

TERRORISM, STATE RESPONSIBILITY AND THE USE OF ARMED FORCE

René Värk

dr. iur., Associate Professor of Constitutional and International Law at the Estonian National Defence College, Assistant Professor of International Law at the University of Tartu, Legal Adviser (reserve) to the 1st Estonian Infantry Brigade, rene.vark@mil.ee

ABSTRACT. Terrorism has become an especially pressing security problem, both domestically and internationally, over recent decades. States have considered terrorism also as a national security threat that requires military action. Although the rules on the use of armed force were traditionally for inter-state relations, it does not mean that states may not use armed force in the conflict with terrorist non-state actors. Indeed, it would be absurd to claim that states may not exercise self-defence or employ collective security system merely because the adversary is a non-state actor. This demands a more innovative interpretation and use of existing international legal system, while not jeopardising its foundations in the process.

Key words: *terrorism, state responsibility, non-state actors, use of armed force, self-defence, collective security.*

Introduction

Terrorism has plagued mankind for more than two thousand years but it has become an especially pressing security problem, both domestically and internationally, in recent decades. The most significant milestone was the terrorist attacks against the United States on 11th September 2001. Since then we regularly hear about terrorist groups, terrorist acts and potential terrorist threats – terrorism has become an inseparable part of contemporary everyday life.

Terrorism can be viewed from either a law enforcement or a military perspective. The former considers terrorism as a criminal activity that falls under the responsibility of domestic law enforcement authorities while the latter perspective regards terrorism as a national security threat that demands military action. This article is about the military perspective. States and the international community, faced with the extreme threats of contemporary terrorism, have expressed a willingness to exercise self-defence in order to anticipate or retaliate against terrorist attacks as well as to employ the measures provided by a collective security system. The decision to resort to these means may appear attractive for political or similar reasons, but it

involves numerous (legal) complications. For instance, non-state actors do not have their own territory – they are located in state territory – and therefore every use of armed force against such actors is also a use of armed force against the host state. One should not take lightly the decision to engage militarily with another state; the latter has to bear (legal) responsibility for the conduct of the non-state actor or its substantial involvement therein.

Exercising self-defence and employing a collective security system is complicated because we lack a “universal language” on terrorism. Today, terrorism is so frequently spoken about that one cannot blame people for thinking there is a consensus on what terrorism means. However, if examined more closely, it becomes apparent that there is no common understanding of terrorism at all and, as a result, no common understanding of the enemy in the “war on terror”. No global treaty dealing with the prevention and punishment of acts usually perceived as terrorism expressly uses the words “terrorism” or “terrorist” when defining these particular acts; at the most, these words are mentioned in the title and/or preamble.

The term “terrorism” is imperfect, emotionally charged and politically influenced. Labelling someone as a terrorist often reveals more about the one using the label than the one being labelled. Terrorism is more likely to refer to a socio-political conviction than to describe a phenomenon. Nevertheless, persons or groups are too easily considered terrorists, states are too easily accused of using or supporting terrorism and human rights are too easily restricted by claiming that such measures are necessary in order to fight terrorism. The absence of a generally accepted definition of terrorism contributes to legal uncertainty as well as undermining the states’ credibility and the legitimacy of their conduct in the “war on terror”. Besides problems of definition, there is another factor which adds to the complexity of terrorism – the latter can be practiced in different forms. Generally, we can identify three forms. At the extreme ends of the scale there are purely state and purely private terrorism, while the most troubling form is the grey area in between. This type of terrorism is perpetrated privately, but unofficially supported or directed by states. This third form of terrorism is especially troubling in the light of the traditional norms and principles of international law.

It is clear that a state cannot be held equally responsible for whatever relations with terrorism. Not every situation provides the right to use armed force as a form of self-defence or as a coercive measure within the collective security system. Every counter-measure must be a necessary and proportional reaction to terrorist attack, its threat or its consequences. The absence of clear rules and restrictions leaves states less interested in dealing with the causes of terrorism; forceful counter-measures will simply become a convenient and robustly effective choice. At the same time, we cannot deny that terrorism shakes our previous beliefs and demands innovative interpretation in order to bridge these legislative gaps. Indeed, international law cannot remain static, it

has to find ways to adapt and modernise itself without jeopardising the foundations of international relations and the legal system in the process.

This article examines whether and under which circumstances states may use armed force in the fight against terrorist non-state actors. To find the answers, several interrelated topics are discussed. On the whole, the international fight against terrorism must be based on a common understanding of what terrorism is in order to ensure legal certainty and avoid abuse. The use of armed force must respect previously agreed fundamental principles, even in the context of terrorism; terrorism does not justify a “fresh start” in the form of hastily inventing completely new principles. Before making decisions in the framework of self-defence and the collective security system, one must first identify applicable obligations in preventing terrorism under international law and must then examine whether such obligations have been breached and what counter-measures are appropriate in the circumstances. In practice, states are instead resorting to political arguments that are neither transparent nor predictable and may destabilise the domestic and international situation.

This article looks at international terrorism from the perspective of international law, more specifically the perspective of regulations concerning state responsibility and the use of armed force. Domestic (criminal) law aspects are touched upon only to the extent necessary to explain states’ international obligations when fighting terrorism. International terrorism generally requires that its perpetrators come from one state and commit terrorist acts in another state, but this may also be supported by a third state. Because states usually do not practice terrorism directly but use non-state actors instead, this article focuses on aspects relating to terrorist non-state actors.

1. Concept of Terrorism in International Law

1.1. Different Approaches to Terrorism

Terrorism can be approached from a law enforcement or military perspective. The first is older and was previously dominant,¹ but in the 1980s states began to argue that traditional law enforcement mechanisms are sometimes inadequate in the fight against terrorism and that the military has to take over responsibility for combating this threat.² Both perspectives have

¹ See **Bassiouni, M. C.** 2002. Legal Control of International Terrorism: A Policy-Oriented Assessment. – Harvard International Law Journal, 43, pp. 88–96 for the measures applied and their critical assessment.

² **Livingstone, N. C.** 1990. Proactive Responses to Terrorism: Reprisals, Preemption, and Retribution. – International Terrorism: Characteristics, Causes, Controls. Ed. C. W. Kegley, Jr. London: Macmillan, pp. 219–220.

positive and negative aspects.³ Law enforcement ensures a thorough investigation and court proceedings with appropriate legal guarantees, but this has turned out to be ineffective on numerous occasions as terrorists have taken advantage of legal loopholes and the lack of international co-operation.⁴ One can reasonably argue that terrorism is more than just a crime; terrorists are enemies of the state who threaten the political regime and governments may resort to more serious measures when defending the state. The decision to use the military is a political one that is not necessarily based on “evidence” acceptable in a court of law. Therefore it is easier to use military force than law enforcement as the former can address the problem in a more robust manner “to get things done”. Although a potential advantage, the political decision-making process and this much lower standard of evidence are also open to abuse. However, the protection of national security means that risks are taken and mistakes are sometimes made, but this is the price one has to pay. Judges, prosecutors and attorneys may have the luxury to weigh up all evidence in detail and take their time, but this approach can have devastating effects in the event of actual threats to national security. In practice, states use different approaches in different situations and not all terrorist acts or groups warrant military action.⁵ Nevertheless, one must realise that the use of force has become a real alternative which states are increasingly prepared to resort to.

1.2. Defining Terrorism

States are willing to use armed force to fight terrorism, but do they have a clear understanding of terrorism? Interestingly, states are prepared to retroactively label someone or something as a terrorist or terrorism but are not able to describe it beforehand. Is terrorism indefinable? Might states argue that they will know terrorism when they see it?⁶ The absence of a generally accepted definition causes legal uncertainty as well as undermining a state’s credibility and the legitimacy of their conduct in the “war on terror”. Even so,

³ **Erickson, R. J.** 1989. *Legitimate Use of Military Force against State-Sponsored International Terrorism*. Maxwell Air Force Base: Air University Press, pp. 47–57.

⁴ For example, **Maogoto, J. N.** 2005. *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror*. Aldershot: Ashgate Publishing, p. 53; **Bassiouni** 2002, pp. 92–93.

⁵ See **Silke, A.** 2003. *Retaliating against Terrorism. – Terrorists, Victims and Society: Psychological Perspectives on Terrorism and Its Consequences*. Ed. A. Silke. Chichester: Wiley, pp. 215–231 for the inappropriateness of military measures.

⁶ Paraphrasing Associate Justice Potter Stewart of the United States Supreme Court who asserted in relation to pornography that he could not define it, but he knew it when he saw it. **Jacobellis v. Ohio**, United States Supreme Court, Judgment, 22 June 1964, 378 US 184 (1964), p. 197.

states have attempted to define terrorism albeit with limited success. They have taken two paths: a more idealistic path that would lead to a generic definition and a more pragmatic path where states deal with specific types of terrorist acts one by one. Global efforts are complemented by regional initiatives that have produced results more easily, but are somewhat biased and reflect political preferences.

The first attempts to define terrorism were made in the 1930s⁷ and since then there have been numerous proposals for a generic definition,⁸ but none has gained the necessary approvals and has accordingly become generally legally binding. The main obstacle has always been the divisive idea that “one man’s terrorist is another man’s freedom fighter”. A significant number of states believed that those fighting for freedom from colonial or other foreign power may use means and methods which are otherwise prohibited by the law of armed conflict (as a general term, covering all rules related to armed conflicts) because they are in an inherently weaker position. This approach was implicitly endorsed by the United Nations General Assembly – it was aware of such questionable means and methods, but still reaffirmed “the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination” and upheld “the legitimacy of their struggle, in particular the struggle of national liberation movement, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations”.⁹ This approach was reaffirmed annually from 1972 for two decades¹⁰ and reflected the split between the western world on one hand and socialist, Islamic and non-aligned blocs on the other hand. In addition, the western world was not ready to accept the possibility that the armed forces can commit terrorist acts.

When references to self-determination and the legitimacy of struggle were finally dropped in 1993¹¹ and the General Assembly unequivocally condemned all acts, methods and practices of terrorism because they constitute a grave violation of the United Nations Charter and may pose a threat to international peace and security,¹² hopes ran high that finally states would be able to agree upon a generic definition of terrorism. But these hopes were not met with results and even the events of 11th September 2001 that provoked

⁷ Convention for the Prevention and Punishment of Terrorism, Geneva, 16 November 1937, never entered into force, 19 LNOJ 23.

⁸ For example, Draft Convention for the Prevention and Punishment of Certain Act of International Terrorism, UN Doc A/C.6/L.850 (1972).

⁹ GA Res 3034 (XXVII), 18 December 1972.

¹⁰ GA Res 32/147, 16 December 1977; GA Res 34/145, 17 December 1979; GA Res 36/109, 10 December 1981; GA Res 38/130, 19 December 1983.

¹¹ GA Res 48/122, 20 December 1993.

¹² GA Res 49/60, 9 December 1994, Annex.

unprecedented solidarity within the international community did not result in more than the Draft Comprehensive Convention against International Terrorism.¹³ It declares that it is essentially terrorism if a person, by any means, unlawfully and intentionally, causes:

- (a) Death or serious bodily injury to any person; or
 - (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
 - (c) Damage to property, places, facilities or systems referred to in [the previous paragraph] resulting or likely to result in major economic loss;
- when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.¹⁴

There is no doubt that this is a notable achievement and provides a good definition, but states continue to disagree hopelessly over whose actions should be covered by this convention. Perhaps the most controversial position is that the activities of armed forces during an armed conflict, as those terms are understood under the law of armed conflict, are excluded,¹⁵ but similar activities perpetrated by other parties to the conflict are not. The author believes that a balanced approach is needed and all legitimate parties of an armed conflict, e.g., recognised national liberation movements, should have equal standing, whatever that may be. Furthermore, the exclusion of certain types or forms of terrorism is not in conformity with the General Assembly and Security Councils unequivocal condemnations of all acts, methods and practices of terrorism, by *whomever* and *wherever* they be committed.¹⁶ However, because committing such acts usually perceived as terrorism is already prohibited under the law of armed conflict¹⁷ the inclusion or exclusion of the activities of armed forces is mostly emotional and symbolic.

Since 1963 states have adopted 13 treaties dealing with specific terrorist acts like hijacking, kidnapping and nuclear terrorism.¹⁸ Because these are not politically sensitive acts, states have managed to reach pragmatic solutions. They have defined these acts as criminal (the words “terrorism” and “terrorist” are avoided) and have applied the *aut dedere, aut iuricare* principle requiring

¹³ See UN Doc A/59/894 (2005), Annex II for the latest draft.

¹⁴ *Ibid*, Article 2(1).

¹⁵ *Ibid*, Article 20(2).

¹⁶ For example, GA Res 49/60, 9 December 1994; SC Res 1269, 19 October 1999.

¹⁷ Protocol Additional (I) to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, entry into force 7 December 1978, 1125 UNTS 3, Article 51(2).

¹⁸ For example, International Convention against the Taking of Hostages, New York, 17 December 1979, entry into force 3 June 1983, 1316 UNTS 205.

states either to extradite or prosecute the perpetrators of these acts. On comparing specific definitions with the draft generic definition, one cannot help but notice that the former is covered by the latter. Hence a generic definition is in fact possible; the problem is definitely about the range of potential perpetrators as mentioned above.

The Security Council's contribution to defining terrorism has been limited. However, in 2004 it unanimously adopted a resolution that recalled that "criminal acts, including those against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism", are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.¹⁹ This provision does not, strictly speaking, give a definition but simply *recalls* something that is quite obvious. Before this resolution was adopted some states remarked that the intention was not to officially define terrorism.²⁰ However, we cannot simply set aside this resolution because it was adopted *expressis verbis* under Chapter VII powers, which definitely allow the Security Council to impose legally binding obligations.²¹

Although states have not been able to adopt a treaty law definition, there remains the question of whether efforts over decades have generated a customary law definition instead. Customary law as a primary source of international law requires two elements: constant, uniform and general state practice (objective element) and the conviction by states that such practice reflects a legal obligation (subjective element).²² Proponents use mainly three arguments to support the existence of a customary law definition: (1) globally and regionally adopted treaties contain definitions that have similar elements; (2) year on year General Assembly resolutions repeat a definition of terrorism that is very similar to the one in the Draft Comprehensive Convention; (3) many domestic legal acts have similar definitions to those in the previously

¹⁹ SC Res 1566, 8 October 2004, para. 4.

²⁰ See UN Doc S/PV.5059 (2004); UN Doc S/PV.5059 (Resumption 1) (2004) for the discussion.

²¹ Charter of the United Nations, Articles 25, 48, 49.

²² *North Sea Continental Shelf* (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands), Judgment, ICJ Reports (1969) 3, para. 77; *Continental Shelf* (Libyan Arab Jamahiriya/Malta), Judgment, ICJ Reports (1985) 13, para. 27.

mentioned legal instruments.²³ The author is sceptical that there is such a definition yet – the objective element may be satisfied, but the subjective element is still missing. Global and regional treaties can indeed contribute to the generation of customary law by constituting state practice, but one should be careful when making far-reaching claims. Treaties, as a basis for the generation of customary law, are problematic because (1) when accepting treaty obligations states admit the absence of previous customary law obligations since the treaty creates new obligations (unless the treaty is codifying customary law) and (2) if not mentioned explicitly, one cannot assume that the treaty reflects customary law.²⁴ States have tried for years to adopt a generic definition of terrorism and have failed. How can one claim that there exists necessary *opinio iuris*? In other words, states have failed to adopt a treaty law definition, but at the same time have unconsciously generated a customary law definition. This is unlikely. Moreover, state practice varies because global, regional and domestic definitions differ in terms of perpetrators, motivation and covered acts. Despite the lack of progress, states remain committed to the process of preparing the Draft Comprehensive Convention to “fill existing gaps”, “complete and strengthen the current legal regime” and “supplement the existing conventions dealing with terrorism”.²⁵ The General Assembly also encourages states to adopt the convention.²⁶ If there were indeed a customary law definition, why would the international community concern itself with the onerous task of adopting a new treaty that is so difficult to agree upon? In conclusion, it is too early to claim that international law has a customary law definition of terrorism, but developments are moving in the right direction.

Terrorism in the present context has several inherent and generally acknowledged characteristics: (1) causing serious harm or death to persons or serious damage to property; (2) provocation of a state of terror in a wider audience than direct victims; (3) coercion of a government, an international organisation or a person; (4) intentional activity to further certain objectives; (5) transnational nature. Accordingly, the author proposes a possible definition as a basis for the rest of his analysis: terrorism is the unlawful transnational use or threat of violence or armed force against persons or property with the intent to provoke a state of terror in the general public or to coerce a government, an international organisation or a person to act or to abstain from acting in a specific manner, in pursuit of political objectives.

²³ For example, **Cassese, A.** 2006. The Multifaceted Criminal Notion of Terrorism in International Law. – Journal of International Criminal Justice, 4, pp. 936–941.

²⁴ **Mendelson, M. H.** 1998. The Formation of Customary International Law. – Recueil des Cours de l’Académie de Droit International, 272, p. 301.

²⁵ UN Doc A/63/37 (2008), p. 6; UN Doc A/64/37 (2009), p. 6.

²⁶ For example, GA Res 63/129, 11 December 2008, para. 22.

1.3. Terrorism with State Involvement

Terrorism is a method mostly used by non-state actors to influence states. In inter-state relations, violence is used in the form of armed conflicts which are regulated by specific rules on the use of armed force and the law of armed conflict. However, terrorism is sometimes also exploited by states and therefore we can talk about state terrorism or terrorism directed, supported or tolerated by states. In practice, terrorist non-state actors with state involvement are usually more powerful, protected by states and can use intelligence gathered by governmental authorities. Because of the safe havens provided by certain states, foreign intelligence and law enforcement agencies face difficulties in infiltrating and obstructing their activities.²⁷

States typically resort to terrorist methods for practical and ideological reasons.²⁸ Terrorism can substitute traditional warfare if the latter is too expensive or risky. It has become a rewarding alternative approach of foreign policy to use this extraordinary but potentially effective means as it avoids or minimises the risk of taking responsibility. Since it is rather easy to hide relations with terrorist non-state actors, the use of terrorism constitutes low risks but can also be an influential and cheap “foreign policy”. Every instance of terrorism is *prima facie* morally wrong, but terrorism with state involvement even more so.²⁹

State involvement can have a very different level. It would certainly be dangerous and wrong to classify every involvement in the same manner, because the responsibility of and consequences to a state should obviously depend upon the extent, not on the fact of involvement. At opposing ends of the scale we have (1) terrorism committed directly by state officials and (2) the objective inability to control terrorist activities; between these two extremes we can identify several forms of state involvement. The author believes that, setting aside state terrorism and concentrating on terrorist non-state actors, four levels of state involvement can be identified:

- State direction – a state actively controls or directs terrorists and uses terrorism as an alternative to conventional military methods in order to avoid responsibility and disregard the law of armed conflict, e.g., Libya directing the terrorists who bombed the Berlin discotheque (1986);
- State support – a state does not control the terrorists, but it encourages their activities and provides active support such as money, equipment,

²⁷ **President of the United States of America.** 1986. Public Report of the Vice President’s Task Force on Combating Terrorism. <www.population-security.org/bush_and_terror.pdf>, (1.10.2011), p. 1.

²⁸ See **Byman, D.** 2005. *Deadly Connections: States That Sponsor Terrorism*. New York: Cambridge University Press, pp. 21–52 for the analysis why states support or resort to terrorism.

²⁹ **Coady, C. A. J.** 1985. The Morality of Terrorism. – *Philosophy*, 60, pp. 47–70.

training and transport, e.g., Iran giving substantial support to Hezbollah that has become its main tool for carrying out terrorist strategies;

- State toleration – a state does not actively support or direct terrorists, but it makes no effort either to arrest or suppress them, e.g., the Taliban regime allowing terrorists in 1994–2001 to use Afghanistan as a training ground and base of operations, and refusing to co-operate in the capture of Osama bin Laden and his associates;
- State inaction – a state is simply unable to deal effectively with terrorist due to political factors or inherent weakness, e.g., the Lebanon lacking control over a large portion of its southern territory where terrorists operated against Israel.

A state cannot be held equally responsible for all these situations. Most importantly, not every situation automatically calls for military intervention: remedial action has to be proportionate to the threat or consequences of the terrorist attack. While the state direction of terrorist activities may indeed justify or even demand a military response, mere inaction by this state due to its genuine inability to deal with terrorist non-state actors does not necessarily make the host state a legitimate target of lawful military operations.

2. Legal Framework of the Use of Armed Force

It is the United Nations Charter that provides the legal framework for the use of armed force that must also be respected in the fight against terrorism. The United Nations was created in a climate of popular outrage after the unprecedented horrors of the Second World War.³⁰ Its creation resulted in the most important and certainly the most ambitious modification of international law in the twentieth century, namely the prohibition of the (aggressive) use of armed force in international relations. This fundamental rule is prescribed in Article 2(4), which demands that “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”.

This provision is a considerable improvement compared to previous attempts to outlaw the use of armed force, but at the same time the wording is still not without ambiguities. It is certainly progressive because it talks about the threat or use of “force”, not about “war”. The latter refers to a narrow and technical legal situation which begins with a declaration of war or rejection of an ultimatum, and ends with a negotiated peace treaty.³¹ The term

³⁰ Charter of the United Nations, preamble.

³¹ See **Wilson, G. G.** 1938. *War Declared and the Use of Force*. – American Society of International Law Proceedings, 32, pp. 106–127 for the practice of declaring wars.

“force” has a factual connotation and covers all forms of hostilities regardless of how states decide to classify them. What matters most is the actual use of armed force. This is especially useful in the case of terrorist attacks because host states rarely officially endorse such attacks; on the contrary, they deny involvement and even claim that the attacks are not even a type of force.

Yet there are several negative or problematic aspects to this. *Firstly*, the provision talks about “force”, not “armed force” and has provoked a dispute over the exact scope of “force”. The prevailing and undoubtedly correct view is that in this context the term “force” is limited to armed force and it does not include political or economic coercion.³² *Secondly*, the provision forbids the threat or use of force “against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”. Does this mean that this prohibition is conditional and that armed force can be used for a variety of purposes because it is not aimed “against the territorial integrity or political independence of any State”, e.g., surgical anti-terrorism military operations? These clauses were never intended to restrict the prohibition to the use of armed force, but were seen by the drafters as the most obvious examples of what is prohibited.³³ Therefore an incursion into another state’s territory constitutes an infringement of Article 2(4), even if it is not intended to deprive that state of its territory, and the word “integrity” actually ought to be read as “inviolability”. Furthermore, the clauses “territorial integrity” and “political independence” should not distract attention from the phrase “any other manner inconsistent with the Purposes of the United Nations”. The paramount and overriding purpose of the United Nations is to maintain international peace and security and, to that end, to prevent and remove threats to peace and suppress aggression in its different forms.³⁴ Indeed, every single use of armed force, even a precision attack against a terrorist non-state actor, can potentially endanger that precious and often unstable international peace and security.

Although the United Nations Charter is the primary point of reference, the use of armed force is also regulated by customary law. Article 2(4), as a treaty provision, is legally binding only for United Nations member states. Just a decade after the United Nations Charter was adopted this provision was no longer considered as simply another contractual norm but also a customary

³² For example, **Brownlie, I.** 1963. *International Law and the Use of Force by States*. Oxford: Clarendon Press, p. 362; **Randelzhofer, A.** 2002. Article 2(4). – *The Charter of the United Nations: A Commentary*. Ed. B. Simma. 2nd edn, Oxford University Press, vol. I, p. 117; **Dinstein, Y.** 2005. *War, Aggression and Self-Defence*. 4th edn, Cambridge University Press, p. 86.

³³ United Nations Conference on International Organisation Documents, vol. 6, pp. 556–558.

³⁴ Charter of the United Nations, Article 1(1).

law norm.³⁵ As such it is legally binding to all states. Moreover, the prohibition to use armed force has reached the status of an *ius cogens* norm.³⁶ Generally speaking, the latter are overriding norms of international law which are so fundamental that they must be followed at all times without any excuse. The obligations deriving from *ius cogens* norms are not like usual contractual obligations, but are obligations owed to the international community as a whole. In other words, a violation of an *ius cogens* norm breaches the essential interests of every state; therefore not only the directly injured state but also any other state is entitled to invoke the responsibility of the violating state.

As with every rule, this prohibition to use armed force is not without exceptions. Although certain states and authors have advocated several potentially questionable justifications for the lawful use of armed force, only two explicit exceptions exist:

- Self-defence (Article 51);
- Military enforcement measures authorised by the Security Council (Article 42).

Whenever a state or the international community wants to use armed force against a terrorist non-state actor all deployed methods must fall under these two exceptions. Chapters 4 and 5 are respectively devoted to self-defence and military enforcement measures under the collective security system in the context of terrorism.

3. State Responsibility for Terrorist Non-State Actors

3.1. Principles of State Responsibility

States are responsible for their conduct. International law presumes that states do not engage in terrorism. The reality is quite often different. On the other hand, official state representatives rarely commit terrorist acts; states mostly use non-state actors for that purpose regardless of the fact that international law prohibits supporting terrorism and demands that states take active measures against it. If these obligations are not met, responsibility follows and the state has to bear the appropriate (forcible) counter-measures. At the same time, one must understand that not every connection with terrorism involves responsibility for a particular terrorist act or its perpetrator or, moreover, warrants the use of armed force. Whatever counter-measures are employed, these obligations require that a state be legally, not politically, responsible for

³⁵ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, ICJ Reports (1986) 14, paras 188–190.

³⁶ *Barcelona Traction, Light and Power Company Limited* (Belgium v Spain), Second Phase, Judgment, ICJ Reports (1970) 3, paras 34–35.

terrorist activity and that the choice of counter-measures be justified by the gravity of the terrorist act.

In order to invoke state responsibility it is necessary to show two things: 1) that the conduct in question is attributable to the state under international law and 2) that it constitutes a breach of an international obligation of the State.³⁷ Usually the first condition is the more difficult to prove. States are political abstracts and as such are not able to act.³⁸ Only humans can truly act and it is therefore necessary to demonstrate that the particular conduct is attributable to the state. The obligation in question has to derive from international law including treaty, customary law and general principles of law.³⁹ For the existence of an internationally wrongful act, fault is not a necessary precondition unless explicitly included in the obligation. Therefore it is only the breach of an international obligation that matters, independently of any intention.⁴⁰ For example, states have the obligation not to knowingly allow anyone to use their territory in such a way that might endanger the rights and security of other states.⁴¹ This obligation is breached if the state knows that terrorists are present in its territory and they commit terrorist attacks against other states, even if the host state has no intention to harm other states.

According to the law of state responsibility, all international norms are either primary or secondary.⁴² Primary norms contain international obligations, a breach of which leads to state responsibility. Secondary norms establish conditions for state responsibility and the consequences of such responsibility. One should not confuse the formulation of specific international obligations with more technical rules that determine whether these obligations have been breached. Therefore the rules of state responsibility do not establish obligation in the fight against terrorism, but help to assess whether different anti-terrorism norms or principles have been neglected. If there is no primary norm, there can be no responsibility.

³⁷ Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), Article 2 [hereinafter the Draft Articles].

³⁸ *German Settlers in Poland*, Advisory Opinion, PCIJ Series B, No 6 (1923) 6, p. 22.

³⁹ **International Law Commission**. 2001 Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts. – Yearbook of the International Law Commission. New York: United Nations, vol. II, p. 91 [hereinafter the Commentaries on the Draft Articles].

⁴⁰ **Brownlie, I.** 1983. *System of the Law of Nations: State Responsibility*. Oxford: Clarendon Press, p. 39.

⁴¹ *Corfu Channel* (United Kingdom v. Albania), Merits, ICJ Reports (1949) 4, p. 22.

⁴² See **Combacau, J. & Alland, D.** 1985. ‘Primary’ and ‘Secondary’ Rules in the Law of State Responsibility: Categorizing International Obligations. – Netherlands Yearbook of International Law, 16, pp. 81–109 for more detailed analysis about the nature of primary and secondary norms.

3.2. *Grounds for Responsibility*

The law of state responsibility is based on the concept of agency. As already mentioned, states are political abstractions which act through persons. So, the key question is whether a person has acted as an agent of a particular state and person's acts qualify as acts of that state. The traditional rule is that the conduct of private actors is not normally attributable to the state under international law. However, it is equally well settled that the acts of *de facto* state agents are attributable to a state, i.e., the conduct of apparently private actors may, in fact, be sufficiently connected with the exercise of governmental functions in such a way that otherwise private acts may be deemed state acts instead. It is, however, more difficult to demonstrate that a state is responsible for the private acts themselves (direct responsibility) than to prove that the state is responsible for its own related wrong, i.e., inadequate action in preventing the private acts in question (indirect responsibility). Whether the state bears direct or indirect responsibility usually determines what kinds of counter-measures are appropriate in a particular case.

There are several grounds for state responsibility,⁴³ but three are most relevant in the context of terrorism (their validity is tested mainly against the situation in Afghanistan concerning the Taliban and Al-Qaeda). *Firstly*, if a state directs or exercises control over terrorist non-state actors and they become its *de facto* agents, the state is responsible for their acts.⁴⁴ Certainly there is a question of degree: how much the state has to direct or control the non-state actor before we can say that the state is now responsible. Court practice has provided two tests. The effective control test requires that the state participated in the planning, direction, support and execution of specific terrorist acts.⁴⁵ This test has several limitations. To begin with, it imposes on the victim state the quite unrealistic obligation to provide evidence of specific instructions or directions from the host state relating to the terrorist acts. The author believes that the traditional effective control test is insufficient to address contemporary threats posed by terrorist non-state actors and states that harbour them. Furthermore, there is very little evidence that effective control has wide support in the international community or reflects a definite norm of customary law. This test was conceived by the International Court of Justice (ICJ) and subsequently incorporated into the Draft Articles on State Responsibility by the International Law Commission.⁴⁶ In a later judgment,

⁴³ Draft Articles, Articles 4–11.

⁴⁴ *Ibid*, Article 8.

⁴⁵ *Military and Paramilitary Activities in and against Nicaragua*, para. 115.

⁴⁶ Commentaries on the Draft Articles, p. 47.

the C referred to these articles as a codification of customary law.⁴⁷ It is a vicious circle, a tautology.

There are reasons to believe that the position of such a strict approach has weakened after the 11th September 2001 and that the international community has approved a more liberal approach. The International Criminal Tribunal for former Yugoslavia provided an alternative: the overall control test.⁴⁸ The author shares the tribunal's view that international law does not require that control should extend to issuing specific orders or instructions relating to every attack; it is enough if the state has overall control over a non-state actor in question. The law of state responsibility should, after all, be based on a realistic concept of responsibility. If the state exercises overall control over a non-state actor, i.e., finances, arms and trains as well as generally participating in the planning and supervision of activities, it would be too much and unnecessary to ask the victim state to prove that the host state actually demanded or directed that specific attack. Nevertheless, the overall control test is neither a magical solution for, nor a revolutionary change in, the question of attribution. The essential difference between the two tests lies merely in the degree of control, not in its nature. In both cases the state should have control that goes beyond the mere financing and equipping of terrorist non-state actors, involving participation in the planning and supervision of military operations.

The Taliban and Al-Qaeda had close and mutually beneficial relations, but their exact nature is not clear.⁴⁹ Al-Qaeda was not a typical non-state actor dependent on a state; to some extent, the roles were reversed.⁵⁰ The Taliban did not exercise effective control over Al-Qaeda; in fact, it is even questionable whether it even exercised overall control.

Secondly, if a state acknowledges and adopts the conduct of a terrorist non-state actor clearly and unequivocally as its own, the state is responsible for its acts.⁵¹ This ground is not concerned with implied state complicity arising out of a failure to prevent terrorism or prosecute its perpetrators, but with the explicit acknowledgement and adoption of their conduct by the

⁴⁷ *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, ICJ Reports (1997) 7, paras 47, 50–53, 58, 79, 83, 123.

⁴⁸ *Prosecutor v. Duško Tadić*, Case No IT-94-I-A, ICTY, Judgment of the Appeals Chamber, 15 July 1999, para. 117.

⁴⁹ **National Commission on Terrorist Attacks upon the United States**. 2004. The 9/11 Commission Report. <www.9-11commission.gov/report/911Report.pdf>, (1.10.2011), pp. 63–67.

⁵⁰ For example, **British Government**. 2001. Responsibility for the Terrorist Atrocities in the United States, 11 September 2001 – An Updated Account. <www.number10.gov.uk/Page3682>, (1.10.2011), paras 11–13 describe that Al-Qaeda had representatives at the Taliban military command.

⁵¹ Draft Articles, Article 11.

state. This conduct is not attributable to a state if it merely acknowledges the factual existence of such conduct or expresses verbal satisfaction with it. In their international controversies states often take positions which amount to “approval” or “endorsement” of conduct in some general sense but do not involve any assumption of responsibility. This ground of responsibility, however, carries with it the idea that this conduct would be acknowledged and adopted by the state as its own conduct, in effect. This act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.⁵² Whether such an act has retroactive effect is still disputed.⁵³ The author sees no good reason why responsibility should not be retroactive; otherwise there will be gaps in such responsibility.⁵⁴ There is an important implication for the use of armed force, here. If we consider a state responsible from the moment a terrorist attack is carried out we can claim that the attack was committed by the state and it was allowed to exercise self-defence. Should the state’s acknowledgment and adoption of this attack come weeks or months later, we have to assess whether the criterion of immediacy for exercising self-defence is satisfied. If there is no retroactive effect, then the state is responsible only for what is happening after acknowledgment and adoption. But such partial responsibility is not advisable.

The Taliban did not acknowledge and adopt the attacks of 11th September 2001.⁵⁵ True, it failed to condemn the terrorist attacks, declined to extradite Osama bin Laden and refused to stop the operation of Al-Qaeda,⁵⁶ but this is not clear and unequivocal acknowledgment and adoption of the attacks. Anti-American or Islamic rhetoric by the Taliban cannot be construed as due acknowledgement and adoption.

Thirdly, if, under exceptional circumstances, a terrorist non-state actor exercises elements of governmental authority in the absence or default of the official authorities the state is responsible for its acts.⁵⁷ This ground of responsibility is usable in very exceptional cases where the regular authorities are disintegrated, have been suppressed or are simply inoperative at the time. Failed states would be the most likely examples in the context of terrorism.

⁵² Commentaries on the Draft Articles, p. 47.

⁵³ The ICJ inclines toward the position that acknowledgement and adoption do not have retroactive effect. *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), Judgment, ICJ Reports (1980) 3, para. 74.

⁵⁴ See also Commentaries on the Draft Articles, p. 53; *Prosecutor v. Duško Tadić*, para. 118.

⁵⁵ **Brown, D.** 2004. Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses. – *Cardozo Journal of International and Comparative Law*, 11, p. 11.

⁵⁶ **Schmitt, M. N.** 2002. Counter-Terrorism and the Use of Force in International Law. *Marshall Center Papers*, No 5, p. 47.

⁵⁷ Draft Articles, Article 9.

In such cases, the state system would have collapsed because of a revolution, natural disaster or other similar events and the government would not be able to exercise its functions in a certain part of the territory.⁵⁸ A non-state actor would then take over the “management” of that area and start to organise cross-border violent attacks (possibly even in the belief that it is organising defensive operations or providing security). Although the central government would be temporarily incapacitated, it would still be responsible for the action of that non-state actor. In order to apply this ground of responsibility such actions must effectively be related to exercising elements of governmental authority. So, not every type of conduct is covered.

Although the Taliban allowed Al-Qaeda to operate independently and the latter sometimes performed functions typically reserved for governmental authorities (distributing humanitarian aid and building infrastructure),⁵⁹ we cannot claim that Al-Qaeda exercised elements of governmental authority in the absence or default of the official authorities.

3.3. Providing a Safe haven as Additional Grounds?

Does state responsibility end if the conduct of non-state actors is not attributable on previously discussed grounds or continues if different forms of state support are decisive in carrying out terrorist attacks? It becomes especially relevant if a state is able to exercise control over its territory, but nevertheless tolerates or even encourages terrorist non-state actors. This is a grey area for international law. The debate was initiated once again by President Bush who declared that the United States would make no distinction between the terrorists and those who harbour them.⁶⁰

This line of argument has some validity and definitely should not be cast aside without giving it at least some consideration. Depending on the circumstances, supporting or providing a safe haven for terrorists may breach a number of international obligations under treaties, customary law and Security Council resolutions. To begin with, states should not knowingly allow anyone to use their territory in a way that endangers other states, including the use of its territory as a base for terrorist attacks.⁶¹ As a matter of basic principle in international law, every state has a duty to refrain from organising, instigating, assisting or participating in terrorist acts in another state or acquiescing to organised activities within its territory that are directed towards committing

⁵⁸ Commentaries on the Draft Articles, p. 49.

⁵⁹ **British Government** 2001, para. 12.

⁶⁰ **White House**. 2011. Statement by the President in His Address to the Nation. <georgew-bush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html>, (1.10.2011).

⁶¹ **Corfu Channel**, p. 22.

such acts when the acts referred to involve a threat or the use of armed force.⁶² The Security Council has also demanded that all states must “deny safe haven to those who finance, plan, support, or commit terrorist acts”.⁶³ The emphases of these arguments can be taken as an attempt to revive the theory of vicarious responsibility which concerns a state that knowingly acquiesces to the injurious acts of non-state actors within its territory. Therefore, a state that (1) is or should be aware of a potential terrorist attack against another state, (2) is able to prevent the attack but neglects to do so and (3) fails to warn the other state of the attack is responsible for it. This vicarious responsibility was endorsed in the *Corfu Channel* case.⁶⁴ Here we can draw a peculiar parallel with the law of neutrality which demands that a neutral state may not allow belligerents to use its territory for recruiting combatants or forming units to assist them.⁶⁵ If the neutral state fails to respect that obligation it loses its neutrality and one belligerent may attack the enemy combatants in that state.

Vicarious responsibility would render the Taliban responsible for Al-Qaeda because the former allowed the latter knowingly to operate in its territory while being aware of the nature and extent of Al-Qaeda’s activities.

Some have argued that state responsibility should also be expressed in terms of complicity.⁶⁶ Israel has repeatedly claimed that the terrorist attacks against it from the territory of the Lebanon and Syria were only possible due to the complicity of their respective governments. Although this idea is not inconceivable, it is incompatible with the present rules of state responsibility on complicity.⁶⁷ The latter become relevant only when *one state* is aiding or assisting *another state* in the commission of an internationally wrongful act. Moreover, complicity renders a state responsible for its own illegal conduct (indirect responsibility), not for the conduct of another state (direct responsibility).

One should not neglect the fact that the obligations to prevent terrorism are due diligence obligations, i.e., compliance with these obligations does not require complete prevention of terrorism.⁶⁸ If a state in good faith has taken all feasible measures to eliminate danger from terrorist non-state actors, but

⁶² GA Res 2625 (XXV), 24 October 1970, Annex, section 1.

⁶³ SC Res 1373, 28 September 2001, para. 2.

⁶⁴ *Corfu Channel*, p. 17.

⁶⁵ Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, The Hague, 18 October 1907, entry into force 26 January 1910, 100 BFSP 359, Articles 4–5.

⁶⁶ **Jinks, D.** 2003. State Responsibility for the Acts of Private Armed Groups. – Chicago Journal of International Law, 4, p. 90.

⁶⁷ Draft Articles, Article 16.

⁶⁸ See **Barnidge, R. P. Jr.** 2005. States’ Due Diligence Obligations with regard to International Non-State Terrorist Organisations Post-11 September 2001: the Heavy Burden That

they still manage to attack another state, then the attack is not attributable to the host state and it cannot be held responsible even for the failure to prevent the attack because the due diligence requirement has been satisfied. However, such a situation needs a solution since a danger to the security of other states remains. Therefore the author proposes that if the state fails to perform these obligations, it is not directly responsible for the conduct of terrorist non-state actors not directed or controlled by that state, but has an obligation to bear appropriate (forceful) counter-measures. In other words, if the state does not manage to handle the situation it must allow others to do it. Otherwise non-state actors would enjoy impunity and the security of other states would still be endangered. When states become members of the United Nations they do not only enjoy many privileges, but also take on further duties so that other states might equally benefit from those privileges.⁶⁹ Whatever the principle of sovereignty after the Peace of Westphalia (1648) may have been, contemporary sovereignty includes a duty to protect the rights and security of other states as well as fulfilling the obligations undertaken before the international community.⁷⁰ The same logic similarly applies in cases where the state is, for objective reasons, incapable of protecting the rights of other states and removing the dangers threatening them.

In the event of objective incapacity, all counter-measures should only be directed against the objectives of such non-state actors. The victim state must obviously act in good faith and the decision to use this option should be taken as a last resort. The international community supervises such decisions through the Security Council. While the latter is not likely to deal with these terrorist non-state actors or explicitly authorise military sanctions, it is more likely to react if the victim state made an ill-advised and hasty decision or has gone too far in its operations. The Security Council already exercises similar supervision with regard to self-defence.

It is state practice to show support for such an approach. In the 1990s, Iran and Turkey organised frequent military operations into Northern Iraq from where the Kurdistan Workers' Party (PKK) had launched armed attacks against neighbouring states.⁷¹ Turkey claimed that its military measures did not violate Iraqi sovereignty as Iraq was not in effective control of the northern territory and it would have been useless to demand that Iraq

States Must Bear. – *Irish Studies in International Affairs*, 16, pp. 103–125 for the analysis about the nature of due diligence obligations in the context of terrorism.

⁶⁹ Charter of the United Nations, Article 2(2).

⁷⁰ See UN Doc A/59/565 (2004), paras 29–30 for the relationship between sovereignty and responsibility.

⁷¹ **Gray, C. & Olleson, S.** 2001. *The Limits of the Law on the Use of Force: Turkey, Iraq and the Kurds.* – *Finnish Yearbook of International Law*, 12, pp. 355–410.

prevent trans-boundary attacks by the PKK.⁷² Iraq protested but the Security Council refused to discuss the matter, hinting unofficially that Iraq had failed to live up to its international obligations.⁷³ A similar situation happened again in February 2008: Turkey used similar arguments and the international community was either silent or urged that the operations should be limited in time and scope, i.e., quick precision attacks against the PKK positions. Iraq had to bear the counter-measures.

4. Self-Defence by a State against a Terrorist Attack

4.1. Nature of Self-Defence

States have an inherent right to self-defence. This mantra has been repeated countless times but it is still important to emphasise that self-defence has a clear meaning in international law. It can sometimes have very little connection with the not-so-rare emotional and political declarations by states that they have the right to defend themselves against various “inconveniences”. Self-defence in international law refers to the right to use armed force against an attack involving a significant amount of armed force. There is no doubt that self-defence is permissible if the armed attack was carried out by a state. Do states have similar rights if an attack is organised by a non-state actor? Opinions differ on this matter but it would be unreasonable to argue that self-defence should be ruled out under any circumstances.

All legal instruments which have restricted or prohibited the use of armed force have explicitly or implicitly recognised the right to self-defence.⁷⁴ Article 51 of the United Nations Charter similarly provides that “nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”. Self-defence has generally been associated with inter-state relations but after the events of 11th September 2001 it is necessary to ask whether the concept of self-defence can also include terrorism. Article 51 does not itself specify that the right to self-defence only applies between states. This condition has been taken as implicit because self-defence is an exception to the general prohibition to use force, and Article 2(4) which contains that prohibition expressly mentions states. Nonetheless, there is no reason why the right to self-defence should only be confined to inter-state relations because violent acts from non-state actors can at times be comparable to those of states.

⁷² Franck, T. M. 2002. *Recourse to Force: State Action against Threats and Armed Attacks*. Cambridge University Press, p. 63.

⁷³ UN Doc S/1997/461 (1997).

⁷⁴ Although Treaty providing for the Renunciation of War as an Instrument of National Policy (1928) (usually known as the Kellogg-Briand Pact) does not explicitly mention self-defence, its legality was reaffirmed during the negotiations.

4.2. Armed Attack

Article 51 asserts explicitly that states can lawfully exercise self-defence “if an armed attack occurs”.⁷⁵ The term “armed attack” was left undefined at the San Francisco Conference where the United Nations Charter was adopted because it was considered self-evident and sufficiently clear.⁷⁶ However, this was too optimistic a judgment to make because it soon proved to be rather difficult to agree on a standard definition of “armed attack” as some preferred restrictive and others liberal interpretations of Article 51. The ICJ has asserted that it is necessary to distinguish the gravest forms of armed force (those constituting armed attack) from other less grave forms. However, it does not explain which criteria should be used for making that distinction. It seems that the ICJ assesses the quantitative amount of armed force because it refers to “scale and effect”, distinguishing armed attacks from mere frontier incidents. The author believes that it is dangerous to exclude “small” armed attacks from “genuine” armed attacks. Such a distinction seems artificial and is difficult to apply during or immediately after the attack. It is more reasonable to say that the quantitative extent of armed force simply limits the choice of counter-measures on the basis of proportionality.

Can a terrorist attack be an armed attack *ratione materiae*? If an attack by a non-state actor is comparable by scale and effect to an attack by regular armed forces it would be unreasonable to claim that no armed attack was carried out in the sense of Article 51. This is supported by the Definition of Aggression adopted by the General Assembly that qualifies any act of aggression as “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”.⁷⁷ A single terrorist attack is not very likely to satisfy the requirement of gravity but the ICJ has suggested that separate but connected attacks can cumulatively constitute an armed attack.⁷⁸

Can a terrorist attack be an armed attack *ratione personae*? Traditional interpretation would say no, but the situation has changed since 11th September 2001 and subsequent state practice would suggest that it could be. Article 51 does not provide that the right to self-defence is only applicable if an armed attack originates from a state. Why should this right depend on the type of attacker? The ICJ has acknowledged this possibility, but makes it conditional

⁷⁵ *Military and Paramilitary Activities in and against Nicaragua*, para. 195.

⁷⁶ Brownlie 1963, p. 278.

⁷⁷ GA Res 3314 (XXIX), 14 December 1974, Article 3(g).

⁷⁸ *Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment, ICJ Reports (2003) 161, para. 64.

on whether the attack is eventually attributable to a state.⁷⁹ The infamous *Caroline* case that has long been taken as an authoritative source for the criteria of self-defence was about self-defence against a non-state actor.⁸⁰ Immediately after the 11th September 2001 attacks, the Security Council,⁸¹ NATO⁸² and the Organization of American States⁸³ explicitly confirmed the right to self-defence in the wake of these attacks, a position that was at least implicitly supported by the rest of the international community. True, reaffirmations of self-defence were found in the preamble of the Security Council's resolutions, but this fact does not render these reaffirmations meaningless.

The legitimacy of self-defence against attacks carried out by non-state actors is usually assessed in the context of the rules of state responsibility. It is presumed that the state must be in some way responsible for the attack before the victim state may exercise self-defence. This was certainly a logical approach a decade ago, and more, but it may prove to be insufficient in the new security environment. It is possible to circumvent the need for attribution if we can demonstrate that a state's support to non-state actors gives in itself sufficient justification for self-defence. The conduct of a state would be equated with an armed attack. For that purpose we can use the above-mentioned Definition of Aggression and place emphasis on its second half: "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*".⁸⁴ The author proposes that substantial involvement in the described terrorist attack itself amounts to an act of aggression which is essentially a situation equivalent to an armed attack justifying self-defence. However, such involvement must be decisive, i.e., without it there could not have been a particular terrorist attack. Substantial involvement can be active or passive. In the first case, a state provides non-state actors with financial, logistical and material support; in the second case, a state allows non-state actors to operate freely within its territory and offers protection from external hazards under the shield of sovereignty. Passive involvement obviously warrants more detailed evidence. If passive substantial involvement is caused by the objective incapacity to control non-state actors present in the territory, all counter-measures

⁷⁹ *Military and Paramilitary Activities in and against Nicaragua*, para. 195.

⁸⁰ Meng, W. 1992. The *Caroline*. – Encyclopedia of Public International Law. Ed. R. Bernhardt. Amsterdam: North-Holland, vol I, pp. 537–538.

⁸¹ SC Res 1368, 12 September 2001; SC Res 1373.

⁸² NATO. Statement by the North Atlantic Council. NATO Press Release (2001) 124, 12 September 2001. <www.nato.int/docu/pr/2001/p01-124e.htm>, (1.1.2010).

⁸³ OAS. Terrorist Threat to the Americas, OEA/Ser.F/II.24, RC.24/RES.1/01 (2001).

⁸⁴ GA Res 3314 (XXIX), Article 3(g).

may only be directed against the objectives of such non-state actors. Authors⁸⁵ and states⁸⁶ have previously rejected this idea, mainly using the argument that non-state actors are not capable of carrying out attacks of significant enough gravity as to warrant being described as acts of aggression. But, as reality demonstrates, this has changed in recent years.

4.3. Anticipatory Self-Defence

Although Article 51 provides that states may exercise self-defence “if an armed attack occurs”, there is still the debate about whether states may resort to self-defence before an actual armed attack has occurred (anticipatory self-defence). According to the overwhelming majority of legal doctrine, the term “armed attack” refers to an actual armed attack. This is certainly the position under the United Nations Charter⁸⁷ and no state has, as far as we know, claimed anticipatory self-defence under Article 51.⁸⁸ Hence, any counter argument must be based on customary law. Anticipatory self-defence takes two forms:⁸⁹

- Pre-emptive self-defence – military action taken against an imminent attack;
- Preventive self-defence – military action taken against a threat that has not yet materialised and that is uncertain or remote in time.

Anticipatory self-defence has positive and negative aspects, but the latter prevail. In the context of terrorism one has to be even more cautious, especially when dealing with a situation equivalent to an armed attack. Under normal circumstances, it is the Security Council that may act in an anticipatory manner.

The alleged imminence of an armed attack cannot usually be assessed by objective criteria, therefore any decision to take anticipatory action would necessarily be left to the discretion of the state in question. Such discretion involves a noteworthy potential of error which may have devastating results and a manifest risk of abuse, which can in turn seriously undermine the prohibition to use armed force. Moreover, the argument that an armed attack begins with planning, organisation and logistical preparation is not plausible, otherwise the armed attack would begin with pencil and paper rather than

⁸⁵ **Rifaat, A. M.** 1979. *International Aggression*. Stockholm: Almqvist & Wiksell International, p. 274.

⁸⁶ UN Doc A/9619 (1974).

⁸⁷ **Brownlie** 1963, p. 278; **Henkin, L.** 1979. *How Nations Behave: Law and Foreign Policy*. 2nd ed, New York: Columbia University Press, p. 295.

⁸⁸ **Randelzhofer** 2002, p. 804.

⁸⁹ Different authors and institutions use different notions for more or less the same content.

with bullets and bombs. However, the armed attack may be so imminent and certain (it is not a question of *if*, but *when*) that it would be unreasonable to demand that the soon-to-be victim state should wait until the moment when the first missiles hit their targets.⁹⁰ The author does not support the general right to pre-emptive self-defence, but if a state or non-state actor has taken decisive and irreversible steps to begin an actual attack the targeted state may use interceptive self-defence. These are exceptional cases. A sound mind would not require that the state wait for an inevitable attack to happen before acting. The United Nations Charter should not become a suicide pact.

Preventive self-defence is clearly unlawful under international law. There is nothing in contemporary legal norms and state or court practice that would suggest that such a broad, even overly broad, construction of a situation equivalent to an armed attack is a part of current customary law.⁹¹ Such a precautionary approach would be alarming, undesirable and wide-open to mistakes or abuse and it is difficult to understand how this would contribute to global stability and ensuring international peace and security. States simply may not use armed force when an armed attack is merely a hypothetical possibility.⁹²

4.4. *Criteria for Exercising Self-Defence*

Self-defence has to be immediate, necessary and proportional. These well-known criteria are also applicable if self-defence is exercised against non-state actors. However, there are a few nuances that should be taken into consideration. Overall, some flexibility is necessary in order not to render self-defence a mere theoretical option.⁹³

The geographical origin of the attacks carried out by terrorist non-state actors is not immediately known as is usually the case in inter-state conflicts. For that reason, gathering information and identifying the perpetrators (somewhere abroad) prolongs the reasonable time period between the armed attack and the implementation of self-defence. The requirement of necessity demands that there be no feasible alternative to the use of armed force. It is reasonable to ask the state to consider peaceful means of settling disputes if the armed attack was an isolated or insignificant episode. But in the event of an extensive

⁹⁰ Dinstein 2005, pp. 190–191.

⁹¹ Additionally, supportive literature is almost non-existent. Bothe, M. 2003. Terrorism and the Legality of Pre-emptive Force. – European Journal of International Law, 14, p. 232.

⁹² SC Res 487, 19 June 1981.

⁹³ The criteria are not included in Article 51, but are derived from customary international law and must be assessed based on generally accepted state practice. *Military and Paramilitary Activities in and against Nicaragua*, paras 194, 237; *Oil Platforms*, paras 43, 76.

attack the state may use armed force more freely as a first resort.⁹⁴ Judgment on necessity is certainly subjective, but this subjectivity does not equate to wanton discretion. Assessing proportionality is not an exact science either; the best results are achieved after conflicts have ceased when it is possible to calmly and comprehensively evaluate the circumstances. The purpose of self-defence is to repel and end the attack. So, for example, a terrorist attack does not justify the full occupation of the host state. As mentioned before, victim states have to restrain themselves especially in situations where military operations are prompted by the objective incapacity of target states.

4.5. *Collective Self-Defence*

States may collectively exercise a right that they may also individually exercise. Collective self-defence receives surprisingly little attention. Most principles and criteria are equally applicable in both cases, but collective self-defence is more complex and deserves closer examination.

Firstly, exercising collective self-defence requires that (1) a state identify itself as the victim of an armed attack⁹⁵ and (2) a state issue a request for assistance⁹⁶. The first requirement is implicitly applicable also in the event of individual self-defence and indicates that there was an armed attack that triggered the right to self-defence. The second requirement is supposed to prevent situations where other states intervene against the will of the victim state. Without this requirement an armed attack can become an excuse to intervene in another state for less honourable reasons. After 11th September 2001, the United States informed the Security Council that it was the victim of armed attacks and from 7th October 2001 they would be exercising individual and collective self-defence in Afghanistan.⁹⁷ This opened the way for collective self-defence and for the participation of other states.

Secondly, collective self-defence is exercised for the benefit of the victim state (no need for some degree of “self”).⁹⁸ Therefore the range of appropriate participants is not limited to those who were victims along with the state issuing a request for assistance. This is most reasonable and better maintains international peace and security: a potential aggressor has to consider the possibility that all states may, from the moment of the first armed attack, participate in a multinational military operation against it (spontaneously or

⁹⁴ **Schachter, O.** 1984. The Right of States to Use Armed Force. – Michigan Law Review, 82, p. 1635.

⁹⁵ *Military and Paramilitary Activities in and against Nicaragua*, para. 195.

⁹⁶ *Ibid*, para. 199; *Oil Platforms*, para. 51.

⁹⁷ UN Doc S/2001/946 (2001).

⁹⁸ *Military and Paramilitary Activities in and against Nicaragua*, paras 195–196.

under a prior agreement⁹⁹). The United Kingdom was not a direct victim of the 11th September 2001 attacks (Article 5 of the Washington Treaty creates a legal fiction that all members of NATO were victims of these attacks), but was entitled to participate in collective self-defence with the United States.

5. Collective Security System against Terrorism

5.1. Nature of the Collective Security System

Contemporary terrorism can threaten international peace and security. The leading terrorist non-state actors operate internationally in order to gain wider exposure – and as a result more success – but also to find supporters, namely states that sympathise with their political objectives. International counter-measures are naturally associated with the Security Council to whom the states have conferred primary responsibility for the maintenance of international peace and security under the collective security system.¹⁰⁰ Despite being a political organ whose decisions are, and also have every right to be, linked to political motivations not necessarily congruent with legal considerations, the Security Council's activity has legal consequences. It is the one organ of the United Nations that can impose legally binding obligations and sanctions on the member states.¹⁰¹

The Security Council, a constantly attentive executive organ, has a broad range of considerable means at its disposal for that purpose under Chapter VII of the United Nations Charter, starting with diplomatic or economic sanctions¹⁰² and ending with military measures¹⁰³. But before the Security Council can utilise these means it must first determine whether terrorism falls within its competence. For example, does terrorism constitute a threat to the peace that justifies its response? When this is done the Security Council may even take forceful anticipatory steps against future breaches of the peace or acts of aggression, regardless of whether it is imminent or, by contrast, remote and uncertain in time. As discussed above, this is a privilege that the United Nations Charter withholds from states acting individually or collectively.

Before venturing any further it is worth mentioning three aspects connected with military measures applied within the collective security system. They are also rationalised by the fact that the collective security system is not a situation of state versus state but state versus international community. The state against which military measures are imposed may not (legally speaking):

⁹⁹ Dinstein 2005, pp. 255–256.

¹⁰⁰ Charter of the United Nations, Article 24.

¹⁰¹ *Ibid*, Article 25.

¹⁰² *Ibid*, Article 41.

¹⁰³ *Ibid*, Article 42.

1. Exercise self-defence;
2. Use reprisals against states participating in the application of coercive measures;
3. Demand reparations for the damages caused by coercive measures.

5.2. Exploring the Meaning of Terrorism

For a long time the Security Council was reluctant to get involved in the debate about terrorism. During the Cold War it was the General Assembly where states discussed the matter. This passive period ended in December 1985 when the Security Council used the term “terrorism” for the first time in response to a spate of terrorist acts in the preceding year.¹⁰⁴ At the beginning, the Security Council was concerned mostly with hostage-taking and abduction, but soon also came assassinations, attempted or otherwise, bombing airplanes, terrorising the general public in conflict situations, etc. After the Iraq-Kuwait War in 1991 the Security Council began to demand abstractly that states should take all appropriate measures to prevent terrorist acts and to bring their perpetrators to justice.¹⁰⁵ At the same time, the Security Council failed to explain what it considered terrorism actually was. Its condemnations were retroactive. On one hand, such condemnations were not necessarily a very practical problem because the acts concerned were declared illegal in specific treaties on terrorism. On the other hand, the obligations imposed were not sufficiently clear but still carried legal weight and violating them could lead to sanctions under the collective security system. Although the Security Council’s action was certainly necessary in regards to terrorism, it also generated its fair share of confusion.

The events of 11th September 2001 caused the Security Council to become even more active and determined. Subsequent resolutions brought in several new developments, but in some respects the practice remained the same. The Security Council began to regard *all* acts of international terrorism as a threat to international peace and security¹⁰⁶ but despite this unprecedented unity within the international community no explanation of terrorism was given. The *travaux préparatoires* indicate that this lack of definition was the price states had to pay in order to secure the adoption of Resolution 1373, cornerstone of the present fight against terrorism.¹⁰⁷ The Counter-Terrorism Committee established under that resolution also decided not to define terrorism

¹⁰⁴ SC Res 579, 18 December 1985.

¹⁰⁵ SC Res 687, 3 April 1991 (Iraq); SC Res 748, 31 March 1992 (Libya); SC Res 1267, 15 October 1999 (Afghanistan).

¹⁰⁶ For example, SC Res 1368.

¹⁰⁷ See also **Rosand, E.** 2003. Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism. – American Journal of International Law, 97, pp. 339–340.

in a legal sense, “although its members had a fair idea of what was blatant terrorism” as was commented by one delegation.¹⁰⁸ However, many states have expressed the wish to have a sort of reference explanation that could be used, for example, domestically when implementing Security Council resolutions. The closest thing we have to a definition is the description in Resolution 1566 discussed above.

5.3. Determination of a Situation

The Security Council cannot avail itself of enforcement measures at any given moment – it is supposed to follow certain procedures in order to establish that conditions for the use of such measures are satisfied. According to Article 39, the primary condition is the existence of a threat to the peace, a breach of the peace or an act of aggression. Once a positive determination has been made, the door is automatically opened to enforcement measures of a non-military or military nature. Nevertheless, this is a procedural rather than substantive limitation, basically demanding that the Security Council as a collective organ reach consensus before imposing enforcement measures. Yet such a limitation may equally help to ensure consistency in the Security Council’s practices if this determination is not made on the basis of political expediency but after a genuine assessment of the situation and comparison of the latter with other similar situations. This practice demonstrates that the Security Council has not always determined that a threat to the peace, a breach of the peace or an act of aggression existed before imposing sanctions.¹⁰⁹ In such cases we have to assume an implied determination. A few observations are called for. *Firstly*, there is no need to expressly refer to Article 39 when making such a determination.¹¹⁰ *Secondly*, this determination is not necessary in cases of resolutions that follow from previous resolutions that did contain a determination.¹¹¹ The latter are cited in the preambles to the former; therefore, the necessary link and legal basis are already established. *Thirdly*, in terms of time, the validity of such a determination does not expire automatically. It remains valid until the Security Council decides otherwise, even if there is a change in the situation on the ground.

The discretionary power of the Security Council is very broad in terms of deciding both *when* and *how* to act. At the San Francisco Conference various proposals were made that the regulation should be more detailed with regard to the collective security system but, in the end, the present wording was preferred. It was expressly stated that the lack of more specific criteria was

¹⁰⁸ UN Doc SC/7276 (2002).

¹⁰⁹ For example, SC Res 1160, 31 March 1998.

¹¹⁰ For example, SC Res 713, 25 September 1991.

¹¹¹ For example, SC Res 687.

necessary if the Security Council were to be allowed to decide how to act on a case-by-case basis.¹¹² A determination is essentially a judgment based on factual findings and the weighing up of political considerations that cannot be measured by legal criteria. The former usually prevail. The political nature of determinations is further underlined by the fact that permanent members of the Security Council have the power of veto.¹¹³ Nonetheless, once it has made a determination this determination is conclusive and all member states must accept the Security Council's verdict even if they do not share its opinion. The Security Council is theoretically obliged to make a determination and subsequently take any enforcement measures. But in reality it operates selectively and with much discretion.¹¹⁴

The "threat to peace" is the most flexible and dynamic of the three terms in Article 39 and it is here that the Security Council enjoys the broadest discretion. It is equally true that within this discretion lies the possibility of subjective political judgment. In fact, we can conclude rather bluntly that a threat to the peace is whatever the Security Council says is a threat to the peace. Obviously, here one should distinguish such discretion from the necessity to sufficiently explain to states the characteristics of a specific threat to the peace. While this may not be necessary in the event of more traditional threats (e.g., preparing an armed attack against a state), it may well be vital if the Security Council is referencing a continuous state of affairs (e.g., the inability to demonstrate the denunciation of terrorism) or an abstract phenomenon (e.g., terrorism). A threat to the peace does not have to be linked to any breach of international law. In other words, a threat to the peace is not necessarily a state of facts: it can merely be a state of mind; and the mind that counts is that of the Security Council.

In order to understand the threat to the peace it is also important to reflect on the meaning of the word "peace". The latter can be defined either negatively (narrowly) or positively (widely). In the negative sense, the word refers to the absence of the organised use of armed force; therefore, in order to constitute a threat to the peace the situation in question must have the potential of provoking armed conflict between states in the short or medium term. Still, an actual outbreak of armed conflict is not necessary. The more positive concept of peace is wider and also includes friendly relations between states as well as other political, economic, social and environmental conditions that are necessary for a conflict-free international community. The absence of war and military conflicts amongst States does not in itself ensure international peace and security and that non-military sources of instability in the

¹¹² United Nations Conference on International Organisation Documents, vol. 12, p. 505.

¹¹³ Charter of the United Nations, Article 27(3).

¹¹⁴ **Österdahl, I.** 1998. *Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter*. Uppsala: Iustus, pp. 103–105.

economic, social, humanitarian and ecological fields have become threats to such peace and security.¹¹⁵ When examining Security Council practice, one notices that very different situations may qualify as a threat to the peace: for example, non-international armed conflicts,¹¹⁶ serious violations of human rights,¹¹⁷ violations of the democratic principle,¹¹⁸ violations of the law of armed conflict¹¹⁹ as well as the proliferation of nuclear, chemical and biological weapons¹²⁰.

5.4. Terrorism as a Threat to the Peace

By now, the Security Council has on several occasions designated terrorism as a threat to the peace. In a number of cases, insufficient action by states against terrorism has been categorised in this way: for example, Libya's failure to surrender those responsible for the Lockerbie bombing in December 1988,¹²¹ Sudan's refusal to extradite three suspects in connection with an attempt to assassinate the president of Egypt in Addis Ababa, Ethiopia, in June 1995¹²² or Afghanistan's failure to cease providing sanctuary and training for international terrorists and co-operate with efforts to bring indicted terrorists to justice¹²³. The events of 11th September 2001 brought about a new approach. The Security Council condemned unequivocally in the strongest terms these horrifying terrorist attacks and regarded "such acts, like *any* act of international terrorism, as a threat to international peace and security".¹²⁴ This determination goes further than previous ones as it was not confined merely to the terrorist attacks in question but extended to all present and future terrorist acts without ascribing them to any particular state. Moreover, this was not an isolated incident immediately after these unprecedented attacks invoking global solidarity but the beginning of a series of similar resolutions.¹²⁵

The Security Council's decision to condemn terrorist acts so strongly and decisively was certainly welcomed, but the adopted approach also brought with it certain problems. *Firstly*, as already discussed, terrorism was still not defined after 11th September 2001. To some extent the Security Council

¹¹⁵ UN Doc S/23500 (1992).

¹¹⁶ For example, SC Res 713.

¹¹⁷ For example, SC Res 688, 5 April 1991.

¹¹⁸ For example, SC Res 1132, 8 October 1997.

¹¹⁹ For example, SC Res 808, 22 February 1993.

¹²⁰ For example, SC Res 1540, 28 April 2004.

¹²¹ SC Res 748.

¹²² SC Res 1044, 31 January 1996.

¹²³ SC Res 1267.

¹²⁴ SC Res 1368 (emphasis added).

¹²⁵ For example, SC Res 1438, 14 October 2002; SC Res 1618, 4 August 2005.

adopted the approach of “we will know it when we see it”. Now, how can one determine the existence of a threat to the peace when using undefined terms? This ambiguity and the Security Council’s demands to take effective measures against terrorism have presented several states with a welcome opportunity to enact broad-reaching anti-terrorism laws directed against the political opposition or other inconvenient persons instead. The Human Rights Committee has criticised numerous states for defining the crime of terrorism and especially an association with terrorism too vaguely, or for imposing the death penalty for such crimes.

Secondly, does the Security Council have the authority to designate a generalised indeterminate phenomenon, as opposed to a specific incident, as a threat to the peace? Moreover, there are neither temporal nor geographical limits here. Even though a determination regarding a specific incident (such as a violation of the law of armed conflict in the former Yugoslavia) is formally binding for all member states, it is not, however, likely to affect many of them in practical terms on account of geographical distance, for example. By contrast, in the event of an indeterminate phenomenon having no temporal or geographical limits; all member states are affected by it and are potentially subject to different sanctions. Once again such a situation is open to abuse by individual states both domestically and internationally. The Security Council’s determination may serve as a blanket excuse for the illegitimate and forceful settlement of other disputes. One should keep in mind that the Security Council is a reaction-oriented organ, not equipped to prevent all possible long-term tensions. Therefore, it is somewhat irresponsible for it to try to provide blanket excuses and impose unspecific obligations that may endanger international peace and security if implemented overzealously. Since a threat to the peace continues until the Security Council decides otherwise, the latter has placed itself in a very tricky position – a declaration that there is no longer a threat to the peace would indicate that the terrorist problem had been eliminated. But how likely is this to happen?

Although misgivings have been expressed, this new approach is supported by several arguments. *Firstly*, alongside traditional threats, terrorism is constantly becoming a more current concern and an ever more serious international security threat. Terrorist acts can certainly threaten international peace and security, but not every terrorist act does so. *Secondly*, the threat to the peace is a dynamic, constantly evolving political concept that has been expanding since the establishment of the United Nations. Despite the broad and abstract nature of this determination in the new resolutions, it remains within the realm of a negative (traditional) definition of peace. Whilst these resolutions contain some novelties, these novelties do not dissociate the threat to the peace from the potential outbreak of international armed conflict. *Thirdly*, because the Security Council is entrusted with the primary

responsibility of maintaining international peace and security with the exclusive right to take anticipatory steps, it should take the problem of terrorism most seriously and adopt appropriate measures in order to fight it.

Conclusion

International law relating to terrorism has been shaken up of late. Previously settled rules or traditional understandings face trouble when having to deal with ever more globalised and dangerous threats. This is not to say that we need completely new rules – a more innovative use of the international legal system could deliver adequate results. Then again, this should not lead to a clearly unreasonable application or interpretation of the existing rules. Hence, interceptive self-defence may well be sensible but to use preventive self-defence is going too far and endangers the stability of the international community. Terrorism should not become a magic word that justifies exceptions or arguably unavoidable deviations from fundamental norms or principles.

What are the main conclusions and suggestions? *Firstly*, international law lacks a generic definition of terrorism both in treaty and customary law. There are two main obstacles to reaching a treaty definition, namely how to distinguish freedom fighters from terrorists and whether the members of the armed forces can commit terrorist acts. As far as the definition in customary law is concerned, its weakest point is the lack of *opinio iuris*, although state practice and understanding of the nature of terrorism are not consistent either. The signs show that there has been potential progress towards a customary law definition but at the moment it is still too early to speak about such a thing. In the search for a definition states have been more successful at a regional level where understandings and values are more similar. The author believes that a treaty or customary law definition would become a reality if states could leave aside the question of potential perpetrators. The nature of terrorism does not depend on its perpetrators. Therefore western states should agree that the armed forces can also commit terrorism and former colonies and Islamic states should embrace the fact that the law of armed conflict is equally applicable to freedom fighters.

Secondly, the state has an obligation to bear counter-measures by other states if the former provides a safe haven for terrorist non-state actors. According to the fundamental principle of international law, a state must not knowingly allow anyone to use its territory in a way that might endanger the rights and security of other states. This obligation has been frequently reiterated in international court practice and numerous important international legal instruments. The author believes that this obligation should be taken more seriously because the era of absolute sovereignty is over. A state that knowingly allows non-state actors to use its territory as a base of operations

ought to be held responsible for their attacks. By being able but intentionally neglecting to prevent such attacks, the state acquiesces to the injurious acts of non-state actors. If the state fulfils its due diligence obligation to prevent terrorism but still fails to eliminate the threat from non-state actors or the state is, for objective reasons, simply incapable of dealing with non-state actors, it is not directly responsible for the conduct of such non-state actors. However, the author proposes that in such cases the state has the obligation to bear appropriate (forceful) counter-measures from other states. Otherwise the non-state actors would enjoy the impunity of protection provided by sovereignty and territorial inviolability. Besides, the security of other states remains endangered. Nevertheless, all counter-measures may only be directed against the objectives of such non-state actors. The victim state must obviously act in good faith and the decision to use the option in question should be taken as a last resort. To ensure that this option is not abused or misused, the international community operates through the Security Council. In addition, the conduct of a non-state actor is attributable to a particular state if (1) the state exercises control over them and they become its *de facto* agents, (2) the state acknowledges and adopts their conduct clearly and unequivocally as its own or (3) they exercise, under exceptional circumstances, elements of governmental authority in the absence or default of the official authorities.

Thirdly, a state may exercise self-defence against a terrorist attack committed by a non-state actor if the attack (1) is comparable in scale and effect to a conventional armed attack and (2) is attributable to a state or the latter is substantially involved in the attack. Contemporary terrorist attacks can be comparable to conventional armed attacks by regular armed forces. The author believes that in such cases there is no good reason to argue that self-defence is not allowed. Nothing in the United Nations Charter suggests that self-defence may be exercised only if an armed attack originates from a state. Earlier customary law accepted the possibility that an armed attack could originate from a non-state actor. Exercising self-defence is certainly permissible if the terrorist attack is attributable to a state. Additionally, the author proposes that substantial involvement in the described terrorist attack amounts in itself to an act of aggression which is essentially a situation equivalent to an armed attack, justifying self-defence. However, such involvement must be decisive, i.e., without it there could not have been a particular terrorist attack. Normally it is the Security Council that may use anticipatory armed force but the author is prepared to accept the possibility that a state may use armed force to stop an armed attack if the other party (state or non-state actor) has taken decisive and irreversible steps to begin the actual attack. When assessing the criteria of self-defence, one should be more flexible in order to avoid making hasty decisions, mistakes or unduly limiting the right to self-defence.

Fourthly, a collective security system may be employed against terrorism because, in addition to traditional threats, terrorism has become a real, pressing and serious international problem. Since the Security Council is entrusted with the primary responsibility of maintaining international peace and security as well as the right to take anticipatory measures, it has a greater obligation to react decisively to terrorism and to take appropriate steps to fight it. For some time now the Security Council has considered international terrorism as a threat to the peace. The latter is also one precondition for invoking the collective security system. After the attacks of 11th September 2001, the Security Council embarked on a somewhat troublesome path – it has classified all terrorist acts as a threat to international peace and security without any further qualification or ascribing these acts of terrorism to a particular state. The author calls for a more cautious approach simply because not every terrorist act is a threat to international peace and security. Overly frequent referrals to minor terrorist acts could also devalue major terrorist acts. While it is politically convenient not to individually assess every terrorist act brought to the Security Council's attention but instead to label them all as a threat to the peace, such an approach endangers numerous fundamental rules and inter-state relations as well as international peace and security, eventually. The author also considers problematic the fact that the Security Council does not explain its understanding of terrorism clearly enough, but imposes on states legally binding obligations concerning the fight against terrorism. As a result, states do not know exactly what they are supposed to fight and cannot be certain that all necessary steps have been taken in order to avoid possible international sanctions for disobedience. Furthermore, such ambiguity coupled with the Security Council's demands to take effective measures against terrorism have presented several states with the welcome opportunity to draw up broad-reaching anti-terrorism laws directed against political opposition or other inconvenient persons instead. The author believes that one should not refrain from trying to define terrorism in the Security Council merely because such a task seems unrealistic or because someone might find a way around the definition and claim that the conduct in question is therefore legal. Respect for the principle of legality should override practical conveniences or fears of potential, but fixable, loopholes.

The fight against terrorism has mostly been a reactive phenomenon. Instead, more attention should be paid to the identification and elimination of the root causes of terrorism as terrorism is not born out of nothing or randomly directed against any state. Historical injustice, freedom fighting, occupying forces, poverty, ignorance and bad foreign policy decisions are some of the causes or favourable conditions of terrorism. But the original reason may become blurred over time and organising attacks becomes an aim in itself.

Acknowledgement

This article is based on the author's doctoral thesis *The Possibility of Self-Defence and Collective Security System in the Context of Terrorist Non-State Actors* defended at the Faculty of Law, University of Tartu. For the sake of brevity, this article omits informative remarks, most explanations of international law, certain secondary topics, many examples and some supportive arguments.

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