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Anticipatory action in self-defence: The law of self-defence - past, presence and future

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10 Self-defence against non-state actors

10.1 Introduction

Arguments justifying the use of self-defence against non-state actors have been advanced by many states throughout the twentieth century. Political violence between states and non-state actors has been given different names over time, from guerrilla war to insurgency or militant terrorism.¹ The present chapter will focus on those claims of self-defence that were made by states against attacks carried out by non-state actors. The chapter will analyse several instances of state practice, but will also follow through the evolution of so-called terrorism from small, state-supported irregular bands to globalised networks of militants, relatively independent from the state apparatus.²

The aims of Chapter 10 are threefold. First, it will analyse how states, the Security Council, the General Assembly and legal publicists viewed armed acts committed by non-state actors and whether they saw them as amounting to armed attack in the sense of Article 51 of the Charter. Secondly, it will assess how specific claims of self-defence against armed acts carried out by non-state actors have been perceived over the years after the adoption of the Charter. Thirdly, it will shed light on the evolution of the ‘accumulation of events’ theory and its relation to the concept of self-defence.

The chapter is divided in four main sections. The first (10.2) will focus on the conflict between Israel and Arab militant groups in the 1950s-1970s. Section 10.2 depicts the initial approach of the Security Council towards armed acts carried out by non-state actors and introduces the ‘accumulation of events’ theory. The second section (10.3) shows how this theory was used by other states and developed in legal literature in the 1960s-1980s. The third section (10.4) focuses on armed acts of non-state actors in the 1990s. It also examines the changing attitude of the Security Council towards such acts. The fourth section (10.5) discusses several claims of self-defence made by states against non-state actors in the 2000s. Section 10.5 also analyses how the ‘accumulation of events’ theory can be used in assessing the justifiability of a claim of self-defence.

10.2 Israel and Arab militants

Confrontations between the Israeli and Palestinian communities erupted as early as the 1920s as a result of the Balfour Declaration legitimizing the creation of a Jewish state. That conflict escalated to involve neighbouring Arab states as well. One of its main

¹ For a classification of political violence between states and non-state actors, see G. Chaliand and A. Blin, eds., *The History of Terrorism: From Antiquity to Al-Qaeda* (Berkeley, University of California Press 2007) pp. 16-23.

² The term ‘terrorism’ had many shifting and contested meanings over time and it is acknowledged to have a stigmatizing, delegitimizing, even dehumanizing connotation. In the light of the ‘kaleidoscopic use of the term,’ it is acknowledged by the present author that terrorism is very difficult to define (for an analysis of the use of the term, see B. Saul, *Defining Terrorism in International Law* (Oxford, Oxford University Press, 2006) pp. 3-4). For that reason, in the present book ‘terrorism’ will be used to describe: ‘criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act.’ SC Res. 1566 (2004) para 3. Characterizations of acts as ‘terrorist’ made by states or publicists will be put in quotation marks.

characteristics was the use of non-state actors to carry out hit-and-run type of acts, such as those undertaken by regular armed forces in some of the conflicts discussed in Chapter 8 (the hit-and-run attacks that led to claims of self-defence by the UK and the US in the 1964 UK bombing of a Yemeni fort, the 1986 US bombing of Libya and the 1993 US bombing of Iraq, respectively). The same type of attacks – also coined as guerrilla warfare or terrorist-type of acts – were frequently resorted to by irregular armed groups.³

On the occasion of the 1956 Sinai campaign, Israel justified its actions as self-defence not only against the blocking of the Suez Canal but also against the raids of the *fedayeen* supported by Egypt.⁴ At that time, Israel characterized the use of the *fedayeen* units as ‘the spearhead of Egyptian belligerency.’⁵ The Israeli Foreign Minister Abba Eban went on to explain that their use ‘is a new device for making war and for making it with safety. The doctrine is one of unilateral belligerency. The Egyptian-Israel frontier is to be a one-way street. It is to be wide open for these armed Egyptian units to penetrate deeply into Israel to accomplish their mission and to return.’⁶ Israel complained about the incursions and attacks of the *fedayeen* in order to sustain its claim that the ‘long and uninterrupted series of encroachment amounted to an armed attack that justified self-defence.’⁷

Similar arguments were raised by Israel to justify the repeated incursions into Jordanian and Lebanese territory to disable alleged bases of Palestinian organizations and armed units.⁸ Between December 1968 and March 1969, Israel carried out concerted land and airborne attacks against alleged ‘terror bases’ deep inside Jordanian territory, reaching Amman.⁹ On 27 March 1969, before the Security Council, Israel contended that ‘more than 200 sabotage raids and firing attacks across the cease-fire lines’ had been recorded since the beginning of that year.¹⁰ They included ‘attacks by small arms, mortar, bazooka and Katyushka fire’ on several Israeli villages as well as ‘sabotage raids with grenades and explosives directed against civilians, incidents of mining and six clashes with terror units in which seventeen saboteurs were killed and six captured.’¹¹ These attacks had resulted in eight Israelis being killed and sixty-one wounded.¹² Israel went on to blame Jordan for supporting these operations and claimed that Jordanian territory

³ Chaliand and Blin, pp. 212-213.

⁴ GAOR, 1st Emergency Special Sess., UN Doc. A/PV.562 (1956) paras. 138-145.

⁵ *Ibid.*, para. 143.

⁶ *Ibid.*

⁷ *Ibid.*, para. 146. Israel used similar arguments to justify armed action against regular forces as well. In 1964 Israel carried out airstrikes against Syrian territory in response to ‘repeated acts of aggression by Syrian armed forces against citizens and territory of Israel’ and ‘threats by official spokesmen of the Syrian government against the territorial integrity and political independence of Israel.’ In the ensuing Security Council debate, the Israeli representative justified the action as a last resort and as an obligation of the Israeli government to defend the territory of the state and the life of its citizens, while the Syrian representatives coined the airstrikes as a premeditated aggression. The Syrian representative maintained that the Israeli ‘defensive measure’ was an abuse of right and that concepts such as ‘exploratory self-defence’ or ‘preventive self-defence’ should not be accepted. The Security Council failed to adopt a resolution, but the draft proposals submitted all concentrated on criticising Israel for its actions. See: Letter dated 16 November 1964 from the Permanent Representative of Israel addressed to the President of the Security Council, UN Doc. S/6046 (1964); *Repertoire*, Supp. 1964-1965, ch. 8, pp. 139-140, 196.

⁸ Alexandrov, pp. 174-176.

⁹ SCOR, 24th Sess., 1466th mtg., UN Doc. S/PV.1466 (27 March 1969) paras. 30, 69.

¹⁰ *Ibid.*, para. 59.

¹¹ *Ibid.*

¹² *Ibid.*, para. 60.

served as ‘the main jumping-off ground for attacks’ and as ‘the central base of the terror operations.’¹³ Moreover, ‘the terror organizations’ units are free to roam the country, to cross the Jordan River for raids into Israel and enjoy full protection on the part of the regular Jordanian army.’¹⁴ On this basis, Israel justified its armed action as self-defence against the repeated acts of the new ‘terror warfare’.¹⁵ During the unfolding discussion, the Russian representative characterized the Israeli raids as ‘premeditated, planned acts of aggression.’¹⁶ Similar opinions were expressed by the delegates of Algeria, Finland, France, Pakistan and China.¹⁷ The US delegate, while deploring the loss of life and condemning Israel’s ‘indiscriminate actions’, emphasized the responsibility of the Arab states for the frequent breaches of the cease-fire and for the various attacks carried out on population centres.¹⁸ At the end of the discussions, the Security Council adopted a resolution in which it condemned the ‘premeditated air attacks by Israel.’¹⁹

A few months later, Israel carried out similar air attacks against alleged ‘bases of terror organizations’ in Lebanon and justified its action as self-defence against ‘repeated attacks’.²⁰ The Security Council adopted yet another resolution in which it condemned the Israeli air attacks.²¹ Similar resolutions were adopted by the Security Council in May and September 1970 as well as in February and June 1972 condemning Israeli military action against Lebanon or demanding the withdrawal of its forces.²² In the ensuing discussion after the June 1972 Israeli ground and air attacks on Lebanese territory, the representative of Belgium contended that the right of self-defence could only be used against ‘a single case of armed aggression’ and that the ‘incidents’ which provoked the Israeli reaction could not be described as an act of aggression.²³

Israel continued to invoke self-defence against what it saw as ‘terror warfare’ and continuous attacks from armed groups based in the neighbouring Arab states.²⁴ In December 1975, Israel raided a complex of Palestinian bases in Lebanon, from which multiple attacks against Israeli territory had originated.²⁵ This time, the Security Council was unable to pass a resolution because of the veto exercised by the United States. During the discussions, the US delegate reminded the Council that the organizations which carried out acts of violence against Israel had publicly acknowledged their responsibility.²⁶ Moreover, progress could not be made with the adoption of ‘one-sided

¹³ Ibid., para. 62.

¹⁴ Ibid.

¹⁵ Ibid., para. 87.

¹⁶ Ibid., 1467th mtg., UN Doc. S/PV.1467 (27 March 1969) para. 6.

¹⁷ Ibid., 1468th mtg., UN Doc. S/PV.1468 (28 March 1969) paras. 3, 18, 34, 41; 1470th mtg., S/PV.1470 (29 March 1969) para. 50.

¹⁸ Ibid., 1467th mtg., UN Doc. S/PV.1467 (27 March 1969) paras. 48-49.

¹⁹ SC Res. 265 (1969) para. 3.

²⁰ Letter dated 12 August 1969 from the Permanent Representative of Israel addressed to the President of the Security Council, UN Doc. S/9387 (1969).

²¹ SC Res. 270 (1969) para. 1.

²² SC Res. 279, 285 (1970), 313, 316 (1972).

²³ SCOR, 27th Sess., 1650th mtg., UN Doc. S/PV.1560 (26 June 1972) para. 93.

²⁴ SC Res. 337 (1973) and 347 (1974).

²⁵ SCOR, 30th Sess., 1860th mtg., UN Doc. S/PV.1860 (5 December 1975); Dinstein 2005, pp. 247-248; Alexandrov, pp. 176-177.

²⁶ SCOR, 30th Sess., 1860th mtg., UN Doc. S/PV.1860 (5 December 1975) para. 3.

resolutions' that left Israel believing that it was the victim of discrimination and bias on the part of the United Nations.²⁷

The Israeli line of reasoning that had crystallized by that time was based on a concept of 'repeated attacks',²⁸ 'continuous warfare',²⁹ 'series of encroachment',³⁰ that amounted to armed attacks. There were two important arguments in this assertion: first, that the totality of the continuous attacks have caused serious harm to the life of the Israeli citizens and second, that the repetition of these attacks prompted Israel to believe that more were yet to come.³¹ The first argument raised the threshold of gravity to that of an armed attack, whereas the second justified defensive action against future threats. This assertion became to be known as the *Nadelstichtaktik*, 'needle-prick' approach or 'accumulation of events' theory.³²

The 'accumulation of events' theory raised questions as to the necessity and proportionality requirements of self-defence. Accordingly, the 'needle-prick' approach saw a present and inevitable need to act both against already occurred acts and in the face of new threats. The notion of 'armed attack' had to be interpreted collectively to include a series of repeated attack, 'pinpricks' that together created the immediate (present and inevitable) need to act. Furthermore, proportionality had to be measured against the need to neutralize the source of all future attacks.

Although self-defence against non-state actors was not an entirely new phenomenon in the legal history of the right, the general reaction to the Israeli claims showed that the members of the Security Council and the General Assembly were reluctant to accept that armed attacks could also be carried out by irregular forces and that the target state had the right to defend itself against them.³³

Israel was not the only state to resort to the 'needle-prick' approach. As will be shown below, starting with the 1960s, other countries have raised similar claims to justify resort to armed force.

10.3 State practice in the 1960s-1980s

²⁷ Ibid., para. 5.

²⁸ Letter dated 12 August 1969 from the Permanent Representative of Israel addressed to the President of the Security Council, UN Doc. S/9387 (1969).

²⁹ SCOR, 24th Sess., 1466th mtg., UN Doc. S/PV.1466 (27 March 1969) para. 89.

³⁰ GAOR, 1st Emergency Special Sess. 1956, UN Doc. A/PV.562 (1956) para. 146.

³¹ M.B. Baker, 'Terrorism and the Inherent Right to Self-Defence (A Call to Amend Article 51 of the United Nations Charter)', 10 *Houston Journal of International Law* (1987) p. 42; M.R. Jacobson, 'War in the Information Age: International Law, Self-Defense, and the Problem of "Non-Armed" Attacks', 21 *Journal of Strategic Studies* (No. 3, 1998) pp. 13-14.

³² D. Bowett, 'Reprisals Involving Recourse to Armed Force', 66 *American Journal of International Law* (1972) p. 12; Y. Blum, 'State Response to Acts of Terrorism', 19 *German Yearbook of International Law* (1976) pp. 233; L.M. Gross, 'The Legal Implications of Israel's 1982 Invasion into Lebanon', 13 *California Western International Law Journal* (1983) p. 478; O. Schachter, 'The Lawful Resort to Unilateral Use of Force', 10 *Yale Journal of International Law* (1985) p. 293; Baker 1987, p. 42; Jacobson, pp. 13, 16.

³³ Both the *Caroline* incident and the expedition in the pursuit of Pancho Villa involved non-state actors. See *supra* 3.2.2 and 3.2.2.1. See also M.J. Kelly, 'Critical Analysis of the International Court of Justice Ruling on Israel's Security Barrier', 29 *Fordham International Law Journal* (2005) pp. 225-227.

The question whether armed acts of irregular bands, individually or collectively, could amount to an armed attack under Article 51 was discussed early on by several legal scholars.³⁴ Higgins, for instance, affirmed that if a state had been subjected, over a period of time, to border raids by nationals of another state, which were openly supported by the government of that state, to threats of a future and possibly imminent, large-scale attack, that state was entitled to use force in self-defence, provided it was proportionate, in nature and degree, to the prior illegality or the imminent attack.³⁵ Brownlie also acknowledged that ‘a co-ordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a state from which they operate, would constitute an armed attack, more especially if the objective were the forcible settlement of a dispute or the acquisition of territory.’³⁶ Despite the increasing attention received in legal doctrine and state practice, many controversies remained as to the gravity, number and purpose of armed acts carried out by irregular bands. Likewise, the ‘accumulation of events’ theory raised questions of necessity and proportionality of armed actions in self-defence. These controversies became apparent in virtually all instances when states justified their use of force in self-defence on the basis of the ‘needle-prick’ approach. These instances were not necessarily connected with non-state actors; states sometimes referred to the ‘needle-prick’ theory also in relation to repeated acts committed by regular forces.

One of such instance was the 1964 UK bombing of a Yemeni fort, the details of which have been discussed in Chapter 8.³⁷ The UK claimed self-defence against ‘a deliberate and increasing attack by Yemen’³⁸ against the South Arabian Federation. Although the British action was directed against regular armed forces of Yemen, the explanation brought up was very similar to that used by Israel in relation to the irregular armed groups on the territory of its Arab neighbours. The Security Council once again rejected such arguments and condemned the action as a reprisal.³⁹

Similar arguments were put forward by the United States in connection with the Gulf of Tonkin incident, elaborated in Chapter 8.⁴⁰ The US characterized the raids carried out against North Vietnamese targets as ‘limited and relevant measures to secure its naval units against further aggression.’⁴¹

Although the two examples mentioned above did not involve non-state actors, they are illustrative as to how the ‘accumulation of events’ theory was becoming increasingly relevant in claims of self-defence against repeated attacks.

Portugal invoked the right of self-defence to justify its military actions against Guinea, Senegal and Zambia between 1969 and 1971. Before the Security Council, Portugal repeatedly claimed that repeated attacks were being carried out against adjacent

³⁴ M.R. Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States* (The Hague, Nijhoff 1962) p. 114; Higgins, p. 201; Brownlie 1963, p. 279.

³⁵ Higgins, p. 201.

³⁶ Brownlie 1963, p. 279.

³⁷ See *supra* 8.5.

³⁸ *Repertoire*, Supp. 1964-1965, ch. 8, p. 128.

³⁹ SC Res. 188 (1964).

⁴⁰ See *supra* 8.6.

⁴¹ SCOR, 19th Sess., 1140th mtg., UN Doc. S/PV.1140 (5 August 1964) par. 44.

Portuguese territories by armed organizations based in Guinea, Senegal and Zambia.⁴² The Security Council rejected all the justifications brought up by Portugal and condemned its military actions.⁴³

Apartheid South Africa also made use of similar arguments. Between the late seventies and the early eighties, South Africa carried out several military actions across its borders against neighbouring countries (i.e., Angola, Mozambique, Zambia, Zimbabwe, Lesotho, and Botswana) allegedly to protect its territory against guerrilla attacks.⁴⁴ South Africa claimed that these attacks were organized by the African National Congress and supported by the neighbouring countries.⁴⁵ The presence and activity of 'terrorist elements'⁴⁶ on the territory of the neighbouring countries proved, in South Africa's view, that these states were harbouring armed units that carried out repeated attacks against civilians in South Africa. These actions, it was claimed, hindered the government's reform process and disrupted civilian life in general.⁴⁷ For that reason, South Africa found that it had no other choice than 'take effective measures in self-defence to protect our country and population against threats.'⁴⁸ These claims were repeatedly rejected by the Security Council and several resolutions were adopted condemning the South African actions.⁴⁹

Despite the numerous claims of self-defence based on the 'needle-prick' approach, the Security Council showed continuous reluctance to accept it and to acknowledge the potential gravity of (repeated) armed acts committed by irregular forces. Apart from the obvious political divides that dictated many of the opinions of Council members, genuine concern as to the necessity and proportionality of such responses was also considered.⁵⁰ The 'accumulation of events' theory needed a widening of the context in which acts of self-defence were to be justified and emphasis was to be put not only on past incidents, but also on future ones.⁵¹ The Security Council was unwilling to make such a concession and claims of self-defence against armed acts of irregulars were repeatedly rejected by the UN executive organ.

⁴² SCOR, 24th Sess., 1486th mtg., UN Doc. S/PV.1486 (18 July 1969) paras. 69-70; 1516th mtg., S/PV.1516 (4 December 1969) para. 103; 1524th mtg., S/PV.1524 (18 December 1969) paras. 73-74; Letter dated 10 July 1971 from the Charge D'Affaires a.i. of the Permanent Mission of Portugal to the United Nations addressed to the President of the Security Council, UN Doc. S/10255 (1971); *Repertoire*, Supp. 1969-1971, ch. 8, pp. 140-145.

⁴³ SC Res. 273, 275 (1969); 294 (1971).

⁴⁴ Alexandrov, p. 180; F.M. Higginbotham, 'International Law, the Use of Force in Self-Defence and the Southern African Conflict', 25 *Columbia Journal of Transnational Law* (1987) pp. 561-572.

⁴⁵ Higginbotham, p. 565; *Repertoire*, Supp. 1975-1980, ch. 11, pp. 402-402; *ibid.*, 1981-1984, ch. 9, p. 326; SCOR, 41st Sess., 2684th mtg., UN Doc. S/PV.2684 (22 May 1986) p. 22.

⁴⁶ SCOR, 41st Sess., 2684th mtg., UN Doc., S/PV.2684 (22 May 1986) p. 22.

⁴⁷ *Ibid.*, pp. 22-23.

⁴⁸ *Ibid.*, p. 26.

⁴⁹ SC Res. 387, 393, 402 (1976); 428 (1978); 447, 454 (1979); 466, 475 (1980); 527 (1982); 545 (1983); and 546 (1984).

⁵⁰ SCOR, 24th Sess., 1468th mtg., UN Doc. S/PV.1468 (28 March 1969) paras. 18-19 (Finland expressing concern about the loss of civilian life), 34 (France expressing doubt as to the proportionality of the Israeli action); SCOR, 27th Sess., 1650th mtg., UN Doc. S/PV.1560 (26 June 1972) para. 93 (Belgium claiming that Art. 51 allows self-defence only against a single case of armed aggression); SCOR, 30th Sess., 1860th mtg., UN Doc. S/PV.1860 (5 December 1975) para. 3 (the US calling for an analysis of the Israeli airstrikes in the context of the repeated acts of violence committed by irregulars).

⁵¹ Bowett 1972, pp. 6-7.

The Security Council's scepticism was somewhat counterbalanced by resolutions of the General Assembly and by legal doctrine. In 1970, the General Assembly adopted the so-called Friendly Relations Declaration, according to which states had to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state. States also had the duty to refrain from 'organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts.'⁵²

Four years later, the General Assembly went one step further and adopted the Definition of Aggression, according to which 'the sending by or on behalf of a state or armed bands, groups, irregulars or mercenaries' which would carry out acts of armed force against another state of such gravity as to amount to acts performed by regular forces could amount to an act of aggression. Moreover, a state's substantial involvement in such activities was also seen as a potential act of aggression.⁵³

The resolutions of the General Assembly did not touch upon the 'accumulation of events' theory; their purpose was, *inter alia*, to ascertain the gravity of armed acts performed by other than regular armed forces of a state. While the Friendly Relations Declaration equated organizing or encouraging the organization or irregular forces with an unlawful use of force that breached the provisions of the Charter, the Definition of Aggression went one step further and rendered such activities acts of aggression.

Both resolutions were acknowledged by the International Court of Justice as codifications of customary international law.⁵⁴ Moreover, in the *Nicaragua* case, the Court found that an armed attack could also be understood as including 'the sending by or on behalf of a State of armed bands' for the purposes described by Article 3(g) of the Definition of Aggression.⁵⁵ It is important to note, however, that the Court rejected the view according to which the provision of weapons or logistical or other forms of support to irregular bands would also amount to an armed attack.⁵⁶

The accumulations of events theory received more attention in legal doctrine. In 1972, Bowett offered a thorough analysis of the concept and asserted that to focus on a particular incident and its cause without regard to 'the broader context of past relations between the parties and events arising therefrom, is to ignore the difficulties in which states may be placed, especially in relation to guerrilla activities.'⁵⁷ In other words, by rejecting the 'accumulation of events' theory and isolating an incident from its context, the Security Council not only found itself being accused of 'one-sidedness', but also was forced to characterize as illegal reprisals actions which, 'on a broader view of self-defence, might be regarded as legitimate.'⁵⁸ At the same time, Bowett pointed out that by condemning the disproportionate acts as reprisals and remaining silent or evasive on small-scale, cause-and-effect, relatively proportionate responses, the Security Council was in fact legitimizing proportionate, *de facto* reprisals.⁵⁹

⁵² Friendly Relations Declaration, GA Res. 2625, Part 1. See *infra* 11.3.1.

⁵³ Definition of Aggression, GA Res. 3314, Art. 3(g). See *infra* 11.3.1.

⁵⁴ *Nicaragua*, ICJ Rep. (1986) para. 195.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* See *infra* 11.4.1.

⁵⁷ Bowett 1972, p. 9.

⁵⁸ *Ibid.*, pp. 9-10.

⁵⁹ *Ibid.*, pp. 11-12.

The same theory was given attention by Yehuda Blum, legal scholar and Israeli Ambassador to the UN (1978-1984) in an article that analysed possible state responses to acts of terrorism.⁶⁰ Blum offered a comprehensive list of secondary legal sources that acknowledged support to and toleration of armed bands likely to carry out hostile incursions in the territory of another state as forms of indirect aggression.⁶¹ He then went on analysing the conditions under which ‘acts of terrorism’ could be considered an armed attack. As Bowett, he asserted that such a conclusion would greatly depend whether one was inclined to give a narrow or a broad interpretation to the words ‘if an armed attack occurs’ of Article 51.⁶² In Blum’s opinion, an isolated terrorist act was bound to be treated differently from ‘an act of terrorism which constitutes but one link in a long chain of such acts, particularly when it is obvious that acts of such intensity could not have been carried out without the encouragement, or at least knowledge or toleration, of the sanctuary state.’⁶³ In other words, although sporadic acts, taken separately, may not constitute an armed attack, their accumulation may demonstrate a systematic campaign which could amount to a veritable armed attack.⁶⁴ Blum went on to explain that the reason why ‘terrorist organizations’ engaged in protracted acts of violence was that they were incapable of achieving ‘in one concentrated and direct blow’ what they could accomplish in smaller, repeated acts of force.⁶⁵ If proportionality were to be measured to each of the acts, individually, hardly any response would qualify as proportionate. For that reason, Blum asserted, the ‘needle-prick’ approach helped in looking at the violent acts *in their totality* and assessing the proportionality of the response from such a perspective.⁶⁶

The ‘accumulation of events’ theory was implicitly referred to by Roberto Ago in his report to the International Law Commission (ILC) on the draft articles for state responsibility.⁶⁷ Accordingly, Ago believed that self-defence could be justified against an armed attack consisting ‘of a number of successive acts.’ In such a case, the requirements of proportionality and immediacy had to be looked at ‘in the light of those acts as a whole.’⁶⁸ Ago was very cautious in his wording, but he did admit that ‘if a state suffers a series of successive and different acts of armed attack, from another state, the requirement of proportionality would certainly not mean that the victim state is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks.’⁶⁹ It is important to note that Ago referred to repeated acts of *armed attack of states* (thus regular armed forces) and not to sporadic raids of irregular armed groups. That approach was criticized in the ensuing ILC discussions by

⁶⁰ Blum, pp. 223-237.

⁶¹ *Ibid.*, pp. 230-231.

⁶² *Ibid.*, p. 233.

⁶³ *Ibid.*

⁶⁴ *Ibid.*; Gross, p. 478; Jacobson, p. 13.

⁶⁵ Blum, p. 233.

⁶⁶ *Ibid.*, p. 235.

⁶⁷ R. Ago, *Addendum to the Eighth Report on State Responsibility*, UN Doc. A/CN.4/318/Add.5-7 (1980) (hereafter, Ago Report). See also *infra* 11.3.2.4.

⁶⁸ Ago Report, pp. 69-70, para. 121.

⁶⁹ *Ibid.*, pp. 69-70, para. 121.

Schwebel, who asserted that ‘armed attack’ had to be interpreted in such way as to allow states to defend themselves against ‘attacks by terrorist organizations and individuals.’⁷⁰ In the 1980s, state practice showed a steady increase in invoking the *Nadelstichtaktik* against accumulated acts of armed groups. In 1981, Israel carried out airstrikes against Palestinian bases in Beirut and in 1982 invaded Lebanon to neutralize armed bases of the Palestine Liberation Organization (PLO). At the Security Council meeting of 17 July 1981, Israel justified its Beirut raids as defensive action against PLO’s ‘relentless campaign of murder against Israel and its people.’⁷¹ The Israeli representative emphasized that the raids were targeted against ‘concentrations of PLO terrorists in Lebanon’ and not civilians. The unwanted civilian casualties were the result of the PLO choosing bases ‘in villages and refugee camps’ under Lebanese control.⁷² The arguments put forward were once again criticized by the intervening Security Council members.⁷³ The resolution adopted called for the immediate cessation of ‘all armed attacks’, but stopped short of specifically condemning Israel, as was done in earlier years.⁷⁴

One year later, on 6 June 1982, Israeli armed forces invaded southern Lebanon to push the PLO out of the range of northern Israeli settlements and to establish a twenty-five mile ‘buffer zone’ along the Israeli-Lebanese border.⁷⁵ For months prior to the invasion, Israel had expressed concerns over the build-up of PLO bases in southern Lebanon.⁷⁶ The act which triggered the invasion was the assassination attempt on the Israeli ambassador to Great Britain two days earlier. The attempt was staged by Palestinians in London, but the PLO denied responsibility for it.⁷⁷ Israel justified its armed intervention as self-defence against continuous shelling of its northern settlements and the repeated PLO attacks against Israel.⁷⁸ It was also claimed to be a defensive measure against the imminent threat posed by the growing stockpile of weapons at the PLO bases of southern Lebanon.⁷⁹ Again, the Security Council was not convinced and several resolutions were adopted in the following weeks demanding the withdrawal of the Israeli forces from Lebanon.⁸⁰

The 1982 Israeli invasion of Lebanon drew further attention to the ‘accumulation of events’ theory. Several authors defended the theory and attempted to justify it on the basis of legal and policy arguments as well as common sense.⁸¹ Gross opined that even if the Israeli invasion was of a much larger scale than the sporadic PLO attacks, the purpose of the intervention was to prevent future attacks that formed part of the same pattern. Under the *Nadelstichtaktik* approach, such a response could be justified.⁸² Schachter

⁷⁰ Summary Record of the 1621st ILC mtg., UN Doc. A/CN.4/SR.1621 (1980) para. 5.

⁷¹ SCOR, 36th Sess., 2292nd mtg., UN Doc. S/PV.2292 (17 July 1981) paras. 40, 55.

⁷² Ibid., paras. 56-57.

⁷³ Ibid., paras. 65-116.

⁷⁴ SC Res. 490 (1981) para. 1.

⁷⁵ Gross, p. 459.

⁷⁶ SCOR, 36th Sess., 2292nd mtg., UN Doc. S/PV.2292 (17 July 1981) para. 46.

⁷⁷ Gross, pp. 458-459.

⁷⁸ SCOR, 37th Sess., 2375th mtg., UN Doc. S/PV.2375 (6 June 1982) paras. 39, 58, 65.

⁷⁹ Gross, p. 459; Letter dated 2 July 1982 from the Permanent Representative of Israel to the United Nations addressed to the President of the Security Council, UN Doc. S/15271 (1982); SCOR, 37th Sess., 2375th mtg., UN Doc. S/PV.2375 (6 June 1982) paras. 45-46, 65.

⁸⁰ SC Res. 509, 515, 517, 520, 521 (1982).

⁸¹ Gross, pp. 458-492; Schachter 1985, p. 293.

⁸² Gross, p. 487.

asserted that it was not unreasonable to allow a state, victim of an attack, to respond with force beyond the immediate area of attack when that state had good reason to expect a continuation of attacks from the same source. Such action could not be characterized as merely anticipatory, because prior attacks had taken place; nor would it be a reprisal, because its principal aim would be protective and not punitive.⁸³

The validity of the ‘accumulation of events’ theory was suggested by the International Court of Justice as well. In the *Nicaragua* case, the Court stated that it had not enough evidence to decide whether Nicaraguan transborder incursions into Honduras and Costa Rica ‘may be treated for legal purposes as amounting, singly or collectively, to an armed attack by Nicaragua.’⁸⁴

The ‘needle-prick’ theory received increased attention as a result of the 1986 US airstrike against targets in Libya, discussed in Chapter 8.⁸⁵ Before the Security Council, US Ambassador Walters put forward a clear vindication of the ‘accumulation of events’ theory:

[I]n the light of that reprehensible act of violence [the bombing of the West Berlin club, KTSz] – only the latest in an ongoing pattern of attacks by Libya – and of clear evidence that Libya was planning a multitude of future attacks, the United States was compelled to exercise its right of self-defence. The United States hopes that this action will discourage Libyan terrorist acts in the future.⁸⁶

Clearly, the US claim of self-defence relied on the ‘accumulation of events’ theory. As with the early Israeli line of reasoning, both constitutive elements of the theory were asserted. First, that the ongoing pattern of attacks have seriously endangered American life and property abroad and second, that the repetition of these attacks prompted the US to believe that more were yet to come. Nonetheless, the majority of the Security Council members rejected the explanation.⁸⁷ The United Kingdom defended the American action by asserting that the evidence of ongoing terrorist activities of the Libyan government was beyond dispute and that the US had a right of self-defence which included destroying or weakening the capacity of one’s assailant.⁸⁸ Other Western European countries criticised the US airstrikes, but condemned Libya’s involvement in terrorist activities.⁸⁹ The US, the United Kingdom and France vetoed a draft resolution that would have condemned the American airstrikes. Australia and Denmark also voted against the resolution. Nine other members of the Council – Bulgaria, China, Congo, Ghana, Madagascar, Thailand, Trinidad and Tobago, the USSR and the United Arab Emirates – voted in favour of the resolution. Venezuela abstained.⁹⁰ The UN General Assembly adopted, nonetheless, a resolution condemning the airstrikes by 79 to 28 votes, with 51 states abstaining or absent.⁹¹

⁸³ Schachter 1985, p. 293.

⁸⁴ *Nicaragua*, ICJ Rep. (1986) para. 231.

⁸⁵ See *supra* 8.11.

⁸⁶ SCOR, 41st Sess., 2674th mtg., UN Doc. S/PV.2674 (15 April 1986) p. 17.

⁸⁷ *Ibid.*, 2674th–2682nd mtg., UN Doc. S/PV.2674–2682 (15–21 April 1986).

⁸⁸ *Ibid.*, 2679th mtg., UN Doc. S/PV.2679 (17 April 1986) p. 27.

⁸⁹ *Ibid.*, 2674th–2682nd mtg., UN Doc. S/PV.2674–2682 (15–21 April 1986); Intoccia, pp. 187–188.

⁹⁰ SCOR, 41st Sess., 2682nd mtg., UN Doc. S/PV.2682 (21 April 1986) p. 43.

⁹¹ GA Res. 41/38 (1986). Franck 2002, p. 91.

The reaction to the US airstrikes was mixed, though many countries had later imposed economic sanctions on Libya for its terrorist activities. Some authors have, nonetheless, defended the US line of argumentation.⁹² Greenwood called for a reinterpretation of Article 51 of the UN Charter to include the ‘accumulation of events’ theory. In his view, if irregular or terrorist attacks, each one of which, taken separately, would be a relatively minor use of force, emanate from the same state and form a reasonably coherent pattern, their accumulation could amount to an ongoing armed attack. In such a case, the right of the victim state to take defensive action should be considered in the light of the whole of these attacks. Consequently, there would be no need for the victim state to show that another attack was imminent before it could react by using force in self-defence. In Greenwood’s opinion, it would be sufficient that there was reason to believe that future attacks were likely to occur.⁹³

By the beginning of the 1990s, the ‘needle-prick’ approach or ‘accumulation of events’ theory comprised several elements. First, there had to be a number of prior attacks, which, in their totality, would amount to an armed attack.⁹⁴ These acts, taken individually, need not be of increased gravity; it was enough if their totality resulted in great harm.⁹⁵ Secondly, these attacks had to emanate from an identifiable source, usually an armed group sent, supported or tolerated by another state.⁹⁶ It was implicitly understood that the link between the armed group and the sending, sponsoring or harbouring state had to be established and evidence had to be brought that that state was either incapable or unwilling to tackle the problem.⁹⁷ Thirdly, the repeated nature of attacks had to create the conviction that more would follow in order to achieve the objective of the armed group.⁹⁸ On this basis, the targeted state was allowed to invoke self-defence to repel future attacks that were anticipated because of the very reoccurrence of past attacks.⁹⁹ Lastly, the proportionality of the use of armed force by the targeted state was to be weighed against the totality of past and future attacks and not against isolated incidents.¹⁰⁰

The crystallization of the elements of the ‘needle-prick’ theory happened in spite of a generally negative attitude of the Security Council. In the early 1950s and 1960s, the theory was vehemently rejected by the Council. Starting with the 1960s, some states, including the US and the UK, gradually softened their position, especially as a result of instances of state practice in which they invoked a similar reasoning.¹⁰¹ As a result, on some occasions when Israeli claims of self-defence were discussed, the US stressed the importance of analysing those claims against the general context of reoccurring violence and not in an isolated manner.¹⁰² Although the reluctance of the Security Council to

⁹² Greenwood 1987, pp. 933-960; McCredie, pp. 215-242. Dinstein characterized them as ‘defensive armed reprisals’. Dinstein 2005, p. 229.

⁹³ Greenwood 1987, p. 954.

⁹⁴ Brownlie 1963, p. 279; Gross, p. 478; Greenwood 1987, p. 954; Schachter 1985, p. 293.

⁹⁵ Blum, p. 233; Gross, p. 478; Greenwood 1987, p. 954; Schachter 1985, p. 293.

⁹⁶ Blum, p. 233; Greenwood 1987, p. 954; Gross, p. 478; Schachter 1985, p. 293.

⁹⁷ Blum, p. 233.

⁹⁸ Greenwood 1987, p. 954; Schachter 1985, p. 293.

⁹⁹ Blum, p. 233; Greenwood 1987, p. 954; Gross, p. 478; Higgins, p. 201; Schachter 1985, p. 293.

¹⁰⁰ Blum, p. 235; Gross, pp. 486-487; Schachter 1985, p. 293.

¹⁰¹ See *supra* 8.5 and 8.6.

¹⁰² SCOR, 24th Sess., 1467th mtg., UN Doc. S/PV.1467 (27 March 1969) paras. 48-49; SCOR, 30th Sess., 1860th mtg., UN Doc. S/PV.1860 (5 December 1975) paras. 3-5.

accept the validity of the ‘needle-prick’ theory lingered on, by the 1980s, it became less willing to condemn the Israeli actions and limited itself to call for the cessation of hostilities.¹⁰³ The attitude of the Security Council was counterbalanced by writings of publicists and resolutions of the UN General Assembly. Jurists drew attention to the growing dangers posed by armed acts of irregular groups and called for a validation of the ‘needle-prick’ approach within the limits of the principles of necessity and proportionality.¹⁰⁴ General Assembly resolutions limited themselves to enouncing that armed acts of irregular bands could amount to illegal use of force or acts of aggression. Moreover, even the International Court of Justice allowed for armed attacks to include acts of irregular bands, albeit under restrictive conditions.¹⁰⁵ Nonetheless, many controversies remained fuelled by the scepticism of the Security Council and a general distrust of public opinion towards the ‘needle-prick’ theory and its susceptibility for abuse.

The 1990s saw a gradual shift in public opinion in the face of an augmentation in both number and scope of terrorist organizations and terrorist acts. Gradually, many of the controversies that characterized the debate of previous decades were renounced in the face of the changing nature of the threat posed by non-state actors.

10.4 Terrorist attacks in the 1990s

While state-sponsored terrorism has remained active, starting with the nineties, quasi-independent regional or global militant networks also started acquiring importance. These networks or organizations have been only partly dependent on state support; private persons act as founders or sponsors, while harbouring states often prove to be incapable or unwilling to control their activity. They have also engaged in more or less legitimate businesses and have drawn considerable revenues from these independent sources of income.¹⁰⁶ Apart from a steadily broadening reach – assisted by modern information technology –, these networks have also shown a growing preference for large-scale, lethal, indiscriminate attacks in public places.¹⁰⁷

¹⁰³ SC Res. 490 (1981); 509, 515 and 517 (1982). In SC Res. 520 and 521 (1982) the Security Council condemned Israel for renewed incursions into Beirut.

¹⁰⁴ Blum, pp. 223-237; Greenwood 1987, pp. 933-960; Gross, pp. 458-492; Schachter 1985, pp. 291-294.

¹⁰⁵ Friendly Relations Declaration, GA Res. 2625, Part 1; Definition of Aggression, GA Res. 3314, Art. 3(g); *Nicaragua*, ICJ Rep. (1986) para. 195. See *infra* 11.4.1.

¹⁰⁶ R. Gunaratna, ‘New Threshold Terrorism’, in G. Gunaratna, ed., *The Changing Face of Terrorism* (Singapore, Marshall Cavendish 2004) pp. 20-21.

¹⁰⁷ *Ibid.*, pp. 19, 29-30. For looking into the debate on the ‘new terrorism’, see G. Rose, ‘It Could Happen Here: Facing the New Terrorism’, 78 *Foreign Affairs* (1999) pp. 131-137; D. Tucker, ‘What is New about the New Terrorism and how Dangerous Is It?’, 13 *Terrorism and Political Violence* (No. 3, 2001) pp. 1-14; C.W. Kegley, Jr., ed., *The New Global Terrorism: Characteristics, Causes, Controls* (Upper Saddle River, N.J., Prentice Hall 2003); M.J. Morgan, ‘The Origins of the New Terrorism’, 34 *Parameters: US Army War College* (No. 1, 2004) pp. 29-43; G. Gunaratna, ed., *The Changing Face of Terrorism* (Singapore, Marshall Cavendish 2004); I. Duyvesteyn, ‘How New is the New Terrorism?’, 27 *Studies in Conflict and Terrorism* (No. 5, 2004) pp. 439-454; R.D. Howard, ‘The New Terrorism and Weapons of Mass Destruction’, in R.D. Howard and N.E. Bajema, eds., *Weapons of Mass Destruction and Terrorism* (New York, McGraw-Hill 2008) pp. 6-22; B.M. Jenkins, ‘The New Age of Terrorism’, in R.D. Howard and N.E. Bajema, eds., *Weapons of Mass Destruction and Terrorism* (New York, McGraw-Hill 2008) pp. 23-31; J.F. Murphy,

As a result of these developments, the attention of governments, intergovernmental organizations and legal publicists alike began to focus on efficient ways to prevent, ward off and punish terrorist acts. Among other questions concerning transnational cooperation and law enforcement, the issue of using armed force against such terrorist organizations was given more consideration than before.

Throughout the 1990s, the number of acts of international terrorism decreased. As a result, until the attacks of 11 September 2001, most Western governments considered that terrorist threats were in decline. Although the number of terrorist attacks has been, indeed, in decline, the lethality of such attacks has actually been increasing.¹⁰⁸ Moreover, during the 1990s, it became evident that the target of terrorist attacks were, increasingly, US and other Western nationals.¹⁰⁹

In 1990, the Tupac Amaru Revolutionary Movement bombed the US embassy in Lima, Peru. In the same year, the Philippine New People's Army killed two US soldiers in the Philippines. Two years later, in 1992, US businessmen were kidnapped in Manila by Philippine armed groups.¹¹⁰

On 26 February 1993, the World Trade Center in New York was badly damaged when a car bomb exploded in an underground garage. The bomb left 6 people dead and a 1000 people injured. The men carrying out the attack were led by Ramzi Yousef, trained in one of bin Laden's al-Qaeda camps in Afghanistan.¹¹¹ He wanted the bomb to topple one tower, with the collapsing debris knocking down the second, bringing the entire complex down and killing what he hoped would be 250,000 people.¹¹² Instead, the bomb created a 30-meter crater several stories deep and several more high.¹¹³

Deadly attacks continued through the second half of the 1990s. In 1995, Hamas claimed responsibility for the detonation of a bomb that killed 6 and injured over 100 persons, including several US citizens in Jerusalem. A year later, the US embassy in Athens was damaged by a fire rocket. The same year, in 1996, in Jerusalem, a suicide bomber blew up a bus, killing 26 persons, including three U.S. citizens, and injuring some 80 persons, including three other US citizens. The attack was claimed by Hamas.¹¹⁴ In June 1996, a fuel truck carrying a bomb exploded outside the US military's Khobar Towers housing facility in Dhahran (Saudi Arabia), killing 19 US military personnel and wounding 515 persons, including 240 US personnel.¹¹⁵ On 17 December 1996, members of the Tupac Amaru Revolutionary Movement took several hundred people hostage at a

'Challenges of the New Terrorism', in D. Armstrong, ed., *Routledge Handbook of International Law* (London, Routledge 2009) pp. 281-293.

¹⁰⁸ Gunaratna 2004, 'New Threshold', p. 19; N. Gurr and B. Cole, *The New Face of Terrorism: Threats from Weapons of Mass Destruction* (London, I.B. Tauris 2002) pp. 22-23.

¹⁰⁹ A. Blin, 'The United States Confronting Terrorism', in G. Chaliand and A. Blin, eds., *The History of Terrorism: From Antiquity to Al-Qaeda* (Berkeley, University of California Press 2007) pp. 408-413.

¹¹⁰ *Significant Terrorist Incidents, 1961-2003: A Brief Chronology* (US Department of State, Office of the Historian, Bureau of Public Affairs 2004), available at <www.fas.org/irp/threat/terror_chron.html> (accessed 31 March 2010).

¹¹¹ L. Wright, *The Looming Tower: Al-Qaeda and the Road to 9/11* (New York, Alfred Knopf 2006) p. 177.

¹¹² *Ibid.*, p. 178.

¹¹³ US Federal Bureau of Investigations, Headline Archives, available at <www.fbi.gov/page2/feb08/tradebom_022608.html> (accessed 31 March 2010).

¹¹⁴ *Significant Terrorist Incidents, 1961-2003*.

¹¹⁵ Wright 2006, pp. 237-239.

party given at the Japanese ambassador's residence in Lima, Peru. Among the hostages were several US officials, foreign ambassadors and other diplomats, Peruvian government officials, and Japanese businessmen. The group demanded the release of all Tupac Amaru members in prison and safe passage for them and the hostage takers. The terrorists released most of the hostages in December but held 81 Peruvians and Japanese citizens for several months.¹¹⁶ In November 1997, gunmen shot and killed 58 tourists and four Egyptians and wounded 26 others at the Hatshepsut Temple near Luxor, Egypt. Thirty-four Swiss, 8 Japanese, 5 Germans, 4 Britons, 1 French, 1 Colombian, a dual Bulgarian-British citizen, and 4 unidentified persons were among the dead. Twelve Swiss, 2 Japanese, 2 Germans, 1 French, and 9 Egyptians were among the wounded.¹¹⁷ Although the listing above is only illustrative, it becomes evident that the impact and magnitude of the terrorist attacks had considerably changed by the second half of the nineties. They became more lethal and pronouncedly more anti-Western, especially targeting US nationals abroad. As Wedgwood explained, modern terrorism featured independent ideological, political or ethnic factions rather than state-sponsored groupings. Such a faction was less vulnerable to international sanctions than states. 'With an uncertain membership and inchoate form,' Wedgwood observed, 'terrorist networks lie outside the web of civil responsibility that constrains private and public actors in international society.'¹¹⁸

- The Kenya and Tanzania bombings

The bombings of the US embassies in Kenya and Tanzania were also evidence of the new type of terrorist attacks. On the morning of 7 August 1998, terrorists driving in a truck detonated a large bomb in the rear parking area of the American embassy in Nairobi, Kenya. A total of 213 people were killed, of whom 200 were Kenyan civilians and 12 were American citizens. Approximately 4000 persons were injured by the blast.¹¹⁹ On the same morning, a truck laden with explosives drove up to the US embassy in Dar-Es-Salaam, Tanzania. Apparently unable to penetrate the perimeter because it was blocked by an embassy water tanker, the suicide bomber detonated his charge at a distance of about 35 feet from the outer wall of the chancery. The bomb attack killed eleven people and injured 85. No US citizens were among the fatalities, but many were injured, two of them seriously.¹²⁰

Two weeks later, on 20 August 1998, Tomahawk Land Attack Missiles (TLAMs) were launched at targets in Afghanistan and Sudan associated with the Kenya and Tanzania explosions. The US contended that the Afghan targets were training camps used by a number of groups associated with the so-called 'bin Laden network'. According to the American findings, the bases housed 'the infrastructure for their funding and

¹¹⁶ *Significant Terrorist Incidents, 1961-2003*.

¹¹⁷ Wright 2006, pp. 256-258.

¹¹⁸ R. Wedgwood, 'Responding to Terrorism: The Strikes against Bin Laden', 24 *Yale Journal of International Law* (1999) p. 559.

¹¹⁹ 'Nairobi: Discussion and Findings', in *Report of the Accountability Review Boards on the Embassy Bombings in Nairobi, Kenya and Dar es Salaam, Tanzania on August 7, 1998* (Washington, D.C., Department of State 1999), available at <www.state.gov/www/regions/africa/board_nairobi.html> (accessed 7 March 2010).

¹²⁰ *Ibid.*

international travel and for training them in tactics and in the assembly and use of a wide variety of weapons.¹²¹ The Sudanese target was a chemical plant in northeast Khartoum, claimed to be ‘involved in the production of chemical weapons agents’ and associated with the bin Laden network.¹²²

Then US President Clinton justified the airstrikes as necessary to address an ‘imminent threat’ to American national security.¹²³ He further asserted that there was convincing intelligence information that the bin Laden network was responsible for the bombings. Moreover, the President stated that further compelling evidence showed that the network was planning to mount further attacks.¹²⁴

The United States promptly informed the Security Council about the airstrikes and invoked the right of self-defence against ‘a series of armed attacks’ against US embassies and nationals.¹²⁵ It asserted that the strikes were carried out in response to the Kenya and Tanzania terrorist attacks, and to prevent and deter their continuation.¹²⁶ The US permanent representative assured the Security Council that the airstrikes were carried out only after conclusive evidence showed the connection of the Afghan and Sudan targets to the bin Laden network. Moreover, the representative pointed out that the American action was taken only after ‘repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Laden organization’ had failed.¹²⁷ In a national address three weeks after the airstrikes, then Secretary of State Madeleine Albright characterized the Tanzania and Kenya attacks as signals of ‘the emergence of terrorist coalitions that do not answer fully to any government, that operate across national borders, and have access to advanced technology.’¹²⁸ In the face of ‘well-financed terrorist leaders such as Osama bin Laden,’ whose expressly acknowledged purpose was ‘to kill American worldwide,’ Albright pledged that the US would ‘wage the struggle against terror on every front on every continent with every tool, every day.’¹²⁹

The Security Council did not meet in public session to evaluate the US military action, as it did in 1986. International reaction was generally favourable, although a few prominent states condemned the US action.¹³⁰ Most US allies, including the United Kingdom, Germany, Australia, New Zealand and Israel expressed their support for the

¹²¹ US Department of State, Fact Sheet: U.S. Strike on Facilities in Afghanistan and Sudan, 21 August 1998, available at <www.state.gov/www/regions/africa/fs_binladin_facilities.html> (accessed 7 March 2010); Wedgwood 1999, p. 563.

¹²² Ibid.

¹²³ President Clinton, Address to the Nation (20 August 1998), available at <www.state.gov/www/regions/africa/strike_clinton980820a.html> (accessed 7 March 2010) (hereafter, President Clinton 1998).

¹²⁴ Ibid.

¹²⁵ Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/1998/780 (1998).

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Madeleine K. Albright, Secretary of State, Address to the American Legion Convention, New Orleans, Louisiana (9 September 1998), available at <http://avalon.law.yale.edu/20th_century/t_0025.asp> (accessed 30 March 2010).

¹²⁹ Ibid.

¹³⁰ Franck 2002, p. 95.

American choice of action. France and Italy showed moderate acquiescence. Russia, China, Pakistan, Libya and Iraq condemned the airstrikes.¹³¹

Several authors discussed the self-defence justifications brought by the US.¹³² Wedgwood asserted that the military strikes of August 1998 could be justified as self-defence even according to the most stringent interpretation of the right. The magnitude of the Kenya and Tanzania bombings surely amounted to an armed attack, while US intelligence brought conclusive evidence of future attacks being planned by the bin Laden network.¹³³ At the same time, ‘the prudent use of military force to prevent terrorist attacks and to degrade terrorist infrastructures’ was a proportionate response to the bombings.¹³⁴ On the contrary, Campbell considered that the two airstrikes did little to eradicate the threat of the bin Laden network and they actually increased anti-American sentiment worldwide.¹³⁵ Moreover, he asserted that even though the Tanzania and Kenya bombings could amount to armed attacks, the US response failed to respect the requirements of necessity and proportionality.¹³⁶ Likewise, Lobel characterized the US air strikes as an ‘assertion of imperial might and arrogance in opposition to international law.’¹³⁷

The justification brought by the US for its air strikes was another vindication of the ‘accumulation of events’ theory. Certainly, the Tanzania and Kenya bombings could be construed as amounting to armed attacks, even if taken individually. It was also clear that they were committed against US citizens and property and that they were carried out by non-state actors. Equally, there was virtually no debate on the veracity of the claim that the network of Osama bin Laden was behind the attacks.¹³⁸ Nonetheless, the factual link connecting these bombings to targets in Sudan and Afghanistan was widely debated.¹³⁹ Likewise, the assertion that future attacks were being planned from, or with the assistance of those targets, was – at the time of the airstrikes – less than unquestionably proven.¹⁴⁰ Moreover, the proportionality of the air strikes was also debated.¹⁴¹ Still, general public reaction was relatively muted in comparison with past criticism of resort to force on the basis of similar justifications. According to Lobel, the reason for the lack of public protest and debate was the general disinterest of other states in Sudan and the awareness that a potential Security Council condemnation would be vetoed by the US.¹⁴²

According to the present author, the gradual realization that the danger posed by terrorist organizations and their armed acts was increasing in gravity played an important role in the relatively quiet public reaction. Governments and citizens alike began to

¹³¹ Ibid., p. 95; J. Lobel, ‘The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan’, 24 *Yale Journal of International Law* (1999) p. 538.

¹³² L.M. Campbell, ‘Defending against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan’, 74 *Tulane Law Review* (2000) pp. 1067-1096; Lobel, pp. 537-557; Wedgwood 1999, pp. 559-576.

¹³³ Wedgwood 1999, pp. 564-565.

¹³⁴ Ibid., pp. 563, 575.

¹³⁵ Campbell 2000, pp. 1090-1092.

¹³⁶ Ibid., pp. 1093-1096.

¹³⁷ Lobel, p. 557.

¹³⁸ Wright 2006, pp. 270-272.

¹³⁹ Lobel, pp. 548-555; Campbell 2000, pp. 1089-1091.

¹⁴⁰ President Clinton 1998; Campbell 2000, pp. 1090-1091.

¹⁴¹ Campbell 2000, pp. 1093-1096. *Per a contrario*, see Wedgwood 1999, pp. 563, 575.

¹⁴² Lobel, pp. 556-557.

understand that the new forms of terrorism needed a rethinking of the available responses and that states had to have different means to defend themselves against such threats.

If the requirements of necessity and proportionality are corroborated with the ‘accumulation of events’ theory, three interpretative points can be made regarding the East Africa bombings. First, the existent danger referred not only to the already occurred armed attacks in Tanzania and Kenya, but also to the threat lying in the planned future attacks. In other words, the conditionality of an armed attack (as an element of necessity) had to be interpreted to include both past and future events. Secondly, this collective conditionality of past and future attacks created a present and inevitable need to act (immediacy element of necessity). Furthermore, the proportionality of the US action had to be measured against the need to neutralize the source of all future attacks, thus it could involve a response that was considerably larger in scale than the attacks already occurred. The relationship between the requirements of necessity and proportionality, on one hand, and the ‘accumulation of events’ theory, on the other, was further tested in the twenty-first century conflicts involving non-state actors.

10.5 Terrorist attacks of the new millennium

Although states began to focus more on the available responses to international terrorism, it was not until 9/11 that they began to fully appreciate the threat posed by the new terrorist groups. One of the main changes in anti-terrorism strategy, was the re-definition of terrorism from a law-and-order problem to a national security threat.¹⁴³ As a result, the use of force in self-defence against terrorist organizations and terrorist attacks became one of the most relevant issues to address.

10.5.1 The attack on the *USS Cole* (2000)

Two years after the Kenya and Tanzania bombings, the US was once again faced with the decision whether to use force against a terrorist attack or to resort to other means. On 12 October 2000, in Aden (Yemen), a small dinghy, carrying explosives, rammed the destroyer *USS Cole*, killing 17 sailors and injuring 39 others.¹⁴⁴ The ensuing US investigation quickly linked the attacks to al-Qaeda elements in Yemen and Afghanistan, but no conclusive evidence was uncovered at the time.¹⁴⁵ Then US President Bill Clinton believed that ‘it was not responsible for a president to launch an invasion of another country just based on a preliminary judgment.’¹⁴⁶ If he had been given a definite answer from the intelligence agencies, he would have sought a Security Council ultimatum and given the Taliban few days before taking further action against both al-Qaeda and the Taliban.¹⁴⁷ The Bush administration took a similar stance in face of a ‘strong circumstantial case,’ which, however, lacked ‘conclusive information on external

¹⁴³ R. Gunaratna, ‘Change or Continuity’, in R. Gunaratna, ed., *The Changing Face of Terrorism* (Singapore, Marshall Cavendish 2004) p. 3.

¹⁴⁴ Wright 2006, pp. 319-320.

¹⁴⁵ National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (Washington, D.C., National Commission, etc. 2004) pp. 190-197 (hereafter, *The 9/11 Commission Report*).

¹⁴⁶ *Ibid.*, p. 195.

¹⁴⁷ *Ibid.*

command and control of the attack.¹⁴⁸ As a result, the Bush administration decided to abandon the strategy of ‘tit-for-tat’ responses to terrorism and embarked on reassessing its anti-terrorist strategy.¹⁴⁹

The lack of armed response to the attack on the *USS Cole* is an instance in which the US contemplated the use of force, but decided not to resort to it. Neither the Clinton nor the Bush administration considered at the time that the available evidence was enough to sustain a claim of self-defence or to request collective enforcement measures from the Security Council.

Two years after the attack on the *USS Cole*, on 3 November 2002, a CIA-operated Predator drone fired an AGM-114 Hellfire missile at a car on a highway in a rural area of Marib province (Yemen), destroying it and killing six militant Islamists, one of them a prime suspect in planning and authorizing the attack on the *USS Cole* and believed to be an al-Qaeda senior in Yemen.¹⁵⁰ The strike was condemned as an extrajudicial killing by the UN Special Rapporteur on Civil and Political Rights.¹⁵¹ Since the strike was carried out with the consent of the Yemeni government, the Special Rapporteur concluded that an alarming precedent might have been set for extrajudicial execution by consent of government.¹⁵² According to Printer, the Predator strike was justified as a measure dictated by military necessity in conformity with *jus ad bellum*. He asserted that the strategic use of special forces and advanced aircraft against terrorists was not a disproportionate use of force.¹⁵³ It is important to note at this point that military necessity pertains to *jus in bello* rather than *jus ad bellum*. The conditions under which acts like the Predator strike are justifiable by military necessity pertain to the law of armed conflict rather than the principles regulating the use of force in general. It is beyond the purpose of this research to dwell into the *jus in bello* rules relating to such strikes.¹⁵⁴ Nonetheless, it is the opinion of the present author that targeted killings of individuals, the apprehension of whom is possible, falls outside the purpose and scope of the international law of self-defence.

¹⁴⁸ Ibid., p. 202.

¹⁴⁹ National Commission on Terrorist Attacks upon the United States, *Ninth Public Hearing*, witness, Dr. Condoleezza Rice (8 April 2004). Transcript of the hearing is available at <www.9-11commission.gov/archive/hearing9/9-11Commission_Hearing_2004-04-08.htm> (accessed 31 March 2010); *The 9/11 Commission Report*, pp. 202-203.

¹⁵⁰ Mueller et al., p. 241.

¹⁵¹ *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, Asma Jahangir*, UN Doc. E/CN.4/2003/3 (2003) paras. 37-39.

¹⁵² Ibid., para. 39.

¹⁵³ N.G. Printer, Jr, ‘The Use of Force against Non-State Actors under International Law: An Analysis of the US Predator Strike in Yemen’, 8 *UCLA Journal of International Law and Foreign Affairs* (2003) p. 357.

¹⁵⁴ See: N. Melzer, ‘Targeted Killings in Operational Perspective’, in T.D. Gill and D. Fleck, eds., *Handbook of the International Law of Military Operations* (Oxford, Oxford University Press, 2010) pp. 277-301.

10.5.2 The attacks of 9/11 (2001)

10.5.2.1 Factual background

The attacks of 11 September 2001 were of unprecedented magnitude not only for the US, but also for the entire world. On 11 September 2001, at 8:45 a.m., a hijacked passenger jet crashed into the north tower of the World Trade Center (WTC) in New York. Several minutes later, at 9:03 a.m., a second hijacked airliner crashed into the south tower of the WTC. Forty minutes later, at 9:43 a.m., a third hijacked passenger jet crashed into the Pentagon in Washington. At 10:10 a.m. a fourth airliner, also hijacked, crashed on the field in Somerset County, Pennsylvania.¹⁵⁵ As a result of the first two crashes, both towers of the WTC collapsed that day and the Pentagon was also badly damaged. Air traffic was completely halted in the US and several office buildings and headquarters were evacuated in New York and Washington.¹⁵⁶ Some 5000 people lost their lives as a result of the attacks, the overwhelming majority civilians, including nationals from over eighty-one different countries.¹⁵⁷ Two days later the US Federal Bureau of Investigations (FBI) announced the list of the 19 hijackers believed to belong to the al-Qaeda network and connected to Osama bin Laden.¹⁵⁸ The FBI claim was denied by Osama bin Laden until October 2004, when he claimed responsibility for the attacks.¹⁵⁹

World reaction was very strong and overwhelmingly supportive of the US.¹⁶⁰ On 12 September 2001, the North Atlantic Council of NATO issued a statement in which it pledged that, if it was determined that the attacks were directed from abroad against the US, 'it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.'¹⁶¹ The Organization of American States issued a similar statement on 22 September 2001.¹⁶² Unprecedented offers of air space and territory were made by various countries and even states that usually opposed US actions – such as Russia, China, Iran and Libya – pledged their support.¹⁶³

Likewise, on 12 September 2001, the Security Council adopted Resolution 1368 and 'unequivocally' condemned 'in the strongest terms the horrifying terrorist attacks' of 11

¹⁵⁵ 'September 11: Chronology of terror', *CNN*, 12 September 2001, available at <<http://archives.cnn.com/2001/US/09/11/chronology.attack/index.html>> (accessed 31 March 2010).

¹⁵⁶ *Ibid.*

¹⁵⁷ Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/946 (2001).

¹⁵⁸ FBI Press Release, FBI Announces List of 19 Hijackers (14 September 2001), available at <www.fbi.gov/pressrel/pressrel01/091401hj.htm> (accessed 31 March 2010).

¹⁵⁹ 'Bin Laden says he wasn't behind attacks', *CNN*, 17 September 2001, available at <<http://archives.cnn.com/2001/US/09/16/inv.binladen.denial>> (accessed 31 March 2010); 'Bin Laden claims responsibility for 9/11', *CBC News*, 29 October 2004, available at <www.cbc.ca/world/story/2004/10/29/binladen_message041029.html> (accessed 31 March 2010); 'God knows it did not cross our minds to attack the towers', in *Guardian*, 30 October 2004, available at <www.guardian.co.uk/world/2004/oct/30/alqaida.september11> (accessed 31 March 2010).

¹⁶⁰ J.M. Beard, 'America's New War on Terror: The Case for Self-Defense under International Law', 25 *Harvard Journal of Law and Public Policy* (2002) pp. 568-573.

¹⁶¹ NATO Press Release, Statement by the North Atlantic Council (12 September 2001), available at <www.nato.int/docu/pr/2001/p01-124e.htm> (accessed 31 March 2010).

¹⁶² Beard, pp. 568-569.

¹⁶³ *Ibid.*, pp. 571-573.

September. It also asserted that such attacks were regarded as threats to international peace and security.¹⁶⁴ In the preamble of the same resolution, the Security Council referred to the inherent right to individual and collective self-defence in accordance with the Charter, acknowledging this way the right of the US to resort to armed force.¹⁶⁵ The applicability of the same right was confirmed two weeks later in Resolution 1373 that established a wide range of measures to combat terrorism.¹⁶⁶ In both resolutions, the Security Council combined measures under Chapter VII with the right of self-defence. Although it stopped short of calling for the use of force under Chapter VII, it called upon the adoption of a wide plethora of measures to combat international terrorism and to offer support to the United States and other coalition states.¹⁶⁷

On 20 September 2001, in addressing the question of the identity of the attackers, then US President George W. Bush stated: ‘The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al-Qaeda. They are some of the murderers indicted for bombing American embassies in Tanzania and Kenya and responsible for bombing the *USS Cole*.’¹⁶⁸ The president went on saying that al-Qaeda and its leader, ‘a person named Osama bin Laden,’ were linked to many different organizations in different countries and that there were thousands of members in more than sixty countries. The leadership of al-Qaeda, the president asserted, had great influence in Afghanistan and supported the Taliban regime in controlling most of that country.¹⁶⁹ Against that background, President Bush made a five-point demand to the Taliban: (1) deliver to US authorities all of the leaders of al-Qaeda who were hiding in Afghanistan; (2) release all foreign nationals, including American citizens who had been unjustly imprisoned; (3) protect foreign journalists, diplomats and aid workers; (4) close immediately and permanently all terrorist training camps in Afghanistan and hand over members and their support structures to appropriate authorities; and (5) give the US full access to terrorist training camps.¹⁷⁰

Taliban spokesman Abdul Salaam Zaef promptly rejected the US demands and suggested that bin Laden was made a scapegoat by Washington.¹⁷¹ As a result, the US government decided to resort to force and, together with British military forces, launched a massive aerial and ground campaign against the Taliban in Afghanistan. Before launching *Operation Enduring Freedom*, Zaef put forward the offer of the Taliban to

¹⁶⁴ SC Res. 1368 (2001) para. 1.

¹⁶⁵ *Ibid.*, preamble.

¹⁶⁶ SC Res. 1373 (2001) preamble.

¹⁶⁷ T.D. Gill, ‘The Eleventh of September and the Right of Self-Defence’, in W.P. Heere, ed., *Terrorism and the Military. International Legal Implications* (The Hague, T.M.C. Asser Press 2003) pp. 30-31.

¹⁶⁸ ‘Transcript of President Bush’s address to a joint session of Congress on Thursday night, 20 September 2001’, *CNN*, 21 September 2001, available at <<http://archives.cnn.com/2001/US/09/20/gen.bush.transcript>> (accessed 31 March 2010).

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ ‘Clerics answer “no, no, no!” and invoke fates of past foes’, in *New York Times*, 22 September 2001, available at <www.nytimes.com/2001/09/22/world/nation-challenged-taliban-clerics-answer-no-no-no-invoke-fates-past-foes.html> (accessed 31 March 2010); ‘Taliban won’t turn over bin Laden’, *CBS News*, 21 September 2001, available at <www.cbsnews.com/stories/2001/09/11/world/main310852.shtml> (accessed 31 March 2010).

detain bin Laden and try him under Islamic law.¹⁷² The offer was rejected by the US and military operations started on 7 October 2001.

On the same day, the US sent a letter to the Security Council in which it announced the measures taken and invoked the right of individual and collective self-defence. The US contended that it had gathered ‘clear and compelling information’ that linked al-Qaeda harboured by the Taliban to the 9/11 attacks.¹⁷³ The US further asserted that the objective of the measures taken was to ‘prevent and deter further attacks on the United States’ and that they were directed against ‘al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.’¹⁷⁴ The United Kingdom put forward similar arguments in justifying its engagement in the operation. Accordingly, in a letter sent to the Security Council on 7 October 2001, the UK stated that Osama bin Laden and al-Qaeda ‘have the capability to execute major terrorist attacks, claimed credit for past attacks on United States targets, and have been engaged in a concerted campaign against the United States and its allies.’¹⁷⁵

Operation Enduring Freedom has been going on for the last nine years. The initial purpose to oust the Taliban regime and neutralize al-Qaeda camps has been changed to address insurgency movements. The NATO-led International Security Assistance Force (ISAF) has also been actively engaged in the conflict since 2001.

Several issues were discussed in legal literature in relation to the 9/11 attacks and the US response. The most important ones pertained to the role of the Security Council in responding to the 9/11 attacks, the definition of ‘armed attack’, the responsibility of Afghanistan and the legality of the US use of force on the basis of the right of self-defence.

10.5.2.2 The role of the Security Council

The unprecedented nature of the Security Council’s reaction and the measures adopted received considerable attention.¹⁷⁶ Along with a great number of states, NATO and OAS, the Security Council also condemned the terrorist attacks and acknowledged the right of individual and collective self-defence of states against such attacks.

Cassese characterized Resolution 1368 (2001) as ambiguous and contradictory. He pointed out that the Security Council was wavering between the desire to take matters into its own hand and the acknowledgement of the right of the US to use force unilaterally.¹⁷⁷

According to Gill and Ratner the unanimous adoption by the Security Council of Resolution 1368 (2001) and the unprecedented supportive reaction of various governments showed that the applicability of self-defence against attacks of non-state

¹⁷² ‘U.S. rejects Taliban offer to try bin Laden’, *CNN*, 7 October 2001, available at <<http://archives.cnn.com/2001/US/10/07/ret.us.taliban>> (accessed 31 March 2010).

¹⁷³ Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/946 (2001).

¹⁷⁴ *Ibid.*

¹⁷⁵ 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 (2001).

¹⁷⁶ Beard, pp. 559-590; Cassese 2001, p. 996; Franck 2002, p. 54; Gill 2003) pp. 30-31.

¹⁷⁷ Cassese 2001, p. 996.

actors was widely accepted.¹⁷⁸ Ratner went as far as to suggest that the overwhelming support expressed by even the most unlikely governments showed a highly significant change in the views regarding the underlying legal norms that governed the relevant state of affairs.¹⁷⁹

10.5.2.3 The 9/11 attacks and the definition of ‘armed attack’

The obvious difference in magnitude between previous terrorist attacks and 9/11 were highlighted to show that terrorist attacks could unequivocally amount to armed attacks.¹⁸⁰ Beard asserted on this issue that:

[T]he fact that the September 11 terrorist attacks occurred on the territory of the United States, that al-Qaeda’s ongoing terrorist attacks against American targets represent a sustained and continuing injury to the United States, and that the attacks caused an enormous loss of life and severe damage to both private and government property, bring these terrorist attacks into a category that would implicate a state’s right to self-defence, even under a less permissive standard than that reflected in contemporary international practice.¹⁸¹

On the contrary, Murphy claimed that, on the basis of the ICJ’s definition of an armed attack in the *Nicaragua* case, the nineteen hijackers could not be characterized as ‘armed groups’ or ‘mercenaries’, because they were a small group of persons carrying nothing but knives on them, who committed a conventional criminal act rather than an armed attack.¹⁸² At the same time, Murphy acknowledged that the scale of the attacks, their impact and public reaction to them showed that they could be equated to an armed attack.¹⁸³

Gill stated that the effects of 9/11 in terms of both human casualties and material damage demonstrated without a doubt that the attacks ‘exceeded the threshold of the term armed attack contained in Article 51 of the UN Charter.’ He also asserted that they could almost certainly qualify as crimes against humanity.¹⁸⁴

Conversely, Cassese asserted that by accepting that terrorist attacks could amount to armed attacks and that states could defend themselves against terrorist groups and harbouring states, the ‘international community’ was very close to opening ‘Pandora’s Box’, setting an extremely dangerous precedent for the use of force in self-defence.¹⁸⁵

¹⁷⁸ Gill 2003, pp. 30-31; S.R. Ratner, ‘*Jus ad Bellum* and *Jus in Bello* after September 11’, 96 *American Journal of International Law* (2002) pp. 909-910.

¹⁷⁹ Ratner, p. 910.

¹⁸⁰ Beard, pp. 574-575; D. Brown, ‘Use of Force against Terrorism after September 11th: State Responsibility, Self-Defence and Other Responses’, 11 *Cardozo Journal of International and Comparative Law* (2003) pp. 24-25; B.A. Feinstein, ‘Operation Enduring Freedom: Legal Dimensions of an Infinitely Just Operation’, 11 *Journal of Transnational Law and Policy* (2002) p. 279; T. Franck, ‘Terrorism and the Right of Self-Defence’, 95 *American Journal of International Law* (2001) p. 840; Franck 2002, p. 54; Greenwood 2003, p. 16.

¹⁸¹ Beard, p. 575.

¹⁸² S.D. Murphy, ‘Terrorism and the Concept of “Armed Attack” in Article 51 of the UN Charter’, 43 *Harvard International Law Journal* (2002) pp. 45-46.

¹⁸³ Murphy 2002, pp. 47-50.

¹⁸⁴ Gill 2003, p. 30. Similarly, Brown 2003, p. 27.

¹⁸⁵ Cassese 2001, p. 998.

The magnitude of the 9/11 attacks rendered the question whether acts of non-state actors could amount to armed attacks obsolete and signalled the increased lethality and danger posed by such organizations and their actions. The 11 September attacks also prompted the emergence of a cascade of legal and international relations literature on the changing nature of the terrorist threat and the available strategies to respond to it.¹⁸⁶

10.5.2.4 The responsibility of the Taliban regime for the 9/11 attacks

The evidence adduced by the US to link the attacks to bin Laden and al-Qaeda was analysed by a number of authors.¹⁸⁷ Charney warned against the dangerous precedent that the reluctance of the Bush administration to disclose the evidence linking the attacks to al-Qaeda was creating.¹⁸⁸ In his opinion, the state resorting to self-defence against terrorist acts carried the burden of presenting evidence to support its actions; otherwise, it would become much easier for others to take unjustifiable military actions based on unsupported assertions of self-defence.¹⁸⁹ Although Franck agreed with the importance of providing conclusive evidence supporting the resort to force of the injured state, he emphasized that such requirement was relevant after the exercise of self-defence and not before. In his opinion, the right of the injured state to defend itself could not depend on its ability to convince the fifteen members of the Security Council that it had indeed correctly identified the attackers and the host state.¹⁹⁰

Indeed, there is nothing in the pre-Charter history and post-Charter use of the requirement of necessity that would require states to undoubtedly prove the justifiability of the use of force *prior* to their action. That would go against the immediacy factor embedded in the requirement of necessity. If a target state found itself facing a present and inevitable need to take action to ward off an attack, its right to defend itself should not be made dependent upon convincing the Security Council or any other official organ as to the accuracy of the evidence in its possession. That being said, the target state would be obliged to offer an explanation during or after its defensive action. Article 51 requires reporting the use of force in self-defence to the Security Council. As it was done many times in state practice, the defending state would have ample opportunity to present evidence and justification of its action before the members of the Security Council.¹⁹¹

The attributability of the attacks to the Taliban regime for harbouring al-Qaeda and, more generally, the question of responsibility of states for sponsoring and harbouring terrorists, also received attention.¹⁹² Brown believed that even when states could not be held responsible for sending or organizing irregular bands, use of force against the armed groups on the territory of that states could be lawful, if certain conditions applied. Namely, the host state could give its consent to another state's use of force against them.¹⁹³ Further, if the host state was unwilling to prevent the use of its territory by

¹⁸⁶ See, for instance, Tucker, pp. 1-14; Jenkins, pp. 23-31; Murphy 2009, pp. 281-293.

¹⁸⁷ Beard, pp. 575-578; J. Charney, 'The Use of Force against Terrorism and International Law', 95 *American Journal of International Law* (2001) p. 836; Franck 2001, p. 843.

¹⁸⁸ Charney 2001, p. 836.

¹⁸⁹ Ibid.

¹⁹⁰ Franck 2001, p. 843.

¹⁹¹ Higgins, pp. 205-207.

¹⁹² Brown 2003, pp. 30-32; Feinstein 2002, pp. 278-279.

¹⁹³ Brown 2003, p. 30.

terrorist groups, the injured state could have the right to respond against the non-state actor notwithstanding the sovereign status of the host state.¹⁹⁴ Moreover, when the host state inside which the terrorists operate was unable to prevent its territory from being used to launch attacks, the injured state could be allowed to resort to force against the authors of the attacks.¹⁹⁵ Greenwood and Feinsein were of the opinion that the unwillingness of the Taliban regime to prevent terrorist actions against the US justified the US use of force in Afghanistan.¹⁹⁶

It is not the purpose of this research to dwell into the questions concerning the responsibility of states that support or harbour irregular groups accountable for the carrying out or the planning of armed attacks. For the sake of developing the arguments concerning self-defence against non-state actors, the present author agrees that unwillingness or inability to prevent the use of its territory by irregular groups can be an essential factor in rendering the harbouring or sponsoring state responsible for the activities of such groups.¹⁹⁷

10.5.2.5 The legality of the US war in Afghanistan

The legality of the Afghanistan war on the basis of the right of self-defence (and other grounds) was addressed by several publicists.¹⁹⁸ Some contended that the US action was a lawful exercise of self-defence endorsed by the Security Council under Chapter VII.¹⁹⁹ Both Franck and Gill asserted that there was no contradiction in using both legal bases to justify the same armed action.²⁰⁰ Conversely, Charney was of the opinion that the US relied solely on the right of self-defence and that such a stance was counterproductive given the wide support it enjoyed within the UN system after the 9/11 attacks.²⁰¹

On the issue of ‘anticipatory self-defence’, Brown argued that it did not offer a sound legal basis for the use of force against terrorist attacks unless the existence of an imminent threat that goes beyond mere preponderance was proved.²⁰² Feinsein maintained the contrary: *Operation Enduring Freedom* was not only a lawful exercise of self-defence after an armed attack had occurred, but also a legal anticipatory action designed to prevent further serious injury.²⁰³

¹⁹⁴ Ibid., pp. 30-31.

¹⁹⁵ Ibid., p. 31.

¹⁹⁶ Feinsein, p. 279; Greenwood 2003, p. 25.

¹⁹⁷ Similar opinions: Feinsein, p. 279; Greenwood 2003, p. 25. See also *Prosecutor v. Dusko Tadić*, ICTY Case No. IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, paras. 131, 137. In *Tadić* the Appeal Chamber found that overall control by the state over organized and hierarchically structured groups was sufficient to deduce state responsibility. Such ‘overall control’ resided not only in equipping, financing or training and providing operational support to the group, but also in coordinating or helping in the general planning of its military or paramilitary activity. For a comparison of the *Nicaragua* and *Tadić* tests, see A. Cassese, ‘The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’, 18 *European Journal of International Law* (2007) pp. 649-668.

¹⁹⁸ For instance: Beard; Brown 2003; Charney 2001; Cassese 2001; Feinsein; Franck 2001; Gill 2003; Greenwood 2003; Murphy 2002; Ratner.

¹⁹⁹ Franck 2001, p. 840, 841; Gill 2003, pp. 31-32.

²⁰⁰ Gill 2003, p. 31.

²⁰¹ Charney 2001, p. 837.

²⁰² Brown 2003, p. 43.

²⁰³ Feinsein, p. 282.

The legality of the US invasion of Afghanistan can be assessed both under the requirements of necessity and proportionality, on one hand, and the elements of ‘accumulation of events’ theory, on the other. As said above, the magnitude of the 9/11 attacks demonstrated that acts of non-state actors can, in themselves, amount to armed attacks. At the same time, the 11 September attacks can be viewed as part of a series of attacks directed against US targets. Consequently, three interpretative points can be made regarding the 2001 US action. First, the existent danger referred not only to the 9/11 attacks, but also to past attacks (such as the 1993 New York, the 1998 East Africa and the 2000 Yemeni bombings) as well as to the threat lying in the planned future attacks. In other words, the conditionality of an armed attack (as an element of necessity) had to be interpreted to include both past and future events. Greenwood offered a clear explanation on this matter:

‘The events of September 11 cannot be considered in isolation. Taken together with other events, such as the attacks on the US embassies in East Africa in 1998 and the attack on the USS Cole for which Al-Qaida had claimed responsibility, there were the clearest possible indications of further outrages to come. Moreover, in these circumstances there seems little difficulty in regarding the threat of future attacks from Al-Qaida as meeting the criteria of imminence.’²⁰⁴

Secondly, this collective conditionality of past and future attacks created a present and inevitable need to act (immediacy element of necessity). The intention of the US government was to preclude future attacks by al-Qaeda. The re-occurrence of these attacks was evidenced by the available information that undoubtedly showed that the carrying out of armed attacks against US or Western targets was part and parcel of al-Qaeda’s anti-US, anti-Western political agenda.²⁰⁵

Thirdly, the proportionality of the US action had to be measured against the need to neutralize the source of all future attacks. According to Gill, the requirement of proportionality of the US response had to be measured in the light of the scale and effects of the attacks, the nature of the threat of further attacks posed by al-Qaeda and its supporters, either directed against the US or against other states, the objectives pursued by al-Qaeda as well as the feasibility of arriving at a cessation of armed activity by any other means.²⁰⁶ On the basis of these factors, Gill concluded that there was no alternative than the one pursued by the US and its allies in invading Afghanistan. The Taliban refused to cut all ties with al-Qaeda and there was little hope that it would have complied with Security Council resolutions to hand over the leadership of al-Qaeda and cooperate in bringing to justice those responsible for terrorist acts. The Taliban expressly rejected all demands made by the US, which could have precluded resort to armed force.²⁰⁷ Greenwood also pointed out that it was difficult to see how the US intervention could have succeeded in its aims of removing the al-Qaeda bases in Afghanistan without overturning the leadership of that country.²⁰⁸

Cassese took a more restrictive approach. In his view, the use of force had to be aimed at detaining the persons allegedly responsible for the crimes and destroying

²⁰⁴ Greenwood 2003, p. 23.

²⁰⁵ *The 9/11 Commission Report*, pp. 47-48, 59.

²⁰⁶ Gill 2003, p. 33.

²⁰⁷ *Ibid.*, pp. 33-34.

²⁰⁸ Greenwood 2003, p. 25.

military objectives used by the terrorists. The use of force could not aim at replacing Afghan leadership or destroying Afghan military installations if those had no connection to al-Qaeda, unless they ‘show by words or deeds that they approve and endorse the actions of terrorist organizations.’²⁰⁹ For this author, it is hard to see how the refusal to hand over the al-Qaeda leadership and close terrorist training camps does not show ‘by words or deeds’ that the Taliban approved and endorsed the actions of bin Laden’s recruits.

In the opinion of the present author, the US invasion of Afghanistan was a lawful exercise of self-defence that was also recognized by the Security Council in Resolution 1368 (2001).²¹⁰ The US response was lawful on the basis of the right of self-defence *per se*, as a measure taken *after* a series of armed attacks had occurred with the objective of warding off *future* attacks premeditated by al-Qaeda.

Some authors have maintained that the attacks of 9/11 had a groundbreaking effect on the content of the right of self-defence.²¹¹ Although the 11 September attacks had some important effects on the interpretation of self-defence, it is the opinion of the present author that they did not alter the content or the temporal limits of that right. The most important development in the immediate aftermath of 9/11 was the explicit acceptance on behalf of the Security Council that armed acts carried out by non-state actors could justify resort to self-defence.²¹² This was not a revolutionary development for the customary right of self-defence, but rather the result of a ‘growing consistent pragmatism that is essentially fact-specific without being idiosyncratic.’²¹³ The pre-Charter understanding of the right had never restricted its exercise to armed acts carried out by states. Furthermore, there was nothing in Article 51 of the Charter that outlawed such an interpretation. Moreover, the justifiability of defensive action against non-state actors had been several times voiced in post-Charter state practice prior to 9/11. Consequently, the importance of the reaction to the 11 September attacks lies in the closing of the gap between state-, Security Council-practice and legal doctrine regarding the justifiability of self-defence against non-state actors. By accepting that armed acts of irregular groups could amount to armed attacks, the Security Council implicitly confirmed one of the elements of the ‘accumulation of events’ theory as well.

10.5.3 The war against Iraq (2003)

Immediately after 11 September 2001, then US President George W. Bush tasked some of its officials to conduct a survey of intelligence information on the possible involvement of Saddam Hussein in the 9/11 attacks.²¹⁴ The survey was sent on 18

²⁰⁹ Cassese 2001, p. 999.

²¹⁰ Franck 2002, p. 54.

²¹¹ Cassese 2001, pp. 993, 995-998; F. Mégret, ‘“War”? Legal Semantics and the Move to Violence’, 13 *European Journal of International Law* (2002) pp. 361-399; Myjer and White, pp. 5-17. See also W.M. Reisman, ‘Self-Defence in an Age of Terrorism: Remarks’, 97 *American Society of International Law Proceedings* (2003) pp. 142-143. Reisman maintains that the development of ‘anticipatory self-defence’ was prompted by the introduction of more destructive and rapidly delivered weapons, suggesting this way that anticipatory action in self-defence was a result of post-Charter developments.

²¹² SC Res. 1368 (2001) preamble. Franck 2002, pp. 66-67.

²¹³ Franck 2002, p. 67.

²¹⁴ *The 9/11 Commission Report*, p. 334.

September 2001 to then Secretary of Defence Condoleezza Rice. The conclusion of the report was that there was no compelling evidence that Iraq had either planned or perpetrated the attacks.²¹⁵ The president thus decided to focus on Afghanistan, but ordered the US Defence Department to be ready to deal with Iraq if Baghdad acted against US interests.²¹⁶ On 20 September 2001, at a meeting with then British Prime Minister Tony Blair, President Bush asserted that Iraq was not the immediate problem, even though some members of his administration thought otherwise.²¹⁷

The US invasion of Afghanistan was acknowledged by the Security Council both under Chapter VII and on the basis of the inherent right of self-defence. The government harbouring al-Qaeda was overturned, significant damage was inflicted to terrorist facilities in Afghanistan and many of the al-Qaeda leaders were either apprehended or killed in combat. The Bush administration did not stop at this. Apart from continuing its 'war on terror' against several targets all over the world, it also directed its attention towards Iraq. The road to the 2003 invasion and the legal arguments put forward were discussed in Chapter 9.²¹⁸ As maintained above, one of the grounds for invading Iraq was its alleged links with 'terrorism'.²¹⁹ In his speech given to the UN General Assembly on 12 September 2002, President Bush asserted that:

'In violation of Security Council Resolution 1373, Iraq continues to shelter and support terrorist organizations that direct violence against Iran, Israel, and Western governments. Iraqi dissidents abroad are targeted for murder. In 1993, Iraq attempted to assassinate the Emir of Kuwait and a former American President. Iraq's government openly praised the attacks of September the 11th. And al-Qaeda terrorists escaped from Afghanistan and are known to be in Iraq.'²²⁰

That statement was reiterated on 17 March 2003, when the US president once again asserted that Iraq had 'aided, trained and harboured terrorists, including operatives of al-Qaeda'.²²¹ In the same national address the president maintained that the danger Iraqi sponsorship of terrorism posed was 'clear': 'using chemical, biological or, one day, nuclear weapons, obtained with the help of Iraq, the terrorists could fulfil their stated ambitions and kill thousands or hundreds of thousands of innocent people in our country, or any other.'²²²

Notwithstanding such bold statements regarding Iraq's links to terrorists, the US did not produce any clear evidence to demonstrate that Iraq had any involvement in the 9/11 attacks or that it had any connection to al-Qaeda.²²³

In connection with the war in Afghanistan, several legal issues were raised by commentators. Accordingly, the role of the Security Council, the definition of an armed attack, the responsibility of host states and available proportional measures were widely

²¹⁵ Ibid.

²¹⁶ Ibid., p. 335.

²¹⁷ Ibid., p. 336.

²¹⁸ See *supra* 9.5.1 and 9.5.2.

²¹⁹ US President's Remarks 2002.

²²⁰ Ibid.

²²¹ US President's Remarks 2003. See *supra* 9.5.3.1.

²²² US President's Remarks 2003.

²²³ M.J. Flynn, *First Strike: Preemptive War in Modern History* (New York, Routledge 2008) p. 203; Henderson, p. 15; Lowe, p. 860; McGoldrick, p. 17; Sapiro 2005, p. 360.

discussed.²²⁴ The 2003 war against Iraq raises similar questions, but the answers greatly differ from those given in connection with the 2001 US response.

First, the Security Council did not endorse the Iraqi war. There was no confirmation of the right of self-defence and no endorsement under Chapter VII.

Secondly, since the link between the 9/11 attacks and the regime of Saddam Hussein was never proven, there was no possibility of blaming Iraq for what happened on 11 September 2001.²²⁵ Iraq could not be held responsible for planning, organizing or supporting the completion of the 9/11 attacks. Moreover, there was no proof that individuals responsible for involvement in those attacks ever took refuge in Iraq.²²⁶

Thirdly, there was no proof to the presence of al-Qaeda or other terrorist elements on Iraqi territory. There was no proof that Iraq was involved in sponsoring or harbouring terrorist groups that planned future attacks on the US.²²⁷ All in all, the existence of a credible (let alone imminent) terrorist threat involving Iraq was not proven by the US.

Finally, the question of proportionality needs no answer. Without a legitimate ground for invoking self-defence against a terrorist threat originating from Iraq, the 2003 US-led war could not be rendered proportionate in any way.

As opposed to the US war in Afghanistan, no form of the 'accumulation of events' theory can be maintained for the 2003 invasion of Iraq. There were no armed acts amounting (individually or in their totality) to an armed attack that would render the future occurrence of other attacks imminent. Consequently, neither the requirement of necessity nor that of proportionality was met by the 2003 US invasion of Iraq.

10.5.4 Israeli invasion of Lebanon (2006)

Three years after the 1982 incursion of Israel into Lebanon, in June 1985, Israeli forces withdrew from most of Lebanon to the 12-mile wide security zone in the south of the country.²²⁸ During the 1990s, Israeli Defence Forces (IDF) and Hezbollah clashed a few more times and sustained week-long battles. Nonetheless, in May 2000, Israeli troops withdrew from southern Lebanon and the UN establishes the 'Blue Line' as a border between the two countries.²²⁹ The fighting between Israel and Lebanon continued, however, in a very predictable manner. Hezbollah launched rockets at Israel, targeted random Israeli citizens in a number of shootings and kidnapped Israeli soldiers and civilians.²³⁰ In response, Israel carried out airstrikes, such as the one in September 2003, when warplanes hit targets in southern Lebanon in response to Hezbollah's firing anti-aircraft missiles at Israeli planes in the area.²³¹

²²⁴ See *supra* 10.5.2.

²²⁵ *The 9/11 Commission Report*, p. 334.

²²⁶ Henderson, p. 15; Lowe, p. 860; McGoldrick, p. 17; Sapiro 2005, p. 360.

²²⁷ *The 9/11 Commission Report*, p. 334.

²²⁸ Mansfield, p. 314.

²²⁹ Sorenson, pp. 33-34; Y. Shiryayev, 'The Right of Armed Self-Defense in International Law and Self-Defense Arguments Used in the Second Lebanon War', 3 *Acta Societatis Martensis* (2007-2008) p. 80.

²³⁰ J.S. Wrachford, 'The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defence, or A Reprisal Gone Bad?', 60 *Air Force Law Review* (2007) p. 46.

²³¹ 'Israeli jets fire on Lebanon', *BBC News*, 3 September 2003, available at <http://news.bbc.co.uk/2/hi/middle_east/3079072.stm> (accessed 15 April 2010); Wrachford, p. 46.

From 2000 through 2006, the Security Council adopted a series of resolutions in which it called on Lebanon to reassert its control over the southern part of the country.²³² In Resolution 1559 (2004) the Security Council expressed its grave concern at the ‘continued presence of armed militias in Lebanon, which prevent the Lebanese government from exercising its full sovereignty over all Lebanese territory.’²³³ Resolution 1559 called for the ‘disbanding and disarmament of all Lebanese and non-Lebanese militias.’²³⁴

On 12 July 2006, Hezbollah launched a series of rocket attacks across the Blue Line against northern Israeli towns and IDF units patrolling the border with Lebanon. At the same time, Hezbollah fighters crossed into Israel and attacked an Israeli patrol. As a result of Hezbollah’s *Operation True Promise*, eight Israeli soldiers and two civilians were killed. Two Israeli soldiers were captured and taken back to Lebanon.²³⁵

On the next day, Israel launched *Operation Change Direction*. It first imposed a naval blockade on Lebanon and bombed several military and logistic targets in Lebanon. The naval and air blockade as well as the airstrikes continued for the following weeks, with Israeli ground troops crossing the border on 22 July 2006 and moving into Lebanon.²³⁶ In response, Hezbollah fired countless Katyusha rockets targeting Haifa and a number of settlements in northern Israel.²³⁷ The conflict lasted for over a month; it claimed the lives of some 116 Israeli soldiers, 28 Lebanese soldiers, 43 Israeli civilians and 1109 Lebanese civilians (of whom a part were Hezbollah fighters). Scores of people were wounded or forced to leave their homes.²³⁸

On the day the Hezbollah operations started, the Permanent Representative of Israel to the UN sent two identical letters to the UN Secretary-General Kofi Annan and to the president of the Security Council.²³⁹ The Israeli representative reported that ‘Hezbollah terrorists unleashed a barrage of heavy artillery and rockets into Israel, causing a number of deaths. In the midst of this horrific and unprovoked act, the terrorists infiltrated Israel and kidnapped two Israeli soldiers, taking them into Lebanon.’ The representative further noted that responsibility for these acts lay with the Lebanese government for ‘ineptitude and inaction’ as well as with the Iranian and Syrian governments for supporting and embracing those who carried out the attack. After declaring that the attacks posed a grave threat not just to Israel’s northern border, but also to the region and the entire world, the representative justified Israel’s armed response on the basis of the right of self-defence.²⁴⁰

²³² For instance: SC Res. 1310 (2000); 1337, 1365 (2001); 1391, 1428 (2002); 1461 (2003); 1525, 1553, 1559 (2004); 1583, 1614 (2005); and 1655, 1680 (2006).

²³³ SC Res. 1559 (2004) preamble.

²³⁴ *Ibid.*, para. 3.

²³⁵ M.N. Schmitt, ‘“Change Direction” 2006: Israeli Operations in Lebanon and the International Law of Self-Defence’, 29 *Michigan Journal of International Law* (2008) p. 127; Shiryayev, pp. 80-81; Wrachford, p. 47.

²³⁶ Schmitt 2008, p. 127; Wrachford, pp. 47-48.

²³⁷ T. Ruys, ‘Crossing the Thin Blue Line: An Inquiry into Israel’s Recourse to Self-Defence against Hezbollah’, 43 *Stanford Journal of International Law* (2007) p. 266; Wrachford, p. 48.

²³⁸ Ruys 2007, p. 266.

²³⁹ Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/30/937 (2006) and S/2006/515 (2006).

²⁴⁰ *Ibid.*

Lebanon characterized the Israeli move as an act of aggression and asserted that it did not endorse the cross-border attacks and did not take responsibility for them.²⁴¹ Israel emphasized that after ‘having shown unparalleled restraint for six years while bearing the brunt of countless attacks,’ it had no choice but to respond to an ‘absolutely unprovoked assault, whose scale and depth was unprecedented in recent years.’ It was further maintained that although Israel held the Lebanese government responsible for these attacks, it was concentrating its response carefully, ‘mainly on Hezbollah strongholds, positions and infrastructure.’²⁴²

Several members of the Security Council – Argentina, Australia, Brazil, Canada, Denmark, Greece, Guatemala, Peru, Slovakia, Turkey, the UK and the US – acknowledged Israel’s right to self-defence.²⁴³ The right of Israel to defend itself was recognized by Secretary-General Kofi Annan as well. He reiterated several times that Israel had a right of self-defence under Article 51 of the UN Charter as long as it observed proportionality.²⁴⁴ Israel’s right of self-defence was also recognized by the representative of Finland speaking on behalf of the European Union, while urging Israel to exercise utmost restraint and not to resort to disproportionate action.²⁴⁵ Criticism as to the proportionality of Israel’s actions was, however, frequently expressed in the later days of the conflict.²⁴⁶ On 11 August, the Security Council adopted a resolution calling for the immediate cessation of hostilities on both sides.²⁴⁷ It did not make reference to the right of self-defence, but it refrained from condemning Israeli actions as it frequently did in the past.

Such a wide recognition of Israel’s right of self-defence against paramilitary attacks was unprecedented. The reaction to the 2006 Israeli invasion of Lebanon was a very good opportunity to assess how the opinion of the Security Council – and of a large group of states – had changed after the 9/11 attacks. There was nothing new in the line of reasoning put forward by Israel. It advanced the selfsame ‘needle-prick’ theory that had been rejected so many times in the past.²⁴⁸ The Israeli government made reference to the long series of terrorist attacks that it had suffered, put the emphasis on the most recent ones and asserted that they together amounted to an ongoing armed attack. On that basis, Israel maintained that it was necessary to resort to armed action to ward off such attacks in the near future.²⁴⁹ The legal argument was old. The approach of the Security Council – and most of its members – was new. The ‘accumulation of events’ theory was implicitly recognized for the first time by the Security Council.

²⁴¹ Letter dated 13 July 2006 from the Chargé d’Affaires of the Permanent Mission of Lebanon to the United Nations addressed to the President of the Security Council, UN Doc. S/2006/517 (2006); SCOR, 61st Sess., 5489th mtg., UN Doc. S/PV.5489 (14 July 2006) p. 4.

²⁴² SCOR, 61st Sess., 5489th mtg., UN Doc. S/PV.5489 (14 July 2006) p. 6.

²⁴³ Ibid., pp. 12, 14, 15, 17; *ibid.*, 5493rd mtg., UN Doc. S/PV.5493 (21 July 2006) pp. 17, 19 and S/PV.5493 (Resumption1) (21 July 2006) pp. 9, 19, 27, 28, 39, 41.

²⁴⁴ SCOR, 61st Sess., 5492nd mtg., UN Doc. S/PV.5492 (20 July 2006) p. 3.

²⁴⁵ Ibid., 5493rd mtg., UN Doc. S/PV.5493 (Resumption1) (21 July 2006) p. 16.

²⁴⁶ Ibid., 5497th mtg., UN Doc. S/PV.5497 (27 July 2006); Statement by the President of the Security Council, UN Doc. S/PRST/2006/34 (2006); SCOR, 61st Sess., 5498th mtg., UN Doc. S/PV.5498 (30 July 2006) pp. 2-3; 5499th mtg., UN Doc. S/PV.5499 (30 July 2006); Statement by the President of the Security Council, UN Doc. S/PRST/2006/35 (2006).

²⁴⁷ SC Res. 1701 (2006).

²⁴⁸ See *supra* 10.2.

²⁴⁹ Ibid.

Legal doctrine was more divided on the lawfulness of the 2006 invasion of Lebanon. Heinze cautiously noted that the Israeli move was the latest example of state practice that suggested an eased requirement of attribution for using force against states that harboured non-state actors engaging in trans-boundary violence.²⁵⁰ Schmitt asserted that the 2006 Israeli action against Lebanon was ‘an excellent illustration of the growing acceptability of cross-border counter-terrorist operations when the State in which terrorists are located fails to comply with the duty to police its own territory.’²⁵¹ Ruys maintained that Israel’s actions could be justified as self-defence as the kidnapping of two of its soldiers did amount to an armed attack. Further, even though Lebanon was not willingly harbouring Hezbollah, the latter had assumed the role of *de facto* government in some parts of the Lebanese territory and Israel was right in targeting its camps and facilities. Nonetheless, Ruys concluded that Israel exceeded the limits of self-defence by targeting governmental and civilian infrastructure in contravention with the principle of proportionality.²⁵² Schmitt also found the Israeli action justified as self-defence and emphasized that the proportionality of *Operation Change Direction* had to be assessed ‘in the context of not only the 12 July Hezbollah attacks, but also those which had preceded them and those which likely would have followed.’²⁵³ Wrachford took a middle-way approach: he found Israeli actions on Hezbollah-controlled territory justifiable as self-defence, while the incursions into territory not controlled by Hezbollah he characterized as illegal.²⁵⁴

The 2006 Israeli invasion of Lebanon was another instance in which the ‘needle-prick’ theory served as basis for the claim of self-defence. For that reason, as with the US action against Afghanistan, the requirements of necessity and proportionality have to be analysed in corroboration with the elements of the ‘accumulation of events’ theory. Israel had been facing a series of Hezbollah attacks over the years, the 12 July 2006 being the latest in that protraction (collective conditionality of attacks). Further, the immediacy of the situation was given not only by the continuous shelling of northern Israeli towns, but also by the certainty of occurrence of future attacks by the same authors against similar targets. Consequently, both factors of the necessity requirement can be maintained if the elements of the ‘accumulation of events’ theory are accepted.

Questions remain as to the proportionality of the Israeli armed action. The Security Council voiced concerns over specific incidents in July and August 2006, in which Israel seemed to resort to disproportionate measures. The proportionality of the Israeli invasion must be assessed on the basis of the ‘accumulation of events’ theory. Accordingly, the proportionality has to be weighed against the force needed to neutralize Hezbollah camps and facilities to stop future attacks. For the present author, it is hard to see how operations directed against Lebanese targets, both military and civilian, can be rendered proportionate without clear evidence that such measures were needed to neutralize the

²⁵⁰ E.A. Heinze, ‘Non-State Actors in the International Legal Order: the Israel-Hezbollah Conflict and the Law of Self-Defence’, 15 *Global Governance* (2009) p. 100.

²⁵¹ Schmitt 2008, p. 164.

²⁵² Ruys 2007, p. 293.

²⁵³ Schmitt 2008, pp. 163-164. *Per a contrario*, see V. Kattan, *The Use and Abuse of Self-Defence in International Law: The Israel-Hezbollah Conflict as a Case Study* (University of London, School of Oriental and African Studies, Working Paper, June 2007), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=994282> (accessed 15 April 2010).

²⁵⁴ Wrachford, pp. 88-89.

threat coming from Hezbollah.²⁵⁵ In this respect, the Israeli action exceeded the proportionality requirement of self-defence.

10.5.5 Turkish incursion into Northern Iraq (2007-2008)

Another instance of state practice in which armed force was used to preclude the reoccurring of attacks by non-state actors was the 2007-2008 Turkish incursion in Northern Iraq against the forces of the Kurdistan Workers' Party (PKK). The Turkey – PKK conflict dates back to the late 1970s and purports several legal arguments including secessionist claims based on the principle of self-determination.²⁵⁶ Although no official claim of self-defence was made on the part of Turkey, the armed action purported the main characteristics of self-defence against non-state actors.

On 21 February 2008, Turkey launched a major ground offensive into Northern Iraq to address the threat posed by PKK forces.²⁵⁷ The incursion took place against a general background of increased violence between the parties that culminated in several armed incidents in 2007.²⁵⁸ The cross-border attacks of 7 and 21 October 2007 resulted in the death of twenty-five Turkish soldiers and thus pushed tensions to the limit.²⁵⁹ After the attack of 7 October, some 100,000 Turkish ground troops massed along the border with Iraq.²⁶⁰ Following the 21 October attack, the Turkish government ordered the carrying out of aerial bombardments, artillery attacks and small-scale hot pursuit in Northern Iraq against PKK positions and forces.²⁶¹ The aerial bombardment was increased in December 2007 and it was followed by a ground offensive launched on 21 February 2008.²⁶²

Although the Turkish government did not advance any formal justification along the lines of self-defence, the background and purpose of the armed action was very similar to those undertaken by other states claiming self-defence against non-state actors. As with the Israeli invasion of Lebanon, the general reaction of states focused on the conduct of

²⁵⁵ P. Ducheine and E. Pouw, 'Operation Change of Direction: A short survey of the legal basis and the applicable legal regimes', *NL-ARMS Netherlands Annual Review of Military Studies* (2009) pp. 71-72; Ruys, p. 291.

²⁵⁶ For details on the history of the conflict and the claims of the Kurdistan Workers' Party, see E. Doğu, 'PKK: The Kurdistan Workers' Party', in M. Heiberg, B. O'Leary and J. Tirman, eds., *Terror, insurgency and the State: Ending Protracted Conflicts* (Philadelphia, University of Pennsylvania Press 2007) pp. 323-356.

²⁵⁷ 'Turkey launches major land offensive into Northern Iraq', *Reuters*, 22 February 2008, <http://uk.reuters.com/article/idUKL22614485_CH_242020080222> (accessed 14 June 2010); 'Ground Offensive against Separatists', 54 *Keesing's Record of World Events* (2008) p. 48427.

²⁵⁸ While in the 1990s the conflict unfolded in the south-eastern part of Turkey (a predominantly Kurdish region), after the capture of the PKK leader, Abdullah Ocalan, the conflict shifted to Northern Iraq, a region where the bulk of the PKK forces took refuge. Consequently, from 2004 onwards, the number of cross-border incidents had been increasing between the PKK rebels and Turkish forces. See T. Ruys, 'Quo Vadit Jus ad Bellum?: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq', 9 *Melbourne Journal of International Law* (2008) pp. 334-335, 336-339.

²⁵⁹ Ruys 2008, p. 338.

²⁶⁰ 'Authorization of Incursions into Iraq', 53 *Keesing's Record of World Events* (2007) pp. 48219-20; Ruys 2008, p. 338.

²⁶¹ Ruys 2008, p. 338.

²⁶² 'Offensive against PKK Positions in Northern Iraq', 53 *Keesing's Record of World Events* (2007) p. 48316; 'Ground Offensive against Separatists', 54 *Keesing's Record of World Events* (2008) p. 48427; Ruys 2008, p. 338.

hostilities rather than on legality grounds.²⁶³ On the day the ground offensive started, the European Union issued a statement in which it acknowledged ‘Turkey's need to protect its population from terrorism,’ but urged the government ‘to refrain from any disproportionate military action’ and to ‘respect human rights and the rule of law.’²⁶⁴ The UN Secretary-General issued a similar statement:

‘While conscious of Turkey’s concerns, he reiterates his appeal for utmost restraint, and for respect of the international borders between Iraq and Turkey. He also repeats his previous calls for an immediate end to continued incursions by PKK elements carrying out terrorist attacks in Turkey from Northern Iraq.’²⁶⁵

Countries like the US, UK and France all emphasized the need for utmost restraint, while none of them condemned the underlying reasons of the Turkish offensive.²⁶⁶

Several questions arise as to the justifiability of the Turkish action as self-defence. First of all, the Turkish government did not report its actions to the Security Council, thus missed an opportunity to clarify the factual background and the legal issues at stake. Secondly, the Turkish government never made an official claim of self-defence and never referred to the ‘accumulation of events’ theory to justify its actions. The characteristics of the Turkish armed action show nevertheless considerable similarities with self-defence claims against non-state actors. As to the conditionality of an armed attack, it can be argued that the long series of attacks of the PKK amounted to an armed attack in the understanding of the ‘needle-prick’ approach. That view was implicitly accepted by both the European Union and the UN Secretary General in their acknowledgment of ‘Turkey’s concerns’.²⁶⁷ Similarly, the answer of the Dutch foreign minister to a parliamentary question also confirmed that the actions of the PKK can be interpreted as legal basis for self-defence.²⁶⁸ Matters are less straightforward when it comes to the immediacy element of self-defence. The Iraqi government instituted a number of measures aimed at stopping the cross-border attacks against Turkey, but it refused to extradite any Kurdish rebel or take armed measures against the PKK forces.²⁶⁹ This put the Turkish government into a significant impasse, because the Iraqi measures were clearly not efficient enough to stop the PKK attacks.²⁷⁰ Nonetheless, it is hard to discern from the available information whether that impasse led to a present and inevitable need to launch an aerial and ground offensive across the border into Northern Iraq. Javier Solana, the European Union’s

²⁶³ Ruys 2008, pp. 339-345.

²⁶⁴ ‘EU calls on Turkey to avoid “disproportionate” army action in Iraq’, *EU Business*, 22 February 2008, available at <www.eubusiness.com/news-eu/1203683534.57/?searchterm=None> (accessed 14 June 2010).

²⁶⁵ ‘Secretary-General Concerned by Latest Escalation of Tension along Turkish-Iraqi Border’, UN Doc. SG/SM/11436 (22 February 2008), available at <www.un.org/News/Press/docs/2008/sgsm11436.doc.htm> (accessed 14 June 2010).

²⁶⁶ Ruys 2008, p. 340.

²⁶⁷ ‘EU calls on Turkey to avoid “disproportionate” army action in Iraq’, *EU Business*, 22 February 2008; ‘Secretary-General Concerned by Latest Escalation of Tension along Turkish-Iraqi Border’, UN Doc. SG/SM/11436 (22 February 2008).

²⁶⁸ Maxime Verhagen, Dutch Minister of Foreign Affairs, Ministerial Statement: Beantwoording vragen van het lid Van Bommel over een Turkse invasie in Noord-Irak, 3 March 2008, available at <www.minbuza.nl/nl/Actueel/Kamerstukken/2008/03/Beantwoording_vragen_van_het_lid_Van_Bommel_over_ee_n_Turkse_invasie_in_Noord_Irak> (accessed 14 June 2010).

²⁶⁹ Ruys 2008, pp. 342-343.

²⁷⁰ *Ibid.*

foreign policy chief asserted that the Turkish incursion was ‘not the best response’ and that diplomatic solutions should have been given priority.²⁷¹ The repeated warnings as to the excessiveness of the Turkish military action also question the proportionality of the use of force.²⁷²

Although the Turkish government never made an official claim of self-defence in relation to its 2007-2008 Iraqi incursions, this instance of state practice is very similar to those in which states resort to armed action against repeated attacks carried out by non-state actors. As with the 2006 Israeli invasion of Lebanon, the general reaction as to the legality of such action was acquiescing rather than disapproving. The post-9/11 approach to self-defence against non-state actors (and, implicitly, to the ‘accumulation of events’ theory) had been once again confirmed by state practice.

10.5.6 The Gaza crisis (2008-2009)

The Israeli military operations launched in December 2008 against strongholds of Palestinian armed groups in Gaza are another example of post-9/11 defensive measures against non-state actors. On 14 December 2008, Hamas political leader Khaled Meshaal announced that the six-month ceasefire with Israel would not be extended. That ceasefire had been brokered by the Egyptian government and came into effect on 19 June 2008. Consequently, it was due to expire on 18 December 2008.²⁷³

The ceasefire agreement included a commitment by Israel to cease its military operations in Gaza as well as a pledge by the Gaza authorities to stop attacks by Palestinian armed groups against Israel with immediate effect. Israel also reportedly agreed to ease its blockade of Gaza and gradually lift its ban on the import of a large number of commodities.²⁷⁴ Throughout the months of the ceasefire, it became clear that none of the parties were able to keep to their commitments. The firing of rockets into Israel continued, whereas most of the Gaza crossings were progressively closed by Israeli authorities.²⁷⁵ Israeli forces also launched several raids into Gaza and reportedly killed members of various Palestinian armed groups as well as a few civilians.²⁷⁶

From November 2008 onwards, the number of armed incidents significantly increased. On 4 November, Israeli forces entered into Gaza to close a cross-border tunnel that in Israel’s view was intended to be used by Palestinian fighters to kidnap Israeli soldiers. In the ensuing fighting, one member of the al-Qassam Brigades²⁷⁷ was killed and several Israeli soldiers wounded. In response, the al-Qassam Brigades fired more

²⁷¹ ‘EU calls on Turkey to avoid “disproportionate” army action in Iraq’, *EU Business*, 22 February 2008.

²⁷² Ruys 2008, pp. 339-345.

²⁷³ Report of the United Nations Fact Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories*, UN Doc. A/HRC/12/48 (2009) para. 224 (hereafter, HRC Report 2009); ‘Timeline: Israeli-Hamas violence since truce ended’, *Reuters*, 5 January 2009, available at <<http://uk.reuters.com/article/idUKTRE50423320090105>> (accessed 15 June 2010).

²⁷⁴ HRC Report 2009, para. 225.

²⁷⁵ *Ibid.*, paras. 227-253.

²⁷⁶ *Ibid.*, paras. 230, 242 (raids), 230, 244, 245 (Palestinian groups casualties), 238, 247 (civilian casualties).

²⁷⁷ Ezzedeem Al-Qassam Brigades (EQB) was established in the midst of the Palestinian Intifada (1987-1994) against the Zionist occupation. Their mission statement is available at <www.qassam.ps/aboutus.html> (accessed 15 June 2010).

than 30 Qassam rockets into Israel. Israel responded with an air strike that left a further five members of the al-Qassam Brigades dead.²⁷⁸

Throughout the month of November 2008, 125 rockets and 68 mortar shells were fired into Israel by Palestinian armed groups.²⁷⁹ Rocket and mortar fire by Palestinian armed groups continued unabated throughout December 2008.²⁸⁰

On 18 December 2008, Hamas declared the end of the ceasefire with Israel.²⁸¹ That declaration was followed by an upsurge of rocket attacks.²⁸² On 24 December 2008, 30 rockets and 30 mortars were fired into Israel. The Israeli forces responded with air strikes on positions inside Gaza and the crossings into Israel remained closed. On 26 December 2008, a rocket launched from Gaza fell short and hit a house in northern Gaza killing two children.²⁸³

On 27 December 2008, Israel started its military operations in Gaza.²⁸⁴ In a wave of air and missile attacks on targets across Gaza, some 225 people were killed on that day, most of them policemen within the Hamas militant movement.²⁸⁵ The Israeli military operations lasted until 18 January 2009 and resulted in some 1400 Palestinian deaths.²⁸⁶ The military operations included both an air and a land offensive with several hundred targets damaged or destroyed.²⁸⁷ As the Israeli forces began withdrawing around 15 January 2009, there appeared to be a practice of systematically demolishing a large number of structures, including houses, water installations, such as tanks on the roofs of houses, and of agricultural land.²⁸⁸ Moreover, whereas the strikes in the first days of the operation had been relatively selective, the last few days saw an increase in the number of strikes with several hundred targets hit, causing not only very substantial damage to buildings but also, according to some sources, underground structural damage.²⁸⁹

Before the Security Council, Israel claimed that it was acting in self-defence. The Israeli representative asserted:

‘In the past two weeks, prior to Israel’s reaction, we witnessed a steep escalation in Hamas attacks against Israel. Israel has been subjected to more than 300 rockets and mortar shells, which were launched indiscriminately, striking cities and towns, schools and playgrounds, commercial centres and synagogues. In its military operation Israel has exercised its inherent right to self-defence, which is enshrined in Article 51 of the United Nations Charter. Any other State would have acted in the same manner when faced with similar terrorist threats.’²⁹⁰

²⁷⁸ HRC Report 2009, para. 254.

²⁷⁹ *Ibid.*, para. 257.

²⁸⁰ *Ibid.*, para. 259.

²⁸¹ *Ibid.*, para. 262; ‘Timeline: Israeli-Hamas violence since truce ended’, *Reuters*, 5 January 2009, available at <<http://uk.reuters.com/article/idUKTRE50423320090105>> (accessed 15 June 2010).

²⁸² HRC Report 2009, paras. 263-265.

²⁸³ *Ibid.*, para. 265.

²⁸⁴ *Ibid.*, para. 267.

²⁸⁵ ‘Gaza crisis: key maps and timeline’, *BBC News*, 18 January 2009, available at <http://news.bbc.co.uk/2/hi/middle_east/7812290.stm> (accessed 15 June 2010).

²⁸⁶ The percentage of civilians among the casualties varies from source to source. For an outline of the various sources, see HRC Report 2009, paras. 350-358.

²⁸⁷ *Ibid.*, para. 333.

²⁸⁸ *Ibid.*, para. 349.

²⁸⁹ *Ibid.*

²⁹⁰ SCOR, 63rd Sess., 6060th mtg., UN Doc. S/PV.6060 (31 December 2008) p. 6.

Several members of the Security Council expressly accepted the Israeli claim of self-defence. Accordingly, the representatives of South Africa, Italy, Viet Nam and Costa Rica all confirmed Israel's right to defend itself.²⁹¹ Other members – such as China, France, Panama, Russia, UK and the US – stressed the importance of a diplomatic solution and called for the immediate cessation of hostilities.²⁹² None of these members questioned the right of Israel to defend itself. Although the US did not expressly refer to the right of self-defence, it acknowledged that it was 'intolerable for Israel to live under the terror of rocket attacks.'²⁹³ The representatives of Libya and Egypt expressly condemned the Israeli action as aggression and rejected the claim of self-defence.²⁹⁴ Indonesia adopted a similar position, although it stopped short of condemning the Israeli military operation as aggression.²⁹⁵ Nonetheless, all representatives have expressed concern or outrage as to the excessive use of force on the Israeli part.²⁹⁶ That opinion was also shared by the Secretary-General. While refraining to comment on Israel's claim of self-defence, Ban Ki-moon stated:

'I condemn unequivocally and in the strongest possible terms the ongoing rocket and mortar attacks by Hamas and other Palestinian militants. But I also condemn the excessive use of force by Israel.'²⁹⁷

The attitude of the Security Council members showed that Israel's claim of self-defence against the repeated attacks originating from various Palestinian armed groups was generally accepted. As with the 2006 Israeli invasion of Lebanon and, implicitly, the 2008 Turkish incursion into Northern Iraq, self-defence against non-state actors was not a controversial claim anymore. Accordingly, the reaction to the Gaza crisis again showed that repeated attacks carried out by non-state actors could lead to a situation in which both elements of necessity (armed attack and immediacy) were present. The relentless rocket and mortar attacks against Israel did indeed create an intolerable situation that led to a present and inevitable need to take armed action. Nonetheless, the extent of the armed action was heavily criticized by all members of the Security Council as well as independent agencies.²⁹⁸ One of the main conclusions of the September 2009 Human Rights Council is particularly striking in this respect. Accordingly, the report asserts that 'while the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self-defence, the Mission [mandated by the Human Rights Council, KTSz] considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole.'²⁹⁹

²⁹¹ Ibid., pp. 9 (South Africa), 13 (Italy and Viet Nam), 16 (Costa Rica).

²⁹² Ibid., pp. 9 (France), 10 (Panama), 11 (Russia), 12 (UK), 14 (US) and 15 (China).

²⁹³ Ibid., p. 14.

²⁹⁴ Ibid., pp. 7 (Libya), 18 (Egypt).

²⁹⁵ Ibid., p. 11.

²⁹⁶ Ibid., pp. 9-18.

²⁹⁷ Ibid., p. 3.

²⁹⁸ Ibid., pp. 9-18; HRC Report 2009, paras. 1674-1692.

²⁹⁹ HRC Report 2009, para. 1680.

10.6 Concluding remarks

This chapter analysed several instances of state practice which had two common elements. First, they involved a claim of self-defence. Secondly, specific for this chapter, they pertained to armed acts carried out by non-state actors.

On the basis of the state practice and legal doctrine discussed, it can be established that, in conflicts involving non-state actors, the temporal dimension of the post-Charter concept of self-defence is most of the time circular: the same defensive action is both remedial (against a string of past attacks) and anticipatory (against future attacks). The circularity stems from the ‘accumulation of events’ theory: the incidence of future attacks is expected because of the occurrence of past attacks. That is not to say that a single armed act carried out by a non-state actor cannot amount to an armed attack (9/11). Moreover, the ‘accumulation of events’ theory can also be relevant for armed acts carried out by regular armed forces (Yemen, 1964; Libya, 1986; Iraq, 1993). Nonetheless, the state practice examined in this chapter has shown that the ‘accumulation of events’ theory is most of the time connected to claims of self-defence against non-state actors. From this respect, the temporal dimension of self-defence against non-state actors is mirroring the pre-Charter understanding of the right in its full form: defence being allowed before, during and after an armed attack.

The ‘accumulation of events’ theory clearly influences the interpretation of the necessity and proportionality requirements of self-defence. First, the existent danger refers both to already occurred armed attacks and to the threat lying in planned future attacks. In other words, the conditionality of an armed attack (as a factor of the necessity requirement) has to be interpreted to include both past and future events. Secondly, this collective conditionality of past and future attacks has to create a present and inevitable need to act (immediacy factor of the necessity requirement). Furthermore, the proportionality of the defensive action has to be measured against the need to neutralize the source of all future attacks, thus it can involve a response considerably larger in scale than the already occurred attacks.

The ‘accumulation of events’ theory has given rise to many controversies since the adoption of the UN Charter. For long, the Security Council and a significant part of the legal doctrine did not accept the possibility of attributing armed attacks to non-state actors and thus rejected the ‘needle-prick’ approach as well.³⁰⁰ This was in spite of the fact that pre-Charter customary law offered several examples of self-defence being invoked against non-state actors. Such a case was none else but the *Caroline* incident itself.³⁰¹ Since the 9/11 attacks, that approach has been undergoing some changes as evidenced by the considerably changed attitude of the members of the Security Council to the 2006 Israeli invasion of Lebanon.³⁰² The *per se* legality of defensive action against non-state actors was also acknowledged in relation to the Turkish incursions into Northern Iraq as well as the Gaza crisis.³⁰³ From this respect, the notion of armed attack has partly ‘returned’ to its pre-Charter meaning, in the sense that non-state actors are again accepted as potential authors of an armed attack.

³⁰⁰ See *supra* 10.2. and 10.3.

³⁰¹ See *supra* 3.2.2.1 and 6.6.1. See also Kelly, p. 225.

³⁰² See *supra* 10.5.4.

³⁰³ See *supra* 10.5.5 and 10.5.6.

Nonetheless, controversies still remain as to the elements of the ‘accumulation of events’ theory and their compatibility with the necessity and proportionality requirements of self-defence. As the last three instances of state practice showed, meeting the requirement of proportionality is especially problematic in large-scale defensive actions against non-state actors (or hit-and-run tactics in general).³⁰⁴ The relationship between the ‘accumulation of events’ theory and the necessity and proportionality requirements will be further discussed in Part III of this book.

³⁰⁴ See *supra* 10.5.4, 8.3.2.5 and 10.5.6.