

SHORTER ARTICLES, COMMENTS AND NOTES

TERRORISM, THE USE OF FORCE AND INTERNATIONAL LAW AFTER 11 SEPTEMBER

The United States response to the terrorist attacks of 11 September 2001 was encouraging for those who worry about a tendency towards unilateralism on the part of the single superpower. The US deliberately engaged a number of international organisations and built an extensive coalition of supporting States before engaging in military action.

Coalition building offered certain practical advantages, such as enabling the freezing of terrorist assets in other States, but it also imposed certain constraints. Some of the members of the coalition would have been concerned to keep the military action within the bounds of international law. For this reason, it was impractical for the US to assert that it was engaged in reprisals, which are precluded by the UN Charter.¹

There were, however, at least four possible legal justifications for the use of force against Afghanistan: Chapter VII of the UN Charter, intervention by invitation, humanitarian intervention and self-defence. It is significant that the US relied solely on the last justification.

This was not because of the kinds of international law involved. Arguments of intervention by invitation, humanitarian intervention, and self-defence are all based largely on customary international law—that informal, unwritten body of rules derived from the practice and opinions of States.² Instead, the decision to opt for self-defence was driven by considerations arising out of the interaction of international politics and international law, as assessments of the four possible legal justifications show.

I. CHAPTER VII

On 12 September 2001, in Resolution 1368, the UN Security Council strongly condemned the terrorist attacks against the US but stopped short of authorising the use of force. Instead, the Council expressed 'its readiness to take all necessary steps', thus implicitly encouraging the US to seek authorisation once its military plans were complete.³

It was reported that the US, at this point, decided not to return to the Council to secure that authorisation.⁴ Perhaps it was concerned that other members might seek to impose a time limit on the mandate, or only authorise such force as was necessary to capture Osama Bin Laden. But it seems that the US may then have changed its mind. On 28 September 2001, in Resolution 1373, the Council adopted language that could be argued to constitute

¹ See Security Council Res 188 of 9 Apr 1964, UN Doc. S/5650, <<http://www.un.org/documents/scres.htm>> ('The Security Council . . . Condemns reprisals as incompatible with the purposes and principles of the United Nations.')

² See generally Michael Akehurst, 'Custom as a Source of International Law,' (1974–5), 47 *British Yearbook of International Law* 1; Gennady Danilenko, *Law-Making in the International Community* (Dordrecht: Martinus Nijhoff, 1993), 75–129.

³ Security Council Res 1368, UN Doc. SC/7143, <<http://www.un.org/documents/scres.htm>>.

⁴ Anne Penketh, 'Annan: UN Must Have Role In Fight Against Terrorism', *Independent*, 25 Sept 2001, 5.

an almost unlimited mandate to use force.⁵

The language was buried among a number of provisions concerning the freezing of terrorist assets. When those are separated out, the key passage reads:

'The Security Council, . . .

'Acting under Chapter VII of the Charter of the United Nations, . . .

'2. Decides also that all States shall: . . .

'(b) Take the necessary steps to prevent the commission of terrorist acts, including. . .

Although the language differs slightly from that previously used to authorise force, for example the phrase 'use all necessary means', it provides better evidence of a Chapter VII authorisation than either the 'material breach' argument used to justify the no-fly-zones in Iraq or the 'implied authorisation' argument used to justify the 1999 Kosovo intervention.⁶ Moreover, the legality of any action under Resolution 1373 is unlikely ever to be tested in court, and Washington could veto any further resolution that might seek to clarify or rescind Resolution 1373, or condemn actions taken in reliance on it. The point, therefore, is not that the resolution *should* be read as authorising the use of force—indeed, in my view it does not⁷—but that it *could* provide the US with an at-least-tenable argument whenever and wherever it decides, for political reasons, that force is necessary to 'prevent the commission of terrorist acts'.⁸

But the US is not the only State that could benefit from this. In future, China and Russia could invoke Resolution 1373 and block any attempts to clarify or rescind it. This may

⁵ Security Council Res 1373, UN Doc SC/7158, <<http://www.un.org/documents/scres.htm>>.

⁶ On material breach, see Michael Matheson, 'Legal Authority for the Possible Use of Force Against Iraq' (1998) 92 *American Society of International Law Proceedings* 136 at 141; Christopher Wren, 'UN Resolutions Allow Attack on the Likes of Iraq,' *New York Times*, 5 Feb 1998, A6; Ruth Wedgwood, 'The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq's Weapons of Mass Destruction' (1998) 92 *American Journal of International Law* 724; D Leuridijk and R Siekmann, 'The Legal Basis for Military Action Against Iraq' (1998) 4 *International Peacekeeping* 71. On implied authorisation, see Barbara Crossette, 'Conflict in the Balkans: At the UN; Council Seeks Punishment for the Kosovo Massacre', *New York Times*, 2 Oct 1998, A6; Neil Lewis, 'The Rationale: A Word Bolsters Case for Allied Intervention', *New York Times*, 4 Apr 1999; Ruth Wedgwood, 'NATO's Campaign in Yugoslavia' (1999) 93 *American Journal of International Law* 828 at 829–30.

⁷ A passage in the *Namibia Advisory Opinion* ((1971) ICJ Reports 15, 53) provides one of the very few authoritative guides to the interpretation of Security Council resolutions: 'The language of a resolution of the Security Council should be carefully analysed . . . having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences . . .'. The context of Resolution 1373 and the kinds of 'steps' identified all suggest an interpretation that does *not* include a Chapter VII authorisation for the use of force.

⁸ For views supportive of this possible interpretation, see: 'Tony Blair: Interview', *Daily Telegraph*, 24 Oct 2001, 4 ('We are entitled to take action against him [bin Laden]. A UN Security Council resolution authorised that.'). Serge Schmemmann, 'UN Requires Members to Act Against Terror,' *New York Times*, 29 Sept 2001, A1 ('The resolution . . . could clearly be interpreted to open the way for the use of force against the radical Islamic Taliban government of Afghanistan if it failed to "deny safe haven" to terrorist groups.'). Jordan Paust, 'Comment: Security Council Authorization to Combat Terrorism in Afghanistan,' *ASIL Insight*, 23 Oct 2001, <<http://www.asil.org/insights/insigh77.htm>>. The argument might be strengthened by reference to paragraph 3(b) of the same resolution ('The Security Council . . . Calls upon all States to: . . . Cooperate . . . to prevent and suppress terrorist acts and take action against perpetrators of such acts') and Resolution 1377, adopted on 12 Nov 2001 and thus after the US began its military offensive, where the Council 'Calls on all States to intensify their efforts to eliminate the scourge of international terrorism', UN Doc S/Res/1377 (2001), <<http://www.un.org/documents/scres.htm>>.

explain why the resolution was adopted unanimously, though time pressures might also have played a role. As the *Financial Times* reported: 'Diplomats who drafted the text, which was passed surprisingly quickly, now admit they did not take into consideration all the possible consequences of the resolution.'⁹

The fact that China and Russia could also argue that Resolution 1373 authorizes the use of force probably explains why the US has not done so. Washington may, after further reflection, have decided that it was contrary to its interests to establish a precedent by relying on a resolution that could strengthen the arguments in favour of subsequent actions by other States.

II. INTERVENTION BY INVITATION

A second possible legal justification was 'intervention by invitation'. Under international law, the government of a State is entitled to request assistance from other States in the suppression of rebel groups.¹⁰ The Taliban could have been regarded as a rebel group: they rose to power quite recently, were only ever recognised by three States and never controlled all of Afghanistan. They were the targets of Security Council condemnations and Chapter VII sanctions.¹¹ But the invitation to intervene would have come from the Northern Alliance, and it was unclear that the Alliance was the legitimate government of Afghanistan instead. For the last four years, delegates from both sought accreditation as representatives of their country to the UN General Assembly. The Assembly repeatedly deferred its decision.¹²

This raises the question whether Afghanistan could have been considered a 'failed State'.¹³ Was it a territory without an effective government? And if so, did its failure to fulfil all the criteria of statehood mean that it no longer benefited from the prohibition on the use of force set out in Article 2(4) of the UN Charter, at least with regard to military

⁹ Carola Hoyos, 'UK to chair UN sanctions committee,' *Financial Times* (US edition), 4 Oct 2001, 2.

¹⁰ See generally Georg Nolte, *Eingreifen auf Einladung—Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung* (Berlin: Springer, 1999); Art 20, ILC Draft Articles on State Responsibility, in 'Report of the International Law Commission on the work of its Fifty-third session,' *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10, chap.IV.E.2)*, available at <<http://www.un.org/law/ilc/index.htm>> ('Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.'). See also: Commentary to Art 20, *ibid*, 176, para 8 ('Examples of consent given by a State which has the effect of rendering certain conduct lawful include commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, humanitarian relief and rescue operations and the arrest or detention of persons on foreign territory'); Commentary to Art 26, *ibid*, 209, para 6 ('[I]n applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose.').

¹¹ See, eg Security Council Res 1333, UN Doc S/RES/1333 (2000); Security Council Res 1267, UN Doc S/RES/1267 (1999); both available at <<http://www.un.org/documents/scres.htm>>.

¹² See, eg Report of the Credentials Committee, 11 Dec 1997, UN Doc A/52/719, <<http://www.un.org/ga/52/credcomm/reporscr.htm>>, especially paras 9 and 10. Russia and some of the former Soviet Central-Asian Republics did recognise the Alliance as the legitimate government prior to Sept 2001.

¹³ See generally Daniel Thürer, 'The "Failed State" and International Law' (Dec 1999) 81 (836) *International Review of the Red Cross* 731.

action directed at terrorists?¹⁴ The Taliban, however, had a strong grip on most parts of the country, as evidenced by their ability to close down almost all of the opium production in those areas under their control.¹⁵ In addition, any argument that 'failed States' do not benefit from Article 2(4) encounters a series of problems. Who decides that a State has failed? What of the presumption that governments, once established, retain their legal authority even if they subsequently lose much of their effective control?¹⁶ And what of the previous reluctance of the international community to conclude that a failure of government amounts to a failure of statehood, in Somalia, Sierra Leone, and elsewhere?

Added to the legal issue of the capacity to invite intervention were political concerns regarding an over-dependence on the Alliance, with its fragmented leadership and consequent unpredictability. Moreover, the Alliance, which was made up of minority tribes from the north of the country, was strongly opposed by Pakistan and had behaved in a dreadful manner when previously in control of Kabul. The argument of intervention by invitation would have strengthened the claim of the Alliance to return to power and thus risked further chaos and suffering.

Reliance on intervention by invitation would also have undermined the self-defence argument, as examined in some depth below. In short, it was easier for the US to claim self-defence against the State of Afghanistan, as controlled by the *de facto* government of the Taliban, than against the terrorists themselves. Recognising the Alliance as the legitimate government would have made this particular claim untenable.

III. HUMANITARIAN INTERVENTION

A third possible legal justification was a developing customary international law right of unilateral humanitarian intervention—that is an intervention, for humanitarian purposes, which has not been authorised by the Security Council.¹⁷

The UK explicitly claimed the existence of such a right when justifying its actions in northern Iraq in 1991 and Kosovo in 1999.¹⁸ The US, however, was more cautious, refer-

¹⁴ For a suggestion to this effect, see Michael Reisman, 'International Legal Responses to Terrorism' (1999) 22 *Houston Journal of International Law* 3 at 51–4.

¹⁵ Richard Lloyd Parry, 'End of Taliban Will Bring Rise in Heroin' *Independent*, 19 Oct 2001, 10.

¹⁶ Governments in exile are but the most extreme manifestation of this presumption. See: FE Oppenheimer, 'Governments and Authorities in Exile' (1942) 36 *American Journal of International Law* 568; Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Oxford: Clarendon Press, 1998).

¹⁷ See generally Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000); Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd edn) (Dobbs Ferry, NY: Transnational, 1997). Cf. Michael Byers and Simon Chesterman, 'Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law' in JL Holzgrefe and Robert Keohane, *Humanitarian Intervention: Principles, Institutions and Change* (Cambridge: Cambridge University Press, forthcoming 2002).

¹⁸ See Anthony Aust, Legal Counsellor, Foreign & Commonwealth Office, statement before the House of Commons Foreign Affairs Committee, 2 Dec 1992, *Parliamentary Papers*, 1992–3, HC, Paper 235-iii, 85, reproduced in (1992) 63 *British Yearbook of International Law* 827; Sir Jeremy Greenstock, UK Permanent Representative to the UN, statement to the Security Council on 24 Mar 1999, UN Doc S/PV.3988 (1999) 11–12, reproduced in (1999) 70 *British Yearbook of International Law* 580–1. See also 4th Report of the House of Commons Foreign Affairs Committee, 2000, HC 28-1, which points out that the UK Government justified humanitarian intervention only 'as an exceptional measure in support of purposes laid down by the UN Security Council . . . where that is the only means to avert an immediate and overwhelming humanitarian catastrophe'.

ring repeatedly to 'humanitarian concerns' but never explicitly claiming the existence of a customary rule.¹⁹ Germany, for its part, gave its consent to the Kosovo intervention on the condition that it was made clear that this was not a precedent for further action.²⁰ Some academic commentators, it must be said, were not nearly so hesitant.²¹

The desire to avoid setting a precedent was particularly evident in statements made after the air campaign. The then US Secretary of State, Madeleine Albright, stressed that Kosovo was 'a unique situation *sui generis* in the region of the Balkans' and that it was important 'not to overdraw the various lessons that come out of it'.²²

It may be that a similar anxiety about creating a precedent restrained the US from invoking such an argument this time. The anxiety would have been augmented by the fact that the precedent created would have been more sweeping than that arising out of Kosovo. The Security Council had not deemed the food crisis in Afghanistan a threat to the peace and the intervention was, at least initially, conducted by two States only.

It is more likely that the US was concerned that using such an argument could actually limit its ability to use force. If the threat of a humanitarian catastrophe in Kosovo provided a basis for overriding the sovereign rights of Yugoslavia, the threat of one in Afghanistan was the basis for saying that the bombing, even if lawful, should be stopped so as to allow food in.²³

In any event, the apparent incongruity of invoking a humanitarian argument in response to terrorist acts probably precluded this justification from the outset.

IV. SELF-DEFENCE

The US instead decided to rely on self-defence, an area of international law that is particularly contentious and difficult to analyse. Although Article 51 of the UN Charter stipulates the conditions giving rise to a right of self-defence and that acts of self-defence must be reported to the Security Council, it does not define the content of that right.²⁴ Self-defence is part of customary international law.²⁵

¹⁹ See, eg, Bill Clinton's speech on 24 Mar 1999: 'In the President's Words: "We Act to Prevent a Wider War"', *New York Times*, 25 Mar 1999, A15 ('We act to protect thousands of innocent people in Kosovo from a mounting military offensive.').

²⁰ Deutscher Bundestag, Plenarprotokoll 13/248, 16 Oct 1998, 23129, available at <<http://dip.bundestag.de/parfors/parfors.htm>>.

²¹ See, eg Neil A Lewis, 'The Rationale: A Word Bolsters Case for Allied Intervention,' *NY Times*, 4 Apr 1999 (quoting Abram Chayes, Diane Orentlicher, Michael Reisman, Ruth Wedgwood and Thomas Franck); Christopher Greenwood, 'Yes, But Is the War Legal?', *Observer*, 28 Mar 1999; Ruth Wedgwood, 'NATO's Campaign in Yugoslavia,' (1999) 93 *American Journal of International Law* 828.

²² US Secretary of State Madeleine Albright, Press Conference with Russian Foreign Minister Igor Ivanov, Singapore, 26 July 1999 <<http://secretary.state.gov/www/statements/1999/990726b.html>>.

²³ Kim Sengupta and Cahal Milmo, 'UN Demands Pause In Bombing To Let Aid Reach Starving Afghans', *Independent*, 13 Oct 2001, 1; Andrew Buncombe and Colin Brown, 'Short Demands Early End To Offensive As Stray Bomb Hits Kabul Homes,' *Independent*, 14 Oct 2001, 1.

²⁴ Art 51 reads: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

²⁵ See generally Ian Brownlie, *International Law and the Use of Force by States* (Oxford:

Necessity and proportionality are the key requirements. During the 1837 rebellion in Upper Canada, British forces captured an American ship that was being used to supply the rebels on the Canadian side of the Niagara River, set it on fire and sent it over Niagara Falls. The US asserted that the United Kingdom had to show this was a necessary and proportionate act of self-defence. The UK agreed with the American assessment of the legal requirements, and the modern law of self-defence was born.²⁶

The UK was also involved in a more recent precedent: its response to the 1982 Falklands/Malvinas invasion was a necessary and proportionate act of self-defence.²⁷ But most claims of self-defence arise in circumstances that are less clear cut. Their contribution to the ongoing development of customary international law turns on whether they are widely accepted by other States.

For example, in 1976 Israeli commandos stormed a hijacked plane in Entebbe, Uganda, killing the pro-Palestinian hijackers and rescuing most of the passengers and crew. Although many of the passengers were Israeli, Israel itself had not been attacked. Nor had it sought Uganda's permission for the raid. But most States tacitly approved of what Israel had done. The requirements of necessity and proportionality were, as a result, loosened somewhat with regard to the rescue of nationals abroad.²⁸

In contrast, when Israel destroyed an Iraqi nuclear reactor in 1981, its claim of self-defence was firmly rejected by other States.²⁹ Since a nuclear strike had not occurred, and was not imminent, the requirements of necessity and proportionality were not fulfilled. Any right to engage in anticipatory acts of self-defence remained tightly constrained.

V. RESPONSE TO TERROR

Today, the question arises as to whether the right of self-defence extends to military responses to terrorist acts, particularly since most such responses will violate the territorial integrity of a State that is not itself directly responsible. For decades, the US, Israel and apartheid South Africa promoted such a claim. For example, in 1986 the then US Secretary of State George Shultz said:

[T]he Charter's restrictions on the use or threat of force in international relations include a specific exception for the right of self-defense. It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations, even for the purpose of rescuing hostages; or from using force against states that support, train, and harbor terrorists or guerrillas.³⁰

Clarendon Press, 1963) 231–80; Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 1994) 661–78; *Nicaragua case* (1986) ICJ Reports 14 at 102–6, 110, 122–23, paras 193–201, 210–11, 236–7.

²⁶ See 29 British and Foreign State Papers 1137–38 and 30 British and Foreign State Papers 195–6; Robert Jennings, 'The *Caroline* and *McLeod* Cases,' (1938) 32 *American Journal of International Law* 82.

²⁷ See generally: Alberto Coll and Anthony Arend, *The Falklands War: Lessons for Strategy, Diplomacy, and International Law* (Boston: G Allen & Urwin, 1985).

²⁸ See: UN Doc S/PV 1939, 27, 51–9, 92 and UN Doc S/PV 1941, 31–2, reproduced in (1976) 15 *International Legal Materials* 1224; Michael Akehurst, 'The Use of Force to Protect Nationals Abroad,' (1977) 5 *International Relations* 3.

²⁹ See Security Council Res. 487 (1981) (unanimous), <<http://www.un.org/documents/scres.htm>>.

³⁰ Shultz, 'Low-Intensity Warfare: The Challenge of Ambiguity,' Address to the National

Although invocations of this position to justify specific uses of force have been accepted in some instances,³¹ the pattern of response has not been clear enough to establish new customary international law. For example, Israel claimed to be acting in self-defence when it attacked the headquarters of the Palestine Liberation Organisation in Tunisia in 1985. The Security Council strongly condemned the action.³² In 1998, after the bombings of its embassies in Kenya and Tanzania, the US fired cruise missiles at targets in Sudan and Afghanistan and claimed self-defence. A number of governments expressed concern about the fact that the territorial integrity of sovereign States was violated in an attempt to target, not the States themselves, but terrorists believed to be present there.³³

Even when the State concerned is directly implicated in terrorism, acts of self-defence directed against it have—in most instances—received at best a mixed response.³⁴ In 1986, a terrorist bomb in a Berlin nightclub killed a number of American soldiers. The US responded by bombing Tripoli, and claimed self-defence. The claim was widely rejected, with many States expressing doubt as to whether the attack on Libya was necessary and proportionate.³⁵ In 1993, in Kuwait, an assassination attempt was made on George Bush Sr. The US responded by bombing the headquarters of the Iraqi Secret Service. It claimed self-defence on the basis that the attack on the ex-President was tantamount to an attack on the US itself. Again, the claim received little support from other States.³⁶

In the *Nicaragua* Case, the International Court of Justice accepted that self-defence could include responses to the 'sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another State of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular armed forces, or its substantial involvement therein'.³⁷ In other words, the

Defense University, Washington, DC, 15 Jan 1986, reproduced in (1986) 25 *International Legal Materials* 204 at 206. The so-called 'Shultz Doctrine' was first articulated on 25 Oct 1984. See 'Excerpt's From Shultz's Address on International Terrorism,' *New York Times*, 26 Oct 1984, A12. For a wide-ranging analysis, see Jordan Paust, 'Responding Lawfully to International Terrorism: The Use of Force Abroad' (1986) 8 *Whittier Law Review* 711.

³¹ See the extensive analysis of State practice in: Claus Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakten Privater* (Berlin: Duncker & Humblot, 1995).

³² Security Council Res 573 (1985), <<http://www.un.org/documents/scres.htm>>. The resolution was adopted with fourteen votes in favour and one abstention: the US.

³³ See Final Document of the XIth Summit of the Non-aligned Movement, 2–3 Sept 1998, Durban, South Africa, <<http://www.nam.gov.za/xiisummit/>>, para 159; (1998) *Africa Research Bulletin* 13268; Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2000) 117–8. Cf Ruth Wedgwood, 'Responding to Terrorism: The Strikes against Bin Laden' (1999) 24 *Yale Journal of International Law* 559.

³⁴ Some academic commentators have been less equivocal. See, eg Antonio Cassese, 'The International Community's "Legal" Response to Terrorism' (1989) 38 *ICLQ* 589 at 598 ('where the terrorists are officials of the State or are *de facto* effectively controlled by it . . . international law is clear: the terrorist attack is attributable to the State and a use of force against it by way of individual or collective self-defence is allowed.').

³⁵ See Gray, op cit 116–17; Michael Reisman, 'International Legal Responses to Terrorism' (1999) 22 *Houston Journal of International Law* 3 at 33–4.

³⁶ See Dino Kritsiotis, 'The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law' (1996) 45 *ICLQ* 162; Gray, 'After the Cease-fire: Iraq, the Security Council and the Use of Force' (1994) 65 *British Yearbook of International Law* 135 at 169–72.

³⁷ *Nicaragua Case* (1986) ICJ Reports 14 at 103, para 195.

Court held that an 'armed attack' exists only when the link between the State and the non-State actor is very close, and the attack is of a seriousness akin to an attack by a State. This position is consistent with the law of State responsibility insofar as it concerns the attribution of the acts of non-State actors to a State.³⁸

In late September 2001, the US found itself in something of a legal dilemma, though not an entirely unhelpful one. In order to maintain the coalition against terrorism, its military response had to be necessary and proportionate. This meant that the strikes had to be carefully targeted against those believed responsible for the atrocities in New York and Washington. But if the US singled out Bin Laden and Al-Qaeda as its targets, it would have run up against the widely held view that terrorist attacks, in and of themselves, do not constitute 'armed attacks' justifying military responses against sovereign States. Even today, most States would not support a rule that opened them up to attack whenever terrorists were thought to operate within their territory.

In response to this dilemma, the US adopted a two-pronged legal strategy. First, it expanded its focus to include the Taliban.³⁹ By giving refuge to Bin Laden and Al-Qaeda and refusing to hand him over, the Taliban were alleged to have directly facilitated and endorsed his acts. Moreover, their continued presence as the *de facto* government of Afghanistan was viewed as a threat, in and of itself, of even more terrorism. As John Negroponte, the US Permanent Representative to the UN, explained in a letter to the President of the Security Council on 7 October 2001:

The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.⁴⁰

The US in this way broadened the claim of self-defence to include the State of Afghanistan. Although it would normally still be contentious, this is much less of a stretch from pre-existing international law than a claimed right to attack terrorists who

³⁸ Under the customary international law of State responsibility, States are only responsible for those acts of private individuals or groups over which they exercise 'effective control'. See Art 8, ILC Draft Articles on State Responsibility, in 'Report of the International Law Commission on the work of its Fifty-third session,' *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10, chap.IV.E.2)*, available at < <http://www.un.org/law/ilc/index.htm>> ('The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out that conduct.'). Commentary to Art 8, *ibid.*, 104, para 3 ('Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation.'). On State responsibility and terrorism specifically, see Luigi Condorelli, 'The Imputability to States of Acts of International Terrorism' (1989) 19 *Israel Yearbook on Human Rights* 233.

³⁹ It is possible that the expansion was driven, not only by legal strategy, but also by the discovery of evidence implicating the Taliban in the attacks of 11 September. See 'Blair Presents His Case Against Al-Qa'ida Network,' *Independent*, 5 Oct 2001, 4; 'The allies' case against Bin Laden: Extracts from yesterday's government document,' *Guardian*, 5 Oct 2001, 4.

⁴⁰ UN Doc S/2001/946, available at <<http://www.un.int/usa/s-2001-946.htm>>. See also: Christopher Wren, 'US Advises UN. Council More Strikes Could Come,' *New York Times*, 9 Oct 2001, B5.

simply happened to be within the territory of another State.⁴¹ Subsequent statements by the Taliban, apparently endorsing the terrorist acts, may further have engaged their legal responsibility even if, under pre-existing customary international law, this might not have made them responsible for an 'armed attack'.⁴² And for these reasons, the claim to be acting in self-defence against the State of Afghanistan—and the modification of customary international law inherent within that claim—had a much better chance of securing the expressed or tacit support of a large number of other States.

Second, the US worked hard to secure widespread support in advance of its military action. The formation of the coalition, including the invocation of Article 5 of the 1949 North Atlantic Treaty and Article 3(1) of the 1947 Inter-American Treaty of Reciprocal Assistance, even though neither NATO nor the parties to the Inter-American Treaty were called upon to engage in military action, helped smooth the path for the self-defence claim.⁴³ Both groups identified the events of 11 September as an 'armed attack'. Similarly, the Security Council resolutions adopted on 12 and 28 September were carefully worded to affirm, within the context of a broader response to terrorism, the right of self-defence in customary international law.⁴⁴

This second strategy built upon an approach previously used in 1998. A few short hours before he ordered the cruise missile strikes against terrorist targets in Sudan and Afghanistan, Bill Clinton telephoned Tony Blair, Helmut Kohl, and Jacques Chirac and requested their support. Without having time to consult their legal advisers, all three leaders agreed—and followed this with public statements immediately after the strikes.⁴⁵ Criticism of the military action by other States was, consequently, more restrained than it might have been. And this relatively restrained response facilitated the eventual modification of customary international law that has now quite clearly occurred.

As a result of the legal strategies adopted by the US, coupled with the already contested character of the rule and a heightened concern about terrorism world-wide, the right of self-defence now includes military responses against States which actively support or willingly harbour terrorist groups who have already attacked the responding

⁴¹ For prior academic commentary to this effect, see Oscar Schachter, 'The Lawful Use of Force by a State against Terrorists in Another Country' (1989) 19 *Israel Yearbook on Human Rights* 209 at 215–18.

⁴² See 'Mullah Omar—in his own words', *Guardian*, 26 Sept 2001, Features, 3 (translation of interview with Voice of America); *United States Diplomatic and Consular Staff in Tehran* (1980) ICJ Reports 3 at 36, para 74 (Once the Government of Iran endorsed the illegal acts of Iranian militants, it became legally responsible for those acts itself).

⁴³ See Suzanne Daley, 'For First Time, NATO Invokes Joint Defense Pact With US,' *New York Times*, 13 Sept 2001, A17; Suzanne Daley, 'NATO Says US Has Proof Against bin Laden Group,' *New York Times*, 3 Oct 2001, A1; 'Rio Treaty Countries Lend Full Support to United States,' OAS Press Release E-213/01, 16 Oct 2001, <<http://www.oas.org>>. The North Atlantic Treaty ('Washington Treaty') may be found at <<http://www.nato.int/docu/basicxt/treaty.htm>>; the Inter-American Treaty ('Rio Treaty') at <<http://www.oas.org>>.

⁴⁴ Security Council Res 1368, UN Doc SC/7143; Security Council Res 1373, UN Doc SC/7158; both available at <<http://www.un.org/documents/scres.htm>>. The language used in the two resolutions differs slightly. Resolution 1368 reads, *inter alia*: 'Recognizing the inherent right of individual or collective self-defence in accordance with the Charter'. Resolution 1373 reads, *inter alia*: 'Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)'. It could be argued that the language used in the second resolution is more expansive—and thus less restraining.

⁴⁵ William Drozdiak, 'European Allies Back US Strikes; Japan Says It "Understands",' *Washington Post*, 21 Aug 1998, A20.

State.⁴⁶ And in accordance with a longstanding consensus—and Article 51 of the UN Charter—self-defence can be either individual or collective, enabling States that have been attacked by terrorists to call on other States to participate.

The long-term consequences of this strategic approach may be significant. Had the US relied on arguments of Security Council authorisation, invitation or humanitarian intervention, it is unlikely that many States would have objected, but next time it would have been more difficult to act alone or in the absence of such additional conditions. Although previous attempts to establish a right to engage in self-defence against terrorists proved largely unsuccessful due to a lack of international support, the situation in the aftermath of 11 September was considerably more conducive. Having seized the opportunity to establish self-defence as an accepted basis for military action against some terrorist attacks, the US will now be able to invoke it again—even when the circumstances are less grave. It is thus plausible to regard the choice of justification as, in part, a strategic decision directed at loosening the legal constraints on the use of force to the *ongoing* advantage of the US.

VI. PRE-EMPTIVE ACTION

The US may now be employing similar legal strategies in an effort to develop or extend a right of anticipatory self-defence against terrorist acts. Until 11 September, any right to pre-emptive action was widely contested—and thus tightly constrained. When Israel destroyed the Iraqi nuclear reactor, its claim of self-defence was firmly rejected.⁴⁷ In fact, Article 51 of the UN Charter states that the right of self-defence arises when ‘an armed attack occurs’ and most States have, since 1945, been very reluctant to claim a right of anticipatory self-defence.

Israel justified the strikes that initiated the 1967 Six Day War on the basis that Egypt’s blocking of the Straits of Tiran was a prior act of aggression.⁴⁸ The US justified its 1962 blockade of Cuba on the basis of Chapter VIII of the UN Charter, as regional peacekeeping,⁴⁹ and the 1988 downing of an Iranian civilian Airbus as a response to an ongoing armed attack.⁵⁰ An ongoing series of attacks might justify a

⁴⁶ For a similar view, see: Frederic Kirgis, ‘Israel’s Intensified Military Campaign Against Terrorism,’ ASIL Insight, Dec 2001, <<http://www.asil.org/insights.htm>> (‘Because customary international law is often developed through a process of official assertions and acquiescences, the absence of challenge to the US asserted right of self-defence could be taken to indicate acquiescence in an expansion of the right to include defense against governments that harbor or support organized terrorist groups that commit armed attacks in other countries.’). For evidence of support from other States, see, eg, ‘Assembly Winds Up Week-Long Debate on Elimination of Terrorism,’ UN Press Release GA/9929, 5 Oct 2001, <<http://www.un.org/News/Press/docs/2001/ga9929.doc.htm>>; ‘Universal Condemnation of Terrorism Continues in Assembly’s General Debate, Counter-Action Supported; Five Presidents Heard,’ UN Press Release GA/9959, 11 Nov 2001, <<http://www.un.org/News/Press/docs/2001/ga9959.doc.htm>>; Serge Schmemmann, ‘Near Unity at the UN On Opposing Terrorism,’ *New York Times*, 17 Nov 2001, B5.

⁴⁷ See Security Council Resolution 487 (1981) (unanimous), <<http://www.un.org/documents/scres.htm>>; discussion, above 406.

⁴⁸ (1967) United Nations Yearbook 166, 174 and 196.

⁴⁹ Abraham Chayes, ‘Law and the Quarantine of Cuba,’ (1963) 41 *Foreign Affairs* 550.

⁵⁰ (1988) United Nations Yearbook 199; *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)*, Preliminary Objections, written pleadings of US, Part I, Ch II (available at: <<http://www.icj-cij.org/icjwww/lcases/iirus/iirusframe.htm>>).

response on the basis that each incident is part of a larger campaign, which, as a whole, constitutes the armed attack. But there is relatively little support for a right of anticipatory self-defence, as such, in present day customary international law—either generally or in respect of terrorist acts.⁵¹

This does not mean that this aspect of the law will remain unchanged. In his letter of 7 October 2001, Ambassador Negroponte did more than invoke the right of self-defence with regard to Afghanistan. He also wrote: ‘We may find that our self-defence requires further actions with respect to other organisations and other states.’⁵² The US, in extending its claim beyond Al-Qaeda, is clearly contemplating widespread military action of a pre-emptive character that it would justify as anticipatory self-defence. Negroponte’s letter could be seen as a step towards securing advanced support for an extension of the right of self-defence to encompass this previously contested sphere.⁵³ Indeed, the letter attracted little in the way of protests from other States—an omission that might, if continued in the face of action justified as anticipatory self-defence—be regarded as evidence of acquiescence in yet another change to customary international law.

VII. SELF-DEFENCE AND THE UN CHARTER

Although Article 51 of the UN Charter does not define self-defence, the Charter system does impose some limits on the exercise of the right.⁵⁴ There is likely to be considerable debate over these limits in the months and years to come. For example, the right of self-defence is conditioned on the occurrence of ‘an armed attack against a Member of the United Nations’.⁵⁵ It will probably be argued that the atrocities of 11 September did not constitute an armed attack since they did not involve the use of force by a State, and that the relevant framework of analysis is instead international criminal law. In response, it might be said that this argument fails to distinguish between ‘aggression’ in the sense of Articles 1(1) and 39 of the Charter, and an ‘armed attack’ in the sense of Article 51 (at least in its English version).⁵⁶ But the debate over ‘armed attack’ will be irrelevant: by expanding its claim of self-defence to include the Taliban and securing the advance

⁵¹ See Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2000) 111–15. Cf Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim’s International Law* (9th edn) (London: Longman, 1992), 421–2. It is noteworthy that the International Court of Justice, in its *Nuclear Weapons Advisory Opinion*, made no reference to anticipatory action when it declared itself unable to conclude whether the use of nuclear weapons would be legal in ‘an extreme circumstance of self-defence, in which the very survival of a State would be at stake’ (1996) ICJ Reports 226, <<http://www.icj-cij.org>>, at para 97.

⁵² UN Doc S/2001/946, available at <<http://www.un.int/usa/s-2001-946.htm>>. See also Christopher Wren, ‘US Advises UN Council More Strikes Could Come,’ *New York Times*, 9 Oct 2001, B5.

⁵³ The UK would seem to have already expressed its support, in a speech delivered by Defence Secretary George Hoon. See Richard Norton-Taylor, ‘Prepare to fight terror worldwide, says Hoon,’ *Guardian*, 6 Dec 2001, 6 (‘We may need to coerce regimes and states which harbour or support international terrorism, with the threat and, ultimately the use of, military force in the event that diplomatic and other means fail.’).

⁵⁴ See generally Nico Krisch, *Selbstverteidigung und kollektive Sicherheit* (Berlin: Springer, 2001); DW Greig, ‘Self-Defence and the Security Council: What Does Article 51 Require?’ (1991) 40 ICLQ 366.

⁵⁵ For the full text of Art 51, see above, n 24.

⁵⁶ The French version speaks simply of *agression armée*.

support of a large number of other States, the US has effectively overcome any such limitation.⁵⁷ The attacks on New York and Washington engaged individual criminal responsibility, but State-sponsored terrorism on this scale now also constitutes an 'armed attack'.

Article 51 also stipulates that the right of self-defence exists 'until the Security Council has taken measures necessary to maintain international peace and security'.⁵⁸ It could be argued that the adoption of Resolutions 1368 and 1373, rather than reinforcing the right of the US to engage in self-defence against Afghanistan, instead superseded that right. Both resolutions were adopted in direct response to the terrorist acts rather than pursuant to a US report of self-defence action, both were adopted under Chapter VII, and both call upon or require States to take a range of non-forceful measures to combat terrorism. They could thus be seen as constituting 'measures necessary to maintain international peace and security'.

There are at least three legal or practical problems with this argument. First, it fails to explain why the Security Council, in both instances, was careful to recognise 'the inherent right of individual or collective self-defence'. This explicit recognition would make little sense if the Council intended to supersede the US right to engage in defensive action. Although the US is not identified specifically as the State having the right to engage in self-defence,⁵⁹ the thrust of both resolutions is clearly to express and provide wide-reaching support for the US. Subsequent support for the US military action reinforces this interpretation.⁶⁰ Secondly, even if the argument carried some weight, the argument that the right of self-defence survives, because it has explicitly been recognised in the same two resolutions, is no less tenable. And in the realm of international politics, at least, a tenable argument may well be good enough—particularly for the single superpower.⁶¹ Thirdly, the argument ignores the possibility that Resolution 1373 could be argued to contain an almost unlimited Chapter VII authorisation of the use of force.⁶² Arguing that the right of self-defence has been superseded might have the unfortunate consequence of provoking the invocation of this aspect of the resolution, thereby opening the door for further such invocations, by Russia, China and others, once the current consensus on the use of force disappears.

⁵⁷ See discussion: above, 408–9.

⁵⁸ For the full text of Art 51, see: above, n 24.

⁵⁹ In contrast, the Security Council resolution adopted immediately after the Iraqi invasion of Kuwait recognized the right of individual or collective self-defence specifically in response to the armed attack against Kuwait. See Res 661 (1990) <<http://www.un.org/documents/scres.htm>>; Colin Warbrick, 'The Invasion of Kuwait by Iraq' (1991) 40 *ICLQ* 482 at 483–8.

⁶⁰ See, eg, 'Assembly Winds Up Week-Long Debate on Elimination of Terrorism,' UN Press Release GA/9929, 5 Oct 2001, <<http://www.un.org/News/Press/docs/2001/ga9929.doc.htm>>; 'Universal Condemnation of Terrorism Continues in Assembly's General Debate, Counter-Action Supported; Five Presidents Heard,' UN Press Release GA/9959, 11 Nov 2001, <<http://www.un.org/News/Press/docs/2001/ga9959.doc.htm>>; Serge Schmemann, 'Near Unity at the U.N. On Opposing Terrorism,' *New York Times*, 17 Nov 2001, B5.

⁶¹ See Sir Arthur Watts, 'The Importance of International Law', in Michael Byers (ed), *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000), 5 at 8 ('There is room for the view that all that States need for the general purposes of conducting their international relations is to be able to advance a legal justification for their conduct which is not demonstrably rubbish. Thereafter, political factors can take over').

⁶² See discussion: above 401–3.

VIII. CONSEQUENCES

Apart from the extended scope of the right of self-defence, there are at least three related consequences that bear consideration.

First, the strength of the arguments that the US did not use is likely to remain unaffected by the decision to focus on self-defence. Arguments as to a possible Chapter VII authorisation, invitation and unilateral humanitarian intervention will be no less available in future, should the facts accommodate them.

Secondly, the extension of the right of self-defence to include action against States actively supporting or willingly harbouring terrorists raises difficult issues of evidence and authority. Simply put: who decides that there is sufficient evidence of State complicity to justify the use of military force? Is the Article 51 requirement that self-defence measures be reported to the Security Council sufficient protection against incautious or opportunistic behaviour—especially given that five of the States most able to engage in such measures have the capacity to veto any resolution directed against them? These issues become only more difficult in the context of an extension of the right of self-defence to include pre-emptive action.

Thirdly, extending the right of self-defence to include action against States willingly harbouring terrorists creates a potentially awkward overlap between the law of self-defence and the law of judicial co-operation, especially with regard to extradition. At what point is a State's right to choose between prosecuting or extraditing an accused terrorist superseded by a second State's right to use force in self-defence against it? Should the second State be required to present evidence of culpability to the first State before launching self-defence action? Or should the Article 51 reporting requirement be reinterpreted so that a State wishing to engage in self-defence against a terrorist-harbouring State must first present evidence to the Security Council *and* receive its approval? This, it may be noted, is essentially what occurred with Resolution 1373.⁶³ The right to choose between prosecution or extradition was overridden by the Council on a previous occasion—though not one involving a claim of self-defence—with regard to two Libyan nationals accused of having committed the Lockerbie bombing.⁶⁴ Resolution 748 effectively suspended Libya's right, under the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, to prosecute the accused in Libya rather than extradite them abroad.⁶⁵

Although terrorism is not a crime falling within the Rome Statute of the International Criminal Court, some terrorist acts, such as the attacks of 11 September, may be of a scale that makes them crimes against humanity.⁶⁶ This raises the question

⁶³ See discussion: above 408–9.

⁶⁴ Security Council Res. 748 (1992), <<http://www.un.org/documents/scres.htm>>.

⁶⁵ (1975) 974 United Nations Treaty Series 177, <<http://untreaty.un.org>>.

⁶⁶ See, eg Art 7(1)(a) of the ICC Statute, setting out the elements of the crime against humanity of murder: '1. The perpetrator killed one or more person. 2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systemic attack against a civilian population.'—Rome Statute of the International Criminal Court, UN Doc A/Conf.183/9 (1998), <<http://www.un.org/law/icc/statute/rome.htm>>. However, a proposal to include terrorism itself as one of the crimes subject to the jurisdiction of the ICC was rejected by the Rome Conference. See UN Doc A/CONF.183/C.1/L27; Neil Boister, 'The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics,' (1998) 3 *Journal of Armed Conflict Law* 27.

of the relationship between the new right to engage in self-defence against States willingly harbouring terrorists and the soon to be in place mechanisms of the ICC. Although international criminal law and the law governing the use of force necessarily operate in tandem—indeed, one of the primary heads of ICC jurisdiction is to be ‘war crimes’—they remain conceptually and practically distinct. The important role accorded national courts is a reflection of this distinction.⁶⁷ Extending self-defence to include attacks on States willingly harbouring terrorists could create an additional, awkward overlap with these new institutional mechanisms.

These and other problems will have to be resolved in order to enable the extended right of self-defence to co-exist easily with other, related fields of international law. But the existence of these problems does not mean that the extension of the right of self-defence is necessarily a bad thing. As Sir Arthur Watts has explained, with considerable prescience:

Self-defence probably has to be an inherently relative concept—relative to the times and circumstances in which it is involved. Self-defence on the days of naval warfare, such as that at Trafalgar, is a very different thing from self-defence in the days of nuclear warfare, Exocet missiles, and the possibility of easy transport to almost any destination in the world of small packages of anthrax or nerve agents. All the same, there are limits to the burden which the concept of self-defence can safely, and legally, be called upon to bear. It is essentially a legal concept, and its application to any particular circumstances must be evaluated in accordance with international law. To stretch the concept to such an extent that it departs from the ordinary meaning of the term, as refined by judicial pronouncements, serves not only to undermine this particular branch of the law, but also to bring the law in general into disrepute.⁶⁸

The events of 11 September have set in motion a significant loosening of the legal constraints on the use of force, and this in turn will lead to changes across the international legal system. Only time will tell whether these changes to international law are themselves a necessary and proportionate response to the shifting threats of an all too dangerous world.

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⁶⁷ On ‘complementarity’, see Art 17, Rome Statute of the International Criminal Court, UN Doc A/Conf.183/9 (1998), <<http://www.un.org/law/icc/statute/romeofra.htm>>.

⁶⁸ Sir Arthur Watts, above n 61, at 11.

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