

Terrorism and the Use of Force

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There exist today a number of conventions aimed at combating terrorism. These treat acts of terrorism as criminal acts. However, the events of 11 September 2001 introduced a new dimension into the debate on the use of force in addressing the problem of terrorism. This article discusses whether the UN Security Council has given its approval for the USA's use of force in the wake of 11 September 2001 and whether this use of force can be justified under the right of self-defence. The article's conclusion is that the Security Council has not given its approval. Nevertheless, the USA may invoke the right of self-defence on the basis of the Taliban's support for the terrorists. However, it is important to remember that acts of terrorism ought as far as possible to be addressed through criminal prosecution. Furthermore, any use of force ought to take place under the control of the UN. And we must be on our guard against any erosion of the prohibition against the use of force in international law.

TERRORISM is new neither as a political phenomenon nor as a problem within international law. Physical *force* has been used *for* political motives throughout history, while the concept of terrorism can be traced back at least *to* the period of the French Revolution and Robespierre. In the last century, the assassinations of a number of statesmen during the interwar period led *to* negotiations within the League of Nations. A convention on the prevention and prosecution of terrorism was adopted in 1937, though this never came into *force*.¹

Today, we have 12 important global conventions *for* the suppression of terrorism, as well as a number of regional terrorist conventions. Common *to* these is that acts of terrorism are treated as criminal offences, *to* be dealt with by national *courts* of law. The conventions define the offences that they cover and impose on states a duty *to* investigate such offences and either bring the perpetrators *to* justice or extradite suspects. However, the prevention of terrorism has not been unproblematic in international law. There has been disagreement both about what ought *to* be deemed *to* be terrorism and about whether states may respond with force if they are subjected to a terrorist attack originating from inside the borders of another state.

The events of 11 September 2001 represent a new element within terrorism, in terms of both the objects of the terrorist attacks and the extent of the damage caused. In addition, these attacks were presumed to have come from terrorists with bases in another country, and the attacks were made upon the world's only superpower, one with the capacity and will to strike back.

In this article, I shall first discuss whether the UN Security Council has approved the USA's use of military force against other states in the wake of these attacks and whether the USA might be able to base its use of force on the right of self-defence. In the concluding section,

¹ For the historical background, see Konig (1995).

emphasis is given to the need for preservation of the general prohibition against the use of force in international law.²

Has the Security Council Approved the USA 's *Use of Force*?

Under Chapter VII of the United Nations Charter, the UN Security Council may adopt binding measures against states or authorize the use of military force where it finds that international peace and security are threatened. In connection with acts of terrorism, the Security Council has previously implemented sanctions against Libya, Sudan and Afghanistan.³ However, the council has not previously approved the use of military force in the fight against international terrorism. UN Security Council Resolution 1368 (2001) strongly condemned the terrorist attacks on the USA and declared that such acts were a threat to international peace and security. But does Resolution 1368 recognize the USA's right to exercise force against Afghanistan and other states that may be deemed to have contributed to terrorism? Here, reference may be made to the fact that the resolution acknowledges the right of self-defence: 'Recognizing the inherent right of individual and collective self-defence in accordance with the Charter. ...'. However, it should be noted that the right of self-defence follows from general international law and from Article 51 of the UN Charter. Consequently it does not require approval by the Security Council. The Security Council has been given no role in the exercise of the right of self-defence, other than that this right only applies under Article 51 until the council has 'taken measures necessary to maintain international peace and security'.

Furthermore, the resolution makes no reference to Chapter VII of the UN Charter, and it contains no explicit approval of the use of force. In addition, the formulation concerning self-defence is part of the preamble to the resolution, not its operative part. This is in contrast, for example, to UN Security Council Resolution 678, adopted in 1990 after Iraq's invasion of Kuwait, which in the operative part of the resolution 'authorises' all member-states cooperating with Kuwait to use 'all necessary means' to force Iraq to implement the council's resolutions and restore international peace and security in the region.

The wording of Resolution 1368 has been taken word for word from Article 51 of the UN Charter, and the resolution makes particular reference to the right of self-defence that exists under the terms of the Charter. This can only mean that the Security Council did not take a position on whether the Charter's conditions for the use of force in self-defence had been satisfied in the case then under consideration, in contrast to UN Security Council Resolution 661 (1990), which also made reference to the right of self-defence but at the same time linked this right to 'the armed attack by Iraq against Kuwait'.

It is also relevant that Resolution 1368 was passed on the day following the terrorist attacks, at a time when it was not possible to know with certainty who was behind the attacks or whether they had been planned from abroad. It has the presumption against it that the council should at this time have given unlimited authority for the USA to use force against any state that had connections with terrorism in general or this attack in particular. Nor were either the right of self-defence or the design of the resolution touched upon in statements made in the Security Council in connection with the resolution's adoption, though the USA as the final speaker declared that no distinction would be made between terrorists and those who 'harbor them' in

² An earlier version of this article was published in Norwegian (Ulfstein, 2002). The article was revised and brought up to date for publication in *Security Dialogue*.

³ UN Security Council Resolutions 748 (1992), 1054 (1996), 1267 (1999) and 1333 (2000).

terms of responsibility (United Nations, 2001a). Finally, it may be argued that the use of force is a far-reaching intrusion into state sovereignty and thus ought to require clear legal authority.

Given these arguments, it must be clear that, legally speaking, Resolution 1368 does not in itself approve the use of force on the part of the USA.⁴ It may be claimed, though, that the resolution represents political acceptance of the idea that the use of force in exercise of the right of self-defence may be appropriate in cases of terrorism. However, it is difficult to see that the Security Council could have been expressed its opinion on the right of self-defence in a more noncommittal way than through a simple reference to Article 51 of the UN Charter.

UN Security Council Resolution 1373 (2001) deals with the financing of terrorism and places on member-states a duty to prevent and criminalize such financing. Since this resolution also refers in its preamble to the right of self-defence, it may be asked whether the Security Council therein approved the USA's right to use force in exercise of the right of self-defence. The relevant formulation is: '*Reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001) ...'.

In contrast to the earlier Resolution 1368, this resolution was adopted under Chapter VII, though this may be explained by the fact that the resolution places demands on the member-states that are binding in international law, inter alia with regard to the prevention of the financing of terrorism. Furthermore, in this resolution too the formulation concerning self-defence is found in the preamble, not in the resolution's operative part. The wording of Resolution 1373 is just as general as that of Resolution 1368 and provides no explicit acknowledgement of a right on the part of the USA to use force against a particular state or states in exercise of the right of self-defence. And since no debate took place in the Security Council in connection with the adoption of Resolution 1373, there is no guidance to be found there with regard to how the resolution is to be interpreted (United Nations, 2001b).

It could be claimed that, 17 days after the attacks on the USA, it was clearer who was behind them and that the clues pointed in the direction of Osama bin Laden and Afghanistan. This might suggest that the council approved the right to use force in self-defence against Afghanistan. Here again, however, it is pertinent to point out that it is not part of the Security Council's function to approve the right of self-defence and that, if any such approval were to be given, it ought at any rate to be stated clearly. In any case, legally speaking, to claim such approval would be to read too much into a resolution that, in terms of its wording, exclusively refers to the right of self-defence as it is formulated in Article 51 of the UN Charter (Kirgis, 2001).⁵ The use of such general wording also limits the significance of the resolution as a political ground for legitimizing the use of force by the USA against states other than Afghanistan.

In letters of 7 October 2001, the USA and the UK informed the Security Council, in accordance with Article 51, that actions had been implemented against Afghanistan in self-defence.⁶ In the letter from the USA, however, it was stated that the issue of self-defence might also be relevant with regard to organizations other than Al-Qaeda and states other than Afghanistan. In a press statement from the president of the Security Council, it was announced that the council met at the request of the USA and the UK to be informed of measures that had been taken. The Security Council took note of the letters from the two countries, and its members 'were appreciative of the presentation' (United Nations, 2001d). It has since been claimed that

⁴ .Antonio Cassese (2001) characterizes the resolution as 'ambiguous and contradictory'.

⁵ See also Bring (2001-02).

⁶ .See United Nations (2001c); a similar letter was sent by the United Kingdom.

this should be taken as agreement by the council that the two states were acting in self-defence (Randelzhofer, 2002). However, the president did not explicitly state that the Security Council endorsed the actions taken. Furthermore, a press statement by the president is not equivalent to a decision by the council, nor even equivalent to a formal presidential statement adopted by consensus and read out at a formal meeting of the council. Accordingly, this press statement should not be seen as a formal recognition by the Security Council of the lawfulness of the military actions in Afghanistan.

In UN Security Council Resolution 1377 (2001), the council adopted at the ministerial level a declaration in which reference was made to previously adopted resolutions and the need for implementing measures against terrorism, though without any mention of the use of force. In UN Security Council Resolution 1378 (2001) we also find a formulation that may be relevant in relation to the right of self-defence: '*Supporting* international efforts to root out terrorism, in keeping with the Charter of the United Nations, and *re-affirming* also its resolutions 1368 (2001) of 12 September 2001 and 1373 (2001) of 28 September 2001 ...'. However, Resolution 1378 was not adopted under Chapter VII, and once again the relevant formulation is not actually part of the resolution's operative part. Also, what particularly distinguishes this formulation from the previous ones is that here no actual reference is made to the right of self-defence. Instead, the resolution states that the Security Council supports 'international efforts to root out terrorism'.

It could be argued that since this resolution was adopted after the USA had commenced its military operations against Afghanistan, that use of force must be considered as a part of the international efforts referred to in the resolution. Also, it could be argued that 'to root out' is a very strong term - stronger than, for example, 'to combat' - and that referring to the previous resolutions implies that Resolution 1378 builds on and goes further than them. On the other hand, supporting international efforts is not the same as authorizing them. Nor does the Security Council specifically mention the use of force, either in Afghanistan or elsewhere. Instead, it expresses itself in general terms in relation to 'international efforts' in the plural, with no definite article. And the term 'to root out terrorism' need not be taken to imply the use of force, since it is conceivable that this goal could be achieved without resort to force. Thus, both because this resolution was not adopted under Chapter VII and because authorization of the use of force ought to have a reasonably clear legal basis, Resolution 1378 should not be considered as providing such authorization. In addition, the reference to the UN Charter indicates that the Security Council took no standpoint on whether the conditions for the exercise of the right to use force in self-defence as they are formulated in Article 51 were satisfied.

Politically speaking, however, Resolution 1378 does provide clearer support for the USA's use of force. Yet, here as well it is significant that the resolution does not state precisely which international efforts are to be supported. Nor can the resolution be said to provide support for measures that are of a different nature than those that were in progress against Afghanistan at the time the resolution was adopted: the resolution does not, for example, provide support for the use of force against states other than Afghanistan, be they Iraq or Somalia.

UN Security Council Resolution 1390 (2002) was adopted under Chapter VII, and the wording of its preamble corresponds with that of Resolution 1378 in terms of supporting 'international efforts to root out terrorism'. This resolution, therefore, provides nothing new for an evaluation of whether the Security Council has expressed support for the use of force in exercise of the right of self-defence in efforts directed against terrorism.

In view of the above, it may be concluded that, legally speaking, the Security Council has not *approved* the USA's use of force in exercise of the right of self-defence - neither against Afghanistan nor against other states - in any of its resolutions, (Greenwood, 2002: 309; Charney, 2001: 835; Franck, 2001: 840; Delbriick, 2001: 13-14; Megret, 2002: 375). Nor has the council authoritatively taken a standpoint on whether the conditions for the exercise of the right of self-defence in accordance with Article 51 of the UN Charter have been satisfied. However, the

resolutions may have legal significance as expressions of the Security Council's view that the right of self-defence has not been *impaired* through the council's having taken 'measures necessary to maintain international peace and security' in pursuance of Article 51. Furthermore, the resolutions' coupling of terrorism and self-defence may be a relevant interpretation factor in an evaluation of the right of states to use force on the basis of terrorist acts (see below).

The USA, however, has not asked for legal approval of its military actions. It has preferred to act without formal international recognition. This is consistent with increasing unilateralism on its part, seen in its rejection of the Kyoto Protocol on climate change, the International Criminal Court and other multilateral agreements. All the same, the political support from other states represented by the Security Council resolutions with regard to military measures taken against Afghanistan is welcomed by the USA. But this support has not been given in an explicit form: the Security Council has chosen to make general references to the right of self-defence and measures against terrorism. At the same time, no countries -not even Afghanistan - are specifically mentioned, and explicit reference is made to the provisions of the United Nations Charter concerning the use of force. These resolutions therefore cannot be seen as support for absolutely any military measure against Afghanistan. Nor do they provide political support for the implementation of military measures against states other than Afghanistan.

The Right of Self-Defence

International law lays down a prohibition against the use of force between states. This prohibition is expressed in Article 2(4) of the UN Charter. Above, it was concluded that the Security Council has not approved the use of force in response to the attacks of 11 September 2001 under Chapter VII of the Charter. Therefore, if the use of force in such a case is to be lawful, this must be based on the right of self-defence under Article 51 of that charter. However, disagreement has been voiced about whether terrorist attacks give rise to the right of self-defence.⁷

Article 51 states that the right of self-defence may be exercised if a state has suffered an armed attack. Here, however, we must consider whether the attacks of 11 September were directed against the USA as a state. Damage to buildings, hijacking of aircraft and killings perpetrated by private individuals are normally considered criminal acts, not armed attacks against a state. In terms of the goals behind the attacks -namely, to protest against US policy -it is perhaps true that the attacks on Washington and New York were directed against the USA as a state. However, most terrorist activities have similar aims. In this instance, though, there is a further reason to deem the attacks as directed against the USA as a state: one of the targets of the attacks was the Pentagon, that is to say the USA's defence ministry. Also, the attack on the World Trade Center may in a certain sense also be seen as directed against the USA as a state on account of the symbolic significance of those buildings for the country's economic power.

However, not every instance of the use of force against a state is deemed to be an armed attack under Article 51. There is a requirement that the level of force involved be of a certain magnitude. In the *Nicaragua* case -where the International Court of Justice (ICJ) examined the question of whether the USA was responsible for acts performed by the US-financed contras in Nicaragua -one of the court's rulings was that border incidents could not be deemed to constitute an armed attack upon the state.⁸ On the other hand, several thousand people were killed in the case of the terrorist acts of 11 September 2001, and the attacks were of such a nature that the USA implemented comprehensive defence measures in their wake. This would suggest that the

⁷ See, for example, Gray (2000: 115-119) and Alexandrov (1996: 182).

⁸ See International Law of Justice, 1986: 103.

actions ought on account of their nature and extent to be deemed an armed attack under Article 51 (Delbrück, 2001:16; Megret, 2002: 372).

Article 51 does not explicitly say anything about from where an armed attack must have come if it is to give rise to the right of self-defence. The actions against the USA have been seen as an example of a new kind of threat (asymmetric threat), in which attacks are not necessarily carried out by states but by non-state groups. It may be asked whether it shall be deemed necessary that another state can be connected to such an action in order to give rise to the right of self-defence. Because acting in self-defence entails the right to use force against another state, notwithstanding the general prohibition in Article 2(4) of the UN Charter, such a connection should be required (Megret, 2002: 379).⁹

A state is not usually considered responsible for acts performed by individuals who are not in the service of that state. Nevertheless, there may be instances in which a state ought to be identified with actions carried out by certain groups, even when the latter are not formally affiliated to the state concerned. The question here is what type and level of control over such individuals or groups must a state have in order for them to be deemed to represent that state, with the result that the state is held responsible for their actions under international law.

Returning to the *Nicaragua* case, here the ICJ formulated the issue of responsibility as a question of whether the USA had 'effective control' of what the contras were doing in Nicaragua.¹⁰ However, the requirement of effective control was criticized by the Appeals Chamber of the International Criminal Tribunal for former Yugoslavia (ICTY) in the *Tadic* case, where the questions were whether Serbia was responsible for acts committed by Serbs in Bosnia and, if so, whether events in Bosnia constituted an international conflict. Here, the tribunal took the view that the ICJ's requirement for effective control was in conformity neither with provisions relating to state responsibility nor with court and state practice.¹¹ The tribunal came to the conclusion that effective control was not required: 'overall control' was sufficient¹²

In Article 8 of its draft provisions relating to state responsibility (3 August 2001), the UN International Law Commission (ILC) proposed that the condition for state responsibility for the acts of groups of persons is that these groups are acting under the 'instruction', 'direction' or 'control' of the state in carrying out the acts concerned.¹³ The commission took its point of departure in the requirement for control established by the ICJ's ruling in the *Nicaragua* case. It disagreed with the ICTY's criticism of this judgement on the grounds that the questions of law and fact were different in that case, in that the ICTY's role is to apply humanitarian law, not to take a view on the question of state responsibility (International Law Commission, 2001: 196-197).

Another of the ILC's draft provisions that may allow for respo 1 the part of groups of persons is Article 4(2), which provides that [de facto act on behalf of a state should also be considered as or! state, and that the state concerned should thereby be held responsible for the actions of such organs (International Law Commission, 2001: 90)

That noted, the exact relationship between AI-Qaeda and t authorities is somewhat

⁹ On the other hand, Franck argues that '[if] the Council can act against Al Qaeda, so can an attacked state' (Franck, 2001: 840), and Greenwood argues that 'it would be a strange formalism which regarded the right to take military action against those who caused or threatened such consequences as dependent upon whether their acts could somehow be imputed to a state' (Greenwood, 2002: 307).

¹⁰ 10 International Court of Justice, 1986: 65, para. 115; see also paras 109 and 110.

¹¹ *Prosecutor v. Tadic*, 38 International Legal Materials 1999: 1540-1546.

¹² *Prosecutor v. Tadic*, 38 International Legal Materials 1999: 1546, para. 145.

¹³ International Law Commission, 2001: 104. See also Crawford (2002). The ILC's proposal was noted by the UN General Assembly in Resolution 56/83 of 28 January 2002, and the draft provisions appear in an accompanying Annex to the resolution.

unclear. There is nothing to suggest that Al-Qaeda was formally a part of the Afghan state apparatus. On the one hand it is clear not only that Afghan authorities tolerated Al-Qaeda's activities on Afghan territory, but also that there were close ties between the state and the organization. However, it is more difficult to argue that Afghanistan 'directed or controlled the specific operation and the conduct complained of was an integral part of that operation' in accordance with the commentary to the ILC's Article 8, or that Al-Qaeda ought to be considered as organ of the Afghan state pursuant to Article 4(2). Nor are there grounds for asserting that the Afghan authorities recognized and accepted, terrorist actions as their own pursuant to the commission's draft Article 11. There is even less reason to consider Al-Qaeda or individuals with that organization as part of the state apparatus of Afghanistan. This suggests that neither Afghanistan nor any other state ought to be deemed responsible for the attacks on the USA on the basis of the argument that the terrorists, under the terms of international law acting on behalf of such states.

Nevertheless, states may be held responsible for failing to prevent certain actions carried out by individuals, including terrorist acts. UN Assembly Resolution 2625 (XXV) (1970) -the 'Friendly Relations' -lays down that member-states shall not tolerate the use of their territory for terrorist acts.¹⁴ UN General Assembly Resolution 49/60 (1994), on 'Eliminate International Terrorism', also contains a prohibition against allowing the preparation of terrorist acts that are to be carried out on the territory of other states.¹⁵

It is true that UN Security Council Resolution 1269 (1999) on international cooperation against terrorism was not adopted under Chapter VII therefore not binding. However, it refers to UN General Assembly 49/60 and 'calls upon' the member-states to implement all measures, among these being to prevent the preparation of acts of terrorism within their territory. We also have the Security Council resolutions that were specially directed against Afghanistan:¹⁶ two of these were adopted under Chapter VII¹⁷ and specify that Afghanistan's territory should not be allowed to constitute a free area for terrorists.

Support for terrorism or allowing the use of a state's territory by terrorists must on this basis be deemed to be contrary to international law, and it may also be contrary to the UN Charter's prohibition against the use of force. (In the case of Afghanistan, such conduct would also be contrary to binding Security Council resolutions.) However, this does not necessarily entail that the breach of international law constituted by such support means that a state may be attacked by virtue of the right of self-defence that exists under Article 51 of the UN Charter. This distinction between a state's responsibility under international law for providing such support and the right of other states to use force against such a state is not often made clear in the literature on international law (Greenwood, 2002: 313; Franck, 2001: 841; Delbrück, 2001: 15).¹⁸

In the *Nicaragua* case, the ICJ stated that 'substantial involvement' in sending irregular forces into another country may be deemed an armed attack giving rise to the right of self-defence.¹⁹ It

¹⁴ See also UN General Assembly Resolution 42/22 (1987) ('Declaration on the Right to Self-Determination').

¹⁵ See also UN General Assembly Resolution 51/210 (1996) ('Measures to Eliminate International Terrorism'), chapter I, para 5.

¹⁶ UN Security Council Resolutions 1189 (1998), 1214 (1998), 167 (1999) and 1333 (2000). ¹⁷ UN Security Council Resolutions 167 (1999) and 1333 (2000). ¹⁸ But see Mégret (2002: 382-383).

¹⁷ UN Security Council Resolutions 167 (1999) and 1333 (2000)

¹⁸ But see Mégret (2002: 382-383)

¹⁹ See International Court of Justice, 1986: 103, para. 195.

must also be firmly kept in mind that failure to respect the prohibition against accepting the presence of terrorists on a state's own territory does not necessarily mean that the actions of such groups can be considered as an armed attack that might constitute grounds for the use of force in the form of self-defence. Even though in the case of Afghanistan there was close contact between the authorities and Al-Qaeda, there is little to suggest that the terrorists who attacked the United States were sent by the authorities, that they were acting on behalf of those authorities or that the authorities were substantially involved in sending them in the manner required in the Nicaragua judgement.²⁰

But have other conditions been set for exercise of the right of self-defence since 11 September 2001?²¹ It might be argued that the Security Council, through its linking of the attacks against the USA and the right of self-defence in Resolution 1368 and subsequent resolutions, has authoritatively stated that support for terrorists in the form of allowing the use of a state's own territory for planning and training for terrorist actions may give rise to the right of self-defence. It is true that the Security Council does not have a formal role in interpreting the UN Charter, but the council does have a special function in preserving peace and security in the world community. Reference may also be made to the fact that the USA's right to exercise the right of self-defence in the wake of the attacks of 11 September 2001 has been approved both by NATO and by a large number of other states in the world.²² Finally, there are sound equitable grounds to support the view that a state ought in certain instances to be able to use force if another state does not have the will or ability to address acts of terror originating from its own territory.

But, even so, this cannot be taken to grant an open right for any state that wishes to exercise the right of self-defence against any other state that does not take sufficient steps to combat terrorism on its territory. Such a right would undermine the general prohibition against the use of force in international law. A right of humanitarian intervention, as in Kosovo, is open for abuse, but the danger of undermining the general prohibition is no less if states are permitted to respond to terrorist attacks with armed force. It has been claimed that approximately 60 countries support terrorists, and US officials have designated certain countries as 'rogue states'.²³ Worryingly, since the USA has opened up for the possibility of 'pre-emptive action', the threshold for the use of force by the USA appears to be lower than the requirements of international law.²⁴

In questions concerning the use of force, the legal point of departure must be the general prohibition against the use of force unless such use has been approved by the Security Council. This means that an argument of self-defence ought to be applicable only in extreme situations. And, even in response to the attacks of 11 September 2001, the USA and its allies cannot simply call on the right of self-defence to legitimize the use of force against states other than Afghanistan. It was Afghanistan that housed Al-Qaeda and it was Afghanistan alone that was

²⁰ See also Randelzhofer (1994: 674) on the view that the Nicaragua judgement's 'substantial involvement' should be interpreted restrictively.

²¹ See Cassese (2001: 997); see also Bring (2001/02: 251): 'En ny supplementarande självförsvarsnorm är på väg att etableras' [A new supplemental self-defence norm is in the process of being established].

²² The North Atlantic Treaty Council (2001) resolved on 12 September 2001 that if the attack against the USA 'was directed from abroad', this should be deemed to trigger collective self-defence under Article 5 of the North Atlantic Treaty. On 2 October 2001, NATO's Secretary General announced that, on the basis of information provided by the USA, the NATO Council had ascertained that the attack 'was directed from abroad'. See also the resolution passed by the foreign ministers of the member-states of the Inter-American Treaty of Reciprocal Assistance on 21 September 2001, which declared that the attacks were to be considered as 'attacks against all American states' (Inter-American Treaty of Reciprocal Assistance, 2001).

²³ In a speech entitled 'Beyond the Axis of Evil', US Under-Secretary of State John Bolton added Cuba, Libya and Syria to the list of so-called rogue states -Iraq, Iran and North Korea (BBC News, 6 May 2002; available at <http://news.bbc.co.uk/2/hi/world/americas/1971852.stm> [28 August 2002]).

²⁴ President George W. Bush at the US Military Academy at West Point, New York on 1 June 2002; see <http://usinfo.state.gov/topical/pol/terror/0206020t.htm> (21 August 2002). See also Kirgis (2002).

made the object of the binding resolutions discussed above (Schrijver, 2001: 271,286; see also Farer, 2002: 359).

The right of self-defence is subject to further limitations that follow from international customary law. In this connection, reference is usually made to the classic *Caroline* case from 1837, where the US secretary of state formulated the requirements of burden of proof, immediacy, necessity and proportionality.²⁵ Even though this case goes back to a time before there was any prohibition against the use of force in international law, these conditions are still considered to be legally valid (Dinstein, 2001: 183).

To begin with, it is the USA that must bear the burden of proof in terms of establishing that the factual basis for being able to exercise the right of self-defence is present (Charney, 2001: 836; Megret, 2002: 380-381).²⁶ Furthermore, force may not be used for purposes of revenge or punishment, only self-defence. International law does not permit the use of force as a reprisal. However, in the present instance, there is a great deal of evidence to support the view that the USA was involved in a conflict with those behind the actions of 11 September 2001, and that this conflict was not brought to an end with the attacks on the USA. Hence, the US actions may be regarded as defence against an ongoing attack.

The requirements of necessity and proportionality are supported in the *Nicaragua* judgment²⁷ and in the ICJ's advisory opinion on the legality of the threat or use of nuclear weapons (the *Nuclear Weapons* case).²⁸ The requirement of necessity means that force may only be used if no other means are available. The requirement of proportionality means that, even though the actions carried out against the USA were heinous, there are limits to the type and degree of military action that can be justified by this: the USA does not have a free hand to respond however it sees fit, regardless of civilian casualties and irrespective of damage to the property of civilians. In the *Nicaragua* case, the court was of the opinion that assistance from Nicaragua to the revolutionary movement in El Salvador did not provide grounds for the USA's mining of Nicaraguan harbours and its attacks on harbours, oil installations, etc.²⁹ In addition, the law of war sets further restrictions on the measures that may be implemented (Greenwood, 2002: 313-316).³⁰

In relation both to necessity and to proportionality, it may be asked whether invasion of a country like Afghanistan with the purpose of overthrowing its government -true enough, with local support -is in conformity with international law. Here, the point of departure must be that an external state only has the right to 'neutralize' individuals or groups responsible for attacks made upon that state, in this instance Al-Qaeda. However, in this particular instance, there do exist grounds for arguing that the Afghan authorities' extensive cooperation with Al-Qaeda justified the extension of the use of force to include them.³¹

²⁵ The relevant diplomatic note from the USA has been reproduced in Dixon & McCorquodale (2000: 562).

²⁶ On the other hand, see Franck (2001: 842) on the view that 'a victim state and its allies' may exercise 'their own, sole judgments in determining whether an attack has occurred and where it originated'.

²⁷ See International Court of Justice, 1986: 94, para. 176.

²⁸ See International Court of Justice, 1996: 226, para. 41.

²⁹ See International Court of Justice, 1986: 122, para. 237.

³⁰ On the USA's use of 'military commissions' to try individuals accused of terrorism, see *American Journal of International Law* 96(2): 320-359, which contains contributions from Daryl A. Mundis, Ruth Wedgwood, Harold Hongju Koh, Joan Fitzpatrick and Michael J. Matheson.

³¹ See Schrijver (2001:290): 'But targeting the overthrow of the Taliban regime would be beyond the scope of self-defence and hence unlawful: Cassese argues: 'Force *may not* be used to wipe out the Afghan leadership or destroy Afghan military installations and other military objectives that have nothing to do with the terrorist organizations,

Evaluation

As far as possible, we should stick firmly to the view that terrorist acts are criminal offences. It is up to states to prevent terrorism, inter alia by means of prosecution. The more effective the efforts to combat terrorism through combating crime, the less pressure there will be to use military force. Alongside ongoing negotiations on a general convention on terrorism in the UN³² the EU has adopted a Framework Decision on Combating Terrorism,³³ and a number of countries have passed, or are in the process of producing, more effective legislation against terrorism. The difficult weighing and balancing in this work is to avoid encroachment on fundamental human rights, such as freedom of expression and guarantees of legal safeguards.

The use of force should to the greatest possible extent be brought under international- that is to say UN -control. This is in the interests of the international community, while the USA also needs an effective UN in order to secure political support and legitimacy for the use of force. In contrast to the case of Kosovo, there is every reason to suppose that the Security Council would have been willing to authorize the use of force in Afghanistan. However, the USA clearly preferred a strategy of trying to secure the political support of the UN without having its use of force anchored in and brought under the control of the UN (Charney, 2001: 835-837; Delbrück, 2001: 21-22; Mégret, 2002: 395-396).

Furthermore, resolutions of the Security Council should be designed and interpreted in such a way that the general prohibition against the use of force is not undermined. If force is used on the basis of an implicit or extended interpretation of a Security Council resolution, this may have the additional effect of making it more difficult to achieve agreement on future resolutions in the council. The continual bombing of Iraq by the USA and the UK since 1991 may serve as an example of the use of force on a dubious basis in international law (Lobel & Ratner, 1999: 154; Gray, 2002: 11; Byers, 2002: 23-27, 40).

Finally, it is important that the prohibition against the unilateral use of force is not weakened. While on the one hand, it should be appreciated that a state cannot passively accept that terrorists can freely use bases in other countries for attacks on their territory, any dilution of the restrictions on the use of force in international law may in itself constitute a threat to international peace and security and may open the door to misuse of military force (Farer, 2002: 363; Mégret, 2002: 384, 397-399; Byers, 2002: 36, 38-39).

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unless the Afghan central authorities show by words or deeds that they approve and endorse the action of terrorist organizations' (2001: 999).

³² Under the terms of UN General Assembly Resolution 56/88, adopted on 12 December 2001, the Ad Hoc Committee on the drafting of a terrorism convention shall continue to elaborate a comprehensive convention on international terrorism as a matter of urgency; see <http://www.un.org/law/terrorism/index.html> (28 August 2002).

³³ Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA); available at http://ue.eu.int/jai-1o/EN/ST006128_020RIEN.PDF (11 March 2003).

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