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Volume 26  
Number 1 *Symposium: International Law  
Weekend - West*

Article 2

9-1-2003

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#### Recommended Citation

Jaume Saura, *Some Remarks on the Use of Force against Terrorism in Contemporary International Law and the Role of the Security Council*, 26 Loy. L.A. Int'l & Comp. L. Rev. 7 (2003).

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# Some Remarks on the Use of Force Against Terrorism in Contemporary International Law and the Role of the Security Council

JAUME SAURA\*

## I. INTRODUCTION

September 11th is said to mark a turning point in the history and dynamics of international relations. Only time can say whether this is the case, but it is beyond doubt that this outrageous attack pointed out Afghanistan and the Taliban as the headquarters and safe haven of today's most dangerous terrorist organization. It moved the victim of the attack, the United States of America, together with its most faithful ally, to launch an attack on Afghanistan, depose its radically fundamentalist government, and keep a military presence in the area afterwards, while looking for the intellectual authors of the aggression. This action, though triggered by the September 11th attacks, must be put in the context of the struggle against international terrorism, which the international community has undertaken for the last forty years.

Thus, the purpose of this Article is twofold. Part II is a general overlook of the existing treaty framework. In Part III, I analyze the approach to international terrorism adopted by the United Nations Security Council, both before and after the September 11th attacks. I shall discuss how the Security Council

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has considered certain terrorist actions as threats to international peace and security and has acted accordingly, though not always in a predictable and coherent manner. I shall conclude that the issue of terrorism has been on the agenda of the Security Council but that it is not the best-suited organ to produce general norms (legislate) on this topic.

In Part IV, I make a specific reference to the use of force by the United States and the United Kingdom against the Taliban regime in Afghanistan, which has been widely considered as an exercise of the right to self-defense. I will argue that this case did not meet the requirements for self-defense and conclude that the United States had an explicit will to act without the backing of the Security Council on an occasion where, unlike in the more recent Iraqi crisis, an armed action would have gathered unanimous support among its members. Finally, in Part V, I conclude with my belief that the international community and the Security Council lost a great opportunity to reaffirm the institutional nature of using armed force in contemporary international law.

## II. THE INTERNATIONAL TREATY FRAMEWORK AGAINST TERRORISM

Terrorism has become a growing concern of the international community since the early sixties.<sup>1</sup> Criminal acts aimed to provoke terror among the civilian population, usually with a political purpose, were also known in older times.<sup>2</sup> It was not until after the Second World War that terrorism acquired an international dimension, which resulted from the increase of transnational means of transport (e.g., hijacking of aircrafts and vessels) and the generalization of freedom movements (not always clearly

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1. LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW CASES AND MATERIALS 416 (4th ed. 2001).

2. See, e.g., James Blount Griffin, Note, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 VAND. J. TRANSNAT'L L. 405, 422-23 (2001) (discussing the assassinations of politicians and royal persons in the turn of the twentieth century (Franz Ferdinand)); Cara Hirsh, *Policing Undercover Agents in the United Kingdom: Whether the Regulation of Investigatory Powers Act Complies with Regional Human Rights Obligations*, 25 FORDHAM INT'L L.J. 1282, 1291-95 (2002) (explaining the national struggle in Ireland after World War I); Christopher C. Burns, *Re-examining the Prisoner of War Status of PLO Fedayeen*, 22 N.C. J. INT'L L. & COM. REG. 943, 996-97 (1997) (explaining the actions of the Irgun and Stern groups in Palestine immediately after World War II).

supported by the principle of self-determination).<sup>3</sup> In any case, this general concern has not translated into the drafting of a single, comprehensive covenant to fight the different faces that international terrorism shows around the world. On the contrary, at the UN and its specialized agencies, on top of more or less rhetorical condemnations, member states have been able to agree only on treaties that deal with *specific* forms and manifestations of international terrorism. Thus, there are now up to twelve universal treaties that deal with narrow expressions of terrorist action, such as the unlawful seizure of aircraft,<sup>4</sup> other unlawful acts against the safety of civil aviation,<sup>5</sup> unlawful acts against the safety of maritime navigation,<sup>6</sup> the safety of internationally protected persons,<sup>7</sup> the taking of hostages,<sup>8</sup> etc. More recently, the UN has adopted the International Convention for the Suppression of Terrorist Bombings<sup>9</sup> and the International Convention for the Suppression of the Financing of Terrorism.<sup>10</sup> All these conventions are

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3. See Martin Walker, *A Brief History of Terrorism*, EUROPE MAG., Oct. 2001 at 26, available at <http://www.eurunion.org/magazine/0110/p26.htm>.

4. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

5. Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2491, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 546, 974 U.N.T.S. 177; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, S. TREATY DOC. NO. 100-19, 1589 U.N.T.S. 474.

6. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 1678 U.N.T.S. 304; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 1678 U.N.T.S. 222.

7. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

8. International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205.

9. International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. GAOR, 52d Sess., Supp. No. 37, U.N. Doc. A/52/653 (1998).

10. International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, Agenda Item 160, at 408, U.N. Doc. A/54/109 (1999). There are also a number of international agreements concerning different aspects of terrorism at the regional level. See Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, OAS, 27 U.S.T. 3949, 1986 U.N.T.S. 195; European Convention on the Suppression of Terrorism, Jan. 27, 1977, Europ. T.S. No. 90; Arab Convention on the Suppression of Terrorism, Apr. 22, 1998, available at <http://www.al-bab.com/arab/docs/league/terrorism98.htm> (last visited Apr. 22, 2004); Convention of the Prevention and Combating of Terrorism, July 14, 1999, OAU, available

currently in force with a degree of participation that ranges between 79 ratifications to more than 170 state parties.<sup>11</sup>

The agreements adopted under the aegis of the UN share a very similar structure. First, they define in as precise terms as possible the nature and scope of the unlawful behavior that constitutes their object.<sup>12</sup> Second, they oblige signatories to undertake essentially two types of commitments relating to the prevention and suppression of those terrorist acts.

First, parties must treat the specific terrorist acts defined by each covenant, or actions leading to such acts, that are undertaken in their territory as *against* the territory of another country.<sup>13</sup> In fact, one can consider this rule of conduct a general norm of customary international law based upon the territorial sovereignty of states and thus mandatory to all states, irrespective of them being parties to these treaties. International jurisprudence<sup>14</sup> and several UN General Assembly resolutions<sup>15</sup> have established the responsibility of states for the use of their territory as a base of operations for terrorist, subversive, or other armed groups against

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at [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Algiers\\_convention%20on%20Terrorism.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Algiers_convention%20on%20Terrorism.pdf) (last visited Oct. 1, 2003).

11. United Nations Conventions Deposited with the Secretary-General of the United Nations, available at <http://www.un.org/english/terrorism.asp> (last visited Apr. 22, 2003) (providing: the text of treaties pertaining to terrorism recently deposited with the Secretary-General, UN conventions deposited with other depositories, and regional conventions in the authentic languages, the titles of all treaties deposited with Secretary-General in the six official languages, depositary notifications issued by the Secretary-General in his capacity as depositary of multilateral treaties, and the status of each document).

12. *E.g.*, G.A. Res. 109, *supra* note 10, at art. 2.

13. *E.g.*, *id.* at arts. 9-11.

14. *See* Island of Palmas Case (United States v. Netherlands.), 2 R.I.A.A. 829, 839 (Perm Ct. Arb. 1928).

15. *See* G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 222, U.N. Doc. A/8018 (1970) (declaration on principles of international law); G.A. Res. 3314, U.N. GAOR, 29th Sess., Annex, U.N. Doc. A/RES/3314 (1975) (definition of aggression). These resolutions were adopted by general consensus of the Members of the United Nations. According to the former, "[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts...." G.A. Res. 2625, *supra*, at 339. The second resolution defines one form of aggression as "[t]he 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...." G.A. Res. 3314, *supra*, at 3.

the sovereignty of another state. The UN Charter considers this sort of “permissive” activity an illegal form of “use of force.”<sup>16</sup>

Second, parties must cooperate in the criminal and jurisdictional field to facilitate the punishment of those guilty of the crimes specifically mentioned in each treaty.<sup>17</sup> In particular, they must incorporate that concrete conduct and appropriate foreseeable punishment into their criminal code.<sup>18</sup> Then, parties must either *prosecute* or *extradite* the person within their jurisdiction who is suspected of committing this act in the territory of another party.<sup>19</sup> Thus, the treaties provide for universal jurisdiction and act as extradition agreements among parties. In some cases, but not all, they explicitly exclude the possibility of considering those terrorist acts as political crimes.

With this constellation of treaties in force, the international community can consider international terrorism a *crime of international relevance* (similar to, for instance, international drug trafficking) that deserves judicial cooperation among states. It is not an international crime, however, in the sense of generating individual international responsibility as, for instance, war crimes or crimes against humanity. In fact, even if terrorism and drug trafficking were among the crimes included in the draft statute of the International Criminal Court, the Rome Conference rejected the competence of the Court in such matters.<sup>20</sup> Therefore, the

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16. U.N. CHARTER art. 2, para. 4.

17. *E.g.*, G.A. Res. 109, *supra* note 10, at arts. 4, 7.

18. *See* DAMROSCH ET AL., *supra* note 1, at 405.

19. *Id.* at 404.

20. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, U.N. Doc. A/CONF.183/2/Add.1 (1998), available at <http://www.un.org/law/icc/docs.htm>. Curiously enough, the origin of the Court, after the postponement of the topic by the General Assembly in the fifties, is a 1998 request by Trinidad and Tobago to resume work on an international criminal court with jurisdiction to include drug trafficking. Press Release, U.N., UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, U.N. Doc. No. L/ROM/22 (July 17, 1998). Schrijver explains that “[d]uring the Rome conference Algeria, India, Sri Lanka and Turkey proposed that the jurisdiction of a future international criminal court should comprise terrorism as a crime against humanity. However, as a result of the long-standing lack of agreement on the definition of terrorism this did not materialize.” Nico Schrijver, *Responding to International Terrorism: Moving the Frontiers of International Law for ‘Enduring Freedom’?*, 48 NETH. INT’L L. REV. 271, 289 (2001). Nevertheless, the author concludes that “[i]n view of their planned and deliberately widespread and systematic nature, the 11 September 2001 attacks come within the purview of the description of Article 7 on crimes against humanity of the Rome Statute for the International Criminal Court.” Schrijver, *supra*, at 291.

second dimension of the treaties, including the duty to prosecute or extradite, becomes the most relevant element of this agreed upon system. In the absence of a conventional basis, general international law does not impose any duty to extradite a person for ordinary crimes.<sup>21</sup>

This form of conventional cooperation, which is praiseworthy in many ways, still has obvious disadvantages if the fight against international terrorism must be general and worldwide. First, international treaties are only binding to parties.<sup>22</sup> Thus, the duty to extradite disappears if any of the states in which the terrorist act took place, or where the terrorist person has hidden, are not a party to the relevant convention. Second, these treaties refer to very specific acts of terrorism carefully defined in the first articles of each convention.<sup>23</sup> The provisions of such treaties cannot cover any terrorist act that does not fall precisely under such definition. The domestic law of two states could consider a presumed criminal to be of a "terrorist" nature, but the criminal would not be extradited from one such country to another if the criminal act does not fall within the purview of the relevant treaty's definition. This excludes situations where the states have their own, more general, bilateral agreement in force.

Therefore, under this multilateral treaty system, the extent of each member's duties towards other members depends on commonality of treaty ratification. Many terrorist activities may go unpunished, at least at the international level, because they have not yet been included in any treaty. A reasonable solution to these limitations would be to draft a comprehensive treaty against "international terrorism" in all of its forms, and then foster maximum participation to it, which would remain voluntary.

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21. See Juan Antonio Carrillo Salcedo, *Bilan de Recherches de la Section de Langue Francaise du Centre D'Étude et de Recherche de L'Académie*, in CENTRE FOR STUDIES AND RESEARCH IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 1988: THE LEGAL ASPECTS OF INTERNATIONAL TERRORISM 19, 23, 39-47 (Centre D'Étude et de Recherche de Droit, Studies & Research in International Law ed., 1988). See, e.g., Jochen A. Frowein, *The Present State of Research Carried Out by the English-speaking Section of the Centre for Studies and Research*, in CENTRE FOR STUDIES AND RESEARCH IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 1988: THE LEGAL ASPECTS OF INTERNATIONAL TERRORISM. 55, 78-85 (Centre D'Étude et de Recherche de Droit, Studies & Research in International Law ed., 1988).

22. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 26, 1155 U.N.T.S. 331.

23. E.g., G.A. Res. 109, *supra* note 10, at art. 2.

Nevertheless, this is not easy. The UN unsuccessfully tried this strategy during the seventies. It established a special committee between 1972 and 1979, but terminated it because it was impossible for committee members to agree upon a common definition of “international terrorism.”<sup>24</sup> In fact, the resolutions adopted through the years by the General Assembly condemning terrorism do not contain a definition of terrorism, though some elements may be deduced from the piecemeal resolutions.<sup>25</sup> More recently, in the aftermath of the September 11th attacks, a scholar stated that the reason for the 1996 failure to adopt a comprehensive convention against terrorism was this definitional problem.<sup>26</sup> Domestic law is also of little use in this respect because the states’ definitions are so inconsistent in practice – depending on the existence of a *local* terrorist group or clandestine support to neighboring terrorist groups – that it is impossible to derive a customary notion of international terrorism.<sup>27</sup>

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24. See *Report of the Ad Hoc Committee on International Terrorism*, 1979 U.N.Y.B. 1146, U.N. Sales No. E.82.I.1. In that particular case, newly independent countries were afraid that too wide of a definition of terrorism would include legitimate national liberation movements, whose armed actions would be allegedly covered by the universal right to self-determination recognized by the UN.

25. The closest thing to an internationally agreed upon definition is the General Assembly’s reference to “[c]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political reasons.” G.A. Res. 49/60, U.N. GAOR, 49th Sess., Supp. No. 21, at 303-04, U.N. Doc. A/49/60 (1994). See also G.A. Res. 57/27, U.N. GAOR, 57th Sess., ¶ 2, U.N. Doc. A/RES/57/27 (2003) (reiterating the working definition for terrorism created in G.A. Res. 49/60).

26. See Joaquin Alcaide Fernández, *La Guerra contra el terrorismo: ¿Una OPA hostil al Derecho de la comunidad internacional?*, 53 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 289, 292-293 (2001). The Ad Hoc Committee is nevertheless meeting regularly and is promptly expected to elaborate on “a draft comprehensive convention on international terrorism.” G.A. Res. 57/27, *supra* note 25, ¶ 18.

27. NATIONAL LAWS AND REGULATIONS ON THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM, U.N. Doc. ST/LEG/SER.B/22, U.N. Sales No. E/F.02.V.7 (compiling domestic legislation). Obviously there are as many definitions of what constitutes international terrorism as authors who have dealt with the topic, but since “the teachings of the most qualified publicists of the various nations” are not a source of international law, I shall skip what would otherwise become too lengthy of a presentation. Statute of the International Court of Justice, June 26, 1945, art. 38, para. 1, 59 Stat. 1055; 33 U.N.T.S. 993.



### III. THE ROLE PLAYED BY THE SECURITY COUNCIL IN THE FIGHT AGAINST INTERNATIONAL TERRORISM BEFORE SEPTEMBER 11, 2001

#### A. Measures Adopted in Specific Cases

Given the limitations of the treaty system established at the UN on international terrorism, the Security Council has used its powers to act against terrorism in some very particular instances. The Security Council is the only entity in contemporary international law legally allowed to “determine” the existence of a “threat to the peace,”<sup>28</sup> which it can do with complete freedom, in accordance with its own politically discretionary criteria. Before September 11, 2001, the Security Council had considered three specific terrorist actions as threats to the peace and had acted accordingly. First, the 1988 explosion of Pan American World Airways flight 103 resulted in over 200 deaths. Two Libyan agents and, indirectly, the Libyan government, were accused of this attack.<sup>29</sup> Second, there was the 1995 attempted murder of Egyptian President Hosni Mubarak during an official trip to Ethiopia. The government of Sudan was accused of this attempted assassination.<sup>30</sup> Finally, the 1998 bombing of the U.S. Embassies in Nairobi and Dar es Salaam resulted in over 200 deaths. The Taliban government of Afghanistan, not recognized by the United States, and the leader of the terrorist organization al Qaeda, Osama bin Laden, were accused of these bombings.<sup>31</sup>

Chapter VII of the UN Charter is the base of resulting resolutions, which are also very similar in their general structures.<sup>32</sup> They begin by considering Libya, Sudan, and the Taliban government as threats to international peace and security because

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28. U.N. CHARTER art. 39.

29. DAMROSCH ET AL., *supra* note 1, at 371.

30. See S.C. Res. 1054, U.N. SCOR, 51st Sess., 3660th mtg., at 1, U.N. Doc. S/RES/1054 (1996).

31. DAMROSCH ET AL., *supra* note 1, at 728.

32. See S.C. Res. 731, U.N. SCOR, 47th Sess., 3033d mtg., U.N. Doc. S/RES/731 (1992); S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg., U.N. Doc. S/RES/748 (1992) (pertaining to Libya). See also S.C. Res. 1044, U.N. SCOR, 51st Sess., 3627th mtg., U.N. Doc. S/RES/1044 (1996); S.C. Res. 1054, *supra* note 30 (pertaining to Sudan). See also S.C. Res. 1189, U.N. SCOR, 53d Sess., 3915th mtg., U.N. Doc. S/RES/1189 (1998); S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999); S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg., U.N. Doc. S/RES/1333 (2000) (pertaining to the Taliban).

they do not comply with its commands. These commands are mainly: (1) to stop supporting terrorist elements in their territory and (2) to extradite those held in suspicion of actually committing the specific terrorist attack.

The gravity of the cases in Libya and Afghanistan, in comparison with the case in Sudan, justifies the differing nature of the specific sanctions adopted against each country. Libya and Afghanistan suffer from an aerial and arms embargo, among other measures.<sup>33</sup> Meanwhile, Sudan is only sanctioned with lowered diplomatic and consular relations and restricted entry and transit of its political leaders, officials, and military.<sup>34</sup> Curiously, the measures taken against Libya and Afghanistan are not identically in force against the Taliban. Nor did the Security Council adopt either of the two main measures taken against Sudan, which were only “recommended” in the case of the Taliban.<sup>35</sup>

Thus, Security Council action arguably has a sort of common pattern.<sup>36</sup> At the same time, the Council acts with complete discretion in selecting which terrorist attacks deserve its attention.<sup>37</sup> This discretion also applies to the degree of punishment levied against states and governments accused of supporting terrorist groups and elements.<sup>38</sup> The Council seems to dispose of an arsenal of possible sanctions before selecting what it considers the most appropriate measure. If predictability and

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33. S.C. Res. 748, *supra* note 32, ¶¶ 4, 5; S.C. Res. 1333, *supra* note 32, ¶ 5. States are also obliged to stop any military assistance to these governments. S.C. Res. 748, *supra*, ¶ 5; S.C. Res. 1044, *supra* note 32, at 2; S.C. Res. 1333, *supra* note 32, ¶ 5. In the case of Afghanistan, the measures include the closure of the Taliban and Afghan Airlines offices in foreign countries and the freezing of bin Laden’s and al Qaeda’s financial resources. *Id.* ¶ 8.

34. S.C. Res. 1054, *supra* note 30, at 2.

35. Compare S.C. Res. 748, *supra* note 32, with S.C. Res. 1054, *supra* note 30, and S.C. Res. 1333, *supra* note 32.

36. The Security Council issues mandates for signatories to carry out within a certain time limit in conjunction with non-forcible sanctions in case of non-compliance.

37. See *Statement by the President of the Security Council on July 29, 1994*, U.N. SCOR, ¶ 2, U.N. Doc. S/PRST/1994/40 (1994); *Statement by the President of the Security Council on May 30, 1995*, U.N. SCOR, ¶ 1, U.N. Doc. S/PRST/1994/40 (1995); *Statement by the President of the Security Council on March 4, 1996*, U.N. SCOR, ¶ 1, U.N. Doc. S/PRST/1994/40 (1996). Many such attacks that took place during those years did not even make it onto the Council’s agenda or only received general condemnations.

38. See U.N. CHARTER art. 39; S.C. Res. 748, *supra* note 32; S.C. Res. 1054, *supra* note 30; S.C. Res. 1333, *supra* note 32. Note that the resolutions against Libya and Afghanistan contain strict military sanctions, while the Security Council did not levy any military sanctions against Sudan.

consistency are requirements, or at least desirable features, of any sort of jurisprudence, it is clear that the practice of the Security Council in dealing with international terrorism does not meet any of these qualifications.

In any case, these precedents contribute to the growing perception of international terrorism as a threat to international peace and security. In addition, they move the Security Council to adopt some resolutions that do not deal with particular cases of terrorist attacks but with the phenomenon in general. The two main decisions are Resolutions 1269<sup>39</sup> and 1373, adopted less than two years apart, which contain very different wording.<sup>40</sup> I shall deal with the first of these resolutions in the next paragraphs and leave the second one for the next section.

### *B. A Resolution Dealing with International Terrorism in General*

The end of the Cold War and demise of the Soviet Union spawned new dangers to international peace and security, most urgently terrorism. It also allowed new cooperative forms among former enemies to react to some of the gravest terrorist attacks that occurred during the nineties. These precedents, bolstered by the consociation between Security Council permanent members, permitted the acceptance of a resolution that contained the Council's general approach to terrorism. Passed at the end of the decade, Resolution 1269 viewed terrorism as a new threat to international peace and security, but it was not the first such resolution. Prior to Resolution 1269, the Security Council had adopted Resolutions 286<sup>41</sup> and 635<sup>42</sup> on aerial terrorism. These resolutions were triggered by concrete terrorist actions against aircraft (in fact, Resolution 635 was motivated by the Pan American bombing); however, the Council adopted them without reference to specific cases. Nevertheless, the resolutions' value as precedence is rather limited given their narrow scope and the fact that they basically only request to adopt measures to impede armed deviations and other interference in international civil flights.

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39. S.C. Res. 1269, U.N. SCOR, 54th Sess., 4053d mtg., U.N. Doc. S/RES/1269 (1999).

40. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001). The Security Council adopted Resolution 1373 two weeks after the terrorist attacks on New York and Washington, D.C.

41. S.C. Res. 286, U.N. SCOR, 25th Sess., 1552d mtg., U.N. Doc. S/RES/286 (1970).

42. S.C. Res. 635, U.N. SCOR, 44th Sess., 2869th mtg., U.N. Doc. S/RES/635 (1989).

Resolution 1269 was supposed to be a chart for the international community, showing the path drawn by great powers on the topic of terrorism. At the same time, the basic elements show that agreements within the Security Council did not constitute a significant contribution to traditional forms of cooperation among states.

Even if Resolution 1269 established that terrorism “endangers the lives and well-being of individuals worldwide as well as the peace and security of all states,” it is neither within the frame of Chapter VII of the UN Charter, nor does it refer to the right to self-defense.<sup>43</sup> Accordingly, no use of force is lawful as a reaction to a prior terrorist attack, no matter how massive that attack may be.

The Resolution “unequivocally condemns all acts, measures and practices of terrorism,” but because its specific condemnation addresses only “those which could threaten international peace and security,” it indirectly admits that not all terrorist attacks constitute such a threat.<sup>44</sup>

The Resolution requests that state parties apply existing covenants against international terrorism and cooperate in their framework. It also “call[s] upon” all states in general to do the same. This is clearly a legally irrelevant request because parties already have this duty.<sup>45</sup> The Resolution merely advises non-parties to consider the possibility of adopting the existing covenants as a priority.<sup>46</sup>

It also calls upon all states to take a series of steps to prevent and suppress both terrorist attacks<sup>47</sup> and the preparation and financing of all terrorist acts in their territories.<sup>48</sup> In addition, states

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43. S.C. Res. 1269, *supra* note 39.

44. *Id.* ¶ 1. From the wording of this and later resolutions, one could deduce that the defining element of “international” terrorism is a threat to *international* peace and security (while domestic terrorism would be a kind of terror that does not involve this threat). This is a threat obviously understood, in each particular case, according to the Security Council’s discretionary criteria. Moreover, for the time being, however, the latest of this series of resolutions reaffirms that “terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security.” S.C. Res. 1456, U.N. SCOR, 58th Sess., 4688th mtg., at 2, U.N. Doc. S/RES/1456 (2003). The term *international* is intentionally omitted both to qualify *terrorism* and *peace and security*.

45. S.C. Res. 1269, *supra* note 39, ¶ 3.

46. *Id.*

47. *Id.* ¶ 4.

48. *Id.*

are to deny safe havens and refugee status to terrorists.<sup>49</sup> Finally, states are to engage in information exchange and cooperation in judicial and administrative matters to prevent the commission of terrorist acts.<sup>50</sup> Again, all these requests are non-binding.

Thus, in the most important relevant resolution before September 11th, the Security Council does not oblige states to adopt any binding domestic or international measures against terrorism. Nor does it state anything that was not already in force, at least among certain countries, in the existing covenants against international terrorism. The Resolution's value is more political than legal. It reaffirms the issue in the Security Council's agenda, where it had already appeared entangled among other matters,<sup>51</sup> but this time with a monographic character. In the last paragraphs of the Resolution, the Council announced its readiness to take the necessary steps in the future to counter terrorist threats to international peace and security.<sup>52</sup> The Resolution was a warning against terrorist elements and supporting (rogue) states and it reiterates that the Security Council's prior scattered practice would become more systematic and reliable in the future. The Security Council would take action according to its goals in specific situations and against specific non-complying states and actors. The General Assembly, the appropriate organ, had the responsibility to negotiate, draft, and eventually codify the necessary consensus on the issue in the form of a comprehensive convention. The tragic events of September 11th overturned these assumptions.

#### IV. MEASURES ADOPTED AFTER SEPTEMBER 11TH AND WAR AGAINST TERRORISM

##### A. Security Council Resolution 1373 (2001)

The terrorist attacks of September 11th spurred new and important resolutions by the Security Council. These included,

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49. *Id.*

50. *Id.*

51. As early as January 31, 1992, the Security Council, meeting for the first time at the level of heads of state and government, mentioned international terrorism as one of the new challenges posed to the Council in the fulfillment of its responsibility to maintain international peace and security. See S.C. Res. 748, *supra* note 32, ¶ 1.

52. S.C. Res. 1269, *supra* note 39, ¶ 6.

centrally, Resolution 1373, but also Resolution 1368,<sup>53</sup> adopted the day after the attacks, and Resolutions 1377<sup>54</sup> and 1456, which the Council adopted at the Ministerial level containing formal “Declarations” on the global effort to combat terrorism.

Resolution 1368 condemns the September 11th attacks “[like] any act of *international* terrorism, as a threat to international peace and security;” it also expresses the Security Council’s readiness to take necessary steps to respond to the terrorist attacks.<sup>55</sup> Resolution 1377 goes one step further to declare that “acts of international terrorism constitute *one of the most serious threats* to international peace and security in the twenty-first century.” While Resolution 1456 reaffirms this principle, it concerns “terrorism in all its forms and manifestations.”<sup>56</sup>

The Council expressly linked Resolution 1373 with Resolution 1269 and the need for international cooperation against terrorism.<sup>57</sup> Its preamble has three important differences with its predecessor. First, like Resolution 1368, it confirms that *any act of international terrorism* constitutes a threat to international peace and security.<sup>58</sup> If terrorist activities lack an international dimension, they remain irrelevant to the Security Council (though we shall see that this is not always true). Second, it reaffirms the inherent right of individual or collective self-defense. There is, however, no specific linkage to the September 11th attacks or to any other past or present aggression.<sup>59</sup> Finally, its regulatory section adopts both binding measures,<sup>60</sup> such as the establishing of a counter-terrorism committee,<sup>61</sup> and mere recommendations.<sup>62</sup> These measures do not concern an armed response to the specific attacks suffered by the United States, but

53. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001).

54. S.C. Res. 1377, U.N. SCOR, 56th Sess., 4413th mtg., U.N. Doc. S/RES/1377 (2001).

55. S.C. Res. 1368, *supra* note 53. (emphasis added).

56. S.C. Res. 1456, *supra* note 44, ¶ 2 (emphasis added).

57. S.C. Res. 1373, *supra* note 40, ¶ 1.

58. S.C. Res. 1368, *supra* note 53, ¶ 1.

59. S.C. Res. 1373, *supra* note 40, ¶ 1. The Resolution is framed under Chapter VII of the UN Charter. *Id.*

60. *Id.* ¶¶ 1, 2.

61. *Id.* ¶ 6. The committee consists of all the members of the Security Council and was established to monitor the implementation of the resolution.

62. *Id.* ¶ 3.

with the international community's necessary cooperation in the *war* against terrorism.

There are two categories of measures binding on all states. The first category establishes the duty to prevent, suppress, and criminalize terrorist funding.<sup>63</sup> It also obliges states to freeze terrorists' funds and other assets and to prohibit any person within their territories to make any economic resources in any way available to persons that commit or may commit terrorist acts.<sup>64</sup> The second category concerns terrorist acts themselves, as well as persons with any participation in terrorist activities. The Resolution establishes the duty to "refrain from providing any form of support" to terrorists, "to prevent the commission of terrorist acts,"<sup>65</sup> to "[d]eny a safe haven" to terrorists, and to "prevent their movement."<sup>66</sup> Foremost, the Resolution establishes the duty to ensure that terrorist acts are serious criminal offenses in domestic law and any person participating in them is subject to justice, which reaffirms the principle to extradite or prosecute.<sup>67</sup>

As for the non-binding measures, the Security Council merely "calls upon" all states to: (1) accelerate the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; (2) cooperate to prevent and suppress terrorist attacks and take action against perpetrators of such attacks; (3) become parties to the relevant international conventions relating to terrorism; and (4) avoid granting refugee status to terrorists.<sup>68</sup>

The Resolution's actual relevance is that it overrides the existing framework of conventional cooperation against terrorism, that is, decades of careful and balanced negotiations among states. Resolution 1373 is compulsory to *all* states and concerns international terrorism in *all* its forms and modalities whereas international treaties' preventive and repressive measures *only*

63. *Id.* ¶ 1(a), (b).

64. *Id.* ¶ 1.

65. *Id.* ¶ 2(a), (b).

66. *Id.* ¶ 2(c), (g).

67. *See* S.C. Res. 1456, *supra* note 44. Resolution 1456, adopted by the Council meeting at the level of foreign ministers, confirms that "states must bring to justice those who finance, plan, support, or commit terrorist acts or provide safe havens, in accordance with international law, in particular on the basis of the principle to extradite or prosecute." *Id.* ¶ 3.

68. S.C. Res. 1373, *supra* note 40, ¶ 3.

have sectoral character and apply *only* to state parties.<sup>69</sup> In fact, the Resolution's first paragraph is a copy of the 1999 Convention Against the Financing of Terrorism's essential provisions, while the second paragraph is directly inspired by the common provisions of the treaties mentioned above. The Resolution also contains aspects of the yet to be born comprehensive convention against terrorism.<sup>70</sup> In other words, the Security Council is deciding, by virtue of Chapter VII of the UN Charter, that certain international treaties are mandatory to the international community as a whole, irrespective of its consent.<sup>71</sup> The Council does not circumscribe its decision to a particular state or situation. Therefore, the Council is acting as a global legislator, a role that clearly exceeds its competence within the Charter.<sup>72</sup> The problem is that the treaties on which the Resolution is based define precisely their scope of application, while the Resolution does not contain any definition of "international terrorism." Without a commonly accepted notion, the Resolution will lose much of its impact as states make their own definitions and implement their own provisions accordingly.<sup>73</sup>

It is worth mentioning that after the September 11th attacks, further terrorist actions have deserved the attention of the Council, but it has only condemned such attacks and expressed its deepest sympathies and condolences to the affected people. For example, in the recent terrorist attacks in Bali (Resolution 1438),<sup>74</sup> Russia (Resolution 1440),<sup>75</sup> Kenya (Resolution 1450),<sup>76</sup> Bogotá

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69. S.C. Res. 1373, *supra* note 40, ¶ 2; S.C. Res. 1368, *supra* note 53, ¶ 1; S.C. Res. 1269, *supra* note 39, ¶ 2.

70. See G.A. Res. 109, *supra* note 10, at art. 2.

71. Fernández, *supra* note 26, at 296-97.

72. See Gaetano Arangio-Ruiz, *On the Security Council's Law Making*, 83 RIVISTA DE DIRITTO INTERNAZIONALE 609, 610-11 (Giuffrè eds., 2000).

73. U.N. SCOR, 56th Sess., 4413th mtg., U.N. Doc. S/PV.4413 (2001). In its high-level meeting of November 12, 2001, Mr. Cowen, Foreign Minister of Ireland of the Security Council, insisted on the need to arrive as soon as possible on a precise definition of international terrorism in all its forms and manifestations, while urging every state to sign and ratify the existing legal instruments. Mr. Colin Powell, though, was not so keen on the issue of definition. After describing the September 11th attacks, he said, "Those who seek to define terrorism need look no further.... It was an attack on civilization and religion themselves. This is what terrorism means." *Id.* at 16. These are undoubtedly powerful words, but useless in a legal context.

74. S.C. Res. 1438, U.N. SCOR, 57th Sess., 4624th mtg., U.N. Doc. S/RES/1438 (2002).

75. S.C. Res. 1440, U.N. SCOR, 57th Sess., 4632d mtg., U.N. Doc. S/RES/1440 (2002).



(Resolution 1465),<sup>77</sup> and Madrid (Resolution 1530)<sup>78</sup> the Council referred to what it already considers the current general norm on the fight against international terrorism, that is, Resolution 1373.

### B. Operation Enduring Freedom

As we have observed, the armed action taken by the United States and the United Kingdom against Afghanistan's Taliban regime between October and December 2001, together with their continued presence in the area until the present day, is neither explicitly authorized nor supported by Resolution 1373.<sup>79</sup> Instead, the coexisting *International Security Assistance Force* (ISAF), established by Resolution 1386, has an explicit, though very limited, mandate to assist the new Afghan authorities in maintaining security in Kabul and surrounding areas.<sup>80</sup> Thus, the issue is whether the use of force against the Taliban regime and al Qaeda, under the name of Enduring Freedom, is lawful, and under what international law grounds. Scholars favor two arguments, self-defense and consent by invitation.<sup>81</sup>

#### 1. Self-defense?

The general approach to the lawfulness of Enduring Freedom has been to consider the joint military operation as a means of

76. S.C. Res. 1450, U.N. SCOR, 57th Sess., 4667th mtg., U.N. Doc. S/RES/1450 (2002).

77. S.C. Res. 1456, *supra* note 44.

78. S.C. Res. 1530, U.N. SCOR, 59<sup>th</sup> Sess., 4923<sup>rd</sup> mtg., U.N. Doc. S/RES/1530 (2004).

79. Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT'L & COMP L.Q. 401, 401-02 (2002).

80. S.C. Res. 1386, U.N. SCOR, 56th Sess., 4443d mtg., ¶ 2, U.N. Doc. S/RES/1386 (2001). Resolution 1444 has extended this mission until the end of 2003. S.C. Res. 1444, U.N. SCOR, 57th Sess., 4651st mtg., at 1-2, U.N. Doc. S/RES/1444 (2002).

81. Byers, *supra* note 79, at 401-06; RICHARD FALK, THE GREAT TERROR WAR 9, 59. (2003). Byers adds, for the sake of discussion and without actually making a case, two more possible arguments: (1) some sort of hidden authorization to use force by Security Council Resolution 1373, and (2) humanitarian intervention. Byers, *supra*, at 401-06. On the other hand, though supportive of the self-defense argument, Richard Falk prefers to frame the U.S.-U.K. action under the "just war" doctrine. FALK, *supra*, at 66, 124. This is a view that I think cannot be sustained under modern international law and which runs the risk, which Falk himself acknowledges, of justifying actions that go well beyond this approach: "What makes this issue so serious is that the United States by its actions as global leader sets precedents that are available to others for use in quite different circumstances with far less justification." *Id.* at 97. For instance, "an American attack on Iraq is impossible to justify as a proportionate response to September 11 or because Iraq might in the future help al Qaeda launch future attacks." *Id.* at 125.

collective self-defense against the prior attack on the World Trade Center and the Pentagon. In fact, this interpretation derives from the Security Council's reminder of this inherent right in the preambles of Resolutions 1368 and 1373, and from the international community's general acceptance of this approach.<sup>82</sup> This theory, however, has a number of problems. According to well-established international law,<sup>83</sup> self-defense constitutes a proportional and necessary armed response to a prior or imminent armed attack, which is directed to stop and reject such prior or imminent attack. Thus, only an armed attack can be the basis for self-defense, and not on any other form of use of force. Even so, the armed response must meet a number of requirements in order for the alleged self-defense to be lawful.

Traditionally, a terrorist attack would not justify a military attack against a sovereign state.<sup>84</sup> This notion does not contradict the fact that the use of one state's territory to harbor terrorist groups constitutes an unlawful "use of force" that is forbidden by the UN Charter.<sup>85</sup> It simply means that such use of force does not amount to an "aggression" within the meaning of Resolution

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82. S.C. Res. 1368, *supra* note 53, ¶ 1; S.C. Res. 1373, *supra* note 40, ¶ 1. See Luigi Condorelli, *Les Attentats du 11 Septembre et Leurs Suites: Oú va le Droit International?*, 105 REVUE GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC 829, 840 (2001) (analyzing the debates at the General Assembly and confirming the general acquiescence of Member states to the self-defense argument). Although these opinions are important, the ICJ has reminded us that "[t]he mere fact that states declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those states." *Military and Paramilitary Activities (Nicaragua v. United States)*, 1986 I.C.J. 14, 97 (June 27). Nevertheless, Ratner sees this acquiescence as "highly significant as an indication of contemporary expectations – suggesting something from tolerance to embrace the U.S. legal position," to finally conclude that "[t]he United States has been given leeway with respect to its initial reaction to September 11 because of the gravity of the attack and the flexibility of the norms in the Charter regarding self-defense," but that "tolerance for an expansive view of *ius ad bellum* is not infinitely elastic." Steven R. Ratner, *Jus Ad Bellum and Jus in Bello after September 11*, 96 AM. J. INT'L L. 905, 910, 920-21 (2002).

83. B. Welling Hall, *Terrorist Attacks on World Trade Center and the Pentagon: Addendum Relating to Self-Defense*, ASIL INSIGHTS (Sept. 2001), available at <http://www.asil.org/insights/insigh77.htm>. ("[A]uthoritative views in international law about what constitutes legitimate self-defense [exist]. . . . In response [to the *Caroline Case*], Secretary of State Daniel Webster made the now classic formulation that there must be 'a necessity of self-defence, instant, overwhelming leaving no choice of means, and no moment for deliberation' and that responsive measures must be neither 'unreasonable' nor 'excessive'.")

84. S.C. Res. 1269, *supra* note 39 (confirming this approach).

85. G.A. Res. 3314, *supra* note 15, at art. 1.

3314.<sup>86</sup> In this case, however, the "scale and effects"<sup>87</sup> of the force used by the terrorists justifies a departure from this general rule. September 11th was the most deadly terrorist attack in history, claiming more victims than some full-fledged wars.<sup>88</sup> In my view, this was an act of "aggression,"<sup>89</sup> even if it is difficult to accept that a non-state actor can be legally responsible for such an act.<sup>90</sup>

The armed response must satisfy the conditions of necessity, proportionality, and immediateness.<sup>91</sup> Armed response is a means to stop and reject the armed attack that is subsidiary to the action of the Security Council.<sup>92</sup> The self-defense argument is problematic because it fails to satisfy these requirements. It is in the meeting of these requirements that I find most problems in accepting the self-defense argument.

Operation Enduring Freedom was launched on October 7, 2001, almost one month after the September 11th attacks.<sup>93</sup> In the

86. *Id.* at art. 3(g) ("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."). In our case, everything tends to prove that there was not a "sending" by the Taliban government, but rather "acquiescence" with the perpetrators of the crime. This is a behavior that nevertheless constitutes an unlawful use of force attributable to the former Afghan government. G.A. Res. 2625, *supra* note 15.

87. Military and Paramilitary Activities, 1986 I.C.J. at 93.

88. For instance, the Falkland War, between Argentina and the United Kingdom, in 1982, provoked approximately 900 death casualties. MARTIN MIDDLEBROOK, *THE FIGHT FOR THE 'MALVINAS': THE ARGENTINE FORCES IN THE FALKLANDS WAR 282-83* (1989). The 1999 Kosovo intervention by NATO resulted in a little over 500 casualties. *Civilian Deaths in the NATO Air Campaign*, HUM. RTS. WATCH REP., (Feb. 2000), available at <http://www.hrw.org/reports/2000/nato/index.htm>.

89. Javier A. Gonzalez Vega, *Los Atentados del 11 de Septiembre, La Operacion Libertad Duradera y El Derecho de Legitima Defensa*, 53 REVISITA ESPAÑOLA DE DERENCHO INTERNACIONAL 247, 251 (2001). As Falk puts it, "September 11, as widely observed, more closely resembles the Japanese attack on Pearl Harbor than any previous terrorist event, and thereby sharpened the dominant perception that the attacks needed to be treated as acts of war rather than a disruptive, essentially symbolic, terrorist incidents." FALK, *supra* note 81, at 53.

90. Schrijver notes that "the hijacking and deliberately planned and simultaneous use of various large passenger aircraft, fully loaded with fuel, as flying bombs to attack New York's most prestigious buildings as well as the Pentagon (the nerve centre of the American military), may well be viewed as an 'armed attack' against the United States, if these words are to retain a relevance to new forms of violence." Schrijver, *supra* note 20, at 285.

91. *Id.*

92. U.N. CHARTER art. 41.

93. Gonzalez Vega, *supra* note 89, at 249.

meantime, there was investigation on the origin of the attack,<sup>94</sup> as well as talks with the Taliban regime to surrender Osama bin Laden.<sup>95</sup> Consequently, the armed response was not immediate, unless there was any evidence (which, in any case, has not been disclosed) of an imminent new attack coming from the same source. Rather it was an act of retaliation. Self-defense requires immediateness, and negotiation requires paused conversations and an appropriate environment; therefore, they sound like incompatible notions.<sup>96</sup>

It is arguable that the military operation against the Taliban regime was the only means, or rather, a necessity, in stopping an attack that was instantaneous and already finished. It is also doubtful that the armed response's intensity, including the overthrow of a government and the occupation of a country, is consistent with the proportionality requirement. Despite some official statements,<sup>97</sup> there is evidence of violations of international humanitarian law norms. These norms are unconditional and require deference even if the enemy does not comply with them. Finally, the action's purpose was not to reject the attack but to search and capture the terrorist aggressors and dismantle what had become a haven for terrorists.

Theoretically, the September 11th attacks could have justified self-defense. The argument to legally justify the use of force against Afghanistan's Taliban government, however, is weak because of the circumstances of the attack (instant in nature and of unknown origin) and of the armed response (neither proportional nor aimed at rejecting the attack). The Security Council's implicit support of this argument constitutes a surrender of its responsibilities according to the UN Charter; the right to self-defense exists only after the Council takes appropriate and effective action on the matter.<sup>98</sup> On the contrary, here the

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94. *Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/2001/946 (2001) [hereinafter *Letter Dated 7 October 2001*].

95. See FALK, *supra* note 81, at 65.

96. See Byers, *supra* note 79, at 405-06.

97. *Letter Dated 7 October 2001*, *supra* note 94, at 1-2.

98. FALK, *supra* note 81, at 59 ("In general, the UN Security Council did seem to endorse the right of the US to make an effective response, but in very general terms that left full operational discretion in Washington, thereby abandoning any responsibility for assuring that an American response respected appropriate limits on the use of force.").

"defending" nations inform the Council of the military action<sup>99</sup> and the latter avoids taking any action, instead leaving all responsibility to the former.<sup>100</sup> Moreover, "the extension of the right of self-defense to include action against states actively supporting or willingly harbouring terrorists raises difficult issues of evidence and authority."<sup>101</sup> In the context of a passive or blocked Security Council, "who decides that there is sufficient evidence of State complicity to justify the use of military force?"<sup>102</sup>

## 2. Consent?

The doctrine of consent is a different argument that could support the legality of the armed United States and United Kingdom action in Afghanistan. In fact, this argument could easily justify the continued presence of Enduring Freedom troops (different from the ISAF troops, even if the United Kingdom is involved in both operations) since January 2002. Arguably, the new Afghan government has invited these countries to assist their own meager forces to control the territory and search for Taliban activists. The continued presence of foreign troops and their sporadic armed actions during this period would be undertaken through consent and therefore is not unlawful.<sup>103</sup>

Extending the same argument to the prior action against the Taliban government is difficult. The United Kingdom, United States, and most importantly the UN have not recognized this government.<sup>104</sup> Thus, the use of force against the Taliban could be a response to a call by the *legitimate* Afghan government sitting at the UN, a government that the so-called "Northern Alliance"

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99. U.N. CHARTER art. 51 ("Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council. . .").

100. FALK, *supra* note 81, at 59. It must be underlined that this line of (non) action was again widely accepted by all permanent and non-permanent members of the Council in the high-level meeting of November 12, 2001. Even if only two states mentioned *expressis verbis* the right to self-defense (France and Norway), the rest were absolutely supportive. Only Bangladesh poured some criticism in the role of the Council when saying "it has become all the more necessary for the Council to play its role in a balanced, creative and proactive manner, in line with its Charter obligations." U.N. SCOR, 56th Sess., 4413th mtg., at 18, U.N. Doc. S/PV.4413 (2001).

101. Byers, *supra* note 79, at 413.

102. *Id.*

103. We would probably draw a different conclusion if referring to the respect of international humanitarian law in the course and context of such armed actions (especially concerning the treatment of prisoners of war).

104. See Byers, *supra* note 79, at 403-04; FALK, *supra* note 81, at 59.

incarcerated.<sup>105</sup> Although it may be more persuasive than the self-defense argument, this reasoning still has problems.

Since 1996, the Northern Alliance controlled less than ten percent of the Afghan territory, and thus arguably, was not an effective government.<sup>106</sup> Moreover, the Northern Alliance's legitimacy is questionable because although somewhat more egalitarian than the Taliban regime, its creation was not based on any sort of democratic election. Thus, it is considerably nothing more than another Afghan faction fighting for national power. In fact, the post-Taliban government is not a mere Northern Alliance political wing conglomeration, rather it is the result of lengthy negotiations among four Afghan (non-Taliban) factions leading to the Bonn Agreements in December 2001.<sup>107</sup>

According to the International Law Commission's Draft Articles on State Responsibility, consent constitutes a circumstance that precludes wrongfulness.<sup>108</sup> In this case, there can be no allegation of the circumstances described in the project when they refer to *jus cogens* norms, of which the principle of prohibition of force constitutes a paradigmatic example.<sup>109</sup> The consent in this particular situation was merely implicit since the new Afghan government has only officially asked for military cooperation in December 2001.<sup>110</sup> It is doubtful that implied consent is enough to justify the military action of foreign troops in a sovereign country or that this consent has retroactive character.

My conclusion is that despite the September 11th terrorist attacks, and the permanent threat of new aggressions of this sort, the unilateral use of force against Afghanistan cannot be lawful. Disappointingly, in this particular case, it would have been very easy to overthrow the Taliban and search for al Qaeda members in

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105. See Michael P. Scharf & Paul R. Williams, *Report of the Committee of Experts on Nation Rebuilding in Afghanistan*, 36 NEW ENG. L. REV. 709, 718 (2002).

106. See Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648, 693 (2002).

107. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law Legal Regulation of Use of Force: Terrorist Attacks on World Trade Center and Pentagon*, 96 AM. J. INT'L L. 237, 251-52 (2002).

108. G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 49, at 502, U.N. Doc. A/56/49 (2001).

109. Military and Paramilitary Activities, 1986 I.C.J. at 110.

110. See Press Release, U.N., SC/7248, Security Council Authorizes International Security Force for Afghanistan: Welcomes United Kingdom's Offer to be the Initial Lead Nation (Dec. 20, 2001), at <http://www.un.org/News/Press/docs/2001/sc7248.doc.htm>.

Afghanistan in a legal, institutionally backed manner. In effect, Afghanistan (or its de facto government) had committed a serious breach of international law. Its permissiveness toward well-known terrorist entities' activities was, according to general international law, tantamount to authorship of the terrorist attacks of September 11th.

There were many reasons for the Security Council to act against the Taliban regime before September 11th: the Taliban government was itself a threat to the international peace and security; further, during the few years that they were in power, they probably had the worst record of human rights violations in the world.<sup>111</sup> At anytime before or after September 11th, the Security Council could have justified a collective armed action against the Taliban. Before this date, political interests, including the support of Pakistan (a United States ally in the area), barred the Security Council from adopting anything more than economic sanctions and general condemnations against the country and its outrageous policies.<sup>112</sup> After September 11th, support for United States and United Kingdom force against the Taliban would have undoubtedly obtained a unanimous vote in the Council.<sup>113</sup> A resolution of this sort was not adopted only because the relevant states did not look for it. They preferred to act on their own without seeking legal support from the rest of the world. This attitude constituted willful unilateralism by a hegemonic power in a case where, unlike the Kyoto Protocol or the International Criminal Court, the international community was ready to support its initiatives.<sup>114</sup>

## V. CONCLUSION

The international community needs to strengthen cooperation against the scourge of domestic and international terrorism. The

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111. See Human Rights Watch, *Paying for the Taliban's Crimes: Abuses Against Ethnic Pashtuns in Northern Afghanistan* (Apr. 2002), at <http://www.hrw.org/reports/2002/afghan2/afghan0402.pdf>.

112. See Stephen Coates, *Pakistan Fears Fallout from UN's Afghan Sanctions*, AGENCE FR. PRESSE (Aug. 23, 2001), at <http://www.globalpolicy.org/security/sanction/afgstan/2001/0823pak.htm> (last visited Apr. 22, 2004).

113. See Walter B. Slocombe, *Preemptive Military Action and the Legislative Use of Force: An American Perspective* (Jan. 13, 2003), at <http://www.eusec.org/slocombe.htm>.

114. See Reyko Huang, *Fact Sheet: International Security Assistance Force (ISAF) in Afghanistan*, <http://www.cdi.org/terrorism/isaf.cfm> (last modified Feb. 14, 2002).

partial treaties adopted so far are an important step in that direction, but the recent threat posed by global terrorism demonstrates the urgent need for a new and comprehensive global agreement against terrorism. The appropriate body to negotiate and draft such a convention is the General Assembly and its subsidiary bodies.<sup>115</sup> The appropriate instrument is an international convention, mutually agreed upon by as many members of the international community as possible.<sup>116</sup> The Security Council's actions, though needed and useful in specific situations, cannot substitute the law-making power of the sovereign states. The role of the Security Council is not to become a global legislative power. When it tries to do so, it performs this function in a deficient manner. Without a commonly agreed upon definition of international terrorism, cooperation, even with the Council's binding command, would be ineffective.

On the other hand, the action of the Security Council is still essential to authorize and legitimize the use of armed force in international relations. Notwithstanding the attacks against the United States, there can be no legal justification for operation Enduring Freedom without the Council's explicit consent. Concededly, the vast majority of countries have accepted the self-defense argument. Neither the United States nor the United Kingdom has faced immense legal criticism because of this military operation.<sup>117</sup> The problem is rather one of attitude and precedent. Even where there were sufficient arguments and political will to justify an institutional action against the Taliban regime, the United States and the United Kingdom preferred to undertake a unilateral operation and avoid control from the Security Council. In the aftermath of September 11th, we have lost an opportunity to renew the international commitment to the creation of a new world order based on international law. Not only would this new order have required that facts and evidence justify the use of force,

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115. G.A. Res. 57/27, *supra* note 25, at 1 (reaffirming its power to deal with the topic by stating its conviction "of the importance of measures to eliminate international terrorism by the General Assembly as the universal organ having competence to do so").

116. See S.C. Res. 1456, *supra* note 44. The Security Council agrees that "terrorism can only be defeated, in accordance with the Charter of the United Nations and international law, by a sustained comprehensive approach involving the active participation and collaboration of all states, international and regional organizations, and by redoubled efforts at the national level." *Id.* at 2.

117. Brian J. Foley, *U.S. Campaign Against Afghanistan Not Self-Defense Under International Law*, <http://www.zmag.org.foleylegal.htm>.



as they certainly did in this case, but this order would have also given the use legitimacy through institutional approval.

*Barcelona – Los Angeles, April 2003*