.⁶⁸ On the merits of the case, the Appeals Chamber concludes that “given that the Bosnian Serb armed force constituted a “military organization”, the control of the FRY authorities over these armed forces required by international law [...] was *overall* control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.”⁶⁹

2.2.4 The Tehran Hostages Case

The Tehran Hostages case⁷⁰ concerns a dispute between the United States and Iran. In November 1979, the American embassy in Tehran was stormed by a group of militants during a demonstration. Iranian security personnel made no effort to prevent the seizure of the embassy. The militants gained access to the premises by force and diplomatic and other personnel were taken hostage. There was no attempt made by the Iranian Government to rescue hostages or to bring the militants’ action to an end. Official protests were made by the United States Government but the Americans were denied direct contact with the Iranian Government.⁷¹ A spokesman for the militants referred to a statement by Ayatollah Khomeini declaring that it was up to the students to expand their attacks against the United States. According to the Court, this statement did not amount to an authorization to undertake the seizing of the embassy and subsequent hostage-taking, and thereby did not alter the initially independent character of the militants’ actions.⁷² Once the occupation of the embassy had been undertaken, the Iranian Government was under an obligation under international law to bring the occupation to an end and to restore American control over the embassy. No steps to this effect were however taken. The day after the take-over of the embassy, the

⁶⁵ Tadic para 131-132

⁶⁶ Tadic para 137

⁶⁷ Tadic para 138

⁶⁸ Tadic para 139

⁶⁹ Tadic para 145

⁷⁰ United States of America v Iran (ICJ 1980); hereinafter referred to as ‘Tehran Hostages’

⁷¹ Tehran Hostages para 17-18, 26-27

⁷² Tehran Hostages para 59

Iranian Foreign Minister declared that the students responsible enjoyed the endorsement and support of the government. Numerous Iranian authorities expressed their approval of the events, and Ayatollah Khomeini himself made clear the endorsement of both the seizing of the embassy and the detention of its staff. A seal of government approval was set two weeks after the take-over, when Ayatollah Khomeini in a decree declared that the embassy and hostages would remain as they were until the United States had handed over the Shah for trial in Iran. The approval given by Ayatollah Khomeini and other state organs of Iran translated the continuing occupation and detention of hostages into acts of the State of Iran.⁷³

2.3 Security Council Action

The process of self-defence has two stages; the first and preliminary is when the decision to opt for self-defence is left to the victim state; the second is the review of the flow of events by a competent international organ, in this case the Security Council.⁷⁴ The legitimacy of action taken in self-defence may also be dealt with by the International Court of Justice.⁷⁵

Consequently, a state acting in self-defence does so at its own discretion as well as its own risk. Having studied the relevant facts, the Security Council is competent to take any action it deems appropriate to restore peace and security.⁷⁶ Whatever the measures taken, a mandatory decision by the Security Council must be complied with by a Member State. The Security Council is however not a judicial organ, but a political one acting on political motives. Thus, political considerations may prevent the Security Council from taking action even when faced with obvious cases of aggression. Consequently, absence of Security Council action does not necessarily mean that the acts of self-defence undertaken should be considered to be in accordance with international law.

The right of a state to use self-defence only remains as long as the Security Council has not taken steps to restore international peace and security. A binding decision ordering the withdrawal of forces or a cease-fire obligates Member States to act accordingly and self-defence may no longer be invoked. If the Security Council on the other hand fails to take any measures, the exercise of forcible self-defence may continue. In order to deprive a state of its right to self-defence it is necessary that the resolution produces a binding decision demanding cessation of defensive action. Lacking an explicit decree from the Security Council to discontinue the use of force, the right to use self-defence remains until the Security Council has taken measures resulting in the successful restoration of peace and security.⁷⁷ The measures taken by the Security Council would accordingly

⁷³ Tehran Hostages para 70-74

⁷⁴ Dinstein 'War, Aggression and Self-Defence' p 185

⁷⁵ The ICJ in Nicaragua (jurisdiction) held that the right of self-defence has legal dimensions and judgement thereof is not foreclosed by the concurrent jurisdiction of the Security Council. (Nicaragua para 95)

⁷⁶ Dinstein 'War, Aggression and Self-Defence' p 187

⁷⁷ Dinstein 'War, Aggression and Self-Defence' p 189

have to be of such a nature as to render unnecessary the exercise of self-defence.

The duty to report the intention to use self-defence to the Security Council is compulsory, and failure to comply would preclude a state from invoking self-defence.⁷⁸

2.4 Necessity, Proportionality and Immediacy

Again, the source of the customary law goes back to the Caroline incident.⁷⁹ Though some see it as a one-off episode pre-dating the modern law of self-defence, the conditions of immediacy, proportionality and necessity laid down in Caroline still play a crucial role.⁸⁰

[...] did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons onboard the Caroline was impracticable, or would have been unavailing; it must be shown that daylight could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night [...]⁸¹

Armed force used in self-defence must be proportional to the threatened injury and also necessary for the purpose of defence.⁸² Necessity refers to military necessity and force may only be used if it is necessary to accomplish a reasonable military objective.⁸³ Proportionality adds the requirement that the force used to attain the military objectives be weighed against the possibility of civilian casualties.⁸⁴ Force is never considered necessary until peaceful means have been exhausted and have proved futile, or when such attempts would undoubtedly be pointless.⁸⁵

The loss of civilian life and property must not be out of proportion to the military gain. If the importance of the objective is not in proportion to the potential loss of innocent lives, the objective must be abandoned.⁸⁶ Proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy. As

⁷⁸ Nicaragua para 121

⁷⁹ See note 28

⁸⁰ Gray 'International Law and the Use of Force' p 121; See Nicaragua case; Iranian Oil Platforms case; Adv. Op. on the Legality of the Threat or Use of Nuclear Weapons

⁸¹ Reisman 'International Legal Responses to Terrorism' p44-45

⁸² Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (ICJ 1996) para 41

⁸³ O'Connell 'Lawful Self-defence to Terrorism' p 903

⁸⁴ Gardam 'Proportionality and Force in International Law' p 399-400

⁸⁵ Dinstein 'War, Aggression and Self-Defence' p 184

⁸⁶ Additional Protocol I to the Geneva Conventions of 1949 art 51 p 5

one of the determinants of the legality of the use of force, proportionality remains relevant throughout the conflict.⁸⁷ Assessments of proportionality must be made continuously during the conflict. According to some there is no state practice to support this notion and self-defence may “bring about the ‘destruction of the enemy’s army’, regardless of the condition of proportionality.”⁸⁸ This may very well be, but without doubt the condition of proportionality in the sense that the destruction and devastation affecting civilians must be proportional to the military gain, must remain during the whole of the armed conflict. Destruction of military targets is legitimate, whereas the destruction of civilian objectives is not, thus reasonably the condition of proportionality stands as far as civilians are concerned, while perhaps the force used to destroy enemy armies might exceed the limits of proportionality in accordance with the opinion of certain writers and state practice.

Proportionality became a conventional rule with the adoption of Protocol I to the Geneva Convention in 1979. The provisions in the protocol offer protection both to combatants and civilians. According to article 35.1 the right to choose means and methods of warfare are not unlimited. The infliction of damage and casualties must be in proportion to the achievement of a military objective. Part IV of the Protocol offers a detailed set of rules to protect civilians. The prohibition in article 51.4 of indiscriminate attacks is central; article 51.5 gives examples of what is to be considered an indiscriminate attack, namely attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects [...] which would be excessive in relation to the concrete and direct military advantage anticipated.” Indiscriminate attacks must not be launched, and if it becomes apparent that an attack would be disproportionate, the attack must be aborted.⁸⁹

Waging war as a response to an armed attack short of war is an extreme course of action, and proportionality has to be a major consideration. On the other hand, war will always be disproportionate as a response to an attack that does not itself amount to war. The gravity of the armed attack and the danger in which the victim state finds itself must be significant when a decision is made to respond with war, and a determination of proportionality is thus made in advance.⁹⁰ The action needed to repel an attack may well exceed the force used in the armed attack, and weapons of mass destruction may be used by the defending state. The International Court of Justice in its Advisory Opinion on the Legality of the Use or Threat of Nuclear Weapons went as far as saying that “[t]he proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances.”⁹¹ Given the effect of nuclear weapons on the environment and on civilians and combatants alike, this statement is probably of little practical use.

⁸⁷ Gardam ‘Proportionality and Force in International Law’ p 404

⁸⁸ Dinstein ‘War, Aggression and Self-Defence’ p 208

⁸⁹ Gardam ‘Proportionality and Force in International Law’ p 407

⁹⁰ Dinstein ‘War, Aggression and Self-Defence’ p 209

⁹¹ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons para 42

Self-defence has to be initiated promptly. This does however not mean that it has to commence within hours or even days of the armed attack triggering it.⁹² Launching self-defence may be a time-consuming process, and time for deliberation must be allowed. Attempts at peaceful settling of the dispute must be made which, as in the Gulf War, may cause delays not affecting the right to consequently engage in self-defence.⁹³

2.5 Precedents

Both the US and Israel have previously invoked article 51 to justify the use of force in response to terrorist attacks, but this has been regarded by most as going beyond the scope of article 51.⁹⁴ In these episodes, force was used against the state allegedly harbouring the responsible terrorists. Both Israel and the US claimed to be acting in self-defence in response to past actions and to deter future attacks.

In 1968 Israeli air force attacked the Beirut airport in response to an earlier terrorist attack on an Israeli plane. Israel claimed as grounds for directing its self-defence to the territory of Lebanon that the Lebanese state had permitted Arab terrorists to set up headquarters in Beirut and organize training camps on Lebanese territory, thereby encouraging terror against Israel. This Israeli action was unanimously condemned by the Security Council in Resolution 262⁹⁵. The US however pointed out that it in principle accepted the Israeli action, but that the self-defence in reality had been misdirected because Lebanon was not in fact responsible and the action had been disproportionate. In the opinion of the US (and of course Israel), a state under continuing attack from terrorists has a legal right to defend itself against further attacks.⁹⁶ When Israel in 1985 attacked Tunis, it claimed to be acting in self-defence against PLO headquarters in response to Palestinian terrorist attacks on Israeli citizens. The attack being directed at Tunisian territory was explained by the duty of Tunisia to prevent attacks from being carried out from its territory. Again, the US accepted the Israeli argument, but the rest of the Security Council did not and the action was condemned in Resolution 573.⁹⁷

In 1986, the United States attacked Libya in response to terrorist attacks on US citizens abroad. US aircraft attacked military and para-military targets, and reported the action to the Security Council as acts of self-defence. Many US allies questioned the legality of the action and the general response was disapproval. The UN Secretary General condemned the act, and the General Assembly passed a resolution denouncing the raid.⁹⁸ A Security Council resolution condemning the action was vetoed by the US, Great Britain and France.⁹⁹

⁹² Dinstein 'War, Aggression and Self-Defence' p 212

⁹³ Dinstein 'War, Aggression and Self-Defence' p 213

⁹⁴ Gray 'International Law and the Use of Force' p 161

⁹⁵ Security Council Res 262 (1968)

⁹⁶ Gray 'International Law and the Use of Force' p 161

⁹⁷ Security Council Res 573 (1985)

⁹⁸ General Assembly Res 41/38 (1986)

⁹⁹ Reisman 'International Legal Responses to Terrorism' p 34

In 1993 the US fired missiles against Iraqi intelligence facilities as a response in self-defence to the attempted assassination of former President Bush, a response which caused little objection from other states.¹⁰⁰

In 1998 cruise missiles were fired against paramilitary training camps in Afghanistan, and against a pharmaceutical plant in Sudan allegedly used to produce chemical weapons. The Security Council was notified of this action of self-defence, which was taken in response to the embassy bombings in Tanzania and Kenya. US allies expressed varying degrees of support, while Arab states condemned the attacks.¹⁰¹

The impact of these incidents and the international response to them on the law of self-defence is debated. These incidents and the response to them may be seen as displaying an increased level of tolerance when it comes to responding to terrorist attacks with self-defence. Ascertaining the legal implications of this tolerance is however not easy. Political rather than legal motivations may be at the root of this indulgence of foremost American interpretations of the law. One must not lose sight of the fact that the Security Council operates on political motivation and the significance of its resolutions as evidence of state practice should not be exaggerated. There is however also the option that this may be evidence of new state practice in the field of self-defence possibly giving rise to new and wider rights. The implications of this will be discussed further in Chapter 4 below.

¹⁰⁰ Travalio, Altenburg 'Terrorism, State Responsibility, and the Use of Military Force' p 106

¹⁰¹ Reisman 'International Legal Responses to Terrorism' p 48-49

3 The Legality of Operation Enduring Freedom

On the 4th of October 2001 the British Government published a document stating the conclusions made by the Government on the responsibility for the September 11th terrorist attacks.¹⁰² The British Government purports to have confidence in the conclusions drawn in the document, stating the responsibility of Osama bin Laden and al Qaeda for the terrorist attacks of September 11th, and the close relationship between bin Laden, al Qaeda and the Taliban government of Afghanistan:

The clear conclusions reached by the government are:

- Usama Bin Laden and Al Qaida, [...] planned and carried out the atrocities on 11 September 2001;
- Usama Bin Laden and Al Qaida retain the will and resources to carry out further atrocities; [...]
- Usama Bin Laden and Al Qaida were able to commit these atrocities because of their close alliance with the Taleban regime, which allowed them to operate with impunity in pursuing their terrorist activity¹⁰³

According to the document, bin Laden and al Qaeda have been based in Afghanistan since 1996, and they have a mutually dependant relationship with the Taliban regime. The Taliban allow bin Laden and al Qaeda to operate training camps on the territory of Afghanistan as well as protect him and the network from outside attacks. The British government is confident that the terrorist activities could not be operated without the support of the Taliban. Without the financial and military support of al Qaeda, the Taliban would be seriously weakened. bin Laden has claimed credit for the attack on American soldiers in Somalia in 1993, the attack on US embassies in Kenya and Tanzania in 1998, and has been linked to the attack on the USS Cole in 2000.¹⁰⁴ All of which are claimed by the US as being part of the ongoing terrorist attack on the United States and its interests.¹⁰⁵

The level of truth in these allegations cannot easily be ascertained, and the discussion below is based on the premises that the connections between al Qaeda and the hi-jackers, and al Qaeda and the Taliban respectively were what they have been claimed to be – close.

¹⁰²<www.fas.org/irp/mews/2001/10/ukreport.htm> (last visited 2005-02-09), hereinafter referred to as 'UK Report'. No similar document was released by the US government

¹⁰³ UK Report para 1

¹⁰⁴ UK Report para 4.6

¹⁰⁵ O'Connell 'Lawful Self-defence to Terrorism' p 897

3.1 Armed Attack

First, the question of whether the September 11th attacks can be considered an 'armed attack'. The hijackers were not the armed bands, groups of irregulars or mercenaries sent on behalf of a state that the Nicaragua court mentioned as being able of perpetrating an armed attack. In addition, the hijackers made up small groups of individuals and did not operate as a regular military or paramilitary unit. Apparently, they were armed only with small knives, and not the kind of weapons one would normally associate with military units. The hijackers did not engage in an armed attack in the conventional sense, but boarded aircraft on US territory, hijacked them and, using the aircrafts as missiles, crashed them on US territory. Perhaps terrorist acts such as those committed on 11 September are more appropriately categorized as criminal offences. There are several international conventions on terrorism which classify acts like the hijacking of aircraft¹⁰⁶, sabotage of aircraft¹⁰⁷, and attacks against state or infrastructure facilities using explosive devices¹⁰⁸ as criminal offences. The purpose of these conventions is to create procedures for the prosecution of the offenders, their accomplices as well as those who organize the crimes. In the aftermath of the 11 September events, the General Assembly condemned the terrorist acts, but did not characterize them as attacks, nor recognize a right of self-defence in response to the attacks. Instead, the General Assembly called for international cooperation to bring the perpetrators to justice.¹⁰⁹ This suggests that the terrorist acts were regarded as conventional crimes rather than armed attack.¹¹⁰

There are however also arguments to the effect that the 11 September events constituted an armed attack. The scale of the incident was parallel to that of a military attack; the destruction wrought was dramatic, as was the death toll. The fact that the weapons used were somewhat unconventional should not be decisive when determining the existence of an armed attack - the fuel laden aircrafts were as effective as any missile. The United States immediately perceived the events as an armed attack, an act of war.¹¹¹ The Security Council received a report from the United States stating that it was the victim of armed attacks by al Qaeda and that the US would respond in self-defence.¹¹² The American interpretation of the terrorist attacks as armed attacks seems to have been largely accepted by other states. Although not referring to an armed attack and not authorizing the use of force, both Security Council resolutions 1368 and 1373 affirmed the right of self-

¹⁰⁶ Convention for the Suppression of the Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970

¹⁰⁷ Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971

¹⁰⁸ International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly on 9 December 1999

¹⁰⁹ General Assembly Res 56/1 (2001)

¹¹⁰ Murphy 'Terrorism and the concept of 'armed attack' in article 51 of the UN Charter' p 45-46

¹¹¹ Bush's statement: www.whitehouse.gov/news/releases/2001/09/20010920-8.html last visited 2005-04-05

¹¹² US letter to Security Council UN Doc S/2001/946 (2001)

defence and the need to ‘combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts.’ The North Atlantic Council also regarded the terrorist acts as an armed attack.¹¹³ In the Tehran Hostages case the ICJ, without further comment, referred to the storming of the embassy and consequent hostage taking as an armed attack.¹¹⁴ It would seem that the 11 September attacks could be appropriately described as an armed attack provided a state could be held responsible for them.

Since the attack on 11 September was completed it remains to be proved that this attack was part of a set of attacks and that the threat of future attacks was real. The US did not specify in its letter to the Security Council any particular anticipated attacks. Even if subsequent attacks on the United States were planned by al Qaeda, which was suggested by evidence consequently found in Afghanistan¹¹⁵, they would have to be well on their way to implementation in order to fulfil the imminence requirement and constitute lawful grounds for self-defence. Most likely the condition of the attack being on-going or at least imminent was not fulfilled when Operation Enduring Freedom was initiated.

3.2 State Responsibility

The US in its letter to the Security Council acknowledged the fact that in order for self-defence to be lawful, a state would have to be the perpetrator. The letter did not claim that the Taliban had planned, organized or encouraged al Qaeda, but referred to the decision of the Taliban to allow Afghanistan territory to be used as a base by al Qaeda.¹¹⁶ This does not live up to the standards laid down in Nicaragua or even Tadic. Without evidence of more direct Taliban involvement in specific al Qaeda actions, there is no responsibility for an armed attack on behalf of the state of Afghanistan. Although it is difficult to verify the level of truth in all the statements made about the links between al Qaeda and the Taliban, one recurring fact is that it seems the Taliban were rather more dependent on al Qaeda than the other way around. The rules of state responsibility presume a dependence on the side of the non-state actors, but in this case it seems the non-state actors al Qaeda depended on the state, the Taliban, only for supply of territory, whereas the Taliban received all kinds of support from al Qaeda – financial, military and material.¹¹⁷ To fit the concept of ‘effective control’ it seems the parameters would have to be reversed.¹¹⁸ The question arises whether the Taliban could have retained control over Afghanistan without the support of al Qaeda, and what this does to the question of state responsibility. In international law the domestic law system is determinant when establishing

¹¹³ Murphy ‘Terrorism and the concept of ‘armed attack’ in article 51 of the UN Charter’ p 48

¹¹⁴ Tehran Hostages para 57, 91

¹¹⁵ O’Connell ‘Evidence of terror’ p 30

¹¹⁶ US letter to Security Council UN Doc S/2001/946

¹¹⁷ UK Report para 4.4

¹¹⁸ Mégret ‘“War”? Legal Semantics and the Move to Violence’ p 24

the status of an organ or individual as state or non-state.¹¹⁹ This domestic or ‘internal’ law is however not to be seen in formal terms, since formal categories may be very localized and conventional, and informal modifications may occur in times of internal stress. State authority may be delegated to local authorities, private companies or individuals, or political organizations. Consequently, determining what is a state organ may essentially be a question of facts unrelated to formal tests provided by law. The reference to domestic law is not disposed of, but may in many situations not provide a conclusive answer and thus other criteria be resorted to.¹²⁰ If al Qaeda could be fitted into the concept of state organ, then state responsibility for Afghanistan would ensue. In order to be able to act (unilaterally) against al Qaeda attempts have been made to fit the organization into pre-existing paradigms of self-defence and state responsibility, but these paradigms do not fit. Even though al Qaeda may be dependent on access to territory, their aim was most likely not to take over the state of Afghanistan or to become agents of that state. If for no other reason, then simply because the absence of statehood and state sponsorship makes al Qaeda ‘untouchable’ through the established rules of international law.¹²¹

The Taliban sheltering of bin Laden and al Qaeda may indicate support, but neither the continued sheltering nor the refusal to extradite bin Laden is sufficient to generate state responsibility based on subsequent endorsement.¹²²

3.3 Necessity, Proportionality and Immediacy

If there had been an on-going attack on the US, the time lapse of almost a month cannot be seen as a violation of the condition of immediacy. A major military operation in a remote country naturally takes time to set into motion. If self-defence were exercised to prevent an imminent attack, the immediacy condition would be inherently fulfilled. The attack was however not on-going. The Americans have claimed that the 11 September events were part of an on-going campaign of terror against the United States, and thus an ‘on-going armed attack’.¹²³ Clearly, the attacks are few and far-between and to consider them on-going seems far-fetched. The ILC in Nicaragua may have accepted the possibility that a series of smaller attacks may add up to an actual ‘armed attack’¹²⁴, but no elaboration was made. The idea of considering a series of attacks as one on-going attack may be warranted when attacks are being carried out at weekly or even monthly intervals as a pre-planned series of attacks, but when years pass between

¹¹⁹ ILC Articles on State Responsibility art 4.2

¹²⁰ Brownlie ‘System of the Law of Nations’ p 135-136

¹²¹ Mégret ‘War’? Legal Semantics and the Move to Violence’ p 24

¹²² Mégret ‘War’? Legal Semantics and the Move to Violence’ p 23

¹²³ This alleged series of attacks would include the Berlin bomb in 1986, assassination attempt on Bush Sr in 1993, embassy attacks in 1998, attack on USS Cole in 2001

¹²⁴ Nicaragua para 231 where border incursions by Nicaragua “[...] may be treated for legal purposes as amounting singly or collectively, to an “armed attack” [...]”.

attacks, and there is nothing to suggest that a series of attacks is going on (other than possibly the identity of the victim and the perpetrators), this claim seems to be not only lacking legal grounds, but also factual ones. During the time between the attack and the initiation of Operation Enduring Freedom, the Americans made demands both to the Taliban directly and through the Government of Pakistan to surrender bin Laden and other al Qaeda lieutenants.¹²⁵ A formal extradition of bin Laden was however never sought, nor did the US present evidence of bin Laden's criminal involvement in the 11 September events to the Taliban. The demands directed at the Taliban did not meet the standard generally observed by states in extradition requests in that particular suspects were not named and no evidence was given as to their alleged involvement.¹²⁶ This failure to make serious attempts at having bin Laden and others extradited indicates that the use of force may not have been necessary. If protection from further terrorist attacks was possible by means of extradition and consequent trials in American courts, this option should have been pursued. Attempts might prove ineffective, but until attempts have been made, peaceful means cannot be seen as exhausted and thus recourse to force is unnecessary and unlawful.¹²⁷

Given the presence of state responsibility on the part of Afghanistan, elimination of the military capacity of al Qaeda and the Taliban leading to the apprehension and bringing to justice of the leaders was a proper aim for Operation Enduring Freedom. Elimination of the whole governmental structure would go beyond necessity of self-defence, and attacking other states is not justifiable.¹²⁸ The US was criticized for continuing the bombing after the Taliban fell. The continued use of that kind of force may have been excessive both in relation to necessity and proportionality. The shift to ground troops to pursue al Qaeda fighters in the Afghan hills seems more in accord with the standards of proportionality and necessity.¹²⁹ The continued American presence in Afghanistan after the fall of the Taliban cannot be justified by referring to self-defence.

Even though the military action in Afghanistan killed or disarmed many al Qaeda members, the tactic of using long-distance firing led to a large number of civilian casualties, which may fuel the resentment and indignation that is a major motivation to Middle Eastern terrorists. US action may well have played into the hands of the terrorists, providing more support from the Muslim community.¹³⁰

¹²⁵ Schmitt 'Deconstructing October 7th: A Case Study in the Lawfulness of Counterterrorist Military Operations' p 39

¹²⁶ Quigley 'The Afghanistan War and Self-Defence' p 547; Bassiouni 'Legal Control of International Terrorism: A Policy Oriented Assessment' p 87

¹²⁷ Quigley 'The Afghanistan War and Self-Defence' p 548

¹²⁸ O'Connell 'Lawful Self-defence to Terrorism' p 904

¹²⁹ O'Connell 'Lawful Self-defence to Terrorism' p 904

¹³⁰ Quigley 'The Afghanistan War and Self-Defence' p 551-552, Bassiouni 'Legal Control of International Terrorism: A Policy Oriented Assessment' p 87

3.4 Notification of the Security Council

Both the US and the UK fulfilled their duty to inform the Security Council of their intention to use self-defence.¹³¹ The US letter referred to the ongoing threat to the United States and its nationals posed by al Qaeda, but did not specify particular anticipated attacks.¹³²

3.5 Conclusions

Even though there may have been an armed attack, this attack most likely cannot be ascribed to the state of Afghanistan and thus not give rise to a right of self-defence.

Furthermore, the attack on 11 September was completed and the US has not produced any evidence to suggest that an armed attack was imminent on 6 October.

In the absence of an on-going attack, failure to pursue means of peaceful settling can be fatal to a plea of self-defence. The Americans not making serious attempts to have the alleged perpetrators extradited makes the consequent use of force dubious in terms of necessity.

The elimination of not only military targets in Afghanistan, whether belonging to al Qaeda or the Taliban, but the entire governmental structure of the state goes far beyond the scope of both proportionality and necessity. The initial approval of the use of self-defence by other states does not necessarily have any legal implications, and even if it does, those implications are for the future and not for Operation Enduring Freedom itself.

Thus, Operation Enduring Freedom was contrary to international law, and as mentioned above, the use of self-defence where self-defence is found to be without legal grounds, amounts to an act of aggression and, given the circumstances in this case, an armed attack.¹³³

¹³¹ US letter to Security Council UN Doc S/2001/946; UK letter to Security Council UN Doc S/2001/947

¹³² US letter to Security Council UN Doc S/2001/946

¹³³ Supra Chapter 1.1

4 Effects on the Law of Self-defence

A wider right of self-defence than the one generally accepted has been asserted by the US and Israel on several occasions in the past. The widespread support for the American acts of self-defence in response to 11 September may be seen as creating a change in the perception of the right to self-defence. The questions are if such a widening or new rule has been created and the content of this new rule; how this rule may have been created, and the implications for the future.

4.1 Security Council Resolutions 1368 and 1373

The characterization in both resolutions of terrorism as a threat to international peace and security is not a novelty, and the applicability of Chapter VII to the situation in Afghanistan was confirmed in Resolution 1267 (1999) and reiterated in Resolution 1333 (2000).¹³⁴ The innovation in resolutions 1368 and 1373 is the reaffirmation of the inherent right to self-defence. The Security Council did not however speak of an armed attack but referred to the 11 September events as terrorist attacks, not expressly linking this concept to the reference to the right of self-defence. This difference in the wording, and most likely the intent, becomes obvious if compared with the wording in Security Council Resolution 661 in which the Security Council affirmed “the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait [...]”¹³⁵

In the case of 11 September the Security Council did not mention a specific author of the attacks, nor link the events to a specific state. Resolutions 1267 and 1333 explicitly condemn the use of Afghan territory controlled by the Taliban for sheltering and training camps, and deplore the Taliban allowing Osama bin Laden and his associates to use Afghan territory as a base for planning and sponsoring acts of terrorism.¹³⁶ These acts, attributed to the Taliban, have apparently not been sufficient in order for the Security Council to find the terrorist acts of 11 September attributable to the state of Afghanistan based on information available to the Security Council on the dates of adoption of Resolutions 1368 and 1373. Thus, the conclusion may be drawn that the harbouring of terrorists, which the Taliban were ‘guilty’ of, was not adequate to hold the Taliban accountable for the armed attack in the eyes of the Security Council.¹³⁷ The reference in Resolutions 1368 and

¹³⁴ Stahn ‘Security Council Resolutions 1368 (2001) and 1373 (2002); What They say and What They Don’t Say’

¹³⁵ Security Council Res 661 (1990) para 6 (preamble); Mégret p 14

¹³⁶ Security Council Res 1267 para 5 (preamble), res 1333 para 7 (preamble)

¹³⁷ Stahn ‘Security Council Resolutions 1368 (2001) and 1373 (2002); What They say and What They Don’t Say’

1373 to the inherent right of self-defence must then be interpreted as a right that may be used only if the preconditions of the UN Charter are met. Consequently, the concept of self-defence had not yet been widened.¹³⁸ Resolutions 1368 and 1373 were invoked by Israel in the ICJ Advisory Opinion on the Wall in Palestine¹³⁹ to support a right of self-defence against terrorism (exercised through the building of the wall). The ICJ points out that the threat to Israel emanates from within territory over which Israel exercises control and that “[t]he situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.”¹⁴⁰ The expression ‘any event’ may imply that in this situation there is absolutely no applicability of the resolutions, but also in other situations, like the one contemplated in the Security Council resolutions, there may still be conditions that have to be fulfilled for the right of self-defence to be applicable, such as those laid down by article 51 of the UN Charter in combination with customary law.

Nevertheless, the widespread acceptance of the international community must be taken into account. The members of the Security Council, the members of NATO, and every other state which has not objected to the use of self-defence seems to have accepted that the right of self-defence now arises not only following armed attacks by states, but also by terrorist organizations. What exactly motivated this acceptance by states is not clear. It may be an expression of state practice and *opinio juris*, possibly representing an emerging extension of existing customary law, a possibility which will be discussed further below.¹⁴¹ The motives may also be of another nature than legal – perhaps an expression of sympathy accompanied by a feeling of vulnerability and the need to do something, whatever that may be. As such, the acceptance would have no legal implications, but would be an exception to the rule, a rule that still has the content it had before 11 September 2001. Terrorism is an increasing problem with – obviously – no effective means of dealing with it. Expanding the right of self-defence may however create more problems than solutions. The conditions of self-defence, which have been fairly clear, may become blurred. Questions regarding legitimate targets, duration and means will no longer be clear. A terrorist organization would be the target, and force would be used against the territory of a state aiding and abetting that organization and this aiding and abetting would be equated with an armed attack. The range of target states would be vast if the organization in question was al Qaeda - as many as 60 countries.¹⁴² Which of these states would be legitimate targets, and which criteria would be used for this

¹³⁸ Stahn ‘Security Council Resolutions 1368 (2001) and 1373 (2002); What They say and What They Don’t Say’

¹³⁹ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ 2004)

¹⁴⁰ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory para 138-139

¹⁴¹ *Infra* Chapter 4.4

¹⁴² Cassese ‘Terrorism is also Disrupting some Crucial Legal Categories of International Law’ para 4

determination? Declaring war on terrorism implies a lengthy exercise of self-defence going further than what is required to repel the terrorists. The limitation of targeting military objectives seems to have been discarded, and some states have already resorted to less conventional methods including extra-judicial assassinations of terrorists.¹⁴³

4.2 The Conditions of Self-defence

A fundamental question is whether the concept of armed attack has undergone a change so that it now extends not only to attacks by actors more or less sponsored by states, but also to non-state actors with no state involvement. Before 11 September, few states were willing to accept a right of self-defence involving the use of force against a state where there was no complicity in the terrorist acts by the state.¹⁴⁴ As discussed above, the generally accepted criteria are (were) those outlined in the Definition of Aggression and put to practice in the Nicaragua case, that is only when there is 'sending by and behalf of a state of armed bands etc, carrying out acts of armed force against another state'.¹⁴⁵

Although President Bush announced that no distinction would be made between terrorists and those who harboured them, the US did not make the same claim in its letter to the Security Council. The letter declaring the intent to invoke article 51 stated that the US had clear and compelling information that al Qaeda, with the support of the Taliban, was responsible for the attacks on 11 September.¹⁴⁶ The British letter to the Security Council likewise referred to the close alliance between al Qaeda and the Taliban.¹⁴⁷ The degree of involvement by Afghanistan in the actions of al Qaeda necessary for a justification of the use of force was not specified by neither state. It is possible, but not likely, that the association between al Qaeda and the Taliban was sufficient to fulfil the conditions of the requirements from Nicaragua, despite the American use of the word 'harbouring'.¹⁴⁸ Since the US put emphasis on establishing some kind of link between al Qaeda and the Taliban, it is possible that the Americans themselves, despite their statements to the contrary, did not consider mere passive harbouring enough to justify an armed attack. Some requests had been made by the US that the Taliban extradite Osama bin Laden and other al Qaeda members; the Security Council had repeatedly passed resolutions condemning the use of Afghan territory, and deplored the fact that the Taliban continued to provide Osama bin Laden and al Qaeda with a safe haven from which to operate.¹⁴⁹ Thus the harbouring by the Taliban was a fairly active one. Whether

¹⁴³ Cassese 'Terrorism is also Disrupting some Crucial Legal Categories of International Law' para 4; An example of 'extra-judicial assassination' is the US predator strike in Yemen in 2002 killing six suspected al Qaeda members For more information on this event, see Norman G Printer: 'The use of force against non-state actors under international law: an analysis of the US predator strike in Yemen'

¹⁴⁴ Gray 'International Law and the Use of Force' p 165

¹⁴⁵ Supra Chapter 2.1

¹⁴⁶ US letter to Security Council UN Doc S/2001/946

¹⁴⁷ UK letter to Security Council UN Doc S/2001/947

¹⁴⁸ Gray 'International Law and the Use of Force' p 166

¹⁴⁹ Security Council Res 1193 (1998), 1214 (1998), 1267 (1999), 1333 (2000)

motivated by actual support or merely a wish to assert Afghan sovereignty remains unknown.¹⁵⁰

The question whether the concept of armed attack has changed consequently remains disputed. The legal grounds for such a change will be discussed below.

Self-defence in response to an armed attack that is completed has been considered illegal since there is no necessity when the harm has already been done. Using self-defence to deter future attacks gives rise to major problems concerning evidence. If there is no detailed evidence of a particular impending attack, how is it possible to determine the necessity and proportionality of the counter-attack? Without the limits of necessity and proportionality, how far does the right of self-defence stretch? An expansion of the law of self-defence making it lawful to respond to attacks that are not yet imminent make the customary requirements of necessity, proportionality and imminence superfluous, leaving the right to self-defence virtually boundless.

4.3 State Practice

Israel has repeatedly invoked the right of self-defence to justify its use of force against Lebanon and its incursions into Lebanese airspace since 11 September. According to Israel, Lebanon permits Hezbollah to operate from Lebanon and Hezbollah is responsible for a number of attacks on Israeli nationals and armed forces.¹⁵¹ The language used by Israel is similar to that used by the Americans, key concepts being 'global terrorism' and 'harbouring'. Allegedly, Hezbollah is an international terrorist organization with an extensive network and a history of global terrorism. Syria and Lebanon have been accused of harbouring Hezbollah, but Israel has also argued that the Syria and Lebanon are actively supporting the organization and it is this active involvement which incurs the responsibility for the actions of Hezbollah and gives Israel a right to use force against Lebanon as well as Syrian targets in Lebanon. Israel has not claimed to be acting against non-state actors, but stressed their allegation that there was collusion between Lebanon, Syria and Hezbollah. Strong international rejection followed the Israeli extension of its war on terrorism into Syria itself based on the allegation that Syria was harbouring terrorists. An Israeli raid into Syria in 2003 was condemned by the UN Secretary General, and in the Security Council a majority of states condemned the Israeli action.¹⁵² There have been several terrorist attacks since 11 September, but international responses have generally not involved the use of force. The focus in the Security Council has been on peaceful means of combating terrorism; assertions have been made that terrorism constitutes a threat to international peace and security, but without reference to Chapter VII or

¹⁵⁰ Mégret 'War'? Legal Semantics and the Move to Violence' p 23

¹⁵¹ Gray 'International Law and the Use of Force' p 172

¹⁵² Gray 'International Law and the Use of Force' p 174-175

self-defence.¹⁵³ In response to terrorist acts in Kenya, for which al Qaeda claimed responsibility, the Security Council deplored the claims of responsibility but made no reference to self-defence.¹⁵⁴ Security Council Resolution 1456 (2003), which is a general declaration on combating terrorism, likewise has no reference to self-defence but is limited to peaceful means.¹⁵⁵ The unwillingness of the Security Council to make any reference to the right of self-defence in these resolutions can be seen as a strong indication that the right to use force against completed terrorist attacks remains exceptional and that there is no right of pre-emptive self-defence.¹⁵⁶ In the name of 'war on terrorism', the US has established new military bases around the world. US presence in Colombia, initially fighting communism, then drugs, is now justified by the war terrorism. US troops have also been deployed in the Philippines to support the country in its fight against terrorism.¹⁵⁷

In stark contrast with the military response to 11 September and these instances of US intervention, the United States is reluctant to accept such right on the part of any other state. Russia has on several occasions used force against Chechen separatists in Georgia in response to terrorist attacks perpetrated by Chechens in Russia. In a letter to the Security Council of September 2002, Russia asserted a right to act in accordance with article 51 of the UN Charter if Georgia did not establish control over the affected area and the terrorists operating from it.¹⁵⁸ In response to this, the US stressed the rights of Georgia and deplored the Russian violations of Georgian territory and sovereignty. Even though the US accepted the alleged link between the Chechen separatists and al Qaeda and appreciated the inability of the Georgian government to establish control over the area in question, it indicated that antiterrorism was not the true motive of the Russians.¹⁵⁹ The US has along with the UK provided training and other assistance to Georgia in order to improve anti terrorist control. Even though Russia may have a strong and legitimate case, the United States is obviously reluctant to accept another state exercising a right that the US has asserted for itself. This does not promote the idea of 11 September and Operation Enduring Freedom having established new rules of customary law or even a tendency towards such a development.¹⁶⁰

4.4 Changing the Law

The prohibition of the use of force contained in article 2.4 is a codification of the corresponding customary *jus cogens*, a norm of international law

¹⁵³ Security Council Res 1438 (2002 Bali bombing), 1440 (2002 Moscow hostage taking), 1465 (2003 Colombia bombing); 1516 (2003 Istanbul bombing)

¹⁵⁴ Security Council Res 1450 (2003)

¹⁵⁵ Security Council Res 1456 (2003)

¹⁵⁶ Gray 'International Law and the Use of Force' p 187

¹⁵⁷ Gray 'International Law and the Use of Force' p 189

¹⁵⁸ UN Doc S/2002/1012 (Georgian reply UN Doc S/ 2002/1033)

¹⁵⁹ Gray 'International Law and the Use of Force' p 190

¹⁶⁰ Gray 'International Law and the Use of Force' p 190

from which no derogation is allowed.¹⁶¹ A jus cogens norm can only be modified by another norm having the same character.¹⁶² The right of self-defence contained in article 51 (and its customary counterpart) is an exception to this rule, and as such, its status is up for debate. Is self-defence part of the jus cogens prohibition of the use of force, or is it a norm like any other?

Every expansion of the applicability of article 51 has a corresponding effect of decreasing the span of article 2.4. Adding situations, for example when acts of terrorism have been committed, in which it is legal to use armed force in self-defence removes those situations from the list of acts prohibited by article 2.4. and thus affect jus cogens This supports the view that the exception of self-defence is indeed an integral part of the prohibition of force and any alteration of it would be in conflict with jus cogens.

To modify jus cogens, you need jus cogens. Only a new rule of the same dignity may supersede the old jus cogens.¹⁶³ Individual states have no means of opting out of a rule such as the prohibition of force, but the international community, being the author of the peremptory norm, may alter it. Since custom typically is created by a series of unilateral acts, and each of these acts would be contrary to existing jus cogens and therefore without legal effect, the creation through custom of a new rule of jus cogens altering an existing one would be unlikely.¹⁶⁴ A General Assembly resolution adopted by consensus might be of help, but without the state practice to support it, this would at most create 'instant custom'.¹⁶⁵ The concept of instant custom is very controversial, and would most likely lack any relevance in relation to the creation of new jus cogens, especially where, as in this case, such a norm would replace an already existing one in a field of law which has been regulated for centuries and affects all states.¹⁶⁶

A modification of jus cogens could be attained through a general multilateral treaty terminating or amending previous responsibilities. The support required would be expressed by the consent of states, and the entry into force of the treaty would have to be conditioned by the ratification or accession by a majority of states. By obtaining a large number of ratifications and accessions before its entry into force, the treaty could prevail over the previous jus cogens rule and become valid.¹⁶⁷ Needless to say, no such treaty has been drafted, let alone signed and ratified.

Not considering the right of self-defence as part of jus cogens offers other options for altering the law. Claims have been made to the effect that customary law may evolve in the areas not covered by the UN Charter, and as a consequence customary rules covering a right to self-defence against

¹⁶¹ As recognized by the ILC (1966 II ILC Ybk 247); the ICJ in Nicaragua (para 100)

¹⁶² Vienna Convention on the Law of Treaties (1969) art 53

¹⁶³ Vienna Convention on the Law of Treaties article 53

¹⁶⁴ Dinstein 'War, Aggression and Self-Defence' p 96

¹⁶⁵ Dinstein 'War, Aggression and Self-Defence' p 96

¹⁶⁶ The concept of 'instant custom' was first conceived in relation to space law in the sixties. This field of law was new, and at the time only relevant to two states, the US and the USSR. For more information, see Cheng 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?'

¹⁶⁷ Dinstein 'War, Aggression and Self-Defence' p 97

non-state actors could emerge.¹⁶⁸ In making this claim, writers seem to have forgotten that the prohibition of the use of force in article 2.4 of the Charter prohibits all inter-state force, and lest the unlikely event that the non-state actors be on the open sea or in international airspace, self-defence would still be directed at the territory of another state and as such be covered by the prohibition in article 2.4 of the UN Charter. Accordingly, no such development of customary law is feasible.

All the articles of the UN charter may be amended in accordance with article 108 of the Charter. No such amendment has been made of article 51. It is however questionable if such amendments would be valid without a corresponding alteration of the customary jus cogens.¹⁶⁹

Remains the option of treaty interpretation. The rules of treaty interpretation are contained in articles 31-33 of the Vienna Convention on the Law of Treaties, the one of main relevance to this particular situation being article 31.3b regarding subsequent practice between the parties. If one regards the right to self-defence as jus cogens, article 51, or for that matter article 2.4, may of course not be interpreted contrary to the content of the customary jus cogens rule. Consequently, if one sees the right of self-defence as jus cogens, the option of treaty interpretation also fails to provide a possibility to widen the scope of the right to resort to self-defence. If the right of self-defence is not jus cogens, subsequent state practice may widen the scope of article 51. The amount of state practice needed is quite extensive and cannot be said to exist at this time. Before 11 September there were mere tendencies toward accepting a wider claim to self-defence than the one envisaged in the UN Charter, and since the initiation of Operation Enduring Freedom, there have been no further instances of states seemingly accepting such a right.

Thus, if one sees the right of self-defence as a part of jus cogens it is clear that no alteration has been accomplished through recent events. If self-defence is not jus cogens, there is still not sufficient state practice to enable the conclusion that the law, whether customary or conventional, has been altered.

¹⁶⁸ Printer 'The Use of Force against Non-State Actors under International Law: an Analysis of the US Predator Strike in Yemen' p 352

¹⁶⁹ Dinstein 'War, Aggression and Self-Defence' p 98

5 Concluding Remarks

Global terrorism is a new phenomenon, and as such it poses new problems to the international community. Having been mainly a problem contained within the boundaries of a state, such as the IRA¹⁷⁰ in Great Britain and Northern Ireland or ETA¹⁷¹ in Spain, terrorism now involves actors of varying nationality operating from the territory of various states and directing their acts of terror towards targets in states all over the world. Naturally, the problem needs to be dealt with, but it is not certain that present international law contains the appropriate tools for this.

Approaching terrorism with force, as attempted by the United States, may be effective or not, but either way it poses difficulties when it comes to the legality of the actions when taken unilaterally.¹⁷² A solution to the problem would be to acknowledge the jurisdiction of the Security Council over the matter, and let it be the overall judge of when to use force against terrorism in order to preserve peace and security. The Security Council itself has acknowledged that terrorism is a threat to peace and security and thus action can be taken under Chapter VII.¹⁷³ Disregarding the possibility that force may not be the optimum solution to the problem of terrorism, the fact remains that the composition of the Security Council may prevent it from acting even when action is warranted. The system with five permanent members having the power to veto any resolution that is not to their liking may effectively impair the Council's ability to act.¹⁷⁴ In addition, political considerations may play too great a part in Security Council decisions leaving states 'of less interest' to fend for themselves.

Existing conventions on terrorism do not encompass the use of force, but treat terrorism as a crime for which the people responsible should be held accountable. There are twelve global conventions on terrorism, and three of these¹⁷⁵ have over 170 ratifications or accessions but later conventions have rather less than that, making their applicability limited.¹⁷⁶ This demonstrates a main problem with conventions – they can only bind states that have agreed to be bound by them, and unless there is universal agreement on what should be the content of a convention, it is bound to be left unsigned by some states and thus not universally applicable. Another problem with these conventions – and international law in general – is the lack of

¹⁷⁰ IRA Irish republican Army. For more information see <http://en.wikipedia.org/wiki/IRA>

¹⁷¹ ETA (Euskadi Ta Askatasuna), part of what is known as the Basque National Liberation Movement. For more information see <http://en.wikipedia.org/wiki/ETA>

¹⁷² Supra Chapters 3, 4

¹⁷³ See f ex Security Council Resolutions 1267 (1999), 1333 (2000), 1368 (2001), 1373 (2001)

¹⁷⁴ UN Charter articles 23-27

¹⁷⁵ Convention on Offences and Certain other Acts Committed on Board Aircraft (Tokyo 1963); Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague 1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal 1971)

¹⁷⁶ Updated information on the status of international and regional instruments on combating terrorism can be found at http://www.un.org/law/terrorism/terrorism_table%20update%20dec%202004.pdf

enforcement possibilities. It is all very well when states are obliged to take measures against terrorism, but when they choose not to there are no means of making them comply.¹⁷⁷

A thirteenth global convention, the International Convention for the Suppression of Acts of Nuclear Terrorism, was adopted by the General Assembly in April 2005, and this convention will be open for signature in September.¹⁷⁸ A Draft Comprehensive Convention on International Terrorism is currently being drafted. The Draft Convention criminalizes all acts of terrorism and complicity thereto, and creates a duty for states to establish jurisdiction, including an obligation of *aut dedere aut judicare*, over any offences falling within the scope of the Convention. States are obliged to cooperate to prohibit and prevent terrorism offences and afford one another assistance in investigations; intervention is prohibited.¹⁷⁹ Whether these new conventions will prove to be more effective than previous ones remains to be seen, but it seems clear that the UN, and through it the World, wishes to see a peaceful solution to the problem of terrorism.

¹⁷⁷ The fact that a state by not living up to its conventional obligations is in breach of international law and may be held responsible for this according to rules of state responsibility does little to aid this dilemma

¹⁷⁸ General Assembly Res 59/290 (2005)

¹⁷⁹ For content of the Draft Convention see UN Doc A/57/37(supp)

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