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# Terrorist Acts as “Armed Attack”: The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism

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The legal response to the September 11, 2001, attacks has been unusual.<sup>1</sup> In unprecedented moves, both NATO and the Organization of American States qualified the September 11 attacks as “armed attacks” against the United States, justifying the exercise of self-defense. Russia and China, which had often opposed the use of military force against terrorist acts, displayed support for America’s self-defense response—Operation Enduring Freedom. Even the United Nations Security Council, for the first time, expressly invoked the right of self-defense in reaction to al-Qaeda’s attacks on the United States. Moreover, the quasi-unanimous statements of support from the international community for the U.S. military action were soon followed by unprecedented offers of airspace and landing rights.<sup>2</sup>

For international lawyers, the main question is how this development may be explained in legal terms. Did the fall of the Twin Towers trigger a sudden change in the perception regarding the permissibility of the use of force in response to a terrorist attack by private actors? Does the international legal system face what some call a “new constitutional moment”<sup>3</sup> or a process of creation of “instant customary law?”<sup>4</sup>

I am skeptical that the reaction to the September 11 attacks represented a rigorous change in the law. There was no thorough discussion of the term “armed attack” in the records of the United Nations (UN) founding conference held in San Francisco in 1945. The drafting history suggests that the framers of the UN

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Charter left the concept of “armed attack” deliberately open to the interpretation of its organs and Member States.<sup>5</sup> Most importantly, the framers of the Charter drafted the wording of Article 51<sup>6</sup> broadly enough to allow for the use of self-defense against acts emanating from non-state actors.

For a long time, the broadness of the text seemed to contrast with a diverging international practice, signaling caution with regard to a wide interpretation of the right to self-defense. However, a closer look reveals that state practice has probably never been as divergent as it was said to be. The central lesson appears to be that the international criticism of the exercise of self-defense against alleged

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terrorist acts was largely determined by the evidence of the facts and their context, not by a categorical rejection of the applicability of the right to self-defense.<sup>7</sup>

Take, for example, the U.S. bombing of Libya in April 1986. The criticism of the U.S. strikes against Libya in response to the *La Belle* disco attack focused mainly on two points: the question of whether the isolated murder of a U.S. serviceman abroad may give rise to an armed attack under Article 51; and the question of the necessity and

the proportionality of the strikes.<sup>8</sup> By contrast, the 1993 U.S. missile attack on Iraq<sup>9</sup> in response to a failed assassination attempt on former U.S. President Bush encountered only little objection. Most states either supported it or did not object to it. Only China condemned the action expressly.<sup>10</sup>

The apparent change reflected in the reaction to the September 11 attacks was in many ways a change in fact, rather than a change in the law. The invocation of the right to self-defense after September 11 was, in terms of legal typology, less controversial than the claim to self-defense in the context of the raid in Libya because the former resulted from a classical territorial attack directed against targets in the U.S., not an attack against U.S. targets abroad. Furthermore, the attacks of September 11 differed considerably in magnitude from previous terrorist attacks, which led NATO to declare the justification for self-defense as “clear and compelling.”<sup>11</sup> All of these findings lend support to the conclusion that it is the circumstances rather than the legal matrix that has changed.

Where does international law stand now? I would like to address three issues as they relate to Article 51 of the UN Charter: (1) the system of the use of force, (2) the notion of “armed attack,” and (3) forcible countermeasures.

## I. ARTICLE 51 AND THE SYSTEM OF THE USE OF FORCE

The first lesson of September 11 is the almost unanimous official recognition in state practice that acts of terrorism carried out by independent private actors fit within the parameters of Article 51. But the events of September 11 have another more profound impact on the law of self-defense—they affect the system itself. They will most likely strengthen the role of Article 51 as a new *Grundnorm* governing the unilateral use of force by states against armed violence.

If there is one certainty after September 11, it is that the "effective control test" articulated in the International Court of Justice's (ICJ) decision in *Nicaragua* has been over-turned. In *Nicaragua*, the issue brought before the ICJ was whether the United States could be held responsible for violations of international humanitarian law committed by organized military and paramilitary groups of Nicaraguan rebels. The Court held that the acts of the Nicaraguan contras could not be imputed to the United States because the latter had not specifically "directed or enforced" the perpetration of these acts.<sup>12</sup> It is quite obvious that the use of force against the Taliban government cannot be justified on the basis of these requirements as no state has been in a position to present evidence about both the Taliban's assistance to al-Qaeda, and their knowledge of or involvement in the attacks on the United States, neither in 1998 nor in 2001.<sup>13</sup> The consequence is a wider concept of armed attack based on an eased nexus requirement concerning the act of terrorism to state actors.<sup>14</sup> This relaxation will, in the long run, lead to an increasing invocation of Article 51 and to an extension of the scope of Article 51.

This is not the only consequence of the turnover of *Nicaragua*. The other implication is a growing focus on the use of force in response to violence on Article 51. The lowered threshold for attributing terrorist acts to non-state actors will push states to rely on Article 51 to justify military means, rather than invoke a right to self-defense under customary law or the existence of a state of necessity.

Here are two examples. It has so far been argued that self-defense may extend to situations not involving an "armed attack."<sup>15</sup> This argument has never been convincing. The armed attack requirement was inserted to narrow the unilateral use of force. How else can it be explained that Article 51 does not use the flexible term "aggression," but the narrower concept of "armed attack?" Other non-Article 51 based theories will, most likely, lose attraction. Some have claimed that forcible responses to ter-

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rorism are permissible because they do not violate the qualitative threshold of Article 2(4).<sup>16</sup> The use of limited, temporary force to eliminate a terrorist threat, so goes the argument, does not violate the territorial integrity or independence of a state in which the terrorists are located and is therefore consistent with the Charter. This argument has been rightly criticized.<sup>17</sup> To create an exception to the prohibition of the use of force because of the motive or consequences of the intervention would deprive Article 2(4) of much of its intended effect. Whatever the merit of an exception to Article 2(4) may be, it is becoming increasingly redundant under an emerging right to self-defense against terrorist attacks.

### *1. Merits of an Expanded Concept of "Armed Attack"*

In principle, the growing centralization of the system around Article 51 is a desirable development. An expansion of Article 51 is preferable to the creation of unwritten exceptions under the Charter because it does not further erode the prohibition of the use of force under Article 2(4), but simply opens a broader spectrum of justifications for what continues to be unlawful conduct under Article 2(4). A broadening of the "law of justification" is much less detrimental to the regulatory framework of the Charter than a limitation of its prohibitory character. In addition, Article 51 presents the decisive advantage of containing

inherent limits to self-defense, leaving less room for abuse than an (unlimited) exception to Article 2(4).

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On a more general level, the broadening of the notion of armed attack to include acts of terrorism by non-state actors such as al-Qaeda may also be viewed as a recognition of the adaptability of the system from within. It avoids the perpetuation of the Kosovo dilemma, namely, the emergence of categories of uses of force that may be said

to be "illegal but justifiable" while further isolating the "Glennonists" of international law, who call into question the viability of the Charter rules on the use of force.<sup>18</sup> Moreover, many of the dangers of a broad definition of the notion of "armed attack" may be attenuated by a reasonable application of the principles of necessity and proportionality, which are the cornerstones of the permissibility of the use of force in self-defense.<sup>19</sup>

The great challenge which the system faces is the question of supervision. In this respect, some comfort may be derived from the fact that the application of the use of force under Article 51 is expressly embedded within the broader context of collective security. Grouping claims to a right to use force against terrorist acts under the heading of Article 51 presents the advantage of subordinating the appli-

cation of the rules to the overall review of the Council, which exercises a "jurying function" under the Charter, and is based on four essential features:

- (1) The reporting duty of states under Article 51, forcing UN members to present a transparent and coherent justification of their action to the Council;
- (2) The Council's power to suspend the exercise of self-defense by taking action under Chapter VII;<sup>20</sup>
- (3) The power of the Council to authorize the exercise of self-defense under Chapter VII and to legitimate action that would otherwise transcend the permissible limits of self-defense;<sup>21</sup> and
- (4) The possibility of the Council to approve the exercise of self-defense, *ex post* or *ex ante* (such as in the case of the September 11 attacks), which eliminates doubts about the right to resort to the use of force in specific cases.<sup>22</sup>

The drafters of the Charter did not directly foresee options three and four. However, it is important to note that the increasing expansion of Article 51 has gone hand in hand with a stronger involvement by the Council in the exercise of self-defense in the 1990s, giving a rise to what one may call "actions under Article 51 (½)."

Such an approach has several advantages. The early involvement of the Council may help to determine the permitted scope of self-defense *ex ante* and avoid subsequent doubts of legitimacy. Furthermore, the fact that measures of self-defense are carried out on behalf of, or with the authorization of, the Council, may extend the limits of self-defense: the right of self-defense is then placed within the general context of the maintenance of international peace and security. The Council's determinations under Article 51 of the Charter read in conjunction with the right to self-defense would set the framework for the permissible scope of self-defense.

Moreover, a valuable asset of the Security Council's practice of authorizing or approving self-defense is that it safeguards the flexibility of the Charter system by allowing a controlled extension of the concept of self-defense to new types of attacks on state sovereignty or independence, which do not fall within the traditional parameters of "armed attack," but inflict comparable harm to the defending state. On a procedural level, this practice may lay the foundation for a new model of community-based self-defense, allowing the use of force against unexpected threats while requiring close cooperation with the Council.

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The doctrine of the justification to use force under Article 51 (1/2) clearly underlie the military strikes against the Taliban in 2001.<sup>23</sup> Interestingly, even Operation Iraqi Freedom fits into this general scheme. Although the use of force against Iraq is legally much more controversial than the military strikes in Afghanistan, there exist some parallels with Operation Enduring Freedom. The war in Iraq presents a new form of (preventive) self-defense which does not come within the ambit of the traditional concepts of Chapter VII or Article 51,<sup>24</sup> but derives some legitimacy from the interplay between collective security and self-defense.

Any attempt to justify the current use of force against Iraq on the basis of an express authorization of the Council, derived from Security Council Resolution 678<sup>25</sup> or the concept of "material breach" contained in Resolutions 1154<sup>26</sup> and 1441,<sup>27</sup> is exposed to serious criticism because it clearly disregards the intention of the Council not to grant UN Member States a unilateral right under Article 42<sup>28</sup> to use force to "disarm Iraq." In paragraph 34 of Resolution 687 and paragraph 5 of Resolution 1154, the Council declared itself "seized of the matter" and expressly reserved itself the power to take the steps required for the implementation of its resolutions and to "secure peace and security in the area," making further enforcement action conditional upon specific new authorization.<sup>29</sup> Furthermore, Resolution 1441 maintained the status quo, containing a "unanimous agreement to disagree" on the necessity of authorization among supporters and opponents of unilateral enforcement action in the Council.<sup>30</sup>

It is hardly possible to justify the use of force against Iraq in Operation Iraqi Freedom solely on the basis of Article 51 because no credible evidence has been presented to show that Iraq has carried out, or intends to carry out, an armed attack on the U.S., or that it has been "substantially" involved in the September 11 attacks.<sup>31</sup> However, one cannot fail to note that, just like in the case of Afghanistan, military force is exercised in a gray area situated somewhere in between Chapter VII and Article 51. There is, at least, an abstract risk that Iraq may provide international terrorist groups with biological or chemical weapons to international terrorists. Moreover, the use of force receives some legitimacy from Chapter VII related elements, such as the qualification of the situation as a "threat to peace" by the Council and the consistent disregard of the targeted regime of its obligations under the Charter. What distinguishes this form of action from other claims of self-defense is that it serves not only the purposes of the defending state, but also, on a more general level, the interests of the international community. These features alone do not justify the use of military force in contravention of the Charter. But they may serve as "mitigating" factors, helping to bridge the gap between legitimacy and (il)legality.

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## 2. *A Caveat*

Unfortunately, both the growing centralization of the system of the use of force on Article 51 and the emergence of new forms of unilateral action under Article 51 (1/2) have a number of downsides. Firstly, the Council's role as a body of review over the exercise of self-defense has its imperfections. Its objectivity is compromised by the veto privilege of the permanent five members, on the one hand, and the political character of the Council as an organ, on the other. Furthermore, a growing shift towards the use of force in self-defense may disturb the relationship between Article 51 and the responsibility of the Security Council for the maintenance of international peace and security under the Charter, thereby favoring unilateral responses to force over measures of collective security.

The legal practice in the aftermath of the September 11 attacks has shown that a relaxation of the requirements of Article 51 may provide an incentive for states to circumvent the mechanism of the Council, and to opt for the less burdensome option of unilateral self-defense. Although the Council was not bypassed in the aftermath of September 11, it was, in fact, manipulated to meet the U.S. interests for greatest possible operational independence.

Moreover, the case of Operation Iraqi Freedom illustrates that the exercise of self-defense may itself collide with the prerogatives of collective security,<sup>32</sup> such as the continuation of the inspections regime. The challenge posed by the recent shift in paradigm is to distinguish more clearly cases of Article 51 from cases in which the use of force should be based on enforcement measures under Chapter VII.<sup>33</sup> A clear authorization of the Council should, in particular, be required if the use of force involves measures with a far-reaching impact on a regime or government that is not directly involved in an armed attack.<sup>34</sup> Such measures are not merely responsive or retaliatory in nature, but to a great extent are of a preventive character. The system of the Charter would suggest that these types of measures come within the primary responsibility of the Council. Article 39 of the Charter charges the Council explicitly with countering threats to international peace and security. This includes, the right to take preventive action, whereas action under Article 51 is on the contrary, generally limited to the use of force as a response to, rather than in anticipation of, an armed attack.

## II. TERRORIST ATTACKS AS "ARMED ATTACKS"

On a normative level, the main question is how the events of September 11 affect the interpretation of the armed attack requirement under the Charter. There is no easy answer to this question. The general trend points towards a broadening of the notion of armed attack. The devil, however, is in the details.

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1. Attribution versus External Link

The recognition that acts of private actors may give rise to an armed attack is anything but revolutionary. The term “armed attack” was traditionally applied to states, but nothing in the Charter indicates that “armed attacks” can *only* emanate from states. The main question is whether a terrorist act must be in some form attributable to another state in order to qualify as an armed attack. It is not entirely clear from the practice in the aftermath of September 11 whether the requirement of the attributability of a terrorist act to a specific state actor was, in fact, fully abandoned. NATO, for instance, introduced an interesting new formula when determining whether the September 11 attacks amounted to “armed attacks.” It did not expressly inquire whether the attacks were “attributable” to the Taliban or Afghanistan, but instead asked whether “the attack against the United States on September 11 was *directed from abroad*” and could “therefore be regarded as an action covered by Article 5 of the Washington Treaty.”<sup>35</sup>

One way of interpreting this new formula is that the qualification of armed attack still requires a nexus of the terrorist act to another state entity.<sup>36</sup> The weakness of this approach is that it does not adequately address situations in which the attack is launched from failed states or territories governed by *de facto* regimes. The other problem is that it can hardly explain the permissibility of the use of force in “hot pursuit” cases, such as with the use of force against State A that provides sanctuary to terrorists who launched the attack in State B without the involvement of State A.

It may be of greater consequence to admit openly that the requirement of attributability does not play a role in the definition of armed attack. Such a step would certainly mark a qualitative change in the application of Article 51 because it breaks with the conception of Article 51 as a state-centered norm. But such a

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proposal is not unreasonable. Taken literally, the formulation employed by NATO did not make reference to the attributability of the act to a state, but merely inquired whether the attack against the United States on September 11 was directed from abroad.

Furthermore, it has been argued in the context of *de facto* regimes that the applicability of Article 2(4) of the Charter cannot depend on the recognition of the author of the act as a state.<sup>37</sup> A similar argument can be made with regard to armed attacks under Article 51. One may argue that the criterion of the attributability of an armed attack is only relevant in the context of the question towards whom the forcible response may be directed, but



not in the context of the definition of an armed attack. Moreover, the main criteria to determine whether a terrorist attack falls within the scope of application of Article 51 would not be attributability, but whether the attack presents an external link to the state victim of the attack.

The "external link" requirement may be derived from Article 2(4) of the Charter, which prohibits the "the threat or use of force" rather than only in "the international relations" of a state, implying thereby that the provision does not apply to forms of domestic violence. Textually, the "international relations" restriction appears only in Article 2(4), but it applies *a fortiori* in the context of the stricter interpretation of Article 51, which requires a "threat or use of force" that amounts to an armed attack.

A sufficient external link may be deemed to exist in at least the following two situations:

- (1) If the attack "emanates" from a territory other than the targeted state;  
or
- (2) If the attack has been launched and directed from the territory of the targeted state by foreign nationals.

Situation 1 is most likely what NATO had in mind when it used the notion "directed from abroad." The justification given for the strikes against Afghanistan suggests that this requirement is met if the terrorist activities were either prepared, controlled, or financed by members of a terrorist group operating from outside the territory of the United States. Situation 2 would have arisen had the September 11 attacks been conducted entirely by a U.S.-located branch of al-Qaeda operating in the United States. It is plausible to argue that situations of this kind should also be covered by Article 51, in particular in the case that the perpetrators of the attack take refuge in a third state after launching the attack.

## *2. Article 51 and the Victim of "Attack"*

The second challenge posed by the inclusion of terrorist acts under Article 51 is the question of the circle of victims protected by that same article. Under Article 51 it is recognized that a state may exercise its right to self-defense in a number of cases in response to terrorist attacks against targets abroad. This is easy to establish in the case of attacks against the state itself. Article 3(d) of the Definition of Aggression qualifies state attacks against military units of another state stationed abroad as an act of aggression.<sup>38</sup> However, an intriguing question is how the international legal order should react to attacks that are directed against innocent civilians. It can hardly be doubted that a state may defend its nationals within its territorial jurisdiction. But what about nationals abroad?

The rule is that only few forcible incursions into another country for the protection of nationals abroad come within the ambit of self-defense. The reason

is obvious. Not every failure of the host state to protect foreign nationals from criminal acts or injuries by other private persons shall open the door for interventions in the name of self-defense. Nevertheless, some exceptions have been made in the case of limited rescue operations in defense of a state's nationals against an armed attack by a terrorist group, causing an imminent threat of death or serious bodily harm.<sup>39</sup>

Opponents of such an approach, and mostly supporters of an exception under Article 2(4), have so far argued that "if words mean anything there cannot be any question that an armed attack cannot consist of a terrorist action against citizens on foreign territory, even if tolerated by the territorial state."<sup>40</sup> But such a narrow understanding of the notion of armed attack is open to challenge in the context of today's terrorist acts.

The main danger of modern terrorism lies precisely in the threat to civilians. If it is now established that the wording of Article 51 is broad enough to cover armed attacks by private terrorists groups, why should its applicability depend on the question whether the attack hit individuals on the territory of

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their home state or abroad? It is precisely in situations when individuals leave their home state that they expose themselves to terrorist threats and need to be protected. At the time of the *Entebbe* case, for example, the members of the Council were divided, although they did not finally condemn the Israeli rescue operation.<sup>41</sup> If the issue came up again under the circumstances of today, it would probably be discussed differently.

The unspoken premise of the September 11 attacks is that terrorist groups shall not receive an "unwitting shield" from the territorial integrity of a state which is unable or unwilling to put an end to terrorist activity giving rise to an armed attack. The normative corollary of this hypothesis is the emergence of a principle, which posits that the right to territorial integrity must, in some instances, yield to the exercise of another state's right to protect itself and its citizens under the rubric of self-defense.

In the light of these principles, the case for the permissibility of limited rescue operations has become much more compelling than 20 years ago in cases in which an armed attack is of substantial gravity (in terms of the number of victims concerned and the degree of threat to life or safety) and if the other conditions of self-defense are met—namely the aim of the actors to spread terror or to indirectly target the state, the inability and unwillingness of the host state to put an end to the attack and the absence of alternative measures to the use of force.

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### 3. Article 51 and Gravity

Not only the definition of the victim, but also the issue of the gravity of the act requires new attention in the context of the application of Article 51 to terrorist acts. The gravity requirement in the definition of armed attack goes back to the scale and effect test introduced by the ICJ in the *Nicaragua* case. The Court held that "the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such operation because of its scale and effects, would have been classified as an armed attack rather than a mere frontier accident had it been carried out by regular armed forces."<sup>42</sup> Although the Court did not define which threshold must be reached for the use of force to qualify as an armed attack, it stipulated nevertheless that this would only be the case if the acts of armed bands "occur on a significant scale." This passage of the judgment has been severely criticized and described as an incentive to low-intensity violence.<sup>43</sup> Moreover, it has been argued that the quantitative distinction between armed attacks and mere frontier incidents is flawed because the requirements of necessity and proportionality would provide adequate protection against the excessive use of force.<sup>44</sup>

Is the *Nicaragua* rule redundant? The message that the events in the aftermath of September 11 send is not one of a reported death of *Nicaragua*, but rather "*Nicaragua* is dead, long live *Nicaragua*." It certainly does not make sense to take *Nicaragua* literally. The applicability of Article 51 cannot depend on the question whether terrorist acts formally match state-related forms of violence. But the most important point is that gravity does, and should, still matter, in particular, in the context of terrorist acts.

The scale of the September 11 attacks was one of the main factors guiding NATO and the Security Council in their qualification of the acts as armed attacks. Moreover, the requirement of gravity under Article 51 has received another dimension in the context of terrorism. The events of September 11 have made it necessary to redefine the different roles of domestic law and international law in the combat of internationalized violence. The implicit danger of expanding the concept of self-defense lies in the militarization of crime. The gravity requirement of Article 51 sets the parameter at which point a state may resort to forcible countermeasures. The boundaries of law enforcement and self-defense can only be defined on the basis of a gravity threshold, which is determined on the basis of a variety of criteria, such as the duration and the severity of the injury caused by the terrorist acts to the state. A low gravity threshold is, in this context, not necessarily desirable.

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Certainly military force has its place in combating terrorism. However, in the long term, a global law enforcement and criminal justice approach is clearly the better strategy.

Furthermore, the threshold that *Nicaragua* established is not in itself unreasonable or unrealistic. One of the most intriguing questions in the age of terrorism is whether a state may respond with force to a long chain of small terrorist acts, which, viewed individually, do not reach the scale of massive military force envisioned by the Charter but amount in their totality to a systematic pattern of violence. The ICJ did not categorically exclude such an approach.<sup>45</sup> The Court actually spelled out that trans-border incursions could be taken singly or collectively to constitute an armed attack. One may therefore legitimately take the position that smaller terrorist attacks which form part of a consistent pattern of violent terrorist action may constitute an armed attack, even without overthrowing *Nicaragua*. Of course, this begs the question: where should the limits be drawn?

The first rule appears to be that isolated or sporadic acts of violence do not amount to an armed attack. This is, in particular, illustrated by the wide condemnation of the 1985 Israeli raid on the PLO Headquarters in Tunis,<sup>46</sup> which followed the killing of three Israeli citizens on a yacht in the port of Larnaca, Cyprus. Israeli intelligence was convinced that a commando unit of the Fatah branch carried out the attack, but the claim was weakened by the fact that the PLO denied any responsibility in the murders.<sup>47</sup> Secondly, a case can be made that in instances where low scale attacks are part of a broader campaign of violence, the claim to self-defense depends less on the number of victims than on the necessity and proportionality of forcible countermeasures. A good example is, again, *Entebbe*,<sup>48</sup> in which more than 100 Israeli citizens were held hostage by the Popular Front for the Liberation of Palestine, but it was established that the acts were part of a series of attacks against Israel which started before the hijacking.

### III. ARTICLE 51 AND PERMISSIBLE COUNTERMEASURES

The last question which shall be addressed here is the issue of possible countermeasures to terrorist acts. The interpretation of Article 51 to include armed attacks by global terrorist groups has made it necessary to determine more carefully than ever the circle of targets against which force may be lawfully directed. A single terrorist act can be planned in one country by terrorists from a second country, executed against targets in a third country by terrorists recruited in a fourth country using weapons acquired in a fifth. The question of which countries the defending state may use force against in an act of self-defense must be assessed on the basis of the principles of necessity and proportionality. It is suitable to distinguish two categories of the use of force: military action against

terrorist bases in another state and military action against another state involved with terrorist actors.

### *1. Military Action Against Terrorist Bases in Another State*

In the past, the legality of interventions in foreign states to end ongoing threats emanating from terrorist training camps has been largely determined by the level of involvement of the territorial state in the attacks.<sup>49</sup> It was broadly acknowledged that the state victim of the attack could use force against another state in situations in which the terrorists were officials of that state or controlled by it.

Such a strict position cannot be said to accurately reflect the existing state of the law today. The more or less instant qualification of the acts of September 11 as armed attacks by NATO and the OAS, without further inquiry about the specific role of the Taliban, indicates a departure from the principles of *Nicaragua*. A viable and reasonable alternative to the "effective control test" is, in particular, the "overall control test" adopted by the Appeals Chamber of the ICTY in the *Tadic* case.<sup>50</sup> This test relieves the defending state from the unrealistic obligation that it must provide evidence of specific instructions or directions of the host state relating to the terrorist act, thus triggering the right to self-defense. An application of the "overall control" test would even suffice to justify the U.S.-led legal action against the Taliban and al-Qaeda in 2001. But the trend points clearly towards the establishment of an even further-reaching responsibility of the host state based on the mere toleration or harboring of terrorists.

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The principle is simple: the defending state is under a duty to resort initially to diplomatic means in requesting the government in whose territory the terrorist acts have been planned to take suppressive measures. If it becomes evident that the host state is unable or unwilling to act, the injured may, as an *ultima ratio* measure, take military action to stop the persisting threat. From a doctrinal point of view, such an approach may be based on two foundations: a conception of sovereignty as responsibility, entailing protective duties vis-à-vis third states; and the relative character of territorial integrity, placing states under the obligation to acquiesce in defensive action of other states, if no other option is available, to put an end to an impending danger.<sup>51</sup>

The problem of this doctrine is that it raises difficult issues with respect to the permissible scope of self-defense. It might sound reasonable to allow military action against states in which training centers or camps of global terrorist groups are located, but what about states that harbor only a handful of terrorists

or countries that have in the past offered support to terrorists or acquiesced in terrorist activities? It is overbroad to claim that there is "a right to self-defense against states harboring terrorism." However, one may demystify the "harboring doctrine" by distinguishing several situations.

*a) Attacks against terrorist bases from which the attack was launched or directed*

The least problematic proposition is that the defending state may take military action against terrorist bases located in another state, from where an armed attack has been launched or directed. Some support for this position may be found in the state practice of the 1998 strikes against Afghanistan and Sudan<sup>52</sup> and in the legal response to the September 11 attacks.<sup>53</sup> The legality of the action would require that military measures are directed at the actual terrorist camps or installations. Furthermore, military action would appear to be permissible only if the threat emanating from these targets is such that a repetition of the armed attack may be reasonably expected.<sup>54</sup> Such conditions might be deemed to exist if the terrorist group announces further action.

*b) Attacks on terrorist bases of same terrorist group in another state*

It is more difficult to determine whether the defending state would also be entitled to take military measures against terrorist targets in a state which has not been used as a staging area for the armed attack, but that serves as a sanctuary for members of the terrorist group which launched the attack. The most obvious example is a strike against targets in a neighbor state to which the members of the group have escaped and which does not respond to diplomatic requests to stop the terrorist threat. The basic rationale of the "harboring doctrine" seems also to apply in this situation. Why should a terrorist actor who simply changes jurisdictions benefit from the "shield of sovereignty" of another host state which fails to fulfill its duty to suppress terrorist activities emanating from its soil?

In this situation, necessity and proportionality would require that the terrorist target is related to the prior attack (e.g., because it provides shelter to the terrorist group responsible for the armed attack), and that another attack is to be expected.

*c) Attacks against terrorist bases which are not related to the armed attack*

The most difficult question arising under the emerging "harboring" doctrine is whether the defending state would even be entitled to use force against terrorist bases in another state, which are not related to the prior attack but present an actual threat to the defending state. Such action can hardly be justified under Article 51 as it currently stands. The exercise of military force against targets which are not related to the prior attack is either anticipatory or pre-emptive self-defense. Self-defense under Article 51, however, is linked to the occurrence of an armed attack ("if an armed attack occurs"), which is absent in this situation.

Self-defense against "imminent threats" emanating from terrorist bases in another state may, if at all, only be justified under a broader right to anticipatory self-defense under customary law.<sup>55</sup> The argument in favor of the legality of such military action is that states faced with a perceived danger of immediate attack cannot be expected to await the attack but should be allowed to take the appropriate measures for their defense. However, only in limited circumstances which demonstrate "instant and overwhelming necessity" could military action possibly be taken under customary law against terrorist targets which are not related to a prior attack.<sup>56</sup>

Any extension of these categories by attempts to replace the concept of imminent threat by "sufficient threats" to national security, such as in the National Security Strategy of the United States of September 2002,<sup>57</sup> is unacceptable. To replace the requirement of an imminent danger by that of a "sufficient danger" transforms the very essence of self-defense.<sup>58</sup> It would allow unilateral action by a state on its own decision, on the basis of its own findings, and on its own characterization of those facts. Such an empowerment of the "self" shakes the foundations of the concept of self-defense because it breaks with the principle that "no state is actually the sole judge of its own cause" when exercising self-defense.<sup>59</sup> It has been rightly argued that Article 51 is "auto-interpretative,"<sup>60</sup> but the auto-interpretative character of self-defense finds its limits in the incorporation of Article 51 in Chapter VII. The rationale of the construction of the Charter is that in situations other than an armed attack, a state must bring its case to the Council and persuade Council members that the urgency of the threat requires action. The events of September 11 illustrate that the likelihood of receiving a sympathetic response from the Council is actually quite high if the case is compelling.<sup>61</sup> If the Council refuses to act, it does so for good reason and presumably because the case is simply not compelling.

The Bush doctrine of preventive self-defense threatens to upset the system. If the Bush doctrine became the new law, it would have devastating consequences for world public order. Such a step would, first of all, mark a serious setback for the international legal system as a whole. It would transform the existing system from a rule of law-based framework to a balance of power system. Moreover, it would trigger significant insecurity and instability. Once the door of preventive self-defense is open, it can hardly be closed again. This may come at a very high price. Action by the U.S. against new threats from terrorist groups and rogue states is at the very heart of the debate today. What if countries such as China, Pakistan, or North Korea start to advance similar claims tomorrow?

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*Once the door of preventive self-defense is open, it can hardly be closed again.*

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## *2. Military Action Against Another State Involved with Terrorist Actors*

Depending on the circumstances, the use of force in self-defense may not only be permissible against terrorist perpetrators of the attack, but also allowable against implicated states as well. However, in this case, the degree of permissible action depends essentially on the role and the scope of involvement of the state in the armed attack.

### *a) Action against states harboring terrorists*

The mere fact that a state does not prevent terrorists from carrying out armed attacks against another state will hardly suffice to allow action against that regime. The necessity test under Article 51 limits the possibility to justify measures of self-defense against a regime that fails to take appropriate action against terrorists operating from its territory. If action has been taken against the terrorist actors themselves, this action will, in most cases, eliminate the concrete threat of future attacks related to the past attack. The mere threat that a regime will once again fail to suppress terrorist activities emanating from its territory is only an abstract danger, which is not as such covered by Article 51.

The use of force against the host state might, on the contrary, be permissible to the extent that forces of the host state obstruct the use of force by the defending state against terrorist targets,<sup>62</sup> or if they even join units of the terrorist group that launched the attack. In this case, military force is justified by the fact that the host state fails to put an end to an impending danger.

### *b) Action against states involved in the attack*

Different standards apply if a state was actually involved in the attack. In this situation the action of the state itself may constitute an act of aggression. A defending state may use force against a state which controls the terrorist group conducting the armed attack.<sup>63</sup> A more typical scenario is where a state provides various forms of assistance to terrorist groups, which in turn undertake actions that give rise to an armed attack.

In *Nicaragua*, the ICJ held that "assistance to rebels in the form of provision of weapons or logistical or other support" does not fall into the category of armed attack, even though "[s]uch assistance may be regarded as a threat or use of force." The most pertinent question is whether this proposition still stands with regard to forms of assistance to terrorist actors. This question cannot be answered in full detail here. However, it is submitted that the categorical exclusion of all of three types of assistance (weapons, logistical, and other support) from the notion of armed attack is overbroad.

Indeed, acts such as the supply of arms, money, and logistical support have only rarely been regarded as armed attacks.<sup>64</sup> Moreover, not any loan by a state-

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owned bank to a terrorist organization can be qualified as an act of aggression, but the provision of financial, logistical, or other support on a large scale may be an indication of the state's "overall control" over the group. In this case, the defending state could use force in self-defense against the terrorist-linked state.<sup>65</sup>

In addition, there may be cases in which the accumulation of several acts of support to a terrorist group causes much greater harm to the defending state. To exclude these cases from the scope of application of Article 51 would deprive states of their protection against indirect aggression. It is, in particular, unrealistic to privilege the criterion of sending over other forms of support in the context of large-scale terrorist operations, which are carried out by independent global terrorist networks.<sup>66</sup> This is even recognized by the wording of Article 3(g) of the Definition of Aggression ("substantial involvement therein") which equates the "substantial involvement" in "acts of armed force against another state" to the "sending...of armed bands, groups, irregulars or mercenaries."<sup>67</sup>

## CONCLUSION

The right to self-defense is visibly enrolled in a process of change. Many of the strict requirements of *Nicaragua* in the definition of the notion of armed attack have either been overturned or have been opened to challenge. This gives Article 51 a different focus, namely the assessment of necessity and proportionality. The risks of a broadened notion of self-defense are evident: uncertainty and indeterminacy of the limits of self-defense. However, it is worthwhile to return once again to the maxim "*Nicaragua* is dead, long live *Nicaragua*." The potential for abuse is significantly reduced if states observe the evidentiary threshold established by the ICJ, requiring that: (1) states carefully evaluate the evidence as to who is responsible for the attack; (2) that the facts relied upon made public; and (3) the facts are subject to international scrutiny and investigation<sup>68</sup> ■

*Nicaragua is dead, long  
live Nicaragua.*

## NOTES

1 See generally Carsten Stahn, "International Law at a Crossroads? The Impact of September 11," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 62 (2002): 184; Michael Byers, "Terrorism, the Use of Force and International Law After 11 September," *International & Comparative Law Quarterly* 51 (2002): 401.

2 See Jack M. Beard, "Military Action Against Terrorists Under International Law: America's New War On Terrorism: The Case For Self-Defense Under International Law," *Harvard Journal of Law & Public Policy* 25 (2002): 559, 571.

3 See Anne-Marie Slaughter and William Burke-White, "An International Constitutional Moment," *Harvard International Law Journal* 43 (2002): 1-2.

4 Antonio Cassese, "Terrorism is also Disrupting Some Crucial Legal Categories of International Law," *European Journal of International Law* 12 (2001): 993, 996-997.

5 See Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law* (1996), 182.

6 Article 51 of the UN Charter reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken 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.

7 See also Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (2002), 67.

8 See William O'Brien, "Reprisals, Deterrence and Self-Defense in Counterterror Operations," *Virginia Journal of International Law* 30 (1990): 421, 464-465; Richard Falk, "The Beirut Raid and the International Law of Retaliation," *American Journal of International Law* 63 (1969): 415.

9 See generally Michael Reisman, "The Raid on Baghdad: Some Reflections on its Lawfulness and Implications," *European Journal of International Law* 5 (1994): 120; Dino Kriticos, "The Legality of the 1993 U.S. Missile Strike on Iraq and the Right to Self-defense in International Law," *International and Comparative Law Quarterly* 45 (1996): 162.

10 See Christine Gray, *International Law and the Use of Force* (2000), 117.

11 See NATO Secretary General Lord Robertson, Statement at NATO Headquarters, October 2, 2001, available at <<http://www.nato.int>>.

12 See ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment of 27 June 1986 (Merits), ICJ Rep. 1986, 14, 54, at paragraph 115.

13 See also Mark A. Drumbl, "Victimhood in our Neighbourhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order," *North Carolina Law Review* 81 (2002): 36.

14 For further discussion, see Stahn, "International Law at a Crossroads?" 226.

15 See D. W. Bowett, *Self-defense in International Law* (1958), 188; See also the Dissenting Opinion of Judge Schwebel in *Nicaragua*, rejecting the view that Article 51 applies "if, and only if, an armed attack occurs," ICJ Rep. 1986, 249, 337, at paragraph 172.

16 For a proponent of such an exception, see Gregory M. Travalio, "Terrorism, International Law, and the Use of Military Force," *Wisconsin International Journal of Law* 18 (2000): 166.

17 See Oscar Schachter, "The Lawful Use of Force by a State Against Terrorists in Another Country," *Israel Yearbook on Human Rights* 19 (1989): 213.

18 See Michael J. Glennon, "Military Action against Terrorists under International Law: The Fog of Law: Self-Defense, Inherence and Incoherence in Article 51 of the United Nations Charter," *Harvard Journal of Law Public Policy* 25 (2002): 546, 556-557. See also Michael J. Glennon, "Pre-empting Terrorism: The Case for Anticipatory Self-Defense," *Weekly Standard*, January 28, 2002, 24. But see Louis Henkin, "The Reports of the Death of Article 2 (4) are Greatly Exaggerated," *American Journal of International Law* 65 (1971), 544; and *Nicaragua*, 87, paragraph 186 ("If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of attitude is to conform rather than to weaken the rule").

19 For a similar conception of Article 51, see Yoram Dinstein, *War, Aggression and Self-Defense* (2001), 165.

20 See Article 51 "until."

21 See generally Danesh Sarooshi, *The United Nations and the Development of Collective Security* (1999), 167.

22 See Carsten Stahn, "Collective Security and Self-Defense after the September 11 Attacks," *Tilburg Foreign Law Review* 10: 38-39.

23 The Security Council reaffirmed the "inherent right of individual and collective self-defense" in the preambles of SC Res. 1368 (2001) and 1373 (2001). See paragraph 3 of the preamble of Resolution 1368 and paragraph 4 of the preamble of Resolution 1373. For a discussion, see Carsten Stahn, "Security Council Resolutions 1368 and 1373: What They Say and They do not Say," <[http://www.ejil.org/forum\\_WTC/ny-stahn.html](http://www.ejil.org/forum_WTC/ny-stahn.html)> (accessed April 1, 2003).

24 See Mary Ellen O'Connell, "The Myth of Preemptive Self-Defense," <<http://www.asil.org/taskforce/oconnell.pdf>> (accessed April 1, 2003).

25 See paragraph 2 of Resolution 678 (1990) of November 19, 1990.

26 See paragraph 3 of Resolution 1154 (1998) of March 2, 1998 ("severest consequences").

27 See paragraph 1 of Resolution 1441 (2002) of November 8, 2002.

28 Article 42 of the UN Charter reads:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain

- or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.
- 29 See also Jules Lobel & Michael Ratner, "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime," *American Journal of International Law* 93 (1999): 127; Niels Blokker, "Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by, Coalitions of the Able and Willing," *European Journal of International Law* 11 (2000): 541; Christine Gray, "From Unity to Polarisation: International Law and the Use of Force against Iraq," *European Journal of International Law* 13 (2002): 10; Thomas M. Franck, "Legal Authority for the Possible Use of Force against Iraq," *American Society of International Law Proceedings* (1998): 139.
- 30 See paragraph 12 of Resolution 1441, in which the Council decides "to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11, in order to consider the situation and the need for full compliance with all of the relevant Security Council resolutions, in order to restore international peace and security." But see the continuing reference to the authorization clause of Resolution 678 in the preamble of Resolution 1441 and the ambiguous paragraph 13 of the resolution warning Iraq that it will face serious consequences as a result of its continued violation of its obligations. See generally on Resolution 1441, Craig Scott, "Iraq and the Serious Consequences of Word Games: Language, Violence and Responsibility in the Security Council," *German Law Journal* 3 (11) (2002), <[http://www.germanlawjournal.com/past\\_issues](http://www.germanlawjournal.com/past_issues)> (accessed April 1, 2003).
- 31 It is quite telling that Congress Resolution 114 of October 2, 2002 authorizing the use of the United States Armed Forces against Iraq contains only a very general link to the right to self-defense: "Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself." See *House Joint Resolution Authorizing the Use of Force Against Iraq*, 107th Cong. 2d sess. H.J. Res. 114, October 2, 2002.
- 32 See for a critique in the context of the 2001 strikes in Afghanistan, Jonathan I. Charney, "The Use of Force Against Terrorism and International Law," *American Journal of International Law* 95 (2001): 839.
- 33 See in the context of *Operation Enduring Freedom*; also Jost Delbrück, "The Fight against Global Terrorism: Self-Defence or Collective Security as Internal Police Action? Some Comments on the International Legal Implications of the 'War against Terrorism,'" *German Yearbook of International Law* 44 (9) (2001): 22.
- 34 See Stahn, "International Law at a Crossroads?" 232.
- 35 See NATO, "Press Release No. 124, Statement of the North Atlantic Council," September 12, 2001, <<http://www.nato.int/docu/pr/2001/p01-124e.htm>> (accessed April 1, 2003).
- 36 See Albrecht Randelzhofer, "On Article 51," in B. Simma, ed., *Charter of the United Nations* (2002), 802.
- 37 See Jochen Abr. Frowein, *Das de facto-Regime im Völkerrecht* (1968), 38-39.
- 38 This statement suggests that attacks of this kind qualify also as "armed attacks." Furthermore, this rule should, by way of analogy, be applied to terrorist attacks against state officials, police or military units situated abroad. Otherwise terrorists would have an incentive to strike the state where it is at its weakest. This can hardly be the intention of Article 51.
- 39 For a survey, see Gray, 108; and Dinstein, 203.
- 40 See Jochen Abr. Frowein, "The present state of research carried out by the English-speaking section of the Centre for Studies and Research," in *Legal Aspects of International Terrorism* (1988), 64.
- 41 See Franck, "Recourse to Force," 114.
- 42 See ICJ Rep. 1986, paragraph 195.
- 43 See Michael Reisman, "Allocating Competences to Use Coercion in the Post Cold-War World: Practices, Conditions, and Prospects," in Damrosch and Scheffer, eds., *Law and Force in the New International Order* (1991), 39-40.
- 44 See Dinstein, 175-176.
- 45 See *Nicaragua*, paragraph 231.
- 46 The Security Council condemned Israel's "active armed aggression" in Resolution 573 (1985) with the U.S. abstaining from the vote.
- 47 See Sage R. Knauft, "Proposed guidelines for measuring the propriety of armed state responses to terrorist attacks," *Hastings International & Comparative Law Review* 19 (1996): 783.
- 48 See also Dinstein, 205-206.
- 49 See Antonio Cassese, "The International Community's Legal Response to Terrorism," *International & Comparative Law Quarterly* 38 (1989): 599.

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- 50 See ICTY, Appeals Chamber, *Prosecutor v Tadic*, Judgment of July 15, 1999, paragraph 137.
- 51 See also Barry A. Feinstein, "Operation Enduring Freedom," *Journal of Transnational Law & Policy* 11, 284.
- 52 See Ruth Wedgwood, "Responding to Terrorism: The Strikes against Bin Laden," *Yale Journal of International Law* 24 (1999): 564.
- 53 See also Sean D. Murphy, "Terrorism and the Concept of 'Armed Attack' in Article 51 of the Charter," *Harvard International Law Journal* 43 (2002): 49.
- 54 See also Dinstein, 220.
- 55 For a prohibition of anticipatory self-defense by the Charter, see Randelzhofer, 803.
- 56 For a survey of state practice, see Franck, "Recourse to Force," 97-108; and Alexandrov, 149.
- 57 See *National Security Strategy of the United States of America*, September 2002, <<http://www.whitehouse.gov/nsc/nss.html>> (accessed April 1, 2003).
- 58 For a critique, see also O'Connell, 11, 16.
- 59 See Oscar Schachter, "Self-Defense and the Rule of Law," *American Journal of International Law* 83 (1989), 259, 264.
- 60 This notion goes back to Leo Gross, "Autointerpretation in international law," in *Essays on International Law and Organization*, Vol. I (1984), 832. On the auto-interpretative character of Article 51, see Martti Koskenniemi, "Iraq and the 'Bush Doctrine' of Pre-Emptive Self-Defence," <<http://www.crimesofwar.org/expert/bush-koskenniemi.html>> (accessed May 11, 2003).
- 61 Concurring Michael Byers, "Iraq and the 'Bush Doctrine' of Pre-Emptive Self-Defence," <<http://www.crimesofwar.org/expert/bush-byers.html>> (accessed May 11, 2003).
- 62 See also Dinstein, 220.
- 63 See *Nicaragua*, 54, paragraph 115.
- 64 For a survey, see Gray, 128-129.
- 65 The Appeals Chamber itself stated in *Tadic* that the "overall control" test is not confined to the area of international humanitarian law. The Prosecution had argued that the criteria for ascertaining state responsibility would be different from those necessary for establishing individual criminal responsibility. But this distinction was expressly refuted by the Appeals Chamber which stated that the same standards apply "(i) where the court's task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating the international responsibility of that State; and (ii) where the court must instead determine whether individuals are acting as *de facto* State officials, thereby rendering the conflict international and thus setting the necessary precondition for the 'grave breaches' regime to apply." See *Tadic* Appeals Judgment, paragraph 104.
- 66 See also Randelzhofer, 801.
- 67 Whether the level of "substantial involvement" in the attack is reached by the provision of munitions, logistical and other support to terrorist actors must be determined in each individual case. See also Schachter, 218.
- 68 In *Nicaragua*, the ICJ held that the claim to use force in self-defense must be supported by credible evidence of an armed attack and of the attacker's identity. See *Nicaragua*, 110, paragraphs 232-234.
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