



FACULTY OF LAW  
Lund University

Veronica Lundström

# A State's right of self-defence and the criterion of attribution

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Supervisor: Moa De Lucia Dahlbeck

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# Summary

The determination of a state's right of self-defence is a complex process. In order for the use of force to be justifiable as an act of self-defence several criteria have to be fulfilled. According to Article 51 of the Charter of the United Nations a right of self-defence only exists when an armed attack has occurred. This is interesting because it had for a long time been argued, by states and international organizations, that an attack executed by a non-state actor could not be considered an armed attack unless it was attributable to a state. This became evident in several situations during the later half of the 20th century such as in 1968 when Israel launched an attack on Lebanese territory arguing that it constituted an act of self-defence. This use of force was condemned by the United Nations Security Council as would several similar attempts in the following years. After the terrorist attacks aimed at the World Trade Centre and the Pentagon on September 11, 2001, the United States declared war on terrorism and began an operation known as Operation Enduring Freedom. The right of self-defence was argued, by the United States, to provide the legal basis for this operation that targeted the terrorist organization Al Qaeda, believed to be responsible for the attacks, and the Taliban regime, which was considered the de facto government of Afghanistan. The argument of self-defence became accepted by the international community which suggested that a change in the law of self-defence had occurred. This thesis explores the development of the right of self-defence in order to determine when a change could have taken place and more importantly what had changed. I arrive at a conclusion that the right of self-defence did not change in the days in between 9/11 and Operation Enduring Freedom. Instead the change occurred over time in the years previous to 9/11 and the attacks on the World Trade Centre and the Pentagon simply provided the circumstances necessary for this change to become apparent. The change consisted of a new interpretation of the concept of attribution which meant that an attack by a non-state actor could be imputable to a state on other grounds than previously. This change can be described as a pendulum swing which began with the Caroline case. At the time of that case attribution was not considered in relation to self-defence but the conclusion could still be made that attribution most likely would have been interpreted very widely. After the UN Charter was formed the criteria of attribution became more relevant. However, since this concept was new it would have been reasonable to assume it would be interpreted in the light of the Caroline case for example which would result in a wide interpretation. Instead attribution was interpreted narrowly during the later half of the 20th century. However the pendulum began to swing back and at the time of 9/11 attribution was once again believed to include various elements and was interpreted widely. This provide for the use of self-defence in more situations where attacks are carried out by non-state actors.

# Sammanfattning

Att bestämma utsträckningen av en stats rätt till självförsvar är en komplex process. För att en stats användning av våld ska kunna rättfärdigas med hjälp av rätten till självförsvar måste flertalet kriterier vara uppfyllda. Enligt artikel 51 i FN-stadgan kan rätten till självförsvar endast åberopas då ett väpnat angrepp föreligger. Detta är intressant då det under en lång tid har hävdats, både av stater och internationella organisationer, att en attack utförd av en icke-statlig aktör inte kan utgöra ett väpnat angrepp om attacken inte kan hänföras till en stat. Denna syn på väpnat angrepp blev tydlig under den senare hälften av 1900-talet då till exempel Israel attackerade Libanon 1968 med argumentet att attacken utgjorde självförsvar. Förenta Nationernas Säkerhetsråd fördömde Israels användning av våld i det fallet, så som många andra fall under efterföljande år. Efter terroristattackerna som var riktade mot World Trade Center och Pentagon 9 september 2001 förklarade USA krig mot terrorism och påbörjade en operation som fick namnet Operation Enduring Freedom. Enligt USA var operationen, som var riktad mot Al Qaeda, organisationen som ansågs vara ansvarig för terroristattackerna, och Talibanregimen som ansågs vara de facto regering i Afghanistan, lagenlig då den uppfyllde kraven för rätten till självförsvar. Argumentet att Operation Enduring Freedom utgjorde självförsvar blev accepterat av majoriteten av världens stater samt FN vilket skulle innebära att rätten till självförsvar hade genomgått en förändring. Detta arbete undersöker utvecklingen av rätten till självförsvar i syfte att kunna konstatera när denna förändring skett och framförallt på vilket sätt rätten förändrats. Slutsatsen är att rätten till självförsvar inte förändrades i någon större utsträckning under tidsperioden mellan 9/11 och Operation Enduring Freedom. Istället skedde förändringen gradvis under flera år innan 9/11 och attackerna mot World Trade Center och Pentagon innebar snarare en situation som förde fram förändringarna i ljuset. Förändringen innebar en ny tolkning av kriterierna för hänförlighet vilket förde med sig att en attack utförd av en icke-statlig aktör kunde hänföras till en stat på andra grunder än tidigare. Utvecklingen kan beskrivas som en pendel som, med utgångspunkt i Caroline-fallet, svängt fram och tillbaka. Då Caroline-fallet utspelade sig var hänförlighet inte relevant i förhållande till självförsvar. Det kan dock baserat på förutsättningarna och slutsatserna i fallet konstateras att hänförlighet med all sannolikhet skulle ha tolkats vitt. Efter att FN-stadgan hade utformats blev hänförlighet än viktigare. Eftersom konceptet var nytt i sammanhanget borde det rimligtvis ha tolkats i ljuset av tidigare fall, så som Caroline-fallet, vilket skulle resulterat i en vid tillämpning av hänförlighet. Istället tillämpades dock hänförlighet mycket snävt under andra halvan av 1900-talet. Pendeln svingade dock tillbaka från denna strikta tillämpning och då 9/11 utspelade sig ansågs hänförlighet kunna baseras på vida grunder. Detta innebär att möjligheterna att använda självförsvar mot icke-statliga aktörer utökas till att innefatta fler situationer.

# Preface

When I began my law studies about five years ago I was filled with dread. The reason for this was the realization that at the end of the program, standing between me and a law degree, was a graduate thesis. My graduate thesis is now completed and I couldn't be happier about it. However, I have learned that writing the thesis was not the hardest part. Writing this preface is. There are so many things I would like to say, and so many people I would like to say them to. However, instead of turning into that one person who's speech is always five minutes too long I have tried to keep it short.

First of all I would like to say thank you to my family and especially to my Mom and Dad. Without you this journey would have been impossible. Thank you for always believing in me, even when I have doubted myself, and for your encouragement in all the situations when I have wanted to give up. Thank you for providing me with food when I haven't had the time to cook for myself and for reminding me to breathe. I love you. Furthermore I want to express my gratitude to Stairway Foundation Inc. for giving me the opportunity to write my thesis on a beautiful island in the Philippines, surrounded by amazing people. Thank you for allowing me to be a part of your program and for giving me so many insights and wake up calls. I would also like to say thank you to my supervisor, Moa De Lucia Dahlbeck. This may sound like a cliché but without you my thesis would most likely not exist. Thank you for sharing your thoughts and ideas with me, for all your constructive criticism, and for always being positive, even after reading my first draft. Last but not least I want to say thank you to every single one of my friends. Thank you for making me laugh and for standing by my side despite the fact that I have acted like a stubborn child more times than I would like to admit over these last few years. I will try to grow up now.

*"Unless someone like you cares a whole awful lot, nothing is going to get better. It's not."*

*- Dr. Seuss*

Malmö, May 2016  
Veronica Lundström

# Abbreviations

ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
ICJ	The International Court of Justice
ICSFT	The International Convention for the Suppression of the Financing of Terrorism
ILC	The International Law Commission
ISAF	International Security Assistance Force
LN	The League of Nations
NATO	North Atlantic Treaty Organization
OEF	Operation Enduring Freedom
PLO	Palestine Liberation Organization
UN	The United Nations
VCLT	Vienna Convention on the Law of Treaties

# 1 Introduction

The determination of a state's right of self-defence is a complex process. In order for the use of force to be justifiable as an act of self-defence several criteria have to be fulfilled. According to Article 51 of the Charter of the United Nations (hereafter the UN) a right of self-defence only exists when an armed attack has occurred. Since the beginning of the 21st century several attacks have been carried out by organizations and networks operating on an international level.<sup>1</sup> These attacks, especially the attack on the World Trade Centre on September 11, 2001, have sparked an international debate concerning whether an attack by a non-state actor can constitute an armed attack or not. Previous to 9/11 an attack by a non-state actor could only be considered an armed attack if it, according to international law of state responsibility, was attributable to a state. However, after 9/11 it has been argued that the criteria of attribution had changed. Those arguing that a terrorist attack could constitute an armed attack, even if the criteria of attribution was not fulfilled, primarily based their opinion on one of two theories relating to attribution. One side argued that additional situations in which actions by a non-state actor could be attributable to a state had emerged. The other side claimed that attribution no longer was required for an action to constitute an armed attack. A use of force could therefore, according to this line of reasoning, be considered an armed attack when a state, as well as a non-state actor, is responsible.<sup>2</sup>

However the second argument has not attracted very much support from states nor doctrine. The reason for this is probably that it would make it possible for one state to execute attacks on the territory of another state if a non-state actor is operating on the second state's territory. Few states would likely accept an interpretation of international law that would allow a violation of territorial integrity without the state itself being responsible.<sup>3</sup> For that reason I will presume that the argument, that a criterion of attribution no longer is at all relevant for the concept of armed attack, is of less importance. This thesis will therefore presuppose that a criterion of attribution still applies to an armed attack and instead examine whether or not the concept of attribution can be interpreted differently after 9/11 compared to before.

What constitutes a source of law is often quite easy to establish in a domestic legal system. Often there is a hierarchical structure where the individual has to obey by the rules created by a legislator. Separated from the legislator there is a judicial body with the responsibility to interpret the rules. Furthermore there is a third entity with the responsibility to enforce

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<sup>1</sup> See for example; Keesing's Record of World Events (2001), p. 44333 and; Paris Attacks: What Happened on the Night, BBC News (2015) and; Brussels Explosions: What we know about airport and metro attacks, BBC News (2016).

<sup>2</sup> Linderfalk, (2010), 900-902.

<sup>3</sup> Byers (2002), 408-409.

the rules and ensure that they are followed. The situation is entirely different in international law where states act as creators and enforcers of law while at the same time they are the actors that the rules apply to. From this follows that the judicial power is much closer connected to the legislating power in international law compared to domestic law. Actions by states, the subjects of international law, influence the rules. From this follows that a source of international law can be affected by more factors than sources of domestic law.<sup>4</sup> Because of this it is difficult to establish exactly what the law in a given situation is since states can change their behaviour and this way affect what is considered to be international law. The terrorist attacks of 9/11 caused a heated legal debate in the international community. The discussion concerned whether or not a state's right of self-defence had changed so that it was possible to refer to self-defence even when the attack requiring a response was executed by a non-state actor.<sup>5</sup> The question of attribution mentioned above was one of the cornerstones in this debate along with the interpretation of the term armed attack mentioned in Article 51 of the UN Charter. What I find interesting with the right of self-defence, and the criterion of attribution is that even though it has been explored by numerous scholars, especially after 9/11, the possibilities and limitations of self-defence still seem unclear.

## 1.1 Purpose and research questions

The purpose of this thesis is to examine a state's right of self-defence in international law today. More specifically the examination focuses on a situation where an attack or a threat may be attributed to a non-state actor such as a terrorist organization. The right of self-defence is strongly connected with the concept of armed attack. This thesis will therefore focus on determining whether an attack executed by a non-state actor can be considered to constitute an armed attack. As mentioned initially, the debate concerning attribution which arose after 9/11 is relevant when determining if an attack amounts to an armed attack. For this reason that debate will be examined. In order to create a complete understanding of the debate this thesis will also investigate and trace the development of the right of self-defence during the last century. Through analyzing these different aspects of self-defence the thesis aim to identify the limitations and possibilities of the right of self-defence against non-state actors in present time.

For these reasons the research question of this thesis is the following:

Can a state ever invoke the right of self-defence in situations where an attack or a threat of attack is attributable to a non-state actor, and if so, under what circumstances?

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<sup>4</sup> Shaw (2014), 4-5.

<sup>5</sup> Linderfalk (2010), 898-900.

## 1.2 Delimitations

A state's right of self-defence is depending on many factors and all of them could be examined thoroughly. For example an act of self-defence has to be proportionate and necessary.<sup>6</sup> Furthermore, Article 51 of the UN Charter requires, as mentioned above, the event of an armed attack. This has not only given rise to the discussion about attribution in relation to attacks from non-state actors but also a debate about so called anticipatory self-defence. This is the possibility to act against a threat of an attack in order to prevent the attack from happening. Such measures, if successful, would result in that no armed attack occurs. The debate concerning anticipatory self-defence examines under what circumstances a state can act in self-defence before an armed attack has occurred.<sup>7</sup> However, the focus of this thesis is to examine whether a right of self-defence exists if an attack is executed by a non-state actor. Therefore these other criteria will not be discussed at length. This thesis also investigates the development over time of the right of self-defence against non-state actors. This time period will be limited to the 20th and 21st century. This decision was made after the insight that most changes affecting this right occurred during this period. It is during modern times that the right of self-defence in response to attacks by non-state actors has become increasingly debated and challenged.<sup>8</sup> This thesis explores a right of self-defence belonging to states and for this reason domestic legal systems are not considered as they are not governing this right.

This thesis will only examine the extraterritorial use of force in self-defence. It will therefore not examine the use of force by a state within its' own territory. By extraterritorial use of force is meant a forcible action targeting a state or a non-state actor that in some way is affecting, most likely violating, another states territorial integrity. It is important to distinguish this situation from one where the state who's territorial integrity is being affected consents to the use of force.<sup>9</sup> The situation where consent is given will not be explored in this thesis. The reason for focusing on extraterritorial use of force is that Article 2(4) of the UN Charter explicitly mentions that states are prohibited from using force in international relations. Article 51 of the UN Charter constitutes an exception from Article 2(4) and from this follows that the right of self-defence in Article 51 only is applicable to situations concerning international relations.<sup>10</sup> Furthermore, extraterritorial use of force in self-defence became the topic of many international debates, especially after 9/11. In addition, with the development of large terrorist networks and their increasing capacity to execute attacks on an international

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<sup>6</sup> Gray (2008), 148-151.

<sup>7</sup> Shaw (2014), 825.

<sup>8</sup> See section 4.4 for examples of situations where the right of self-defence has been invoked and debated. For examples of articles concerning the debate after 9/11 see; Linderfalk (2010), 898 note 9.

<sup>9</sup> Tams (2009), 362.

<sup>10</sup> Tams (2009), 362.

scale, the possibilities and limitations of extraterritorial use of force in self-defence have become very important to determine.<sup>11</sup>

## 1.3 Methodology

International law is intertwined with international politics. Therefore you cannot examine one without considering the other.<sup>12</sup> A considerable amount of the sources used in this thesis are written with a political agenda. Often the author of an article has a particular standpoint in a discussion and a personal view of international law. These opinions permeate the work created by the author. The sources used are examined with this in mind. While conscious about this fact, I am also aware of the fact that a perfect objectivity is impossible, also in relation to my own work.

This thesis is written based on studies of international sources of law. As mentioned in the introduction, what is considered to be a source of law is not as straight forwardly assessed in international law as it is in domestic legal systems.<sup>13</sup> This is so because there is no single legal organ with the competence to create legally binding rules in international law. In this thesis Article 38 (1) of the Statute of the International Court of Justice have been used as an indication of what constitutes a source of law. This article is considered to be an authoritative declaration of what a relevant source of international law is.<sup>14</sup> Article 38 (1) lists international conventions and custom, general principles of law recognized by civilized nations, judicial decisions and teachings by the most highly qualified publicists. I will research these sources along with relevant doctrine to reach a conclusion of what the law is at a specific time and in a specific situation. This method of working is recognized as the traditional dogmatic legal method.<sup>15</sup> The method can be described as creating a reconstruction of a legal system at a specific point in time. Although this does not exclude venturing outside the frames of what is the law.<sup>16</sup>

## 1.4 Outline

In order to fully understand the right of self-defence it is important to obtain knowledge concerning some of the more important concepts. Chapter two of

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<sup>11</sup> See for example; Keesing's Record of World Events (2001), p. 44333 and; Paris Attacks: What Happened on the Night, BBC News (2015) and; Brussels Explosions: What we know about airport and metro attacks, BBC News (2016).

<sup>12</sup> Shaw (2014), 8.

<sup>13</sup> Shaw (2014), 4-5.

<sup>14</sup> Shaw (2014), 50.

<sup>15</sup> Korling, Fredric & Zamboni, Mauro (red.) (2013), 21.

<sup>16</sup> Jareborg (2004), 4-7.

this thesis will examine such concepts and provide definitions that will be used for the remaining part of this thesis. Chapter three will discuss the right of self-defence in general. Chapter four, five and six will in chronological order examine the right of self-defence in response to an attack by a non-state actor. Chapter four focuses on this right as it was before 9/11. In chapter five the events of 9/11 and their impact on the right of self-defence against non-state actors are explored, while in chapter six this right as it is perceived after 9/11 is examined. Finally in chapter seven the researched material will be analyzed and a conclusion will be presented.

## 2 Important concepts

Many concepts of international law are difficult to define. Often this is the case since states and scholars have different political views. Furthermore, they may come from different cultural backgrounds and have received education coloured by different philosophical and ideological ideas. However, the focus of this thesis, the right of self-defence, requires that some concepts are clarified. This section will serve this purpose and deal with some of the most frequently used terms in this thesis. It will also cover the relevant articles of the UN Charter since an understanding of certain articles is crucial to understand the debates on self-defence against non-state actors.

### 2.1 Terrorism

What constitutes terrorism is a debated topic and until the end of the 20th century a general definition did not seem to exist.<sup>17</sup> However, despite the lack of a general definition in international law, a common element can be viewed in various interpretations of terrorism. Terrorism is always considered to be acts of violence with the purpose of instilling fear in a group of people causing them to act in accordance with the political, religious or ethical views of the terrorist organization.<sup>18</sup> In 1999 the International Convention for the Suppression of the Financing of Terrorism<sup>19</sup> (hereafter ICSFT) was concluded. This convention was the first to provide a general definition of terrorism and it acknowledges the common element that was considered to exist when defining terrorist acts. Article 2 (1) of the ICSFT states:

”Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

- (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
- (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”<sup>20</sup>

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<sup>17</sup> Danziger (2012), 211.

<sup>18</sup> Schachter (1988-1989), 309.

<sup>19</sup> Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999.

<sup>20</sup> Article 2(1) ICSFT.

The article makes references to previous treaties prohibiting and regulating certain situations but does also provide a more general description of what terrorism is. Since the ICSFT was created a Draft Comprehensive Convention Against International Terrorism has been discussed by the UN General Assembly. However, as of April 2016, the member states have not been able to reach an agreement on the convention.<sup>21</sup> It is important to note that what is defined as terrorism is highly political. What could be considered an act of terrorism by one person could be considered an act in a fight for freedom by another. For the purpose of this thesis terrorism will be defined according to Article 2(1) of the ICSFT which focuses on the intention of the perpetrators of an international attack.<sup>22</sup> For the sake of the following discussion in this work it will be assumed that intention can be known in every case, despite the fact that it can be very difficult to establish in reality.

## 2.2 Non-state actor

Knowledge of what constitutes a state is crucial for the understanding of what a non-state actor is. There are four qualities that an international legal person is required to possess in order to be considered a state. These criteria are stated in the Montevideo Convention on the Rights and Duties of States. First of all the international legal person has to have a permanent population. Second it needs to be in control of a territory which can be defined in some aspects. Furthermore the existence of a government is required, and finally it has to have a capacity to enter into relations with other states. All of these criteria are open for interpretation and to determine whether an international person of law is in fact a state, or not is complicated.<sup>23</sup> Other states may recognize the legal person as a state which has significant impact on the relations between the two entities since certain rights and obligations only exist in interstate relations. Previously recognition was of great importance and it was argued that a state came into being simply by recognition. Today a state has to fulfil the criteria mentioned above and recognition is to some extent a more political instrument.<sup>24</sup> In reality the creation of a state is extremely complex. For the purpose of discussion in this work however, it will be assumed that as long as an entity fulfils the criteria mentioned in the Montevideo convention and is recognized by other states, it is considered to be a state.

What distinguishes a non-state actor from for example a state's regular armed forces is that the former is not in any aspect controlled by a state. This means that a non-state actor is acting on behalf of, and representing, itself and not a state. Their identities are separated from each other. Despite

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<sup>21</sup> UN General Assembly, *The United Nations Global Counter-Terrorism Strategy*, 70th session, Agenda item 117, 12 April 2016, A/70/826, paras. 19-20.

<sup>22</sup> Danziger (2012), 211.

<sup>23</sup> Crawford (2012), 128-129.

<sup>24</sup> Shaw (2014), 150.

this there are situations where these two entities may be linked together. A basis for this could be a common viewpoint such as a shared ideology or the fact that a state expresses support for the non-state actor in any way.<sup>25</sup> This thesis however, will focus for the most part on a non-state actor which is not influenced by a state and who's actions are not attributable to any state, for example an organization recognized as a terrorist organization.

## 2.3 Concepts in the UN Charter

The UN Charter contains certain articles that are highly relevant when examining the right of self-defence. The interpretation of these articles is frequently discussed, especially following major attacks by non-state actors such as the events of 9/11. Article 2(4) of the UN Charter contains a prohibition on the use of force. Since self-defence contains the use of force an exception from the main rule is needed. It is found in Article 51 of the UN Charter.

### 2.3.1 Prohibition on the use of force

In the UN Charter a prohibition of the threat or use of force is found in Article 2(4). This article is considered to be one of the most important in the charter and it is generally agreed upon amongst states and scholars that this rule also exist in customary international law.<sup>26</sup> The International Court of Justice (hereafter ICJ) also affirmed this viewpoint in the Nicaragua case.<sup>27</sup> The consequence of this is that the rule is binding for all states, not only the members of the UN.<sup>28</sup> Furthermore, in the Nicaragua case the ICJ referred to a commentary by the International Law Commission (hereafter ILC) which expressed that the prohibition of the use of force is considered to be *jus cogens*.<sup>29</sup> International law is not a hierarchical system containing clear rules of conflicts determining which norm should prevail in case of a conflict between two norms. This is so because no treaty or convention is per definition considered to be of a higher status than another. If one norm prevails in conflict with another it does so because states themselves have chosen the outcome. However, one exception exists and it concerns peremptory norms, *jus cogens*. Article 53 of the Vienna Convention on the Law of Treaties (hereafter VCLT) states that if a treaty is in conflict with a peremptory norm then the treaty norm is void.<sup>30</sup> Furthermore Article 53 of the VCLT defines a peremptory norm as "[...] a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".<sup>31</sup>

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<sup>25</sup> Lubell (2010), 15.

<sup>26</sup> Gray (2008), 30.

<sup>27</sup> Nicaragua Case, para. 190.

<sup>28</sup> Shaw (2014), 814.

<sup>29</sup> Nicaragua Case, para 190.

<sup>30</sup> Orakhelashvili, (2006), 7-8.

<sup>31</sup> Article 53 VCLT.

From this follows that norms considered to be jus cogens are distinguished from general rules of international law since they are superior and cannot be negotiated with by states. A jus cogens norm is considered to have an inherent and fundamental value in itself and because of this it cannot be done away with using ordinary means. The prohibition of the use of force has, as mentioned, been considered a jus cogens norm<sup>32</sup>

The understanding of Article 2(4) is a frequently discussed problem and the prohibition has many possible interpretations. One of the debates concern whether or not the concept 'use of force' only includes armed force or if it extends to other actions such as economic pressure or persuasion as well. Another disagreement is if force used in a humanitarian intervention could be considered to be lawful despite violating the prohibition.<sup>33</sup>

The prohibition on the use of force also coincides with the idea that every state is sovereign on its' own territory. In the Corfu channel case the ICJ stressed the importance of respect for territorial sovereignty in international relations between states.<sup>34</sup> This concept of territorial integrity is of importance when discussing the right of self-defence in response to a terrorist attack and will be examined in more detail in the later sections of this thesis.

### **2.3.2 Article 51 of the United Nations Charter**

Article 51 of the UN Charter is an exception to the provision on non-use of force in Article 2(4) of the UN Charter. It states the following:

”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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”<sup>35</sup>

In the early stages of the creation of the UN Charter a provision recognizing a right of self-defence was not suggested. The fact that previous documents, such as the Covenant of the League of Nations, with provisions on the restriction of war were not considered to exclude a right of self-defence may provide an explanation for this. Discussions on whether a provision on self-defence should be included or not were held on both national and international level. The United States was concerned that an incorporation

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<sup>32</sup> Shaw (2014), 88-89.

<sup>33</sup> Gray (2008), 30-31.

<sup>34</sup> The Corfu Channel Case, 35.

<sup>35</sup> Article 51 of the UN Charter.

of the right of self-defence into the charter would make a more narrow interpretation of the right possible in comparison with the corresponding right in customary international law. At the San Francisco conference, where the final version of the UN Charter was created, this issue was debated.<sup>36</sup> During the process some states raised concerns about this right and in what ways the UN Charter with its' prohibition of the use of force might restrict such a right. A suggestion was made by a few states that an explicit justification of self-defence in case of an attack by another state should be incorporated in the charter.<sup>37</sup> As the conference continued, a right of self-defence was suggested in an amendment with reference to regional organizations. The amendment was revised several times by different states before it took its final form and became Article 51 of the UN Charter.<sup>38</sup> The article provides a state with a possibility to act in order to defend its' interests in the event of an attack, but only until the UN Security council has acted to restore international peace and security. Therefore it can be argued that the purpose of the article is to make certain that a state is able to protect itself during the time it takes for the council to act.<sup>39</sup>

Article 51 of the UN Charter refers to an "inherent right of individual or collective self-defence". It has been discussed whether or not this right is the only one of its kind or if there exists another right of self-defence in customary international law which remained unaffected by the charter.<sup>40</sup> Two different opinions in regard to the interpretation of Article 51 has been expressed, one endorsing a restrictive interpretation and one in favour of a wide interpretation. Those advocating a restrictive interpretation claim that Article 51 is supposed to be interpreted narrowly, not including customary international law, for example. From this follow that use of force only is legitimate in self-defence in the case of an armed attack. Although the question of which actions that amounts to an armed attack is not generally agreed upon within this group of scholars.<sup>41</sup> Others however, are advocating a broad interpretation of the provision on self-defence. They claim that since the charter is explicitly referring to the inherent right created not by the charter but previously existing independently then customary international law has to be considered.<sup>42</sup> Those in favour of this viewpoint argue that the creation of the UN Charter and its Article 51 did not affect the right of self-defence much in any significant way. Instead they claim that the article merely recognized the existing right without limiting it to situations literally covered by the wording of the article.<sup>43</sup> However, the ICJ stated in the Nicaragua case that Article 51 of the UN Charter had deviated from the right of self-defence in customary international law in the way that it made the occurrence of an armed attack a criterion. The definition of armed attack however is not found in the UN Charter. Instead it has to be determined by

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<sup>36</sup> Tworek (2015), 67 and; Alexandrov (1996), 78-80.

<sup>37</sup> Alexandrov (1996), 78-80.

<sup>38</sup> Alexandrov (1996), 85-89.

<sup>39</sup> Alexandrov (1996), 92-93.

<sup>40</sup> Alexandrov (1996), 93-94.

<sup>41</sup> Kühn (1980), 45.

<sup>42</sup> Alexandrov (1996), 93-94.

<sup>43</sup> Kühn (1980), 45-46.

the use of customary international law in combination with treaties indicating *opinio juris*.<sup>44</sup> Although some scholars argue that the right of self-defence in customary international law, that Article 51 of the UN Charter is referring to, does not include the criterion of an armed attack.<sup>45</sup> This thesis will from here on after focus on the more restrictive interpretation of Article 51 since it seems to be the viewpoint supported by the ICJ and, as we will see further on, also by the UN Security Council.

### **2.3.3 The concept of an armed attack**

The occurrence of an armed attack is a criterion that has to be fulfilled in order for a right of self-defence to exist according to Article 51 of the UN Charter. This expression had not been used in this context previously and it replaced the term aggression which had been the previous requirement for a right of self-defence to emerge. The meaning of the concept armed attack seems to have been considered clear during the San Francisco conference since no attempt to discuss or define it was recorded. However, with time it became obvious that what constitutes armed attack was not as easy to determine. Some argued that simple actions with little or no impact on a state's interests still could be considered an armed attack while others claimed that only severe attacks amounted to an armed attack.<sup>46</sup> Furthermore it has been argued that an act of aggression only could be considered an armed attack if is attributable to a state. The reason for this is that Article 51 of the UN Charter constitutes an exception to the prohibition of the use of force in Article 2(4) of the charter. This article refers to members which would indicate that it is only applicable to states. From this follows that the exception also would be applicable to actions by states only.<sup>47</sup> When a state is subject to an attack it is in the early stages the state itself that has to determine whether or not it is the victim of an armed attack which would make it possible to act in self-defence. Although it is the UN Security Council that has the final say in determining whether or not an act or aggression is to be considered an armed attack or not. The victim state therefore needs good arguments to convince the council of the fact that the attack was indeed an armed attack. If it fails to do so then the measures taken in self-defence are to be considered unlawful and not justifiable by Article 51 of the UN Charter.<sup>48</sup>

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<sup>44</sup> Nicaragua Case, paras. 193-194 and 191. See also; Greig (1991), 368.

<sup>45</sup> Beard (2001-2002), 567.

<sup>46</sup> Alexandrov (1996), 96-97.

<sup>47</sup> Frigessi Di Rattalma (2003), 61.

<sup>48</sup> Alexandrov (1996), 100.

### 3 Self-defence, an overview

When a state consider itself to be the victim of an attack there are different ways in which it can respond. These actions are usually referred to as self-help and can for example include to take action by ending certain diplomatic relations. However, certain situations are considered by the affected state to demand a more forceful reaction. The right of self-defence sets up certain requirements that needs to be fulfilled in order for such a right to exist. If the criteria are met then a state is able to respond to an attack with the lawful use of force.<sup>49</sup> Self-defence is considered to constitute a form of self-help used when other means are proven to be insufficient.<sup>50</sup> When the predecessor of the UN, the League of Nations (hereafter LN), was in force it did not attempt to stop states from using force or starting a war. It did however, aim to decrease the use of force to a reasonable level through a certain procedure.<sup>51</sup> In 1928 the General Treaty for the Renunciation of War, also known as the Kellogg-Briand Pact, was signed. By signing the treaty states agreed to not use war in order to solve a dispute between them.<sup>52</sup> In the reservations made by some states to this treaty it is evident that a right to use force in self-defence was considered to be a principle of international law. This indicates that not all actions using force were considered to violate the treaty. Under certain circumstances the use of force seemed to be acceptable.<sup>53</sup>

The LN did not remain active for very long although its existence did result in a solid groundwork and several of its core principles were incorporated in the UN after World War II.<sup>54</sup> When the UN was formed its' member states created the UN Charter. Article 2(4) of the UN Charter explicitly prohibits use of force in inter-state relations, therefore Article 51 of the UN Charter constitutes an important exception. It is important to understand that the sole purpose of the right of self-defence in Article 51 of the UN Charter is to provide states with an instrument to protect their rights. It does not in any way justify actions taken in retribution or as a punishment for actions taken against a state.<sup>55</sup> In the charter the term *war* was exchanged for the expression *use of force*. Article 2(4) in the UN Charter prohibits the use of force which leaves room for a wider interpretation than the previous term *war*.<sup>56</sup> It is possible to argue that the UN Charter simply is a codification of a set of rules on the use of force that were developing during the 20th century. However the argument that the UN Charter is a new structure with norms entirely different from established customary international law at the time could also be made. Regardless of which standpoint one chooses in this

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<sup>49</sup> Dinstein (1994), 175.

<sup>50</sup> Alexandrov (1996), 11. See also; Dinstein (1994), 175.

<sup>51</sup> Shaw (2014), 22, 814.

<sup>52</sup> The General Treaty for the Renunciation of War (Kellogg-Briand Pact).

<sup>53</sup> Shaw (2014), 814.

<sup>54</sup> Shaw (2014), 22.

<sup>55</sup> Alexandrov (1996), 17.

<sup>56</sup> Gray (2008), 6-7.

question the UN Charter and its articles on the use of force and self-defence<sup>57</sup> created a new terminology. The expressions used in the charter has not changed since and are still used in present time.<sup>58</sup> However, these articles were created in a time when conflicts between states were common. Over the years interstate war has been replaced with other forms of fighting such as civil war and battles between governments and liberation movements. The articles of the UN Charter had to be adapted and interpreted in a different light, in order to suit these situations. Examples of such situations are rebellions and terrorist attacks. The evolvement of the articles applicable to situations of self-defence has been complex and even in situations where application seemed simple the articles have been interpreted differently by states.<sup>59</sup> Situations when different interpretations have been presented are for example Israel's actions in Beirut in 1968 and the United States actions in Libya 1986.<sup>60</sup> These situations are examined more thoroughly in section 4.4. An important question is whether or not the UN Charter, and its prohibition of the use of force, are intended to have a static meaning. If the answer is yes, the articles of the UN Charter should be interpreted according to their meaning in 1945. If the answer is no it would open up for the possibility that the interpretation of the articles have changed and developed over time.<sup>61</sup> The ICJ stated in the Nicaragua case that state practice is able to influence the interpretation of articles in the UN Charter.<sup>62</sup> The court uses Article 51 of the UN Charter as an example stating that it acknowledges customary international law and that certain definitions of concepts such as armed attack cannot be found in the article but in customary international law.<sup>63</sup> The statement by the ICJ that the UN Charter should be interpreted in the light of for example customary international law is in line with what is stated in Article 38 (1) of the Statute of the ICJ. As previously mentioned, Article 38 (1) states that custom and state practice are sources of law and because of this the ICJ statement, that the UN Charter should be read in the context of factors such as custom, seems to have strong support.

### 3.1 Consequences of a violation

This thesis examines what actions are considered lawful under the right of self-defence. Why is it important to determine what is considered to be lawful self-defence and what actions fall outside the scope of the principle? This is because certain international responsibilities arise when a principle of international law is violated. A state may take action in response to an attack claiming it has been exercising its' right of self-defence. However if the UN Security Council, or an international court such as the ICJ, states that the criteria for lawful self-defence were not met it would mean that the

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<sup>57</sup> Article 2(4) and Article 51 of the UN charter.

<sup>58</sup> Gray (2008), 6.

<sup>59</sup> Gray (2008), 7.

<sup>60</sup> Gray (2008), 195-196.

<sup>61</sup> Gray (2008), 8.

<sup>62</sup> Nicaragua Case.

<sup>63</sup> Nicaragua Case, para. 176.

state has violated the prohibition of non-use of force. Since the state would have breached a principle of the UN Charter and customary international law its actions would be considered internationally wrongful. This follows from Article 2 in ARSIWA. Article 1 in ARSIWA states that "Every internationally wrongful act of a state entails the international responsibility of that state". The article does not define the term responsibility. However, in its' commentary to ARSIWA the ILC expresses that if no specific provision exists in the instrument which have been violated, then reparation for injuries is the primary obligation of the responsible state.<sup>64</sup> Furthermore, Article 31 of ARSIWA states that "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".<sup>65</sup> It is important however to keep in mind that ARSIWA is not binding upon states but merely an indication on what can be considered customary international law.

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<sup>64</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Adopted by the ILC during its fifty-third session (2001), Yearbook of the ILC, 2001, Vol II, Part II, 87.

<sup>65</sup> ARSIWA Article 31(1).

## 4 Before 9/11

States using force against a non-state actor is not a new phenomenon, it was discussed already in 1837 when the Caroline case was settled. However, some of the most atrocious terrorist attacks before 9/11 were planned and executed within the territory of one state. These domestic attacks did not give rise to the same concerns of international law that attacks planned in one state and directed at the territory of another state does. The attacks on 9/11 indicate that there has been a change. We now seem to live in a time where terrorist attacks are of a more international character, launched from the territory of one state against another.<sup>66</sup> This section will explore this change and examine the influences it has had on the right of self-defence.

### 4.1 The Caroline case

The right of self-defence as a legal doctrine emerged in a case known as the Caroline case. Previously, self-defence had simply been a political tool used as an excuse by states when they used force on or against the territory of another state. Although with the Caroline case came a shift and the right of self-defence went from being simply a political argument to a legal doctrine.<sup>67</sup> In 1837 during a Canadian rebellion a group of armed men, the majority being American citizens, gained control over Navy Island. This territory, located in the Niagara river in the province Ontario, was a part of the British possessions at the time. During a period of 27 days the group of men, lead by an American, attacked the Canadian shore as well as ships passing by carrying the British flag. During this period the rebels were supplied with weapons and other necessities from the American territory. A vessel with the name Caroline was used to transport the goods from the American shore to the island. The governor of New York was informed of these events but no action was taken. British forces were at the time gathered on the Canadian shore and the commander of these forces decided it was necessary to destroy the Caroline. The reason for this decision was that destroying the vessel would prevent reinforcement and basic necessities from reaching the island from which the rebels operated. It would also prevent the rebels from reaching the mainland of Canada. During one night the Caroline was boarded and after taking control over the boat British forces set her on fire and sent her out on the river where she went down the Niagara falls.<sup>68</sup>

Britain argued that their actions were legitimate based on a number of factors, one of them was self-defence and self-preservation due to the fact that the United States had not enforced their laws in the area where the

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<sup>66</sup> Dinstein (2009), 44.

<sup>67</sup> Jennings (1938), 82.

<sup>68</sup> Jennings (1938), 82-84.

Caroline was used.<sup>69</sup> The Law Officers to whom the case was referred came to the conclusion that the British actions taken against the Caroline was in compliance with the law of nations, which at the time was customary international law.<sup>70</sup>

The Caroline case is considered to have clarified the right of self-defence in customary international law and established the popular definition of this right. The case therefore remains relevant since Article 51 of the UN Charter mentions customary international law in relation to the right of self-defence.<sup>71</sup> Furthermore the Caroline case touches on the topic of the use of self-defence against a non-state actor operating from the territory of another state.<sup>72</sup> As will be shown further down, this situation has become more and more common with time.

The Caroline case, it can be argued, stated three basic criteria that have to be fulfilled in order for a use of force to be considered a legitimate use of self-defence. The first criterion is that a right belonging to the state using self-defence must have been violated. The second criterion is that only actions aiming to end the violation is allowed. Furthermore these actions have to be proportionate. The third criterion is that the state from whose territory the non-state actor in operating is unwilling or incapable to use its own powers to end the violation.<sup>73</sup> In addition to these criteria it has also been argued that the Caroline case stated the criterion that a measure of self-defence have to be taken immediately. A state had to act against an attacker without delay, if it waited to long then the actions were not considered acts of self-defence but rather retribution.<sup>74</sup>

In the modern debate on the use of self-defence against non-state actors this third criterion has become especially important. It is discussed whether or not an attack by a non-state actor can be attributed to a state on the basis that the state accepts that a non-state actor is operating on its territory. An example that will be further discussed in chapter 5 is the situation concerning Afghanistan and Al Qaeda.<sup>75</sup>

It has been argued that the actions of Al Qaeda are imputable to Afghanistan since the de facto government of Afghanistan harboured Al Qaeda on its territory and did not use its legal power to stop the organization.<sup>76</sup> As previously mentioned, it was stated in the Caroline case that measures taken in self-defence have to be immediate. This criterion was discussed in relation to the United States' actions in response to the attacks on 9/11. The operation was commenced approximately one month after 9/11 and it has been debated whether or not this delay caused the actions to fall outside the

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<sup>69</sup> Jennings (1938), 85.

<sup>70</sup> Jennings (1938), 87-88.

<sup>71</sup> Shaw (2014), 820-821.

<sup>72</sup> Alexandrov (1996), 20.

<sup>73</sup> Alexandrov (1996), 20.

<sup>74</sup> Rowe (2002), 310.

<sup>75</sup> Linderfalk (2010), 901-902.

<sup>76</sup> Linderfalk (2010), 901-902.

scope of lawful self-defence.<sup>77</sup> As can be seen from these examples the Caroline case is undoubtedly still relevant to the discussion on self-defence.

## 4.2 The Nicaragua case

The Nicaragua case is a case that concerns many different aspects of the law of self-defence and it is possible to discuss each and every detail at length. However, this section will not cover the details of the case but focus on the ICJ's definition of what constitutes an armed attack. The reason for this is that the definition of armed attack later became relevant in many cases concerning the right of self-defence against terrorist attacks, and especially in the debate following 9/11.

The need for ICJ to examine the term 'armed attack' and its interpretation arose from the United State's argument that it was acting in collective self-defence justified by Article 51 of the UN Charter.<sup>78</sup> The court stated that response to an act of aggression performed by an individual or a group, on behalf of a state, could be considered legitimate under the provision on self-defence. However, this would only be the case if the attack was considered severe enough to constitute an armed attack, had it been performed by regular forces of a state. Furthermore, the entity responsible for the attack had to be connected in some way to a sending or controlling state. The court built this argument on Article 3 of the definition of aggression, annexed to UN General Assembly resolution 3314 (XXIX), and argued that it may mirror customary international law.<sup>79</sup> The Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)<sup>80</sup> is an attempt to reflect the law of state responsibility in customary international law. In general the action of an individual or non-state actor is not attributable to a state. However, Article 8 of ARSIWA states that an act is attributable to a state if the entity carrying out the act is "acting on the instructions of, or under direction or control of, that state".<sup>81</sup> The ICJ's reasoning in the Nicaragua case is in line with this provision on the law of state responsibility. Furthermore, the ICJ states that in order for a state to be responsible for actions by a non-state actor the state has to be in effective control of the actor.<sup>82</sup>

## 4.3 Other acts of self-defence

Since the Caroline case there has been multiple scenarios where a right of self-defence has been invoked by states to justify the use of force. For

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<sup>77</sup> Rowe (2002), 310.

<sup>78</sup> Nicaragua Case, para. 24.

<sup>79</sup> Nicaragua Case, para. 195.

<sup>80</sup> Adopted by the ILC at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10).

<sup>81</sup> Article 8, ARSIWA.

<sup>82</sup> Nicaragua Case, para. 115.

example in 1873 a vessel sailing on the high seas under the United States flag was seized by Spain and several people on board were executed without trial. The ship, *Virginius*, was used to smuggle reinforcements to rebels and was caught in the act. Some of the people on board the vessel were citizens of the United Kingdom and for that reason the United Kingdom questioned the executions after they had been carried out. However, the United Kingdom stated that the seizure of the vessel was an act of self-defence and did not protest against it.<sup>83</sup> Another interesting situation occurred in 1916 during the first World War. Greece had not become involved in the war at the time but became victim of an attack on Thessaloniki. The city was occupied by French troops and Germany, the state responsible for the attack, argued that because of this the territory was no longer to be considered neutral. Furthermore, Germany claimed that the attack was aimed at the French troops that were in control of the strategically important territory and did not target Greece. The case was tried by a tribunal which came to the conclusion that the neutrality of Greece had been violated by the French occupation and it therefore was unlawful in regard to Germany. The tribunal concluded that Germany therefore was authorized to act in defence even if that meant attacks on Greek territory. This situation where a state, such as Greece, is obligated to control its' territory preventing hostile actors from using it, is comparable to terrorist networks operating in modern time. This will be discussed at length in later sections. However, it is interesting to remember, that in 1916 it was considered legitimate to carry out an attack on another state's territory when said state was unable or unwilling to prevent hostile use of its' territory.<sup>84</sup>

#### **4.4 Self-defence in response to attacks by non-state actors?<sup>85</sup>**

In the *Caroline* case measures of self-defence were taken by British forces against a group of rebels in order to prevent future attacks. This group was not considered to be following orders from a government and was not considered to be acting as or representing a state.<sup>86</sup> Because of this it can be classified as a non-state actor which makes the *Caroline* case relevant for this thesis. During the 19th century, following the case, a right of self-defence against a non-state actor therefore seem to exist. However, it could be argued that the actions of the rebels, mainly citizens of the United States, were attributable to the United States. Especially since Britain argued that it had to take action because the United States did not enforce their laws in the area where the *Caroline* was used, preventing the ship from being used for

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<sup>83</sup> Alexandrov (1996), 21.

<sup>84</sup> Alexandrov (1996), 21-22.

<sup>85</sup> This section follows the order of events as presented in; Gray (2008), 195-197. The reason for this is that Gray created a pedagogical compilation of relevant events leading up to 9/11 that was very useful in this examination.

<sup>86</sup> Jennings (1938), 82-99.

unlawful purposes.<sup>87</sup> The question of attribution was not expressly mentioned in the case. It is therefore not possible to conclude whether the actions leading to a right of self-defence was considered to be actions taken by a group with no affiliation to a state, or if the rebel group's actions were considered to be taken by the United States on the basis of attribution. However, since the Caroline case was settled in the first half of the 19th century we know that attacks executed by non-state actors is not a new phenomenon, even if it seems to have become more common with time. Today the most common situation in which questions concerning the right of self-defence against a non-state actor are raised is when a terrorist attack occurs. Especially the events of 9/11 sparked an international debate concerning this issue and the discussion is still ongoing. However, the topic of 9/11 will be more thoroughly examined in chapter 5.

One of the earliest situations, apart from the Caroline case, in which a state responded to a terrorist attack with measures of self-defence occurred in 1968. Israel conducted an attack on Beirut airport in Lebanon using air force. Israel claimed that it was acting in self-defence in response to a previous terrorist attack aimed at an Israeli airplane in Athens.<sup>88</sup> Lebanon was accused of allowing a terrorist organisation to work out of its territory, using it as a base for operations and training its members there. This was the case since Lebanon did not take appropriate measures to stop and prevent the organisation from working in its territory.<sup>89</sup> According to Israel, Lebanon thus spurred terrorist warfare against Israel making it possible to use force in self-defence.<sup>90</sup> The UN Security Council was of a different opinion. In resolution 262 (1968) it condemned the military actions taken by Israel and issued a warning stating its intentions to act if Israel were to violate its' obligations under the UN Charter once more. The UN Security Council clearly states in the resolution that Israel's military actions were premeditated and were considered a threat to peace.<sup>91</sup> The decision was taken unanimously but the United States claimed it was only doing so based on the facts that Israel's actions were not proportionate and that Lebanon could not be held responsible for the terrorist attack. On the other hand the United States recognized that a state could use force in self-defence to protect itself from ongoing terrorist attacks and to prevent further attacks.<sup>92</sup>

The arguments laid forward by the United States and Israel in the previous case concerning the attack on Lebanese territory have been used in attempts to legitimize other acts of force as well. On October 1 1985, Israel bombed the headquarters of the Palestine Liberation Organization (hereafter PLO) in Tunisia. Israel claimed the attack was a response to the murder of three Israeli citizens carried out by PLO in Cyprus. The Israeli attack resulted in

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<sup>87</sup> Jennings (1938), 85.

<sup>88</sup> Gray (2008), 195.

<sup>89</sup> Alexandrov (1996), 174.

<sup>90</sup> Gray (2008), 195.

<sup>91</sup> UN Security Council resolution 262 (1968).

<sup>92</sup> Gray (2008), 195.

great material destruction and the death of many people.<sup>93</sup> As a response to these events the UN Security Council adopted resolution 573 (1985) in which it condemned Israel's attack in Tunisia. It defined these actions as acts of armed aggression in violation with the Charter of the UN as well as "international law and norms of conduct".<sup>94</sup> The resolution was adopted with 14 votes against none, however the United States abstained from voting.<sup>95</sup> All members of the council, the United States excepted, argue that the acts of aggression conducted by Israel could not be justified by the terrorist attack resulting in three dead Israeli citizens. The representative of Denmark for example said "While at the same time condemning acts of terrorism committed against Israeli citizens, Denmark does not believe that they justify such action".<sup>96</sup> After the resolution was adopted the representative of the United States explained the reasons to why the United States abstained from voting. He said:

" We speak of a pattern of violence, but we must be clear: it is terrorism that is the cause of this pattern, not responses to terrorist attacks. We do not yet have all the relevant facts concerning this particular response. However, we recognize and strongly support the principle that a State subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks. This is an aspect of the inherent right of self-defence recognized in the Charter of the United Nations. We support this principle regardless of attacker, and regardless of victim."<sup>97</sup>

This view on the right of self-defence against terrorist attacks was different from the view expressed by the other members of the Security Council at the time. It is interesting to note that the representative mentioned continuing terrorist attacks since this would suggest that terrorist attacks no longer were seen as separate events. Instead it seems that terrorist attacks were considered to be connected and that they together could create a different context that would give rise to a right of self-defence. However, since the majority of the council voted in favour of the resolution it was adopted and the official standpoint of the UN Security Council was that it condemned the acts of aggression executed by Israel.<sup>98</sup>

The United States did not interpret the right of self-defence in the same way as the other members of the UN Security Council. In 1986, only a year after Israel's actions were condemned, the United States attacked targets in Libya claiming it was acting in self-defence according to Article 51 of the UN Charter. The United States held Libya accountable for terrorist attacks targeting citizens of the United States away from their home country. It was

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<sup>93</sup> United Nations Yearbook (1985), 285.

<sup>94</sup> UN Security Council resolution 573 (1985).

<sup>95</sup> UN Security Council resolution 573 (1985).

<sup>96</sup> UN Security Council, 2611th meeting, October 2 1985, para. 18.

<sup>97</sup> UN Security Council, 2615th meeting, October 4 1985, para. 252.

<sup>98</sup> UN Security Council Resolution 573 (1985). See also; Gray (2008), 195-196.

argued that the measures taken in self-defence were an attempt to prevent future attacks but also a response to the attacks already carried out. The government of the United Kingdom supported the acts of aggression taken by the United States allowing military airplanes to use its' territory to launch attacks on targets located in Tripoli. The Security Council did not adopt any resolution condemning the actions taken by the United States and supported by the United Kingdom. The reason for this was that the United States joined by France and the United Kingdom used their veto as permanent members on the council to prevent the resolution from being adopted.<sup>99</sup> While the UN Security Council was prevented from adopting a resolution, the UN General Assembly adopted a resolution on the matter. The resolution condemning the United States' attack on Libya was accepted with 79 votes against 28, 33 states abstained from voting.<sup>100</sup>

The United States has attempted to use the same line of reasoning in more recent years as well. In 1993 following what was claimed to be an attempt by Iraqi agents to assassinate ex-president Bush it fired missiles at Baghdad. The target was the Iraqi Intelligence Headquarters and in a report of the acts to the UN Security Council the United States justified its actions by referring to Article 51 of the UN Charter.<sup>101</sup> This situation differs from the ones examined above since the United States claim to be acting in self-defence in response to actions taken by the Iraqi government. In the letter to the UN Security Council informing them that the United States exercised its' right of self-defence it claimed that the Iraqi government were to be considered directly responsible for the attempt of assassination.<sup>102</sup> Despite this, the situation is of relevance to the discussion on self-defence against terrorist attacks. This is based on the fact that the assassination, although ordered by a foreign government, was to some extent considered to be a terrorist attack which resulted in a discussion on the legality of using force in self-defence against terrorism. In this case the position of the UN Security Council seem to have shifted slightly towards a positive standpoint on the matter. China was the only state to expressly condemn the actions taken by the United States.<sup>103</sup> The general standpoint of the UN Security Council during its meeting following the missile attack was appreciative of the United States' actions.<sup>104</sup> In a larger context many states either supported the actions taken by the United States or refrained from making a judgement. Even the Arab countries remained neutral or positive, despite its strained relationship with the United States.<sup>105</sup> This seem to be a development from the council's, almost unanimous, condemnation of Israel's acts of aggression the previous year and may serve as an indication of a wider interpretation of the right of self-defence.

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<sup>99</sup> Gray (2008), 196.

<sup>100</sup> UN General Assembly resolution 41/38 (1986) and; Cohan (2003), 323.

<sup>101</sup> Gray (2008), 196.

<sup>102</sup> UN Security Council, Letter Dated 26 June 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the President of The Security Council, 26 June 1993.

<sup>103</sup> Gray (2008), 196-197.

<sup>104</sup> Kritsiotis (1996), 163-164.

<sup>105</sup> Beard (2001-2002), 564.

On August 20, 1998, the United States informed the UN Security Council of its use of force against targets in Sudan and Afghanistan. The attacks consisted of strikes on a facility claimed to produce chemical weapons and what was argued to be training facilities used by a terrorist organization led by Usama Bin Ladin. According to the United States these measures were taken in response to bombings of the United States' embassies in Nairobi and Dar Es Salaam. The terrorist organization was believed to be responsible for the bombings and the United States argued that its attempts to use peaceful means, in order to end terrorist activities in Afghanistan, had not had the desired effect. Because of this, the use of force as a response to the bombings was considered necessary. The strikes were also expected to prevent future attacks against the United States and its citizens. The fact that further attacks could be expected, according to the United States, made actions of self-defence necessary. Article 51 of the UN Charter was cited to support the use of force in self-defence.<sup>106</sup> International reactions to these events varied. Some states such as Russia and Iraq expressed their disapproval of the actions taken by the United States. They were supported by the Secretariat of the League of Arab States which condemned the attack carried out in Sudan, however it remained silent concerning Afghanistan. Other states, Australia, Japan, France and the United Kingdom amongst others, were of a different opinion. They expressed an understanding for the actions taken by the United States.<sup>107</sup> Australia even expressed support for the United States' use of force in self-defence.<sup>108</sup>

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<sup>106</sup> UN Security Council, Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, 20 August 1998.

<sup>107</sup> Murphy (1999), 164-165.

<sup>108</sup> Drozdiak (1998).

# 5 The terrorist attacks on 9/11

Acts of aggression by non-state actors, such that sometimes are referred to as terrorist attacks, have traditionally been executed by a single individual or a minor group. However, during the last few decades a new form of attacks and organizations have emerged. The individual perpetrator has been succeeded by large networks and organized groups with great resources. From this change follows that attacks have become more sophisticated and the possible effects considerably more severe.<sup>109</sup> This became evident on September 11, 2001, when the United States suffered a terrorist attack of unprecedented proportions. This section will examine the legal consequences of this attack and attempt to establish if international law of the right of self-defence was affected in any way.

## 5.1 What happened?

The events on September 11, 2001, are known to most people and for that reason this section will only consist of a brief summary. On the morning of September 11, 2001, during rush hour in New York two airplanes were flown into the World Trade Centre, also known as the Twin Towers. Shortly after, a third plane was flown into the Pentagon while a fourth plane crashed in Pennsylvania. These four airplanes were hijacked by men believed to be associated with the terrorist network Al Qaeda.<sup>110</sup> The head of this organization was, by the United States, believed to be a man named Usama bin Laden.<sup>111</sup>

The attack, it has been argued, constituted a violation of several international treaties. The multilateral convention for the suppression of unlawful seizure of aircraft, which many states have ratified, states in Article 1 that:

”Any person who on board an aircraft in flight:  
(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or  
(b) is an accomplice who performs or attempts to perform any such act commits an offence (hereinafter referred to as ”the offence”)”<sup>112</sup>

Article 1 of the Convention for the suppression of unlawful acts against the safety of civil aviation contains a similar statement, however it is slightly

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<sup>109</sup> Guillaume (2004), 542.

<sup>110</sup> Keesing’s Record of World Events (2001), p. 44333.

<sup>111</sup> United States Attorney, Southern District of New York, *Press Release* [Concerning the Indictment of Usama bin Laden by the United States of America], November 4, 1998.

<sup>112</sup> Article 1, Convention for the Suppression on Unlawful Seizure of Aircraft.

more detailed.<sup>113</sup> There is no doubt that these articles are applicable on the events of 9/11. From this follows that the attack was a violation of at least two multilateral treaties.<sup>114</sup> As mentioned previously in section 4.4 the Al Qaeda network had been held responsible for attacks against the United States embassies in Nairobi and Dar es Salaam during 1998. The attack on 9/11 was of a much greater scale resulting in more than 6000 casualties. As a response to this attack the United States informed the world that it was going to wage war against terrorism. The international community condemned the terrorist attack and the Prime Minister of the United Kingdom even stated that it was an attack on a democratic world and not the United States alone.<sup>115</sup> The UN Security Council adopted a resolution on September 12 condemning the attacks. It determined that they were to be considered a threat to international peace and "expressed its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001 [...]".<sup>116</sup> This statement has been interpreted as encouraging the United States to seek authorization to use force once it decided on how to respond, although that did not happen. The resolution itself however did not contain any authorization to use force.<sup>117</sup> Even so this resolution is a deviation from the previous reactions in the UN Security Council to terrorist attacks since it affirms the right of self-defence in response to the attacks on 9/11.<sup>118</sup> A few weeks later, on September 28, 2001, another resolution concerning 9/11 was adopted by the UN Security Council. In this resolution the council acted under chapter VII of the UN Charter and a possible interpretation of the provisions would suggest that they could be considered to authorize the use of force. Although this interpretation has not been argued by the United States.<sup>119</sup>

In a response to the terrorist attack the United States in collaboration with the United Kingdom commenced an attack on the territory of Afghanistan. These actions became known as Operation Enduring Freedom (hereafter OEF). This was a military operation targeting training camps used by terrorist organizations as well as regular military targets, for example air bases and means of communication.<sup>120</sup> OEF was begun on October 7, 2001, and lasted until December 31, 2014, when it was succeeded by Operation Freedom's Sentinel, a mission focusing on rebuilding Afghanistan.<sup>121</sup> On October 7 the United States informed the UN Security Council of its military actions and intentions. On the same day the United Kingdom submitted a letter to the UN Security Council with a similar content. The use of force against targets in Afghanistan was based on the inherent right of

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<sup>113</sup> Article 1, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

<sup>114</sup> McWhinney (2002), 283.

<sup>115</sup> Keesing's Record of World Events (2001), p. 44333.

<sup>116</sup> UN Security Council resolution 1368 (2001).

<sup>117</sup> Byers (2002), 401.

<sup>118</sup> Beard (2001-2002), 565.

<sup>119</sup> UN Security Council resolution 1373 (2001). See also; Byers (2002), 401-403.

<sup>120</sup> Linderfalk (2010), 897-898.

<sup>121</sup> Linderfalk (2010), 897 and; United States Department of Defence, Obama, Hagel Mark End of Operation Enduring Freedom (December 2014).

individual and collective self-defence as stated in Article 51 of the UN Charter. OEF was intended to prevent the continuation of terrorist attacks and was considered necessary since previous efforts by peaceful means had been proved insufficient. In its letter to the UN Security Council the United States explicitly claimed that it had been the victim of an armed attack.<sup>122</sup> This statement is of importance since the right of self-defence in Article 51 of the UN Charter, as well as in customary international law, can be used only in the event of an armed attack.<sup>123</sup>

The UN Security Council had previously declared the situation in Afghanistan as a threat to international peace and security. In a resolution adopted in 1998 it expressed concern that the Taliban regime provided a sanctuary for terrorist networks in the areas under its control.<sup>124</sup> The Taliban organization was a movement operating in Afghanistan. In 1996 it had seized Kabul and established itself as the de facto government of Afghanistan. As a consequence the up until then sitting president of Afghanistan was hanged.<sup>125</sup> In addition to the resolution adopted in 1998 concerning Afghanistan, the council acted under chapter VII of the UN Charter in a resolution adopted in 1999. The council demanded certain measures to be taken by states against the Taliban regime as well as Usama bin Laden and his network Al Qaeda. Amongst other things these actions included the freezing of assets and funds.<sup>126</sup> OEF was aimed at Al Qaeda but also against the Taliban regime in Afghanistan since it was considered to be sheltering the terrorist organization, an opinion supported by the UN Security Council in the resolutions mentioned above.

### **5.1.1 Actions by the UN Security Council**

The UN Security Council had, as mentioned above, adopted several resolutions concerning Afghanistan previous to 9/11.<sup>127</sup> In the remaining time of 2001 after 9/11 it adopted several new resolutions in response to 9/11 and the general situation in Afghanistan. UN Security Resolutions 1368 (2001) and 1373 (2001) have been discussed previously in section 5.1 and are a direct response to 9/11. On November 14, 2001, the UN Security Council adopted resolution 1378 (2001) in which it expressed support for the efforts of Afghan people to establish a transitional administration leading to a new government of Afghanistan.<sup>128</sup> On December 5th a letter was sent from the Secretary-General of the UN to the president of the

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<sup>122</sup> UN Security Council, Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, 7 October 2001 and; UN Security Council, Letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, 7 October 2001.

<sup>123</sup> Linderfalk (2010), 900.

<sup>124</sup> UN Security Council resolution 1214 (1998).

<sup>125</sup> Marsden (2002), 1-4.

<sup>126</sup> UN Security Council resolution 1267 (1999).

<sup>127</sup> See for example UN Security Council resolutions 1267 (1999) and 1333 (2000).

<sup>128</sup> UN Security Council resolution 1378 (2001).

Security Council. The letter contained information about an agreement known as the Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions which was signed in Bonn, Germany, on the same day. In this agreement a request was made for a UN mandated force positioned in Afghanistan.<sup>129</sup> The agreement was an attempt to provide conditions suitable for the establishment of a new government in Afghanistan after the Taliban regime had been overthrown.<sup>130</sup> The Security Council endorsed the agreement signed in Bonn in resolution 1383 (2001) adopted on December 6, 2001. Furthermore the council, through resolution 1386 (2001) authorized an International Security Assistance Force (ISAF) which had been considered in the Bonn agreement. The resolution also contained a provision authorizing "the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate".<sup>131</sup> This action was taken under chapter VII of the UN Charter, therefore the passage could be interpreted as an authorization to use force. These resolutions, adopted during a short time following 9/11, show the actions taken by the UN Security Council in response to the threat to international peace and security that the situation in Afghanistan and the sheltering of Al Qaeda was considered to constitute.

Some argue that the UN Security Council, through its' resolutions 1368 (2001) and 1373 (2001), stated that the use of force was justified if it was exercised in response to a terrorist attack. This view could be criticized in several ways. First of all the council did not get an opportunity to elaborate on its' statement since OEF was undertaken without reference to authorization by the council. Furthermore, the Security Council has not adopted any resolution that examines or expresses the lawfulness of OEF in regard to the right of self-defence in Article 51 of the UN Charter. Most likely the UN Security Council did not intend to justify all forcible actions in response to a terrorist attack. Therefore, I do not believe that the two resolutions mentioned can be used as a basis for legitimizing actions of self-defence in regard to terrorist attacks.<sup>132</sup>

## **5.2 The international legal debate that emerged after 9/11**

The terrorist attack on 9/11 became a topic of discussion world wide. In the international legal community however, it was the legality of OEF that became the focus of debates.<sup>133</sup> In a wider perspective the question concerned whether or not forcible actions in response to a terrorist attack,

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<sup>129</sup> UN Security Council, Letter dated 5 December from the Secretary-General addressed to the President of the Security Council, 5 December 2001.

<sup>130</sup> Murphy (2009), 121.

<sup>131</sup> UN Security Council resolution 1386 (2001).

<sup>132</sup> Terry (2016), 30-31.

<sup>133</sup> Linderfalk (2010), 897-898.

could be justified with the provisions on the right of self-defence. It is the territory on which the actions take place that distinguishes the use of force in self-defence against a terrorist network from the same measures taken against a state. If a state is deemed responsible for an attack then the victimized state may use self-defence against the perpetrating state. These measures of self-defence would most likely be carried out on territory controlled by the state responsible for the attack. This means that the use of force in self-defence would not violate an innocent state's territorial integrity. However, the situation is different if measures of self-defence are aimed at a non-state actor. A non-state actor, such as Al Qaeda for example, does not have its' own territory. An attack aimed at such a network must therefore necessarily be carried out on the territory of another state, thus violating the territorial integrity and sovereignty of that state. Because of this the question of whether or not the right of self-defence includes response to attacks by non-state actors becomes relevant.<sup>134</sup>

The debate following 9/11 explored many questions relating to self-defence in an attempt to decide on whether OEF was a legal operation or not. Many agreed that the right of self-defence had undergone a change in the time between 9/11 and the start of OEF, although there was no consensus in regards to how it had changed. The remaining part of this section will cover the debate concerning what constitutes armed attack and the closely connected concept of attribution.

Previous to 9/11 attacks by non-state actors have not been considered to constitute armed attacks, unless they are attributable to a state. The argument that an attack in self-defence, on the territory of a state harbouring a terrorist network, would be legitimate since the state, by allowing the existence of the network on its' territory, is considered an accomplice has been argued by the United States and Israel previous to 9/11. See for example the situations described above in section 4.4. However, as mentioned in that section, this line of argument did not receive support from many states, instead it was considered to far reaching and the actions taken were condemned. Thus, before 9/11 there seemed to be an established consensus amongst states and scholars that an attack on a foreign states territory could not be justified by these means because of the criteria of attribution. After 9/11 however, this ceased to be the case since states and scholars established different opinions.<sup>135</sup>

Whether or not an attack by a non-state actor can be considered attributable to a state can be determined using international law on state responsibility. The difficulty however, lies in the fact that international law on state responsibility seemed to be somewhat unclear at the time of the attacks on 9/11. Tests to determine under what circumstances a state could be held responsible on the basis of attribution had been created in two judgements,

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<sup>134</sup> Byers (2002), 406.

<sup>135</sup> Cassese (2001), 996.

one by the ICJ and one by the International Criminal Tribunal for the Former Yugoslavia (hereafter ICTY).<sup>136</sup>

The ICJ had developed the effective control test in the Nicaragua case in order to determine when actions by a non-state actor can be attributed to a state. In the Nicaragua case the ICJ argued that supplying an organization with weapons did not amount to the support or control needed in order for the actions by a non-state actor to be attributable to the state.<sup>137</sup> From this statement follows that, previous to 9/11, it would have been difficult to argue that harbouring an organization amounted to enough support to create a basis for attribution. The Taliban regime allegedly did nothing more than shelter Al Qaeda on Afghan territory. I therefore share the opinion of Christopher Greenwood, that the Taliban regime's influence over Al Qaeda did not amount to such effective control needed for attribution to Afghanistan, according to the Nicaragua case.<sup>138</sup>

In 1999 the ICTY developed another test for attribution in the Tadic Case. The ICTY stated that in order for actions by a military or para-military group to be attributable to a state "[...] it must be proved that the state wields overall control over the group [...]"<sup>139</sup> Furthermore if the actor is not organized in a military structure then specific orders or public approval is necessary to attribute actions by a non-state actor to a state.<sup>140</sup> According to the ICTY it was not effective control, but instead overall control, that would give rise to the possibility of attribution. However, as in the case of the effective control test mentioned above, it would be difficult to argue that the Taliban regime had overall control simply by sheltering Al Qaeda. Therefore according to Greenwood the relations between Al Qaeda and Afghanistan did not seem to fulfil the requirements of the overall control test either.<sup>141</sup>

Another factor, aside from the lack of grounds for attribution, indicating that a terrorist attack was considered to fall outside the scope of 'armed attack' before 9/11 was a strategic concept adopted by the North Atlantic Treaty Organization (hereafter NATO). In this document it was expressed that Articles 5 and 6 of the North Atlantic Treaty, also known as the Washington Treaty, would be applicable on all armed attacks aimed at the territory of the member states. In addition to this statement, the strategy mentioned other possible threats of a wider range, such as terrorism, that could have an impact on security. The fact that terrorism is mentioned in a separate, broader category and not in the context of armed attack indicates the alliance' standpoint before 9/11. Similar to the ICJ it did not consider the concept of armed attack to include acts of terrorism for which a non-state actor was responsible. From this follows that Article 51 of the UN Charter

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<sup>136</sup> Nicaragua Case, paras. 229-230 and; Tadic Case, para. 131.

<sup>137</sup> Nicaragua Case, paras. 229-230.

<sup>138</sup> Greenwood (2003), 23-24.

<sup>139</sup> Tadic Case, para. 131.

<sup>140</sup> Tadic Case, paras. 130-132.

<sup>141</sup> Greenwood (2003), 23-24.

cannot be used to justify use of force against a non-state actor in response to a terrorist attack.<sup>142</sup> On the morning of 9/11, before the attack, it was clear that if no grounds for attribution existed, according to international law on state responsibility, then an attack executed by a non-state actor could not be identified as an armed attack.<sup>143</sup> The factors mentioned above makes it evident that the attacks on 9/11 would not constitute armed attacks unless something changed.

Many scholars agree that international law had developed and changed in the period between 9/11 and the launch of OEF. However, what they did not agree on was in what way the law had changed. Two standpoints emerged in the matter, both relating to attribution. Some scholars argued that it no longer mattered whether or not an attack was imputable to a state or not, if it was severe enough it would be considered an armed attack. Others argued that an attack still had to be attributable to a state in order to be classified as an armed attack. Although instead of judging attribution according to criteria existing in international law previous to 9/11, a new criterion had emerged. It was argued that the actions of a non-state actor could be attributed to a state if said state had been sheltering the organization for a long time. The difference compared to the situation before 9/11 is that no control had to be exercised by the state over the non-state actor. Furthermore no explicit support had to be given. It would simply be enough for attribution if a state accepts that a non-state actor is operating on its territory and decides to do nothing to prevent this.<sup>144</sup>

One opinion that was raised in the debate after 9/11 was that the two resolutions, 1368 and 1373, adopted by the UN Security Council implied that the terrorist attack could be considered an armed attack.<sup>145</sup> This view gained support when NATO invoked Article 5 of the Washington treaty, after confirming that the terrorist attack originated from outside the territory of the United States. This article states that an armed attack targeting one of the member states should be considered an attack on all member states. Since NATO invoked the article, which requires the occurrence of an armed attack it has to be regarded as identifying the events of 9/11 as an armed attack.<sup>146</sup> Furthermore the United States had in its letter to the UN Security Council stated that it had been the victim of an armed attack.<sup>147</sup> The fact that most states acted in support of the United States' actions suggest that the international law on self-defence had undergone a change. The resolutions and the letter only indicate that an attack by a non-state actor was considered, by the UN Security Council and the United States, to constitute an armed attack. However, they do not reveal whether or not this was the

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<sup>142</sup> NATO, The Alliance's Strategic Concept of April 24 1999, Press Release, NAC-S(99)65, para. 21. See also; Linderfalk (2010), 907.

<sup>143</sup> Linderfalk (2010), 903-905.

<sup>144</sup> Linderfalk (2010), 901-902.

<sup>145</sup> Beard (2001-2002), 568.

<sup>146</sup> Beard (2001-2002), 568.

<sup>147</sup> UN Security Council, Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, 7 October 2001.

case since attribution no longer was needed or since the criteria for attribution had changed.

The concept of armed attack and its interpretation may according to Michael Byers have influenced the United States' justification of OEF. If it was to claim its' attacks were aimed at Al Qaeda alone the argument for justification would have had to be that a terrorist attack constitutes an armed attack even if it is not attributable to a state.<sup>148</sup> As seen previously this interpretation had not received much support amongst states in general and that a terrorist attack would be classified as an armed attack was extremely unlikely.<sup>149</sup> A terrorist attack being considered an armed attack without being attributable to a state would also open up for a possible violation of a state's territorial integrity every time a terrorist network was believed to operate from within that state. Without the criterion of attribution this would lead to the possibility of innocent states becoming victims of measures of self-defence targeting a non-state actor.<sup>150</sup> This would provide an explanation to why states in general are not positive towards categorizing a terrorist attack as an armed attack.

In order to justify the attacks carried out on the territory of Afghanistan the United States therefore stated that it targeted Al Qaeda as well as the Taliban regime. Since the Taliban regime was the de facto government of Afghanistan at the time it would be possible to argue that the actions taken by the Taliban could be imputable to the state of Afghanistan. This line of argument is an example of the idea that acts of aggression by a terrorist organization becomes attributable to a state harbouring the organization. As a consequence OEF was considered legitimate by the group of scholars advocating this specific change in international law.<sup>151</sup> Although despite the Taliban regime's actions as the de facto government of Afghanistan it is still questionable that the state of Afghanistan could be considered responsible according to international law.<sup>152</sup>

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<sup>148</sup> Byers (2002), 408.

<sup>149</sup> Linderfalk (2010), 901.

<sup>150</sup> Byers (2002), 408.

<sup>151</sup> Byers (2002), 408.

<sup>152</sup> Arai-Takahashi (2002), 1082.

## 6 After 9/11

In the years between 9/11 and today the world has experienced several atrocious terrorist attacks. This chapter will explore some of the actions taken in what states argue constitute self-defence after 9/11.

### 6.1 Advisory opinion concerning the wall

On July 4, 2004, the ICJ presented an advisory opinion concerning a wall built by Israel in the occupied Palestinian territory. The UN General Assembly had submitted a request to the court asking for its opinion. Israel, the occupying power of the territory, had constructed a wall which did not follow previously determined demarcation lines but instead some stretches were built on the occupied territory. Some parts of the wall had already been built when the ICJ received the question while some parts were scheduled for construction. Furthermore Israel created so called closed areas in the territory between the wall and the demarcation lines. In order to enter or remain in these areas a person was required to have a permit issued by Israeli authorities or Israeli identification. Because of this a new administrative regime emerged.<sup>153</sup> Israel argued that the wall was a necessary measure to protect the state from terrorist attacks and not to be considered a border. The wall was not intended to be permanent, instead Israel claimed that when the attacks ceased it would no longer be needed. Furthermore, Israel argued that when constructing the wall Israel was exercising its right of self-defence as stated in Article 51 of the UN Charter.<sup>154</sup>

The ICJ was asked to determine whether or not these measures taken by Israel were legitimate according to international law. As a starting point the court referred to Article 2(4) of the UN Charter recalling that use of force against the territorial integrity of another state is prohibited.<sup>155</sup> After discussing several aspects of international law the ICJ concluded that the construction of the wall was violating several international obligations owed by Israel. Since Israel claimed that the construction, despite violating certain provisions, could be justified by the right of self-defence in Article 51 of the UN Charter the court had to examine whether or not such a right existed.<sup>156</sup> The ICJ begun by stating that Israel, although it argued that it was exercising its' right of self-defence, never claimed that it had been the victim of an armed attack executed by another state. Neither did it argue that

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<sup>153</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, paras. 72-85.

<sup>154</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, paras. 116 and 138.

<sup>155</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, paras. 86-87.

<sup>156</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, paras. 138-139.

it was suffering from an armed attack, or the threat of such an attack, by a non-state actor that was attributable to another state. The court goes on to discuss the territory, from which the terrorist attacks were arguably, according to Israel, originating from. Since Israel was the occupying power of said territory it was considered to exercise control over it. The ICJ therefore stated that the attacks were to be considered as if they were executed from within the territory of Israel. For this reason Israel was not able, according to the court, to support its' actions by referring to the two UN Security Council resolutions adopted only days after 9/11. These two resolutions, 1368 (2001) and 1373 (2001) (mentioned above in section 5.1) cover the topic of the right of self-defence in the event of terrorist attacks. However, the threat of a terrorist attack in the case of the wall was originating from within the territory of the state defending itself. This fact distinguishes this situation from the one expressed in the resolutions. Because of this they could not be considered to support Israel's claim according to the ICJ. The court finishes its discussion concerning self-defence by stating that Article 51 of the UN Charter was not relevant to the case.<sup>157</sup> This opinion by the ICJ could be argued to reaffirm the standpoint it expressed in the Nicaragua case. Both the Nicaragua case and the case concerning the wall affirm that an armed attack has to be attributable to a state in order for a right of self-defence to exist.<sup>158</sup> This could be seen as an argument against the theory arising after 9/11 that attribution was no longer a necessary criterion for the concept of armed attack. Instead it supports the argument that a criterion of attribution still exists. Although the court does not elaborate on whether or not the interpretation of attribution had developed and become wider in comparison with the time before 9/11.

The ICJ received criticism for the fact that the case concerning the wall only repeated the criterion of attribution as it was stated in the Nicaragua case without properly examining the validity of the Israeli claim of self-defence. The fact that the court was heavily criticized for this advisory opinion could be indicating that it should be considered less authoritative in situations concerning self-defence against non-state actors, such as terrorist networks.<sup>159</sup>

## 6.2 UN Security Council resolutions

One of the main issues with the right of self-defence in regard to terrorist attacks, is the violation of other states' territorial integrity and sovereignty. This problem is not only relevant to self-defence but to many other preventive actions against terrorism as well. The UN Security council has acknowledged this and in a resolution adopted in February 2015 it dealt with the issue of financing terrorism. In this resolution it reaffirmed "the independence, sovereignty, unity and territorial integrity of the Republic of

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<sup>157</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, para. 139.

<sup>158</sup> Trapp (2007), 143.

<sup>159</sup> Trapp (2007), 143-144.

Iraq and the Syrian Arab Republic [...]”.<sup>160</sup> In the same resolution the council referred to different terrorist organizations such as the Islamic State (IS), the Al-Nusrah Front and Al Qaeda. This statement was also later reaffirmed in a UN Security Resolution adopted in December 2015.<sup>161</sup> It may indicate that the council intended to remind the member states that actions of terrorist networks do not justify actions against another state without the explicit approval of the council.

In a resolution adopted in November 2015 the UN Security Council classified the Islamic State as a threat to international peace and security. This was a consequence of the organization’s actions and operations in Iraq and the Levant. Furthermore, the resolution served as a reminder that the same classification already had been done concerning Al Qaeda and the Al-Nusrah Front.<sup>162</sup>

## **6.3 The Islamic State and Syria**

There is one major difference between the situation in Syria and the situation in Afghanistan before and after 9/11. The Taliban regime had provided a safe-haven for Al Qaeda by allowing the organization to operate on its territory without consequences. It has also been argued that the regime to some extent even supported the network in additional ways. The Syrian government however, does not seem to support or accept the Islamic State in any way. Instead it has with support from Russia attempted to combat the organization. Therefore, the argument that Al Qaeda's actions could be imputable to Afghanistan and therefore justify actions in self-defence against the state could not be used in regard to Syria and the Islamic State. It can be considered uncertain whether or not any action by the Islamic State can be attributable to Syria. If no attribution seem to be possible it would be questionable if the use of force against Islamic State on Syrian territory is in accordance with international law of self-defence.<sup>163</sup>

### **6.3.1 Terrorist attacks in France**

On November 13, 2015, a terrorist attack consisting of a few different elements was carried out in the centre of Paris, France. The attack began with several suicide bombers detonating their explosives outside of a football stadium during a game. It then continued with several gunmen opening fire at restaurants and bars and another suicide bomber detonating explosives. Finally three men entered a concert hall during a concert and fired their weapons into the crowd. They were also wearing explosives and eventually detonated them. The attacks combined resulted in around 130 dead and many injured. The terrorist organization the Islamic State was

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<sup>160</sup> UN Security Council Resolution 2199 (2015), 2.

<sup>161</sup> UN Security Council Resolution 2253 (2015), 1.

<sup>162</sup> UN Security Council Resolution 2249 (2015), 1.

<sup>163</sup> Terry (2016), 32.

believed to be responsible for the attack.<sup>164</sup> UN Security Council resolution 2249, mentioned above, was adopted only seven days after the terrorist attack in the centre of Paris. The council both encouraged and demanded that all member states in a position to take action against terrorism would do so. However, it was also stressed that all measures taken had to comply with international law and the states' obligations under the UN Charter.<sup>165</sup> The statement serves as a reminder that a state acting against a terrorist network in self-defence must do so in accordance with Article 51 of the UN Charter, or customary international law, in order for the action to be lawful. It is also important to notice that the UN Security Council was not acting under chapter VII of the UN Charter when adopting the resolution. The consequences of this is that a use of force is not authorized since this only can be the case when the council is exercising its' powers under chapter VII. This could be seen in relation to the resolutions adopted by the council following the attacks on 9/11 in which it was expressed that the council was acting under chapter VII of the charter. A military campaign against the Islamic State located in Syria had been launched more than a year before the attack in Paris. This operation was led by western states such as the United States, France and the United Kingdom, although it received support from Arab states along with Turkey.<sup>166</sup>

### **6.3.2 Terrorist attacks in Belgium**

On March 22, 2016, a terrorist attack was carried out at an airport and a metro station in Brussels, Belgium. The organization behind the attack was believed to be the Islamic State, the same organization that allegedly carried out the Paris attack mentioned previously. The attack consisted of two explosions in the check in area of an airport and one explosion at Maelbeek metro station which is located near multiple EU institutions and a UN centre. Around 30 people were killed in the attacks.<sup>167</sup>

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<sup>164</sup> Paris Attacks: What Happened on the Night, BBC News (2015). See also; 2015 Paris Terror Attacks Fast Facts, CNN Library (2016).

<sup>165</sup> UN Security Council Resolution 2249 (2015), 2.

<sup>166</sup> Terry (2016), 27-29.

<sup>167</sup> Brussels Explosions: What we know about airport and metro attacks, BBC News (2016). See also; Hume, Tim, Ap Tiffany and Sanchez, Ray, Here's what we know about the Brussels terror attacks, CNN (2016).

# 7 Analysis

This thesis aim to clarify the development of the right of self-defence in international law and define the scope of this right as of today. In this section I will explore the facts previously presented in this work in order to answer the research question posed in the introduction. The question asked was:

Can a state ever invoke the right of self-defence in situations where an attack or a threat of attack is attributable to a non-state actor, and if so, under what circumstances?

## 7.1 The Caroline case

The Caroline case (see section 4.1) is an interesting case. The events occurred almost two hundred years ago and despite this fact the case is still relevant to the right of self-defence. The Caroline case touched upon a few very important questions. First of all it was the first situation in which the right of self-defence was acknowledged as a principle of international law. This was the turning point when the right of self-defence became a recognized part of customary international law instead of merely an instrument used in politics.

The use of self-defence against a non-state actor was also an important aspect of the Caroline case. The United Kingdom acted against a group of rebels operating from the territory of the United States. The rebel group was not connected to any state organ and had to be considered a non-state actor. This rebel group could perhaps in modern time be considered a terrorist organization. It is difficult to argue that this would most certainly be the case since terrorism is quite hard to define. One organization is considered a terrorist organization while another is not, despite the fact that these groups might work in similar ways and have similar goals. In the Caroline case it was concluded that a right of self-defence existed against non-state actors. However, this right was not without criteria such as the criterion of necessity and that the state on who's territory the non-state actor was operating had failed to prevent stop the actor or remained passive in regard to the non-state actor's activities. I especially find this second criterion interesting since I believe it says something about attribution. My interpretation of the Caroline case is that attribution was interpreted widely at the time. The United States had been informed of the rebel group and its' activities. However the United States allegedly did nothing to put and end to or prevent the attacks performed by the rebels. This fact, that the state was unwilling to act against the non-state actor, seemed to have given rise to the right of self-defence. The concept of attribution was not relevant in this context at the time of the Caroline case. It became relevant later in time when the UN Charter was created making an armed attack a criterion for

self-defence. However, based on the circumstances of the case and the way they were interpreted, I would argue that they suggest that were the Caroline case to be settled in a time after the introduction of attribution, it is likely that the actions by the rebel group would have been attributed to the United States.

## **7.2 Armed attack and attribution**

The occurrence of an armed attack is one of the main criteria in Article 51 of the UN Charter. If no armed attack has occurred then a right of self-defence does not exist according to the charter. The difficulty lies in defining what type of action constitutes an armed attack? As mentioned in section 2.3.3 different standpoints have emerged concerning this matter. Some argue that an armed attack requires a certain degree of severity while others argue that attacks affecting the interests of a state in minor ways also could be considered armed attacks. Despite the different viewpoints I would argue that an attack in which human lives are at risk would most likely amount to the severity required in order for an attack to be considered an armed attack in this sense. The more difficult question in relation to the concept of an armed attack is to determine who the perpetrator has to be. As seen in the Caroline case it did not seem to be of high importance that the entity responsible for the attacks was a non-state actor. With time however, this became more important. When the UN Charter was created, an armed attack became explicitly necessary for the existence of a right of self-defence. Seen in the light of the previously settled Caroline case it would be reasonable to argue that an armed attack at that time did not require attribution to a state. However, the opposite soon became evident. The UN Security Council did not seem to accept measures of self-defence taken in situations where attacks had been executed by non-state actors. Examples of situations where actions argued by states to be measures of self-defence have been condemned by the UN Security Council can be found in section 4.4. It became evident that a general opinion, different from what could be concluded in the Caroline case had emerged. During the second half of the 20th century it was argued that an attack only could constitute an armed attack, in the meaning of Article 51 of the UN Charter, if the responsible entity was a state. Because of this statement the concept of attribution became important. If an attack by a non-state actor could not give rise to a right of self-defence then the attack had to be attributed to a state in order to meet the criteria of an armed attack. During this period of time several events took place giving rise to the discussion on attribution and self-defence. One event that in my opinion clearly demonstrates the changes to the right of self-defence since the Caroline case, is the Israeli measures of alleged self-defence against Lebanon. Israel argued that Lebanon had not acted against a non-state actor, operating from its territory, in order to stop or prevent attacks. The fact that Lebanon had not taken appropriate measures was by Israel considered to allow for measures of self-defence. In comparison to the Caroline case this line of argument is similar to the one endorsed by the United Kingdom in regard to the United States

unwillingness to act against the rebel group. Although in the case concerning Israel the UN Security Council was of a different opinion. The council condemned the actions argued by Israel to be actions of self-defence. Perhaps the council took this standpoint based on that the attack originating from Lebanese territory did not constitute an armed attack since it was not attributable to a state. The fact that Lebanon did not take action against the non-state actor would perhaps not be considered enough for attribution. Regardless of what the reasons behind the UN Security Council's decision was it is evident that a shift in the right of self-defence against non-state actors had occurred in the period of time between the Caroline case and 1968. The idea of self-defence against non-state actors had gone from being accepted to being rejected. However, the United States and Israel still seemed to cling to the previous notion that self-defence against a non-state actor could be possible. In the time period between the Israel and Lebanon situation in 1968 and the end of the 20th century these two states, Israel and the United States, seem to be the only advocates for a right of self-defence in response to attacks by non-state actors. Although, it is evident that neither the UN Security Council nor the international community agreed with this reasoning. However, it is interesting to notice that towards the end of this time period the general attitude towards a right on self-defence against non-state actors seem to have become somewhat more positive. The United Kingdom was one of the first states to expressly show agreement with the point of view argued by the United States and Israel. This was shown for example in 1986 when the United Kingdom allowed the United States to launch attacks against targets in Libya from its' territory. At this point in time however, the idea that self-defence could be used against attacks attributable only to a non-state actor was still not generally accepted. This was demonstrated for example by the resolution adopted by the UN General Assembly following the United States attack. With time more states seemed to rethink their position in the matter concerning self-defence against non-state actors. States began to express understanding for actions in self-defence against non-state actors even if they did not accept them as lawful or in accordance with the right of self-defence. This was for example the case when the United States launched attacks at Baghdad following the attempt to assassinate ex-president Bush. After the attacks against the United States' embassies in Nairobi and Dar Es Salaam the change towards a more accepting view of self-defence against non-state actors became even more evident. Perhaps this slow development in attitude contributed to the reactions to the attacks on 9/11.

The reactions by states and international organizations following the attack of 9/11 were not entirely different from previous reactions by some states, for example the United Kingdom and Australia, to attacks by non-state actors. Instead of condemning the United States' use of force in self-defence through OEF, most states expressed understanding and support. The UN Security Council even reminded the international community of the inherent right of self-defence in a resolution adopted shortly after 9/11. In relation to previous reactions to similar situations this was a change since many states seemed to adopt a view previously only held by a handful of states, led by

the United States and Israel. In the years following 9/11 it was thoroughly discussed whether or not international law on self-defence had changed in the period between 9/11 and OEF and if so in what way. My opinion on this matter is that the right of self-defence most certainly had undergone a change. However, I am not entirely convinced that this change necessarily occurred between 9/11 and OEF. It is more likely that this change of attitude towards accepting self-defence against non-state actors began some time before 9/11. With time, attacks by non-state actors had become more and more devastating. For example the attacks on the United States embassies in Nairobi and Dar Es Salaam had provided a recent example of the capacity of non-state actors at that time. At the end of the 20th century non-state actors most likely had the capacity equivalent of some states to carry out attacks. This fact could not have remained invisible to states or the UN. The United States and Israel had already been supporting the idea of self-defence against non-state actors for a long time. Perhaps the fact that the United States as one of the largest and most influential states in the world endorsed this idea also influenced the opinions of other states. Based on reactions, by states and UN organs, to measures of self-defence in response to attacks by non-state actors during the later half of the 20th century, it is in my opinion evident that they were not considered to be in accordance with the law on self-defence. For this reason I am of the opinion that only a change in the international law on self-defence could have allowed for the United States actions in self-defence to be legal. Furthermore, I would argue that this change was not something that happened over night but instead it emerged during a longer period of time. However, since the attacks of 9/11 was of such magnitude it was in the period after these attacks that the change became evident. The idea that self-defence, given certain circumstances, could be used against non-state actors seem to indicate that the ideas of the Caroline case have emerged again.

I have argued that there has been a change in the right of self-defence and that we once again are getting closer to the expression of self-defence against non-state actors found in the Caroline case. I will now go on to discuss in what ways I believe the right of Self-defence has changed. It is undoubtedly so that a criterion of an armed attack still exists in regard to measures of self-defence. I believe the change has occurred in the interpretation of this concept together with the idea of attribution. With a glance at Caroline case and the period up until the end of the 20th century I would argue that there has been a slow change, comparable to a pendulum swing. The Caroline case allowed for a very wide interpretation of attribution. This despite the fact that attribution was not relevant at the time and therefore was not explicitly discussed. In the period between the Caroline case and the later half of the 20th century the pendulum seemed to swing in the opposite direction. Through several situations (see section 4.4) it became evident that attribution was instead interpreted very narrowly. A state was considered responsible, on the ground of attribution, for actions by a non-state actor only in cases where a clear connection, either by control or support, could be established between a non-state actor and the state. This

was perhaps, as mentioned above, somewhat surprising since it would be reasonable to assume that an armed attack and the criteria of attribution would be interpreted in the light of the Caroline case. However, after a period of interpreting attribution narrowly the pendulum later swung back towards the interpretation of attribution found in the Caroline case. I would argue that attribution to a state is still required in order for an attack by a non-state actor to be considered an armed attack. Without attribution and a responsible state the measures of self-defence would be unlawful. If self-defence against non-state actors was allowed without any attribution to a state it would simply open up for too far-reaching violations of territorial integrity and sovereignty as mentioned in section 5.2. However, it is my opinion that the scope of attribution has become wider. Not only effective control, as expressed in the Nicaragua case, or overall control, as expressed in the Tadic case, can make attribution possible. States today seem to accept that allowing a non-state actor to operate on your territory would open up for the possibility of responsibility for attacks executed by the non-state actor. The United States argued that OEF targeted both Al Qaeda and the Taliban regime, which was the de facto government of Afghanistan. I interpret this argument as an expression of the fact that Al Qaeda's actions were considered attributable to Afghanistan by the United States. The international community seem to have accepted this connection between Al Qaeda and Afghanistan as well since general support and understanding for OEF was expressed.

The conclusion to my research question is therefore that due to a change in the international law on self-defence, and the concept of attribution it is possible to exercise a right of self-defence in response to attacks by non-state actors. However, this is only the case when the actions by a non-state actor are attributable to a state. The criteria of attribution have developed and at the time of, and following, 9/11 they are interpreted very widely.

With this said I will explore the more recent situation concerning the Islamic State. The Islamic State has been considered responsible for several terrorist attacks in the last few years. Their attacks target large numbers of people and in my opinion they are undoubtedly severe enough to be considered armed attacks. However, according to my interpretation of the right of self-defence after 9/11, these attacks are not armed attacks unless they are attributable to a state. The question of attribution however, may be somewhat more difficult in the case of the Islamic State. They are operating on the territory of Syria, a state which explicitly does not support the organization. Instead Syria is making attempts to stop the Islamic State and prevent them from using Syrian territory. Even if attribution can be achieved on looser grounds than before it can, in my opinion, not be argued that attribution can be considered in a situation where the state actively is working against the non-state actor. Based on these arguments I would claim that, if France for example would have used force against the Islamic State and Syrian territory in response to the attack in Paris, these actions would not have constituted lawful self-defence. However, it is important to keep in mind that this does not mean that nothing can be done. The Security

Council would still be able to act under chapter VII of the UN Charter and authorize the use of force.

Another question that is relevant to this discussion, is what the consequences would be if the Islamic State could be considered the de facto government of Syria. In the same way Afghanistan was considered responsible for actions by the Taliban regime this would suggest that Syria could be considered responsible for actions by the Islamic State. While recognizing the Islamic State as the de facto government of Syria undoubtedly is problematic from the point of view of statehood, it could open up for a right of self-defence in response to attacks by the Islamic State. This line of reasoning could become relevant in the future if the Islamic State is allowed to exercise more and more control over Syrian territory. Another alternative would be to argue that the Islamic State is considered to be a state on its own, separate from Syria. Although this scenario is unlikely since very few states likely would recognize the Islamic State as a state. Furthermore I would argue that, at least for the time being, the Islamic State do not seem to fulfil the criteria of the Montevideo convention. The organization does not seem to have the capacity of entering into relations with other states and I believe it would be difficult to argue that the organization has a permanent population. Even if arguing that the Islamic State is a state would result in the fact that self-defence can be used in response to their attacks, it is not a reasonable option.

The attacks in France and Belgium did not result in any actions of self-defence by the victimized states. I explored this hypothetical situation above, that France or Belgium would have acted in self-defence, and my conclusion was that the use of force in self-defence would be unlawful if it was aimed at Syrian territory. However, non-state actors, such as for example those considered to be terrorist organizations, have proven that they are capable of the most atrocious actions. It is not unlikely that we will experience more attacks of similar nature as 9/11 in the near future. If so, will the international community act in a similar way to 9/11 or will we see yet another nuance in the discussion on attribution and what constitutes an armed attack. I predict that the reaction and the opinions most likely will mirror those after 9/11. The reason for this is that states in general are careful with allowing actions that possibly could result in a violation of their sovereignty and their territorial integrity. An even wider interpretation of attribution would allow for serious intrusions on a state's territory even if the state had no responsibility. That a state would accept and endorse an interpretation that opens up for such a situation is according to my opinion highly unlikely. Therefore I believe we are at the end of the pendulum swing, it will not go further towards a more liberal interpretation of attribution. Although I do not find reason to believe that the pendulum will swing back towards a more conservative interpretation either. It seems as if a balance has been achieved between on the one hand protecting sovereignty and territorial integrity, and on the other allowing a state to defend its' interests in the event of an attack by a non-state actor.

# Bibliography

## Litterature

Alexandrov, Stanimir A., *Self-Defence Against the Use of Force in International Law*, Kluwer Law International, 1996

Crawford, James, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press, 2012

Dinstein, Yoram, *War, Aggression and Self-Defence*, 2nd ed., Press Syndicate of the University of Cambridge, 1994

Gray, Christine, *International Law and the Use of Force*, 3rd ed., Oxford University Press, 2008

Korling, Fredric & Zamboni, Mauro (red.), *Juridisk metodlära*, 1<sup>st</sup> ed., Studentlitteratur, 2013

Lubell, Noam, *Extraterritorial Use of Force Against Non-state Actors*, Oxford University Press, 2010

Marsden, Peter, *The Taliban: War and Religion in Afghanistan*, Revised ed., Zed Books ltd, 2002

Orakhelashvili, Alexander, *Peremptory Norms in International Law*, Oxford University Press, 2006

Shaw, Malcolm N., *International Law*, 7th ed., Cambridge University Press, 2014

Yearbook of the United Nations, vol. 39 (1985), part 1: the United Nations, section 1: Political and Security Questions, ch. 9: Middle East, pp. 261- 368

## Articles

Arai-Takahashi, Yutaka, *Shifting Boundaries of the Right of Self-Defence – Appraising the Impact of the September 11 Attacks on Jus Ad Bellum*, *The International Lawyer*, vol. 36, no. 4 (Winter 2002), pp. 1081-1102

Beard, Jack M., *America's New War on Terror : The Case for Self-Defence Under International Law*, *Harvard Journal of Law and Public Policy*, vol. 25 (2001-2002), pp. 559-590

Byers, Michael, *Terrorism, the Use of Force and International Law after 11 September*, International & Comparative Law Quarterly, vol. 51, no. 2 (April 2002), pp. 401-414

Cassese, Antonio, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, European Journal of International Law, vol. 12, no. 5 (2001), pp. 993-1001

Cohan, John Alan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defence in Customary International Law*, Pace International Law Review, vol. XV, no. II (Fall 2003), pp. 283-357

Danziger, Yoram, *Changes in Methods of Freezing Funds of Terrorist Organizations Since 9/11*, Journal of Money Laundering Control, Vol. 15, Issue 2 (2012), pp. 210-236

Dinstein, Yoram, *Terrorism and Afghanistan*, International Law Studies, vol. 85 (2009), The War in Afghanistan: a Legal Analysis, Schmitt, Michael N. (Ed.), U.S Naval War College, pp. 43-57

Frigessi Di Rattalma, Marco, *War in Afghanistan, Self-Defence and Questions of Attribution of the September 11 Attacks to the Afghan-Taliban Regime*, Italian Yearbook of International Law, vol. 13 (2003), pp. 59-75

Greenwood, Christopher, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, San Diego International Law Journal, vol. 4 (2003), pp. 7-37

Greig, D. W., *Self-Defence and the Security Council: What Does Article 51 Require?*, International & Comparative Law Quarterly, vol. 40, no. 2 (April 1991), pp. 306-402

Guillaume, Gilbert, *Terrorism and International Law*, International & Comparative Law Quarterly, vol. 53, no. 3 (July 2004), pp. 537-548

Jareborg, Nils, *Rättsdogmatik som Vetenskap*, Svensk Juristtidning, Issue 1 (2004), pp. 1-10

Jennings, R.Y., *The Caroline and McLeod Cases*, American Journal of International Law, vol. 32, no. 1 (January 1938), pp. 82-99

Kritsiotis, Dino, *The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law*, International & Comparative Law Quarterly, vol. 45, issue 01 (January 1996), pp. 162-177

Kühn, T. M., *Terrorism and the Right of Self-Defence*, South African Yearbook of International Law, vol. 6 (1980), pp. 42-77

Linderfalk, Ulf, *The Post 9/11 Discourse Revisited – The Self-Image of the International Legal Scientific Discipline*, Goettingen Journal of International Law, vol. 2, no. 3 (2010), pp. 893-949

McWhinney, Edward, *International Law-based Responses to the September 11 International Terrorist Attacks*, Chinese Journal of International Law, vol 1, issue 1 (2002), pp. 280-286

Murphy, Sean D., *Contemporary Practice of the United States Relating to International Law*, American Journal of International Law, vol. 93, no. 1 (January 1999), pp. 161-194

Murphy, Sean D., *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan*, International Law Studies, vol. 85 (2009), The War in Afghanistan: a Legal Analysis, Schmitt, Michael N. (Ed.), U.S Naval War College, pp. 109-139

Rowe, Peter, *Responses to Terror: The New 'War'*, Melbourne Journal of International Law, vol. 3 (2002), pp. 301-321

Schachter, Oscar, *The Extraterritorial Use of Force Against Terrorist Bases*, Houston Journal of International Law, Vol. 11 (1988-1989), pp. 309-316

Tams, Christian, J., *The Use of Force Against Terrorists*, European Journal of International Law, vol. 20, no. 2 (2009), pp. 359-397

Terry, Patrick, *Germany Joins the Campaign Against Isis in Syria: A Case of Collective Self-Defence or Rather the Unlawful Use of Force?*, Russian Law Journal, vol. 4, no. 1 (2016), pp. 26-60

Trapp, Kimberly N., *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors*, International & Comparative Law Quarterly, vol. 56, no. 1 (January 2007), pp. 141-156

Tworek, Heidi J., *From World Health to World Heritage 70 Years of the United Nations*, UN Chronicle, vol. 52, no. 1 & 2 (2015), pp. 67-69

### **Non-doctrinal material**

*2015 Paris Terror Attacks Fast Facts*, CNN Library, Updated April 13, 2016

<http://edition.cnn.com/2015/12/08/europe/2015-paris-terror-attacks-fast-facts/> (Retrieved on April 25, 2016)

*2016; Brussels Explosions: What we know about airport and metro attacks*, BBC News, April 9, 2016

[www.bbc.com/news/world-europe-35869985](http://www.bbc.com/news/world-europe-35869985) (Retrieved on April 25, 2016)

Drozdiak, William, *European Allies Back U.S Strikes*, The Washington Post, August 21, 1998

[www.washingtonpost.com/archive/politics/1998/08/21/european-allies-back-us-strikes/cb506c4a-ed70-482f-9617-5fba1a2129b0/](http://www.washingtonpost.com/archive/politics/1998/08/21/european-allies-back-us-strikes/cb506c4a-ed70-482f-9617-5fba1a2129b0/) (Retrieved May 15, 2016)

Hume, Tim, Ap Tiffany and Sanchez, Ray, *Here's what we know about the Brussels terror attacks*, CNN, March 25, 2016

<http://edition.cnn.com/2016/03/23/europe/brussels-belgium-attacks-what-we-know/> (Retrieved April 25, 2016)

Keesing's Record of World Events, Vol. 47 (2001), Issue no. 12 (December), p. 44333

NATO, The Alliance's Strategic Concept of April 24 1999, Press Release, NAC-S(99)65

*Paris Attacks: What Happened on the Night*, BBC News, December 9 2015  
[www.bbc.com/news/world-europe-34818994](http://www.bbc.com/news/world-europe-34818994) (Retrieved on April 25, 2016)

United States Attorney, Southern District of New York, *Press Release* [Concerning the Indictment of Usama bin Laden by the United States of America], November 4, 1998

<https://fas.org/irp/news/1998/11/prladen.pdf> (Retrieved on May 22, 2016)

United States Department of Defence, *Obama, Hagel Mark End of Operation Enduring Freedom* (December 2014)

[www.defense.gov/News-Article-View/Article/603860](http://www.defense.gov/News-Article-View/Article/603860) (Retrieved April 13, 2016)

### **International legal instruments**

*Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, Concluded at Montreal on September 23, 1971

*Convention for the Suppression on Unlawful Seizure of Aircraft*, Signed at the Hague 16 December 1970

*Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, Adopted by the ILC during its fifty-third session (2001), Yearbook of the ILC, 2001, Vol II, Part II

*The General Treaty for the Renunciation of War (Kellogg-Briand Pact)*, Paris, 27 August 1928

UN General Assembly, *General Assembly resolution 41/38 (1986)* [Declaration of the Assembly of Heads of State and Government of the

*Organization of African Unity on the aerial and naval military attack against the Socialist People's Libyan Arab Jamahiriya by the present United States Administration in April 1986*], 20 November 1986, A/RES/41/38 (1986)

UN General Assembly, *General Assembly resolution 54/109 (1999) [International Convention for the Suppression of the Financing of Terrorism]*, 9 December 1999, A/RES/54/109 (1999)

UN General Assembly, *The United Nations Global Counter-Terrorism Strategy*, 70th session, Agenda item 117, 12 April 2016, A/70/826

UN Security Council, *Letter Dated 26 June 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the President of The Security Council*, 26 June 1993, S/26003

UN Security Council, *Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, 20 August 1998, S/1998/780

UN Security Council, *Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, 7 October 2001, S/2001/946

UN Security Council, *Letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council*, 7 October 2001, S/2001/947

UN Security Council, *Letter dated 5 December from the Secretary-General addressed to the President of the Security Council*, 5 December 2001, S/2001/1154

UN Security Council, *Security Council resolution 262 (1968) [Middle East]*, 31 December 1968, S/RES/262 (1968)

UN Security Council, *Security Council resolution 573 (1985) [Israel-Tunisia]*, 4 October 1985, S/RES/573 (1985)

UN Security Council, *Security Council resolution 1214 (1998) [Afghanistan]*, 8 December 1998, S/RES/1214 (1998)

UN Security Council, *Security Council resolution 1276 (1999) [Middle East]*, 15 October 1999, S/RES/1267 (1999)

UN Security Council, *Security Council resolution 1333 (2000) [Afghanistan]*, 19 December 2000, S/RES/1333 (2000)

UN Security Council, *Security Council resolution 1368 (2001) [Threats to international peace and security caused by terrorist acts]*, 12 September 2001, S/RES/1368 (2001)

UN Security Council, *Security Council resolution 1373 (2001) [Threats to international peace and security caused by terrorist acts]*, 28 September 2001, S/RES/1373 (2001)

UN Security Council, *Security Council resolution 1378 (2001) [Afghanistan]*, 14 November 2001, S/RES/1378 (2001)

UN Security Council, *Security Council resolution 1386 (2001) [Afghanistan]*, 20 December 2001, S/RES/1386 (2001)

UN Security Council, *Security Council resolution 2199 (2015) [Threats to international peace and security caused by terrorist acts]*, 12 February 2015, S/RES/2199 (2015)

UN Security Council, *Security Council resolution 2249 (2015) [Threats to international peace and security caused by terrorist acts]*, 20 November 2015, S/RES/2249 (2015)

UN Security Council, *Security Council resolution 2253 (2015) [Threats to international peace and security caused by terrorist acts]*, 17 December 2015, S/RES/2253 (2015)

UN Security Council, *United Nations Security Council 2611th meeting*, 2 October 1985, S/PV.2611

UN Security Council, *United Nations Security Council 2615th meeting*, 4 October, 1985, S/PV.2615

# Table of Cases

*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, Advisory Opinion of July 9, 2004

*Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, International Court of Justice, Judgement of June 26, 1986

*Prosecutor v. Tadic*, International Criminal Tribunal for the Former Yugoslavia – Appeals Chamber, Judgement of July 15, 1999

*The Corfu Channel Case (The United Kingdom v. Albania)*, Merits, International Court of Justice, Judgement of April 9, 1949