

Unilateral Recourse to Military Force Against Terrorist Attacks

Karl M. Meessen[†]

I. A NEW RESPONSE TO A NOT SO NEW CHALLENGE

If a state that has been victimized by a large-scale terrorist attack seeks recourse to military force against another state, it can be expected to do so at a scale well above the threshold set by Article 2(4) of the Charter of the United Nations. Such threat or exercise of military force is prohibited by that rule unless it is authorized under the provisions on collective security laid down in Chapter VII of the U.N. Charter or unless it occurs in legitimate self-defense. Under Chapter VII, it is for the multilateral decision-making of the Security Council to qualify a terrorist attack as a “threat to the peace” and then to decide what remedy is appropriate. The question to be discussed in this paper, however, refers to the legality of “unilateral” acts of military force in response to terrorist attacks. The discussion will therefore have to address the self-defense exception to the general prohibition on the use of force. Unilateral acts, it should be added, are here understood to include “plurilateral” acts, that is, acts undertaken by two or more states.

Under Article 51, “nothing in the present Charter,” which includes the prohibition on the use of force in Article 2(4), “shall impair the inherent right of individual or collective self-defense 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.”¹ A terrorist attack masterminded by, or otherwise attributable to, a particular foreign state may constitute an “armed attack” in the sense of Article 51 and then be answered by the unilateral or plurilateral exercise of the right of self-defense. However, September 11, 2001, and its aftermath, has shown that terrorist attacks need not be state-sponsored at all, and that sometimes no evidence for any state-sponsorship may be available. Terrorist attacks out of the clear blue sky, like those of 9/11, lack the government connotation of the term “armed attack.” Such terrorist attacks are society-induced. Is responding to them covered by Article 51 all the same?

Shortly after the Iraqi invasion of Kuwait in 1990, François Mitterand, the then president of France, spoke of the “logic of war” (*logique de guerre*) as the principle driving events at the time.² The fight against society-induced

[†] Jean Monnet Professor of Public Law, European Law, Public International Law and International Commercial Law at the Friedrich-Schiller-Universität Jena (Germany).

1. U.N. CHARTER art. 51.

2. JACQUES ATTALI, VERBATIM, CHRONIQUE DES ANNÉES 1988-1991, at 574 (1995); *Press Conference, Held at the Elisée Palace (Paris) on August 21, 1990*, LE MONDE, Aug. 23, 1990, at 6.

terrorism, too, follows its own logic. That logic is equally inescapable but also quite different from the logic of war President Mitterand had in mind.³ While the potential of society-induced crossborder terrorism may only have become manifest on September 11, trying to fight it on a worldwide scale certainly is an entirely new phenomenon. The precise properties of the logic of that fight, one is glad to note, are unknown so far. Conjectural considerations cannot altogether be avoided.

Legal rules, even of written law, rarely precede factual developments. Understandably, therefore, every conceivable effort is undertaken to apply the existing rules to the new phenomenon of a worldwide fight against society-induced terrorism so as either to render an early verdict of illegality on unilateral action,⁴ or to pave the ground for a more favorable assessment by extending, or overextending, the meaning of the existing law.⁵ In the post-9/11 literature, only a few authors advocate a new approach.⁶ To leave the well-trodden paths means incurring a high risk, but such an approach at least offers the chance of viewing the structure of the rules in accordance with the pattern of the practice they are designed both to reflect and orient.

In venturing such a new approach, it is appropriate to start in Part II by setting out some characteristic features of society-induced terrorism and possible ways of fighting it. Thereafter, Part III will identify the pertinent rule on the right of self-defense against society-induced terrorist attacks as one of emerging customary law. It is directly based upon a state's "right to survival" and is limited by the principles of necessity and proportionality. Part IV will further discuss the contents of that rule with regard to three salient problems: the role of multilateral decision-making, preemptive strikes, and the choice of target states. Part V discusses the prospects for the rule in a postscript written after the war against Iraq.

II. THE LOGIC OF THE FIGHT AGAINST TERRORISM

The fight against terrorism is taking place in an asymmetrical setting.⁷ On September 11, 2001, the most powerful state the world has ever known, both in absolute and relative terms, was hit in the heart of both its military and

3. For the prospect of an "ongoing conflict" with regard to international terrorism, and its "differences from traditional warfare" see Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559, 560-3, 575 (1999).

4. See e.g., PIERRE-MARIE DUPUY, *DROIT INTERNATIONAL PUBLIC* 603-08 (6th ed. 2002); Jonathan I. Charney, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 835, 837 (2001); Allain Pellet & Sarah Pellet, *The Aftermath of September 11*, 10 TILBURG FOREIGN L. REV. 64 (2002)

5. See e.g., Albrecht Randelzhofer, *Article 51*, in 1 THE CHARTER OF THE UNITED NATIONS 802 (Bruno Simma ed., 2d ed. 2002); Thomas Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839 (2001); Christopher Greenwood, *International Law and the "War Against Terrorism,"* 78 INT'L AFF. 301 (2002).

6. But see W. Michael Reisman, *In Defense of World Public Order*, 95 AM. J. INT'L L. 833 (2001); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1 (2002); Karl M. Meessen, *Selbstverteidigung als werdendes Völkergewohnheitsrecht*, NEUE ZÜRCHER ZEITUNG, Feb. 18, 2003, at 4.

7. HERFRIED MÜNKLER, *DIE NEUEN KRIEGE* 242 (2002).

commercial prowess by just a few men of daunting courage.⁸ In addition to the terrorists' resolve to sacrifice their lives, it is their invisibility that gives them the capacity to launch attacks of such horrible effectiveness. The following examples show why it is difficult to fight an invisible enemy who has the freedom to choose where and when to strike:

(1) To defend oneself passively by bulletproof windows and other defensive measures is a helpful and, with respect to prime targets, a necessary measure of precaution. But surely it is impossible to protect all high-rise buildings of the world against kamikaze aircraft, nor can every discotheque be turned into a fortress.

(2) Police action against terrorist networks, if carried out in all of the 190 or so states of the world, would be extremely helpful, yet there will always be some states that merely feign serious action or openly refuse to cooperate.

(3) Targeting individual terrorists, e.g., by launching a missile from a drone to blow up a private car filled with presumed terrorists peacefully traveling in the Yemenite desert,⁹ may spread an intended feeling of insecurity but such measures fall short of rule-of-law principles, and the network structure of terrorist organizations allows for rapid replacements.

In the final analysis, society must rely on self-control. Society-induced terrorism can only be overcome by persuading terrorists to desist from causing indiscriminate casualties.¹⁰ Terrorists, however, tend to be rather dogged. Religious conviction immunizes them against moral argument, or nearly so. Yet the hope for instant paradise does not fully explain their sense of determination. In addition, more worldly sentiments have to be taken into account. A quest for a share in the public memory of posterity may actually come close to an obsession for them. Terrorists have the living in mind: their family, their people, and their co-believers. A whole scene of sympathizers, who themselves prefer to remain on the safe side, inspire and motivate them.¹¹ Efforts of persuasion should be directed toward them. But how should one proceed?

First of all, the political objectives of the terrorists and their sympathizers should be taken seriously. This is not to suggest Munich-style appeasement, which was then, and is today, liable to trigger even more excessive demands. A reappraisal of one's own position, however, if

8. For an account, see Sean D. Murphy (ed.), *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 237 (2002).

9. Caroline Daniel, *Murky Tactics Surface in War on Terror*, FIN. TIMES, Nov. 22, 2002, at 4.

10. For a psychological approach, see John J. Mearsheimer, *Hearts and Minds*, NAT'L INTEREST, Fall 2002, at 13.

11. See, e.g., Phillip B. Heymann, *Dealing With Terrorism: An Overview*, INT'L SECURITY, Winter 2001/02, at 27.

undertaken in a sincere way and not as a sham, may work miracles whether or not it leads to a substantive adjustment of one's position or just to a careful restatement of that position's moral background. Thereby taking some wind out of the sails may induce second-thoughts among terrorist sympathizers and lessen their support. The prospect of suffering from increasing isolation is bound eventually to have an impact upon the terrorists themselves.

Second, with regard to the military option, it should be remembered that not even armed attacks of the traditional kind can be fought by firepower alone. In that respect, the United States has had both positive and negative experiences: in the two world wars and in Korea, the moral case for American military action was compelling, but it was not so persuasive in Vietnam. The moral case is about substance and, as Somalia has shown, about presentation. To present the most telling image on the television screen is even more important in the fight against terrorism than in traditional wars:¹²

(1) It means to avoid any measure that, by its brutal appearance, could alienate public opinion. Deterrent effects would be outdone by calls for revenge.

(2) Symbols matter. The former skyline of Manhattan is remembered by every American, and many others. In the eyes of America's foes, even Saddam Hussein has a symbolic function, if only for his recklessness.

(3) Finally, there is a point which is perhaps better understood in a new frontier society than in the cozy corners of the European House:¹³ it may from time to time be necessary to send the terrorists and their sympathizers a message of one's own determination, one's courage, and one's preparedness for sacrifice.

The foregoing observations do not exactly propound a call to arms. All that can be said at this point is that the fight against terrorism has to be envisaged—as it actually is—at many different levels at a time.¹⁴ If there is a decisive battle to be fought against terrorism, it must be fought and won on the psychological level, which may involve signaling the resolve of Western society to take risks for its conception of world peace. The widely held view of the incapacitating effects of the “post-heroic age” may need to be refuted.¹⁵ If military action is to be taken, neither the unilateral option, because of the probable unavailability of effective multilateral action, nor the option of

12. MÜNKLER, *supra* note 7 at 193.

13. See generally Robert Kagan, *Power and Weakness*, POLICY REV., June/July 2002.

14. For comprehensive programs, see *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered Titles of U.S.C.); Council Framework Decision of 13 June 2002 Combating Terrorism, 2002 O.J. (L164) 3.; *Report of the Policy Working Group on the United Nations and Terrorism*, U.N. GA/SCOR, 57th Sess., Annex 1, Agenda Item 162, A/57/273-S/2002/875 (2002).

15. MÜNKLER, *supra* note 7 at 177; see also Frédéric Encel, *Les Enseignements de la guerre États-Unies Al Quaida*, DÉFENSE NATIONALE, March, 2002.

preemptive strikes, because of the greater damage they might help to avoid, can be generally left aside.¹⁶ But those very options also present a particular challenge to legal analysis.

III. THE RIGHT TO SURVIVAL IN THE BOUNDS OF LEGAL RATIONALITY

The procedural posture of the *Nicaragua* case prevented the International Court of Justice from applying multilateral treaty law, including the legal rules contained in the U.N. Charter.¹⁷ The Court therefore had to base its decision on the merits on other sources of international law, such as bilateral treaties and customary international law. Referring to the language of the Charter—"inherent right" in the English text and "droit naturel" in the French text—the Court held that the right of self-defense is granted under both treaty law and customary international law.¹⁸

Relying on the "Definition of Aggression" annexed to General Assembly Resolution 3314 (XXIX) of December 14, 1974,¹⁹ the Court went on to define the terms "armed attack" and "*agression armée*" as suggesting some link to one or more particular states backing the action.²⁰ In the *Nicaragua* case, the mere "assistance to rebels in the form of provision of weapons or logistical or other support" was explicitly denied the effect of attributing the responsibility for private operations to a particular state.²¹

Under that standard, the attack on the World Trade Center and the Pentagon can hardly be qualified as an armed attack on the part of Afghanistan against the United States.²² To be sure, arguing for a lower standard than the one set by the Court is possible,²³ albeit unrelated to the logic of fighting society-induced terrorist attacks. Yet there is, as will be elaborated below, an emerging rule of customary law that directly addresses society-induced terrorist attacks. That rule focuses on fighting terrorism rather than fending off ongoing attacks launched by one or more foreign states under the standard developed by the Court.

The possibility of further evolution of customary law outside the Charter will have to be justified by reference firstly to the written law of Article 51, and secondly to the law and practice of collective security. Thirdly, the

16. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, Sept. 2002, at 6, 13, available at <http://www.whitehouse.gov/nsc/nss.html>.

17. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 38 (June 27).

18. *Id.* at 102.

19. For the text of the definition, see the "Draft Definition of Aggression" in the *Report of the Working Group of 12 April 1974*, U.N. Special Committee on the Question of Defining Aggression, 29th Sess., at 3-6, U.N. Doc. A/AC.134/L.46. This report was made an annex to G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31 (1974).

20. *Military and Paramilitary Activities*, 1986 I.C.J. at 103.

21. *Id.* at 104.

22. See, e.g., Pellet & Pellet, *supra* note 4 at 65, 69.

23. See Franck, *supra* note 5; Greenwood, *supra* note 5. For a discussion of the safe-haven argument see Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT'L & COMP. L. Q. 401, 409 (2002); Carsten Stahn, *Collective Security and Self-Defense after the September 11 Attacks*, 10 TILBURG FOREIGN L. REV. 10, 26 (2002).

conceptual basis of an emerging customary rule will be identified as a starting-point for a discussion of the rule's contents in Part IV.

A. *The Limited Applicability of the "Armed Attack" Requirement*

By the very choice of terms in Articles 2(4) and 51, the drafters of the Charter may have restricted the treaty law as well as the customary law on self-defense at a level below the eye-for-an-eye standard self-defense is normally accorded. Certain acts may be prohibited under Article 2(4) without qualifying as an "armed attack," in which case the victim state would be prevented from taking recourse to self-defense under Article 51. That restriction, whatever effect it might ultimately have,²⁴ applies to both the treaty law and the customary law of self-defense,²⁵ but, as historical recollection will show, it does so only with regard to responding to acts prohibited under the treaty law of Article 2(4).

Under the Kellogg-Briand Pact of 1928,²⁶ which preceded Article 2(4) of the U.N. Charter, the prohibition on the use of force covered only war proper, and the customary law exception of self-defense, though well accepted, was not even mentioned.²⁷ In 1945, the Charter proceeded to include a specific reference to the right of self-defense as an exception to the reaffirmed and newly expanded prohibition on the threat or use of force contained in Article 2(4).

Treaty law additionally restricted recourse to self-defense by introducing the "armed attack" threshold. That restriction would, of course, be meaningless unless it also modified the corresponding rule of customary law in the way stated above. The question, however, is whether the treaty law restriction also affects the possible emergence of new customary law on self-defense against society-induced terrorist attacks.

The wording and the historical context of Article 51 both suggest a negative response. The armed attack requirement was clearly coined to preserve or restore peace with regard to the only type of attacks known at the time of the Charter's drafting, and covered by Article 2(4)—the Charter's principal rule on the subject. Indeed, Article 2(4), as follows from its introductory part, imposes obligations only upon "the Organization (i.e. the "United Nations") and its Members." Society-induced terrorist attacks are outside the purview of Article 2(4), and it would seem somewhat far-fetched if Article 51 were read to restrict defense against them by interpreting the "armed attack" requirement as generally prohibiting self-defense against attacks originating from society.

24. For an extensive discussion of that notorious "gap" in the law of self-defense, see Randelzhofer, *supra* note 5, at 790.

25. *Id.* at 793.

26. General Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

27. Albrecht Randelzhofer, *Article 2(4)*, in 1 THE CHARTER OF THE UNITED NATIONS, *supra* note 5, at 116.

B. *The Room Left to Unilateral Action*

While freed from the constraints of the “armed attack” requirement, the customary law on self-defense might still be considered superseded by the system of collective security set out in Chapter VII of the Charter. In post-September 11 international law doctrine, a strong, maybe dominant, line of reasoning is as follows: since Article 51 fails to permit unilateral recourse to military force in response to terrorist attacks not attributable to a particular state, let alone by way of preemptive strikes, any military response to acts of terrorism must be authorized under the broader requirements of Chapter VII (presupposing a majority vote in the Security Council with no veto cast by any of its permanent members).²⁸

There is certainly something attractive about that view. The United Nations system would be strengthened with the prospect of avoiding ill-considered unilateral action by the only remaining superpower or a regional hegemon. The legal stringency of this theory, however, falls short of its popular appeal.

With regard to self-defense against armed attacks attributable to a state, Article 51 only limits the duration of measures of self-defense “until the Security Council has taken measures necessary to maintain international peace and security.”²⁹ From a legal point of view, prioritizing collective security would therefore presuppose the assumption that, in the one or other way, a monopoly of decision-making has been entrusted to the Security Council under Chapter VII: whenever, in a particular case, the narrowly interpreted criteria of Article 51 were not met, it would be for the Security Council to authorize or to block any exercise of a customary law of self-defense.

The Charter does not contain a rule providing for such a Security Council prerogative. Moreover, the thesis that effective peace-making under Chapter VII need not restore a state’s territorial integrity, and may yet block any further exercise of the attacked state’s right of self-defense,³⁰ seems irreconcilable with the language of Article 51, pursuant to which “nothing in the present Charter shall impair the inherent right of . . . self-defense.”³¹ State practice might, however, develop so as to expand the role of collective security at the expense of any new customary law on self-defense against society-induced terrorist attacks. Yet can current practice really be interpreted in that way?

The first reaction of the Security Council to the attacks of September 11 was to “recognize” the right of self-defense, on the one hand, and to qualify the attacks “as a threat to international peace and security” as well as to express the Council’s “readiness to take all necessary steps to respond to the terrorist attacks,” on the other hand.³² This act of recognition identifies the

28. See, e.g., Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT’L L. 993, 1000 (2001).

29. U.N. CHARTER art. 51.

30. For a carefully argued presentation of that view, see NICO KRISCH, SELBSTVERTEIDIGUNG UND KOLLEKTIVE SICHERHEIT 405-12 (2001).

31. U.N. CHARTER art. 51.

32. S.C. Res. 1368, U.N. SCOR, 56th Sess., 5470th mtg., U.N. Doc. S/RES/1368 (2001).

basis for a unilateral response but, in the absence of a verifiable target at that early moment, the resolution fails to endorse any specific action. In addition, Resolution 1368 takes up the language of Article 39 of the Charter and even expresses a commitment to multilateral action. Only afterwards did the Council, while reaffirming its previous resolution, explicitly refer to Chapter VII and set out a comprehensive program of action to combat "international terrorism."³³

The debate over whether the Council's obvious attempt to seize control of the situation amounts to state practice, making unilateral recourse to military force dependent on its prior authorization, is still on-going. So far, neither the Council's reaction to the military intervention in Afghanistan, nor its reaction to what, in November 2002, merely amounted to a threat of unilateral action against Iraq permits the conclusion that collective security constitutes the only lawful response to society-induced acts of terrorism:

(1) Resolution 1378 of November, 14 2001,³⁴ focuses on how to alleviate the plight of the Afghan people. Neither this nor any other resolution brands the intervention in Afghanistan as illegal under Article 51 and thus in violation of Article 2(4).

(2) Resolution 1441 of November 8, 2002,³⁵ partly modeled after Resolution 678 of November 29, 1990,³⁶ which precipitated political decision-making leading to the war against Iraq in 1991, gives Iraq a "final opportunity" to comply with its disarmament obligations. But, in contrast to its historic antecedent, it fails to state what would happen if that final opportunity were missed without, however, precluding unilateral action either. Like Resolution 1378, Resolution 1441 also fails to treat the threat of military action accompanying the deliberations of the Council as tantamount to the use of force and therefore, unless put forward in legitimate self-defense, as violative of Article 2(4).

State practice so far fails to accord the Council an unwritten prerogative on all matters of self-defense against society-induced acts of terrorism. Even as seen from a post Iraq war perspective,³⁷ the common denominator of state practice and *opinio juris* on fighting society-induced terrorism at most reflects an obligation to undergo a serious attempt at multilateral decision-making in the U.N. framework.

C. The Conceptual Basis of Self-Defense Against Society-Induced Terrorism

33. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

34. S.C. Res. 1378, U.N. SCOR, 56th Sess., 4415th mtg., U.N. Doc. S/RES/1378 (2001).

35. S.C. Res. 1441, U.N. SCOR 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002).

36. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/1678 (1990).

37. For that perspective, see *infra* Part V.

The inapplicability of the “armed attack” requirement and the absence of a constant practice of exclusive recourse to collective security open the way toward the development of new customary law, which may allow for a unilateral recourse to military action against society-induced terrorist attacks. Neither that fact, nor the actual interventions in Afghanistan and Iraq, suffice to establish a new rule of customary law. On the conceptual side, however, the grounds for an emerging rule of customary law seem well prepared. The pertinent concepts can be derived from the traditional law of self-defense as it has been developed by the International Court of Justice.

The principle found to underlie the right of self-defense is the right of a state to fight for its survival. In the *Nuclear Weapons* advisory opinion, the Court stated that right in the context of a state taking resort to self-defense in a desperate situation, “when its survival is at stake.”³⁸ With regard to resorting to nuclear weapons, the judges proved unable to agree on the legal consequences to draw from that principle.³⁹ With regard to fending off terrorism, however, survival seems a principle clearly in point: terrorists, if equipped with weapons of mass destruction,⁴⁰ may threaten the physical survival of the victim state. It is not, as in the case of employing nuclear weapons, the other way around. Moreover, the situation of a people living under the constant threat of a recurrence of 9/11-type events falls short of survival in human dignity.

The exercise of the right to survival, as of any other right, is bounded by rationality. Rationality in law may generally be expressed by the principles of necessity and proportionality. The International Court of Justice was right to find that those principles constitute corollaries of the right of self-defense.⁴¹ That finding applies to the right of self-defense against society-induced terrorist attacks as well. By limiting a state’s exercise of its right to survival, the principles of necessity and proportionality give guidance to the evolution of operative rules on self-defense against society-induced terrorist attacks.

IV. NECESSITY AND PROPORTIONALITY OF MILITARY RESPONSES

In the face of less intrusive alternatives, a military response is bound to prove unnecessary and thus illegal. Similarly, measures that cannot possibly reach their objectives would not constitute a necessary response. In addition, proportionality requires the intrusiveness of the measures applied to be commensurate with the goals pursued. In the light of those and other aspects of necessity and proportionality, the three most pressing problems of the military option in fighting terrorism will be discussed below: the relationship between unilateral and multilateral responses, the appropriateness of preemptive strikes, and the choice of target state.

38. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 263 (Advisory Opinion of July 8).

39. *Id.* at 266.

40. For a discussion of that risk, see, e.g., Robin Blackburn, *The Imperial Presidency, the War on Terrorism, and the Revolutions of Modernity*, 9 CONSTELLATIONS 3, 30 (2002).

41. Military and Paramilitary Activities, 1986 I.C.J. at 103; Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at 246.

A. *Subsidiarity of Unilateral Action*

Had a terrorist attack of the September 11 variety occurred before the end of the Cold War, collective security would almost certainly have been unavailable to the state victim of the attack.⁴² Since the end of the Cold War the prospects for the Council to use its powers under Chapter VII, and to assume effective control of a crisis situation, may have improved. But satisfactory results cannot be taken for granted. The victim state's choice of unilateral response might, for a variety of reasons, fail to draw the support of the majority of the member states represented in the Council and, of course, the casting of a "nyet" in the terms of good old Stalinist times by one or more of the permanent members of the Council still constitutes more than a faint possibility.

To be sure, there may be sound reasons for a permanent member to cast a veto and, even more so, for a majority of members to block the mounting of an effective response to a society-induced terrorist attack. Such lack of support is likely to reflect policy concerns that correspond to shortcomings under the legal principles of necessity or proportionality. But there may also be cases where the grounds for refusing support are not so sound and quite unrelated to the issue under review. In that case, should an exercise of the right of self-defense be barred merely on account of a refusal of support by the Security Council? If so, possible target states that wish to obtain legal protection against military action responding to terrorist attacks would merely have to secure the veto of a single permanent member of the Security Council or to obstruct the taking of a majority vote. The exercise of a state's right to survival can hardly be considered dependent on the opportunism of members of the Security Council. To safeguard the right to survival, unilateral action may eventually prove necessary.

Multilateral action, however, remains the preferable course of action also as a matter of law. The necessity of multilateral action can be more easily established. Sympathizers may be led to realize that world public opinion as expressed by a unanimous or majority vote of the Security Council is turning against them. Furthermore, the appraisal of the facts and of the law in a particular case is less prone to misjudgment if it can be based on the opinion of the many rather than the few.⁴³

From a normative viewpoint, the two statements made above—on the residual necessity of unilateral action and the preferability of multilateral action—can be reconciled by a rule of subsidiarity: unilateral recourse to military force is permitted if effective multilateral action proves unavailable. Multilateral action must be sufficiently effective before it can be considered "available" in the sense of that rule. Of course, this approach requires an amount of fine-tuning of the subsidiarity rule that only further discussion of various scenarios can provide.

42. For a comprehensive, up-to-date account of applying Chapter VII see Dupuy, *supra* note 4, at 578-83.

43. For a discussion of problems of assessment, see Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537 (1999).

B. *The Case for Preemptive Strikes*

With regard to traditional wars, preemptive strikes are anathema. Their legality is explicitly ruled out by the requirement of the occurrence of an armed attack. It would contradict the whole idea of prohibiting the threat or use of force if preemptive strikes were permitted to escalate hostilities and have their legality established only afterwards. To be sure, with the bombers in the air, one need not wait until they drop their deadly freight on the domestic fleet peacefully anchored in a domestic harbor.⁴⁴ That limited exception to the traditional rule on prohibiting preemptive strikes can be framed in the venerable language following the Caroline incident of 1837 as “leaving no choice of means, and no moment for deliberation.”⁴⁵

The concern of foreclosing an easy pretext to outright aggression applies to terrorist attacks as well, and yet the time element has to be seen in a different light.⁴⁶ Terrorists choose the time for attack as it pleases them. How could one expect the state victim of such an attack to postpone its response until the aircraft are on their way next time? In that respect, self-defense against terrorist attacks follows the logic of preventive police action rather than the one of fighting an enemy army.

The necessity and proportionality of preemptive strikes require careful scrutiny. Will a preemptive strike bring effective relief or turn out to be counterproductive, for instance, by upsetting public opinion? To what extent are innocent lives likely to be affected? The burden of proof for a satisfactory answer to those and many other questions lies upon the state engaging in a strategy of preemptive strikes. The odds are against considering them legal. The only point is that, the time element being less compelling, their legality cannot be ruled out altogether.

C. *The Choice of the Target State*

“Next Stop Baghdad?”⁴⁷ The choice of that heading for a recent article in *Foreign Affairs* highlights the problem in an almost cynical manner. It brings to one’s mind more potential “stops” along the way, and yet the choice of target almost inevitably means infringing upon the territorial integrity of a foreign state and jeopardizing innocent lives.

With regard to traditional wars, the notion of “armed attack” adequately reflects necessity: attacks are to be quelled by taking measures of self-defense against the state of origin. But where do society-induced terrorist attacks originate? Having by definition excluded the attributability of society-induced attacks to a particular state, that question seems quite pointless. Pursuant to the logic of the fight against terrorism, it should rather be asked against which

44. Robert Jennings & Arthur Watts, *Self-Preservation and Self-Defense*, in OPPENHEIM’S INTERNATIONAL LAW 421 (9th ed. 1992); for a narrower view, see RANDELZHOFFER, *supra* note 5 at 803.

45. Werner Meng, *The Caroline*, in 1 ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 537 (Rudolph Bernhardt ed., 1992).

46. See, e.g., Robert W. Tucker, *The End of a Contradiction?*, NAT’L INTEREST, Fall 2002, at 5, 6.

47. Kenneth M. Pollack, *Next Stop Baghdad?*, FOREIGN AFF., Mar./Apr. 2002, at 32.

state it may be permissible to invoke the right to survival within the bounds of necessity and proportionality.

The very term "survival" sets a threshold that excludes any frivolous choice of targets. After all, the target state must be presumed to lack the right to defend itself once the victim state's right of self-defense is acknowledged. Only grave shortcomings in the fight against terrorism could justify singling out a state to suffer measures of self-defense. Pending farther reaching treaty law, the present scope of obligations with regard to that fight can be derived from Resolution 1373 of September 28, 2001, which was formally adopted under Chapter VII and hence is binding under Article 41 of the Charter.⁴⁸

Under the requirement of necessity, the establishment of links to previous terrorist attacks, even if they come close to the standard of attributability set by the Court in *Nicaragua*, seems less significant than the facilitation of future attacks. In that respect, the presence of al Qaeda command centers and training camps provided an ominous link to Afghanistan. At present, the collective imagination is, of course, dominated by the Iraq scenario: if, as seems to be the case, Iraq does not figure among the primary host states of the al Qaeda network, what else could have justified making it a target state in the fight against terrorism?

Iraq—as well as several other states—has an impressive record of ignoring UN resolutions.⁴⁹ Furthermore, Iraq is known to have used chemical weapons in the past, and even if it does not continue to store any weapons of mass destruction, it must be considered capable of producing more of them. And who could exclude the possibility of some of those weapons being passed on to another group of terrorists ready to commit suicide? Above all, the former leaders of Iraq generously lent support to an unqualified hatred of anything American and thereby possibly contributed to encouraging further terrorist attacks.

Did the aggregation of those points justify military action, the risk of causing numerous victims among the civilian population of Iraq notwithstanding? The criteria for an answer again are the necessity and proportionality of any measure to be taken. After the process of U.N.-led inspections ended in a draw, the ultimate conclusion depends heavily on what Michael Reisman called "extra-arena implications,"⁵⁰ that is, in the present context, the positive or negative effects military action will have by discouraging other states of the region from supporting al Qaeda (and encouraging them to set up effective mechanisms of control), or by triggering innumerable new recruitments for future terrorist attacks.

With regard to Iraq, unlike Afghanistan, the evidence known at the end of April 2003 remains inconclusive. Except for a future change of the record, post 9/11 state practice must be found to have delimited the law of self-defense against society-induced terrorist attacks from both sides—a largely approved practice in conformity with the necessity requirement in

48. See S.C. Res. 1373, *supra* note 33.

49. See, e.g., the account given in S.C. Res. 1441, *supra* note 35.

50. W. Michael Reisman, *The Raid on Baghdad: Some Reflections on its Lawfulness and Implications*, 5 EUR. J. INT'L L. 120, 133 (1994).

Afghanistan and a widely criticized practice falling short of that standard in the case of Iraq. Generally speaking, it should be emphasized that replacing the prerequisite of an armed attack by a direct reference to the standards of necessity and proportionality does not suggest that self-defense against society-induced terrorist attacks is more easily available than self-defense against armed attacks in the sense of Article 51. On the contrary, the doubtful ability of military action to defeat terrorism makes one hesitant to single out a particular state as a target to bear the brunt of indiscriminate military action against the elusive scene of worldwide terrorism.

D. *Self-Defense Against Terrorist Attacks*

At the outset of the following summary, it should be remembered that terrorist attacks that amount to an “armed attack” as defined by the Court in the *Nicaragua* case trigger a right of self-defense against the foreign state or states responsible for the attack under the conditions laid down in Article 51 of the Charter and under the additional criteria of necessity and proportionality as elaborated by the Court in the *Nicaragua* case and the *Nuclear Weapons* advisory opinion.

De lege lata, self-defense by one or more particular foreign states against such terrorist attacks that falls short of an “armed attack” is not precluded by Article 51, nor by any absolute prerogative of the Security Council under Chapter VII as it may have been developed in state practice. The conditions for the exercise of the right of self-defense against society-induced terrorist attacks are to be derived from the principle of a state’s right to survival, on the one hand, and the principles of necessity and proportionality, on the other.

The formation of operative rules is a matter of emerging customary international law. Such rules are likely to include a strong favor of multilateral action putting unilateral (or plurilateral) recourse to military action at a subsidiary level. Absent the traditional requirement of armed attack, preemptive action will not be precluded a priori, but will remain subject to strict considerations of necessity. So will the choice of target state. The target state will primarily, yet not exclusively, be determined by its deliberate and persistent failure to live up to the international obligations of policing terrorist activities.

V. THE POST IRAQ WAR POLICY CONTEXT

On rereading the December 2002 version of this paper in April 2003, no substantial changes imposed themselves except for some factual updating. Yet, the suggestion “to give drafting treaty law on the subject high priority,” originally contained in Part V of the earlier draft, must be reconsidered. A reconsideration of that proposition is not prompted because substituting treaty rules for non-descript principles of emerging customary law is no longer required. Regrettably, it is prompted because the political controversy that

preceded and accompanied the war against Iraq seriously prejudiced the chances of agreeing on treaty rules addressing the military end of options regarding the fight against society-induced terrorist attacks.

The unanimous adoption of Resolution 1441 actually expressed agreement on the military option if certain contingencies were met. Yet the ensuing controversy split what used to be called the Western Alliance into two halves, as the debate moved from seeking to strike a proper balance between multilateralism and unilateralism to an overriding concern about actual or potential unipolarism.⁵¹ The fundamental issue involved is the equality of states. In the view of this author, sovereign equality is one of the most important principles of international law,⁵² but it is a legal principle that has never constituted an accurate description of the factual distribution of power among states. As a legal principle, it includes preventing any state from disrupting the international system in the global or any regional context through action based on superior power alone. How should one go about that task? So far, collective security was to check and balance the exercise of self-defense and other devices associated with the Westphalian system of nation states. Should collective security, even to the extent it is not forthcoming or ineffectively so, henceforth replace that older system? If so, it is unlikely to work in the real world.

First of all, collective security has Westphalian elements. Governments that advocate the absolute priority of collective security might also seek to enhance their role as a permanent member of the Security Council. Furthermore, the privilege of implementing the decisions taken collectively tends to remain with the more powerful nation-states. And it clearly was the threat of unilateral action that brought about the unanimous adoption of Resolution 1441.

Second, the power of the United Nations needs some checks and balances, too. Majority views are more likely to be correct than minority views, but given the volatility of media-made public opinion, even majority viewpoints can be mistaken. Democratic structures presuppose open-minded deliberations, not authoritarian dictates by a single power, nor by an international organization.

The logic of the fight against society-induced terrorism is of a kind that it must be fought on the basis of a consensus on the continued duality of multilateral and unilateral decision-making. Those two processes condition and check each other. In fact, unipolarism might even be strengthened by severing the multilateral from the realpolitik elements. Once consensus has largely been reestablished, one can turn to the task of drafting an international convention on how to limit, not a priori preclude, unilateral recourse to military force against society-induced terrorist attacks.

51. For a similar observation see Michael Glennon, *Why the Security Council Failed*, FOREIGN AFF., May/June 2003, at 16, 18.

52. For a recent account of the author's position, see Karl M. Meessen, *Souveränität im Wettbewerb der Systeme*, in LIBER AMICORUM GÜNTHER JAENICKE 667 (1998).