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Eric Corthay  
*Bahrain Polytechnic, eric\_corthay@hotmail.com*

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# MILITARY COOPERATION IN THE FIGHT AGAINST TERRORISM FROM THE STANDPOINT OF INTERNATIONAL LAW

Eric Corthay\*

## Abstract

*From the Sahel-Sahara region to Afghanistan, from Syria to the Philippines, the international community has been witnessing, for a number of years now, the establishment of military training and support partnerships, the launch of joint military operations and the formation of international coalitions which have had a recent upsurge, all of these having been specifically designed to fight against and eliminate the terrorist scourge. These different forms of military cooperation have been justified either by a consent or request from the territorial State, by the right of self-defense, or even by an authorization from the UN Security Council. This article's purpose is to analyze the legal framework within which the operations must fall in order for them to be lawful and their justifications to be valid. Through the analysis of doctrinal debates, actual State practice and the decisions of the International Court of Justice, this paper examines notably the criteria that make an intervention by invitation valid, the limitative conditions of invocation and implementation of the right of self-defense, and finally the original as well as the current mechanism of collective security that has led to the establishment of peace or multilateral operations.*

**Keywords:** *Military training, terrorism, the right of self defense*

## I. INTRODUCTION

For years, terrorism has become a serious concern to the international community. In order to prevent and eradicate this scourge that threatens international peace and security, States have been called upon for cooperation. International cooperation against terrorism is characterized by the implementation of a wide array of measures addressed by the United Nations Counter-Terrorism Strategy (e.g. education, law enforcement, judicial cooperation, sanctions, and capacity building). This paper does not intend to address all the different types of cooperation but rather to focus on a specific one, namely the military cooperation among States while combating terrorism. Military cooperation among members of the international community takes different forms ranging from training national forces of other countries, sharing intelligence, to launching joint combat operations against terrorists harbored

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\* Assistant Professor of International Law and International Relations, Bahrain Polytechnic; eric\_corthay@hotmail.com. Foreign Editor of IJIL.

in the territory of a third State.

The military operations launched in the context of the fight against terrorism are not left to the sole discretion of the States. On the contrary they are governed by international law, and, very often, by the *jus contra bellum* which is a legal regime consisting of a fundamental principle enshrined in Article 2, paragraph 4, of the UN Charter – the prohibition of the use of force in the international relations between States – and of two confirmed and recognized exceptions that are the right of self-defense and the use of force authorized by the UN Security Council. Therefore, in order to determine whether the different forms of military cooperation against terrorism fall within the framework of the *jus contra bellum*, it is necessary to clarify the content and scope of the principle (I) and its two exceptions (II).

## **II. THE PRINCIPLE PROHIBITING THE USE OF FORCE**

Since 1945 at least, international law has been proscribing the threat or use of force in the international relations between States. This fundamental principle prohibiting the use of force is enshrined in Article 2, paragraph 4, of the UN Charter which provides that “[a]ll 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.” As this provision “constitutes the basis of any discussion of the problem of the use of force”<sup>1</sup>, a clarification of its terms seems therefore required. Following on, it will be stressed that some forms of military cooperation, when based on a valid consent of the territorial State, do not fall within the ambit of the *jus contra bellum*.

### **A. CONTENT AND SCOPE OF THE PRINCIPLE: AN OVERVIEW**

The notion of ‘force’ has created some debates. However, the prevailing view is that the term must be limited to the notion of direct or indirect ‘armed force’ and does not comprise other forms of force like,

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<sup>1</sup> Albrecht Randelzhofer, ‘Article 2(4)’, in: Brunno Simma (ed.), *The Charter of the United Nations, A Commentary*, vol. I, Munich, C.H. Beck, 2002, at 116.

for example, political and economic coercion<sup>2</sup>. Indeed, in the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, a document annexed to Resolution 2625 (XXV) of the General Assembly which contains an interpretation of the fundamental principles of the UN Charter, the section dealing with the prohibition of force only refers to the notion of armed or military force. The other forms of force, such as the economic and political coercion, are covered by the section dealing with the principle of non-intervention<sup>3</sup>. Moreover, in order to be qualified as a ‘use of force’ under Article 2, paragraph 4, a military operation must affect the territory, people or objects placed under the jurisdiction of another State<sup>4</sup>. Indeed, the mere non authorized flights by foreign military aircrafts over the airspace of a third State are, in general, qualified as a violation of the sovereignty of the territorial sovereign but not a violation of the principle embodied in the paragraph 4<sup>5</sup>.

Furthermore, the wording ‘international relations’ means that the threat or use of force proscribed by Article 2, paragraph 4, of the UN Charter is limited to the international relations between States. In other words, the *jus contra bellum* is essentially an inter-State regime proscribing military coercion by a State against another one, in violation of the sovereignty of the latter<sup>6</sup>.

Article 2, paragraph 4, of the Charter also provides that States shall

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<sup>2</sup> See notably Hans Wehberg, ‘L’interdiction du recours à la force. Le principe et les problèmes qui se posent’, *Collected Courses of the Hague Academy of International Law*, t. 78, 1951, at 69 [hereinafter *Collected Courses...*]; Dereck W. Bowett, *Self-Defence in International Law*, Manchester, Manchester University Press, 1958, at 148; Ian Brownlie, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963, at 362.

<sup>3</sup> For other reasons in favor of a restrictive interpretation of the notion of force, see notably Eric Corthay, *La lutte contre le terrorisme international, De la licéité du recours à la force armée*, Bâle, Helbing Lichtenhahn, 2012, at 37-38, Albrecht Randelzhofer, *supra* note 1, at 118.

<sup>4</sup> Ian Brownlie, *supra* note 2, at 363-364; Pierre-Marie Dupuy, public sitting, 15 June 1998, *Fisheries Jurisdictions (Spain v. Canada)*, CR 1998/13, at 59, para. 22.

<sup>5</sup> Ian Brownlie, *ibid*.

<sup>6</sup> Olivier Corten, *The Law Against War, The Prohibition on the Use of Force in Contemporary International Law*, Oxford and Portland, Oregon, Hart Publishing, 2012, at 169.

refrain 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”. Following a narrow interpretation of the provision, some scholars argue that the principle prohibiting the use of force is infringed only when a military operation intends to overthrow a foreign government or annex a foreign territory<sup>7</sup>. In their opinion, therefore, targeted killings, rescue operations, as well as the bombardment of terrorists’ training camps abroad would not be prohibited by the principle<sup>8</sup>. Such a view, however, must be rejected. At the Conference of San Francisco in 1945 the terms ‘territorial integrity’ and ‘political independence’ have not been included in the paragraph 4 to restrict the scope of the prohibition of the use of force, but rather to emphasize the need to protect these two core elements of statehood<sup>9</sup>. According to the predominant opinion, the principle in question proscribes any kind of forcible trespassing that violates international frontiers and State sovereignties<sup>10</sup>. The term ‘territorial integrity’ must be read as ‘territorial inviolability’<sup>11</sup> or inviolability of frontiers, and the ‘political independence’ of a State – defined as the right of a State to exercise its internal and international political sovereignty without outside interference – is deemed to be immediately infringed when a foreign military action is conducted without the authorization of the territorial State, even if that action does not result in

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<sup>7</sup> See notably Dereck W. Bowett, *supra* note 2, at 152 and 186 ; Rosalyn Higgins, ‘The Legal Limits to the Use of Force by Sovereign States : United Nations Practice’, *BYIL*, vol. 37, 1961, at 317.

<sup>8</sup> See notably Louis Henkin, *How Nations Behave : Law and Foreign Policy*, New York, Columbia University Press, 2<sup>nd</sup> ed., 1979, at 141-145 ; Gregory M. Travalio, ‘Terrorism, International Law, and the Use of Military Force’, *Wisconsin Int’l L.J.*, vol. 18, 2000, at 166 ; Jordan J. Paust, ‘Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond’, *Cornell Int’l L.J.*, vol. 35, num. 3, 2002, at 536.

<sup>9</sup> See declarations of Honduras, Egypt, New Zealand, Ethiopia, Bolivia, UNCIO, 1945, vol. IV.

<sup>10</sup> See notably Humphrey Waldock, ‘The Regulation of the Use of Force by Individual States in International Law’, *Collected Courses...*, t. 81, 1952-II, at 493 ; Ian Brownlie, *supra* note 2, at 267 ; Eduardo Jiménez de Aréchaga, ‘International Law in the Past Third of a Century’, *Collected Courses...*, t. 159, 1978-I, at 89-92.

<sup>11</sup> This expression is notably used by Lassa F. L. Oppenheim, *International Law : a Treatise*, vol. 2, *Disputes, War and Neutrality*, 7<sup>th</sup> ed., H. Lauterpacht (ed.), London, New York, Longmans Green, 1952, at 154.

overthrowing the government of the said State<sup>12</sup>.

Finally, one must be clearly reminded that Article 2, paragraph 4, *in fine* (“[...] or in any other manner inconsistent with the Purposes of the United Nations”) is not intended to restrict but, on the contrary, to strengthen a general and comprehensive prohibition of force in the international relations between States<sup>13</sup>. As stated by the delegate of the United States during the *travaux préparatoires* of the UN Charter in 1945, “*the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase ‘or in any other manner’ was designed to ensure that there should be no loopholes*”<sup>14</sup>.

## B. MILITARY COOPERATION NOT FALLING WITHIN THE AMBIT OF THE JUS CONTRA BELLUM

Some forms of military cooperation do not fall within the ambit of the regime of the *jus contra bellum* as defined *supra*. In the context of the fight against terrorism, one might indicate at least two types of cooperation not covered by that regime. The first one is the advisory support, training and supply of military equipment by one State on the request of another one. This scenario has been exemplified when, under the framework of an annual joint exercise, Balikpapan 02-1, US military advisors trained Philippine Armed Forces in anti terrorist tactics and intelligence gathering techniques<sup>15</sup>. Another example is the supply of military equipment to the Kurds in northern Iraq, in the past few months, by an emerging coalition of States, including notably the United States, Germany, France, Great Britain, and Italy<sup>16</sup>. This sup-

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<sup>12</sup> Eric Corthay, *supra* note 3, at 57-58.

<sup>13</sup> See notably Hans Wehberg, *supra* note 2, at 70 ; Quincy Wright, ‘The Outlawry of War and the Law of War’, *AJIL*, vol. 47, num. 3, 1953, at 370 ; Ian Brownlie, ‘The Use of Force in Self-Defence’, *BYIL*, vol. 37, 1961, at 236 ; Albrecht Randelzhofer, *supra* note 1, at 123.

<sup>14</sup> UNCLOS, 1945, vol. VI, at 335. See also the proposed amendments made by Australia, Bolivia, Brazil, Costa Rica and Iran, at 557-563.

<sup>15</sup> Wayne A. Larsen, *Beyond Al Qaeda: Islamic Terror in South East Asia*, Maxwell Air Force Base, Alabama, 2005, at 26.

<sup>16</sup> On September 10, 2014, President Obama announced the support to Iraqi and Kurdish forces with training, intelligence and equipment, and highlighted that allies were already sending arms and assistance to Iraqi security forces. See

port, given with the consent of Iraq's central government, aims at aiding Kurds in their battle against militants of the Islamic State in Iraq and the Levant (ISIL), stopping their expansion throughout the country, protecting civilians, and avoiding a destabilization of the region<sup>17</sup>.

The second type of cooperation concerns the combat operations against non-state actors with the request or consent of the host State. This is notably the case of the current air campaign against ISIL conducted by a coalition of States (US, France, UK and others) on the request of the Iraqi government and with the help of Iraqi security forces on the ground gathering intelligence<sup>18</sup>. Another example is the French Operation *Barkhane*, launched in August 2014 on the basis of defense agreements, which consists in securing the Sahel-Sahara region by supporting G-5 Sahel troops (Chad, Mali, Niger, Burkina Faso and Mauritania) and preventing the setting up of terrorist sanctuaries<sup>19</sup>.

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Statement by the President on ISIL, *available at*: <http://www.whitehouse.gov/the-press-office/2014/09/10/remarks-president-barack-obama-address-nation>. As well, Iranian forces are helping the Iraqi army on the ground, providing weapons, intelligence and advisors, *see* Kate Brannen, 'Teheran's Boots on the Gound', *Foreign Policy*, 10 September 2014, *available at*: [http://complex.foreignpolicy.com/posts/2014/09/10/tehraboots\\_on\\_the\\_ground\\_iraq\\_syria\\_islamic\\_state\\_isis\\_iran](http://complex.foreignpolicy.com/posts/2014/09/10/tehraboots_on_the_ground_iraq_syria_islamic_state_isis_iran). Also, in September, Saudi Arabia gave the green light for the US Request for an anti-ISIS training program, *see Foreign Policy*, *available at*: [http://www.foreignpolicy.com/articles/2014/09/11/fps\\_situation\\_report\\_obama\\_lays\\_out\\_plan\\_475\\_more\\_troop\\_s\\_for\\_iraq\\_but\\_no\\_boots\\_o](http://www.foreignpolicy.com/articles/2014/09/11/fps_situation_report_obama_lays_out_plan_475_more_troop_s_for_iraq_but_no_boots_o).

<sup>17</sup> EurActive.de, 'Merkel defends decision to arm Iraqi Kurds with German weapons', 2 September 2014, *available at*: <http://www.euractiv.com/sections/global-europe/merkel-defends-decision-arm-iraqi-kurds-german-weapons-308148>.

<sup>18</sup> Karen De Young, 'Obama approves deployment of 350 more troops to Iraq', *The Washington Post*, 2 September 2014, *available at*: [http://www.washingtonpost.com/world/national-security/obama-approves-deployment-of-350-more-troops-to-iraq/2014/09/02/b05aa99a-3306-11e4-a723-fa3895a25d02\\_story.html](http://www.washingtonpost.com/world/national-security/obama-approves-deployment-of-350-more-troops-to-iraq/2014/09/02/b05aa99a-3306-11e4-a723-fa3895a25d02_story.html). Christopher Paul, Colin P. Clarke, 'A broad approach to countering the Islamic State', *The Washington Post*, 2 September 2014, *available at*: [http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/09/02/a-broad-approach-to-counter-the-islamic-state/?utm\\_source=Sailthru&utm\\_medium=email&utm\\_term=%2AMideast%20Brief&utm\\_campaign=2014\\_T%20he%20Middle%20East%20Daily\\_9.3.14](http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/09/02/a-broad-approach-to-counter-the-islamic-state/?utm_source=Sailthru&utm_medium=email&utm_term=%2AMideast%20Brief&utm_campaign=2014_T%20he%20Middle%20East%20Daily_9.3.14). It is also said that Iranian forces are helping the Iraqi army on the ground in conducting joint operations against ISIL.

<sup>19</sup> For more information, *see* the French Minister of Defense's website, in: [www.defense.gouv.fr](http://www.defense.gouv.fr); *see also* Andrew McGregor, 'Operation Barkhane: France's New Military Approach to Counter-Terrorism in Africa', *TerrorismMonitor*, vol. XII, issue

It goes without saying that consented military training and supply of military equipment *per se* do not constitute any violation of Article 2, paragraph 4, of the UN Charter, as no ‘resort to force’ occurs *in casu*. Moreover, combat missions by foreign troops on the territory of another State, with the consent or on the request of the latter, must be considered as interventions by invitation and as such are legal. Indeed, it is not contested that consent may justify a military operation by one State in the territory of another one. In its Resolution 387 (1976), for example, the Security Council recalled “the inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other State or group of States”. Intervention by invitation must not be considered as an exception to the principle prohibiting the use of force. Neither must consent be considered as a circumstance excluding the wrongfulness of a military operation<sup>20</sup>. Indeed, for consent to be valid, it must be given *ex ante facto*. The resulting operation consented to does not constitute, as such, a violation of the principle, and therefore, as there is no breach of an international obligation, no wrongful act occurs and consequently no wrongfulness that consent can preclude<sup>21</sup>.

Consent justifies a military operation by one State in the territory of another only if it is valid. In the light of State practice, it can be affirmed that its validity depends upon several criteria. Firstly, consent must be internationally attributable to a State, *i.e.* “it must emanate from an organ whose will is deemed, at the international level, to be the will of the State”<sup>22</sup>. Secondly, as already pointed out *supra*, consent must be given by the territorial State prior to the commission of

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15, 25 July, 2014, at 3-4

<sup>20</sup> See, with regard to the circumstances precluding wrongfulness, Resolution 56/83 of 12 December 2001 in which the General Assembly took note of the Draft Articles on Responsibility of States for internationally Wrongful Acts [hereinafter ILC Articles].

<sup>21</sup> Roberto Ago, ‘Eighth report on State responsibility: The internationally wrongful act of the State, source of international responsibility’, *Yearbook of the International Law Commission*, Vol. II, Part One, 1979, at 30, para. 55 [hereinafter *Y.B. Int’l L. Comm’n*].

<sup>22</sup> Report of the International Law Commission on the work of its thirty-first session, 14 May – 3 August 1979, *Y.B. Int’l L. Comm’n*, Vol. II, Part Two, 1979, at 113, para. 15.



the act<sup>23</sup>. Thirdly, consent must be given freely; *i.e.* “consent must not be vitiated by ‘defects’ such as error, fraud, corruption or coercion”<sup>24</sup>. Fourthly, consent must be clearly established and not presumed<sup>25</sup>. In addition, it should be noted that a particular act, which otherwise would have been considered as a breach of an international obligation, is lawful only if conducted “within the limits which the State expressing the consent intends with respect to its scope and duration”<sup>26</sup>. Therefore, as long as these criteria are fulfilled, one might consider that the consent given by the States mentioned *supra* (*e.g.* Iraq, Sahel countries) are valid. Consequently, the foreign military operations carried out in their territory are not in breach of the principle embodied in Article 2, paragraph 4, of the Charter.

### **III. THE EXCEPTIONS TO THE PRINCIPLE PROHIBITING THE USE OF FORCE**

For years, several counter-terrorism military operations, sometimes carried out by a coalition of States, have been conducted in different places in the World. All of these operations have been justified by either of the two exceptions to the principle of non resort to force, *i.e.* the right of self-defense (1), or an authorization given by the Security Council (2). The following paragraphs aim at clarifying the content and scope of these two exceptions in order to assess the legality of the operations.

#### **A. THE RIGHT OF SELF-DEFENSE**

An example of the call for international cooperation in the context of the fight against terrorism occurred in the aftermath of the 9/11 terrorist attacks. On 20 September 2001, President George W. Bush said: “[w]e ask every nation to join us” in the fight against terror<sup>27</sup>. On 10 November 2001, before the General Assembly, he also stated that

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<sup>23</sup> *Ibid.*, at 113, para. 16.

<sup>24</sup> *Ibid.*, at 112, para. 12.

<sup>25</sup> *Ibid.*, at 112, para. 14.

<sup>26</sup> *Ibid.*, at 113, para. 17.

<sup>27</sup> President George W. Bush, *Address to a Joint Session of Congress and American People*, 20 September 2001, available at: <http://www.americanrhetoric.com/speeches/gwbush911jointsessionspeech.htm>

“[t]he conspiracies of terror are being answered by an expanding global coalition. [...] We are asking for a comprehensive commitment to this fight. We must unite in opposing all terrorists [...]”<sup>28</sup>. A large majority of States responded positively to that appeal. It must be mentioned that the United States left them with little choice but to cooperate. Indeed, President Bush clearly stated: “[e]very nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists”.<sup>29</sup> The support of the international community was manifold: politically, financially, and sometimes militarily<sup>30</sup>.

Military cooperation against Al-Qaida and the Taliban regime in Afghanistan is illustrated by the joint US and UK Operation *Enduring Freedom* which was launched on October 2, 2001, and justified through the right of self-defense. Indeed, in the letter addressed to the President of the Security Council, the US Permanent Representative to the United Nations, John D. Negroponte, declared that “the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001”<sup>31</sup>. Many other cooperating nations did not operate in front line missions on the ground, but merely provided air, sea and land support (e.g. bases, territorial access, and overflight permission) to countries engaged in offensive missions in Afghanistan.

More recently, on September 23, 2014, the United States and an array of Arab allies launched airstrikes in Syria against ISIL and Al-Qaida targets which pose terrorist threats to the US and its allies. These strikes have also been justified by the right of self-defense. In her letter to the UN Secretary-General, the US Permanent Representative, Samantha J. Power, declared: “States must be able to defend themselves, in accordance with the inherent right of individual and collective self-

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<sup>28</sup> UN Doc. A/56/PV.44, at 8 and 9.

<sup>29</sup> President George W. Bush, *supra* note 27.

<sup>30</sup> See declarations of States before the General Assembly at the 44<sup>th</sup> plenary meeting, 10 to 16 November 2001, UN Doc. A/56/PV.44 to A/56/PV.57.

<sup>31</sup> UN Doc. S/2001/946. See also the letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/947.

defense, as reflected in Article 51 of the UN Charter, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe-havens effectively itself”.<sup>32</sup>

In the opinion of the present writer, Operation *Enduring Freedom* in Afghanistan and the airstrikes in Syria do not comply with the law *de lege lata*, and, in particular, with the customary law of self-defense enshrined in Article 51 of the UN Charter. This Article requires: “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”. Taking into consideration scholarly works, international jurisprudence and State practice, it will be shown *infra* that the right of self-defense can only be invoked in the case of *ongoing armed attack by a State*<sup>33</sup>. As the conditions of invocation (armed attack by a State) and implementation (ongoing armed attack) of the right of self-defense have not been met, the two military operations could not and should not have been justified by that right.

1. The conditions of invocation of the right of self-defense

the requirement for an armed attack to exist was confirmed in the *Nicaragua* case by the International Court of Justice which held that such an attack is “the condition *sine qua non* required for the exercise of the right of [...] self-defence”<sup>34</sup>. The question as to whether a particular use of force may be qualified as an armed attack depends upon the degree of gravity of the said act. Indeed, in the *Nicaragua* case, the Court held: “As regards certain particular aspects of the principle [prohibiting the use of force], it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.”<sup>35</sup> In order to determine whether

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<sup>32</sup> See the letter available at: <http://justsecurity.org/15436/war-powers-resolution-article-51-letters-force-syria-isil-khorasan-group/>.

<sup>33</sup> Eric Corthay, *supra* note 3, at 93.

<sup>34</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *ICJ Reports* 1986, para. 237 [hereinafter *Nicaragua* case]. See also, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, *ICJ Reports* 2003, para. 51 [hereinafter *Oil Platforms* case].

<sup>35</sup> *Nicaragua* case, para. 191.

the degree of gravity necessary for an armed attack has been reached, the scale and effect of the attack need to be analyzed.<sup>36</sup>

Terrorist attacks, as those perpetrated in New York (2001) or Bali (2002), show that non- state actors are capable of severely endangering national and international peace and security with, at the very least, the same degree of effectiveness and horror as the conduct of any conventional armed attack by States. Therefore, some scholars and certain members of the international community assert that an armed attack giving rise to the right of self-defense can be carried out by individuals or groups of individuals even when those entities have no sufficient connection with a State for attributing their violent conduct to that State.<sup>37</sup> However, many scholars, to which one subscribes, have serious reservations with regard to the opinion according to which the act that triggers a reaction in self-defense might be the conduct of a person or group of persons which is not attributed to a State.<sup>38</sup>

a. The jurisprudence of the international court of justice

The International Court of Justice, which is the principal judicial organ of the United Nations and whose task is mainly to explain the state of international law on particular points at a specific moment, has recalled many times that an armed attack is and must be

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<sup>36</sup> *Ibid.*, para. 195.

<sup>37</sup> See notably Humphrey Waldock, *supra* note 10, at 463-464, and 498; Dereck W. Bowett, *supra* note 2, at 55- 56; James E. S. Fawcett, 'Intervention in International law. A Study of Some Recent Cases', *Collected Courses...*, 1961-II, at 363; Ruth Wedgwood, 'Responding to Terrorism: The Strikes Against bin Laden', *Yale J.Int'l L.*, vol. 24, num. 2, 1999, at 564; Thomas M. Franck, 'Terrorism and the Right of Self-Defense', *AJIL*, vol. 95, num. 4, 2001, at 840; Yoram Dinstein, *War, Aggression and Self-Defence*, 3<sup>rd</sup> ed., Cambridge, Cambridge University Press, 2001, at 192 and 214; Jordan J. Paust, 'Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond', *Cornell Int'l L.J.*, vol. 35, num. 3, 2002, at 534.

<sup>38</sup> See *inter alia* Joseph L. Kunz, 'Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations', *AJIL*, vol. 41, num. 4, 1947, at 878; Hans Kelsen, 'Collective Security and Collective Self- Defense under the Charter of the United Nations', *AJIL*, vol. 42, num. 4, 1948, at 791; Eric P. J. Myjer, Nigel D. White, 'The Twin Towers Attack : an Unlimited Right to Self-Defence ?', *JCSL*, vol. 7, 2002, at 7; Marcelo G. Kohen, 'Is the Legal Argument for Self-Defence against Terrorism Correct ?', in: Wybo P. Heere (ed.), *From Government to Governance, The Growing Impact of Non-State Actors on the International and European Legal System*, The Hague, TMC Asser Press, 2003, at 290.

understood as being an act of State. For example<sup>39</sup>, in 1986, in the *Nicaragua* case, the Court linked and quasi assimilated the concept of armed attack mentioned under Article 51 of the UN Charter with the concept of aggression used in the Annex (Definition of Aggression) to the Resolution 3314 (XXIX) of the General Assembly<sup>40</sup>. Article I of the Annex defines the concept of aggression as “[...] the use of armed force *by a State* against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”<sup>41</sup>. Almost twenty years later, in the *Wall* case, when answering the question whether the construction of a wall between Israel and Palestine could be justified by the right of self-defense, the Court held that “Article 51 of the Charter [...] recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.”<sup>42</sup> However, as “Israel [did] not claim that the attacks against it are imputable to a foreign State” the Court concluded that Article 51 of the UN Charter had no relevance in this case<sup>43</sup>.

b. The opinion of the international law commission

The International Law Commission, which is responsible for the codification and progressive development of international law, points out that the act which triggers an action in self-defense must be an internationally wrongful act, *i.e.* an act of State. Indeed, in the Addendum to the eighth report on State responsibility, Roberto Ago underlined that “the State takes action [in self-defense] after having suffered an international wrong, namely, the non-respect of one of its rights by the State against which the action in question is directed”<sup>44</sup>. Then, when clarifying the nature of the ‘wrong’, Ago

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<sup>39</sup> See also as another example but not detailed here, *Oil Platforms* case, *supra* note 34, paras. 51 and 61.

<sup>40</sup> *Nicaragua* case, *supra* note 34, para. 195.

<sup>41</sup> Emphasis added.

<sup>42</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* 2004, para. 139.

<sup>43</sup> *Ibid.*

<sup>44</sup> Roberto Ago, ‘Addendum to the eighth report on State responsibility: The internationally wrongful act of the State, source of international responsibility’, *Y.B. Int’l L. Comm’n*, Vol. II, Part. One, 1980, at 54, para. 89.

underscored that “the only international wrong which, exceptionally, makes it permissible for the State to react against another State by recourse to force, despite the general ban on force, is an offence which itself constitutes a violation of the ban”<sup>45</sup>.

When non-state actors launch an attack against a State from the territory of another one but their conduct is not attributed to any State, no internationally wrongful act is committed by them. In particular, no violation of the fundamental principle on the prohibition of the use of force, and consequently no armed attack in the meaning of Article 51 can occur because the principle on the prohibition of the use of force applies only to States and in their relations with others. Therefore, according to Ago, in such a situation the victim State is not authorized to invoke the right of self-defense, although it is still lawful for that nation to take appropriate security measures within its territory in order to defend its citizens and maintain peace and security.

c. The rules of attribution

For the reasons mentioned above, an armed attack is and can only be the conduct of a State. In other words, in order to assess if the 9/11 terrorist attacks are susceptible to being referred to as an armed attack, it is *inter alia* necessary to determine if that act is attributable to a State. To do that, the rules of attribution mentioned under Chapter II of the Articles on Responsibility of States for Internationally Wrongful Acts must be applied<sup>46</sup>. Chapter II specifies the limitative conditions under which a conduct is attributable to a State.

With regard to Operation *Enduring Freedom*, none of these conditions have been invoked by the United States or the United Kingdom to declare that the 9/11 attacks were attributable to a State. Indeed, not once did they contend that bin Laden and his group were *de jure* organs of a government (Art. 4), or that their conduct was carried out on the instructions or under the direction or control of a State (Art. 8), or that their actions had been acknowledged and adopted by State authorities *ex post facto* (Art. 11).

Concerning the airstrikes in Syria against ISIL, some scholars and law practitioners hold the view that when a State is ‘unwilling or

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<sup>45</sup> *Ibid.*

<sup>46</sup> See ILC Articles, *supra* note 20.

unable' to prevent individuals from using its territory for launching terrorist attacks, it may be lawful for the targeted State – or other States in case of collective self-defense – to use force in self-defense in order to address that threat<sup>47</sup>. This raises the question of whether a new condition of attribution has emerged, and more exactly, whether failure to prevent or punish terrorist attacks conducted by non-state actors justifies inferring the host State's *complicity* in the individuals' acts, and consequently regarding the terrorist acts as the conduct of the host State.

i. The theory of complicity and the standard of due diligence

According to the controversial theory of complicity invoked today by some scholars in the context of the fight against terrorism<sup>48</sup>, the actions carried out in the territory of the victim State by private entities residing in the territory of the host State are attributed to that latter State, not because the private entities would have acted on its behalf, on its instructions, or under its direction or control, but simply because the host State has failed to fulfill its *ex ante facto* duty of not tolerating, supporting or encouraging (*e.g.* funding, arming, training) the preparation in its territory of actions directed against the victim State, or its *ex post facto* duty of prosecuting and punishing or extraditing the offenders for their wrong<sup>49</sup>. In other words, States would be complicit and would be held responsible for the conduct of individuals when they fail to fulfill their international obligations of vigilance. Such an obligation can be broadly defined as a requirement for each State to protect other States, as well as the representatives and the nationals of these other States, against the illicit acts carried out or about to be perpetrated by

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<sup>47</sup> See John B. Bellinger, *Legal Issues in the War on Terrorism*, conference given at the London School of Economics, 31 October 2006, available at: [http://www2.lse.ac.uk/PublicEvents/pdf/20061031\\_JohnBellinger.pdf](http://www2.lse.ac.uk/PublicEvents/pdf/20061031_JohnBellinger.pdf).

<sup>48</sup> Yoram Dinstein, 'Comments on the Presentations by Nico Kirsch and Carsten Stahn', in: Walter Christian, *et al.* (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Heidelberg, Springer, 2004, at 920; Michael Byers, 'Not yet havoc: geopolitical change and the international rules on military force', *Review of International Studies*, vol. 31, supplement, 2005, at 58.

<sup>49</sup> Roberto Ago, 'Fourth Report on State Responsibility, The internationally wrongful act of the State, source of international responsibility', *Y.B. Int'l L. Comm'n*, Vol. II, 1972, at 119-120, para. 135 (theory rejected by Ago).

individuals, when these acts are conceived, prepared and/or carried out within its territory or under its jurisdiction<sup>50</sup>.

It is worth noting that the obligation of vigilance is not absolute. It is an obligation of conduct and not of result<sup>51</sup>. The host State – Syria, for instance – is only required to employ all means reasonably available to prevent or repress non-state actors' conduct. When doing so, the host State fulfils its obligation of vigilance and cannot be accused of tolerating or acquiescing to the terrorist activities, even if it is not able to efficiently prevent or repress such activities<sup>52</sup>. Contrariwise, in the event Syria is able but unwilling to take measures against ISIL it would breach its obligation of due diligence.

ii. A fundamental difference between terrorists 'conduct and states' conduct

It is essential to understand that a violation of the obligation of due diligence by Syria doesn't at all imply that the country engages its international responsibility for the injurious conduct of ISIL. Indeed, acts committed by private individuals acting as such cannot be considered as acts of the State and therefore the latter is not held responsible for the acts of the formers<sup>53</sup>. Nevertheless, actions of private individuals might reveal the existence of an internationally wrongful act – an action or omission of organs of the State –, and it is that very wrongful act which entails the international responsibility of the State.

The acts of individuals are described as 'catalysts', and what is attributed to the State and might involve its international re-

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<sup>50</sup> Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of International Responsibility of States', *GYIL*, vol. 35, 1992, at 34 ff.; François Dubuisson, 'Vers un renforcement des obligations de diligence en matière de lutte contre le terrorisme?', in: Karine Bannelier, *et al.* (ed. by), *Le Droit international face au terrorisme*, CEDIN-Paris I, Pedone, Cahiers internationaux num. 17, 2002, at 141-157.

<sup>51</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *ICJ Reports* 2007, para. 430 [hereinafter *Genocide Convention case*].

<sup>52</sup> *See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports* 2005, para. 301; *Genocide Convention case*, *supra* note 51, para. 430.

<sup>53</sup> Roberto Ago, *supra* note 49, at 96, para. 63.



sponsibility are not the catalysts *per se* but what is revealed by the catalysts<sup>54</sup>. In the context of the fight against terrorism, the catalysts – *i.e.* the conduct of terrorists acting as private individuals – might highlight the violation of the due diligence obligation by the State in whose territory terrorist actions are conceived and prepared, *i.e.* the violation of the duty to prevent terrorist attacks and/or to punish their acts injurious to the other States. Such a breach arises notably when the host State uses indirect force, examples of which are listed in the annex to Resolution 2625 (XXV) of the General Assembly: organizing, assisting in terrorists acts in another State, acquiescing in organized activities within its territory, etc.

When infringing its due diligence obligation, the host State engages its international responsibility towards other States and is required to cease the wrongful conduct and to make full reparation for the injury caused<sup>55</sup>. For its part, the targeted State has the right to take countermeasures against the host State in order to induce the latter to comply with its international obligations<sup>56</sup> – for example the obligation not to infringe the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the UN Charter and referred to in the annex to Resolution 2625 (XXV). However, the targeted State is not allowed to unilaterally use armed force against the host State and to invoke self-defense, as the acts attributed to that latter State (*i.e.* assisting, acquiescing, etc.) do not constitute an armed attack but merely an indirect use of force<sup>57</sup>.

## 2. The conditions of implementation of the right of self-defense

The existence of an armed attack is a necessary condition, but not a sufficient one, for authorizing a State to use force in self-defense. The implementation of that right requires that the victim States also comply with three other “essential conditions for the admissibility of the

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<sup>54</sup> *Ibid.*, at 123, para. 140.

<sup>55</sup> See ILC Articles, *supra* note 20, in particular Arts. 28, 30 and 31.

<sup>56</sup> *Ibid.*, Art. 49.

<sup>57</sup> *Nicaragua case*, *supra* note 34, para. 191.

plea of self-defence in a given case”<sup>58</sup>: the customary<sup>59</sup> requirements of necessity, proportionality and immediacy. Before analyzing the condition of immediacy, it is important to determine the exact purpose of self-defense, because the compliance of the action taken in self-defense with the requirements of the necessity, proportionality and immediacy is appreciated in light of this purpose.

a. The purpose of an action in self-defense

Operation *Enduring Freedom* and the recent airstrikes in Syria have been justified by the desire to prevent and deter future terrorist attacks. The US Permanent Representative to the United Nations declared for example: “In response to [the 9/11 terrorist] attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States.”<sup>60</sup> In fact, what the intervening States called self-defense is nothing more than the implementation of the nineteenth century concept of self-help (known also as self-preservation or self-protection) that could be invoked in many differing situations such as preventing or deterring non-state actors from launching terrorist attacks<sup>61</sup>. However, since the 1930s the purpose of the right of self-defense has been limited to one of halting and repelling an armed attack<sup>62</sup>.

Today, the very large majority of States and scholars agree that the only admissible purpose of a military operation launched in self-defense is to halt and/or to repel an armed attack<sup>63</sup>. Roberto Ago,

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<sup>58</sup> Roberto Ago, *supra* note 44, para. 119.

<sup>59</sup> *Nicaragua case*, *supra* note 34, para. 176.

<sup>60</sup> UN Doc. S/2001/946, 7 October 2001. *See also* UN Doc. S/2001/947.

<sup>61</sup> *See* Humphrey Waldock, *supra* note 10, at 463-464; Ian Brownlie, *supra* note 2, at 43.

<sup>62</sup> *See* the in-depth research conducted by Linos-Alexandre Sicilianos, *Les réactions décentralisées à l'illicite: des contre-mesures à la légitime défense*, Paris, LGDJ, 1990, at 297

<sup>63</sup> *See notably* Antonio Cassese, ‘Article 51’, in: Jean-Pierre Cot, Alain Pellet (dir.), *La Charte des Nations Unies: Commentaire article par article*, Paris, Economica, 2<sup>nd</sup> ed., 1991, at 775; Oscar Schachter, ‘The Right of States to Use Armed Force’, *Mich.L.Rev.*, vol. 82, num. 5 & 6, 1984, at 254; Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Oxford, Clarendon Press, 1994, at 232; Judith Gardam, ‘Necessity and Proportionality in Jus ad Bellum and Jus

for example, underscored that “the objective to be achieved by the conduct in question [*i.e.* self-defense], its *raison d’être*, is necessarily that of repelling an attack and preventing it from succeeding, and nothing else”<sup>64</sup>. The term ‘preventing it from succeeding’ must be interpreted as meaning ‘defeating an ongoing armed attack’<sup>65</sup>.

It is true that for many years now, some scholars and States<sup>66</sup> have invoked other more controversial purposes for the right of self-defense. According to those scholars, actions in self-defense would be also authorized to prevent attacks and deter attackers from launching operations in the future<sup>67</sup>. This stretching out of the self-defense’s purpose has often been invoked in the context of the war against terrorism, notably because terrorist operations are so sudden and sporadic that it is therefore much easier to prevent or repel terrorist attacks than to halt ongoing ones. However, it must be stressed that such a doctrine has never been confirmed by the actual State practice which has never been neither constant nor uniform – conditions for the existence of a new customary rule<sup>68</sup> – with regard to that matter.

b. The condition of immediacy

The condition of immediacy is closely linked to the objective of self-defense. The former raises the question of when can an action in self-defense be launched: before, during or after an armed

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in Bello’, in: Laurence Boisson de Chazournes, Philippe Sands (ed.), *International Law, The International Court of Justice and Nuclear Weapons*, Cambridge, Cambridge University Press, 1999, at 280

<sup>64</sup> Roberto Ago, *supra* note 44, at 69, para. 119.

<sup>65</sup> See Luigi Condorelli, ‘Les attentats du 11 septembre et leurs suites: où va le droit international?’, *RGDIP*, t. 105, 2001, at 838.

<sup>66</sup> Eric Corthay, *supra* note 3, at 241-250.

<sup>67</sup> See notably Louis Henkin, ‘The Use of Force: Law and U.S. Policy’, in: Henkin Louis, *et. al.* (ed.), *Right v. Might, International Law and the Use of Force*, New York, London, Council on Foreign Relations Press, 1989, at 45; Oscar Schachter, *International Law in Theory and Practice*, Dordrecht, Boston, Martinus Nijhoff Publishers, 1991, at 154; Jost Delbrück, ‘The Fight Against Terrorism: Self-Defense or Collective Security as International Police Action? Some Comments on the International Legal Implications of the ‘War Against Terrorism’’, *GYIL*, vol. 44, 2001, at 17.

<sup>68</sup> For the conditions relating to the existence of a new customary rule, see *Colombian-Peruvian Asylum Case*, Judgment, *ICJ Reports* 1950, notably at 277; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 3 June 1985, *ICJ Reports* 1985, para. 27.

attack? Operation *Enduring Freedom* and the air campaign in Syria have been justified by the right of anticipatory self-defense (*i.e.* preventing further attacks)<sup>69</sup>. However, an interpretation of the letter and spirit of Article 51, the study of actual State practice subsequent to the adoption of the Charter, as well as the reading of the International Court of Justice's decisions, have led to the conclusion that the alleged right of anticipatory self-defense has no place in international law to date.

Article 51 of the UN Charter provides that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs*”<sup>70</sup>. A textual interpretation of the provision leads to a rejection of the doctrine of anticipatory self-defense. Indeed, the wording ‘if an armed attack occurs’ is clear and does not mean ‘if the threat of an armed attack occurs’. In other words, and according to the canon *expressio unius est exclusio alterius*, the condition stated in Article 51 – the existence of an ongoing armed attack – is the only condition admitted for the exercise of the right of self-defense<sup>71</sup>. In addition, and following a purposive interpretation of the UN Charter, one can point out that the will of those who drafted the Charter was to limit as much as possible the right for States to use force in their international relations, and not to recognize a right of self-protection that could be implemented every time they were threatened<sup>72</sup>.

It is *a priori* not impossible that, between 1945 and today, States have expansively interpreted Article 51 and considered that nowadays the said provision authorizes States to use force in anticipation of an attack. In that case, actual State practice would have given rise to a new customary law of anticipatory self-defense. This being

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<sup>69</sup> The operation in Syria is also carried out to eliminate continuing attacks from ISIL against Iraq. See letter of the US Permanent Representative, *supra* note 32.

<sup>70</sup> Emphasis added.

<sup>71</sup> See Josef L. Kunz, *supra* note 38, at 878; Hans Kelsen, *The Law of the United Nations. A Critical Analysis of its Fundamental Problems*, London, Stevens, 1950, at 797. *Contra* Myres S. McDougal, ‘The Soviet-Cuban Quarantine and Self-Defense’, *AJIL*, vol. 57, num. 3, 1963, at 600.

<sup>72</sup> Louis Henkin, *supra* note 8, at 142; Albrecht Randelzhofer, ‘Article 51’, in: Bruno Simma (ed.), *The Charter of the United Nations, A Commentary*, vol. I, Munich, C. H. Beck, 2002, at 803.

said, in order for a new customary law to emerge, actual practice of “the international community of States as a whole”<sup>73</sup>, – a practice that reflects their *opinio juris* – must have been constant and uniform. However, the examination of actual State practice leads to the conclusion that the requirements of constancy and uniformity have not (yet) been met. Indeed, since 1945, the operations justified by a right of self-defense in anticipation of terrorist attacks show a radical division between States<sup>74</sup>. Few of them accepted a legal right of anticipatory self-defense. Many qualified the military operations as notably being aggressions<sup>75</sup> or acts of aggression<sup>76</sup>. The same division exists with regard to Operation *Enduring Freedom*. Although many States remained silent on the legality of the operation – and it is therefore not easy to determine whether such a silence was the expression of their approbation or, on the contrary, of their condemnation of the operation – some States<sup>77</sup> and international organizations<sup>78</sup> claimed that the operation was justified by the right of self-defense, while a few States openly qualified the joint military operation as an aggression or in violation of the Afghan sovereignty<sup>79</sup>. This brief study of State practice subsequent to the adoption of the UN Charter seems to show that States are divided on the question of whether the right of anticipatory self-defense has a place in international law. Therefore, as the actual practice of the international community of States as a whole is not uniform, as well as not constant – and even if the international community as a

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<sup>73</sup> See Art. 53 of the *Vienna Convention on the Law of Treaties*, available at: [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

<sup>74</sup> See Eric Cortthay, *supra* note 3, at 241-250.

<sup>75</sup> With regard to Operation *Litani* (1978), see UN Docs. S/PV.2071, 2072 and 2073.

<sup>76</sup> It was notably the case during the 1975 Israeli raid against Palestinian camps in Lebanon, see UN Docs. S/PV.1859, 1860, 1861, 1862.

<sup>77</sup> See notably Commonwealth of Dominica, UN Doc. A/56/PV.51, 13 November 2001, at 2; Republic of Moldova, UN Doc. A/56/PV.56, 16 November 2001, at 10; Seychelles, UN Doc. A/56/PV.56, at 32; France, UN Doc. S/PV.4413, 12 November 2001, at 7; Norway, UN Doc. S/PV.4413, at 10.

<sup>78</sup> NATO invoked Article 5 of the Treaty of Washington (collective self-defense), ‘Statement by NATO Secretary General, Lord Robertson’, Press Release 138, 8 October 2001; European Union, UN Doc. A/56/PV.44, 10 November 2001, at 37.

<sup>79</sup> See Cuba, UN Doc. A/56/PV.13, 1<sup>st</sup> October 2001; Iraq, UN Doc. A/56/PV.51, 13 November 2001; North Korea, UN Doc. A/56/PV.52, 14 November 2001.

whole demonstrated an approbation of the operation in Syria, this would not mean that the criteria of constancy is met – it may be concluded that the right of anticipatory self- defense does not exist in general international law.

The conclusions mentioned above are confirmed by judicial decisions<sup>80</sup>. In the *Oil Platforms* case, whose judgment was rendered after the launch of Operation *Enduring Freedom*, the Court held: “in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that *attacks had been made* upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as “armed attacks” within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force”<sup>81</sup>. Therefore, the Court states that the implementation of the right of self- defense requires the existence of an armed attack, and not only the existence of a threat of attack; a condition not fulfilled in the case of Operation *Enduring Freedom*.

## B. THE SYSTEM OF COLLECTIVE SECURITY

Terrorism is a scourge that the international community attempts to prevent and eradicate. Nevertheless, as mentioned *supra*, given that most of the terrorist attacks are sudden, sporadic and not attributed to a State, it is very difficult to justify a military counter-terrorism operation through the right of self-defense. If States consider it necessary to use force against terrorists, and for their operations to be legal, it would be then preferable for them to look for and apply the second exception to the principle prohibiting the use of force: an authorization by the Security Council to use armed force. Their military operations would be consequently an application of the mechanism of collective security – at least of its spirit if not of its letter– provided for by the Chapter VII of the UN Charter.

Collective security can be defined as a system in which, when peace and security of a State are undermined or about to be affected,

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<sup>80</sup> See also *Nicaragua* case, *supra* note 34, paras. 176, 195 and 232.

<sup>81</sup> *Oil Platforms* case, *supra* note 34, para. 51 (emphasis added).

and this breach has or leads to a risk of repercussions at the regional or international level, so other Members of the UN Organization unite and join forces against the peace-breaker in order to maintain or restore peace and security. In 1945, the drafters of the Charter wanted the system of collective security to be based on a complete centralization of the legitimate use of force<sup>82</sup>. In other words, collective enforcement actions had to be decided and directed by a central organ of the Organization, namely the Security Council which is sometimes qualified as “the embodiment of the collective”<sup>83</sup>.

Member States have given a number of powers to the Security Council, in particular those mentioned under Chapter VII. This Chapter, entitled “Action with respect to threats to the peace, breaches of the peace, and acts of aggression”, is the very heart of the system of collective security. Chapter VII starts with Article 39 that provides: “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” This provision, sometimes defined as the “single most important provision of the Charter”<sup>84</sup>, may be considered as the cornerstone of the system of collective security in the sense that it contains a summary of the powers given to the Security Council and necessary for the implementation of the mechanism of collective security: to determine the existence of a specific situation first, and then to decide what measures to take in order to maintain or restore international peace and security.

#### 1. The power of determination

According to Article 39 of the UN Charter, “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression”. Before examining how the Security Council qualifies terrorism and terrorist-related behaviors, it seems important to clarify the scope of the power of determination.

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<sup>82</sup> Hans Kelsen, *supra* note 38, at 784-785.

<sup>83</sup> Hilary Charlesworth, “The Inadequacy of ‘Collective Security’”, *Finnish Y.B. Int’l L.*, vol. 9, 1998, at 39. *See also* Article 24, paragraph 1, of the UN Charter.

<sup>84</sup> U.S. Secretary of State, *Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation*, Washington, U.S. Govt. Print. Off., 1945, at 90-91.

a. General observations

First of all, the Security Council's power consisting of determining whether a threat to, or a breach of, the peace, or an act of aggression exists is the condition *sine qua non* required for the adoption, then, of military or non military enforcement measures under Articles 41 and 42<sup>85</sup>. Moreover, the Council cannot delegate this power to any other entity, be it a State or an international organization<sup>86</sup>. Furthermore, as Article 39 empowers but does not oblige the Security Council to act, the Council is under no obligation to make a determination vis-à-vis a concrete situation, even if on the basis of its past practice the said situation could be objectively and clearly qualified as a threat to, or a breach of, the peace, or an act of aggression<sup>87</sup>. Also, as evidenced *infra*, the determination of a threat to the peace does not require the prior existence of a breach of the law by a State. In other words, to be qualified as such, a threat to the peace must not necessarily be the result of the wrongful act of a State<sup>88</sup>.

Finally, it is worth noting that the Security Council's power of determination is subject to certain limitations. Indeed, in the *Tadic* case, the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia declared: "The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be".<sup>89</sup> As an example of constitutional limitations, one may notably mention the obligation for the Security Council, and therefore for its Members,

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<sup>85</sup> Jean Combacau, 'Le Chapitre VII de la Charte des Nations Unies : résurrection ou métamorphose?', in : Rafâa Ben Achour, Slim Laghmani, *Les nouveaux aspects du droit international*, Rencontres internationales de la Faculté des sciences juridiques, politiques et sociales de Tunis, colloque des 14, 15 et 16 avril 1994, Paris, Pedone, 1994, at 144-145.

<sup>86</sup> Danesh Sarooshi, *The United Nations and the Development of Collective Security, The Delegation by the UN Security Council of its Chapter VII Powers*, Oxford, Oxford University Press, 1999, at 33.

<sup>87</sup> Eric Corthay, *supra* note 3, at 354.

<sup>88</sup> See for example Resolution 1440 (2002) related to the act of taking hostages in Moscow by non-state actors.

<sup>89</sup> ICTY, *Prosecutor v. Tadic*, Appeals Chamber, IT-94-1-AR72, 2 October 1995, para. 28.



to “act in accordance with the Purposes and Principles of the United Nations”.<sup>90</sup>

b. Terrorism and the “threat to the peace”

Since the beginning of the 1990s, the Security Council has been qualifying terrorism only as the first of the three cases mentioned in Article 39, namely a threat to the peace. This notion needs to be defined. Peace may be considered as a state of stability and order<sup>91</sup>. The state of peace is thus threatened when a destabilizing and potentially explosive situation emerges. In the field of international relations, it may be asserted that a threat to the peace is the resultant of a destabilization of the international security. Since 1945, such a destabilization has taken different forms. According to the *High-level Panel on Threats, Challenges and Change*, threats to international security are constituted by “[a]ny event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system”.<sup>92</sup> Terrorism has been identified as such a ‘event or process’.<sup>93</sup>

It is only progressively that the Security Council has realized that terrorism impinges on international peace and security. The first relevant resolutions did not address the issue of terrorism in general but merely some of its *modus operandi*, such as the taking of hostages or hijackings.<sup>94</sup> Then, since 1992, the Security Council qualifies the acts of ‘international terrorism’ as threats to the international

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<sup>90</sup> Article 24, paragraph 2, of the UN Charter. This obligation was also pointed out in *Tadic* case, para. 29. On the principle of good faith, see Eric Cortthay, *supra* note 3, at 359-367.

<sup>91</sup> Emmerich De Vattel, *The Law of Nations; or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, (ed. by Joseph Chitty), Philadelphia, T. & J. W. Johnson, 1853, Book II, Chap. IV, para. 1.

<sup>92</sup> *A more secure world: our shared responsibility*, Report of the High-level Panel on Threats, Challenges and

Change, UN Doc. A/59/565, 2 December 2004, at 12.

<sup>93</sup> Other clusters of threats identified by the High-level Panel are economic and social threats, including poverty, infectious diseases and environmental degradation; inter-State conflict; internal conflict, including civil war, genocide and other large-scale atrocities; nuclear, radiological, chemical and biological weapons; and

transnational organized crime.

<sup>94</sup> See for example Resolution 579 (1985).

peace and security.<sup>95</sup> Finally, from 2003 onwards, the Council continuously reaffirms that ‘terrorism’, in all its forms and manifestation, – and no longer merely ‘international’ terrorism – constitutes one of the most serious threats to international peace and security.<sup>96</sup> Moreover, in parallel, the Security Council constantly reaffirms that it is also crucial for the maintenance of international peace and security to combat and defeat terrorism,<sup>97</sup> this having to be done in accordance with the UN Charter and international law, including applicable international human rights, refugee and humanitarian law.<sup>98</sup> An in-depth examination of the Security Council’s practice following the perpetration of terrorist acts reveals that at least four different terrorist-related situations have been qualified as a threat to international peace and security: *primo*, the non-compliance by a government with the requests set out by the Security Council in a previous resolution<sup>99</sup>; *secondo*, the terrorist acts *per se*<sup>100</sup>; *tertio*, the terrorist acts and their implications<sup>101</sup>; and *quatro*, some terrorist

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<sup>95</sup> See Resolution 731 (1992) related to the Lockerbie bombing, Resolution 1373 (2001), Resolution 1377 (2001), Resolution 1438 (2002) related to Bali bombings, Resolution 1440 (2002) related to the hostage-taking terrorist attack in Moscow, Resolution 1450 (2002) related to the bombing at the *Paradise Hotel* in Kenya and the attempted missile attack on Arkia Israeli Airlines flight 582.

<sup>96</sup> See Resolutions 1530 (2004), 1535 (2004), 1566 (2004), 1611 (2005), 1617 (2005), 1618 (2005), 1624 (2005), 1735 (2006), 1787 (2007), 1805 (2008), 1822 (2008), 1904 (2009), 1963 (2010), 1989 (2011), 2083 (2012), 2129 (2013), 2133 (2014), 2161 (2014), and 2170 (2014).

<sup>97</sup> See notably Resolutions 731 (1992), 748 (1992), 1044 (1996), 1054 (1996), 1189 (1998), 1214 (1998), 1267 (1999), 1989 (2011), 2083 (2012), 2129 (2013), 2133 (2014), 2161 (2014), and 2170 (2014).

<sup>98</sup> See for example Resolutions 1269 (1999), 1438 (2002), 1440 (2002), 1450 (2002), 1455 (2003), 1530 (2004), 1566 (2004), 1611 (2005), 1618 (2005), 1624 (2005), 1822 (2008), 1988 (2011), 1989 (2011), 2083 (2012), 2161 (2014), and 2170 (2014)

<sup>99</sup> See Resolutions 731 (1992) and 748 (1992) related to the Lockerbie bombing, Resolution 1044 (1996) and 1054 (1996) related to the assassination attempt of President Mubarak.

<sup>100</sup> See for example Resolution 1438 (2002) related to Bali bombings, Resolution 1450 (2002) related to the bombing at the *Paradise Hotel* in Kenya, Resolution 1530 (2004) related to Madrid bombings, Resolution 1611 (2005) related to London bombings.

<sup>101</sup> See Resolution 1644 (2005) related to the bombing that killed former Lebanese Prime Minister Hariri and the subsequent risk of destabilization of the country

groups and those associated with them.<sup>102</sup>

2. The authorization to use force

according to Article 39, after having determined the existence of a threat to the peace, breach of the peace or act of aggression, the Security Council shall “decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”. While Article 41 refers to non-military enforcement measures, Article 42 is related to military enforcement ones. The following part focuses on the implementation of military measures and aims at describing the original scheme set out in the Chapter VII in 1945 before analyzing the new practice developed by the Security Council mainly since the end of the Cold War. It will be shown that under the new practice established by the Council at least two large military operations mandated to counter terrorism have been constituted.

a. From a centralized process to decentralized operations

The founding fathers of the UN Charter had designed a very centralized mechanism for the implementation of military enforcement measures. However, this original mechanism was never implemented as such and therefore the Security Council decided to develop a new practice, in conformity with the spirit of the Chapter VII, which consisted of delegating its enforcement powers to Member States.

i. The scheme set out in chapter VII

Article 42 of the UN Charter provides: “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” The implementation of such an action is set out in the Articles which follow. These provisions do not envisage the establishment of ‘an international army’ but stipulate that “[a]ll Members of the United Nations [...] undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facili-

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<sup>102</sup> See for example Resolutions 1617 (2005), 1989 (2011) and 2083 (2012) related to Al-Qaida and other individuals, groups, undertakings and entities associated with it.

ties [...] necessary for the purpose of maintaining international peace and security.” (Art. 43, para. 1). These agreements shall be concluded between the Security Council and UN Members and aim to govern the numbers and types of forces, their degree of readiness and general location and the nature of the facilities and assistance to be provided (Art. 43, paras. 2 and 3). The Security Council shall exercise strong command and control over the national troops made available to it. Indeed, assisted and advised by a Military Staff Committee, the Council shall determine the strength and degree of readiness of the contingents, their employment, plans for their combined action, the regulation of armaments and possible disarmament (Arts. 45 to 47). Thus, it is clear that Chapter VII set out a very centralized process for combined international enforcement measures, when necessary, to maintain or restore international peace and security.

ii. A new practice: the authorization to use armed force

It is important to note that the original collective security scheme explained *supra* has never been implemented as such. Due to political and ideological divergences, the special agreements mentioned under Article 43 have never been concluded, and without these agreements and multinational contingents under its command and control the Security Council is obviously not able to *take* military action – *stricto sensu* – as may be necessary. Therefore, for the Security Council the alternative was as follows: either to renounce the idea of taking military operation necessary to maintain or restore international peace and security, or to develop and implement a new practice in conformity with the spirit – and not with the letter – of the Chapter VII, a practice progressively accepted by the international community.<sup>103</sup> The Council chose the second option. Indeed, it has often authorized Member States or regional arrangements to use force in order to maintain or restore international peace and security,

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<sup>103</sup> Robert Kolb, *Ius contra bellum*, Le droit international relatif au maintien de la paix, Helbing Lichtenhahn, Bâle, Bruylant, Bruxelles, 2003, at 93. In the opinion of the present writer, the authority of the Security Council to authorize the use of armed force by States is not founded on Article 42 but rather on the theory of implied powers, see Eric Corthay, *supra* note 3, at 381-385.

especially since the end of the Cold War. In other words, the Security Council has often transferred or delegated to States some of its discretionary enforcement powers under Chapter VII.<sup>104</sup> This process of delegation introduces an element of decentralization in the system of collective security in the sense that now States decide on a voluntary basis whether, to which degree and for how long, they will take the necessary measures called for by the Council.<sup>105</sup>

iii. Two types of joint military operations

The Security Council's practice authorizing States to use force has led to the creation of two different types of military operations: the peace operations (blue helmets) and the multinational operations. In the context of the fight against terrorism one could mention at least two combined military operations for which the Security Council has authorized States to use force: the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) and the International Security Assistance Force (ISAF) in Afghanistan.

MINUSMA was established by Resolution 2100 (2013)<sup>106</sup> adopted under Chapter VII. This is an example of *hybrid* peace operations which are defined by Tardy as "operations that bring together two or more international actors that operate simultaneously or sequentially and the activities of which imply a certain degree of inter institutional cooperation".<sup>107</sup> The mission is comprised of more than ten thousand military personnel and around one thousand five hundred police personnel from more than thirty countries. Its mandate is in essence to support the political process in Mali and to carry out a number of security-related stabilization tasks.<sup>108</sup> The Mission in Mali is

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<sup>104</sup> Danesh Sarooshi, *supra* note 86, at 13.

<sup>105</sup> Jochen Abraham Frowein, Nico Krisch, 'Article 42', in : Simma Bruno (ed.), *The Charter of the United Nations, A Commentary*, 2<sup>nd</sup> ed., Oxford, Oxford University Press, vol. I, 2002, at 756.

<sup>106</sup> Resolution 2165 (2014) extends the mandate of MINUSMA until 30 June 2015.

<sup>107</sup> Thierry Tardy, 'Hybrid Peace Operations', *Global Governance*, vol. 20, num. 1, Jan.-Mar. 2014, at 97

<sup>108</sup> For more information, see MINUSMA, available at: <http://www.un.org/en/peace-keeping/missions/minusma/>.

not deployed to conduct offensive counter- terrorism operations because “[t]he United Nations is not configured to oversee such operations at a strategic level, nor are its peacekeepers typically trained, equipped or experienced in this kind of operations”.<sup>109</sup> With regard to the threat posed by terrorists and other groups, MINUSMA is primarily a mission of stabilization and protection: stabilization of key population centres and support for the reestablishment of State authority throughout the country, protection of civilians and UN personnel, support for humanitarian assistance and protection of cultural and historical sites.<sup>110</sup> It operates with the support of an EU training mission and previously with the French Operation *Serval* which itself counted on EU countries for notably in-air refueling activities. ISAF has been established by Resolution 1386 (2001) adopted under Chapter VII. Indeed, in December 20, the Security Council “[a]uthorizes [...] the establishment [...] of an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment”. Since August 2003, NATO assumed leadership of the ISAF operation and has been responsible for the command, coordination and planning of the force. In October 2003, Resolution 1510 extended ISAF’s mandate to cover the whole of Afghanistan. As of today, around forty eight nations provide more than forty thousand military personnel to ISAF.<sup>111</sup> The mission of ISAF is multi-faceted and notably consists of assisting the Afghan Government in the establishment of a secure and stable environment, strengthening the institutions, supporting the growth in capacity and capability of the Afghan National Security Forces (ANSF), supporting reconstruction and development in the country, and supporting humanitarian assistance. Moreover, and although this is first and foremost the mission of the Coalition

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<sup>109</sup> Report of the Secretary-General on the situation in Mali, UN Doc. S/2013/189, para. 70.

<sup>110</sup> See Resolution 2100 (2013) and 2165 (2014).

<sup>111</sup> See Troop numbers and contributions, *available at*: <http://www.isaf.nato.int/troop-numbers-and-contributions/index.php>.

(i.e. Operation *Enduring Freedom*), ISAF, together with ANSF, also carry out combat operations against the Taliban and other terrorist groups.<sup>112</sup>

It should be noted that in both cases – and this is what happens in most of the situations<sup>113</sup> – the host States (Mali and Afghanistan) had already consented to the military operations before the adoption of the Resolutions 1386 (2001) and 2100 (2013).<sup>114</sup> *A priori* such consents are sufficient to consider the operations as lawful. However, adopting a resolution serves several purposes. *Primo*, as explained by Corten, “the Security Council tends, though, to make military action independently of the existence, and also of the scope, of the State’s consent. The very purpose of this type of resolution is to confer extended and autonomous power on the intervening force that is dependent solely on the will of the Security Council itself.”<sup>115</sup> *Secondo*, sometimes the host State itself requests the Security Council to consider authorizing the deployment of a UN mandated force, because the presence of foreign troops under an impartial UN mandate would be easier to accept for local populations used to imperialist invasions.<sup>116</sup>

- b. The letter of the resolutions authorizing the use of force  
The authorization given to States to use armed force must fall under a decision of the Security Council. The power to use force is not transferred to States as long as the Council has not clearly and formally decided so. This requirement is due to the fact that a Security Council’s authorization is an exception to the principle prohibiting the use of force, and it should and must

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<sup>112</sup> See for example ‘Afghan, ISAF forces launch Operation Spin Ghar’, press release 2007-689, available at: <http://www.nato.int>.

<sup>113</sup> See Christine Gray, *International Law and the Use of Force*, Oxford, Oxford University Press, 2004, at 253

<sup>114</sup> Regarding the consent given by Afghanistan to the deployment of ISAF, see Annex to the letter dated 19 December 2001 from the Permanent Representative of Afghanistan to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/1223.

<sup>115</sup> Olivier Corten, *supra* note 6, at 314.

<sup>116</sup> See Agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions (Bonn Agreement on Afghanistan), UN Doc. S/2001/1154, dated 5 December 2001.

stay that way. An authorization, for example, must not be presumed from a resolution by which the Council only determines the existence of a threat to the peace, breach of the peace, or act of aggression.<sup>117</sup> The non-observance of this requirement of clarity and formalism could lead to a multiplication of military operations and therefore could undermine the system of collective security.<sup>118</sup>

The Security Council's practice consisting of authorizing States to use force is varied. Most of the time, the resolutions do not lay down *expressis verbis* the authorization to resort 'to armed force', but only stipulates that States are authorized to take 'all necessary measures' or 'all necessary means' to fulfill the Council's mandate. For example, in paragraph 3 of Resolution 1386 (2001), the Security Council "[a]uthorizes the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate". As well, in paragraph 12 of Resolution 2164 (2014), the Council "[a]uthorizes MINUSMA to take all necessary means to carry out its mandate". At first glance, a brief examination of State practice is sufficient to conclude that these wordings usually imply a resort to military action. However, in order to be absolutely certain that the will of the Council is to authorize the resort to armed force, a case by case examination of the debates and declarations of States surrounding each resolution needs to be conducted.<sup>119</sup>

Once engaged in theater, it is obvious that UN mandated forces must respect and apply the rules of international law, such as the human rights and the international humanitarian law.<sup>120</sup>

They must also respect the terms of the mandate decided by the Security Council in its resolutions and are only authorized to

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<sup>117</sup> Eric Cortay, *supra* note 3, at 387.

<sup>118</sup> Linos-Alexandre Sicilianos, 'L'autorisation par la Conseil de Sécurité de recourir a la force : une tentative d'évaluation', *Collected Courses...*, t. 106, num. 1, 2002, at 47.

<sup>119</sup> Olivier Corten, *supra* note 6, at 327.

<sup>120</sup> See notably Alexandre Faite, Jérémie Labbé Grenier (ed.), *Expert Meeting on Multinational Peace Operations, Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces*, Geneva, 11-12 December 2003, ICRC, October 2004, 93 p.



take action within the framework established by the mandate. Although the Security Council authorizes States to use ‘all’ necessary means or measures, it is worth mentioning that States have no unconditional right to use force. On the contrary, they have merely the right to use force that is necessary to fulfill the mandate established by the Council. Therefore, under the *jus contra bellum*, the legality of a military measure depends upon the objectives of the mandate. Any other military action would be considered as a violation of the principle prohibiting the use of force.

#### **IV. CONCLUSION**

From the standpoint of international law, military operations in the context of the fight against terrorism – by one State or by a coalition of States – are subject to the very strict rules of the *jus contra bellum*, as other operations in other contexts are as well. In other words, there is no *lex specialis* that would merely apply to the war against terrorism. Lawful or not, the relevance and efficiency of military operations launched in the context of the fight against terrorism need to be questioned. When the objective or mandate includes missions of stabilization, protection, reconstruction and humanitarian assistance, a real chance for restoring and maintaining peace and security exists. However, when the objective or mandate of the operation is limited to targeting and destroying terrorist capabilities, its degree of effectiveness, in the middle or long run, is more debatable. Too often, those targeted and limited operations cause an escalation of violence and a spiral of reprisals. Armed violence induces more terrorism, and both of them risk generating innocent victims, a burning sense of injustice and a dangerous grudge.

As terrorism is a universal and complex scourge, the international community has wisely recognized and stressed that it “can only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all States, and international and regional organizations to impede, impair, isolate and incapacitate the terrorist threat”.<sup>121</sup> Necessary collective and multidimensional actions include, but

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<sup>121</sup> See for example Resolution 2170 (2014).

are not limited to, the elimination of ethnic and religious discriminations, the establishment of the rule of law, the promotion of tolerance and dialogue among civilizations, information sharing, as well as judicial cooperation.<sup>122</sup> These measures are a huge undertaking in that they require a sustainable effort over many years, measures however that remain vital and indispensable. Last but not least, in order to succeed in that mission, to avoid misunderstandings and mitigate the risks of abuse, it is also essential that the international community continues to commit all effort to the adoption of a comprehensive convention which contains a clear and universally accepted definition of terrorism.

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<sup>122</sup> For other ideas, see notably the report of the Secretary General, *Uniting against terrorism: recommendations for a global counter-terrorism strategy*, UN Doc. A/60/825, 27 April 2006.

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