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The 'war on terror' and International Law

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5 | The Use of Force

We the Peoples of the United Nations determined to save succeeding generations from the scourge of war ... to reaffirm faith in fundamental human rights ... to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained ... to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest ... have resolved to combine our effort to accomplish these aims.

(Preamble, UN Charter, 26 June 1945)

This chapter considers the law relevant to the question whether, and if so in what circumstances, states are entitled to resort to the use of force under international law as a response to acts, or threats, of international terrorism. The legality of the use of force between states under international law is referred to as the '*jus ad bellum*'. Part A of the chapter addresses key aspects of the relevant legal framework, which part B then analyses alongside examples of state practice in response to international terrorism since 9/11. Specifically, it addresses the military interventions in Afghanistan and Iraq which followed 9/11 and the ongoing attacks on members of al Qaeda and associated groups around the world.

The distinction between the body of law addressed here, and those considered in other chapters of this study, bears emphasis at the outset. The *jus ad bellum* which determines when use of force on another state's territory is lawful must be distinguished from *jus in bello* that encompasses the rules that apply once force has been used and a conflict is underway, and which applies irrespective of whether the resort to force was lawful.¹ The lawfulness of the use of force between states, discussed here, is also distinct from the lawfulness under human rights law of the use of lethal force.² The use of force may be lawful under the *jus ad bellum*, but still a violation of the individual's rights

1 The *jus in bello*, or humanitarian law (IHL) regulates the conduct of hostilities and treatment of persons, and requires, *inter alia*, that civilians must not be the object of attack, which is addressed in Chapter 6.

2 International Human Rights Law (IHRL) is discussed in Chapter 7.

under the quite different normative standards of IHRL.³ As practice will show, confusion – whether deliberately fueled or inadvertent – has often surrounded these divergent areas of law and the justifications available to states under each.⁴ Subsequent chapters explore how the various areas of law might apply, and the interplay between them, in particular situations.⁵

5A THE LEGAL FRAMEWORK

5A.1 THE USE OF FORCE AS A LAST RESORT

Where a terrorist attack amounts to criminal conduct, the appropriate framework of law is that of law enforcement. As discussed in Chapter 4, persons who are directly responsible for a crime or, in certain circumstances, indirectly responsible for contributing to it or failing to prevent it, should be brought to justice before national courts or international tribunals.

Under international law there is an obligation to resolve disputes by peaceful means, which may also be relevant in certain circumstances. This obligation is enshrined in Article 2(3) of the Charter of the United Nations, which states: ‘All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, shall not be compromised.’⁶ Peaceful means of dispute resolution include arbitration, judicial settlement,⁷ non-adjudicatory methods such as negotiation, good offices, mediation, conciliation or inquiry, and settlement under the auspices of the United Nations or regional organizations. As they are directed towards addressing state responsibility, their relevance to the present study is effectively

3 The legal standards are different under different areas of law, even where the terminology may disguise this – e.g., the concept of ‘proportionality’ has a different meaning and effect under IHRL, IHL, and *jus ad bellum*, as does ‘self defence’ under criminal law, which is analogous to but different from the standard that may justify the lethal use of force under IHRL or the use of force under the *jus ad bellum*, addressed later.

4 For an example of confusion see e.g. reliance on arguments that territorial states have ‘consented,’ relevant to the use of force under the *jus ad bellum* but not the legitimacy of action under IHL or IHRL, or comments on the U.S. justification of ‘self defence’ in relation to the killing of Bin Laden in Chapter 9.

5 See, e.g., Chapters 9 and 10 on the diverse issues raised by each area of law in relation to the killing of Osama bin Laden or the Extraordinary Rendition programme respectively.

6 A similar obligation was already enshrined in the so-called Briand-Kellog Pact: Article 2, Treaty Providing for the Renunciation of War as an Instrument of National Policy, Paris, 27 August 1928, in force 24 July 1929.

7 The International Court of Justice (ICJ), as the principal judicial organ of the United Nations, is empowered to determine infringements by one state of the rights of another, order provisional measures and advise on the interpretation of law; see Article 92 UN Charter.

limited to disputes related to state-supported terrorism, and potentially to action taken by states in the name of counter-terrorism.⁸

The question of the lawfulness of the use of force should only arise in circumstances where none of these peaceful means are at the aggrieved states' disposal, or where such means have been exhausted or found to be ineffective.⁹ This reflects the 'general principle ... whereby States can only have recourse to military force as a last resort'.¹⁰

5A.2 THE USE OF FORCE IN INTERNATIONAL LAW: GENERAL RULE AND EXCEPTIONS

The current rules governing the lawfulness of the use of force are contained in the UN Charter and customary international law. The advent of the UN Charter represented a moment of legal metamorphosis, when traditional legal concepts such as the 'just war' and lawful reprisals were radically altered by the new law of the United Nations, which greatly restricted the circumstances in which the use of force can be lawfully deployed.¹¹ The underlying 'purposes' of the UN Charter are set out in Article 1, the first of which is:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

The primacy of this objective is reflected in the Charter's preamble, which opens with the famous expression of determination 'to save succeeding generations from the scourge of war'.¹² Article 2 then sets out certain fundamental 'principles', one of which is the general rule prohibiting the use of force.¹³ Article 2(4) obliges all Members of the United Nations to refrain in their

8 The avenues for peaceful dispute settlement discussed here pre-suppose a level of state responsibility, discussed in Chapter 3.

9 This requirement manifests itself throughout the law on the use of force; *see e.g.* the requirement of 'necessity' of self defence and in the Security Council's power to take 'necessary measures,' below.

10 A. Cassese, 'The International Community's "Legal" Response to Terrorism', 38 (1989) ICLQ 589 at 596.

11 See L. Henkin, 'Use of Force: Law and U.S. Policy', in Henkin *et al.*, *Right v. Might: International Law and the Use of Force* (New York, 1991), pp. 37 ff. See also T. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002).

12 Preamble, UN Charter.

13 Article 2(4).

international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations.

The overwhelming majority of commentators recognise that the obligation enshrined in Article 2(4) of the Charter reflects customary international law.¹⁴ The International Court of Justice (ICJ) in the *Nicaragua* case¹⁵ noted that Article 2(4) reflects customary law,¹⁶ despite the fact that state practice is 'not perfect' in the sense that States have not 'refrained with complete consistency from the use of force.'¹⁷ It has since described it as a 'cornerstone of the UN Charter'.¹⁸ The prohibition of the use of force against another State is one of the relatively few rules of international law which has been recognised as having attained the status of *jus cogens*,¹⁹ though it has also been suggested that the *jus cogens* status may properly be limited to the prohibition on launching aggressive war.²⁰ The resort to force by states in contravention of this rule may amount to an act of aggression for which states, but also individuals, may be responsible.²¹ As will be discussed, it may also amount to an 'armed attack' against another state, a prerequisite for the use of force in self defence.²²

14 See, generally, A. Randelzhofer, 'Article 2(4)', in B. Simma *et al.* (eds.), *The Charter of the United Nations. A Commentary*, 2nd ed. (Oxford University Press, 2002), pp. 133-5, citing authoritative writings in support of this position.

15 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, ICJ Reports 1986, p. 14 ('*Nicaragua* case').

16 *Ibid.*, para. 190.

17 *Ibid.*, para. 186.

18 *Armed Activities on the Territory of the Congo* (hereinafter '*Armed Activities* case') (*Democratic Republic of the Congo v. Uganda*), ICJ Reports 2005, 201, at para. 148.

19 See ICJ, *Nicaragua* case, note 15, para. 190 and ILC Commentaries to Articles on State Responsibility, Commentary to Article 40(4). See Chapter 1, para. 1.2.1.

20 N. Blokker and N. Schrijver, *The Security Council and the Use of Force: Theory and Reality, a Need for a Change?*, (Netherlands: Martinus Nijhoff Publishers, 2005).

21 The UN Charter designates the Security Council as the organ competent to determine, *in concreto*, if a breach of the prohibition of the use of force amounts to an act of aggression. For the definition of aggression see GA Res. 3314 (XXIX) of 14 December 1974, UN Doc. A/RES/3314 (XXIX), Article 1. 'Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.' Article 3 lists acts which qualify as an act of aggression' including '(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.' In 2010 the 13th plenary meeting of the ICC Review Conference agreed upon a definition of aggression for ICC purposes (RC/Res 6., 11 June 2010, Annex 1); see new Article 8 *bis* in Chapter 4A.1.

22 Not every act of unlawful use of force will be sufficiently serious to amount to an act of aggression or an armed attack. See *Nicaragua* case, note 15, para. 195.

Article 2(4) is generally accepted as infringed by any 'forcible trespass,' however limited in geography or time, and whatever its purpose.²³ As such it has been noted that the references to territorial integrity and political independence were not intended to qualify the prohibition, but on the contrary to emphasise (and thus to strengthen) the protection of the nation state from aggressive interference by other states.²⁴

It perhaps goes without saying that where a state has the 'consent' of the territorial state or intervenes at its 'invitation', there is no use of force against the territorial integrity of the state at all. These are therefore key preliminary questions of fact, which are often less straightforward to ascertain than might meet the eye.²⁵ It is only where there is no consent that the general prohibition on the use of force arises.

Certain exceptions to the prohibition are contemplated in the Charter itself. These exceptions, which will be critical to the assessment in Part B of the lawfulness of measures taken in the counter-terrorism context, involve: (a) the use of force in self defence, and (b) Security Council authorisation of force, on the basis that the Council determines it necessary for the maintenance or restoration of international peace and security.

While other possible justifications for the use of force have at times been advanced, such as 'humanitarian intervention', 'pro-democratic intervention' or 'self help', they provide doubtful justification for the lawful use of force, as discussed below. Instead, to rest on a secure legal foundation, any resort to armed force should either constitute self defence or be authorised by the Security Council. It is unsurprising then that it is these legal justifications that have been invoked explicitly by states in the context of resorting to force against terrorism in the post September 11 world, in relation to Afghanistan, Iraq, or the ongoing cross border lethal use of force against alleged al Qaeda terrorists in numerous states around the globe discussed in Part B.

23 J. Sloan, *The Militarisation of Peacekeeping in the Twenty First Century* (Oxford: Hart Publishing, 2012), p. 74 (citing A. Randelzhofer, 'Article 2(4)', in B. Simma *et al.*, *Commentary*, note 14, p. 112-36, 123-4. Cf. D.W. Bowett, *Self-Defense in International Law* (Manchester University Press, 1958), p. 152. See discussion of possible thresholds of scale applicable to an armed attack by non-state actors for the purposes of self defence later.

24 On the process whereby this language came to be included, see, e.g., T. M. Franck, *Recourse to Force*, *supra* note 11, p. 12; C.D. Gray, *International Law and the Use of Force (Foundations of Public International Law)*, 3rd ed. (USA: Oxford University Press, 2008), pp. 31-33.

25 Consent is relevant to ongoing lethal force against terrorism at Chapter 5.B.3, or in relation to the killing of Bin Laden at Chapter 9. Indications that a state has or has not consented may be politically motivated and as one commentator notes often have to be taken 'with a grain of salt': M.N. Schmitt, *International Law and Armed Conflict: Exploring the Faultlines* (Netherlands: Martinus Nijhoff Publishers, 2007) p.183. On the possible relevance of 'intervention by invitation' as a 'possible legal justification' in relation to Afghanistan, see M. Byers, 'Terrorism, the Use of Force and International Law after September 11', 51 (2002) ICLQ 401, pp. 403-4. Invitation is certainly relevant after regime change introduced a government friendly to those executing the 'war on terror'.

5A.2.1 Self defence

Article 51 of the UN Charter provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

As the Charter's reference to the 'inherent' right of self defence may reflect, Article 51 was intended to encompass customary international law. Where Article 51 lacks specificity, an understanding of its content can therefore be informed by customary law.²⁶ However, customary law continues to exist alongside the Charter and, as will be noted, in limited respects its content may not be identical.

Self defence is an exception to the 'general duty of all states to respect the territorial integrity of other states',²⁷ and the only established exception to the prohibition on the use of non-UN authorised force.²⁸ As *Oppenheim's International Law* notes, '[l]ike all exceptions, it is to be strictly applied'.²⁹ The strict approach is particularly important given that self defence operates, at least initially, in the absence of a mechanism to ascertain the validity of a state's claim to exercise the right. In practice, states resorting to force very often invoke self defence as a basis for the legality of action, even where no such tenable justification exists.³⁰

The essence of self defence, as the term suggests, lies in its defensive objective: it is neither retaliation nor punishment for past attacks, nor

26 See, e.g., the tests of necessity and proportionality, which are not explicit in the Charter but are principles of customary law held by the ICJ to be part of the 'inherent' right of self defence under Article 51 – *Nicaragua* case, note 15, para. 194. By contrast, the rules on reporting to the Security Council are explicit in the Charter but are not rules of customary law. They are binding as conventional law on the UN member states as parties to the Charter, *Nicaragua* case, para. 194.

27 R.Y. Jennings and A. Watts (eds.), *Oppenheim's International Law*, vol. I, 9th ed. (London: Oxford University Press, 2008), p. 421.

28 On other possible legal justifications for unilateral resort to force advanced by certain authors but of doubtful legal standing in current international law, see this chapter, para. 5A.3 and N. Lubell, 'Extra-Territorial Use of Force against Non-state Actors', (Oxford: Oxford University Press, 2010), Chapter 3 who addresses, and dismisses, hot pursuit, necessity and piracy as exceptions to the prohibition on the use of force.

29 *Oppenheim's International Law*, *supra* note 27, p. 421.

30 C. Gray, *International Law and the Use of Force*, (Oxford: Oxford University Press, 2000), p. 118. A. Cassese, *International Law* (Oxford: Oxford University Press, 2001), p. 306, points out that self defence has been abused in practice, especially by great powers.

deterrence against possible future attacks.³¹ The former distinguishes permissible self defence, which consists of necessary and proportionate measures to protect oneself against a future threat, from prohibited reprisals, which are responsive and largely punitive. While earlier law allowed reprisals in limited circumstances,³² the law changed with the advent of the UN Charter, which is on its face inconsistent with retaliatory or punitive measures of force.³³ In 1970, the Friendly Relations Declaration, considered to constitute customary law on the point, confirmed that 'states have a duty to refrain from acts of reprisal involving the use of force'.³⁴ Central to an assessment of justifiable self defence is an assessment of the actual threat to a state, and an identification of the measures necessary to avert that threat, to which defensive action must be directed and limited. The conditions which are generally considered to require satisfaction before resort to force can be justified as self defence are set out below.

5A.2.1.1 Conditions for the exercise of self defence

a) Questions Concerning the 'Armed attack' Requirement

Article 51 contemplates self defence only 'if an armed attack occurs against a Member of the United Nations'. As affirmed by the International Court of Justice, '[s]tates do not have a right of ... armed response to acts which do not constitute an "armed attack"'.³⁵ The ICJ has indicated that the attack should be mounted from outside the state itself.³⁶ As noted below, the 'armed attack'

31 See discussion of anticipatory or pre-emptive self defence, Chapter 5A.2.1.1(a). Threats of future attacks that fall outside the scope of permissible self defence may however amount to threats to international peace and security for which the Security Council is uniquely empowered to authorise force.

32 Prior to the UN Charter, the definitive statement of the permissible use of reprisals was found in the 1928 *Naulilaa* case. See C. Waldock, 'The Regulation of the Use of Force by Individual States in International Law', 81 (1952) RdC 455, pp. 458-60.

33 See Article 2(4), Article 42 and Article 51, UN Charter.

34 GA Res. 2625 (XXV), 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations', 24 October 1970, UN Doc. A/RES/2625 (XXV), para. 6. While not a binding instrument, the Friendly Relations Declaration, adopted by consensus by the General Assembly, provides insight into the understanding of states as to the law in 1970 and is often cited as customary international law binding on all states – see *Nicaragua*, note 15, para. 188.

35 *Nicaragua* case, note 15, para. 110.

36 M.N. Schmitt, 'Responding to Transnational Terrorism under the Jus Ad Bellum: A Normative Framework' (hereinafter 'Transnational Terrorism'), 56 (2008) *Naval Law Review* 1, p. 12 notes this was one point of agreement between all judges in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004 (hereinafter 'Wall Advisory Opinion'). In finding there was no right to self defence, the majority distinguished the Israeli situation from that contemplated by SC Res. 1368 and 1373. See also E. Wilmshurst, 'Principles of International Law on the Use of Force by States In Self-Defence', *Chatham House Working Paper*, 2005, p. 6 (hereinafter

requirement is one of the most controversial of the self defence conditions, and highlights a number of areas where international law is unsettled.

Several issues have given rise to controversy as regards the scope of an Article 51 'armed attack,' which will be discussed in turn. A preliminary issue relates to the targets of the attack. The second, of central relevance in the post September 11 context explored in the second part of this chapter, concerns the authors of the attack, specifically whether the use of force by non-state actors may constitute an 'armed attack' for the purposes of triggering self defence, or whether a state must be responsible to justify the use of force against that state. A third issue, less central post 9/11 but which has assumed more significance in the years following those attacks,³⁷ relates to whether there is a threshold or scale requirement for an armed attack, or whether any cross border use of force suffices. The fourth is the thorny issue of whether 'anticipatory,' 'preventive' or 'pre-emptive' self defence is permissible and, if so, the parameters of such a right.

i) *Targets of an Armed Attack:* While there is no accepted definition of armed attack for these purposes, Article 2(4) refers to resort to force against another state's territorial integrity or political independence.³⁸ As noted above, attacks on the state's territory, irrespective of scale, are generally considered to qualify as amounting to attacks against the state's territorial integrity.³⁹ Among the issues in dispute as regards the targets of the armed attack is whether an attack against a state's nationals, or its interests, overseas could suffice to constitute an armed attack.⁴⁰ Support in state practice and academic writing for 'self

'Chatham House Principles'), available at: <http://www.chathamhouse.org/publications/papers/view/108106>. It may be open to question whether this logic would hold in all circumstances; where, e.g. an attack was launched from within the state, either by another state or by a non-state actor located elsewhere, defensive action could be required abroad to avert the ongoing or a subsequent attack. Attacks that originated entirely from within a state are however certainly less likely to give rise to the necessity of action in self defence against another state.

37 See 6A.3.1 justifications for targeted killings in self defence, including the question of whether there can be a continuing attack established through an accumulation of events.

38 See Article 2(4). On the extent to which the language was intended to limit, see Franck, *Recourse to Force*, *supra* note 11 above. The debate on whether attacks against nationals might suffice is addressed below.

39 Note however the suggestion that there is a scale requirement for attacks by non-state actors at 5A2.1.

40 See S. Ratner, 'The Meaning of Armed Attack,' in L. van den Herik and N. Schrijver (eds.), *Counterterrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges*, (Cambridge University Press, 2013). Gray, *International Law and the Use of Force*, *supra* note 30, p.118-19. See discussion of the US National Security Strategies and the protection of broad U.S. interests at 5B.2.

defence' to cover defence of nationals abroad is uneven,⁴¹ and while such a right may exist in certain exceptional circumstances,⁴² it has been suggested that further clarification on this matter is required.⁴³

By contrast, the protection of broader 'interests' beyond the integrity and independence of the state, and, arguably, nationals abroad, finds no justification within the law of self defence.

ii) *State responsibility for the attack: a sine qua non?* A second controversial question relating to the scope of an 'armed attack' under Article 51 is whether a state must be responsible for the attack for the right to self defence to be triggered, or whether the right to self defence arises even where a non-state actor is responsible for the attack (without attribution to a state). The significance of this question in determining the scope of the law of self defence in the contemporary world was put beyond doubt by the September 11 attacks.⁴⁴

The international law of *jus ad bellum*, including self defence, developed on the assumption that disputes and resolutions would occur between states and those that act on their behalf. Yet this assumption has been subject to increasing doubt in recent years. On the one hand, the language of Article 51 of the Charter does not explicitly require state involvement in the attack to trigger self defence.⁴⁵ Nor does the logic of self defence (as permitting a state to take whatever action might be necessary to defend itself against an actual or imminent attack) require proof of state involvement in that attack. Indeed, the seminal *Caroline* case of 1837 involved non-state actors, operating without any apparent state support, indicating that – at least pre-Charter –

41 Gray, *ibid.*, at 156-157, notes that 'few states have accepted a legal right to protect nationals abroad.' She cites the United States, the United Kingdom, Belgium and Israel as having relied upon this argument.

42 D.W. Bowett, *supra*, at 93, notes that it is unreasonable to characterise *every* threat to nationals located abroad as a threat to the security of the state. M. Byers, 'Terrorism, the Use of Force and International Law after September 11', 51 (2002) ICLQ 401, at 406 refers to the tacit approval by most states of the Entebbe incident wherein Israel stormed a hijacked plane in Uganda carrying Israeli nationals. Separate from questions as to whether self defence arises at all are those relating to the proportionality of force to the objective of rescuing or protecting nationals.

43 Ratner, 'The Meaning of Armed Attack', note 40, p. 710.

44 9/11 was widely attributed to the al-Qaeda network in circumstances where state responsibility for the attacks remained uncertain and was not directly asserted. See, e.g., document published by the UK Government, 'Responsibility for the Terrorist Atrocities in the U.S., 11 September 2001', 4 October 2001. For a discussion of the responsibility of al-Qaeda, see S.D. Murphy (ed.), 'Contemporary Practice of the United States Relating to International Law Contemporary Practice', 96 (2002) AJIL 237. On the test whereby acts of private actors become attributable to the state see Chapter 3.

45 Note, however, that as the Charter was drafted on an assumption that force was inter-state and that it governed inter-state relations, too much reliance on the omission of express wording from the Charter would be misplaced.

the law had no difficulty with self defence against force employed by non-state actors.⁴⁶

On the other hand, while the proposition that self defence might arise in response to non-state actor terrorist attacks might not be problematic in principle, concerns do arise from the reality that non-state actors do not operate out of the high seas but are based in other states' territories.⁴⁷ Doubts arise as to whether an interpretation of Article 51 that allows those states to be attacked absent a substantial link to the offending non-state actor is an interpretation consistent with the purposes and principles of the UN Charter, including the protection of the territorial integrity and political independence of states.⁴⁸ This is particularly so where terrorist cells operate globally, potentially rendering many states susceptible to attack if, for example, mere presence on the state's territory would suffice to justify force in self defence, with the inevitable potential for an escalation in conflict.⁴⁹

The predominant view before September 11 appeared to be that for self defence to be justified, acts of individuals or groups must be attributed to the state,⁵⁰ with controversy centering instead on the standard for attributing responsibility.⁵¹ While some commentators said so explicitly, other writers, and indeed the ICJ judgment in *Nicaragua*, appeared to *assume* that a state must

46 The *Caroline* case of 1837, which, as noted earlier, sets down the customary law of self defence, involved the destruction by the British of an American ship, the *Caroline*, which was assisting forces rebelling against the Crown in Canada. It was common ground that the U.S. government had tried to restrain the private initiatives supporting the insurrection and arguably there was not therefore any state involvement. See M. Reisman, 'International Legal Responses to Terrorism', 22 (1999) *Houston Journal of International Law* 3, at 46.

47 See eg. G.M. Travalio, 'Terrorism, International Law and the Use of Military Force', 18 (2000) *Wisconsin International Law Journal* 145.

48 Like any treaty, the UN Charter must be interpreted according to its ordinary meaning, as understood in context, and in accordance with its object and purpose – see Article 31, VCLT 1969 para. 1. Subsequent agreements or practice are also relevant to interpretation: Article 31(3)(a) and (b), VCLT 1969; *Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion*, ICJ Reports 1949, p. 174, in particular p. 180; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion*, ICJ Reports 1962, pp. 157 and 159.

49 Arguably, such vulnerability is limited by a strict application of the necessity and proportionality test to any response, discussed later. See also Chapter 5B.1 on application to Afghanistan.

50 See, e.g. Cassese, 'Legal Response to Terrorism', note 10, at 596, Travalio, 'Terrorism', *supra* note 47, above. Cf. e.g., R. Wedgwood, 'Responding to Terrorism: The Strikes against Bin Laden', 24 (1999) *Yale Journal of International Law* 559, at 564. While the U.S. and Israel have been said to long hold this view, the UN until the 1980s denied that Article 51 could justify the use of force as a response to terrorist attacks: see G.Z. Capaldo, 'Providing a Right of Self Defense Against Large Scale Attacks by Irregular Forces: The Israeli-Hezbollah Conflict' 48 (2007) *Harvard International Law Journal* 101, p. 104 and C. Tams, 'The Use of Force against Terrorists', 20 (2009) *The European Journal of International Law* 2, p. 386. Both notes the shift in the approach to this question by states individually and at UN level.

51 See Chapter 3.1. Gray, *International Law and the Use of Force*, note 24.

be involved in the armed attack.⁵² However, the response to the events of September 11 – notably the widespread reference to the Afghanistan intervention being justified despite state responsibility not having been made out against Afghanistan – is often cited as indicative of a different view of the law, or at least as an indication of how the law may have shifted or be shifting, influenced by the events of 9/11 and responses.⁵³

Surprisingly perhaps, in the *Wall* Advisory Opinion the ICJ reiterated its view that 'Article 51 of the Charter ... recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.'⁵⁴ Despite strong dissenting judgments on this point,⁵⁵ it was suggested that such a clear statement of the Court must, in the words of one of those dissenting judges, 'be regarded as a statement of the law as it now stands'.⁵⁶ However, in the *Uganda v. DRC* judgment shortly thereafter, the Court retreated to a more equivocal position in which it acknowledged but declined to address the issue of 'whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces,' somewhat muting the force of the Court's previous opinion on the matter.⁵⁷

Moreover, subsequent practice, while less striking in the range and nature of the state responses than the response to the Afghanistan intervention, appears to support the view that self defence may arise in respect of terrorist attacks irrespective of attribution. As discussed further in Part B, in relation to shifts in the law since 9/11, in the context of Israeli or Turkish claims to use self defence against non-state groups in the Lebanon in 2006 or Northern

52 *Nicaragua*, note 15, para. 195. Rendering assistance to armed groups, while it may amount to unlawful intervention, did not itself constitute an armed attack as the acts of the irregulars were not attributable to the state according to an 'effective control' test. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007, para. 377-415. Chapter 3.1.

53 Widespread reference to the right to 'self defence' post 9/11 (despite lack of attribution to the Afghan state), including by the Security Council on 12 September 2001, has been cited as indicating that non-state actors may be responsible for an Article 51 attack. See e.g., Greenwood, 'International Law and the "War against Terrorism"', 78 (2002) *International Affairs*, 301 or C. Tams, note 50. A minority view holds that states implicitly recognised that there was a degree of state involvement underlying those attacks: see, e.g., L. Sadat, 'Terrorism and the Rule of Law', 3 (2004) *Washington University Global Studies Law Review* 135, at 150; M. Sassòli, 'State Responsibility for Violations of International Humanitarian Law', 84 (2002) *IRRC* 401 and D. Jinks, 'State Responsibility for the Acts of Private Armed Groups', 4 (2003) *Chicago Journal of International Law* 83.

54 *Wall* Advisory Opinion, note 36, para. 139.

55 *Wall* Advisory Opinion, *ibid*, Opinion of Judges Higgins, para. 33 and Judge Kooijmans, para. 35. Kooijmans describes the ICJ as having by-passed the approach of the Security Council in Resolution 1373. *Wall* Advisory Opinion, note 36, Dissenting Opinion, J. Buergerthal, para 6.

56 Opinion of Judge Higgins, *ibid*.

57 *Armed Activities* case, note 18, para. 147 thereby apparently tempering the impact of its *Wall* Opinion.

Iraq in 2008, respectively, attribution was not treated as a defining question.⁵⁸ While there is still controversy, and room for alternative interpretations of practice, it would appear then to be the case that 'it is now well accepted that non-state actors, even when not acting on behalf of a state, may commit armed attacks that trigger a state's right of [...] self-defence.'⁵⁹

If, alternatively, as some still claim,⁶⁰ a state link is required, the key question becomes the standard by which action of non-state actors becomes attributable to the state. As already discussed in more detail in Chapter 3, the level of support which may render the state responsible for the attack is a question of degree, dependent ultimately on the exercise of sufficient control over the conduct of those directly responsible for the attack.⁶¹ While support for terrorists of various degrees and form may be prohibited in international law, it does not necessarily render the state constructively responsible for an armed attack, or entitle other states to use force against it. As such, it has been suggested by those that consider state responsibility for the armed attack essential, that what practice post 9/11 reveals is that the standards of attribution have loosened in respect of terrorism specifically.⁶² While the stronger view may be that attribution is not a legal pre-requisite for the existence of an armed attack, as the global practice of terrorism and counter-terrorism continues to unfold, the law on self defence, and on state responsibility, and the relationship between the two, is likely to develop further.

iii) A Threshold of Scale and Effects, and Continuing Attacks? An armed attack has traditionally been considered to imply the use of force of considerable seriousness in terms of its scale and effects. The ICJ, setting out certain parameters for when interference in a state through support for armed groups might amount to an armed attack, has consistently considered it necessary

58 S.C. Res. 1701 (2006), 11 August 2006, UN Doc S/RES/1701 (2006). See, e.g., Secretary General Press Release UN Doc. SG/SM/10570, SC8791, 20 July 2006, and discussion of states' positions in Security Council discussions. I. Foss, 'Is there Something Rotten in the State of Jus ad Bellum? State Responses to Terrorism and the Jus ad Bellum', 2010, *The Selected Works of Ian Foss*, p. 25-28, available at: http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=ian_foss; Tams, 'The Use of Force', note 50, at 379 and 380.

59 N. Schrijver and L. van den Herik, 'Leiden Policy Recommendations on Counter-terrorism and International Law' (hereinafter 'Leiden Recommendations'), *Grotius Centre*, 1 April 2010, available at: <http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf> para. 38. 'Chatham House Principles', note 36.

60 Capaldo 'Right of Self Defence', note 50, p. 106 or T. Ruys, 'Armed Attack' and Article 51 of the UN Charter: *Evolutions in Customary Law and Practice* (Cambridge University Press, 2010), 486-89.

61 See ICJ in the *Nicaragua* case, note 15, discussed in Chapter 3. Other formulae for support have been put forward. See, e.g., Cassese, *International Law*, note 30, p. 312, who describes the degree of support required as 'major and demonstrable'. As noted in Chapter 3, some suggest the standard may require adjustment post 9/11.

62 See Chapter 3.

to distinguish between 'grave forms of the use of force (those constituting an armed attack) from other less grave forms.'⁶³ It found, for example, that the supply of arms or logistical support was not *per se* sufficient to constitute an armed attack, while sending armed bands or mercenaries into the territory of another state was.⁶⁴ An armed attack for purposes of Article 51 has also been said to exclude 'isolated or sporadic attacks'.⁶⁵

However it has increasingly been suggested that a distinction is due in this respect between an armed attack by a state and by non-state actors. Where one state resorts to force against another, the predominant view is that this amounts to an armed attack, irrespective of intensity.⁶⁶ However, so far as it is accepted that attacks may emanate from non-state actors, various experts have suggested that this can, or perhaps should, only amount to an armed attack where it is 'large scale'.⁶⁷

It is generally accepted that an attack need not occur all at once, but may arise through a series of attacks over time.⁶⁸ For a series of events to amount to one armed attack, it would have to emanate from the same source.⁶⁹ If the series of attacks is part of sufficiently close continuum to amount to effectively one attack, it may meet a threshold that none of the smaller attacks would themselves meet. However, if an attack were to continue over a prolonged period it may bring into question the nature or the imminence of the threat

63 *Nicaragua case*, note 15, para. 191; see also *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* (hereinafter '*Oil Platforms case*'), Judgment, ICJ Reports 2003, para. 161, which also referred to 'large scale attacks,' albeit in the context of action by armed groups supported by the state. See Tams, 'The Use of Force' *supra* note 50, p. 387.

64 *Nicaragua case*, note 15, para. 195. The same approach was taken in the *Oil Platforms Case*, *ibid.*

65 A. Cassese, 'Legal Response to Terrorism', *supra* note 10, 18 states that self defence 'requires a pattern of violent terrorist action rather than just being isolated or sporadic acts'.

66 'Leiden Recommendations', *supra* note 59, para. 39, suggesting that 'Article 51 does not include a scale requirement for an armed attack ...' except for attacks by non-state actors. Dinstein rejects a threshold beyond a very low threshold of 'trifling' or 'de minimis' effects; Y. Dinstein, *War, Aggression and Self Defence*, 4th ed. (Cambridge University Press, 2005), p. 195. M.N. Schmitt, 'Transnational Terrorism', note 36, p. 14 also notes the 'scale and effects' requirement makes sense in the context of non-state actors. 'Chatham House Principles', note 36, at 966.

67 Leiden Recommendations, *supra* note 59, para. 39. 'Chatham House Principles', *ibid.*, principle 6. The principles recognise this is not the view set down by the ICJ. For another view disputing that there are different scale requirements, see Ratner, 'The Meaning of Armed Attack', note 40. See 5B.1 (Afghanistan) and 2 (Attacks on Al Qaeda) on developments in thinking and practice as regards whether the attack must be attributable to the state.

68 *Ibid.*, para 11 C. Greenwood, 'International Law and the United States' Air Operation against Libya', (1987) 89 *West Virginia Law Review* 933, 942, p 955-56. Tams, *supra* note 50, suggests more debate is required to clarify whether an accumulation of events doctrine is accepted in international law.

69 See Leiden Recommendations, note 59; E. Wilmshurst 'Anticipatory Self Defence', in Herik and Schrijver, *Counterterrorism Strategies in a Fragmented International Legal Order*, note 40.

being defended against,⁷⁰ and the *need* to resort to measures of self defence, discussed next, as collective action under the Charter may then be possible.

iv) A right of anticipatory self defence? The existence of a right to ‘anticipatory,’ ‘preventive’ or ‘pre-emptive’⁷¹ self defence – a right to resort to force in self defence before an armed attack has occurred or to prevent or avert a future attack – is the subject of considerable controversy.⁷²

Article 51 of the UN Charter permits resort to force in self defence ‘if an armed attack occurs against a member of the United Nations’. The ‘ordinary meaning’ of the Article 51 language appears to require that an attack has actually happened or ‘occurred’,⁷³ as opposed to being simply threatened,⁷⁴ as does a ‘contextual’ reading of the provision which, unlike other provisions of the Charter, omits any reference to the ‘threat’ of attack.⁷⁵

On a ‘purposive’ interpretation of the provision – whether permitting anticipatory self defence furthers or undermines the Charter’s objectives – opinion has long been more divided. On the one hand, opponents of the right can highlight the dangers of permitting pre-emptive strikes based on a state’s own assessment of risk, as a slippery slope that may ultimately lead to the unravelling of the prohibition on the use of force altogether, inconsistent with the Charter’s fundamental purposes and principles. On the other, a compelling argument advanced in support of a right to ‘anticipatory self defence’ is an appeal to ‘common sense’⁷⁶ – that it is illogical or unreasonable to require

⁷⁰ See Anticipatory self defence later in this chapter.

⁷¹ On the significance of the different terms, see e.g. N. Lubell, *Extra-territorial Use of Force* *supra* note 28, p. 55. As will be seen anticipatory self defence appears to have growing acceptance whereas a broad doctrine of pre-emptive or preventive use of force is currently put forward by the U.S. but has virtually no international support. See 5B.2.

⁷² The extent of the significance of this issue was not immediately apparent in the wake of the September 11 attacks, which had occurred, but has been brought into sharp focus by the subsequent debate on legal justifications for on-going force against terrorists abroad (see B.2 including the U.S. National Security Strategy of 17 September 2002) asserted a broad-reaching right to resort to preemptive force.

⁷³ The clause ‘if an armed attack occurs’ was inserted in Article 51 at the initiative of the U.S. delegation at the San Francisco Conference. During the debate the U.S. insisted the caveat ‘was intentional and sound. We did not want exercised the right of self defence before an armed attack has occurred.’

⁷⁴ See generally M. Bothe, ‘Terrorism and the Legality of Preemptive Force’ (hereinafter ‘Preemptive Force’), 14 (2003) EJIL 227, specifically at 228.

⁷⁵ See Article 2(4) and Article 39, belying any suggestion that the omission of the threats from Article 51 was inadvertent. See Bothe, ‘Preemptive Force’, *ibid.*, at 228-9.

⁷⁶ R. Higgins, *Problems and Process: International Law and How we Use it* (Oxford: Oxford University Press, 1984), 242: ‘In a nuclear age, common sense cannot require one to interpret an ambiguous provision in a text in a way that requires a state passively to accept its fate before it can defend itself.’ Wilmschurst, ‘Anticipatory Self Defence’, note 69, at 747.

a state to wait until it has been attacked to 'defend' itself.⁷⁷ An analogy may be provided by criminal law, where the absurdity of needing to wait to be fatally shot to invoke self defence is apparent.⁷⁸ The nature of contemporary weapons systems – and the possibility of an initial potentially devastating attack – is cited as bolstering the argument in favour of a more flexible interpretation of Article 51.⁷⁹ As one commentator recently noted, 'no law ... should be interpreted to compel the *reductio ad absurdum* that states invariably must await a first, perhaps decisive, military strike before using force to protect themselves'.⁸⁰

The opposing camps may be reconciled to some degree to the extent that there is room for debate as to when an attack actually 'begins,' when defensive action is 'interceptive' rather than anticipatory,⁸¹ or when an attack is ongoing.⁸² Thus a flexible approach to the definition of armed attack may effectively have the same result as acceptance of anticipatory self defence, allowing states to respond to preparatory acts and to avert the completion of the attack. Thus the rejection of a right of anticipatory self defence does not oblige states to be sitting ducks until harm is suffered; preparatory acts, coupled with evidence of an intent to attack, might be considered to constitute the effective commencement of an attack which can be averted before it achieves its destructive effect.⁸³

77 See O. Schachter, 'The Right of States to Use Armed Force', 82 (1984) *Michigan Law Review* 1620, at 1634: 'It is important that the right of self defence should not freely allow the use of force in anticipation of an attack or in response to the threat. At the same time, we must recognize that there may well be situations in which the imminence of an attack is so clear and the danger so great that defensive action is essential.' See also T.M. Franck, 'When, If Ever, May States Deploy Military Force without Prior Security Council Authorization?' 5 (2001) *Washington University Journal of Law and Policy* 51, at 59-60, who notes in this respect that it may be necessary to respond to 'challenging transformations' such as increased weapons capability.

78 Like its international counterpart, criminal law does however recognise strict limits on the circumstances in which preemptive action may be taken. See A. Ashworth, *Principles of Criminal Law*, 3rd ed. (Oxford University Press, 1999), pp. 147-8; G.P. Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000), pp. 85 ff.

79 Higgins, *supra* note 76. On changing circumstances post the Charter's inception and flexible interpretation, see Franck, *Recourse to Force*, *supra* note 11, pp. 5-9.

80 *Ibid.*, p. 98. However Franck acknowledges that 'a general relaxation of Article 51's prohibitions on unilateral war-making to permit unilateral recourse to force whenever a state feels potentially threatened could lead to another *reductio ad absurdum*'.

81 Dinstein, *War, Aggression and Self Defence*, *supra* note 66 p. 191. He talks of 'embarking on an apparently irreversible course of action' that casts the die. Schmitt notes this broad approach is close to what others in fact call anticipatory self defence. Schmitt, 'Transnational Terrorism', *supra* note 36, p. 17.

82 See discussion on a 'series of attacks' earlier.

83 M.E. O'Connell, 'Debating the Law of Sanctions', 13 (2002) *EJIL* 63; Bothe, 'Preemptive Force', note 74, at 229-30 suggests that the requirement of armed attack is uncontroversial and that it is on the meaning of such attack that there is controversy. He suggests that certain imminent attacks may be seen as 'equivalent to an armed attack.'

Those who assert a right of anticipatory self defence generally rely upon customary law, which they argue diverges from the Charter in this respect,⁸⁴ but which is acknowledged by the reference to the 'inherent' right in Article 51 itself.⁸⁵ One question is whether this right survived the introduction of Article 51, clearly worded to the contrary, and whether the Charter's framers intended a parallel inconsistent body of law to run alongside the Charter, particularly the Charter's quasi-constitutional status. Another is whether there is sufficient state practice since 1945 to support the existence of a continuing customary norm at variance with the Charter, as recourse to anticipatory self defence as a legal justification for using force remains limited.⁸⁶

Doctrinal debate among academic commentators on the question of anticipatory self defence, at least before September 11, revealed little consensus.⁸⁷ *Oppenheim's International Law* suggests that the position is that 'while anticipatory action in self defence is normally unlawful, it is not necessarily unlawful in all circumstances'.⁸⁸ This approach may hold true post 9/11, but it has been suggested that there is growing acceptance of a limited right of self defence against ongoing and imminent attacks since then.⁸⁹

What is clear is that if a right to anticipatory self defence exists, it is strictly limited. The circumstances in which anticipatory self defence might be per-

84 The Article 51 reference to the 'inherent' right of self defence is cited as supporting the continued existence of customary rules. Schachter, 'The Right of States', note 77, at 1633, and G.M. Travaglio, 'Terrorism, International Law and the Use of Military Force', note 47, at 149, stating, similarly, that 'the presence of an armed attack is one of the bases for the exercise of the right of self defence under Article 51, but not the exclusive basis.'

85 See the *Caroline* case, to be discussed.

86 On one of the few occasions on which it was expressly invoked, in relation to Israel's attack on the Iraqi nuclear reactor in 1981, states generally shied away from debating the lawfulness of anticipatory self defence as such, but the underlying action met with condemnation as a violation of the law on use of force: see SC Res. 487 (1981), 19 June 1981, UN Doc. S/RES/487 (1981). Franck, *Recourse to Force*, note ??????@?, suggests that on other occasions despite state's reluctance to refer to it as such, reactions have been more equivocal. For discussion of state practice post Charter, see Gray, *International Law and the Use of Force*, note 24, p. 118.

87 Among writers holding that there is no right of self defence until an armed attack has actually commenced, see, e.g. I. Brownlie, *International Law and the Use of Force by States* (Oxford, 1981), pp. 256-7; B. Simma *et al.*, *Commentary*, note 14; Gray, *International Law and the Use of Force*, note 24, p. 117-18; Bothe, 'Preemptive Force', above, note 74, at 230. A number of authoritative commentators recognise a right to act in self defence against an imminent armed attack. See, e.g., Bowett, note 23, pp. 187-92; *Oppenheim's International Law*, *supra* note 27, p. 421; C. Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', 4 (2003) *San Diego International Law Journal* 7; E.P.J. Myjer and N. D. White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?', 7 (2002) *Journal of Conflict and Security Law* 5; note 76; O'Connell, 'Law of Sanctions' and Wilmshurst, 'Anticipatory Self Defence.'

88 *Oppenheim's International Law*, p. 421.

89 See Part 5B.2 below.

mitted were set out in the seminal *Caroline* case of 1837,⁹⁰ the language of which has been widely cited as establishing, and at the same time strictly limiting, the circumstances in which the use of self defence in anticipation of an attack might be permissible. The *Caroline* test has been endorsed in subsequent judicial decisions as enshrining the appropriate customary law standard,⁹¹ and has been described by one commentator as going 'as far as pre-emptive self defence possibly goes under current international law'.⁹² The test proposed by US Secretary of State and agreed by the opposing party, the British, was that there had to be a necessity that was 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.⁹³

It is clear that a distinction must be drawn between a real and immediate threat of armed attack, and a potential or speculative risk thereof. A threat must be concrete and identifiable. While some may question whether the need for 'no moment for deliberation' goes too far,⁹⁴ it emphasises the immediacy of the threat for permissible anticipatory self defence.⁹⁵ A temporal dimension, which emphasizes the immediacy or imminence, in line with the exceptional or 'emergency' nature of anticipatory self defence, remains a critical criterion, and one that is closely linked to (if not subsumed by) the notion of necessity discussed below.⁹⁶ While a threat, like an attack itself, may arise over a period of time, and it is a question of degree at what point it becomes real and immediate, the passage of considerable time between a threat arising and its response may raise doubts concerning the requirement of immediacy (and with it the necessity of the use of force as a response, to be discussed later).

90 The correspondence between the U.S. and the British Government relating to the case is reproduced in 29 (1841) *British and Foreign State Papers* 1137-1130 and 30 (1842) *British and Foreign State Papers* 195-196.

91 See, e.g., the judgment of the Military Tribunal at Nuremberg in the trial of Goering; D.J. Harris, *Cases and Materials on International Law*, 5th ed. (London, 1998), p. 896; R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994), p. 242.

92 Bothe, 'Preemptive Force', note 74 suggesting that the *Caroline* formula represents the law pre-Charter and that a more restrictive view should be taken in light of Article 51. On positions advanced post 9/11 and the potential shift in legal standards see B.2.

93 Letter dated 24 April 1841 from the U.S. Secretary of State Webster to the Government of the United Kingdom, Fox, reprinted in Harris, *Cases and Materials*, note 91, p. 895. The *Caroline* 'necessity and proportionality' test applies to any action of self defence, but it is 'even more pressing in relation to anticipatory self defence than [it is] in other circumstances'. *Ibid.*, at 421.

94 Wilmschurst, 'Anticipatory Self Defence', note 69.

95 See the U.S. position on the 'imminence' requirement as regards the use of force against terrorist suspects at 5B3 below. Cf. Wilmschurst, *ibid.*

96 As suggested by Christian Tams, imminence may not provide an additional restraint as it is implicit in necessity. C. Tams, 'Necessity and Proportionality and their Practical Application to Self-Defence against Terrorists' in v.d. Herik and Schrijver, chapter 12. However on another view it is useful to consider the temporal element separately from necessity as it emphasizes that the use of force before an attack has begun is exceptional and requires a high level of justification. Wilmschurst, 'Anticipatory Self Defence', *ibid.*

Finally, it follows from the above test that the *capacity* to inflict harm, however grave, is insufficient, unless the circumstances indicate a real and imminent threat to carry out an armed attack. As such, there is little to suggest that the existence of weapons, even those of mass destruction, is considered *per se* sufficient to justify a claim to self defence. The oft-cited destructive capability of al-Qaeda and associated terrorist groups and individuals is clearly distinct from the real and immediate threat posed by a particular source. The rationale is reflected in domestic criminal law, where the fact that someone intends harm, or indeed possesses a weapon with the potential to do harm, or both, may justify other measures of intervention but plainly would not justify the use of force in self defence, whereas brandishing a weapon where the context indicates an immediate and unavoidable threat, would.⁹⁷

So far as anticipatory self defence can be accepted under international law, it is an exception within an exception. It follows that any such right must be strictly and carefully construed. Issues that have arisen with regard to a lax approach, which moves from the notion of anticipatory self defence to preventive or pre-emptive self defence are discussed in relation to post 9/11 practice at Part B.⁹⁸

In conclusion, the nature of the armed attack, in particular the non-state actor origin of the attack and its potentially 'anticipatory' nature, are contentious issues in relation to which the law may be in flux. As Part B will explore, issues related to the armed attack have been central to responses to international terrorism before 9/11,⁹⁹ and since then.¹⁰⁰

b) Necessity and proportionality

As noted, necessity and proportionality are universally recognised as requirements of the law of self defence, under customary law and the UN Charter.¹⁰¹ For self defence to be justified, any response must be *necessary* to avert the

97 See Ashworth, *Principles of Criminal Law*, note 78, on the imminence and duty to prevent conflict and Fletcher, *Criminal Law*, note 78.

98 'Chatham House principles', note 36; Wilmschurst, 'Anticipatory Self Defence', note 69.

99 E.g. L.M. Campbell, 'Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan', 74 (2000) *Tulane Law Review* 1067, or S. Schiedeman, 'Standards of Proof in Forcible Responses to Terrorism', 50 (2000) *Syracuse Law Review* at 249.

100 While the problems of nationals or state 'interests' appear of less relevance to its response to the events of September 11, which were considered an existing armed attack, on U.S. territory, the issue is of broader relevance to the use of force through targeted killings invoked in response to on-going terrorist attacks or threats in the future. See, e.g., Chapter 5.B.2.

101 *Nicaragua* case, note 15, para. 176. The necessity and proportionality rules are 'well established in customary international law'. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226 (hereinafter '*Nuclear Weapons* Advisory Opinion'), para. 141. Gray, *International Law and the Use of Force*, note 24, p. 148.

imminent threat or continuing attack.¹⁰² These factors, which (unlike the armed attack requirement) are prospective as opposed to retrospective, are critical in distinguishing lawful self defence from unlawful reprisals.¹⁰³

As noted earlier, the requirement reflected in the *Caroline* case of 1837, is of a 'necessity ... that ... is instant, overwhelming, and leaving no choice of means, and no moment for deliberation'. The necessity of force presupposes that all alternative, peaceful means have been exhausted, are lacking or would be ineffective as against the anticipated threat.¹⁰⁴ In recent years, it has been suggested that the unwillingness or inability of a state to take such action may be a pre-requisite for the use of force against non-state actors on that state's territory.¹⁰⁵ If a state on whose territory the targets are present is able and willing to take the required action, through criminal law enforcement, use of force or otherwise, the use of force by the state will not be necessary.

Necessity may itself imply a degree of *immediacy*. While an immediate response may not be an effective response, the longer the time lapse, the more tenuous the argument becomes as to the urgent necessity of unilateral action, as opposed to collective action under the UN umbrella.

Logically, for measures to be necessary to avert a threat, they must be capable of doing so. A relevant question in determining the right to self defence is therefore the *effectiveness* of any proposed measure. If measures against those responsible for an attack will increase the threat then they can hardly be said to be necessary to avert it. To this extent questions relating to the impact of the use of force as a counter terrorist strategy, and the likelihood of encouraging or impeding future acts of terrorism, are questions of potential relevance not only to the political expediency but also to the lawfulness of the use of force.

Proportionality and necessity are intertwined, with proportionality requiring that the force used be *no more* than necessary to repel the threat presented.¹⁰⁶ Consistent with the underlying purpose of self defence, to defend the state from on-going or imminent harm, it is important that the

102 *Nicaragua* case, note 15, para. 176. The *Caroline* case of 1837 set down what has been described as the customary law standard on necessity and proportionality. Campbell, 'Defending Against Terrorism', note 99, at 1067 and Dinstein, *War, Aggression and Self Defence*, note 66, at 205.

103 See Lubell, *Extra-Territorial Use of Force*, *supra* note 28, p. 52-3.

104 See Schiedeman, 'Standards of Proof', note 100, at 270. For questions as to the exhaustion of such means post 9/11 see section 5B.2.

105 See N Lubell, *supra* note 28; A.S. Deeks, 'Pakistan's Sovereignty and the Killing of Osama Bin Laden', ASIL Insight, <http://www.asil.org/insights110505.cfm> who observes that while there may be agreement on the test it is difficult to apply in practice. See also A. Deeks 'Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense', V.J.I.L. Vol 52.3, p. 483. See further below B.2.3 on the necessity of the use force against al Qaeda and associates in war on terror practice.

106 Tams, 'Necessity and Proportionality' in Herik and Schrijver, *Counterterrorism Strategies in a Fragmented International Legal Order*, note 40.

proportionality test should be applied *vis-à-vis* the requirements of repelling the threat, rather than, as is often suggested, measured against the scale of the threat or of any prior armed attack.¹⁰⁷ Arguments as to numbers of persons killed in the original attack outweighing numbers killed in subsequent counter-measures are of political relevance only. Assertions that 'the intensity of force used in self-defence must be about the same as the intensity defended against' is too loose an approach to proportionality in the context of self defence, where the key question is the different one of what is strictly required to avert the threat.¹⁰⁸ It seems all the more critical not to measure proportionality against *potential* harm. Thus, it has been suggested that an approach to preventive self defence against 'indeterminate' threats make it difficult if not impossible to apply the proportionality calculus.¹⁰⁹ One commentator has noted, as an example of the limits imposed by the proportionality test, that 'the victim of aggression must not occupy the aggressor's territory, unless strictly required by the need to hold the aggressor in check and prevent him from continuing the aggression by other means'.¹¹⁰

The question of whether (and which) States are responsible for an armed attack (whether or not, as discussed above, a *sine qua non* of self defence) is relevant to the question whether particular measures are justified as necessary and proportionate. Logically, necessity and proportionality require a link between the target of 'defensive action' and the threat being defended against. Targeting state institutions, for example, absent evidence of their connection to the threat or their ability to control that threat, is difficult to justify as a necessary and proportionate measure of self defence.¹¹¹

In summary, the use of force in self defence is not automatically justified, even where there has been an armed attack and there is evidence of an imminent second attack or continuing attack that needs to be repelled. An appraisal must then be made, in the light of the facts, of the necessity and effectiveness of the measures proposed to counter that threat, and whether the measures proposed are proportionate to it. It follows from the necessity (and proportionality) test, that self defence can only be justified where the targets of defensive action have been clearly identified, such that their particular contribution to the threat in question has been properly assessed.

107 Necessity and proportionality are thus closely interrelated.

108 F.L. Kirgis, 'Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon', 10 (2006) *American Society of International Law* 20, available at: <http://www.asil.org/insights/2006/08/insights060817.html> in the context of Israeli/Hezbollah affair. See comment in Capaldo, 'Right of Self Defence', *supra* note 50.

109 Gray, *International Law and the Use of Force*, *supra* note 24, p. 203.

110 Cassese, *International Law*, note 30, p. 305.

111 See Afghanistan, 5B.1.

c) *Self defence and the Security Council*

Two particular issues arise regarding the relationship between the right to self defence and the role of the Security Council. The first is the immediate requirement that any individual or collective self defence measure be reported to the Council.

Article 51 of the UN Charter provides:

Measures taken by Members in the exercise of this right of self defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Reflecting this, Article 5 of the NATO treaty, which provides for the organisation to act 'in exercise of the right of individual or collective self defence recognised by Article 51 of the Charter of the United Nations', specifically provides that '[a]ny such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council.' While the ICJ found there to be no requirement under customary law to report to the Security Council, the requirement is explicit in the Charter itself which is binding on all UN members.¹¹² Failure to report may, moreover, constitute evidence that the state did not consider itself to be acting in self defence.¹¹³

The second issue, though somewhat more controversial, is the limitation on the right to self defence as only justifying the use of force under the Charter *until* the Council is engaged. The Charter (reflected again in the NATO treaty), certainly appears to envisage self defence as a temporary right, pending Council engagement. Article 51 provides for:

the inherent right of individual or collective self defence if an armed attack occurs ... , *until* the Security Council has taken measures necessary to maintain international peace and security.

The NATO Treaty records at Article 5 that '[s]uch measures [of collective self defence] shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security'.

The Charter clearly assumes that once states can, they will seek Council engagement. If the Council is not engaged or does not engage, for whatever reason, the right of self defence continues for as long as the conditions for the exercise of self defence are met, but when the Council *does* engage, the Charter appears to envisage that the right to use force in self defence is superseded. No provision is made for state preference to continue to exercise the unilateral

¹¹² *Nicaragua* case, note 15, para. 200.

¹¹³ *Ibid.*

right of self defence. In any event, unilateral resort to force would be of doubtful 'necessity' if measures were being taken under the collective security umbrella. In practice, the Council has been unusually active in its approach to counter-terrorism since 9/11, albeit in a general rather than fact or context specific way,¹¹⁴ and it has not authorized the use of force in response to international terrorism.¹¹⁵ Despite the level of Council activity post 9/11, it may be doubted whether the nature of that involvement could be understood as engagement of a type that would affect the right of self defence,¹¹⁶ though it does raise the question of what might constitute such engagement and the inter-relationship in practice between the right to self defence and the role of the Council.

5A.2.1.2 *Individual or collective self defence*

The UN Charter enshrines the notion that self defence can be individual or collective, but the precise meaning of 'collective self defence' has generated some debate. Specifically, it is disputed whether Article 51 permits only the collective exercise of individual self defence (by states all of whom are subject to the attack or threat thereof), or whether it empowers other states, whose interests are not affected, to support a victim state in the exercise of that state's right of self defence. The majority of the ICJ in the *Nicaragua* case took the latter view: that a state's interests need not be directly affected where the injured state requests assistance,¹¹⁷ which has been described as corresponding to state practice since 1945.¹¹⁸ However, a dissenting judgment distinguishes self defence from 'vicarious defence,' noting that 'there should, even in 'collective self defence', be some real element of self'.'¹¹⁹

¹¹⁴ See Chapter 2 and Chapter 7.B.1.

¹¹⁵ See, e.g., discussion of the legislative and quasi judicial roles in Ch 7.B.1 'Security v Human Rights'

¹¹⁶ SC Res. 1368 (2001), 12 September 2001, UN Doc. S/RES/1368 (2001). Measures such as those imposed in SC Res. 1373 (2001), 28 September 2001, UN Doc. S/RES/1373 (2001), given the breadth of their reach, could be argued to constitute Council 'engagement' to take the measures necessary for international peace and security, but the fact that it referred to the 'inherent right of individual or collective self defence as recognized by the Charter of the United Nations as reiterated in Res. 1368 (2001)' belies this approach.

¹¹⁷ *Nicaragua* case, note 15, paras. 104-5. See also Cassese, 'Legal Response to Terrorism', *supra* note 10, at 597: 'Collective self defence requires that the State has been requested or authorised to intervene by the [injured] State.'

¹¹⁸ Gray, *International Law and the Use of Force*, note 24, p. 188; describes the insistence on third state interest as 'far fetched'.

¹¹⁹ See Sir Robert Jennings' dissenting opinion in *Nicaragua* case, note 15, at 545. Gray, *International Law and the Use of Force*, note 39, pp. 187-88 notes that 'many others follow the Jennings approach' (while herself describing the position as 'far fetched in the light of state practice since 1945'). See also Dinstein, *War, Aggression and Self Defence*, note 66.

The recognition of the collective nature of the right to self defence is reflected in various treaties, including the NATO treaty.¹²⁰ Article 5 provides:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

No autonomous right to use force is, or could be, contained in the NATO treaty or any other agreement. As the NATO treaty clause itself indicates, the lawful use of collective force is limited by the UN Charter.¹²¹ In this sense, the right enjoyed by the regional or other collective security organisation is the same as that of any individual state. The significance of the NATO treaty in this respect is, however, twofold. First, the NATO treaty is seen to operate as a standing request to other members to assist in its defence. Secondly, while self defence under the UN Charter (unlike a decision by the Security Council) is permissive, not obligatory,¹²² the NATO treaty goes further, by *obliging* states parties to it to act. However, as noted above, these arrangements can only *oblige* states to take measures that they are *entitled* to take consistent with the UN Charter provisions on self defence.¹²³

As set out in the following section, only the Security Council can authorise measures in the interest of peace and security that are not justified in the self defence of any state. However, the Council may, and in practice does, mandate collective or regional organisations to take those measures on its behalf.

120 North Atlantic Treaty, Washington, 4 April 1949, 34 UNTS 243. For another regional security treaty, see, e.g., Inter-American Treaty of Reciprocal Assistance, Rio de Janeiro, 2 September 1947, 21 UNTS 324, in force 3 December 1948, Article 3(1). Like the NATO treaty, this regional security treaty was also activated post 9/11: see K. De Young, 'OAS Nations Activate Mutual Defense Treaty', *Washington Post*, 20 September 2001.

121 Unlike the Security Council, NATO has no independent powers to authorise the use of force. Unless it is mandated to act on behalf of the Security Council, NATO power (like that of member states) is predicated on the principle of self defence.

122 Proposals to oblige other member states to assist victims of aggression were rejected during the negotiation of the Charter. See Franck, *Recourse to Force*, note 11 p. 46.

123 Article 103 UN Charter.

5A.2.2 Security Council: maintenance of international peace and security

In situations where self defence cannot be justified, the only lawful use of force is that authorised by the Security Council.¹²⁴ The Security Council has broad powers, under Chapter VII of the UN Charter,¹²⁵ to determine the existence of any threat to the peace, breach of the peace, or act of aggression¹²⁶ and to take (or to authorise) those measures – including ultimately the use of force – that it deems necessary to address the situation.

Article 39 of the Charter empowers the Security Council to ‘make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security’. The ‘measures’ referred to are further specified in the Articles that follow. In particular, Article 41 concerns ‘measures not involving the use of armed force’ that the Security Council may adopt to give effect to its decisions and establishes an obligation on Member States to apply such measures. Supplementing those powers, Article 42 confers on the Security Council unique powers to mandate enforcement action, where the non-coercive measures are deemed, or proved to be, inadequate.

The language of Security Council resolutions under Chapter VII may be recommendatory – ‘calling on’ all states, or particular states, to take action – or it may be mandatory, ‘deciding’ that specific measures should be adopted. It is these ‘decisions’ that are binding on member states which, under Article 25, are required ‘to accept and carry out’ the Council’s decisions. If questions arise as to non-compliance with these obligations, it is for the Council to decide whether there has been a breach and what measures are appropriate in response.¹²⁷

The UN Charter originally envisaged a form of international stand-by force at the beckoning of the Council.¹²⁸ This UN force has however never come into being and, in practice, the Council has instead discharged its enforcement mandate by delegation,¹²⁹ nominating member states generally, or specific

124 To some extent the GA assumed the Council’s role where the latter could not discharge its mandate during the Cold War: ‘Uniting for Peace’ Resolution (GA Res. 377 (V), 3 November 1950, UN Doc. A/RES/377 (V)) to address the situation in Korea, pursuant to which it established a temporary UN presence in Korea.

125 Chapter VII is entitled ‘Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression’.

126 Article 39

127 These measures may of course involve the use of force. See automaticity debate, later in chapter.

128 Article 43 commits all members ‘to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities...’.

129 Franck, *Recourse to Force*, note 11, p. 43, refers to the Security Council authorisation of action by states as opposed to by the Security Council itself as the ‘adapted power’ of the Council. C. Gray, ‘From Unity to Polarisation: International Law and the Use of Force against Iraq’, 13 (2001) EJIL 1 at 2-3 notes increasing concern, since the 1991 Iraq invasion, to ensure that the Council retains control over UN authorised, but state executed, operations.

states, to take measures involving the use of force. Numerous situations have arisen in the post Cold-war era where states, regional organisations or 'coalitions of the willing' have been authorised to take 'all necessary measures' (which in Council speak clearly includes forceful measures) to give effect to the Council's decisions.¹³⁰

5A.2.2.1 The Security Council and international peace and security: powers and limitations

The Security Council's power to decide measures involving the use of force is ample but not limitless.¹³¹ The Council enjoys a broad discretion to determine the existence of a threat to or a breach of international peace or security, or whether particular conduct constitutes an act of aggression.¹³² The text of Article 42 poses some limits on the power of the Security Council to adopt coercive measures, however, by specifying that measures implying the use of armed force should constitute the *extrema ratio*, to be taken only where 'the Security Council considers that measures [provided for in Article 41] would be inadequate or have proven to be inadequate' and that the measures adopted must be 'necessary to maintain or restore international peace or security'. Moreover, the course of action decided by the Security Council must be consistent with the purposes and principles of the United Nations as defined in Articles 1 and 2 of the Charter.

a) 'Threat to or breach of international peace and security' and terrorism

The first condition for the application of measures under Chapter VII of the Charter is, as noted above, that the situation must amount to a threat to, or breach of, 'international peace and security'. The concept of 'threat to, or breach of, international peace and security' has been given an increasingly broad interpretation by the Security Council. Through practice, the phrase has come to include matters that would originally – when the Charter was framed – have been thought internal questions for the state. For example the deposing of a democratically elected government,¹³³ the commission of extremely serious violations of human rights¹³⁴ and the potential imminent massacre

¹³⁰ See S. Chesterman, *Just War or Just Peace. Humanitarian Intervention and International Law* (Oxford University Press, 2001), p. 123 and Gray, 'From Unity to Polarisation', note 129, at 2-3. Since the Cold War era situations in which the Council has done so include: Kuwait (1990-91), Somalia (1992-93), Rwanda (1994), Haiti (1993), Bosnia-Herzegovina (1995-), Great Lakes (1996), Central African Republic (1997), Albania (1997), Kosovo (1999-), and East Timor (1999), Cote d'Ivoire (2003) and Libya (2011).

¹³¹ N. White, *The Law of International Organisations* (Manchester University Press, 2005), p. 90.

¹³² For discussion of the definition of aggression, see Chapter 4A.1.1.3.

¹³³ See SC Res. 841 (1993), 16 June 1993, UN Doc. S/RES/841 (1993), concerning Haiti.

¹³⁴ See SC Res. 418 (1977), 4 November 1977, UN Doc. S/RES/418 (1977) concerning apartheid in South Africa and SC Res. 232 (1966), 16 December 1966, UN Doc. S/RES/232 (1966) concerning white minority rule in Rhodesia.

of civilians,¹³⁵ non-international conflicts¹³⁶ have all been deemed to constitute threats to 'international peace and security'.¹³⁷ In practice the standard to be applied by the Council has come to be viewed as fairly flexible, with security against overuse residing in the collective mechanism that applies it rather than in the confines of its terms, by contrast to the stricter standards governing unilateral use of force.¹³⁸

Security Council Resolution 748 (1992), addressing Libya's refusal to extradite the Lockerbie bombing suspects,¹³⁹ was the first in a series of resolutions in which the Council articulated a relationship between terrorism and international peace and security. Like subsequent resolutions on the attempted assassination of Egypt's President Mubarak¹⁴⁰ and the bombings of the US embassies in Tanzania and Kenya,¹⁴¹ the Lockerbie resolution noted that 'the suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of international peace and security'. Likewise, Security Council resolutions adopted in response to September 11 and subsequently have unequivocally determined the events of that day and (more controversially) international terrorism more broadly, as constituting a threat to international peace and security.¹⁴²

While the terms of Security Council resolutions 1368 and 1373 of September 2001, and the resolution that followed the Madrid bombing of March 2003, suggest that 'any act of international terrorism' amounts to a threat to inter-

135 SC Res. 1973 on Libya (2011), note 121. The Council debate focused on 'the mission being authorised as that of protecting threatened Libyan civilians against violent atrocities that were allegedly being massively threatened by the Qaddafi government, with special reference at the time to an alleged imminent massacre of civilians trapped in the then besieged city of Benghazi. The debate emphasised the application of the norm of Responsibility to Protect (R2P). R. Falk, 'NATO intervention in Libya: Acting beyond the UN mandate' (hereinafter 'Beyond the Mandate'), *Third World Resurgence*, available at: <http://www.twinside.org.sg/title2/resurgence/2011/253/world1.htm>

136 See SC Res. 713 (1991), 25 September 1991, UN Doc. S/RES/713 (1991), concerning Somalia and SC Res. 794 (1992), 3 December 1992, UN Doc. S/RES/794 (1992) concerning Bosnia-Herzegovina.

137 See discussion on humanitarian intervention and pro-democratic intervention, paras. 3.3.1 and 3.3.2 in this Chapter.

138 It falls to the state invoking self defence, in the initial stage, to apply and determine the legitimacy of its recourse to force. Susceptibility to abuse in the absence of any external oversight is great and therefore the exception to the prohibition on the use of force must be narrowly construed.

139 SC Res. 748 (1992), 31 March 1992, UN Doc. S/RES/748 (1992).

140 SC Res. 1044 (1996), 16 August 1996, UN Doc. S/RES/1044 (1996).

141 SC Res. 1189 (1998), 13 August 1998, UN Doc. S/RES/1189 (1998) and SC Res. 1267 (1999), 15 October 1999, UN Doc. S/RES/1267 (1999).

142 See SC Res. 1368 (2001), note 117. On 28 September 2001 the SC adopted SC Res. 1373 (2001), note 117, described as a 'wide-ranging, comprehensive resolution with steps and strategies to combat international terrorism'. The Council plainly did not however authorise the use of force

national peace and security,¹⁴³ this is to be doubted, particularly given the absence of international accord around the substance and scope of the definition of terrorism. Moreover, the Council's own earlier Resolution 1269 of 1999 '[u]nequivocally condemns all acts, methods and practices of terrorism ... in particular those which could threaten international peace and security'.¹⁴⁴ What is clear is that the concept of a threat to international peace and security *may* encompass acts of 'terrorism', to which Chapter VII action could be directed.

b) Measures to maintain and restore international peace and security

As noted above, the fact that there is a threat to international peace and security itself is not sufficient to trigger the lawful use of force. Consistent with the principles of the UN as enshrined in Articles 1 and 2 of the Charter,¹⁴⁵ and reflected in the language of Article 42, for military action to be possible, the Security Council must consider non-military measures under Article 41 of the Charter to be (or have been) inadequate. The Security Council has to determine that those measures would be ineffective for the purpose of restoring international peace and security, and that force is necessary. Logically, necessity encapsulates an element of proportionality – the particular measures taken should be capable of furthering international peace and security and the force used should be no more than necessary to achieve this purpose. These are essentially factual questions for the Council's assessment in light of the prevailing circumstances.

The Council has broad discretion to decide which measures are appropriate to maintain and restore international peace and security in the particular situation. Measures that the Council may decide to authorise or mandate under the Chapter VII rubric of maintaining international peace and security cover a wide array, some involving armed force and others not, as history attests. In the post-Cold War period, non-forceful measures have included establishment of *ad hoc* criminal tribunals,¹⁴⁶ referral of situations to the ICC,¹⁴⁷ the

143 SC Res. 1368 (2001), note 117, condemns 9/11 as, 'like any act of international terrorism', 'a threat to international peace and security'. The Preamble of resolution 1373 (2001), note 117, likewise notes that 'such acts, like any act of international terrorism, constitute a threat to international peace and security'. See also SC Res. 1530 (2004), 11 March 2004, UN Doc. S/RES/1530 (2004), where the Council, condemning the bomb attacks in Madrid on 11 March 2004, stated that it 'regard[ed] such act, like any act of terrorism, as a threat to peace and security'.

144 SC Res. 1269 (1999), 19 October 1999, UN Doc. S/RES/1269 (1999) (emphasis added).

145 See Article 2(3) on resolution of disputes through peaceful means and Article 2(4) on the non-use of force.

146 On the establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, see Chapter 4.

147 SC Res. 1970 (2011), 26 February 2011, UN Doc. S/RES/1970 (2011) through which the Security Council referred the crisis in Libya to the prosecutor of the ICC; SC Res. 2000 (2011) 27 July 2011, UN Doc. S/RES/2000 (2011), where the Council referred the situation following the 28 November 2010 Ivorian elections; SC Res. 1593 (2005), 31 March 2005, UN Doc. S/

imposition of a war reparations procedure,¹⁴⁸ attempts to force the extradition of alleged terrorists,¹⁴⁹ and sanctions lists with a view to freezing of assets and banning movement of persons placed on Council 'lists'.¹⁵⁰

The Council has authorised 'enforcement action' through coercive measures, for example, to restore a democratically elected government in Haiti¹⁵¹ and to end apartheid in South Africa,¹⁵² white minority rule in Rhodesia¹⁵³ and armed conflicts in Bosnia-Herzegovina¹⁵⁴ and Somalia,¹⁵⁵ and more recently to protect civilians in Libya.¹⁵⁶ The use of force for the purpose of cross-border criminal law enforcement – which may be impermissible if unilateral¹⁵⁷ – also forms part of the Council's enforcement arsenal, and has been invoked in several situations in recent years.¹⁵⁸

As regards measures that may overstep the constitutional limits highlighted above, it has been questioned to what extent the Council is empowered, for example, to authorise 'regime change', given the Charter's protection of states' 'political independence' as a fundamental principle.¹⁵⁹ The Security Council has in fact intervened only once to effect a change of government – where a *de facto* government had usurped power, causing serious unrest, and the Security Council authorised force to restore the democratically elected government – and it did so emphasising the exceptional nature of the measure.¹⁶⁰ It also authorized the Libyan intervention in 2011 that led to deposing the

RES/1593 (2005) the Council decided to refer the situation in Darfur, Sudan to the ICC prosecutor – the first ICC referral giving the ICC jurisdiction over a non-state party.

148 Reparation procedure for Iraq, described by Chesterman, *Just War or Just Peace*, note 142, pp. 121-2. Chesterman also refers to the demarcation of a territorial boundary between Iraq and Kuwait, *ibid.*, p. 122.

149 Extradition measures involved suspects from Libya and Sudan, Chesterman, *ibid.*

150 SC Res. 1267 (1999), 15 October 1999, UN Doc. S/RES/1267 (1999).

151 SC Res. 841 (1993), note 145.

152 SC Res. 418 (1977), note 146.

153 SC Res. 232 (1966), note 146.

154 SC Res. 713 (1991), note 148.

155 SC Res. 794 (1992), note 148.

156 SC Res. 1973 (2011), note 121; see Falk, 'Beyond the Mandate', note 147.

157 History indicates several examples of unilateral enforcement action in the territory of other states having been condemned. See for example *United States v. Alvarez-Machain* 504 US 655 (1992) and *Attorney General of Israel v. Eichmann* (Israel Supreme Court 1962), reprinted in 36 ILR 277 at 299, 304. *Oppenheim's International Law*, p. 387..

158 See, e.g., SC Res. 837 (1993), 6 June 1993, UN Doc. S/RES/837 (1993), in relation to Somalia. The possibility of invoking Security Council powers for the enforcement of criminal law is addressed at Chapter 4.

159 This was questioned in the context of Iraq, see, e.g., R. Singh and A. MacDonald, 'Legality of use of force against Iraq', Opinion for Peacemakers, 10 September 2002, available at <http://www.lcn.org/global/IraqOpinion10.9.02.pdf> (hereinafter 'Singh and MacDonald, Opinion on Iraq'), at para. 79 noting that '[W]hile the Security Council can demand that Iraq achieve certain results, it cannot dictate its choice of government. ... a change of regime cannot be considered absolutely necessary to achieving the Security Council's legitimate aims.'

160 See SC Res. 841 (1993) on Haiti, note 133, which was justified in part by reference to broader regional implications.

Qaddafi regime, though that resolution demanded a ceasefire and an end to attacks on civilians, authorised 'all necessary measures to protect civilians and civilian-populated areas,' and a no-fly zone,¹⁶¹ rather than regime change as such, causing questions as to whether NATO went beyond what the Council had in fact authorized.¹⁶² While removal of an unpopular government by the Council, as an end in itself, would not find support in the Charter, the Council would appear to be empowered to authorise force against a regime which it found to pose a threat to peace and security, which could not be averted other than through the regime's demise.

While it is clear that the Security Council's powers are limited to action taken in accordance with the Charter, less clear are the consequences of overreach, and whether any other body is entitled to review the Council's decisions.¹⁶³ While this issue may become relevant to decisions of the Security Council to authorise measures of force against terrorism in the future, it is not central in the absence of such Council authorisation in the first years of the 'war on terror'.¹⁶⁴

5A.2.2.2 *Express and implied authorisation to use force: interpreting resolutions*

Consistent with general principles of legal interpretation, a Security Council resolution must be interpreted according to the ordinary meaning of the language used, understood in its context and in light of the resolution's pur-

161 SC Res. 1973 (2011), note 121 para 4 *authorizes* 'all necessary measures, ... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force ...'.

162 Richard Falk notes that although SC Res. 1973 does authorise 'all necessary measures,' and the resolution is 'vague,' the debate reveals that the measures authorized related to averting massacre. By contrast, 'once under way, the NATO operation unilaterally expanded and qualitatively shifted the mission as authorised, and almost immediately acted to help the rebels win the war and to make non-negotiable the dismantling of the Qaddafi regime. NATO made these moves without even attempting to explain that it was somehow still acting primarily to protect Libyan civilians. This was not just another instance of "mission creep" as had occurred previously in UN peacekeeping operations (for instance, the Gulf War of 1991), but rather mission creep on steroids!' Falk, 'Beyond the Mandate', note 135.

163 See Chapter 7 B.1 'Security v Human Rights' See also on the lack of UN accountability, Scheinin, U.N. Doc. A/65/258 (2010), note 142, paras. 17-80. For the role of the ICJ and ICTY in reviewing the powers of the Council, see S. Lamb, 'Legal Limits to UN Security Council Powers', in G. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford, 1999), pp. 361 ff. and J. E. Alvarez, 'Judging the Security Council', 90 (1996) AJIL 1.

164 It is uncontroversial that force against terrorism has not explicitly been authorised in the Council's several resolutions on terrorism, discussed at Chapters 2 and 7. Regarding implied authorisation and Iraq, see this Chapter 5 B.2.1.1.

pose. This analysis can be informed by debates that lead to the resolution's adoption and, to a more limited degree, by statements made thereupon.¹⁶⁵

Given the justifications invoked by states for the use of force post September 11 (particularly in Iraq), discussed in section B of this chapter, two issues relating to the interpretation of Resolutions and the manner in which the Security Council authorises states to use force are worthy of mention. The first is whether authorisation can be inferred from earlier Security Council resolutions; the second is whether states can unilaterally 'enforce' obligations imposed by the Council, absent a decision of the Council to that effect.

'Implied authorisation' is, *per se*, a controversial notion. Its legitimacy has been questioned as stretching too far 'legal flexibility'.¹⁶⁶ In practice, reliance by states on implied authorisation as a legal justification in the past has been limited and, where invoked, subject to criticism.¹⁶⁷ Characteristically, it has been asserted not as a primary justification for resort to force but one coupled with the breach by the target state of its international obligations and/or humanitarian intervention,¹⁶⁸ an approach which has been described as a 'combination of a series of weak arguments in the hope that cumulatively they will be persuasive'.¹⁶⁹

Moreover, practice attests to the fact that where the Council authorises force it will generally do so in clear terms. For example, Resolution 678 of 19 November 1990, one of many Security Council Resolutions handed down during the Gulf Conflict and universally understood to authorise the use of force, stated that: 'the Security Council authorises member states cooperating with the government of Kuwait to use all necessary means to uphold and implement Resolution 660'.¹⁷⁰ The '*all necessary means*' language, while not

165 See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, ICJ Reports 1971, note 15, at p. 53; M. Byers, 'The Shifting Foundations of International Law: A Decade of Forceful Measures Against Iraq', 13 (2002) EJIL 21 and M. Wood, 'The Interpretation of Security Council Resolutions', 2 Max Planck Yearbook of United Nations Law 82 (1998).

166 R. Higgins, 'International Law in a Changing International System', 58 (1999) *Cambridge Law Journal* 78, at 94.

167 See generally Gray, 'From Unity to Polarisation', note 129, which addresses the use of force in Iraq up to and including 2001; see also Higgins, 'Changing International System', note 178.

168 Implied authorisation appeared to be relied upon in relation to the use of force in the no-fly zones of Northern Iraq, although the UK later specified its legal justification as humanitarian intervention which, it noted, 'supported' SC Resolution 688 (1990), 5 April 1991, UN Doc. S/RES/688 (1991). For UK justification see Hansard debate, 26 February 2001, in Gray, 'From Unity to Polarisation', note 129, at 9. It was also invoked by at least some states involved in the Kosovo NATO action, although again alongside other justifications, notably humanitarian intervention.

169 Gray, 'From Unity to Polarisation', note 129, at 16 notes that this cumulative 'weak argument' approach is 'typical legal reasoning, and common in the area of the use of force'.

170 SC Res. 660, 2 August 1990, UN Doc. S/RES/660 (1990) called for the withdrawal of Iraq from Kuwait.

explicit, is universally understood in the diplomatic context as synonymous with the authorisation of necessary force.¹⁷¹

Given the fundamental principle prohibiting resort to force, and the exceptional nature of the right to do so, there must be a strong presumption against implied (as opposed to clearly expressed) authorisation¹⁷² or open-ended authorisation to use force, and in favour of a strict interpretation that limits the right to use force to the particular situation and purpose to which the authorisation was directed.¹⁷³

Moreover, given the unique power vested in the Council to determine breaches of peace and security and to authorise force, if necessary, resolutions must not be interpreted in a manner that would ultimately divest the Council of this role.¹⁷⁴ The Council will often threaten to authorise force in the event of non-compliance, by referring to the 'severest consequences' that a material breach of a resolution will attract, but it remains within the exclusive power of the Council to decide whether there has been a breach, whether at that point in time the breach amounts to a threat to international peace and security and whether, in turn, the threat necessitates and justifies coercive measures. While it can and does delegate the carrying out of measures of enforcement, the Council does not, and could not (without abrogating its constitutional responsibilities), delegate the power to decide whether the particular situation, in the light of all prevailing circumstances, justifies the use of force. Often resolutions expressly indicate the Council's intention to decide what measures should be taken in the event of a breach but even where they do not this may be inferred from the Council's exclusive remit under the Charter.

It follows that where a state does not meet its obligations under Council resolutions, there is no automatic right of other states to 'enforce' these obligations. The power to authorise enforcement resides in the Council itself, in accordance with its powers and responsibilities under the Charter, and not with member states.¹⁷⁵ An attempt to justify force on this basis would fall foul of the international law it purports to uphold.

5A.2.2.3 *Veto power and the 'failure' of the Council to act*

The voting system adopted in the Charter was intended to ensure political balance, with the safeguards against overuse implicit in the exceptional powers

171 By contrast, note the absence of such language in the post-September 11 resolutions, confirmed by the general reference to self defence in the first post 9/11 resolution 1368.

172 This is sometimes referred to as the 'automaticity' question.

173 The fact that SC Res. 1368 (2001), note 117, is framed as against 'terrorism' in general, rather than any particular situation, provides an additional reason why the resolution could not be interpreted as authorising force consistently with the UN Charter.

174 See the discussion of attempts to rely on authorisation given in the context of the invasion of Kuwait to justify force against Iraq in a quite different context, para 5B.

175 Article 39, Article 42.

vested in the Council.¹⁷⁶ In other words, it was never meant to be easy to get Council approval to use force under the Charter system. This system, and the veto power in particular, has been subject to criticism since its inception,¹⁷⁷ with criticism harshest and most justified during the Security Council inertia of the Cold War era.¹⁷⁸ But such stagnation is distinct from a scenario where diplomacy fails and a functioning Council cannot agree,¹⁷⁹ or the Council never being approached in the first place.¹⁸⁰ Despite the veto, which the US now invokes more than any other permanent member, and despite controversial refusals to authorize force, such as in light of the crisis in Syria of 2011-12,¹⁸¹ numerous resolutions have been passed in recent years, including authorising the use of force, raising the potential for robust Council engagement. It may be that the limitations in the Council role to date, and concerns regarding unilateral resort to force in recent years, have contributed to greater emphasis on the need to reform and improve the UN system for collective security.¹⁸²

Council authorisation remains a *sine qua non* for the legitimate resort to force other than in self defence. It is worthy of emphasis, in conclusion, that the obligation on states is not to give the Council a first opportunity to

176 A Security Council resolution is passed by a majority of states sitting on the Council voting in its favour, absent the use of the veto by one of the Council's five permanent members. The five permanent members of the Security Council are China, France, Russia, the UK and the U.S.

177 Certain non-permanent members have long challenged the legitimacy of the veto power, while some contend that the Council, as envisaged at its inception, has essentially failed. Franck, *Recourse to Force*, note 11, p. 52. Many others, while acknowledging its imperfections, support it as the only available system of collective security. See generally Cassese, *International Law*, note 30, chapters 13 and 14, and Bothe, 'Preemptive Force', note 74.

178 See e.g. 'Uniting for Peace' Resolution, above. The rationale is that while the Council has primary responsibility for international peace and security under the Charter, the General Assembly can assume 'secondary' responsibility where the Council is paralysed. See *Certain Expenses* case, pp. 164-5 and 168. A presumption was that action taken by the UN for the fulfilment of one of the UN Charter's purposes was not *ultra vires*.

179 The secondary General Assembly 'powers' have not however been invoked for decades..

180 See 5B.1 on Afghanistan, where Operation Enduring Freedom continues for over a decade without seeking SC approval, or also B.2, where approval has not been sought.

181 The refusal of the Council to authorize measures such as sanctions or indeed the use of force in Syria in 2012 on has provoked much controversy. See, e.g., 'Friction at the UN as Russia and China veto another Resolution on Syrian Sanctions', *New York Times*, 19 July 2012, available at: <http://www.nytimes.com/2012/07/20/world/middleeast/russia-and-china-veto-un-sanctions-against-syria.html> Syria and Russia describe the violence as the state's response to acts of 'terrorism' in Syria. See, e.g., 'Russia says US tries to Justify Terrorism in Syria', *Reuters*, 25 July 2012.

182 Among many documents and proposals for Council reform see, e.g., 'In Larger Freedom', report of 2005, UN Doc A/59/2005; and 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels', 19 September 2012. UN Doc A/67/L.1, para. 35. See also 'Hoping to Bring Security Council in Line with Contemporary Realities, Speakers in Open Debate Urge Members to Unblock Resistance to Reform' Security Council 60870th Meeting, (UN Doc. SC/1083).

authorise force, before themselves proceeding unilaterally, but to refrain from the use of force unless or until such authorisation is achieved.

5A.3 OTHER JUSTIFICATIONS FOR THE USE OF FORCE? THE LAUDABLE AIMS AND DOUBTFUL LAWFULNESS OF HUMANITARIAN INTERVENTION OR 'FORCE TO ENFORCE'

As noted above, the UN Charter contains a prohibition on the use of force by states, and one explicit exception thereto in the case of self defence. The starting point for assessing any other purported legal justification of potential relevance to the use of force post September 11, is their incompatibility with the plain wording of the Charter. Their validity depends essentially on the establishment of a compelling argument that a pre-existing customary rule continues to exist post Charter, or that a new customary rule has developed alongside the Charter.¹⁸³

The reluctance on the part of the majority of states as regards the development of customary international law that would extend or dilute exceptions to the prohibition on the use of force might be explained in the following words of a Swedish delegate to the Security Council:

The charter does not authorise any exception to this [Article 2(4)] rule except for the right of self defence. This is no coincidence or oversight. Any formal exceptions permitting the use of force or military interventions in order to achieve other aims, however laudable, would be bound to be abused, especially by the big and strong, and to pose a threat, especially to the small and weak.¹⁸⁴

Unlike self defence or Security Council authorisation, the justifications discussed in this section were not invoked directly by states resorting to force post September 11 and as such cannot constitute legal justifications for action taken. However, as they were alluded to alongside the legal justifications discussed elsewhere in the chapter in the context of the use of force in response to terrorism post 9/11, their relevance in legal terms deserves brief consideration.

183 As will be discussed, attempts to interpret Article 2(4) as itself consistent with other justifications for resort to force have been broadly discredited. It is noted that there is however only limited scope for the development of customary law rules that are inconsistent on their face with the provisions of the Charter. See Gray, *International Law and the Use of Force*, note 24.

184 Swedish representative to the Security Council debate on Entebbe incident involving use of force by Israel against hijackers in Uganda, SC 1940th meeting, in Chesterman, *Just War or Just Peace*, note 130, p. 26.

5A.3.1 Humanitarian intervention and the Responsibility to Protect 'R2P'

Proponents of the doctrine of humanitarian intervention assert that international law allows states, in exceptional circumstances, to intervene militarily to avert 'grave humanitarian crisis'¹⁸⁵ or 'humanitarian catastrophe'.¹⁸⁶ More recently, a broader discussion on the developing notion of the international community's 'responsibility to protect' ('R2P') has emerged and is sometimes cited as comprising the right (or rather the responsibility) to use force to prevent mass atrocities.¹⁸⁷

A crucial distinction must however be drawn between the controversial assertion of the right of humanitarian or protective intervention by states, acting individually or in coalitions, and the power of the Security Council to authorise military force on humanitarian grounds. As noted above, the Security Council has the power to authorise enforcement measures it deems necessary pursuant to international peace and security, which has been interpreted by the Council as encompassing prevention of humanitarian crisis.¹⁸⁸ This is reinforced by the 'R2P' doctrine, which is explicit in respect of the Council's role in authorizing force.¹⁸⁹

185 UK justification in Iraq no-fly zones, 26 February 2001, House of Commons Hansard Debates, in Gray, 'From Unity to Polarisation', note 129, at 9.

186 See for example W.M. Reisman, 'Coercion and Self Determination: Construing Charter Article 2(4)', 78 (1984) AJIL 64; F. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed. (New York, 1997). For a detailed critique of these theories, and others, see, in general, Chesterman, *Just War or Just Peace*, note 130.

187 On R2P, see 'The Responsibility to Protect', Report of the International Commission on Intervention and State Sovereignty, December 2001 (hereinafter 'R2P Report 2001'), available at: <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2004), paras. 199-209, available at: <http://www.un.org/secureworld/report2.pdf>; UN GA Res. of 7 October 2009 on the Responsibility to Protect, UN Doc. A/RES/63/308 (2009). See e.g., Brunnee, Jutta and Toope, Stephen J., *The Responsibility to Protect and the Use of Force: Building Legality?* (February 11, 2010). Global Responsibility to Protect, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1551296> acknowledges controversy with 'humanitarian intervention,' p. VII, and presenting a much more limited proposal regarding use of force.

188 The Council authorised coercive measures under Chapter VII against apartheid in South Africa and white minority rule in Rhodesia (SC Res. 232 (1966), note 136), to end non-international armed conflicts in Bosnia-Herzegovina (SC Res. 713 (1991), note 136) and Somalia (SC Res. 794 (1992), note 136), and to protect civilians from crimes against humanity in Libya (SC Res. 1973 (2011), note 121). In practice such crises have usually been accompanied by an 'international' element, such as refugee influx or the prospect of other states becoming drawn into conflict.

189 E.g. Summit Outcome Document, para 239. R2P acknowledges the primary role of the Security Council but leaves open the possibility that other organisations, the GA or regional organizations, fill the role if the Council cannot. As described by Nicholas Tsagourias, R2P endorses the aims behind humanitarian intervention while 'removing the rather charged language of intervention, and by dressing the action in institutional cloths.' N. Tsagourias, 'Necessity and the Use of Force: A Special Regime', 41 (2010) *Netherlands Yearbook of*

Different questions arise in respect of the right of states acting without Council authorisation. As noted above, there is, at a minimum, a 'heavy burden of proof – an obligation to rebut a solid negative presumption' on those who seek to justify recourse to force on these grounds.¹⁹⁰ Yet state practice in support of the emergence of a customary law right to use unilateral force within the framework of – or alongside – the UN Charter remains scarce.¹⁹¹ While numerous interventions have involved a humanitarian element, such as interventions by India in East Pakistan in 1971, Vietnam in Cambodia in 1978 and Tanzania in Uganda in 1979, the states involved relied primarily on other, more traditional, forms of justification, such as self defence. A right to intervene to avert humanitarian catastrophe was asserted by the United Kingdom in the context of Northern Iraq in 1991,¹⁹² and again, most forcefully, by some (but not all) of the states involved in the NATO intervention in Kosovo in 1999.¹⁹³ The Kosovo intervention is often cited by proponents of humanitarian intervention, but it is noteworthy that many of the states involved relied principally on other justifications, such as Security Council support, as the legal basis of the campaign.¹⁹⁴ The same was true of the interventions in Afghanistan (2001) and Iraq (2003), discussed later.¹⁹⁵ The lack of state practice in support of a right to intervene pursuant to the much discussed 'R2P' (including the failure of states to intervene in Darfur or Syria) is even more pronounced.¹⁹⁶

International Law, p. 25. See 'R2P Report 2001', note 187.

190 Franck, *Recourse to Force*, note 11, p. 151.

191 'In the past five years, more than 133 states (representing approximately 80 percent of the world's population) have issued individual or joint statements rejecting the legalization of [humanitarian intervention]... The weight of academic opinion is also against it.' R. Goodman, 'Humanitarian Intervention and Pretexes for War,' 100 (2006) *AJIL* 107, p. 108. Gray, *International Law and the Use of Force*, note 24, p. 57-9.

192 Statement of the United Kingdom Foreign and Commonwealth Office, reported in Gray, *International Law and the Use of Force*, note 24, p. 36-7.

193 Statement of United Kingdom to the Security Council, justifying 'an exceptional measure to prevent an overwhelming humanitarian catastrophe,' SCOR 3988th meeting, 24 March 1999 at 12. Gray, *International Law and the Use of Force*, note 24, p. 42-3 notes that only the Netherlands and the UK asserted that the action was a legal (as opposed to moral) response to a humanitarian catastrophe.

194 Numerous states relied on the fact that the action supported the Security Council's objectives for Kosovo, despite the absence of authorisation for military action. See e.g. White House statement in S. Murphy, 'Legal Regulation of the Use of Force,' 93 (1999) *AJIL* 628, at 631. On the arguments of states before the ICJ, noting that only Belgium argued humanitarian intervention, see Chesterman, *Just War or Just Peace*, note 130, p. 46.

195 See Section B.2.1.6.

196 The principles of R2P appeared to have some effect in Libya, where the Council authorised force, but not in Syria. While not definitive, as states may chose not to exercise the right for various reasons, there is little apparent basis in state practice to indicate support for a unilateral right (or collective right, outwith the UN system) to use force pursuant to R2P. The dearth of state practice on R2P undercuts any assertion of a legal norm having emerged in relation to the use of force. See e.g. Bruneel and Toope, note 187, p. 17. See discussion

While there is much dispute on what the law *should* provide for, even among those who support such intervention in principle, there are relatively few who assert the existence of a right of humanitarian intervention under current international law;¹⁹⁷ this is exemplified by it being described on occasion as a 'situation precluding wrongfulness' rather than as a lawful basis for resort to force in international law.¹⁹⁸ Likewise, several independent enquiries in the wake of the Kosovo intervention found it to have been illegal but morally justifiable, and called for the elaboration of new legal guidelines in this area.¹⁹⁹ However, the ambivalence of many is reflected in the fact that just as humanitarian or protective grounds have not been invoked frequently by states as a legal justification for action, nor has intervention in circumstances where the motivation was – at least in part – humanitarian met with consistent condemnation from states or the Security Council.²⁰⁰

As so few states have asserted a legal right to intervene on these grounds, it follows that the parameters of the concepts remain undeveloped. The UK – seen to be an advocate of a right to humanitarian intervention in the Iraq and Kosovo contexts²⁰¹ – justified as lawful intervention occurring only in the following certain exceptional circumstances:

"Every means short of force has been tried to avert this situation. In these circumstances and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is

'The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect, D Akande, ejiltalk, 28 August 2013.

197 See Fourth Report of the Forth Foreign Affairs Committee, 1999-2000, at www.parliament.the-stationery-office.co.uk/pa/cm1999/28/2802.htm, inquiring into, *inter alia*, the lawfulness of the Kosovo intervention, which noted that the 'sternest critic' as well as the 'firmest supporter' of humanitarian intervention in Kosovo (referring to Professors Brownlie and Greenwood, respectively) agreed that 'the provisions of the UN Charter were not complied with'.

198 Advisory Council on International Affairs, *Failing States: A Global Responsibility*, Advisory Report No. 35, May 2004, p. 59 (hereinafter *Dutch AIV Report* 2004).

199 See Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* 164 (2000). See also Foreign Affairs Committee Kosovo Report, para. 138, 'we conclude that NATO'S military action, if of dubious legality in the current state of international law, was justified on moral grounds'. See also *Dutch AIV Report* 2004, note 198.

200 Absence of condemnation may be a principal measure of state practice and *opinio juris*, but not necessarily so: see Gray, *International Law and the Use of Force*, note 24, p. 21. It has also been pointed out that lack of response may evidence the common inadequacy of enforcement of international law, rather than an endorsement of the legality of humanitarian intervention. Chesterman, *Just War or Just Peace*, note 130.

201 This was a reversal of its previous view that such intervention was 'at best not unambiguously illegal' (see the internal document of the UK Foreign and Commonwealth Office cited in Chesterman, *ibid.*, p. 2).

directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose".²⁰²

Academic proponents of the development of the law on humanitarian intervention have suggested different prospective formulae, including for example the addition of a requirement that execution be by a 'multinational force'.²⁰³ As regards R2P, the newer incarnation proposes to focus more narrowly on the protection against genocide, crimes against humanity, war crimes and ethnic cleansing, and as noted above recognises the importance of collective or institutional rather than unilateral action.

The issue of the use of force for humanitarian protective purposes is extremely sensitive, lying as it does at the heart of the twin objectives of the UN Charter to prohibit the use of force and to protect humanity.²⁰⁴ While States can and should take measures to ensure respect for human rights and prevent crimes under international law,²⁰⁵ ICJ's statement that "the use of force could not be the appropriate method to monitor or ensure such respect" appears to remain valid as a statement of law.²⁰⁶ Likewise, as discussed at Chapter 3, the International Law Commission Articles on State Responsibility preclude the use of force as a counter measure against international wrongs.²⁰⁷ Rather, it would appear to remain the exclusive remit of the UN Security Council to legitimise coercive measures, other than in self defence, 'whatever be the present defects in international organisation'.²⁰⁸

It is noted that some writers have also asserted a right to pro-democratic intervention, closely associated with but separate from the notion of humanitarian intervention.²⁰⁹ The assertion of this exception to the use of force

202 Statement by the UK representative to the Security Council, S/PV 3988 (1999) 12, in Chesterman, *Just War or Just Peace*, note 130, p. 212. On the grounds put forward in relation to Iraq, see Gray, *International Law and the Use of Force*, note 24, p. 37.

203 Recommendations of Professor Vaughan Lowe, in Foreign Affairs Committee Kosovo Report, p. 369. For other academics' proposed guidelines see R.B. Lillich, *Humanitarian Intervention and the United Nations* (Charlottesville, 1973); Teson, *Humanitarian Intervention*, note 198.

204 See Article 2(3) (on human rights) and Article 2(4), UN Charter. Note however that the statement of Russia before the Security Council in the context of the Kosovo debate questioned whether 'the unilateral use of force will lead precisely to a situation with truly devastating humanitarian consequences', SCOR (LIV) 3988th meeting, at 2-3 in Franck, *Recourse to Force*, note 11, pp. 167-8.

205 See Articles 40 and 41 of the ILC's Articles on States Responsibility regarding the collective responsibility for serious breaches of international obligations, including human rights, discussed in Chapters 3 and 7.

206 See Gray, *International Law and the Use of Force*, note 24, p. 35.

207 ILC's Articles, Article 50.

208 *Corfu Channel* case, note 202, p. 29.

209 See Reisman, 'Coercion and Self Determination', note 186. Another manifestation is 'anti-tyranny' intervention, see A. D'Amato, 'The Invasion of Panama was a Lawful Response to Tyranny', 84 (1990) AJIL 516, Cf. M. Byers and S. Chesterman, "'You, the People': Pro-democratic Intervention in International Law', in G.H. Fox and B.R. Roth, *Democratic Governance and International Law* (Cambridge University Press, 2000), 259-292. On democracy

suffers from all of the difficulties of humanitarian or protective intervention, discussed above, aggravated by the assertion of a substantially lower threshold for intervention, and finds no real support in legal doctrine or state practice.²¹⁰ As one commentator notes, 'if taken literally such a rule would render up to a third of the world's states susceptible to intervention on this basis. More realistically, it opens the way to selective application of a principle that is prone to abuse.'²¹¹ The unilateral use of force on such grounds must again be distinguished from the role of the Security Council. Yet as noted above even the Council has been reticent to authorise forceful measures to remove one government (whatever its political complexion or indeed human rights record) and replace it with another in the name of international peace and security.²¹²

In summary, although the issue remains controversial, it is doubtful that the heavy burden of establishing a customary right of forceful intervention on humanitarian grounds has been discharged.²¹³ Momentum around the notion of the 'responsibility to protect' is, however, gaining ground and the law may yet shift to accommodate such an exception to prevent imminent humanitarian crisis in the future.²¹⁴ It remains to be seen whether coherent rules, and procedural and evidentiary safeguards against abuse, can be elaborated, and the issue is likely, once again, to revert to questions regarding the role of a collective security mechanism.

Finally, while an exception on such humanitarian grounds could conceivably cover the aversion of extremely serious acts of terrorism, this would arise only in extremely rare situations. One can readily envisage, however, that should such a norm develop in the future, it would be invoked in justification

as a human right, see, in general, J. Crawford, 'Democracy and International Law', 93 44 (1993) BYIL 113.

210 While the United States is cited as relying on it (among other grounds) in Grenada, it expressly distanced itself from such a claim in its 1989 invasion of Panama; Statement of the United States to the Security Council, S/PV 2902, reported in Gray, *International Law and the Use of Force*, note 24, p. 57.

211 Chesterman, *Just War or Just Peace*, note 130, p. 90.

212 The sole example of it having done so was Haiti, where the Security Council, emphasising the 'unique character of the present situation in Haiti' authorised the use of force to remove the military junta that had overthrown the first democratically elected government, and to return the ousted President Aristide. As noted, there is controversy as to whether this was what the Council authorized in relation to the Libya intervention, even if this was the result. See Chapter 5A.2.2.

213 This militates strongly against its legality as discussed in Gray, *International Law and the Use of Force*, note 24, p. 24 referring to the ICJ in the *Nicaragua* case: '[F]or the Court the fact that states did not claim a new right of intervention was a decisive factor in the rejection of the emergence of any customary law right.'

214 It is noted that states resorting to use of force post September 11, including the erstwhile foremost proponent of the humanitarian justification, the UK, while emphasising the humanitarian element to the military approach, have not sought to rely on humanitarian intervention as a legal justification.

for the use of force against terrorism, just as the one permissible basis for unilateral force that currently exists, self defence is at present.²¹⁵

5A.3.2 Breakdown in international enforcement?

A question of potential relevance to some of the justifications for use of force made in the context of counter-terrorism is whether a state is entitled to resort to force where another state unlawfully violates its essential interests, and the international enforcement machinery contemplated in the UN Charter fails. It has aptly been described as an argument of 'some moral force' that an aggrieved state should be able to enforce its own rights where the 'source of the right' does not do so.²¹⁶ Flying, as it does, in the face of the clear prohibition in Article 2(4) and the foundations of the collective security system established in the UN Charter, a particularly heavy onus would lie on the proponent of such a view.

However, while states will often invoke non-compliance to bolster the perceived justice of their use of force, state practice in support of 'self help' as a legal justification (as opposed to a factor mitigating the culpability of illegal resort to force) is again limited.²¹⁷ The ICJ in the *Corfu Channel* case noted that Albania had violated its international obligations but found that, while this was an extenuating circumstance, it did not justify recourse to force.²¹⁸ Likewise, the International Law Commission's Draft Articles on State responsibility, while recognising that counter measures against another state that has violated its obligations are permitted, make clear that such measures 'shall not affect ... the obligation to refrain from the threat or use of force contained in the UN Charter'.²¹⁹ While a state may, in the face of violations, take measures of 'self help', under the current system of international law these do not include resort to force.

The failure of states to meet international obligations, for example to hold to account those responsible for terrorism, may be relevant to an assessment of aspects of the self defence test, notably the necessity test that requires that

215 On overuse of self defence, see, e.g., Part 5B. Note that elements of humanitarian arguments accompanied the Iraq and Afghanistan interventions, without full-blown humanitarian intervention being invoked. See the discussion of the legitimacy of the idea of force to enforce in the Report of the Dutch Committee of Inquiry into the war in Iraq, NLIR 2010, *supra* note 198.

216 See Franck, *Recourse to Force*, note 11 p. 109, where he opines that the protracted failure of the UN to redress an egregious wrong may give rise to a limited right of self help.

217 In the post 9/11 practice explored at Part B, failure to meet international duties in respect of terrorism has been invoked in most debates around the legitimacy of certain responses.

218 *Corfu Channel* case, note 202, p. 35. See also *Nicaragua* case, note 15, para. 202, on the general principle of non-intervention. See also Chesterman, *Just War or Just Peace*, note 130, p. 54.

219 Article 50, ILC's Articles.

the use of force be a last resort.²²⁰ But beyond self defence, the assertion of a right of unilateral law enforcement 'bears no relation to the text of Article 2(4) and establishes no limits on which rights may be vindicated or by whom'.²²¹ Enforcement of international law has always been and remains a predominant Achilles heel in the international legal system.²²² If its inadequacies, and those of the Security Council veto system in particular, could be relied upon to justify unilateral force it may represent the unraveling of the prohibition on the use of force and the collective fabric of the UN Charter.

5A.3.3 Hot Pursuit?

Finally, it has occasionally been suggested that cross border incursions against terrorists can be justified on grounds of 'hot pursuit'.²²³ This reflects a misapplication of a doctrine applicable to the law of the sea, which 'involves no violation of territorial sovereignty,' to unlawful cross border incursions which do.²²⁴ Despite misunderstandings in this respect, there is little support in practice or doctrine for an exception to the prohibition on the use of force on these grounds.²²⁵

5A.4 FAILED AND FAILING STATES AND THE USE OF FORCE

Growing attention has been dedicated in recent years to the related phenomenon of failed and failing states. State failure undoubtedly has serious implications for human beings and for the international legal order.²²⁶ Con-

220 See discussion of the unwillingness and inability of states to address threats of terrorism as a basis for action in B.2.1. later in this chapter. Dinstein, *War, Aggression and Self Defence*, note 36, at 247, referring to self defence where the state is unwilling and unable as 'extra-territorial law enforcement' and Schmitt, 'Transnational Terrorism', note 36 at 27, emphasising that self defence against non-state actors necessarily involves breaches of states' duties.

221 Chesterman, *Just War or Just Peace*, note 130, p. 56, referring to the theory of 'self help', in support of humanitarian intervention, put forward by Reisman, 'Coercion and Self Determination', note 186.

222 On advances to improve enforcement of international criminal law post 9/11 see Chapter 4B.

223 See justifications by Turkey for incursions in in Northern Iraq at 5B.5 below.

224 *Oppenheim's International Law*, p. 387 on the distinction.

225 *Oppenheim, ibid.*, Dinstein, note 66 p.176, Lubell, 'Extra-Territorial Use of Force, Chapter 3.

226 The issue is not new, but has been given renewed emphasis in part due to the link to the 'war on terror'. See, e.g., G. Helman and S. Ratner, 'Saving Failed States', *Foreign Policy*, 1992-1993, available at: http://www.foreignpolicy.com/articles/2010/06/21/saving_failed_states. They note that 'From Haiti in the Western Hemisphere to the remnants of Yugoslavia in Europe, from Somalia, Sudan, and Liberia in Africa to Cambodia in Southeast Asia, a disturbing new phenomenon is emerging: the failed nation-state, utterly incapable of sustaining itself as a member of the international community.' For a discussion of the issue and its implications, see, e.g., *Dutch AIV Report 2004*, note 198; J. Piazza, 'Incubators of

cerns have often been expressed, not least by successive US administrations, that such states provide staging or breeding grounds for terrorism.²²⁷ One of the questions that arises is the relevance of the failed or failing nature of states to the law on the use of force against terrorism in those states.²²⁸

On one level, the question that arises is whether interventions in a failed state with no government to protect borders or exert sovereignty can be said to be in violation of Article 2(4) at all. The basic international legal principle is, however, that the state (not the government) is the legal entity that bears rights, and continues to do so even after governments may fail. As such, to equate loss of sovereignty with loss of government, still less with weak government, finds little support as an argument of law.

On the current state of law and practice, there is also no separate exception justifying the use of force in failed or failing states. Rather, the failed or failing nature of states may be relevant to an assessment of facts relevant to determining the lawfulness of force under one of the established exceptions in international law.

Firstly, the Security Council may well consider the failing nature of a state as a relevant factor in determining both the existence of a *threat* to international peace and security, and the *necessity* of multilateral action in light of the lack of the state's own lack of capacity to act. The risk of terrorist attacks flourishing unchecked in a failed state or, more strikingly, the human rights implications that flow for the states own nationals of such a situation, may well provide the basis for Council action.²²⁹ Were a broader right of protective intervention on the part of states, beyond action by the Council, to develop in the future, state failure may well be a factor that would contribute to an assessment of the need for such intervention.

Terror: Do Failed and Failing States Promote Transnational Terrorism?', 52 (2008) *International Studies Quarterly* 469, available at: <http://www.politicalscience.uncc.edu/jpiazza/Terrorism%20and%20Failed%20States%20ISQ%202008.pdf>.

227 Obama has emphasized addressing failed states on several occasions. See, e.g., discussion that '[b]efore the American invasion, Afghanistan was a failed state whose government did not provide for the security and needs of its people,' providing 'the perfect environment in which al Qaeda could flourish'. 'Increase Non-Military Aid to Afghanistan by \$1 billion', available at: <http://www.barackobama.com/pdf/CounterterrorismFactSheet.pdf>. The Bush Administration's national security strategy highlights the problem of failed states. For examples, see M. Lehto, *Indirect Responsibility for Terrorist Acts: Redefinition of the Concept of Terrorism Beyond Violent Acts*, (Netherlands: Martinus Nijhoff, 2009) (hereinafter *Indirect Responsibility*); questioning the empirical basis for this see A. Schmid, 'Why Terrorism? Root Causes, Some Empirical Findings, and the case of 9/11,' in Lehto, *ibid*.

228 See, e.g., B. Dunlap, 'State Failure and the Use of Force in the Age of Global Terror', 27 (2004) *Boston College International and Comparative Law Review* 453, available at: <http://lawdigitalcommons.bc.edu/iclr/vol27/iss2/9>.

229 See, e.g., Haiti SC Res. 841 (1993), note 133, and Darfur SC Res. 1593 (2005), note 147, which may have been examples of this. The Council does not treat states failure as a ground in itself however. *Dutch AIV Report* 2004, note 209, p. 55.

Notably, failure may also be relevant to an assessment of when the use of force is permissible in self defence against terrorist groups. The assessment that the territorial state out of which such groups may operate was not willing or able to address the threat, while not determinative of the lawfulness of defensive action (all criteria including imminence of an attack would need to be satisfied), it may be an important factor pointing towards the necessity of force and the lack of an alternative cooperative framework for addressing the threat. So while it is not a separate ground for use of force, 'in the case of state failure, another circumstance that does warrant intervention may exist at the same time'.²³⁰

In short, alternative justifications for the use of force have little support in current international law. Reliance on self defence is, increasingly, the way in which states justify unilateral force, whatever the true motivation and nature of the operations. Sometimes this entails stretching the concept beyond its natural elasticity and raising questions about the distortion of the exception and its effect. This is particularly apparent in practice in relation to the use of force post 9/11 to which we now turn.

5B THE USE OF FORCE POST 9/11

In the immediate wake of the attacks of 11 September 2001, the United States committed itself to a sustained 'war on terror',²³¹ a significant component of which has involved the use of force by the United States, and on occasion its allies, abroad. It began with the large scale military interventions in Afghanistan and Iraq,²³² and has continued with the use of lethal force against suspected terrorists in other states, with strikes to date at least in Pakistan, Yemen and Somalia, with the potential for further expansion. The latter is the latest manifestation of a policy of preventive – or pre-emptive – force against terrorist threats, which was advanced most radically in the United States National Security Strategies of 2002 and 2006 and which continues in practice in somewhat modified form.²³³

²³⁰ *Dutch AIV Report* 2004, note 198, p. 67.

²³¹ See Address of the U.S. President George W. Bush to a Joint Session of Congress and the American People, 20 September 2001, available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>. The categorisation of this as a 'war' is discussed in Chapter 6B1.

²³² The U.S. military campaign against Iraq ('Operation Iraqi Freedom') and the parallel British military operation ('Operation Telic') began on 19 March 2003.

²³³ See *inter alia* US National Security Strategies, below Chapter 5B.3; speeches from President Bush, State of the Union speech to joint session of Congress, Jan 29, 2002 and more recently President Obama, Speech on US drones and counter-terrorism policy, 23 May 2013, Chapter 5B2. On the 'war on al Qaeda and associated groups' and IHL see Chapter 6B.1.1.

Multiple questions arise regarding the application of the legal framework set out in the preceding section of this chapter. This section seeks to highlight some of those questions considered to be of particular significance to an assessment of the lawfulness of the use of force employed since September 11, while highlighting areas of potential development of the law in this field.

5B.1 AFGHANISTAN

The military intervention in Afghanistan began on 7 October 2001 and continues to the present day.²³⁴ The legal justification for military action, advanced by both the United States and its principal ally, the United Kingdom, was self defence in response to 9/11 and in anticipation of a future attack. Both states reported to the Security Council under Article 51. The US noted that measures were taken as a response to the armed attacks of 9/11 and to 'prevent and deter' further attacks.²³⁵ The United Kingdom took a narrower view, justifying the use of force in self defence 'to avert the continuing threat of attacks from the same source' as the September 11 attacks.²³⁶ However, when it came to the objectives of military action, these were presented, at various points and in various guises, as attacking al-Qaeda training camps and personnel, compelling the Taliban to hand over al-Qaeda suspects, and, ultimately, toppling the Taliban regime.²³⁷

234 'Operation Enduring Freedom' began in the immediate aftermath of September 11, on 7 October 2001, and was not necessarily limited to operations in Afghanistan. It has involved the U.S. and several allies. A UN authorized force, ISAF, was established in 2002 to assist the government, in the interests of international peace and security. However it is separate from OEF which continues to operate alongside ISAF in the pursuit of Taliban and Al Qaeda. For more detail see e.g. Gray, *International Law and the Use of Force*, note 24, p. 194.

235 See '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 SCOR, 56th Session, UN Doc. S/2001/946: 'In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States ... We may find that our self-defence requires further actions with respect to other organizations and other States.'

236 See 'Letter dated 7 October 2001 from the Chargé d'affaires 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): 'These forces have now been employed in exercise of the inherent right of individual and collective self defence, recognized in Article 51, following the terrorist outrage of 11th September, to avert the continuing threat of attacks from the same source.'

237 On the objectives of the campaign, see statement by the UK Prime Minister ('Attack on Afghanistan: Tony Blair statement', CNN.com, 7 October 2001, at <http://edition.cnn.com/2001/WORLD/europe/10/07/gen.blair.speech>). See also the report on the military objectives of the campaign released by the British Ministry of Defence (Ministry of Defence, 'Defeating International Terrorism: Campaign Objectives', available at <http://www.operations.mod.uk/veritas/faq/objectives.htm>). Noting apparent inconsistencies between descriptions of

The unprecedented unity following the September 11 attacks translated into either open or tacit support for military action in Afghanistan.²³⁸ Many states indicated their support for the campaign overtly, for example by allowing their airspace to be used,²³⁹ or offering logistical support.²⁴⁰ There was little state opposition expressed in respect of the military action, and the validity of the legal justifications proffered appeared to almost go unquestioned behind expressions of condolence and sympathy with the US.²⁴¹ At first, critical appraisal of the lawfulness of the Afghan intervention from academics and civil society was also extremely cautious and hesitant; considerably more such criticism has emerged as some distance is gained from the autumn of 2001.²⁴²

State reactions to the use of force in Afghanistan, as elsewhere, are relevant to an assessment of the lawfulness of the use of force in that context. They may also potentially, be relevant to an assessment of the development of the law. One incident itself rarely changes the law, particularly if it conflicts with an established rule, and the events in question must be seen in the context of how similar situations were addressed in the past and in particular whether they are replicated in the future. While there are differences of views as to the extent to which the Afghanistan intervention had a 'radical and lasting transformative effect on the law of self defence',²⁴³ as will be seen there are

campaign objectives advanced at different times, *see, e.g.*, V. Lowe, 'The Iraq Crisis: What Now?', 52 (2003) ICLQ 859 at 860.

238 S. Ratner, 'Jus ad Bellum and Jus in Bello after September 11', 96 (2002) AJIL 905, at 910, citing the only questions concerning legality as having come from North Korea, Sudan, Iraq, Cuba, Malaysia, and Iran. Gray, *International Law and the Use of Force*, note 24, p. 193, citing China, Russia, Japan, and Pakistan among others as having supported the intervention.

239 E.g., Greece and Turkey. See House of Commons Research Paper 01/72, 'September 11: The Response', 31 October 2001, available at: <http://www.parliament.uk/commons/lib/research/rp2001/rp01-072.pdf> (hereinafter 'House of Commons Research Paper 01/72'), p. 28.

240 Japan pledged logistical support. See House of Commons Research Paper 01/72, note 239, p. 29-30.

241 Even the Islamic conference communiqué of 11 October 2001 was notably silent on the U.S. bombardment, while stating that 'We have endorsed a global consensus and condemnation of terrorist acts, condolence and sympathy with the United States and a commitment to eradication of international terrorism.' See 'Islamic Leaders condemn terrorism', CNN.com, 11 October 2001, available at: <http://edition.cnn.com/2001/WORLD/meast/10/11/gen.qatar.oic>. Iran was among the few states opposed to the intervention ('Islamic Leaders Condemn Terrorism', *ibid.*)

242 See, e.g., Myjer and White, 'The Twin Towers Attack', note 87; J. Paust, 'Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond', 35 (2002) *Cornell International Law Journal* 533, who criticise the lawfulness of the intervention as it unfolded against the Taleban as well as al-Qaeda. See also S. Kapferer, 'Ends and Means in Politics: International Law as Framework for Political Decision Making', 15 (2002) *Revue québécoise de droit international* 101. Tams, 'Use of Force Against Terrorists' *supra* note 50 p. 391.

243 Gray, *International Law and the Use of Force*, note 24, p. 194.

grounds to consider that it was instrumental in contributing to a legal shift at least in respect of certain aspects of the law of self defence.

5B.1.1 Key questions arising

The questions arising as relevant to the lawfulness of the use of force in Afghanistan, addressed in this section, relate principally to whether the right of self defence was triggered and the requirements of necessity and proportionality met. Specific questions include the following: could the use of force in self defence be justified where al-Qaeda, as opposed to the state of Afghanistan, was considered responsible for the September 11 attacks; could regime change be justified in these circumstances; was Afghanistan a case of justifiable anticipatory self defence;²⁴⁴ was the use of force a last resort and did the states involved discharge the burden of so demonstrating; what relevance should be attached to the failure to engage the Security Council to take the necessary measures, in preference for prolonged reliance on self defence?

5B.1.1.1 Armed Attack by a Terrorist Group: Dispensing with the State responsibility requirement?

Among the key legal issues of relevance to the lawfulness of the intervention is whether self defence could justify the use of force in Afghanistan in response to 'terrorist' attacks by a non-state actor such as al-Qaeda. In other words, where individuals, networks or organisations are responsible for an attack, could self defence be used against them on the territory of another state, even where their actions could not be attributed to that state?²⁴⁵

As set out above, while not uncontroversial, the dominant view (or at least assumption) until the time of the 9/11 attacks was that armed attack occurred at the hand of a state, with differences of view more commonly revolving around the standard for attribution.²⁴⁶ It was notable, then, that while multiple allegations were lodged against the Taleban,²⁴⁷ the case for its legal

²⁴⁴ As this issue was not controversial in relation to Afghanistan but came into sharp focus in relation to Iraq, anticipatory self defence in Afghanistan is considered at Section 5.B.2.

²⁴⁵ There can be little doubt that the events of 9/11 met other 'armed attack' criteria relating to scale and intensity threshold (see A.2.1); the focus here is on authorship and the status of actors as the controversial issue.

²⁴⁶ See Part A.2.1; cf US and Israel's more isolated positions pre 9/11.

²⁴⁷ There were various references to the Taleban having 'harboured', 'supported' or 'protected' al-Qaeda (UK letter to the Security Council, statements by U.S. President and NATO Secretary General, discussed at Chapter 2) but not to the regime having been legally responsible for the attacks. See, e.g., the statement made on 7 October 2001 by the UK Prime Minister (note 237): 'There is no doubt in my mind, nor in the mind of anyone who has been through all the available evidence, including intelligence material, that these attacks were carried out by the al Qaeda network headed by Osama bin Laden. Equally it is clear

responsibility for the September 11 attacks was never made out in terms by the states seeking to engage in military action in Afghanistan.²⁴⁸ From information publicly available, it is open to question whether the Taleban regime had the power and authority in respect of al-Qaeda to satisfy the degree of control required for the acts of private entities to be legally attributed to it. This is a question of fact, the onus of proof in respect of which would normally rest with those seeking to establish responsibility, but intervening states in Afghanistan declined to do so. No evidence of the regime's 'control' over al-Qaeda, nor clarity as to the other allegations against the regime (and legal consequences thereof), was advanced.

The September 11 attacks were nonetheless broadly characterised – including, in their immediate aftermath, by the Security Council,²⁴⁹ NATO²⁵⁰ and other bodies²⁵¹ – as amounting to 'armed attacks' for the purposes of self defence. On one view these statements, and the conduct of at least some intervening states, could conceivably have been based on *assumptions* as to the responsibility of Afghanistan, consistent with state responsibility being a prerequisite of the law of self defence.²⁵² But on another view the acceptance of the right to self defence as arising in response to the September 11 attacks, absent assertions of state responsibility, strengthens the case that such responsibility was not (or no longer) a prerequisite for self defence under Article 51, at least in the peculiar circumstances of Afghanistan.²⁵³

While perhaps not dispositive, the Afghan intervention and reactions thereto did appear to tilt the balance away from the necessity of a state re-

that they are harboured and supported by the Taliban regime inside Afghanistan. ...We have set the objective to pursue those responsible for the attacks, to eradicate bin Laden's network of terrorism and to take action against the Taliban regime that is sponsoring him.'

248 Acts of private individuals become attributable to the state where the latter exercises 'effective control' over the conduct of the former; the Taliban may also be responsible for 'indirect aggression' where it has 'substantial involvement' in the activities of al-Qaeda. For more detail on applicable standards, see Chapter 3.

249 Resolution 1368 (2001), recognised the 'inherent right of individual or collective self-defence, implicitly accepting that that terrorist attacks addressed in the Resolution constituted 'armed attacks' under Article 51.

250 NATO press release (2001) 124.

251 NATO, OAS, EU and others organisations also affirmed the right of self defence. See C. Gray 'The US National Security Strategy and the New "Bush Doctrine" on Pre-emptive Self-Defence', (2002) 1 *Chinese Journal of International Law* 437, p. 441.

252 By noting that force would be used against 'the same source' as the September 11 attacks, while identifying the Taleban as one of the objectives of the military intervention, the UK's position could be interpreted as having been premised on an assumption that the test had been satisfied. (See however C. Greenwood, 'International Law and the "War against Terrorism"', note 53, at 303, noting that no such allegations of responsibility were made). See L. Sadat, 'Terrorism and the Rule of Law', note 53, at 150.

253 See Greenwood, 'War against Terrorism', *ibid.* See Gray, *International Law and the Use of Force*, note 24, p. 208 on the peculiar circumstances and the view of some that Afghanistan may be seen as a 'one-off' situation. Cf Tams, 'The Use of Force', note 50. See also conclusions in this chapter and Chapter 12.

sponsibility nexus.²⁵⁴ As noted in Part A, this apparent shift was swiftly countered by a subsequent ICJ opinion, however, reasserting the traditional view that self defence arises in response to an attack by or on behalf of a state,²⁵⁵ though as noted in the legal framework section a subsequent ICJ decision was more equivocal.²⁵⁶

Subsequent state practice showed that the approach adopted vis-à-vis Afghanistan was not an aberration. Perhaps the clearest example is the Turkish incursion into Northern Iraq in 2008, to combat 'terrorism' and those that 'help or harbor terrorists.' State responses did not indicate opposition, in principle, to the use of force against armed groups as a violation of Article 2(4).²⁵⁷ Another example relates to the Hezbollah attacks that prompted Israeli incursions into Lebanese territory in 2006; Israel was condemned for the lack of proportionality of the attacks, but not for using force and invoking self defence against a non-state group (although some of Israel's statements held Lebanon responsible for the attacks).²⁵⁸ Just as with 'Operation Enduring Freedom' in Afghanistan, the question of attribution does not appear to have been treated as a defining question in these situations. The non-state actor issue was not a significant feature of debate on the legality of subsequent cross border capture operations.²⁵⁹

While there is still controversy, and room for alternative interpretations of practice, the weight of commentary supports the view that clear cut attribution is no longer a pre-requisite to trigger resort to self defence.²⁶⁰ It would seem that widespread references to the right to 'self defence' post 9/11, including by the Security Council on 12 September 2001, represented or con-

254 As noted in this Chapter 5B.4 this development will have to be assessed in context, in light of subsequent approaches to other similar situations.

255 *Wall Advisory Opinion*, note 36, para. 139, discussed at Section 5.A.2.1.1.(ii).

256 *Armed Activities* case, note 18. See section A.5A211(a)(i)

257 Other states appear to have been broadly supportive and even the criticism was couched in terms of the use of force as 'not the best response. The territorial integrity of Iraq is for us very important,' rather than as unlawful. Foss, *supra* note 58, at 28-31, Tams, 'The Use of Force', note 63, p. 380.

258 S.C. Res. 1701 (2006), 11 August 2006, UN Doc S/RES/1701 (2006). See, e.g., Secretary General Press Release UN Doc. SG/SM/10570, SC8791, 20 July 2006, and discussion of states' positions in Security Council discussions. Foss, *ibid.*, at 26. Statement of G8 noting Israel was 'exercising the right to defend itself...'. Many condemned the lack of proportionality rather than the use of force per se. See, e.g., Foss, *ibid.*, at 25-28, Tams, 'The Use of Force', note 63, at 379.

259 Chapter 9 on the Bin Laden operation and e.g. the U.S. intervention in Libya in 2013 to capture suspected terrorist al Libi who was taken to stand trial in a U.S. court: 'Captured in Libya, 1998 Bombing Suspect Pleads Not Guilty in a Manhattan Court', *NY Times*, 13 Oct 2013.

260 Leiden Recommendations, note 59, para. 38. 'Chatham House Principles', note 36; Wilms-hurst, 'Anticipatory Self Defence', note 69; Tams, 'Use of Force', *supra* note 50, p. 381; Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', note 87.

tributed to a shift in the law.²⁶¹ The question of attribution is no longer considered an essential, though it may yet be relevant to other questions, including the permissible scope of action in self defence, addressed later in this chapter.

There is some question whether states simply dispensed with the need for a state nexus in Afghanistan, or whether they might have been endorsing a lower standard than the traditional 'effective control' test for attributing conduct to the state.²⁶² A shift in standards of attribution may have broader implications for the international legal framework, including finding states responsible for a broader range of private actors, which states may not be willing to embrace.²⁶³ It may be that a loosening of the law on self defence has found favour over a rewriting of the laws on state responsibility.²⁶⁴

It is noteworthy, however, that while the reactions of states and commentators supportive of the use of force in Afghanistan, noted above, seemed to suggest there is no state responsibility requirement, they do appear to rest on assumptions of some degree of 'culpability' on the part of the Afghanistan *de facto* government. It is not however always apparent whether this is a legal prerequisite (or factor rendering the operation more politically palatable), and what precisely is the *legal relevance* of the various formulae put forward to the effect that the Taliban had supported, harboured, protected, or provided safe haven for terrorists²⁶⁵ or that it had 'violated international law' in its relationship with al-Qaeda,²⁶⁶ or otherwise.²⁶⁷

The approach adopted in Afghanistan may have paved the way for, or influenced, subsequent reliance on states having 'harboured' terrorists (the Israeli allegation against Lebanon in 2006²⁶⁸) or been 'unwilling or unable' to address terrorist threats, as providing a basis for the use of force against

261 See, e.g., Greenwood, 'War against Terrorism', note 53. Like the Security Council, NATO, the OAS, the EU and other international organisations also referred to the right of 'self defence' shortly after 9/11.

262 On the assertion that the recognition of 'self defence' represents not a rejection of the state responsibility requirement, but a lowering of the standard by which the conduct of individuals becomes attributable to the state see e.g. Jinks and Sassòli note 53.

263 See discussion in Chapter 3 on e.g. responsibility for terrorism and for private contractors, often engaged in counterterrorist activity without the state being effectively accountable for their actions.

264 Lehto, *Indirect Responsibility*, note 227 at 405, suggests that it 'seems easier to accept a new interpretation of the rules governing the use of force than to set aside the rules of attribution'.

265 For instances where these formulae were used, see Chapter 3. Note also that the U.S. National Security Strategy commits the U.S. to holding to account 'nations that are compromised by terror'.

266 Greenwood, 'War against Terrorism', note 53, p. 313. See the rule against the use of force being invoked as a remedy for violation of obligations, discussed earlier in this Chapter.

267 These wrongs, which were well established, may provoke a right and duty to take steps against a regime, but do not provide a legal justification for using force and they were not invoked as doing so.

268 Gray, *International Law and the Use of Force*, note 24, p. 234-5.

them.²⁶⁹ A number of the questions that arose of relevance to state responses to the Afghan intervention are therefore of broader significance in relation to the use of force against al Qaeda (and other terrorist groups), addressed in the following section.

While certain of the wrongs committed by the Taleban regime may well have created rights and obligations on the part of the international community, they appeared to fall short of amounting to state involvement in the armed attack against another state, and created a dubious legal justification for the use of force.²⁷⁰ The legal relevance, to the use of force, of a state having failed in its obligations to prevent acts of terrorism was not made clear. Obvious doubts related to lack of clarity as to the legal standards and by whom these determinations could be safely and appropriately be judged.²⁷¹

The introduction of notions of culpability may in practice be an attempt to limit (at least a little) the circumstances in which such force can be used on another state's territory, rather than purporting to provide a legal justification as such. Other interpretations of the law pursue a similar end, such as the suggestion noted above that only 'large scale' attacks by non-state actors should trigger the right to use force in self defence.²⁷² There is clearly an awareness of the potential practical and political implications of the removal of the state responsibility link. If a mere territorial link between a state and a responsible organisation were to be sufficient to justify use of force against that state, might the states of 'North America, South America, Europe, Africa, the Middle East and across Asia' which, according to reports, have terrorist cells operating in their territories, be susceptible to attack?²⁷³

The drive to interpret self defence as allowing states to take necessary measures while limiting the circumstances in which this might arise to avoid overreach and ready resort to force is understandable. The multiple claims by states to be using force against terrorists in recent years testify to the importance of restraint. The contours of the concepts surrounding self defence

269 See B.2. below for the Obama administration's reference to unwillingness or inability in the context of self defence, or the more extreme position advanced by Jack Goldsmith, former President Bush adviser, that the prohibition on force does not apply where a state is 'unable to unwilling' to meet the threat itself.

270 On state responsibility and permissible action against wrongdoer states, *see* Chapter 3. As noted in section 5A, the use of force is not justified as a counter-measure against wrongdoing states, unless justified in self defence.

271 *See* Chapter 3 on State responsibility and the impermissibility of force as a counter-measure. 'R2P' reflects the role of the Security Council in making such determinations.

272 Leiden Recommendations, note 59, para. 39. *See* threshold discussion in 5A.2.1.1 of this chapter.

273 'U.S. National Security Strategy', note 251, p. 5. The direct planning of the September 11 attacks took place in several countries, but there is little suggestion that those states should be vulnerable to attack from others defending against the global terrorist threat. Allegations of failure to exercise due diligence are common in most such states at some point; *see* Chapter 7A4.

– whose stretching in recent years may have been followed by attempts to shrink them back to a safer size – may need to continue to be defined and clarified in the years ahead.

5B.1.1.2 Regime change as necessary and proportionate?

It may be accepted as compelling that the rationale of self defence requires a state to be able to take necessary measures to defend itself against those responsible for an imminent or on-going attack, whatever their status and wherever their location, and irrespective of attribution. It may remain doubtful, however, on what basis force can then be directed against the institutions of a state, with a view to regime change, where that state has not been found, or indeed alleged, to be responsible for the attack or the source of any on-going or future attack.²⁷⁴ Questions as to the respect for the territorial integrity and political independence of the state, reflected in Article 2(4) of the Charter, are all the more pressing where force is used not only against private actors on the state's territory but against the institutions of the state itself, and particularly with a view to bringing about a change in regime.

A key issue to arise in relation to the military intervention in Afghanistan is therefore whether targeting institutions of the state, and regime change, was a legitimate objective under the law of self defence, and specifically how it measures up against the necessity and proportionality test? Where a state does not exercise sufficient 'control' over the organisation's conduct to be legally responsible for it, in what circumstances, then, is the government's removal nonetheless strictly necessary and proportionate to avert the threat? A particularly heavy onus must lie on states seeking to rely on their own right of self defence to remove another government, given the Charter's fundamental principle of sovereign equality and political independence, to demonstrate the strict necessity of such measures.²⁷⁵

Despite statements by the UK that force would be directed against the 'same source' as the September 11 attacks, the military intervention in Afghanistan went beyond the targeting of al-Qaeda operations, to the removal of the Taleban regime.²⁷⁶ However, the UK government was evidently uncomfortable with the concept of regime change and sought carefully to restrict its justification for the removal of the Taleban as necessary to destroy the al-Qaeda

²⁷⁴ For the purposes of necessity, brief incursions onto foreign territory to take particular measures of defence, maybe distinguished from removal of a government.

²⁷⁵ Article 2(4) and 2(7) UN Charter.

²⁷⁶ See, e.g., Blair speech of 7 October 2001, note 237; The British Ministry of Defence (note 237) expressly stated that one of the immediate objectives of the so-called Operation Veritas was to bring about '[a] sufficient change in the leadership to ensure that Afghanistan's links to international terrorism are broken ... where necessary taking political and military action to fragment the present Taliban regime, including through support for Pushtoon groups opposed to the regime as well as forces in the Northern Alliance'.

network (even if, as noted above, it did not then clarify the factual basis for its assessment of this relationship between the Taleban and al-Qaeda).²⁷⁷

Concerns about 'regime change' were even more apparent in relation to Iraq discussed at 5B3. In that context, while the US placed considerable emphasis on 'regime change' and the removal of Saddam Hussein, going so far as to place a bounty on his head, it is noteworthy that European states supportive of the United States again sought to distance themselves from these objectives, emphasising that 'Our goal is to safeguard world peace and security by ensuring that this regime gives up its weapons of mass destruction.'²⁷⁸ Such issues have been described as dividing the US and UK governments, and the latter took pains to emphasise that while regime change might be a welcome 'consequence' it was not the 'aim' of the intervention.²⁷⁹ As such, it may be doubtful then whether the Afghan situation, particularly when seen in context of the Iraqi one that followed it, provides any basis for asserting a new legal doctrine of regime change.²⁸⁰

While the support for the use of force in Afghanistan in 2001 was undoubtedly overwhelming, it is questionable whether the same consensus attended the necessity and proportionality of the actual use of force as it unfolded in the months and now many years that followed. The lawfulness of targeting the Taleban depends on whether doing so was genuinely necessary to protect the intervening states – a question of fact that appears never to have been clearly established.²⁸¹ The continued reliance on self defence as a basis for

²⁷⁷ See, e.g., statement of the UK Prime Minister: 'Our target the whole time is to close down the terrorist network in Afghanistan. Since the Taliban regime stand between us and that objective, then we have to remove them. If they choose – as they have done so far at least – to side with bin Laden ...' ('Blair: We have no choice but war', *The Mirror*, 31 October 2003). See also 'Blair says evidence against bin Laden 'powerful' Radio Interview with Tony Blair on ABC Local Radio, Australia, 1 October 2001: 'If [the Taliban] are not prepared to give up bin Laden, which they could do if they wanted to, then they become an obstacle that we have to disable or remove in order to get to bin Laden. So that's their choice. So it's not as if we set out with the aim of changing the Taliban regime, but if they remain in the way of achieving our objective, namely that bin Laden's associates are yielded up, and the terror camps are closed. Then the Taliban themselves become our enemy' (transcript available at: <http://www.radioaustralia.net.au/international/radio/onairhighlights/428882>).

²⁷⁸ M. Champion, 'Eight European Leaders Voice Their Support for U.S. on Iraq, Letter From Group of Countries Isolates France, Germany, Smooths Path to War,' *Wall Street Journal*, 30 January 2003, available at: <http://online.wsj.com/article/0,SB1043875470158445104,00.html> (23 October 2012). The open letter was signed by the Prime Ministers or Presidents of the Czech Republic, Denmark, Hungary, Italy, Poland, Portugal, Spain and the United Kingdom.

²⁷⁹ The UK Attorney General advised that regime change would not be a lawful objective. 54 ICLQ (2005) 767, para 36. See discussion in Gray, *International Law and the Use of Force*, note 24, p.231-34.

²⁸⁰ On the view that there is no such support, see Gray 'Regime Change', *ibid.*, 231.

²⁸¹ Doubts as to the relationship between the Taleban and al-Qaeda, and whether the former really controlled the actions of the latter, grew over time. See, e.g., the reports of the 9/11 Commission (National Commission on Terrorist Attacks upon the United States) noting

forceful action in Afghanistan against Taleban and al Qaeda years later raises 'growing concern that *Operation Enduring Freedom* overstretched the limits of self-defence.'²⁸²

5B.1.1.3 Last resort?

A question much discussed in relation to Iraq but relevant also to the use of force in Afghanistan and elsewhere is whether the military intervention was, as it must be under the law, a last resort, with all peaceful means having been exhausted in accordance with Article 2(3) of the Charter. According to statements by the US President and UK Prime Minister, the bombardment of Afghanistan and the Taleban was justified, in part, by reference to the fact that attempts to secure the extradition of bin Laden and others had been unsuccessful. Before 9/11, extradition of bin Laden had certainly been sought through the Security Council,²⁸³ although post 9/11 it took the form of a demand, outwith the extradition process, that he and others be 'turned over' for extradition from the United States.²⁸⁴

Did this suggest that military action (at least against the Taleban) may not have been necessary if the Taleban had cooperated and been 'prepared to give up bin Laden'?²⁸⁵ It is a question of fact whether all efforts to handle this matter by the criminal law route were exhausted, whether the international cooperation was fully engaged and exhausted, whether the requests for extradition could have been made more effective if bolstered by robust international coordination (and backed up where necessary by Security Council authorisation

that members of the Taleban leadership opposed 9/11 for strategic reasons.

282 Tams, 'The Use of Force', note 50, p. 378.

283 See, e.g., SC Res. 1333 (2000), 19 December 2000, UN Doc. S/RES/1333 (2000). Post 9/11, the Council again urged compliance with earlier resolutions. 'Security Council Urges Taliban to Comply with Texts Ordering Bin Laden Handover', *United Nations News Centre*, 18 September 2001, available at: <http://www.un.org/apps/news/storyAr.asp?NewsID=1501&Cr=iraq&Cr1=>.

284 Reportedly the U.S. demanded extradition, the Taleban requested proof of bin Laden's involvement and later (with the prospect of air strikes looming) said it would consider turning him over to a third country but the U.S. administration indicated that it would not negotiate. After strikes began, the Taleban reiterated its offer: see, e.g., *Toronto Star*, 6 October 2001, p. A4; or *Associated Press*, 7 October 2001: 'Under Islamic law, we can put him on trial according to allegations raised against him and then the evidence would be provided to the court.' It may be that cooperation was not feasible and would not have weakened al-Qaeda sufficiently, but, as has been noted, 'that case was never really made in public'. See R. Falk, 'Appraising the War against Afghanistan', p. II, available at <http://www.ssrc.org/sept11/essays/falk.htm>.

285 See Radio Interview with Tony Blair: 'If they are not prepared to give up Bin Laden, which they could do if they want, they become an obstacle. That is their choice', ABC Radio, note 277.

to use coercive measures),²⁸⁶ or whether the 'extradition' ultimatum was essentially of presentational significance. If self defence were justified at the outset, could the threats at a certain point have been addressed through law enforcement and was this justified on an ongoing basis?

While it would be far-fetched to suggest that the existence of the complex system of national and international criminal justice automatically renders the right to use force in self defence redundant, should be one of the alternatives that states are obliged to explore in assessing the necessity of resorting to force. What may be noteworthy then is that the criminal law paradigm and its relationship to the necessity of the use of force was virtually absent from post September 11 discourse by those that were responsible, ultimately, for the Afghan intervention. While people can reasonably disagree on whether law enforcement measures alone would have been effective to meet the threat posed, and the Afghan record gives cause for profound skepticism,²⁸⁷ the question remains whether, in these circumstances, the case for the necessity of force (of the nature and scale employed in Afghanistan) was adequately made out at all relevant stages.

5B.1.1.4 Self defence and the Security Council post 9/11

Indications are that in the wake of 9/11 the Security Council was poised to assume its responsibility in respect of a situation that it condemned, the day after the attacks, as a 'threat to international peace and security',²⁸⁸ in clear reference to its unique powers to determine and take measures (including if necessary the use of force) to address such threats. It also '[e]xpress[ed] its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations'.²⁸⁹ However, this dimension of the Council's role was not invoked by states, which proceeded instead to act unilaterally and through US-led 'coalitions of the willing'.²⁹⁰ While the UN subsequently authorized ISAF in Afghanistan, it is noteworthy that despite the passage of more than a decade into the enduring military

286 One question is whether criminal law enforcement in conjunction with military force might debilitate the threat, reducing the scope for military action even if it fails to avert it altogether.

287 Prior efforts to secure suspects and process suspected terrorists are a factor in such a determination. However, the possibility of unprecedented post 9/11 unity providing the basis for an enhanced cooperation initiative, if necessary supported by the use of force as a law enforcement tool, should also be considered. See Chapter 4.

288 SC Res. 1368 (2001), 12 September 2001, UN Doc. S/RES/1368 (2001), para. 1.

289 *Ibid.*, para. 5.

290 It has been pointed out that the coalition was not brought under the umbrella of the UN, in contrast to the Gulf Coalition that used force against Iraq in 1990. See Myjer and White, 'The Twin Towers Attack', note 87, at 7. See however, the separate ISAF operation.

operation in Afghanistan, the US continues to purport to act in self defence through Operation Enduring Freedom.²⁹¹

Military action in Afghanistan therefore prompts questions as to the correct relationship between permissible self defence and collective action under the Charter. While the US and its allies may have fulfilled the obligation under Article 51 to 'report' measures taken in self defence to the Council, one question is whether they should have attempted to secure a mandate from the Council instead of relying on self defence one month after the attack.²⁹² The Article 51 reference to self defence 'until the Security Council has taken measures necessary to maintain international peace and security' suggests so. It may be questioned then whether the refusal to engage the Council in this context undermined the collective security mechanism.²⁹³

So far as the use of force is unilateral (permissibly so in the case of self defence) the underlying assessments – such as whether alternative means exist, whether a threat is imminent, or whether it is necessary in the wake of an attack to remove governments perceived to be sympathetic to terrorist causes – are in turn unilateral. In part this highlights the importance of having strict and clearly defined criteria for self defence. It also underlines the importance of a collective mechanism assuming its role at the earliest opportunity. Growing lack of confidence in the reliability of intelligence on the basis of which decisions are made, generated through the 'war on terror', underscores the importance of checks on individual states' discretion to act. By refusing to engage – rather than only report to – the Security Council, states avoided accountability and oversight of the resort to armed force internationally.

5B.2 THE USE OF FORCE IN THE 'WAR' WITH AL QAEDA AND ASSOCIATED TERRORISTS WORLDWIDE

Alongside the conflict in Afghanistan, the US has consistently claimed to be waging a broader war against 'al Qaeda and associated groups' (as discussed in chapter 6, IHL).²⁹⁴ Pursuant to this, it claims the right to use force against

291 It referred to the operation once, while extending the operation of ISAF. Gray, *International Law and the Use of Force*, note 24, p. 207.

292 Note also that questions have been raised as to whether the requirement of 'immediacy' was met by action taken outside the Security Council framework one month on: see generally Myjer and White, 'The Twin Towers Attack', note 87.

293 Article 51 itself provides for self defence 'until the Security Council has taken measures necessary to maintain international peace and security' and imposes an obligation to report.

294 See further Chapter 6.B.1. See inter alia George W. Bush, State of the Union speech to joint session of Congress, Jan 29, 2002; US National Security Strategies, below; most recently President Obama, Speech on US drones and counter-terrorism policy, 23 May 2013, note 233.

non-state actors in territories beyond traditional battlefields.²⁹⁵ In practice, the US has in fact used cross border force against terrorists on a widespread basis, in several states and with growing regularity in recent years.²⁹⁶ Most commonly, this involves air strikes by unmanned aerial vehicles (commonly referred to as 'drones'). Although not limited to Pakistan,²⁹⁷ it is noted that reports indicate thousands of deaths through drone killings in that state alone.²⁹⁸ In Yemen, such attacks are on the rise.²⁹⁹ While less information is available in relation to Somalia, it is clear that numerous attacks have also occurred there, apparently mainly against members of the the al Shabaab organisation believed to have close links to al Qaeda.³⁰⁰ Less commonly, Special Forces operations have also conducted raids to kill (or on occasion to capture) suspected al Qaeda operatives, as illustrated by the particular case

295 "The long war against terrorist networks extends far beyond the borders of Iraq and Afghanistan and includes many operations characterized by irregular warfare – operations in which the enemy is not a regular military force of a nation-state. In recent years, U.S. forces have been engaged in many countries, fighting terrorists and helping partners to police and govern their nations." US Department of Defense *Quadrennial Defense Review Report* (2006) p.11.

296 "In January 2009, when Obama came to power, the drone programme existed only for Pakistan and had seen 44 strikes in five years. With Obama in office it expanded to Afghanistan, Yemen and Somalia with more than 250 strikes. Since April there have been 14 strikes in Yemen alone." 'Drone wars and state secrecy – how Barack Obama became a hardliner' Paul Harris, *The Observer*, Saturday 2 June 2012 20.56 BST <http://www.guardian.co.uk/world/2012/jun/02/drone-wars-secrecy-barack-obama>.

297 The Guardian's website maps the locations of drones strikes in Pakistan: http://www.guardian.co.uk/news/datablog/interactive/2012/aug/02/drone-attacks-pakistan-map?utm_medium=referral&utm_source=pulsenews.

298 See e.g., Stanford Law School Report *Living Under Drones* (2012) at < <http://livingunderdrones.org>>; The Bureau of Investigative Journalism (TBIJ) reports that drone strikes killed 2,562-3,325 people in Pakistan from June 2004 through mid-September 2012. It has been noted that the number has now surpassed the number of those killed in 9/11, though of course legally the requirements of self defence do not involve numbers calculations but proportionality to the attack or imminent threat being averted, as noted in part A and further below. Chapter 6B22 for more detail on drones.

299 TBIJ asserts that the Yemen casualties since 2002 have amounted to between 362-1,052 (reported) and that there have been between 53-63 confirmed U.S. operations in Yemen over this time. For examples see <<http://www.thebureauinvestigates.com/2012/05/08/yemen-reported-us-covert-action-2012/>>.

300 While reporting on the U.S. intervention in Somalia (2001) is described as incomplete, TBIJ has reported approximately 170 people have been killed since 2007, and that there have been up to 23 U.S. strikes and 9 drone strikes between 2007 and 2012. The main target of US action in Somalia has been militant group al Shabaab which is reported as having strong links with al Qaeda. [*Reuters*, 'Qaeda leader says Somalia's Shabaab joins group' Feb 9 2012 <<http://www.reuters.com/article/2012/02/09/ozatp-qaeda-shabaab-idAFJOE8180BP20120209>>], though al Qaeda leaders are also among those targeted: see e.g. Eric Schmitt and Jeffrey Gettleman 'Qaeda Leader Reported Killed in Somalia' *New York Times*, May 2, 2008 accessed <<http://www.nytimes.com/2008/05/02/world/africa/02somalia.html?ref=adenhashiayro&r=0>>.

of Osama bin Laden discussed in Chapter 9.³⁰¹ The actual, and potential, scope of such international operations remains uncertain; one area of speculation for example is whether, or how, the increased CIA surveillance over sways of Africa for example will translate into the 'elimination' of detected threats.³⁰² What is clear is that targeted killings have vastly increased in the course of the war on terror.³⁰³

The US justifies the use of force, including the now frequent resort to drone killings, as 'consistent with its inherent right to self defense under international law'.³⁰⁴ It has claimed the right to attack al Qaeda and associated entities and individuals "anywhere in the world," consistent with the perception of a "global battlefield" and a conflict against international terror networks of 'global reach'.³⁰⁵ The nature of the escalated resort to force by the US raises many questions from across the legal framework.³⁰⁶ The implications of the 'long war' and the 'global battlefield' for the laws of war/IHL, and the inter-relationship with human rights protections, for example, are often the focus of attention, as discussed in Chapters 6 and 7. But critical issues also arise as regards the implications for the principles enshrined in Article 2(4) and the strained approach to the concept of self defence in international law. Some of the key questions arising in respect of the purported right to use force

301 See Lubell 'the War(?) with al Qaeda', referring to operations in Syria, p. 428, and the Libya raid to capture al Libi, October 2013, in E. Wilmshurst (ed.), *Classification of Conflicts* (Oxford), 2013.

302 See, e.g., 'U.S. expands secret intelligence operations in Africa' *Washington Post*, 14 June 2012. The surveillance planes are launched from one of a series of bases where states appear to have consented, but travel into many other African states where counterterrorism is described as the main U.S. priority. http://www.washingtonpost.com/world/national-security/us-expands-secret-intelligence-operations-in-africa/2012/06/13/gJQAHyvAbV_story.html.

303 See below, though Obama heralded a reduced resort to drones in the future in his 2013 National Defense University speech.

304 E.g., Harold Koh, Comments at the Annual Meeting of the American Society of International Law, Washington, D.C. (hereinafter 'ASIL Comments 2010') 25 March 2010, available at: <http://www.state.gov/s/1/releases/remarks/139119.htm>. John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, The Efficacy and Ethics of U.S. Counterterrorism Strategy, Remarks at the Woodrow Wilson International Center for Scholars (Apr. 30, 2012), available at <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>. A released DOJ White Paper, "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force," disclosed by NBC News, 4 Feb 2013 provides the parameters of the US legal position; see also President Obama, speech, 23 May 2013, note 233, asserts the lawfulness of all such actions under the law of self defence.

305 George W. Bush, State of the Union speech to joint session of Congress, Jan 29, 2002; Obama continued to assert the right to target enemies wherever they are; see below for emerging qualifications such as the willingness and ability of the state.

306 This is for many reasons, related to IHRL, IHL – see, e.g., Special Rapporteur on Extra-judicial arbitrary executions among other condemnation (available at: <http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx>) – though they also raise serious issues regarding the law on the use of force which are the focus of this chapter.

against members of al Qaeda on a potentially global scale are highlighted below.

5B.2.1 Overriding Sovereignty? Questioning the relevance of Article 2(4)

A preliminary question has arisen regarding whether the targeted use of force against al Qaeda suspects in certain states around the world, in certain circumstances, engages the article 2(4) prohibition at all. On a perhaps extreme view, it would be unnecessary to invoke self defence as there would be no use of force in *prima facie* violation of Article 2(4).

One question in this vein is whether limited incursions onto another state's territory, for the purposes of a targeted killing for example (as opposed to the large scale military interventions that characterized early resort to force in the war on terror), should be considered to violate territorial integrity or political independence envisioned in Article 2(4) at all. The fact that states often emphasise the 'limited' nature of incursions may suggest that this is relevant to the determination of lawfulness.³⁰⁷ However, as noted in relation to the legal framework set out above, the dominant reading of international law as it currently stands is that there is no 'threshold' for the use of force between states, such that limited excursions might be considered excluded from the prohibition. Rather, any coercive incursion onto another state's territory may violate Article 2(4) unless it can be justified by reference to one of the exceptions outlined above.³⁰⁸

Another view to emerge from debate in the United States, but of doubtful legal force, is that if a territorial state is 'unwilling or unable' to itself address the terrorist threat from its territory, the Charter's 'sovereignty concerns are overcome' and there is simply no violation of Article 2(4).³⁰⁹ While as noted below, willingness and ability may be one factor of relevance to an assessment of whether self defence is necessary,³¹⁰ it must, however, be seriously doubted

307 Tams, 'Use of Force', *supra* note 50, p. 388.

308 This relates to the question of a 'threshold' discussed in a different context (when an armed attack by terrorist groups might arise) in part A.

309 Jack Goldsmith, former head of the Office of Legal Counsel tasked with providing legal guidance to the president and executive branches suggests that the 'U.N. Charter's sovereignty concerns are overcome because the nation in question is unwilling or unable to address the group's threat to the United States.' <http://www.lawfareblog.com/2011/09/thoughts-on-the-latest-round-of-johnson-v-koh>. It contrasts this view to that of Harold Koh which suggests, in line with international law, that the U.S. needs to justify its position by reference to self defence. See also The Stanley Foundation, *Bridging the Policy Divide, America and the Use of Force: Sources of Legitimacy* June 2007, p. 2, p. 7.

310 It appears to be in the context of an assertion of self defence that the Obama administration asserts the relevance of willingness or ability test, not as a separate exception: note the debate between Koh and Goldsmith. Koh's view is that it is part of the self defence assessment, and it is addressed further, in that context, to be discussed.

that the fundamental protection of Article 2(4) is simply removed in these circumstances.³¹¹

States do have obligations to act against terrorism on their territory, as explained for example in Chapter 2, but the legal framework is clear that the use of force is not one of the countermeasures that states may take in response to violations.³¹² Nor, as noted above, is the unilateral use of force to 'enforce' international law a recognized exception.³¹³ Many – if not most – states struggle to various degrees to address the threat of terrorism, and it is difficult to countenance the implications for international stability if allegations of such unwillingness or inability alone, as determined by another state unilaterally, were per se to remove sovereign protection. Indeed, even in relation to the more extreme and difficult situations of failed and failing states in Chapter 5 Part A, it is questioned that the Article 2(4) protection ceases to exist. Rather the question must remain whether or not, absent collective UN authorized action, the conditions for the exercise of the right to self defence are met.³¹⁴

One preliminary question regarding Article 2(4) that is key, however, is whether there is territorial state consent to the particular use of force. While not relevant to many aspects of the framework – a territorial state cannot consent to a violation of human rights on its territory by another state, or to violations of IHL – if a state consents to the cross border operations in question, there is no violation of the state's territorial integrity. It appears for example that Yemen had consented to operations on its territory in relation to the first drone strike of 2002, while the situation in respect of Pakistan remains debatable.³¹⁵ Recent practices recalls that it is often politically difficult for governments to publicly acknowledge that they have consented to the United States' carrying out targeted killings on their territory, which makes this a murky determination of fact. An illustration of this emerged from the revelation that the President of Yemen approved US operations against al Qaida in the Arabian Peninsula while stating that 'we'll continue saying the bombs are ours, not yours',³¹⁶ another was the statement by the foreign minister of Burkina Faso

311 These doubts arise all the more strongly in the context of 'failed and failing' state scenarios, discussed previously, but as noted even there Article 2(4) applies; see Dutch report, *supra* note 194 and discussion at at 5A.4.

312 Chapter 3.3.1.

313 See 5A.3.2, 'Force to Enforce'. States in practice rely on self defence not law enforcement rationale, though they may sweeten their case by reference to infractions by the territorial state – Afghanistan is a prime example. See e.g. discussion in Tams, 'Use of Force', *supra* note 50, p. 378.

314 Chapter 5.A.3.4 'Failed and Failing States'.

315 See Lubell, 'The War (?) with al Qaeda', *supra* note 302, p. 430 and Chapter 9 in relation to the killing of Osama bin Laden.

316 U.S. Embassy cable from Yemen, 4 January 2010, Yemeni president Salah rejects U.S. ground presence (www.guardian.co.uk/world/us-embassy-cables-documents/242380). In C. Gray, 'President Obama's 2010 United States National Security Strategy and International Law on the Use of Force', *Chinese Journal of International Law*, 35 (2010), para. 23.

on the importance of being 'very, very discreet' in relation to whether the state permitted US special forces operations on their territory.³¹⁷ The result may be confusion of fact, but not of law, on the critical preliminary question of state consent.

The fact that the US administration consistently relies on self defence may support the assumption that, at least some of the time, the attacks on members of al Qaeda are not being conducted with the states' consent. Nor can there be a serious contention that they are justified by Security Council resolutions. The lawfulness of the increasing resort to targeted killings in other states territories must therefore depend on the strength of the US claim that the attacks are justifiable under the law of self defence.

5B.2.2 Justifications based on Self Defence

In response to mounting criticism of their wide resort to targeted killings, the US President and several high level officials have set out the parameters of the US position on self defence. The right to self defence has variously been justified on the basis that 'al Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us,' and that 'high level al Qaeda leaders are planning attacks.'³¹⁸ Likewise, it has stated 'we conduct targeted strikes because they are necessary to mitigate an actual ongoing threat – to stop plots, prevent future attacks, and save American lives.'³¹⁹

In relying on self defence as the justification, the questions to be addressed in relation to each incidence of use of force are whether, in accordance with the legal framework set out above, an armed attack has occurred or – if anticipatory self defence is accepted – one is imminent, and if the use of force is necessary and proportionate to avert it.³²⁰

317 E.g., Washington Post 14 June 2012, (note 328), citing an interview with Djibril Bassole, the foreign minister of Burkina Faso, praised security relations between his country and the United States, but declining to answer questions about the activities of U.S. Special Operations forces in his country. 'I cannot provide details, but it has been very, very helpful,' he said. 'This cooperation should be very, very discreet. We should not show to al-Qaeda that we are now working with the Americans.' http://www.washingtonpost.com/world/national-security/us-expands-secret-intelligence-operations-in-africa/2012/06/13/gJQAHyvAbV_story_4.html.

318 Koh, 'ASIL Comments 2010', see note 304.

319 John Brennan, Assistant to the President for Homeland Security and Counterterrorism, speech on counterterrorism of 30 April 2012 at <http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100> Brennan 2012 speech.

320 See Chapter 5A.

5B.2.2.1 Identifying the 'Armed Attack'?

As discussed in the legal framework and in relation to Afghanistan, while the matter remains in dispute, the predominant view would now appear to be that non-state actors may launch an armed attack, triggering the right of self defence.³²¹ While 9/11 was, understandably, widely considered to constitute such an attack, the nature or source of any current 'attack' from 'al Qaeda and associated groups', many years on from 9/11, is far less obvious.³²² It is, for example, doubtful that to the extent that there have been attacks on the US from al Qaeda since then, that they could meet the scale or intensity threshold that is often thought to apply for an armed attack by a non-state group.³²³

One approach, reflected in occasional references to the targeted terrorists as participating in a 'continuing' attack against the US, is that there is an ongoing terrorist attack, which may have begun on 9/11 but continues to the present day.³²⁴ The law acknowledges that a series or accumulation of attacks may in certain circumstances constitute the armed attack – and the series taken together may meet any intensity threshold that singly they would not have met. The suggestion, however, of one 'ongoing' attack broad enough to embrace the 9/11 attacks of more than a decade ago, and the disparate attacks by disparate entities since then, would surely constitute such an elastic approach to armed attack as to be unsustainable.

Moreover, for acts of violence to form part of one larger armed attack for the purposes of self defence they would have to emanate in some degree from 'the same source.'³²⁵ Reports of the diminished, disparate and increasingly individualised nature of al Qaeda actors, discussed in more detail in Chapter 6, make this case harder to sustain as time goes on. It must be doubted whether attacks (or, as noted below, threats) from al Qaeda and its uncertain "associated" groups, still less the "a far-reaching network of violence and

321 See Chapter 5B.1.1.4, 'Self-defence and the Security Council Post 9/11'.

322 On the nature of al Qaeda and its shift from an organisation or network to a broad umbrella ideology, and its capacity, see Chapter 6.B.1

323 On the intensity threshold see Chapter 5A.2.1.1, 'Conditions for the exercise of self defence'. See Lehto, note 227, on the diminished nature of al Qaeda, and the incidence of attacks in recent years.

324 "As recent events have shown, al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us." Harold Hongju Koh, Legal Adviser, U.S. Department of State, 'The Obama Administration and International Law' (Annual Meeting of the American Society of International Law, Washington, DC, 2 March 2010) accessed at <<http://www.state.gov/s/l/releases/remarks/139119.htm>>.

325 See, e.g., Leiden Recommendations, note 59, para 11.

hatred,"³²⁶ could conceivably be considered to constitute a continuum from the same source.³²⁷

5B.2.2.2 From Anticipatory Self Defence to Preventive Force?

More plausible perhaps, and consistent with the emphasis the US places on prevention, is the argument that what the US asserts is a right to act not against an existing attack but against the threat of future attacks. Other than references to al Qaeda 'continuing to attack us,' most of the administration's justifications referred to the 'on-going threats,' and the right to act to stop 'plots' and to act against those 'planning' to attack the US. It is the assertion of the right to exercise self defence 'preventively' in this way that has given rise to one of the most controversial, and most potentially significant, differences of view as to the scope and limits of self defence against terrorism post 9/11.

It is worth sketching out, therefore, the expansive doctrine of self defence against terrorism that has been advanced, in various guises, by the United States since the inception of the war on terror. In its most extreme and explicit form, it was presented in the US National Security Strategy of 2002 which states that the US will 'exercise our right of self defence by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country ... by identifying and destroying the threat before it reaches our borders'..³²⁸ The NSS premised self defence not on an existing attack, nor indeed (expressly rejecting the *Caroline* criteria) an imminent attack, but on the threat represented by 'terrorists' on the one hand, and 'tyrants' and 'rogue states ... determined to acquire WMDs' on the other.³²⁹ Even the threat need not yet have existed, as the US National Security Strategy envisaged military

326 See discussion on the scope of the entity the U.S. purports to be entitled to attack, and to be at war with in Chapter 6. See, e.g., President Obama's cover letter to the 2010 Strategy: "For nearly a decade, our Nation has been at war with a far-reaching network of violence and hatred;" U.S. President Barack Obama, 'The National Security Strategy of the United States of America', May 2010, p. 20, available at: http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf: 'Yet this is not a global war against a tactic – terrorism or a religion – Islam. We are at war with a specific network, al-Qa'ida, and its terrorist affiliates who support efforts to attack the United States, our allies, and partners.'

327 This logical proposition is supported e.g. in the Leiden Recommendations, note 59, para. 39.

328 Presented by President Bush on September 2002. See the doctrine being endorsed explicitly in the 2006 National Security Strategy, but it was not mentioned in the 2010 incarnation. On the extent to which this reflects a shift see later in this chapter.

329 While the link between the two is referred to throughout the U.S. National Security Strategy – by reference to the 'crossroads of radicalism and technology' and the 'overlap between states that sponsor terrorism and those that pursue weapons of mass destruction' – the basis for the assertion of this link has been the subject of controversy in relation to Iraq and beyond. See G. Miller, 'Iraq – Terrorism Link Continues to Be Problematic', *Los Angeles Times*, 9 September 2003. Note the 2010 NSS continues to note as a key threat the risk of 'extremists' accessing WMDs.

action 'against such emerging threats before they are fully formed' with an emphasis on the language of prevention, pre-emption, dissuasion and deterrence.³³⁰ Such a policy of pre-emptive force did not apparently require clear and specific evidence of an impending attack, and it was unclear how speculative the threat might be to purport to justify the pre-emptive use of force in self defence.³³¹ The 2006 National Security Strategy that followed emphatically endorsed the doctrine of pre-emption, explicitly noting that 'The place of preemption in our national security strategy remains the same.'³³² It emphasized that 'to forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defence.'³³³

What remains of the NSS doctrine of pre-emption in US policy and practice?³³⁴ The answer is not apparent on the face of President Obama's 2010 Strategy; while resoundingly different in tone, and audibly so on some substantive issues, it was hushed on the use of force, and silent on pre-emptive self defence.³³⁵ In its immediate wake some question whether this meant an abandonment of the policy of pre-emption on the one hand, or its continuity on the other.³³⁶ The continuity of its position in respect of the preventive use of force in self defence was, however, made resoundingly clear through the practice of increasing resort to targeted killings and the justifications presented in response.

Among the key questions arising in this respect is the nature and source of the current threat and whether it might be sufficient to trigger the exceptional right to use force in anticipatory self defence. Emanating as it does from a non-state actor, presumably absent any assertion of state responsibility, the law may require that a threat would have to be of a significant scale, real and immediate, leaving no alternative to the use of force to avert the attack.

The US has, in the course of its war on terror, sought to present a tighter approach to the sort of 'threats' that might satisfy the self defence criteria,

330 The U.S. National Security Strategy includes e.g. 'prevent[ing] our enemies from threatening us ... with WMDs' (p. 7) and to 'dissuad[ing] future military competition; deter[ing] threats against the US and against US' interests, allies and friends' (p. 29).

331 'The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively', *ibid.*, section V.

332 U.S. President George W. Bush, 'The National Security Strategy of the United States of America', 16 March 2006, p. 23, available at: <http://www.comw.org/qdr/fulltext/nss2006.pdf> (hereinafter 'U.S. National Security Strategy 2006').

333 *Ibid.* at 18.

334 The latter question will be addressed in the 'Conclusions' later in this chapter.

335 It does emphasise that the use of force must be a last resort, consistent with the encouraging emphasis on alternative solutions to military force, and on multi-lateralism – see further 5.B.4. See 'Internationalism' in Chapter 5B.4.

336 Gray, *supra* note 316.

referring for example to a 'significant threat,' though the nature and scope of the threats that would justify use of force in self defence remain uncertain.³³⁷ It has provided illustrations of such threats as ones that: 'might be posed by an individual who is an operational leader of al-Qaeda or one of its associated forces. Or perhaps the individual is himself an operative – in the midst of actually training for or planning to carry out attacks against US interests. Or perhaps the individual possesses unique operational skills that are being leveraged in a planned attack.'³³⁸ These are real threats that many individuals around the world engaged in criminal activity might pose, and they must be addressed. However, it must be questioned whether they present the sort of exceptional situations or 'international emergency' that the law of self defence was intended to address.³³⁹ In some guises the US has suggested that the use of force would be limited to 'high level' terrorists while in others this requirement as such is not present.³⁴⁰

Notably, while the language of pre-emption is no longer favoured or prominent, all justifications assert the right to self defence in the absence of a concrete identifiable threat of imminent attack. The emphasis on using force against those 'planning' attacks and 'intending' to carry them out³⁴¹ would appear to fall some way short of the legal pre-requisites for exceptional resort to anticipatory self defence set out in Part A.

The US at various stages appeared to reject the imminence requirement, reflected most starkly in President Bush's explicit rejection of imminence in his State of the Union address of 2003 or the NSS.³⁴² Obama administration representatives also appeared to shun an imminence requirement suggesting

337 As regards the nature of the threat, see also John Brennan speech 30 April 2012, hereafter Brennan speech, April 2012: "And what do we mean by a significant threat? I am not referring to some hypothetical threat – the mere possibility that a member of al-Qa'ida might try to attack us at some point in the future." <http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100>.

338 Brennan speech, April 2012.

339 Wilmshurst, 'Anticipatory Self Defence', note 69.

340 See e.g. the DOJ White Paper February 2013 note 304 which includes this requirement and the Obama speech of 23 May 2013, note 233, which does not.

341 H.Koh ASIL, Washington D.C. March 25, 2012 states: Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks." Accessed at <<http://www.state.gov/s/l/releases/remarks/139119.htm>>.

342 President Bush stated '[s]ome have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words, and all recriminations would come too late.' See also 2002 U.S. National Security Strategy, note 251: 'To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.'

that the law has become more 'relaxed in this respect'.³⁴³ However, while there may be growing recognition of the existence of a right of anticipatory self defence, and some stretching also by others of the definition of the 'imminence' requirement that may test the limits of the term, there is little support for the call to dispense with it.³⁴⁴

Arguably, recognition that imminence is considered a requirement under international law by other states is reflected in US National Security adviser Brennan's attempts to reconcile divergent international opinions as simply differences as to how you 'define imminence',³⁴⁵ or in the DOJ White paper which acknowledged the requirement of imminence while defining it so broadly as to have lost all meaning.³⁴⁶ It is uncertain how one could plausibly define it in a way that would allow attacks on al Qaeda operatives or others on the basis that they are contributing to the planning of possible future attacks.

An expansive approach to the right to act preemptive or preventively has been coupled with a broad view of related concepts that increase the potential scope of the purported right. First, a broad approach is applied to the targets of the threats that might justify self defence. This is seen, again in its most striking form, in the National Security Strategies, which included threats against 'the United States, the American people and our interests at home and abroad'.³⁴⁷ The US position had long been to invoke self defence in defence of territory and (more controversially) of nationals abroad, but the ambiguity

343 Brennan speech, April 2012, claiming the law had 'relaxed'. Note that Koh ASIL 2010 recognises imminence as a 'consideration', but not apparently a legal pre-requisite: 'Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.' The DOJ White Paper of February 2013 recognises the requirement of imminence, and purports to define it but focuses on the difficulties with imminence in the context of terrorism.

344 See the wide view of imminence put forward by the UK Attorney General, in Gray 2008, *supra* note 24 p. 215. Wilmschurst, *supra* note 69.

345 Speech of John O. Brennan at Harvard Law School, Cambridge Massachusetts 6 September 2011: Practically speaking, then, the question turns principally on how you define "imminence." He notes later "We are finding increasing recognition in the international community that a more flexible understanding of "imminence" may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts."

346 DOJ White Paper, *supra* note 304 p. 3 notes attacks outside undefined zones of hostilities would be against senior operational leaders of al Qaeda or associated forces who represent an 'imminent threat.' However, imminence is confusingly defined by reference to what it is not, including that it 'does not require clear evidence of a specific attack...', while explaining that it should take into account various factors including that some people are "continually planning attacks" and the "likelihood of heading off future disastrous attacks" p. 7-8.

347 See also reference to the protection of U.S. friends and allies in U.S. National Security Strategy, note 72, p. 29.

and potentially extremely wide-reaching scope of the reference to other 'interests' begged questions as to the nature of such interests and limits thereon and went far beyond the standard for self defence established in international law, set out in the legal framework in Chapter 5A above. More recent presentations of the US position have focused less on such broad-reaching 'interests', but have continued to refer to the prevention not only of attacks on the US but on 'allies and partners' for example.³⁴⁸

Just as the targets of attack are broadly framed, so too, critically, is the *source* of the threat, which is not limited to al Qaeda: as the 2010 NSS made clear, it includes the "growing threat from the group's allies worldwide".³⁴⁹ This corresponds with reports that, in fact, members of other terrorist organisations other than al Qaeda are now being subject to attack by the US.³⁵⁰ While recent attempts to move away from the 'war on terror' language are seen as an attempt to better define the enemy, they do not then greatly limit its scope, as seen for example from the explanation that "[T]his is not a global war against a tactic – terrorism or a religion – Islam. We are at war with a specific network, al-Qa'ida, and its terrorist affiliates who support efforts to attack the United States, our allies, and partners."³⁵¹ Threats posed to other nations or interests, by other groups worldwide, appear to be embraced, broadening significantly the scope of the potential use of force for the prevention of terrorist threats worldwide.³⁵²

Self defence is defensive rather than preventive. It can be justified to repel or to avert an attack, always as an exceptional measure of last resort, but not to prevent the (undoubtedly often real) risks of undefined future attacks.³⁵³ Attractive as strategies of prevention rather than response are, the general acceptance of the unilateral right to use force against global threats is irreconcil-

348 Examples include "The nation is at war with terrorist organizations that pose a threat to its security and that of other societies that cherish the principle of self-government", US National Military Strategic Plan; US National Security Strategy 2010.

349 2010 US National Security Strategy: 'Al Qa'ida's core in Pakistan remains the most dangerous component of the larger network, but we also face a growing threat from the group's allies worldwide.'

350 See e.g. report of the head of the Islamic Movement of Uzbekistan, 'Uzbek rebel killed in Pakistan', *BBC News*, 2 October 2009 in Lubell, 'The War against al Qaeda', note 301, p. 427.

351 *Ibid.*, at 20. See also DOJ White Paper, 4 February 2013, and President Obama 23 May 2013 speech, *supra* note 254.

352 See e.g. U.S. National Military Strategic Plan, note 347.

353 Wilmschurst, 'Anticipatory Self Defence', note 69, notes that 'Outside the US the Bush doctrine has had little or no support from States or commentators, and is widely rejected as impermissible under international law.' She cites e.g. the statement by the UK's Foreign Secretary, Foreign Affairs Committee, Foreign Policy Aspects of the War against Terrorism, Session 2002-2003 Cm 5793, 8; In Larger Freedom, UN. Doc A/59/2005 (2005) para. 188-192; C. Gray 'The US National Security Strategy and the New "Bush Doctrine" on Pre-emptive Self-Defence', *supra* note 251, at 437; C. Greenwood 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaeda and Iraq', note 87.

able with the exceptional nature of self defence, the even more exceptional nature of anticipatory self defence, and ultimately the fundamental prohibition on the use of force under international law.

5B.2.3 Necessary and Proportionate Force and Terrorism

For the reasons set out above, it is doubtful that an analysis of the legality of preventive use of force against al Qaeda members around the world would meet the requirements to trigger self defence and proceed to the necessity and proportionality test. If, however, circumstances arose in which terrorists were engaged in a large scale attack against the US, as on 9/11, or such an attack was imminent, the right to self defence may be triggered and the question to be addressed would be the necessity and proportionality of the particular measures of force proposed to avert the threat.³⁵⁴

The use of force must plainly be a last resort. A fundamental question of relevance to the lawfulness of self defence is whether criminal law, backed up with enhanced experience of prosecuting terrorism international cooperation is not available as an option.

The existence of challenges and even a certain degree of risk may be inherent in law enforcement. As the war on terror amply illustrates, detention can be a legal and political quagmire.³⁵⁵ But the criminal cooperation model cannot simply be set aside as costly, inconvenient or risky and therefore unrealistic. The unilateral use of force will be lawful only if, in the particular circumstances of the individual's case, there is no prospect of averting the threat by other means. It may be noteworthy that in Afghanistan there had been indictments issued in respect of Taleban and al-Qaeda operating out of afghan territory, the government had at least in principle been asked to engage to extradite, backed up by the Security Council. By contrast, there is little suggestion by the US that all of the hundreds of individuals now being targeted are subject to international arrest warrants (open or sealed).

One of the ways in which the US doctrine of self defence has become more restricted in its presentation over the course of the war on terror has been through the apparent qualification of its right to act where the state is 'unwilling or unable' to do so.³⁵⁶ Considerable emphasis has, in practice, been

³⁵⁴ See Chapter 5A.2.1.1 and the *Nicaragua* case.

³⁵⁵ See Chapter 7B 'Human Rights and Security Post September 11' and Chapter 6B 'International Humanitarian Law and the 'War on Terror'' for further discussion of detention in armed conflict. See also Chapter 8 Guantanamo Bay.

³⁵⁶ U.S. Attorney General Eric Holder, in an apparent attempt to appease allies, responded to concerns regarding geographic scope by stating that they only target in states which are unwilling or unable to stop the terrorists, though as noted this is relevant to *jus ad bellum*, not to IHL. 'Holder Speech on National Security, Northwestern University, 4 March 2012. See also Obama, 23 May 2013 speech, note 251, and earlier: "What I said was that

placed on states' inability or unwillingness to cooperate to avert the threats, in relation to the bin Laden operation and in other contexts,³⁵⁷ and has been subject of academic commentary for example.³⁵⁸ This reflects practice from other states where emphasis has been placed on the unwillingness and inability of other states to address threats as a justification for action in self defence.³⁵⁹

If the territorial state were willing and able to act, the use of force would be unnecessary. It is therefore appropriate that willingness and ability be taken into account as an element of the necessity test. It should be emphasized, however, that it is not a separate justification for the use of force under international law, and the lawfulness of the use of force depends on all of the conditions for self defence being met.

Likewise, while states are under an obligation to act to address threats and attacks emanating from their territory, the right of other states to use unilateral force is not a consequence that flows from a breach of this obligation.³⁶⁰ Unwillingness and inability should therefore be understood not as providing *carte blanche* to a state to use force but as an aspect of the self defence test among others. This is especially important given that many aspects of the parameters of unwillingness and inability remain unclear, which may represent an area of the law ripe for legal development or clarification.³⁶¹

Finally, the particular instance of resort to force, for example to kill or capture a particular individual, would have to be necessary (and no more than necessary) to avert the threat. This depends on reliable information being available concerning the particular role of the individual, and would by its nature appear to limit the use of force to high level individuals making a direct contribution to an attack, actual or impending, who need to be stopped to stop

if we have actionable intelligence against bin Laden or other key al-Qaida officials ... and Pakistan is unwilling or unable to strike against them, we should." Presidential Candidates Debate Pakistan, Feb. 28, 2008, available at <http://www.msnbc.msn.com/id/23392577/ns/politics-decision_08>.

357 Andy Merten, Presidential Candidates Debate Pakistan, MSNBC (Feb. 28, 2008, 4:24 PM), and Obama Vows to 'Take Out' Terror Targets in Pakistan, AFP (Sept. 28, 2008), available at <http://tinyurl.com/6mlznzx> ("If Pakistan is unable or unwilling to act" against al-Qaida leaders, "then we should take them out."), in A. Deeks, 'Unwilling or Unable' *supra* note 105, fn 2.

358 For academic discussion of this topic, see A Deeks, *ibid*; Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case', 16 *EJIL* (2005) 963. T Waisberg, 'Colombia's Use of Force in Ecuador Against a Terrorist Organization: International Law and the Use of Force Against Non-State Actors', ASIL Insights, August 22, 2008 <<http://www.asil.org/insights080822.cfm>>.

359 Russia in respect of Georgia, Israel in respect of Lebanon and Turkey in respect of Northern Iraq are cited as examples in Deeks, note 105.

360 Chapter 2.

361 A former state department legal adviser A. Deeks puts forward factors for an assessment of inability and unwillingness which she states should constrain states and provide necessary clarity to the legal framework of necessity and proportionality in self defence.

the attack.³⁶² Killing individuals who are suspected to make a more remote contribution, or killings causing widespread harm beyond the targets (as alleged in relation to some drone attacks), are likely to fall foul of the requirements of necessity and proportionality.³⁶³ *A fortiori*, attacks against 'indeterminate' rather than specific concrete threats, renders impossible the application of the necessity and proportionality calculus, and must be inconsistent with the legal framework.³⁶⁴

5B.3 IRAQ

Arguably the use of force against Iraq in March 2003 should not properly be understood as a response to international terrorism at all, and should therefore lie beyond the scope of this study. However, the Iraq intervention was justified repeatedly by reference to the threat of terrorism, to an 'axis of evil' including Iraq, and both Iraq and Afghanistan were described by the Bush administration as the "front lines of the war on terror."³⁶⁵ The US argued that its engagement in Iraq would be 'the death knell for terrorism.'³⁶⁶

The legal justifications for the use of force in Iraq differed from those invoked in relation to Afghanistan, and they differed as between states involved in the intervention. Unlike in Afghanistan, there was no suggestion that the targets of intervention were responsible for the events of 9/11, and in that sense Iraq was not a 'response' to September 11 at all. Though tangential links between Iraq and terrorism were floated sporadically, the Iraq intervention represented an extension of the 'war on terror' beyond terrorists to the longstanding question of the threat posed by the alleged existence of weapons of mass destruction and by Saddam Hussein's regime.

While many arguments were raised before and after the intervention, separately and cumulatively, the US appears to have relied both on self defence

362 Note however how targets are identified in practice, including through eg 'pattern of life' of doubtful consistency with this test, in Chapter 6A.3.1.

363 See Chapters 6B.3.1 on high levels of civilian casualties despite the purported precision compared to other weapons systems. Note that the proportionality analysis here – which requires that action be necessary and proportionate to avert the attack – is different from that under IHL which requires proportion to the concrete military advantage, which may be a broader formula.

364 Gray, *Use of Force*, *supra* note 24, p. 203.

365 Gray, *Use of Force*, *supra* note 24, p. 1. See comments by Bush in President Bush Meets with Prime Minister Blair. Remarks by the President and British Prime Minister Tony Blair', White House Press Release, available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2003/01/20030131-23.html>. See G. Miller, 'Iraq-Terrorism Link Continues to Be Problematic', *Los Angeles Times*, 9 September 2003. On lack of evidence of any such link, see 9/11 Commission Report Chapter 3.

366 Condoleezza Rice in P. Reynolds, 'Iraq War Helped al Qaeda Recruit', *BBC*, 19 October 2004.

and on the 'enforcement' of UN resolutions as legal bases for intervention.³⁶⁷ The UK's legal justification was Security Council authorisation: that even without securing the desired further UN resolution authorising the use of force in Iraq, authorisation could be implied (or 'revived') from earlier resolutions of the Council.³⁶⁸ A similar approach appears to have been adopted by the Dutch government in its decision to support the Iraq intervention.³⁶⁹

The degree of support or, at least, passive acquiescence in the use of force in Afghanistan stands in sharp distinction to the subsequent global divisions over the lawfulness of the resort to force in Iraq. While proponents of military action can be found among states and legal commentators, the Iraq intervention provoked unprecedented opposition, based in significant part on widespread concerns as to its lawfulness. Unusually outspoken statements on the unlawfulness of the Iraq intervention were heard before and after the intervention, including from many states, individually³⁷⁰ and collectively,³⁷¹ the

367 After the adoption of SC Res. 1441 (2002), 8 November 2002, UN Doc. S/RES/1441 (2002), the U.S. Permanent Representative to the UN noted that the resolution 'does not constrain any state from acting to defend ... or to enforce relevant UN resolutions' (U.S. Permanent Representative to the UN Ambassador John Negroponte, Statement to the UN Security Council, U.S. Mission to the UN Press Release, 8 November 2002, available at: <http://2001-2009.state.gov/p/io/rls/rm/2002/15018.htm>). See generally, also W.H. Taft IV and T. Buchenwald, 'Agora: Future Implications of the Iraq Conflict: Preemption, Iraq, and International Law', 97 (2003) AJIL 557.

368 See 'Legal Basis for Use of Force against Iraq', opinion published by the UK Attorney General, Lord Goldsmith, on 17 March 2003, available at: <http://webarchive.nationalarchives.gov.uk/+http://www.number10.gov.uk/Page3287>. For contrary view of this opinion and evidence given in its support to the Iraq Inquiry, see D. Akande and M. Milanovic, 'Submission to the Inquiry on the UK's Legal Justification for the Iraq War and Lord Goldsmith's Legal Advice', 14 June 2010. The Inquiry had yet to report but was expected to do so in 2013. Letter from J. Chilcott to the Prime Minister 13 July 2012, available at: <http://www.iraqinquiry.org.uk/media/54266/2012-07-13%20chilcot%20cameron.pdf>. This includes an outline of the Inquiry's report.

369 Report of the Dutch Committee of Inquiry into the war in Iraq, NLIR 2010, *supra* note 194. The Dutch were not directly involved in but offered support to the Iraq intervention. The Inquiry report was critical of the lack of an adequate legal basis for the war, at p.136, including rejecting what was presented as the "corpus theory" akin to the UK approach, p.134.

370 See, e.g., the responses of France, Russia, China, Syria, Egypt, Saudi Arabia, Kuwait, Bahrain, Iran discussed in House of Commons Research Paper 02/64, 'Iraq and Security Council Resolution 1441', 21 November 2002, pp. 33-6, available at: <http://www.parliament.uk/commons/lib/research/rp2002/rp02-064.pdf>. Comments of French President Chirac, on 23 September 2003 that "The war launched without Security Council authorisation shook the multilateral system", 'Bush urges UN unity on Iraq', *BBC News*, 23 September 2002, available at: <http://news.bbc.co.uk/1/hi/world/americas/3130880.stm>; 'Vatican reasserts opposition to war in Iraq', *Catholic News*, 4 October 2002, available at: <http://www.cathnews.com/news/210/27.php>; Saudi Arabia's Foreign Minister refers to Iraq as 'war of aggression' (see Interview 17 February 2003, available at: http://news.bbc.co.uk/1/hi/world/middle_east/2773759.stm).

UN Secretary-General,³⁷² official enquiries,³⁷³ legal scholars and international civil society,³⁷⁴ with resignations following opposition in several cases.³⁷⁵ There are some indications that governments may have recognized that lawfulness was questionable, but nonetheless supported the intervention, raising questions as to the authority of law and its relationship with legitimacy.³⁷⁶

The onus lies on states seeking to justify the use of force to demonstrate its lawfulness, and international reactions raise serious doubts as to whether this onus was discharged.³⁷⁷ Among the questions arising regarding the lawfulness of the use of force in Iraq are the following: whether the Security Council 'authorised' the use of force, implicitly; whether states can act to 'enforce' earlier resolutions against Iraq, where the Council itself fails to do so; whether a broad right of anticipatory or pre-emptive self defence might be invoked to justify the use of force in this context; and whether the interven-

371 Communiqué of the Arab Summit held in Sharm El-Sheikh, 1 March 2003, available at: <http://www.arabicnews.com/ansub/Daily/Day/030303/2003030324.html>. ('Arab leaders declare opposition to war in Iraq', CNN, 2 March 2003, available at: <http://www-cgi.cnn.com/2003/WORLD/meast/03/01/sprj.iq.arab.ministers>).

372 P. Tyler and F. Barringer, 'Annan says US will violate Charter if it acts without approval', *New York Times*, 11 March 2003, available at: <http://www.nytimes.com/2003/03/11/international/middleeast/11NATI.html>.

373 See the Dutch Inquiry Report, 2010, *supra* note 194; the UK inquiry report is pending publication.

374 Opposition was evident from demonstrations around the world of unparalleled proportions. Objections came from many sources: see e.g.: 'Letter to *The Times*', Sir Franklin Berman, UK legal adviser from 1991 to 1999, and Sir Arthur Watts, UK legal adviser from 1987 to 1991 (*The Times*, Letters, 20 March 2003); open letter to the UK Prime Minister from sixteen academic lawyers ('War Would Be Illegal', *The Guardian*, 7 March 2003); 'Coalition of the Willing – A Pre-emptive Strike on Iraq Would Constitute a Crime against Humanity, Write 43 Experts on International Law and Human Rights', *Sydney Morning Herald*, 26 February 2003; J. Sallot, 'Attack Illegal, Experts Say', *Globe and Mail*, 20 March 2003, reporting an open letter signed by 31 Canadian professors of international law.

375 E. MacAskill, 'Adviser Quits Foreign Office over Legality of War', *The Guardian*, 22 March 2003; T. Happold 'Short Quits Blair's Government', *The Guardian*, 12 May 2003; M. Tempest, 'Cook Resigns from Cabinet over Iraq', *The Guardian*, 17 March 2003; US Department of State, Daily Press Briefing by Richard Boucher, 11 March 2003, available at: <http://2001-2009.state.gov/r/pa/prs/dpb/2003/18621.htm>, reporting the resignation of two senior officers of the U.S. Department of State 'in relation to the situation with Iraq'.

376 O. Burkeman and J. Borger, 'War Critics Astonished as US Hawk Admits Invasion Was Illegal', *The Guardian*, 20 November 2003, noting comments by the Pentagon's Richard Perle: 'I think in this case international law stood in the way of doing the right thing.' See also legal advice by UK and Dutch legal advisers; see eg Dutch Inquiry Report, *supra* note 194, p. 108 – describing any possible legal basis under existing resolutions as 'wafer-thin'. See also the minority view in the course of the Dutch Inquiry Report itself that despite the unlawfulness, support for the intervention may be justifiable; Additional note of Peter van Walsum, Inquiry report, p. 133.

377 Article 2(4) puts the onus on states seeking to justify the use of force. See also Watts and Berman, 'Letter to *The Times*', note 374.

tion that unfolded was strictly necessary and proportionate, pursuant to its objectives.

5B.3.1 Security Council authorisation?

Questions relating to the role of the Security Council come into sharpest focus in relation to the use of force in Iraq. The first question, critical to the lawfulness of the action in Iraq, in accordance with justifications proffered by the UK at the time, is whether the Security Council had in fact implicitly authorised use of force in Iraq. This is essentially a question of the correct interpretation of the resolutions in question, though it raises broader questions regarding the proper approach to the interpretation of Chapter VII resolutions.

The background facts to the assertion of implied authorisation are, in brief, as follows.³⁷⁸ In 1991, in the context of the Iraqi invasion of Kuwait, Resolution 678 authorised states to 'use all necessary means' to effect Iraqi withdrawal from Kuwait and 'to restore international peace and security in the region'. Resolution 686 marked a provisional cessation of hostilities, while expressly preserving the right to use force under Resolution 678, and Resolution 687 imposed a permanent ceasefire, without reference to the right to use force. The Resolution 687 cease-fire was conditional on Iraqi destruction of existing weapons of mass destruction and non-acquisition of others, and to this end cooperation with the UN weapons inspectors. Subsequent resolutions, including Resolution 1154, found Iraq in 'material breach' of these conditions, ordered that immediate access be given to the inspectors and warned of 'the severest consequences' of failure to do so, while explicitly noting that the Council would 'remain actively seized of the matter'.³⁷⁹

Post September 11, and post Afghanistan, the US and UK sought a further resolution on Iraq.³⁸⁰ After negotiation, Resolution 1441 (2002) was passed.³⁸¹ It found Iraq in 'material breach' of earlier resolutions and gave it 'a final opportunity to comply with its disarmament obligations' by setting up an 'enhanced inspection team'. It warned that non-cooperation would constitute a 'further material breach' which would 'be reported to the Council for assessment' and that the Council would 'convene immediately ... in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security'. The Council 'Recall[ed], in that context, that the Council has repeatedly

378 For a description of the background and facts, see generally Dutch Inquiry Report, 2010, *supra* note 194.

379 SC Res. 1154 (1998), 2 March 1998, UN Doc. S/RES/1154 (1998) and SC Res. 1205 (1998), 5 November 1998, UN Doc. S/RES/1205 (1998).

380 See C. Lynch, 'US Presses UN to Back Tough New Iraq Resolution', *Washington Post*, 7 November 2002.

381 SC Res. 1441 (2002), *supra* note 367.

warned Iraq that it will face serious consequences as a result of its continued violations of its obligations'. Subsequent attempts (driven by the UK and US) to negotiate a further resolution authorising the use of force failed.³⁸²

One of the legal justifications invoked for resorting to force was nonetheless Council authorisation. The US did so by focusing on the existence of a 'material breach' of the Council-imposed obligations as triggering the right to engage the use of force.³⁸³ This argument has been aptly criticised as ignoring the collective rather than unilateral nature of the process: the decision not only whether there is material breach but also what action to take in response falls to the Council not individual states.³⁸⁴ As noted in relation to 'force to enforce,' there is no unilateral right of states to take such enforcement action involving the use of force.

From the UK, the purported legal justification took the form of what might be described as a mixture of cumulative, implied, or revived authorisation. In accordance with advice of the UK Attorney General, published in summary form on March 2003,³⁸⁵ the argument simply put was that the authorisation to use force in Resolution 678 was suspended conditionally (not revoked) by Resolution 687 and that once the Council had found Iraq in breach of those conditions (Resolution 1441) the original right to use force was revived.

This argument has given rise to intense controversy on various grounds, stemming from the ordinary meaning of UN resolutions, their context and purpose.³⁸⁶ The first is that while Resolution 678 uncontroversially authorised force, it did so for a particular purpose, namely to address the situation occasioned by the Iraqi invasion of Kuwait, in the context of circumstances prevalent in 1990. Absent express Council indication to the contrary, such author-

382 While many states opposed the use of force, it was the French expression of intention to veto any resolution seeking to authorise force that was reported as having led the U.S. and UK to abandon 'the UN route', although the French later denied this interpretation of their words. See the speech given by the UK Prime Minister on 5 March 2003, justifying military action in Iraq and warning of the continued threat of global terrorism ('Full text: Tony Blair's speech', *The Guardian*, 5 March 2004, available at: <http://politics.guardian.co.uk/iraq/story/0%2C12956%2C1162991%2C00.html>).

383 See memoranda produced by the Office of Legal Counsel of the U.S. Department of Justice: 'Authority of the President under Domestic and International Law to Use Military Force Against Iraq', 23 October 2002, available at: <http://www.justice.gov/olc/2002/iraq-opinion-final.pdf>; and 'Effect of a Recent United Nations Security Council Resolution on the Authority of the President under International Law to Use Military Force Against Iraq', 8 November 2002, available at: <http://www.fas.org/irp/agency/doj/olc/unscr.pdf>. Akande and Milanovic, 'Iraq Inquiry', note 368, para. 5.

384 Akande and Milanovic, *ibid*.

385 See earlier discussion. The Attorney General notoriously changed his advice, a point on which he was called to account before the Iraq Inquiry. See Lord Goldsmith's draft advice to the Prime Minister of 14 January and 12 February 2003 and Lord Goldsmith's memorandum to the Prime Minister on SC Res. 1441, 7 March 2003, para. 9, and testimony to the Inquiry.

386 See Chapter 5.

isation cannot be interpreted as supportive of the use of force in a very different conflict, to address a very different threat, in 2003, in the context of circumstances necessarily quite distinct from those prevalent over a decade earlier.

Second, the plain wording of Resolutions 1154 and 1441, passed since the 1990 resolution, makes clear the Council's intention to remain 'seized' of the matter at each stage and to itself 'consider' how to address the situation as it unfolds.³⁸⁷ The context of the debate in the Council leading to the adoption of other Iraq resolutions, and statements made thereupon, reveal no agreement that states should have a right to use force as a result of those resolutions or an automatic right to do so in the event of a further breach. Indeed such 'automaticity' was expressly rejected by certain participating states in the context of Resolution 1441.³⁸⁸

Moreover, the fact that renewed attempts were made to achieve a further resolution expressly authorising force undermine the argument, ultimately advanced, that no such resolution was necessary anyway.³⁸⁹

The controversy also spawns general questions regarding Security Council resolutions and their interpretation of broader relevance to the use of force against terrorism. These include whether the authorisation to use force can ever be implied or, given the exceptional nature of the use of force, and the stakes involved, it must be clear and explicit, and understood as limited to the context and purpose for which it was given.³⁹⁰ As regards the 'shelf life' of any authorisation to use force, can the assessment of the requirements of international peace and security at one point have continued relevance many months and years later, or does it require clear revival by the Council? Could an overly flexible interpretation of resolutions have a chilling impact on the willingness of states to reach decisions within the Council in the future?³⁹¹ Can – as the notion of 'automaticity' suggests – the Council delegate to member states determinations as to what action, including the use of force, might be necessary in the event of breach of its resolutions? Or, as has been suggested, in accordance with the constitutional role of the Council is it to be doubted

387 See the *travaux préparatoires* to Resolutions 1154 and 1441, referred to in R. Singh and A. MacDonald, 'Legality of Use of Force against Iraq', Opinion for Peacemakers, 10 September 2002, para. 58, available at: <http://www.lcn.org/global/IraqOpinion10.9.02.pdf> (hereinafter 'Singh and MacDonald, Opinion on Iraq').

388 *Ibid.*

389 The AG advised that the resolution was unnecessary on this basis. For a discussion of the basis of this, see his advice to the Inquiry on 27 January 2010, and that of Elizabeth Wilmhurst then Deputy Legal Adviser on 26 January 2010, at <http://www.iraqinquiry.org.uk/>.

390 See Framework, Section A of this Chapter.

391 See R. Higgins, 'International Law in a Changing International System', 58 (1999) *Cambridge Law Journal* 78.

not only whether the Council *did* delegate, but also whether it *could have* delegated, such an assessment to individual states?³⁹²

The UK Attorney General had himself acknowledged at an earlier stage that the 'revival' argument 'is not widely accepted among academic commentators' and that he would not be confident of winning the argument 'if the matter ever came before a court'.³⁹³ The matter is now before a UK official enquiry, which will report in due course.³⁹⁴ As noted above, the Dutch Inquiry for its part completed its work in 2010 and delivered a critical report, rejecting the arguments that either the 'corpus' of resolutions read together, or material breach of prior resolutions, could constitute an adequate legal basis for the intervention.³⁹⁵ The idea that prior authorisation may be relied upon many years after the fact, for purposes not contemplated at the time of the resolution, has little legal support, and if accepted would seriously destabilise the collective security system.³⁹⁶

5B.3.2 Force to enforce UN resolutions?

Explaining the US vote in favour of Security Council Resolution 1441 (2002), the US Permanent Representative to the UN, Ambassador John Negroponte, stated that '[i]f the Security Council fails to act decisively in the event of a further Iraqi violation, this resolution does not constrain any member state from acting to defend itself against the threat posed by Iraq, or to *enforce relevant UN resolutions and protect world peace and security*'.³⁹⁷ In the absence of Council authorisation, can states rely on a breach of international obligations, including Security Council resolutions, to justify the use of force?

There is no legal basis for the unilateral use of force pursuant to law enforcement within the framework of international law. Statements such as that cited appear to conflate and confuse the 'inherent' right to self defence under the Charter and the right to use force to enforce law or otherwise protect international peace and security, which is not inherent and exists only if

392 As noted in Part A, under the Charter it is for the Council to decide not only if there is a breach and if it amounts, at the relevant time, to a threat to international peace and security, but also what measures would be appropriate to address such a threat.

393 He advised therefore that the safer route would be to go for a second resolution, though he later said the better view was that the revival argument would suffice, on the apparent basis that no further resolution would be feasible. See testimony of Elizabeth Wilmshurst to the Iraq Inquiry, available at: <http://www.iraqinquiry.org.uk/media/43617/100126pm-wilmshurst.pdf> (hereinafter 'Wilmshurst Testimony'), and Akande and Milanovic, 'Iraq Inquiry', *supra* note 368.

394 The report is expected during 2013. See <http://www.iraqinquiry.org.uk>.

395 Ducth Iraq Inquiry, 2010, above, Chapter 8 including the conclusion on p. 136.

396 Akande and Milanovic, 'Iraq Inquiry', note 368, at paras. 9 and 10.

397 Statement of the U.S. Permanent Representative to the UN, Ambassador John Negroponte, following adoption of Resolution 1441, *supra* note 367.

conferred by the Security Council. As noted in Part A, the measures of self help that a state may take to enforce its own rights against an offending state cannot amount to the use of force. Moreover, while certain circumstances, such as serious violations of human rights, may give rise to the responsibility of a broader range of states to act to stop the breach, there is no unilateral use of force other than in self defence.³⁹⁸

5B.3.3 Unilateral Action where the Council Fails to Act?

In advancing this role for states, or specifically the United States, as enforcers of obligations (and thereby protectors of the 'relevance of the UN'), emphasis was placed on Security Council failure to act. In the context of the Iraq invasion, it was justified by reference to the fact that no explicit authorisation could be obtained because the veto power had been 'abused', in particular by France which had threatened its use 'unreasonably'.

This implies a doctrine of 'reasonableness' surrounding the use of the veto that international law does not recognise and which would, in practice, eviscerate the Council's authority.³⁹⁹ When the Charter was adopted, the veto power for the five permanent members was inserted for political reasons, to maintain a degree of political 'balance' in the decisions of the Security Council, an inherently political body, albeit one with unique legal powers. States' reasons for voting and vetoing, which are in turn often political and controversial in nature, cannot affect the legal effect of the veto power.⁴⁰⁰ Permitting a state to use force based on its assessment of what the Council *would* have done had all members acted 'reasonably' would clearly be a nonsense.

As noted, history does provide the precedent of the General Assembly's assumption of the Council's responsibilities where the latter was deemed unable to discharge its mandate, though a broad-reaching difference of view (as over the issue of Iraq) is of course distinct from the paralysis of the Cold War era. In any event, in the Iraq context assertions of Council failure did not give rise to assertions of an alternative role for the General Assembly or other

398 See Chapter 3, para. 3.1.3. On the disputed right to intervention to prevent humanitarian catastrophe, see Chapter 5A.3.1 and 5B.2.1.6.

399 See 'Lawyers Doubt Iraq War Legality', *BBC*, 7 March 2003, available at: http://news.bbc.co.uk/1/hi/uk_politics/2829717.stm. It has also been pointed out that the position may not serve the interests of the U.S. and UK as beneficiaries of the veto power; the U.S. is the state resorting to that power most frequently.

400 Article 27 of the Charter provides that non-procedural matters require nine out of fifteen votes, including the concurring votes of the permanent members.

established collective mechanism, but rather resort to the unilateral, US-led, use of force.⁴⁰¹

Both the US and UK expressed a preference for Council authorisation at an early stage, while reserving their right to use force unilaterally or multilaterally outside the UN framework if UN consensus could not be achieved and the Security Council 'fails to act decisively'.⁴⁰² (When the US formed the view that a resolution would not be feasible, both states reverted to arguing that it was not, in any event, necessary.⁴⁰³) This would appear to imply that Council authorisation is optional rather than mandatory and that, at most, resort to the Council is a remedy to be exhausted before invoking force unilaterally. Despite the rhetoric of ensuring the 'relevance' of the UN and the enforcement of its decisions, an approach whereby a State gives the Council time within which to act, threatening to do so itself if the Council does not, raises broader questions relating to the ultimate impact on the legitimacy of the Charter's collective security mechanism.

Do the events surrounding the Iraq invasion therefore indicate a marginalisation of role of the Security Council in favour of unilateral or selective collective approaches, and if so what might be the impact of such a shift in other situations? Or, assessed with the benefit of a longer lens, does the extent of the harsh criticism of the use of force in Iraq indicate a backlash away from unilateralism accepted in relation to Afghanistan towards endorsement of 'the UN route'? The Iraq experience may have contributed to the momentum that grows around whether and how the Security Council system might be strengthened, reformed and made more effective.⁴⁰⁴

401 Neither the GA nor for that matter NATO (though, as already noted, the latter has no independent authority unless self defence) were involved in resort to force in Iraq.

402 See, e.g., 'Powell Says No Quid-Pro-Quos Exchanged for U.N. Vote', U.S. Department of State Press Release, 10 November 2002, available at: http://www.usembassy.it/file2002_11/alia/a2110803.htm: 'I can assure you if [Saddam Hussein] doesn't comply this time, we are going to ask the U.N. to give authorization for all necessary means. If the U.N. isn't willing to do that, the United States, with like-minded nations, will go and disarm him forcefully ...' See also UK Prime Minister in the House of Commons, 25 February 2003, available at: <http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo030225/debtext/30225-05>. '...If disarmament cannot happen by means of the UN route because Saddam Hussein is not co-operating properly, then what? We shall be left with a choice between leaving him there, with his weapons of mass destruction, in charge of Iraq – the will of the UN having therefore been set at nothing – and using force.'

403 See 'Wilmschurst Testimony', *supra* note 393.

404 See UN Doc A/59/565 (2004), *supra* note 187. Secretary-General's statement to the General Assembly on his Report 'In Larger Freedom', *United Nations*, 21 March 2005, available at: <http://www.un.org/sg/statements/index.asp?nid=1355>. UN Doc. A/RES/60/1 (2005), paras. 152-154. See also Reforming the UN Security Council in Pursuance of Collective Security, Nico Schrijver, *Journal of Conflict & Security Law* (2007), Vol. 12 No. 1, 127-138.

5B.3.4 Anticipatory self defence?

Post 9/11 the issue of anticipatory self defence first arose, to some extent, in relation to Afghanistan, as the attack committed on 9/11 was apparently over by the time the military response was launched on 7 October, although the threat of future attacks remained.⁴⁰⁵ Perhaps as a result of the nature of the 9/11 attacks themselves, hitherto controversial questions regarding the legitimacy of anticipatory self defence were hardly raised in that context, leading to the stark assertion shortly after the Afghan invasion that 'in the changed post-September 11 environment, the concept of anticipatory self defence requires no explanation or justification'.⁴⁰⁶ To the extent that the apparent acceptance of anticipatory self defence in Afghanistan may strengthen the case for such a right, it would, however, do so only in very limited circumstances. In Afghanistan those circumstances included (a) a prior attack (of a massive scale), (b) an expressed intention to carry out future attacks, and, arguably, (c) an indication by the Security Council that the requirements of self defence have been satisfied.⁴⁰⁷ Any analysis of the impact of the law in this field must therefore take account of these limitations⁴⁰⁸ and be assessed in context, in particular in light of the controversy generated over the subsequent assertions of anticipatory self defence in Iraq and elsewhere.

In relation to Iraq, the US made several references to the need to act 'to defend itself against the threat posed by Iraq'.⁴⁰⁹ Unlike Afghanistan, there was no meaningful attempt to link Iraq to the attack of September 11 or other attacks, or indeed to al-Qaeda, and as such the justification was clearly anticipatory self defence, without any prior attack. One immediate doubt that such arguments generated in the context of Iraq was what immediate 'threat' Iraq and the alleged weapons of mass destruction posed to the intervening nations

405 See U.S. letter to the Security Council which emphasised the preventive and deterrent effect of the use of force.

406 W.K. Lietzau, 'Combating Terrorism: Law Enforcement or War?', in M.N. Schmitt and G.L. Beruto (eds.), *Terrorism and International Law, Challenges and Responses* (Sanremo, 2003) 75, at p. 77.

407 Preamble, SC Res. 1368 (2001), note 288, and SC Res. 1373 (2001), 28 September 2001, UN Doc. S/RES/1373 (2001).

408 Account should also be taken of the peculiarities of the Afghan situation; see this chapter, para. 5B.4.

409 Statement of the U.S. Representative to the UN, note 454. Similar justifications for the military action in Iraq have been put forward by the U.S. President. See, e.g., George W. Bush, UN General Assembly in New York City Address, 12 September 2002, available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020912-1.html>. See also Taft IV and Buchenwald, 'Agora: Future Implications', note 367; J. Yoo, 'Agora: Future Implications of the Iraq Conflict: International Law and the War in Iraq', 97 (2003) AJIL 563.

and whether it could meet the criteria for self defence.⁴¹⁰ In the UK, it was, with time, made clear that Iraq was not considered by the government to pose an imminent threat to the UK; but in fact no reliance had been placed by the UK on self defence.⁴¹¹

The US, however, focused on much publicised concerns regarding the possession of weapons of mass destruction by Saddam Hussein's regime, in apparent support of the right to use force to prevent 'dangerous nations' threatening the US and the world with 'destructive weapons'.⁴¹² What is critical for an assessment of lawfulness is not what we now know about the threat (or lack of one) from WMDs in Iraq, but what the government in question reasonably believed, upon best inquiry, to have been the case at the relevant time.⁴¹³ While the possession and development of weapons of mass destruction certainly raises legal issues,⁴¹⁴ including the fact that Iraq specifically had obligations in this respect imposed by the Security Council,⁴¹⁵ unlawfulness in this respect clearly does not *per se* justify the use of force in self defence.⁴¹⁶ The critical question, whether any such weapons represented a real and immediate threat to the US, was not addressed by the US, which preferred to advance an expanded conception of pre-emptive self defence as enabling states to act preventively before such threats are formed.⁴¹⁷ If Iraq

410 See Chapter 5A.2.1. There was no evidence of other nations in the Middle Eastern region having requested that the intervening forces act in 'collective self defence, so the threat must have been to the intervening states'. See Bothe, 'Preemptive Force', *supra* note 74, at 234. Where the threat is against one of those states, others can however act in collective self defence if requested to do so by the 'victim' state.

411 In the context of the extended debate on the '45 minute claim' published by the UK Government in a dossier of evidence against Iraq, the UK Government clarified that there was not thought to be any such imminent threat to the UK from Iraq. See R. Norton-Taylor and N. Watt, 'No. 10 Knew: Iraq No Threat', *The Guardian*, 19 August 2003.

412 President Bush's State of the Union Address: 'I will not wait on events, while dangers gather. I will not stand by, as peril draws closer and closer. The United States of America will not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons.' On U.S. reliance on self defence in Iraq, see Ambassador Negroponte's intervention before the Security Council, *supra* note 367.

413 See generally, 'Briefings of the Security Council', 27 January, 14 February, and 7 March 2003, made by Executive Chairman of the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) Hans Blix, available at: http://www.un.org/depts/unmovic/new/pages/security_council_briefings.asp.

414 In the Advisory Opinion on *Nuclear Weapons* the ICJ noted that, under the terms of the Non-Proliferation Treaty, all states had an obligation in good faith to seek nuclear disarmament via international negotiations. See in this respect R. Falk, 'Appraising the War against Afghanistan', note 284.

415 Note Security Council resolutions directed against specific states detailing their obligations to disarm, see, e.g., SC Res. 687 (1991), 3 April 1991, UN Doc. S/RES/687 (1991), concerning the conditions for the ceasefire in Iraq, including disarmament, discussed in section A.

416 It may, however, be a breach of international peace and security, but, as already noted, this must be determined by the Security Council.

417 See 5B.3.1 and 5B.4. See discussion of the controversial U.S. National Security Strategy 2002 that advanced this view prior to Iraq, below.

did not pose an immediate threat, it did, it was suggested, pose a potential threat.

Suffice to recall that the claims to lawfulness on the grounds of self defence in the context of Iraq met with short shrift from other states; indeed the Dutch Inquiry described it as 'universally recognised' that there was no such legal basis.⁴¹⁸ The apparent attempt, at least at the early stages, to rely on self defence arguments went undefended, and as time went on appears to have been deemphasised by the United States itself.⁴¹⁹

The fact that, as is now known, evidence did not emerge of weapons of mass destruction in Iraq following the invasion underscore the questions, highlighted above, as to the degree of evidence that should be required for the use of force against another state, and the lack of any procedure for safeguarding the application of the law of self defence, when states adopt a unilateralist approach outwith the UN framework.

5B.3.5 Humanitarian intervention?

Finally, both the US and UK peppered their discourse on Iraq, and Afghanistan, with references to the humanitarian situations in those countries, but without purporting to rely on humanitarian intervention as a legal justification as such.⁴²⁰ Some have questioned whether humanitarian intervention might not have provided a more plausible basis for legality than other arguments advanced, given the notoriety of the Taleban and Saddam Hussein's regimes.⁴²¹

The reluctance of states to advance the argument, particularly on the part of the UK as the erstwhile proponent of a doctrine of humanitarian intervention in exceptional circumstances, may be seen to reflect the controversial nature of the right and undermine the case for its establishment in international law. Or, more compellingly, it may reflect acknowledgement that the formulae of

418 Iraq Inquiry report, 2010, *supra* note 194.

419 See Taft IV and Buchenwald, 'Agora: Future Implications', *supra* note 409, writing in 2003, who place less emphasis on self defence than Negroponte and Bush did in the autumn of 2002; see also Statement of the U.S. Permanent Representative to the UN, note 399.

420 See e.g., U.S. President's Message to the Iraqi People, 10 April 2003, available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2003/04/20030410-2.html> and 'A Vision for Iraq and the Iraqi People', paper published by the UK Government on 17 March 2003, available at: <http://collections.europarchive.org/tna/20080205132101/number-10.gov.uk/output/page3280.asp>: 'The Iraqi people deserve to be lifted from tyranny and allowed to determine the future of their country for themselves....' See also the remarks made by the U.S. President on Operation Iraqi Freedom and Operation Enduring Freedom ('President Bush Reaffirms Resolve to War on Terror, Iraq and Afghanistan', White House Press Release, 19 March 2004, available at: http://georgewbush-whitehouse.archives.gov/news/releases/2004/03/images/20040319-3_d031904-515h.html) and cf. K. Roth, 'War in Iraq: Not a Humanitarian Intervention', Human Rights Watch, *World Report 2004*.

421 See, e.g., R. Falk, 'Appraising the War against Afghanistan', note 296.

pre-requisites advanced in other contexts for such intervention – notably the requirement of imminent humanitarian catastrophe or crisis – were not satisfied, despite the undoubted brutality of the regimes in question. In addition, it may be that the timing of the interventions, following 9/11, belied the notion that the true objective (as opposed to desirable side effect) was humanitarian in nature.

5B.4 THE US NATIONAL SECURITY STRATEGIES: INTERNATIONALISM, UNILATERALISM OR EXCEPTIONALISM?

The US National Security Strategies are discussed above in relation to self defence specifically. Their approach to collective security, and to international law more broadly, also deserve mention.

The 2002 Strategy describes itself as ‘based on a distinctly American internationalism’.⁴²² While there are several references to allies, coalitions and international institutions (in that order), it clearly presents a multilateral approach to the use of force as optional rather than mandatory and places emphasis on the readiness of the US to use pre-emptive force unilaterally. It notes that: ‘[w]hile the US will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self defence by acting preemptively’.⁴²³ One striking feature of the US National Security Strategy in the post 9/11 context was therefore its readiness to unilateralism.

In this respect a notable shift is apparent in the decade of the war on terror. The 2010 NSS emphasizes engagement, diplomacy, strategic multilateralism and strengthening organisations such as UN and NATO (alongside maintaining US military supremacy).⁴²⁴ The key question is of course not what is in the document but what is in the policy, and how it is given effect. The turn towards international community may be a noteworthy reflection of the lessons of the war on terror, and the effects of excessive unilateralism epitomized in the National Security Strategies of 2002 and 2006. The lauding of multilateralism currently jars, however, with the invocation of such a broad-reaching right to use force unilaterally and preemptively anywhere in the world, as discussed in the preceding section.

Finally, the prominence and relevance of international law in the US National Security Strategies is worthy of comment. As noted above, there is no apparent attempt, direct or indirect, to justify the policy of preemptive self

⁴²² U.S. National Security Strategy, note 72, p. 1.

⁴²³ U.S. National Security Strategy, note 72, p. 7. It also notes that ‘wherever possible, the U.S. will rely on regional organisations and states ... where they meet their obligations to fight terrorism’ (*ibid.*, p. 8).

⁴²⁴ Grey, CJIL para 3. See also Koh ASIL 2010, note 413.

defence by reference to international law in any of the Strategies. In 2002, international law is referred to explicitly only once, with regard not to US policy but in the characterisation of 'rogue states' which, *inter alia*, 'display no regard for international law, threaten their neighbours, and callously violate international treaties to which they are party'.⁴²⁵ In 2006 it is not mentioned at all. In 2010, there are many references to international law, but they are still selective. No attempt is made to justify the policy of self defence according to international law, with the emphasis instead on enforcement of international law breaches by others. For example, it notes that 'We are strengthening international norms to isolate governments that flout them and to marshal cooperation against non-governmental actors who endanger our common security'.⁴²⁶

Regrettably, when reference is made to international law, it continues to be presented as applicable to others, rather than being expressly acknowledged as also a constraint on the United States. Conversely, it is open to question whether it envisages that the same standards – for example regarding global pre-emptive self defence – that it advances for the US should be available to others. If not, the Strategies may represent not so much to a doctrine of unilateralism as one of US exceptionalism, that challenges the universality and credibility of the international legal order that the 2010 US Strategy, encouragingly, purports to uphold.

5B.5 IMPLICATIONS FOR THE USE OF FORCE AGAINST TERRORISM BY OTHER STATES

While the focus of this Chapter is on the practice of the US, which has led the war on terror, it bears emphasis that the practice of cross border force is far from unique to the US, and a similar model may be arising recurrently in international practice in recent years.⁴²⁷

Notably, the Russian Federation has an anti-terrorism law conferring on the Russian President the right to send Russian special forces beyond Russia's borders, potentially to any state where he considers it necessary, in order to

⁴²⁵ Rogue states are also described as violating human rights, being determined to acquire weapons of mass destruction, sponsoring terrorism, rejecting basic human values and 'hat[ing] the United States and everything for which it stands'. U.S. National Security Strategy, note 72, p. 14.

⁴²⁶ *Ibid.*, para 18. C Gray, para 4, who notes that 'a similar approach is taken in the 2010 UK National Security Strategy'; see www.number10.gov.uk/news/latest-news/2010/10/national-security-strategy-55815.

⁴²⁷ This chapter concerns only use of force against other states; for increasing resort to force against people in their own territory in the name of counterterrorism, the relevant framework is human rights law in Chapter 7. For example Syria justified a brutal clampdown during 2012 as action against terrorism.

take whatever measure he deems necessary, to combat terrorism.⁴²⁸ Other examples emerge from practice including the open announcement by Kenya on October 2011 that it would be taking cross border action against al Shabaab militants in Somalia.⁴²⁹ Turkish justified its cross-border incursions against Kurdistan Workers Party (PKK) camps in northern Iraq by reference both to self defence and 'hot pursuit'.⁴³⁰ Colombian incursions into Ecuador to take action against FARC rebels based there provides another example.⁴³¹

While each of these situations raises different issues, there has been a wave of assertions of a broad-reaching right to take cross border coercive measures in the name of the prevention of terrorism. Some of them were relevant to consideration of how the legal framework may have developed, as noted above.⁴³² The significance of the questions raised regarding the US's asserted right to use force against terrorists anywhere in the world are therefore heightened. The US approach may legitimise the same approach by others, as practice already indicates,⁴³³ with significant implications for the prohibition on the use of force at the heart of the international order. It may also contribute, in the future, to a shift in the law itself.⁴³⁴ It has been noted that

428 S.T. Bridge, 'Russia's New Counteracting Terrorism Law: The Legal Implications of Pursuing Terrorists Beyond the Borders of the Russian Federation', 3 (2009) *Columbia Journal of East European Law* 1.

429 E. Hughes, 'In (Hot) Pursuit of Justice? The Legality of Kenyan Military Operations in Somalia', 20 (2012) *African Journal of International and Comparative Law* 471.

430 'The U.S. has expressed solidarity with Turkey in its fight against terror, saying that it recognizes that Ankara is exercising its right to self-defense with recent air strikes against bases of the terrorist Kurdistan Workers' Party (PKK) in northern Iraq'. *Today's Zaman*, Istanbul, 23 August 2011, available at: <http://www.todayszaman.com/news-254728-us-recognizes-turkeys-right-to-self-defense-in-air-strikes-over-iraq.html>

431 Tams, 'The Use of Force', *supra* note 50.

432 See for example, shifting approaches to the question of attribution and practice post-Afghanistan, Chapter 5B.2.

433 In passing the 2006 law 'On countering terrorism' with its broad reaching right to target terrorists abroad, Russian legislators reportedly stated that they were "emulating Israeli and US actions in adopting a law allowing the use of military and special forces outside the country's borders against external threats." See Report of the Special Rapporteur on Extra-judicial executions A/HRC/14/24/Add.6 (2010), para 25. Violations in other areas of law have likewise justified further violations by others, as illustrated in Chapters 7-10.

434 Christian Tams concludes that 'in the course of two decades, the legal rules governing the use of force have been re-adjusted, so to permit forcible responses against terrorism under more lenient conditions.' See Tams, 'Use of Force' *supra* note 50, at p. 361. In some areas, e.g. on self defence being possible against 'terrorist' attacks without state attribution, that shift may already have taken place (see 5.A.2.1 noting that the predominant view post 9/11 seems to be that the source of an armed attack for self defence purposes need not be a state.) In others e.g. on pre-emptive self defence there is insufficient support for that proposition in international practice for there to be a shift, but that may change over time (see 5A.2.1 on anticipatory self defence).

'if other states were to claim the broad-based authority that the United States does, to kill people anywhere, anytime, the result would be chaos.'⁴³⁵

5B.6 CONCLUSION

The previous chapter considered the role of criminal law and international law enforcement in the struggle against international terrorism. The use of force by states is not an alternative for states where that enforcement proves challenging or even inadequate. Rather the prohibition on the use of force is one of the most fundamental norms of international law around which the current legal order is built. The use of force against terrorism can be justified only where one of the exceptions to that prohibition apply – through Security Council authorization or the conditions for self defence being met. If they are to remain exceptions, they must be strictly construed.

The use of force has, however, been a major part of the war on terror. In the early stages, it took the form of large scale military interventions in Afghanistan and Iraq, and it has evolved into a global campaign of targeted killings which has killed thousands of people in several states, and which gives every indication of being set to continue as a method of choice for years to come.

The Security Council's uncharacteristically proactive role post 9/11 is discussed in other chapters,⁴³⁶ but the Council has notably not authorised the use of force.⁴³⁷ This may itself reflect the reluctance on the part of the international community to endorse the use of force as an appropriate tool against terrorism. This reluctance may in turn be increased following the experience of more than a decade of a 'war on terror.' While the use of force in Iraq has been singularly condemned for its unlawfulness and having shaken

435 K. Anderson, 'Rise of the Drones: Unmanned Systems and the Future of War', Written Testimony to the U.S. House of Representatives Subcommittee on National Security and Foreign Affairs, 23 March 2010, p. 5, para. 11, available at: http://www.fas.org/irp/congress/2010_hr/032310anderson.pdf (hereinafter 'Anderson Written Testimony'). Alston, 'Statement of U.N. Special Rapporteur on U.S. Targeted Killings Without Due Process', supra note 433; see e.g., *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

436 See Chapter 2 and in particular Chapter 7B.1 on the Council's novel legislative and quasi-judicial roles.

437 Whether the Council had authorised force was only a real issue at all in relation to the use of force in Iraq as explained above, and the argument does not withstand scrutiny as the Dutch Inquiry's report exemplifies.

the international system,⁴³⁸ the effectiveness of the use of force as a dominant approach in combating terrorism has been questioned more broadly.⁴³⁹

The real battleground of the *ad bellum* post 9/11 has been the potential scope and limits of the right of self defence. Reflecting its status as the one recognized exception to prohibition on unilateral force, the self defence blanket has been stretched, perhaps to tearing point, over a range of conduct and circumstances which it is submitted it cannot conceivably cover. The inconsistencies between practice and the law, highlighted in this chapter, have been striking. As have claims that the fabric of the law has been altered along the way, though the extent of this shift should be treated with some caution.

Assertions of legal shift are most pertinent, and most compelling, in relation to Afghanistan, where the use of force, like the September 11 attacks that preceded it, met with overwhelmingly unified international support. Arguably, this was so without a number of questions relevant to an assessment of the lawfulness of the use of force ever being asked or answered. The first question was whether the attribution of terrorist acts to a state was a prerequisite to the existence of an 'armed attack' and the right to use self defence in the territory of that state. State responses to the Afghan intervention have therefore been broadly cited as contributing to a shift in the law in this respect.⁴⁴⁰ This appears to be supported by subsequent practice, which suggests that in the debate on the lawfulness of cross border incursions in the course of counter-terrorism operations onto other states territories, attribution is rarely raised as a legal requirement.⁴⁴¹

Emphasis has instead been placed on the 'unwillingness and inability' of states on whose territory self defence is employed to address the threats of terrorism emanating from their territory. Such unwillingness or inability is a legal pre-requisite to the necessity of action in self defence, but caution is undoubtedly due not to inflate, as some have, the significance of the assessment by one state of another as 'unwilling or unable' as somehow rendering moot the basic sovereignty concerns or the applicability of the Article 2(4) prohi-

438 Chirac, 23 September 2003, *supra* note 370. Iraq is often cited as a deterrent to further use of force in Syria and elsewhere. See also Spanish president Zapatero noting that after the Madrid attacks that 'You cannot combat terrorism with war. What war does, as has happened in Iraq, is to proliferate hate, violence and terror', *El Pais*, 16 March 2004. See recognition of negative impact of Iraq also in President Obama Speech on Drones and Counter-terrorism, 23 May 2013.

439 Gray, *supra* note 24, p. 2 notes that the experience of Afghan, Iraq, Lebanon and Somalia do not suggest that the use of force has been an effective response to terrorism. See also e.g. the contrasting approach of the UN Global Strategy, Chapter 7B3 See ICJ Eminent Jurists Panel Report 2010.

440 See 5A.2.1.1.

441 In assessing such impact on the law the reactions must be considered in context, by reference for example to events that followed, such as the intervention in Iraq, and Israeli attacks on Syria. Eg *UN Press Release*, 5 October 2003, UN Doc. SC/7887 or the Turkish incursion into Northern Iraq. See Tams, 'Use of Force', *supra* note 50, p. 379.

bition. While the imperative of enhanced international law enforcement is clear, it does not provide legal justification for the unilateral use of force. It may support the claim of lack of alternatives to the use of force, as required by self defence, where the conditions for self defence are met.

Beyond apparently dispensing with the attribution requirement, the lasting effect of the Afghan intervention and response is less clear. Legally speaking, serious doubts must attend the proportionality of targeting in Afghanistan, and whether attacking state institutions with a view to bringing about regime change was truly necessary to avert the attack. Yet the Afghan intervention was marked by an unwillingness to question or insist on necessity and proportionality in the response to 9/11, or to raise the politically unpopular questions regarding the lawfulness of the broad scope of the intervention, including regime change. Such questions were clear in October 2001, and to the extent that self defence could plausibly be invoked in Afghanistan many years later, became glaring.

The failure to question lawfulness in reaction to Afghanistan is of course less surprising from a political perspective. Shock and revulsion at the September 11 attacks was followed by apprehension as to the response that might ensue, particularly in light of the threatening rhetoric that those not 'for' the campaign would be considered 'against' it, and held to account accordingly.⁴⁴² Afghanistan was not only a pariah state with an exceptionally notorious human rights record, for which it had been widely condemned, its de facto government was also uniquely unpopular in the region and globally. At least in the short term there was much to be lost and little to be gained geopolitically from opposition to this conflict. It is possible to speculate that certain reactions, or the absence thereof, may have been based less on a view as to the lawfulness of military action and more on flexibility borne of a reluctance to defend the Taliban or take the intervening forces to task.⁴⁴³ It is unclear to what extent the many unique features of that situation may limit the extent

442 See, for example, the State of the Union Speech by the United States' President, 20 September 2001: 'Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.' (Selected Speeches of President George W. Bush, 2001-2008, *The White House*, p. 69, available at: http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf). See also 'axis of evil' speech, U.S. President George W. Bush, 'State of the Union Address', 29 January 2002, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html>.

443 While what states say and do is critical for the *opinio juris* rather than political motivation, where there is ambiguity, regard can legitimately be had to the context in which state reactions unfold. Such political factors may be directly relevant to assessing the precedential value, if any, of action, and the likelihood that similar 'flexibility' would be shown in the future.

to which the legacy of Afghanistan will be seen to be a broader 'relaxing' of the requirements of self defence.⁴⁴⁴

More recently, in particular with the shift to resort to targeted killings, the focus of controversy is on 'pre-emptive' or preventive self defence. While the assertion of the right to use force to prevent threats of terrorism, rather than responding to on-going or imminent attacks, has been a stalwart of US strategies since 9/11. The potential implications of the 'revolutionary'⁴⁴⁵ view of self defence, advanced in the US National Security Strategies of 2002 and 2006 and continued through the practice of targeted killings, are serious. Particularly so where the expansive view of anticipatory self defence combines with the apparent loosening or abolition of the state responsibility link: the net impact is that an unclear threat from an unclear entity with unclear links to states may render those states, their representatives and citizens vulnerable to attack.

This view has, however, found little support and generated considerable controversy, leaving serious cause to doubt that there might be a shift in international law towards acceptance of such a doctrine.⁴⁴⁶ The US National Security Strategy of 2002 and 2006, to the extent that they purported to present a legal argument as to the state of the law at all, did not garner international support.⁴⁴⁷ When it was relied upon (among other grounds), by the US in relation to Iraq, it was not endorsed by any other state involved in that intervention and met with firm rebuke from many other states and commentators.⁴⁴⁸ More recently, the UK once again made clear the opposition to pre-emptive self defence that it has maintained throughout the war on terror.⁴⁴⁹ The lack of indication of acceptance of such an approach by the broader international community of states means that it is highly unlikely, however, at least for the time being, to impact on international law.⁴⁵⁰

444 A more flexible approach to self defence has been suggested by various academics as noted above and reflected in US policy. The dangers of e.g. acceptance of attacks from non-state actors are limited so long as self defence is otherwise curtailed by strict respect for eg necessity and proportionality, but practice to date suggests otherwise.

445 Gray, 'Bush Doctrine', *supra* note 353.

446 Gray, *ibid.* para 30 states of the U.S. decision not to include it in the 2010 NSS, "...it could be argued that the absence of express reaffirmation does weaken any claim that there is a doctrine of pre-emptive self-defense in international law."

447 See 'Iraq' B3. The isolation of the U.S. position on preemptive force is acknowledged implicitly in the Brennan speech of April 2012, where he tries, unconvincingly, to reduce the differences to different definitions of imminence.

448 See, e.g., the statement of the French President, Jacques Chirac, on 23 September 2003, *supra* note 370. Although Iraq was mostly about the interpretation of Council resolutions the US on occasion also referred to its right to act preemptively.

449 Foremost U.S. ally in the WOT, the UK, has consistently rejected 'preemptive' self defence (in Iraq and in 2012 in rejecting U.S. requests for assistance in relation to Iran): <http://www.guardian.co.uk/world/2012/oct/26/iran-military-action-downing-street>.

450 See the discussion on 'how international law changes' in Chapter 1.2.2.

The United States for its part has distanced itself from extreme expressions of a doctrine of preemption, reflecting at least an appreciation of the international isolation of its legal position.⁴⁵¹ It has presented encouraging messages regarding the importance of multilateralism, which may hint at lessons learned from aspects of its unilateral resort to force since 9/11.⁴⁵² While these statements reassure on one level, they juxtapose with the growing unilateral resort to force across borders, and the assertion by the world's dominant military power of the right to do so anywhere on the global battlefield.⁴⁵³ As recent practice has clarified, there is no support in international law for the right to use force for prevention, as opposed to in response to an on-going or imminent attack. The extent to which this practice will be adopted by other states (as foreshadowed by the Russian Federation's law on the use of force), and the potential implications for the prohibition on the use of force in international law, are uncertain.

The use of force post 9/11 has certainly challenged the boundaries of the international legal framework in many ways. Resort to force has taken many different forms, provoking vastly different state reactions to them. While the use of force in Afghanistan, like the September 11 attacks that preceded it, met with perhaps unprecedented international unity, the use of force in Iraq caused international division rarely seen in the post-Cold War era. As regards the latest frontier of the war on terrorism, the broader assertion of the right to use of force against al Qaeda and the implementation of a targeted killings programme on a potential global scale, the extent to which the unfolding international response condemns, condones or endorses this may influence the ultimate impact on the *jus ad bellum*.⁴⁵⁴

States may become more robust in their insistence on respect for international law as forceful action continues to be used against lower level suspected terrorists, in a broader range of states. The debate may yet clarify the limits of the law's flexibility and the dangers of an unbridled unilateralism or the stretching beyond plausible limits of the notion of self defence.⁴⁵⁵ Experience thus far, however, appears to point to a more 'flexible' understanding of standards in relation to the prohibition on the use of force, the full

451 See US National Security Strategy 2010 which did not address the issue and Brennan April 2012 speech noting why it matters to find common ground on international law with other states. This may all make it less likely that the assertion of a right to use force preventively will affect the prohibition on the use of preemptive self defence in international law.

452 See 'Multilateralism' at 5.B.4.

453 U.S. military spending stands at half of the world's total military spending. Its military capacity is not comparable to that of any other nation. Gray, note 343, notes "But the limits of military power are clear from the US military operations in Iraq and Afghanistan, and are acknowledged in the 2010 USNSS."

454 Little condemnation was seen around the bin Laden operation, discussed separately at Chapter 9; the impact of that particular situation on the law may support the flexible approach whereby states are reluctant to condemn incursions of this type.

implications of which – for the practice of states around the world – remain to be seen.