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An Account on the Problematic Use of Force in Response to Terrorism

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Abstract:

Footages of the terrorist attacks in the United States on September 11, 2001 were seen with shock and disbelief around the world. These attacks resulted in a prompt response with 'war on terrorism' from the United States, and universal and abrupt international condemnation. One may rightly observe that the modern society is experiencing an inclination to adhere to the use of force, to tackle terrorist activities. In this work, I aim to (i) clarify the terms of the discussion; and (ii) affirm that there is something troubling with the practice emerged post September 11, to use force on 'self-defense grounds' against terrorist groups.

Key words: response to terrorism, use of force, self-defense

INTRODUCTION

The use of force by states directed on terrorists located in another country is highly disputed. The United Nations Charter provisions set the conditions under which resort to force is admissible. The Security Council could authorize forcible response under collective self-defence, but it has so far refrained from doing so. States may engage in military actions in self-defence in face of an armed attack. The forcible response should be necessary and proportionate. Major controversy

centres on the question whether todays' international regulation recognizes as lawful military interventions under an 'expanded' doctrine of self-defence, *before* a state sustains an armed attack. I suggest not. International law provisions governing the use of force do not embrace an expanded doctrine of self-defence. Furthermore, the international community is reluctant to accept new 'standards' which permit forcible reactions under lenient conditions. It would pose direct threat to the predictability of international law regarding the use of force, and create leeway for abusive actions.

The first section of this work reviews the main elements of the legal regime on the use of force. It begins with the UN Charter provisions, especially Articles 2 (4) and 51, and customary practice adding to the issue of self-defence. Customary and treaty laws on state sovereignty are relevant as well. Together these pieces help define legal conditions under which states can resort to the use force. They constitute the current legal environment in which military responses against terrorist non-state actors are conducted. The second section focuses on problematic justifications in exercising the right to militarily engage under self-defence. Not all forms of attacks are qualified to amount to an act of aggression that triggers the right to self-defence. In cases when there is a suffered armed attack, the state response should be necessary to confront and proportionate in reaction; otherwise forcible action is doubtful as for its lawfulness. To assert responsibility of the state harbouring terrorists is another knotty problem. Very much contested is the question resulting from the September 11 attacks and what followed afterwards, as to whether self-defence against terrorist non state actors is permissible only when there has been an actual attack or whether pre-emptive action is lawful.

1. THE REGULATION OF THE USE OF FORCE

Military intervention is lawful, if and to the extent, that it comes under the recognized exception to the general rule prohibiting the use of force, meaning by authorization from the Security Council or under self-defence in response to an armed attack.

The prohibition of the use of force is recognized as the 'cornerstone' of modern international law and is enshrined both in the United Nations Charter (hereafter, the UN Charter) and customary international law.[1]

The UN Charter reflects a generally agreed intention to build an international order that guarantees and assures the maintaining of international peace and security among nations, and prohibits - to the largest extent possible forcible - interventions in and between states. In a clear and straightforward manner, under Article 2 (4), the UN Charter declares:

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

The prohibition to threaten with or use force enunciated in Article 2 (4) is intended to be of a comprehensive nature. It is

[1] The ban on the use of force has been referred to as the 'cornerstone of the United Nations Charter' in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment of 19 December 2005, [2005] ICJ Rep. 201, para. 148; 'the cornerstone to promote peace in a world torn by strife' in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* [1986] ICJ Rep 14, separate opinion of President Nagendra Singh, at 153; 'the most important principle in contemporary international law to govern inter-state conduct… indeed the cornerstone of the Charter' in *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America* (Oil Platforms case), Judgment of 6 November 2003, [2003] ICJ Reports 161, dissenting opinion of Judge Elaraby, at 291. *See also* C. Tams, 'The Use of Force against Terrorists', 20 *The European Journal of International Law* 2 (2009).

designed to make the ban unassailable, and is actually acknowledged by the international community as part of *ius cogens*; therefore cannot be derogated by states.[2] At the same time, there is a universal agreement among current governments on a practice that precludes forcible actions as well as any other form of intervention in other states' territorial or political integrity.[3] Territorial and political integrity of individual states is protected by a series of rules that proscribe interference in other states' domestic jurisdiction[4].

The Charter drafters well knew that states would opt to the use of force despite formal prohibitions on their doing so. Very suitably, Article 51 recognizes two situations of exception to the prohibition in which recourse to military force would be accepted as lawful. First, the Security Council may authorize the use of force under collective self-defence in response to a threat of peace and security. Second, states may engage in unilateral (or joint) armed intervention in self-defence against an armed attack from the non-state armed entity.

Article 51 reads as follows:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United 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

[2] B. Simma. 'NATO, the UN and the Use of Force: Legal Aspects', 10 *The European Journal of International Law* 1 (1999), pp. 1-22. *See also*, S. Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter', 43 *Harvard International Law Journal* 42 (2002).

[3] *See* M. Byers, Terrorism, the Use of Force and International Law after 11 September 2001, 51 *International Criminal Law Quarterly* 401 (2002).

[4] *See* M. Shaw, *International Law*, Cambridge: Cambridge University Press (2003), p. 443. Also, I. Brownlie lists several different treaties, resolutions, and proclamations, which embody the consent of High Contracting States to prohibit the resort to force in relationship between each other and as instrument of national policy in their relations with one another. *See*, I. Brownlie, *International Law and the Use of Force by States*, NY and London: Oxford University Press (1963).

> 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."

I. Military Actions and the role of the Security Council

As noted, military interventions against terrorists can be considered legal (i) if undertaken under the authority of the Security Council; and (ii) if commenced by a victimized state reacting in self-defence.

The UN Charter assigns to Security Council responsibility to maintain and restore international peace and security. Under Article 39, Security Council is empowered to determine existence of 'any threat to the peace, breach of the peace, or act of aggression', and decide on measures to be taken so as to maintain and restore international peace and security.

In the absence of its own army, the Security Council has the possibility to authorize Member States to use force in coalitions of the willing.[5] However, in its practice, Security Council has refrained from authorizing military interventions; and in its history only twice has Security Council ordered military intervention. Once, in 1950, under Resolution 83, the Security Council authorized the use of force following the North Korea's invasion of South Korea. And, second, in 1990, it authorized the use of force to expel the Iraqi forces from Kuwait.[6] The Security Council was closest to authorizing forcible intervention subsequent to September 11 attacks, under Resolutions 1368 and 1373. It expressed condemnation of acts of terrorism as 'threat to international peace and security', demanded from states to criminalize terrorism under domestic law, to undertake serious measures to prevent and suppress

[5] M. Ramsey, 'Reinventing the Security Council: The UN as a Lockean System', 79 *Notre Dame Law Review* 1529 (2004), p. 1548.

[6] *See* SC Res 84, 7 July 1950; SC Res 83, 27 June 1950; SC Res 678, 29 November 1990. A. Weiner, The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?, 59 *Stanford Law Review* 415 (2006).

terrorism, and increase cooperation in the sphere of law enforcement and criminal justice to tackle the threat.[7] But, the Security Council stopped short of authorizing military action.

In years that followed, the Security Council persistently condemned terrorist acts and requested from states to further their cooperation in fighting terrorism. For example, in Resolution 1438 (2002)[8], the Security Council condemned terrorist bombings in Bali, Indonesia. It iterated that acts of terrorism pose threat to international peace and security. Through Resolution 1440 (2002)[9], the Security Council condemned heinous Moscow hostage-taking acts and demanded immediate, unconditional release. Similarly, after the bomb attack in Bogota in Columbia, though Resolution 1465 (2003)[10], the Security Council reaffirmed that terrorist bombing amounts to threat of peace and security, urged on international community to provide assistance, and advised Columbian authorities to undertake measures to bring to justice perpetrators, organizers and sponsors of the terrorist attack.

When the United States militarily attacked Afghanistan in 2001, the Security Council did not use its right to issue any measure, once the attack was initiated, and rather left the operation entirely to the United States.[11] In cases of invoked unilateral military actions under self-defence, Article 51 limits the right of self-defence up to the moment when the Security Council takes the necessary measures. However, even in these situations, the Security Council has never intervened to authorize, as such, measures.

[7] *Especially through* SC Res 1373, 28 September 28.
[8] SC Res 1438, 14 October 2002.
[9] SC Res 1440, 24 October 2002.
[10] SC Res 1465, 13 February 2003.
[11] C. Sais, 'Terrorism and the Law of the Use of Force', *Berlin Information-center for Transatlantic Security* (2002). *See also,* T. Gazzini, *The Changing Rules on the Use of Force in International Law*, UK: Manchester University Press (2005).

Another requirement under Article 51 is that 'measures taken by Members in the exercise of the right of self-defence are to be immediately reported to the Security Council'. In the *Nicaragua case*, the Court held that 'the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence'.[12] Since then, it seems that states tend to follow the requirement in Article 51, and present to the Security Council reports reasoning its right to act in self-defence. There seems to prevail a general understanding that failure to report on the necessity to take measures to repel a terrorist act weakens states' claim of acting in self-defence.[13]

Terrorism threats are to be addressed through military attacks, if there is unanimity of thought within the Security Council for the necessity of such measure.[14] Authorizations to use force from the Security Council would present a unanimous decision of the representatives of the Permanent Members in the Security Council. A grounded concern about the Security Council as decision-making body on uses of force is the composition by a small group of states, which are not representative of the whole international community. However, nonetheless, the decision of a group of states represents a more consolidated opinion rather than a decision taken by a single state. Especially, knowing that certain states such as the United States or Israel have shown a tendency to frequently

[12] *Nicaragua v. United States of America* [1986] Merits, at para 200.

[13] *See* C. Gray, International Law and the Use of Force (3rd ed), US: Oxford University Press (2008); T. Gazzini, *The Changing Rules on the Use of Force in International Law*, UK: Manchester University Press (2005).

[14] *For example*, Weiner presents several reasons why it is warranted that the recent global threats be responded to by the Security Council. A. Weiner, The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?, 59 *Stanford Law Review* 415 (2006).

engage in military actions under the cloak of self-defence in response to an act of terror or a threat of an act of terror.[15]

II. Self-defence

Forcible actions against terrorism under self-defence have been subject to much debate and disagreement.

While the second part of the work will deal into more detail with contentious issues related to self-defence, it is useful, at this point, to emphasize that under the UN Charter, and general accepted practice, the first and foremost condition for triggering self-defence is the existence of an 'armed attack' directed to a member state. A state is able to exercise the right of defence if it is subject to an armed attack, and presents to the international community evidences of the attack suffered and the attacker. Military response in self-defence should be necessary to tackle the attack and proportionate to the level that it saves the state from further injury. Forcible actions in self-defence within these limits are considered as legal.[16]

- Developments following September 11 -

September 11, 2001 massive terrorist attack on the United States opened way to consider proposals for the necessity of a new regulation of self-defence, different from what is stipulated under the UN Charter. Al Qaida terrorist organization lead by Osama Bin Laden was considered responsible for this attack and also several earlier terrorist assaults dating back to 1993 targeted to the United States.[17] Subsequently, the United

[15] *For an account, see* J. Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror,* Aldershot: Ashgate Publishing (2005); or C. Gray, *International Law and the Use of Force* (3rd ed), US: Oxford University Press (2008).

[16]See also J. Charney, "The Use of Force Against Terrorism and International Law", 95 *American Journal on International Law* 835 (2001); For a counter argument *see* T. Gazzini, *The Changing Rules on the Use of Force in International Law*, UK: Manchester University Press (2005).

[17] M. E. O'Connell, "Evidence of Terror", 7 *Journal of Conflict and Security Law* 19 (2002). Bin Laden himself claimed he was also planning to engage in future attacks, as

States publicly demanded from the Taliban regime in Afghanistan to close terrorist training camps, surrender Bin Laden and other members of Al Qaida, and allow the United States to carry out inspections in Afghanistan; but the Taliban government refused to cooperate.[18] On October 7, 2001, the United States with the military assistance of the United Kingdom, and the declaration of military support from France, Germany, Australia, Canada and others[19], began Operation Enduring Freedom.[20] The United States and the United Kingdom addressed the Security Council under Article 51, affirming that they were acting in individual and collective self-defence.[21] The intervention was whole-heartedly supported as being taken in self-defence and conformity with the UN Charter and Security Council Resolution 1368, by the international community in general. Resolution 1368 (2001), for the first time, was *considered* to have affirmed a right to self-defence in response to 'terrorist attack', without necessarily requiring the determination of an act of aggression. What ensued was that the United States relied on Security Council Resolutions to claim a right to act in self-defence against terrorism, being a 'threat to peace and security'. If accepted as legal, this argument presents a shift from how the UN Charter regulates the doctrine of 'self-defence'.

noted in T. Franck, Terrorism and the Right of Self-defence, 95 *American Journal of International Law 4* (2001).

[18] S. Murphy, 'Contemporary Practice of the United States relating to International Law', 96 *American Journal of International Law* 237 (2002); C. Gray, *International Law and the Use of Force* (3rd ed), US: Oxford University Press (2008).

[19] The EU declared its support through a press release from Brussels in October 7, 2001. For the first time in its history, the North Atlantic Treaty Organization (NATO) invoked Article 5 of its treaty and declared the attack on the United States as being an attack on all member states and the willingness to engage in military response under collective self-defence. Other states too, with the exception of Iraq. *See* C. Gray, *International Law and the Use of Force* (3rd ed), US: Oxford University Press (2008), p. 194.

[20] M. Byers, Terrorism, the Use of Force and International Law after 11 September 2001, 51 *International Criminal Law Quarterly* 401 (2002).

[21] UN Doc S/2001/946; UN Doc S/2001/947.

A lively debate ensued about the relationship between the treaty law and customary international in regulating the use of force. As the prohibition of the use of force is a treaty-based rule, embedded in the Charter; it is at the same time a rule of customary law. The evolution of this rule has been centre of lively debates; scholars and states alike, have disagreed as to whether the UN Charter provisions subsume customary international law and, in this context, reject new concepts which permit the resort the force under more lenient conditions (be that anticipatory, or peremptory self-defence); or whether the United Nations provisions represent a codified right which then continues to exist and re-shape through international practice.[22] The Pandora box was opened by the International Court of Justice (hereafter, ICJ) (when hearing the case of *Nicaragua vs United States.* In an effort to overcome the United States' reservation, the Court concentrated more on the independent existence of the Charter and customary international law than on their interaction. The Court only cursorily noted that the Charter and other relevant multilateral treaties must be taken into account in ascertaining the content of customary international law, and that in the last decades customary international law had developed under the influence of the Charter.[23] Instead, emphasis was placed on the different methods of interpretation and application of the two sets of norms, as well as on the possibly different remedies available to ensure compliance.[24] The Court further noted that not all relevant customary international rules were identical to those

[22] *See* C. Sais, 'Terrorism and the Law of the Use of Force', *Berlin Information-center for Transatlantic Security* (2002). *See also,* T. Gazzini, *The Changing Rules on the Use of Force in International Law*, UK: Manchester University Press (2005).

[23] Judge Simma and Judge Kooijmans both said that the Court should have taken the opportunity presented by the case to clarify the state of the law on a matter which is marked by great controversy and confusion: self-defence against armed attacks by non state actors, in Judge Simma, Separate Opinion, para 4-15; Judge Kooijmans, Separate Opinion, para 16-31; *Nicaragua v. United States of America* [1986] Merits, at para 96 - 7. *See* T. Gazzini, *The Changing Rules on the Use of Force in International Law*, UK: Manchester University Press (2005).

[24] *Nicaragua v. United States of America* [1986] Merits, at para 95.

embodied in the Charter.[25] The ICJ addressed 'armed attacks' in a cases that followed after the *Nicaragua v. United States* judgement[26]; however, regrettably, judges avoided pronouncing on this contentious issue or shedding light on this ambiguity[27].

As United States military response on Afghanistan was considered acceptable, there is lack of clarity whether this brought a radical transformation of the law of self-defence, or whether the Operation Enduring Freedom was a *sui generis* response which applied only to the very specific incident which nurtured worldwide compassion, and the response was based on the affirmation from the Security Council and almost universal acceptance by states.[28]

However, it is my contention that although one may be tempted to believe that new rules regulating the use of force have emerged, nonetheless the use of force remains entrenched in the traditional form of regulation. The international legal regime on the use of force is therefore founded at the crossing of Articles 2(4), 39, and 51 of the UN Charter. The use of force by the states against other states is prohibited under Article 2(4); the collective use of force is allowed, and is controlled entirely by the UN Security Council by Article 39, among others; and self-defence is response to an attack is defined by Article 51 as legally distinct from what it prohibited by Article 2(4). This is the legal environment into which are presented justifications to resort to the use of force, and the development of legality of military interventions against those engaged in terrorists acts takes place in and around the clear prohibition to the use or threat of force in their inter-state relations.

[25] *Ibid.* at para 93.
[26] In the *Oil Platforms case,* ICJ [2003]; *Democratic Republic of the Congo v. Uganda,* ICJ [2005]; Armed Activities on the Territory of the Congo (DRC v Uganda). *See* C. Gray, International Law and the Use of Force (3rd ed), US: Oxford University Press (2008).
[27] A. Bianchi, 'The International Regulation of the Use of Force: the Politics of Interpretative Method', 22 *Leiden Journal of International Law* 22 (2009).
[28] C. Gray, *International Law and the Use of Force* (3rd ed), US: Oxford University Press (2008).

2. LEGAL IMPEDIMENTS IN MILITARY RESPONSES TO TERRORISM UNDER SELF-DEFENCE

As noted, to be able to claim a right to military intervention under self-defence, a state should be subject to an armed attack by a certain terrorist organization. The reaction in self-defence should be necessary, so that to tackle the directed armed attack; and proportional, up to the level that is indispensable to protect the state from the injury. Since by attacking the non-state armed actors, the victimized state interferes in the sovereignty of the state in which terrorists reside, most often victimized states aim to attribute acts of terrorists to the harbouring state. Unless acting in conformity with the rules postulated under UN Charter provisions, unambiguous state practice and *opinio juris*, a states' military attack in the territory of the other state is unlawful.

I. Any form of extraterritorial intrusion presents a breach to territorial integrity

Military interventions, although aiming to address armed groups, nonetheless consist of incursions in other states' territorial integrity and political independence. The principle of territorial and political integrity, given reference to in Article 2 (4) of the UN Charter, is well recognized and protected by additional series of rules prohibiting interference within domestic jurisdiction of states.[29] The law on non-prohibition is fortified by prominent General Assembly Resolutions, which provide that armed interventions violate commitments for promotion of fundamental human rights and principles of the peace of Westphalia (principle of the sovereignty of states and the fundamental right of political self-determination, principle

[29] *See* M. Shaw, *International Law*, Cambridge: Cambridge University Press (2003), p. 443. *See* J. Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror,* Aldershot: Ashgate (2005).

of legal equality between states, principle of non-intervention of one state in the internal affairs of another state). The ICJ, a significant interpretative body of international law, has since 1949, in the *Corfu vs. Albania case* recognized that 'between independent states, respect for territorial sovereignty is an essential foundation of international relations'.[30]

An exception to this prohibition is when a state consents to the intervention. However, in most of the cases, states are unwilling to permit interferences within their internal affairs. Although, often, a government in which armed terrorists reside is itself discontented to have them operating in its territory; it will nonetheless prefer to deal with them through domestic justice system rather than permit external intervention. And there are also situations in which the host state cannot do anything in this regards as it lacks the capacity to suppress the terrorist groups.

A second exception is when the harbouring state is considered responsible for the actions committed by the terrorist group. Because of ordering, supporting, harbouring, providing financial support or simply failing to eradicate terrorist groups, actions of the terrorist groups may be attributed to the state in which they reside.

An argument states that, if there is uncontested evidence that specific armed forces, residing in the territory of a state, operate under this states' orders to engage in actions which amount to 'armed attacks' against a victimized state, the victimized state can lawfully respond in self-defence.[31] The degree of control that a state must exercise over non-state actors to establish responsibility is not entirely settled under

[30] *Corfu Channel United Kingdom v. Albania*, Judgement of 9 April 1949, [1949] ICJ Reports at 35.

[31] I. Brownlie, 'International Law and the Activities of Armed Bands', 7 International and Comparative Law Quarterly 4 (1958), p. 731. Although, if terrorist groups can be considered as 'de facto' organs of a given state, their international legal status appears controversial. See T. Gazzini, *The Changing Rules on the Use of Force in International Law*, UK: Manchester University Press (2005).

international law. In the *Nicaragua v. United States* case, the existence of 'effective control' was the threshold. In the Tadic case, the International Criminal Tribunal for former Yugoslavia adopted the 'overall control' as a threshold for attribution of acts of armed groups to a sponsoring government. With regards to terrorist actions, here are huge controversies to identify the degree of state involvement that is necessary to make the actions attributable to the state; consequently, to justify action in self-defence in particular cases.[32] In the case of the US attacks on Afghanistan, the United States declared that it was attacking on the Taliban government which was considered complicit in attacks directed to the United States. However, many raise doubts on the legality of attribution that the United States made to the Taliban government for Al Qaida's actions[33].

II. Claiming self-defence as response to an armed attack

As stipulated under the UN Charter, the existence of armed attack is crucial for the right of self-defence. It determines if, and how far, unilateral use of force is admissible.

The UN Charter does not afford a definition of 'armed attack'; but a commonly referenced definition reads as follows: 'An armed attack is an intentional intervention in, or against another State without that State's consent or subsequent acquiescence, which is not legally justified'.[34] The most common types of targets of terrorist attack are private citizens, civil ships or airlines, and embassies or armed forces. Individual,

[32] This question has attracted a large amount of academic discussion since the terrorist attacks of September 11. *See*, mostly Chapter 6 in C. Gray, *International Law and the Use of Force* (3rd ed), US: Oxford University Press (2008); C. Tams, 'The Use of Force against Terrorists', 20 *The European Journal of International Law* 2 (2009), pp. 359-397; A. Weiner, The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?, 59 *Stanford Law Review* 415 (2006).

[33] Symposium, The United States and International Law – The Effects of U.S. Predominance on the Foundations of International, Gottingen (October 25 – 27, 2001).

[34] E. Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-defence', 55 *International and Comparative Law Quarterly* 4 (2006) p. 965.

sporadic or low intensity attacks do not rise to the level of armed attack that would permit a response in self-defence.[35] An armed attack must be of a certain gravity in order to be considered as armed attacks able to trigger a right of defence. This criterion was introduced first in the *Nicaragua v. United States* case. The Court noted that 'it is necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.[36] Same passage was quoted in the *Oil Platforms* judgment, where the Court decided not to accept United States argument that an accumulation of events of smaller scale could amount to an armed attack of grave proportions capable of triggering the right of self-defence'.[37] In the case of 1981 Israeli air strike on the Iraq nuclear reactor, Israel's Permanent Representative to the UN claimed that Israel was exercising its inalienable right to self-defence under Article 51 of the Charter. However, the claim advanced by Israel of events amounting to an armed attack from Iraq was not accepted as reasonable, and the Security Council unanimously adopted Resolution 487 where it stated that it 'strongly condemns the military attack by Israel in clear violation of the Charter of the United Nations and norms of international conduct'.[38] Similarly, in 1985, Israel attacked the headquarters of the Palestine Liberation Organization in Tunisia, contending that the cluster of casualties it suffered justified an act of self-defence, relying on an 'accumulation of events' rationale. Also in this case the raid was considered illegal and in breach of Charter provisions.[39]

[35] *See* P. Alston, 'Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions' (2010).
[36] *Nicaragua v. United States of America*, ICJ [1986] Merits, at para 101.
[37] *Oil Platforms case,* ICJ [2003]. *See* C. Gray, *International Law and the Use of Force* (3rd ed), US: Oxford University Press (2008), p. 146.
[38] M. Williamson, *'Terrorism, War and International Law',* Ashgate International Law Series (2009).
[39] Res 573, 4 October 1985.

In international practice, the legality of military reaction in defence is limited to conditions necessity and proportionality. Although not specifically referred to under Charter provisions, customary international law recognizes that proportionate and necessary military responses engaged under self-defence, constitute basic criteria to assess the lawfulness of the intervention from the state.[40] When countering a terrorist attack still underway, states can take military measures only *extrema ratio* - in the sense that there is no other alternative but the use of force. And, in any case, they must resort to the smallest scale of force which would permit it to achieve the objective, preventing the accomplishment of the terrorist attack or at least minimizing its effects. Israel's military attacks on Lebanon in 1982 were seen as unlawful, not for the fact of the existence of armed attack[41], but rather for the unnecessary, disproportionate or punitive character of the military reaction.[42]

III. Claiming self-defence in response to a 'threat of armed attack'

Since 1945 states have been reluctant to claim a right to self-defence unless an armed attack had occurred. During the last two decades, states have argued that military interventions permitted under more expansive readings of the right of self-defence are legal; doctrines like 'pre-emptive self-defence' or 'anticipatory self-defence' have emerged.

[40] These requirements are often traced back to the 1837 Caroline incident, which involved a pre-emptive attack by the British forces in Canada on a ship manned by Canadian rebels, planning an attack from the United States. Proportionality and necessity were reaffirmed as limits to self-defence in all these cases *Nicaragua v. United States of America [1986]; Oil Platforms case [2003]*; *Democratic Republic of the Congo v. Uganda [2005].*

[41] Israel relied on an 'accumulation of events', recording 240 terrorist actions committed by the Palestine Liberation Organization on Israeli targets including the assassination of an Israeli diplomat in Paris. *See* C. Herzog and Sh. Gazit, *The Arab-Israeli Wars: War and Peace in the Middle East*, US: Vintage Books Press (2005).

[42] T. Gazzini, *The Changing Rules on the Use of Force in International Law*, UK: Manchester University Press (2005).

Attempts from states to justify attacks under 'pre-emptive self-defence' have been widely contested and tightly constrained.[43] Claims, mostly put forward from the United States, of 'anticipatory self-defence', remain decidedly unacceptable. Both ways of arguing sustain a right to self-defence without the existence of an armed attack. The first recognizes an already suffered terrorist attack and a possible tendency for future attack; while the later, bases the argument on future terrorist threat. They rely on the contention that terrorist attacks are unpredictable, sudden, and instantaneous in discharge, and that it is unrealistic for states to be able to identify them in time and take action before their completion.

Affected states have argued that the existence of a previous attack and the confirmed knowledge that there is going to be a continuity of attacks could be considered as sufficient reason for the reaction. In the case of the United States attacks on Al Qaida, the United States provided evidence of previous attacks dating back to 1993 from Al Qaida targeting the United States; additionally, it had statements from Osama Bin Laden claiming responsibility for the attacks and promising to continue attacks on the United States.[44] In this situation, the United States and the United Kingdom[45], argued for engaging the test of imminence based on the existence of a 'hostile intent' to exercise a right of anticipatory self-defence. Anticipatory self-defence relies on the necessity for protection against a 'hostile intent' even though the next 'armed

[43] USA subsequently to extend the right of self-defence to cover purely pre-emptive action has proved extremely controversial M. Bothe, Terrorism and the Legality of Pre-emptive Force, 14 *European Journal of International Law* 22 (2003), p. 227; M. Glennon, "The Fog of Law: Self-defence, inherence and incoherence in Article 51 of the UN Charter", 25 Harvard Journal of Law and Public Policy (2002) 539. M. Byers, Terrorism, the Use of Force and International Law after 11 September 2001, 51 *International Criminal Law Quarterly* 401 (2002); C. Tams, 'The Use of Force against Terrorists', 20 *The European Journal of International Law* 2 (2009).

[44] T. Franck, *Recourse to Force: State Action against Threats and Armed Attacks, US: Cambridge University Press* (2002).

[45] See UN Doc. S/2001/946 and UN Doc. S/2001/947.

attack has yet fully developed'.[46] In 2001, in justifying missile strikes against Iraq, the United States submitted that it was acting to prevent possible future attacks on its aircraft when patrolling the 'no fly' zone. International reaction was almost universally negative: only the US, the UK and Israel accepted the legitimacy of the missile strikes. Three Permanent Members of the Security Council publicly questioned the use of force without Security Council authority.[47]

In another situation, the United States launched a missile strike on Baghdad in 1993, and attempted to justify the attack as being a response to planned, but not completed terrorist attack and on the basis that it was acting to prevent further attacks in the future. In this situation the United States was claiming a right to defence on basis of a pre-emptive self-defence. States that expressed support for the US accepted that an 'armed attack' had occurred and that the US was reacting to it. But no state preferred to endorse the United States use of force on basis of pre-emptive self-defence.[48]

The United States military attack on Iraq in 2003, presents another example where the use of force was employed under the doctrine of 'pre-emptive self-defence'. Although, the United States officials, in a 'brief and cryptic' language have contended that the intervention was legally permissible under a series of Security Council Resolutions.[49] The attack on Iraq was extensively criticized for 'invasion with little regard for international law or for the attitudes reflected by other nations'[50].

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[46] Y. Disntein, 'War, Aggression and Self-defence' (4th ed) NY: Cambridge University Press (2005), p. 192.

[47] E. Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-defence', 55 *International and Comparative Law Quarterly* 4 (2006).

[48] D. Kritsiotis, The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law, 45 *International and Comparative Law Quarterly* 162 (1996).

[49] S. Murphy, Assessing the Legality of Invading Iraq, 92 *Georgetown Law Journal* 4 (2004), p. 12.

[50] *Ibid*. p. 1.

In a speech shortly after the September 11 attacks, President Bush stated that the 'war on terror begins with Al Qaeda, but it does not end there'.[51] Rather, the President indicated that the war 'will not end until every terrorist group of global reach has been found, stopped and defeated'.[52] In so far as the US has asserted the right to the use of force against international terrorists wherever they may be found, in furtherance of a policy of seeking to 'disrupt and destroy terrorist organizations of global reach'[53], the United States does not appear to recognize that a terrorist group must commit an 'armed attack' against the United States before it may be targeted.[54] Through this claim, it sustains the possibility to exercise military response under pre-emptive self-defence. The reasoning of pre-emptive self-defence goes along the line that because of the potential aggressors' threat, an option is to attack them before they conduct a devastating terrorist attack. It moves the nature of contingency to an emerging development that is not yet operational, but permitted to mature could then be neutralized at a higher and possibly unacceptable cost.[55]

As noted, treaty law and customary international law do not recognize a right to self-defence without the existence of an armed attack. The international community, too, has shown extreme reluctance in accepting doctrines extending the concept

[51] President's Address before a Joint Session of the Congress on the US Response to the terrorist attacks on September 11, 2 Pub. Papers 1140, 1141 (Sep 20, 2001) –*available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

[52] *Ibid*. *See also*, the National Security Strategy of the United States of America 5 (2002). The National Security Strategy largely reaffirms, and nowhere limits or repudiates the strategic security doctrines to counter terrorism and WMD proliferation threats articulated in the 2002 National Security Strategy of the United States of America.

[53] The National Security Strategy of the United States of America (2002), p. 5.

[54] The National Security Strategy of the United States of America (2006), p12 (noting US policy to "[p]revent acts by terrorist networks before they occur".

[55] Y. Disntein, 'War, Aggression and Self-defence' (4th ed) NY: Cambridge University Press (2005). / J. Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror*, Aldershot: Ashgate Publishing (2005).

of self-defence.[56]The General Assembly debates on *"In Larger Freedom"* showed that most states were not willing to accept anticipatory, let alone pre-emptive self-defence.[57] The 118 member Non-Aligned Movement has repeatedly rejected the doctrine of pre-emptive self-defence.[58] And recently, the United Kingdom government, in the words of the Foreign Secretary, clearly disavowed a wide doctrine of self-defence.[59]

CONCLUSION

The major argument presented for accepting military responses against terrorist groups, under more lenient conditions, is based on the observation that international terrorism presents a substantially different challenge compared to the traditional state-to-state security threats. And, as they have been the principal focus of the rules governing the use of force at the time when the Charter was drafted, the Charter is no longer adapt to regulate responses to new threats, such as terrorism.[60] The principal force steering such ideas seems to be the United States, which has been subject to massive critique by the international community and scholars for the unacceptable, at times 'plainly illegal'[61] measures undertaken to respond to

[56] Although, in C. Gray, International Law and the Use of Force (3rd ed), US: Oxford University Press (2008) The work of by Reisman and Amstrong based on an interpretative view of general statements of the 'the past and the future' of claims of pre-emptive self-defence argues the opposite.

[57] UN doc GA/10377, 10399, 6-8 April 2005*, referred to in* C. Gray, *International Law and the Use of Force* (3rd ed), US: Oxford University Press (2008), p. 213.

[58] *For example*, in the 2006 Havana Declaration, UN doc S/2006/780, 29 September 2006, para 20.

[59] *See* Foreign Affairs Committee, Second Report, Foreign Policy Aspects of the War against Terrorism, Session 2002-2003, HC 196 at para. 150. See also, C. Gray, *International Law and the Use of Force* (3rd ed), US: Oxford University Press (2008).

[60] *For example,* A. Slaughter and W. Burke-White, "An International Constitutional Moment", 43 *Harvard of International Law Journal* 1, 2 (2002), contends that there is necessity for new rules 'to respond adequately and effectively to the challenges that are emerging in this new paradigm'. *See, also*, R. Turner, "Operation Iraqi Freedom: Legal and Policy Considerations", 27 *Harvard Journal of Law and Public Policy* 765, 793 (2004).

[61] C. Greenwood, International Law and the 'war against terrorism', 78 *International Affairs* 2 (2002), p. 301.

terrorism. Under domestic criminal justice system, very controversial is the treatment of terrorist suspects and prisoners held at the naval base at Guantanamo Bay. Likewise, at the international level, extra-territorial resorts to force consisting of individual eliminations (targeted killings), attacks directed to terrorist groups, or even extensive military actions resulting in destitution of governments (such as the case of Taliban government in Afghanistan) are subject of much contention.[62]

Terrorists operate in secrecy, and it is difficult to detect in advance their preparations to attack. However, measures against them are to be taken within the legal limits. The use of force under international law is limited to Security Council authorizations or reactions to a suffered armed attack. In the case of suffered armed attack, the state nonetheless is limited to follow principles of necessity and proportionality of action so that to skirt the risk. Military actions based on 'threats' of terrorism are illegal in the current regulation. Furthermore, as perplexing a threat of terrorism is, the international community nonetheless is reluctant to accept military actions in response to "mere" threats. Once recognized, a right under extensive reading of the doctrine of self-defense it is potentially very difficult to define or limit it, and bad faith or an error in judgment could easily lead to unnecessary conflict.[63] Such practice would undermine the predictability of international law regarding to the use of force.[64]

[62] T. Gazzini, *The Changing Rules on the Use of Force in International Law*, UK: Manchester University Press (2005), p. 198.

[63] *Maogoto / Byer per long-term significant consequences of this 'strategic approach' (p.410).*

[64] *See* A. Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretive Methods', 22 *Leiden Journal of International Law* 651 (2009); J. Maogoto, *Battling Terrorism, Legal Perspectives on the Use of Force and the War on Terror,* Ashgate Publishing (2005), p. 172.

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