The Right of Self-Defence and The "War on Terrorism" One Year after September 11

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SPECIAL FORUM ISSUE: THE WORLD WE (INTERNATIONAL LAWYERS) ARE IN: LAW AND POLITICS ONE YEAR AFTER 9/11. **A. Introduction: International Terrorism** [1] The destruction of the World Trade Center and a wing of the Pentagon by three highjacked civilian airliners and the crash of a fourth in Pennsylvania on September 11, 2001 constitute without a doubt the high point of terrorist attacks on the United States to date. The terrorists' methods, their destructive force and the attacks' economic and political effects are all without precedent. After September 11, the organisation responsible was quickly identified, namely a terrorist group based in Afghanistan, Al Qaeda, headed by a Saudi expatriate, Osama bin Laden. After a request for his extradition was denied by the ruling Taliban, the United States and the United Kingdom conducted airstrikes against targets in Afghanistan beginning on October 7. As soon as late November 2001, the Taliban's fate was sealed. The uninterrupted bombardment of the US Air Force helped the Northern Alliance gain decisive ground in its campaign against the regime. On December 15, 2001, the various Afghan opposition groups signed a treaty on the Petersberg near Bonn, Germany, that established an interim government. The government's establishment put an end to the Taliban's rule, but it did not put an end to international terrorism with its various goals and interwoven structures. [2] While the attacks of September 11 may in some respects be exceptional, as an incident of international terrorism *per se* they are the latest in a long series. (1) The previous engagement of the United States in the Middle East had already led to the targeting of US institutions and citizens by terrorists. In 1986, a bomb exploded in a West Berlin night-club that predominantly catered to US soldiers. Citing the right of self-defence, the United States reacted with airstrikes on the Libyan capital, Tripoli. On December 21, 1988, the destruction of a PanAm flight over the Scottish town of Lockerbie resulted in the deaths of 259 passengers and 11 inhabitants. The suspects, two Libyan citizens, were tried under United Nations (UN) supervision in the Netherlands before a Scottish court. (2) The Lockerbie case is a well known but rare example of international co-operation in the non-violent fight against international terrorism. [3] The military operation to free Kuwait in 1990 by a US-led alliance resulted in further terrorist attacks, including an assassination attempt on former US President George Bush Sr. in 1993 in Kuwait. The United States again relied on its right to self-defence and conducted airstrikes against the Iraqi Secret Service's headquarters in Baghdad. (3) The continued presence of US soldiers near Islam's holy sites led to the perception by Muslim fundamentalists of the United States as the chief enemy of Islam. The US embassies in Kenya and Tanzania in August 1998 were the next target of attacks, which killed 254 people and injured well over 5000. Their bombing also served to introduce bin Laden (multi-millionaire and fundamentalist on a private mission) as the public face of international terrorism. The US reaction was in keeping with its past practice. On August 20, 1998, US cruise missiles destroyed six alleged bases of bin Laden in Afghanistan and a pharmaceutical factory in Sudan. (4) In these cases, as in the previous ones, the United States justified its armed intervention as an act of self-defence. (5) **B. The Traditional Concepts of "Use of Force" and "Self-Defence" in International Law** [4] The use of force by the United States in response to terrorist attacks prior to and including September 11, 2001 is primarily subject to the norms of international law. A state attacked by terrorists may politically be in an extraordinary position yet its selection of countermeasures is not outside the law. In such a situation, national law usually proves capable of prompt and flexible reactions. In comparison, the norms of international law are relatively static. The prohibition of the use of force in international relations with its limited exceptions serves as a telling example. [5] Since at least the founding of the United Nations in 1945, the international legal system has been dominated by an explicit prohibition of the use of force, namely Article 2[4] UN Charter. This central norm of the UN Charter and its equivalent in customary international law strictly prohibits states from using force of a military nature, even if the government of a state has not been internationally recognized, as was the case with Afghanistan. This interpretation of Article 2[4] UN Charter is undisputed; the controversy concerns the exceptions, specifically the circumstances in which the right of self-defence according to Article 51 UN Charter may be exercised. [6] Self-defence per Article 51 UN Charter, which is emphasised as an "inherent right", requires an *armed attack* upon a state. Three constitutive elements of the term "armed attack" present difficulties in characterising the use of force as self-defence in accordance with international law, especially in response to terrorism. Self-defence against a terrorist attack requires, according to the traditional concept of Article 51 UN Charter, that the terrorist attack be carried out as an ‘act of a state', which means that it must be attributable to a state. (6) In addition, the attack in question has to be comparable to inter-state combat in its scale and effects. Lastly, Article 51 UN Charter requires that the armed attack has not ended but is ongoing when the right of self-defence is exercised. [7] Even if Article 51 UN-Charter does not explicitly limit self-defence to armed attacks by a state, this reading is supported by the UN Charter's concept and the law of nations in general. (7) In the context of Article 2[4] UN Charter, self-defence is an exception to the prohibition of the use of force in inter-state relations. A state is allowed to rely on self-defence if it is affected by another state's unlawful use of force. The crucial point in the context of Article 51 UN Charter is that defence measures of an attacked state affects, in the majority of cases, the territorial

integrity of another state. If a state is attacked by private individuals located on the high seas or in a plane above the high seas, the attacked state has the right to launch armed countermeasures without being in danger of conflicting with Article 2[4] UN Charter. In this case, the attacked state can rely on its unlimited sovereignty; recourse to Article 51 is not required. However, there might be a scenario which calls for a different legal perspective. If terrorists are based in a territory without effective governance (failed state), state practice may support the application of Article 51 UN Charter in favour of the attacked state. This means of course that a failed state is in principle under the protection of Article 2[4] UN Charter. Yet, Afghanistan was far from lacking governmental authority. The Taliban had ruled 90 % of the territory in a very effective manner; therefore it cannot be categorised as a failed state. Consequently, the right of self-defence on the grounds of Article 51 UN Charter required an armed attack against the United States attributable to Afghanistan. [8] With regard to the attribution of acts and omissions to a state, international law possesses relatively stable rules. The basic rule is that the conduct of state organs acting in their official capacity is attributed to the state concerned. Organs of the state comprise all persons who fulfil legislative, executive or judicial functions within the state. (9) Difficulty in determining the attributability of conduct begins with persons lacking formal appointment who act in some connection with the state. Here the concept of the "*de facto* organ" enters the scenario. The *de facto* organ is characterised in draft article 8 on state responsibility (2001) as a person "… in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct." (10) [9] As noted in draft article 8 on state responsibility (2001), the key elements of attribution are instruction, direction and control. Explicit or implied instruction between the militant occupants of the US embassy in Tehran and the Iranian government was lacking, according to the International Court of Justice (ICJ) in the case "United States Diplomatic and Consular Staff in Tehran". (11) The ICJ refined its criteria for attribution in 1986 in the Nicaragua case. The Court underlined the importance of the element of effective state control of the *specific* paramilitary operation in the course of which the alleged violation of international law was committed. (12) The Nicaragua judgement's high threshold for the attribution of the conduct of paramilitary groups was in turn criticised by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in its Tadic judgement of July 15, 1999. (13) Citing statements by the US-Mexican Claims Commission (14), the Iran-United States Claims Tribunal (15) and the European Court of Human Rights (16), the Yugoslavia Tribunal noted that international law does not require the same degree of state control in order for individuals to qualify as *de facto* organs. "In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by co-ordinating or helping in the *general planning* of its military activity. Only then can the State be held internationally accountable for any misconduct of the group." (17) In contrast, where a state merely acknowledges the factual existence of a private individual's conduct or condones that conduct, the attribution of that conduct to the state has no basis in traditional international law. (18) [10] The second requirement of Article 51 UN Charter concerns the scale and effects of the armed attack. Even if Article 51 UN Charter does not explicitly state that the attack in question must be of a certain intensity for it to qualify as an armed attack, the criteria "scale" and "effects" are largely undisputed. The corresponding international practice is reflected in the UN General Assembly's Definition of Aggression of December 14, 1974. (19) Article 3(g) of the relevant resolution states that "[a]ny of the following acts, regardless of a declaration of war, shall (...) qualify as an act of aggression: (...) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein." The General Assembly's definition is substantively related to Article 39 UN Charter and was cited by the ICJ in the Nicaragua case in its interpretation of the right of self-defence. The judgement reads: "The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces." (20) The discretion offered by the requirement of scale and effects can pose a serious problem in deciding on a military response to acts of terrorism. How many victims must suffer in the terrorist attack, and how many terrorists must take part in order for the attack to be comparable to an attack by regular armed forces? [11] Lastly, the requirement of immediacy between armed attack and force used in self-defence can be founded on the wording of Article 51 UN Charter ("if an armed attack occurs"). If an attack has ceased and there is no danger of further attack, the right of self-defence itself ceases. (21) Repressive measures by military means are generally prohibited in international relations. (22) The "Friendly Relations Declaration" adopted by consensus by the General Assembly in 1970 reads: "States have a duty to refrain from acts of reprisal involving the use of force." (23) If, however, the attack in question consists of several successive acts, the requirement of immediacy becomes problematic and would have to be judged on a case-by-case basis. (24) 'Hit-and-run' terrorist attacks, in which the terrorists wait for a period of time before striking again, are a favourite tactic of Al Qaeda: three years passed between the attacks on the US embassies in Nairobi and Dar es Salaam and the attacks on the World Trade Center and the Pentagon. **C. Combating the Taliban Regime in Afghanistan** [12] After September 11 and before targeting Afghanistan, the United States cited its right to self-defence in justifying its military actions to the community of states and the UN. This is especially noteworthy since the UN Security Council (SC) had apparently been willing to permit the use of force on the basis of Chapter VII of the UN Charter: "The Security Council (...) expresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations." (25) In the event, the United States decided against taking up this offer,

opting instead for its right to self-defence. There may be various reasons for this decision. First, a SC mandate that in time and content would have limited the US's freedom of action could thereby be avoided. (26) Moreover, reliance on Article 51 UN Charter is consistent with past US counter-terrorism policy, though this policy did in the case of September 11 meet with the approval of the community of states and the UN. In both Resolution 1368 and Resolution 1373 concerning the September 11 attacks, the SC recognised that there is an "inherent right of individual or collective self-defence in accordance with the Charter." (27) [13] The legal significance of the passage cited, which was without a doubt included in the SC-Resolutions at the request of the United States, is limited. The right of self-defence is an original right of states that has neither been granted nor limited by the UN ("inherent right"). The SC does not therefore have the competence to grant a constitutive right of self-defence to any state. (28) Nevertheless, mention of the right of self-defence by the SC is not completely insignificant. It declares that an armed attack by the United States on Afghanistan – the base of bin Laden and his organisation – does not violate Article 2[4] UN Charter and does not constitute a breach of international security according to Article 39 UN Charter. Moreover, it mirrors the consensus among the vast majority of states that the US countermeasure is in accordance with international law. (29) This consensus is underlined by the decision of the North Atlantic Council of September 12, 2001. "The Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all." (30) A similar decision was reached by the signatories to the Inter-American Treaty of Reciprocal Assistance (31) in accordance with its Article 3. (32) [14] The almost unanimous consensus of states effects the interpretation of the right of self-defence in customary law, to which Article 51 UN Charter is related. The way in which the traditional limits on self-defence have been handled in this case suggests that Article 51 UN Charter has been extended. [15] Affirming the existence of an armed attack on the United States according to Article 51 UN Charter presents no difficulty. Scholars have favoured drawing parallels to the Japanese attack on Pearl Harbor during World War II, an attack that resulted in less loss of life than September 11. (33) [16] With regard to the requirement that an attack be ongoing a certain shift in international practice can be detected. It lies in the nature of hit-and-run terrorist attacks that armed countermeasures of the attacked state are either too late (reprisal) or too early (pre-emptive strike). Previously states had only accepted pre-emptive strikes against objectively imminent armed attacks. (34) The mere feeling of being under threat was not sufficient justification. (35) Events after September 11 suggest, however, that if a terrorist attack can be qualified as an armed attack according to Article 51 UN Charter, and if there is no doubt about the terrorists' willingness to continue their ‘combat' after a tactical break, the use of force to prevent further attacks is now included in the right of self-defence. (36) [17] The main legal issue regarding the war in Afghanistan concerns the attribution of "private" acts of terrorism to a state (i.e. *de facto* organ). The argument that the US armed intervention could be aimed exclusively against the "private" organisation Al Qaeda does not stand in international law, because the integrity of the territory of Afghanistan was inevitably affected (refer para. 7). Moreover, the US offensive was not limited to the elimination of Al Qaeda. It also was targeted at the Taliban regime whose overthrow was achieved. (37) This last-mentioned goal of the US airstrikes was not criticised by other states. [18] It is most striking that the United States did not even attempt to identify effective control – i.e. the power of command – of the Taliban over Al Qaeda. The US Permanent Representative to the United Nations, John Negroponte, summarised his government's legal understanding after the start of the US military offensive against Afghanistan: "The attacks of 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al Qaeda organization have been made possible by the decision of the Taliban regime to allow parts of Afghanistan that it controls to be used by this organization as a base of operation." (38) This argument has been accepted by other states. [19] When viewed in isolation, the Afghanistan case sends a clear massage: The prerequisites for the right to rely on self-defence are toleration and provision of a safe haven for terrorists by a state. It is less clear where such factors impact the interpretation of Article 51 UN Charter. [20] One possible reading is that the attribution of the terrorists' armed attack to the state is no longer required. Instead, the violation of the pre-existing obligation in international law not to harbour terrorists now supports the right of self-defence. Another possible reading is that state practice following September 11 merely leads to the lowering of the threshold for the attribution of private conduct to the harbouring state. Such attribution no longer requires active support and planning of terrorist activities; instead, it is sufficient for a state to allow terrorists to use its territory as a base of their transborder operations. [21] The first reading will raise a variety of legal issues in future cases. Does the right of self-defence remain unaffected if the harbouring State agrees to prosecute the terrorists? There is no general legal principle in international law requiring the extradition of terrorists (*aut dedere aut judicare*). In the case of Lockerbie, Libya's obligation to extradite was based on an enforcement measure of the SC pursuant to Chapter VII UN Charter. (39) Moreover, does the right of self-defence remain unaffected if the harbouring state's sentencing does not meet the attacked state's expectations? In order to avoid these problematic issues, the second reading of the recent state practice – i.e. the lowering of the threshold for the attribution of private conduct – seems preferable even though it presents its own risks. At least it can be said that the lowering of the threshold for the attribution follows a trend in international law, which the divergence of the ICTY's holding in Tadic from the ICJ's in Nicaragua illustrates. Over the long term, both the first and the second readings of Article 51 UN Charter undermine the sensitive balance between the territorial integrity, prohibition of the use of force, the right of self-defence and the authority of the Security Council to launch enforcement measures against harbouring states pursuant to Chapter VII UN Charter. **D. Conclusion** [22] The broad international approval of the war in Afghanistan without a doubt reflects

the magnitude of the tragedy of September 11. The recent consensus regarding the right of self-defence presents, however, several legal difficulties. Does it constitute a singular event or will future state practice confirm the generously interpreted right of self-defence? The risks inherent in lowering of the requirements in Article 51 UN Charter through state practice are obvious. States will soon find themselves in the role of Goethe's sorcerer's apprentice if the fight against terrorism is taken to justify the means and the right of self-defence is degraded to a general authorisation of the use of force. (40) The significance of a generous interpretation of Article 51 UN Charter has been indicated by the US Permanent Representative to the United Nations on October 7, 2001. "We may find that our self-defence requires further action with respect to other organizations and other states." (41)

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(1) See Kirsten Schmalenbach, Der internationale Terrorismus, Ein Definitionsversuch, 42 NZWehrr 15 (2000).

(2) See Responding to Terrorism: Crime, Punishment, and War, 115 Harvard Law Review, 1217, 1218 (2002).

(3) UN Doc. S/PV 3245, p. 3 et seq. (27 June 1993).

(4) See Kirsten Schmalenbach, Die Beurteilung von grenzüberschreitenden Militäreinsätzen gegen den internationalen Terrorismus aus völkerrechtlicher Sicht, 42 NZWehrr 177 (2000).

(5) C. Wilson (USA), Sixth Committee, Opening Debate on Draft Convention for Suppression of Nuclear Terrorism, Press Release GA/L/3093, 25th Meeting (AM), November 11, 1998.

(6) See Ian Brownlie, International Law and the Use of Force, p. 373; see generally Claus Kreß, Gewaltverbot und Selbstverteidigung nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte, pp. 149 – 155.

(7) For a different view see Sean D. Murphy, Terrorism and the Concept of "Armed Attack" in Article 51 on the U.N. Charter, 43 Harvard International Law Review 41, 50 (2002); Thomas M. Franck, Terrorism and the Right of Self-Defense, 95 AJIL 839, 840.

(8) Contra: Christian Tomuschat, Der 11. September 2001 und seine rechtlichen Konsequenzen, 28 EuGRZ 535, 540 (2001); Yoram Dinstein, War, Aggression and Self-Defence, 2. ed., p. 238.

(9) Draft Article 4 on Responsibility of States for Internationally Wrongful Acts (2001), International Law Commission, UN-Doc A/54/19), Official Records of the General Assembly, 56th Session, Supplement No. 10 (http://www.un.org/law/ilc/reports/2001/english/chp4.pdf).

(10) Draft Article 8, *supra* HYPERLINKnote 9; see Gregory Townsend, State Responsibility of Acts of *De Facto* Agents, 4 Arizona Journal of International and Comparative Law 635 (1980).

(11) United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, ICJ Reports 1980, p. 3, 29, para. 58.

(12) Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, ICJ Reports 1986, p. 14, 64, para. 115.

(13) International Criminal Tribunal for the Former Yugoslavia (ICTY), Appeals Chamber, Judgment, July 25, 1999, Procecutor v. Tadic, 38 ILM, 1518, para. 115 (1999).

(14) Stephens Case, Report of International Arbitral Awards, Vol. 4, pp. 266 et seq.

(15) Kenneth P. Yeager Case, Iran-US Claims Tribunal Reports 1987, Vol. 4, pp. 92 et seq.

(16) Loizidou v. Turkey, Judgment, December 18, 1996, para. 63, ECHR Reports of Judgements and Decisions 1996 VI, p. 2216, 2235, para. 56.

(17) ICTY, *supra* note 13, para. 131 (1999); confirmed: ICTY Appeals Chamber, Judgment, February 20, 2001, Celebici Case, 40 ILM, 639, para. 13 et seq. (emphasis added).

(18) Draft Article 11, *supra* note 9, Commentary, p. 121.HYPERLINK

(19) GA-Resolution 3314 (XXIX), Official Records of the General Assembly, 29th Session, Supplement No. 19, UN-Doc A/9619.

(20) Nicaragua v. United States of America, *supra* note 12, p. 116, para. 230.

(21) Tomuschat, *supra* note 8, 542.

(22) Albrecht Randelzhofer in Bruno Simma (ed.), The Charter of the United Nations, A Commentary, 1994, Article 51, para. 37; Schmalenbach, *supra* note 4, 181.

(23) GA-Resolution 2625 (XXV): Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 24 October 1970, United Nations Official Records, 25th Session, Supplement No. 28, UN-Doc A/8028.

(24) Roberto Ago, Addendum to the Eighth Report on State Responsibility, Yearbook of the International Law Commission 1980 II/1, p. 13, 70, para. 122.

(25) SC-Resolution 1368 (2001), adopted by the Security Council at its 4370th Meeting, on 12 September 2001 (SECURITY COUNCIL RESOLUTIONS - 2001).

(26) See Michael Byers, Terrorism, the Use of Force and International Law after 11 September, 51 ICLQ 401 (2002).

(27) SC-Resolution 1368 (2001), *supra* note 25, and SC-Resolution 1373 (2001), adopted the Security Council at its 4385th Meeting, on 28 September 2001 (SECURITY COUNCIL RESOLUTIONS - 2001).

(28) See Franck, *supra* note 7, 840 (2001).

(29) Murphy, *supra* note 6, 48 – 49.

(30) NATO Press Release - (2001) 124 - 12 September 2001

(31) INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE

(32) Byers, *supra* note 26, 409.

(33) Murphy, *supra* note 6, 47.

(34) See the famous Caroline-Case: Jennings, The Caroline and McLeod Cases, 32 AJIL 83, 89 (1938).

(35) See the Security Council's disapproving reaction to the Israeli bombing of the Osiraq nuclear reactor in Iraq, SC-Resolution 488 of 19 June 1981 (Security Council Resolutions 1981).

(36) Christopher Greenwood, International Law and the War Against Terrorism, 78 International Affairs 301, 310 (2002).

(37) Contra: Franck, *supra* note 7, 840.

(38) UN Doc S/2001/946 (http://www.un.int/usa/s-2001-946.htm).

(39) SC Resolution-748 (1992) Security Council resolutions - 1992; see Michael Plachta, Lockerbie Case: The Role of the Security Council in the Enforcing of the Principle *Aut Dedere Aut Judicare*, 12 EJIL, 125 (2001).

(40) See also Jonathan I. Chaney, The Use of Force Against Terrorism and International Law, 95 AJIL 835, 838 (2001).

(41) *supra* note 38HYPERLINK.