

GERMANY JOINS THE CAMPAIGN AGAINST ISIS IN SYRIA: A CASE OF COLLECTIVE SELF-DEFENCE OR RATHER THE UNLAWFUL USE OF FORCE?

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DOI:10.17589/2309-8678-2016-4-1-26-60

On December 4, 2015, the Bundestag agreed to the participation of German troops in the Western-led military campaign against the so-called Islamic State or ISIS in Syria.

This article will discuss whether the military campaign Germany is now supporting is justified under international law. The main argument put forward by the German Government is that the use of force against ISIS targets in Syria is justified based on UN Security Council Resolution 2249 (2015) and Art. 51 of the UN Charter. Germany thus seems to be claiming that it is engaged in collective self-defence against ISIS in support and at the request of Iraq and France.

It will be shown that this line of argument is not convincing. Resolution 2249 does evidently not authorize the use of force. Article 51, on the other hand, while explicitly permitting the use of force in response to an armed attack, is limited to attacks imputable to another state. ISIS, however, is neither a state, nor is it directed by a state.

Having found the German Government's arguments to be unpersuasive, the article will then turn to customary international law as a possible source of justification. Has customary international law, especially in the aftermath of the use of force against Afghanistan under the Taliban in the aftermath of 09/11, evolved in such a way so as to now permit the use of force in self-defence against non-state actors on another state's territory without that state's consent?

Based on state practice prior and subsequent to Afghanistan it will be shown that customary international law does currently not justify the Western-led military campaign against ISIS in Syria. Bearing in mind that Syria's Government, in contrast to the Afghan Taliban Government's attitude towards Al-Qaeda in 2001, is itself attempting to fight ISIS, it must therefore be concluded that Germany's participation in the Western-led military campaign is unlawful.

Keywords: terrorism; self-defence; United Nations; Security Council Resolution 2249; Germany; Syria; ISIS.

Recommended citation: Patrick Terry, *Germany Joins the Campaign against ISIS in Syria: A Case of Collective Self-Defence or Rather the Unlawful Use of Force?*, 4(1) RLJ (2016).

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1. Introduction

On December 4, 2015, and in the aftermath of the Paris terrorist attacks of November 13, 2015, the German Parliament, the *Bundestag*, agreed to the participation of German troops in the Western-led military campaign against the so-called Islamic State or ISIS in Syria at a time when Canada has decided to withdraw from its combat role there.¹ This includes the deployment of six Tornado airplanes for reconnaissance purposes, refuelling aircraft and the dispatch of a frigate to the eastern Mediterranean. Altogether around 1,200 soldiers will initially be involved. Currently it is not anticipated that Germany will actively participate in the military campaign, which currently mainly consists of the aerial bombardment of ISIS targets in Syria conducted chiefly by the USA, France, and, more recently the UK, with intermittent Arab and Turkish support.

¹ *Canada to Withdraw Fighter Jets from Syria and Iraq Airstrikes*, BBC News (Oct. 21, 2015), <<http://www.bbc.com/news/world-us-canada-34589250>> (accessed Mar. 7, 2016).

Many have questioned the wisdom of the undertaking, considering the limited success the campaign, ongoing for more than a year now, has so far achieved, and bearing in mind the disastrous results of past Western interventions in Iraq (2003) and Libya (2011) and the far from successful intervention in Afghanistan (since 2001). This article will, however, discuss whether the military campaign Germany is now supporting is justified under international law. Certainly, Syrian President Assad has claimed that the UK's contribution, following a vote in the House of Commons on December 2, 2015, was illegal under international law.²

The main argument put forward by the German Government is that the use of force against ISIS targets in Syria is justified based on UN Security Council Resolution 2249 (2015) and Art. 51 of the UN Charter. Furthermore, some claim that the German military contribution in support of France is also justified by France's invocation of Art. 42(7) of the Treaty on European Union [hereinafter TEU]. Germany thus seems to be claiming that it is engaged in collective self-defence in support and at the request of Iraq and France, in the latter case following the ISIS-directed attacks on Paris, which have so far caused the death of 130 people and the injury of many more.

It will be shown that this line of argument is not convincing. Resolution 2249 does evidently not authorize the use of force and Art. 42(7) TEU does not provide additional legal grounds to what is already permitted under Art. 51. Article 51, on the other hand, while explicitly permitting the use of force in response to an armed attack is limited to attacks imputable to another state. Despite ISIS often being referred to as the 'Islamic State,' no other state has recognized it as such and the turmoil surrounding its expansion on the territory of Syria and Iraq would at most allow it to be described as a 'jihadist state in formation.'³ Having found the German Government's arguments to be unpersuasive, the article will then turn to customary international law as a possible source of justification. Has customary international law, especially in the aftermath of the use of force against Afghanistan under the Taliban in the aftermath of 09/11, evolved in such a way so as to now permit the use of force in self-defence against non-state actors on another state's territory without that state's consent? When discussing this, it will, however, be necessary to bear in mind that Syria's Government, in contrast to the Afghan Taliban Government's attitude towards Al-Qaeda in 2001, is itself attempting to fight ISIS.

While it will be concluded that customary international law has so far not yet evolved to justify the current Western-led military campaign against ISIS in Syria, it will be acknowledged that a future change in the law cannot be ruled out.

² *Assad: Der Westen wird scheitern*, Stuttgarter Zeitung, Dec. 7, 2015, at 1; see also Christoph Vedder, *Bundeswehr im Krieg?*, Süddeutsche Zeitung, Dec. 9, 2015, at 2.

³ Volker Perthes, as quoted by David Butter, Associate Fellow at Chatham House (Audio tape: Event Speech: Syria, Military Intervention and International Law (Oct. 9, 2014), <<https://www.chathamhouse.org/file/event-speech-syria-military-intervention-and-international-law>> (accessed Mar. 7, 2016)).

2. Resolution 2249, Art. 42(7) TEU

In the aftermath of the terrorist attacks in Paris of November 13, 2015, the Security Council, on November 20, 2015, passed Resolution 2249 in which the Security Council

Calls upon Member States . . . to take all necessary measures, in compliance with international law . . . to prevent and suppress terrorist acts committed specifically by ISIL . . .⁴

Although the authorization to ‘take all necessary measures’ is, in other contexts, generally viewed as a euphemism permitting the use of force,⁵ the Security Council, in adopting Resolution 2249, was not acting under Ch. VII of the UN Charter, which is a prerequisite for council authorization of the use of force. This procedure is also in marked contrast to, for example, the Security Council’s reaction to the Al-Qaeda attacks on the USA in 2001: in Resolution 1373 (2001) the Security Council explicitly stated that it was acting under Ch. VII.⁶ Neither the United Kingdom⁷ nor Germany⁸ are claiming explicit UN Security Council authorization as far as their participation in the use of force against Syria is concerned.

France, the first state to do so, also invoked Art. 42(7) TEU. However, there is general agreement that Art. 42(7) does not authorize military action beyond what is already permitted under Art. 51 of the UN Charter. In fact, Art. 42(7) explicitly demands that any assistance given by EU Member States must be in accordance with Art. 51 of the UN Charter. Consequently neither the UK nor Germany are justifying their military actions on the basis of Art. 42(7) TEU as far as international law is concerned.⁹

⁴ S.C. Res. 2249, ¶ 5, U.N. Doc. S/RES/2249 (Nov. 20, 2015), at <[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2249\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2249(2015))> (accessed Mar. 7, 2016).

⁵ *E.g.*, U.N. Security Council Resolution 678 (1990) authorizing the use of force against Iraq subsequent to its occupation of Kuwait.

⁶ S.C. Res. 1373, Preamble, U.N. Doc. S/RES/1373 (Sep. 28, 2001), at <[http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20\(2001\).pdf](http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf)> (accessed Mar. 7, 2016).

⁷ *Legal Basis for UK Military Action in Syria*, House of Commons Library (Dec. 1, 2015), <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7404>> (accessed Mar. 7, 2016).

⁸ Antrag der Bundesregierung vom 01.12.2015, Drucksache 18/6866, at <<http://dip21.bundestag.de/dip21/btd/18/068/1806866.pdf>> (accessed Mar. 7, 2016).

⁹ *See supra*, nn. 7, 8. The German Government is, however, relying on Art. 42(7) TEU in order to justify its actions under German constitutional law. *See also* Dapo Akande & Marko Milanovic, *The Constructive Ambiguity of the Security Council’s ISIS Resolution*, EJIL: Talk! (Nov. 21, 2015), <<http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>> (accessed Mar. 7, 2016) (they agree that the Resolution does not authorize the use of force but argue that it is worded in such an ambiguous way to allow the USA and other states to claim the use of force to be legal while permitting Russia and Iran to claim the opposite).

Neither Resolution 2249 nor Art. 42(7) TEU thus provide a legal justification for German participation in the military action targeted at ISIS in Syria.

3. Article 51 of the UN Charter

The main argument put forward by the German Government appears to be that German military action is justified under Art. 51 of the UN Charter. By contributing toward the bombing campaign against ISIS targets in Syria Germany was coming to the aid of Iraq and France at those states' request. Therefore Germany was acting in collective self-defence which is a permitted exception to the ban on the use of force under Art. 2(4). It is therefore necessary to examine whether the requirements laid down in Art. 51 are met.

3.1. Past Security Council Confirmation of Art. 51 Situation

Without going into any detail, as to whether the anti-ISIS operations actually conform to the criteria laid down in Art. 51, it has been argued that the Security Council had in the past declared the use of force in response to terrorist acts as justified under Art. 51.¹⁰ This argument is based on Resolutions 1368 (2001) and 1373 (2001) which were adopted by the Security Council in the aftermath of the Al-Qaeda attacks on the USA in 2001 in respect of the use of force against Afghanistan.¹¹

For a number of reasons that view is, however, incorrect. Since the USA and the UK at the time decided not to proceed on the basis of a UN approved military intervention in Afghanistan, this obviously means that the Security Council did not have the chance to express its views on the actual use of force by the two allies.¹²

¹⁰ *Eine juristische Hilfskonstruktion dient als Grundlage*, Stuttgarter Zeitung, Dec. 5, 2015, at 4.

¹¹ Yoram Dinstein, *Terrorism and Afghanistan*, in *The War in Afghanistan: A Legal Analysis* (= 85 International Law Studies) 43, 46 (Michael N. Schmitt, ed.) (Naval War College 2009), available at <<http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1117&context=ils>> (accessed Mar. 7, 2016) [hereinafter Dinstein, *Terrorism*]; Lindsay Moir, *Reappraising the Resort to Force: International Law, Jus ad Bellum and the War on Terror* (= 27 Studies in International Law) 53–54 (Hart Pub. 2010) (despite acknowledging that international law prior to 09/11 demanded an attack to be imputable to a state in order to qualify under Art. 51, and accepting the fact there was no UN authorization, Moir then concludes that the UN Security Council had – apparently – authoritatively decided that, on 09/11, an 'armed attack' on the United States under Art. 51 had occurred, and that the US could therefore respond by using force in self-defence; he therefore obviously deems the UN Security Council resolutions on the matter sufficient to assume Art. 51 was basically adhered to; Moir then proceeds to examine only the questions of necessity and proportionality); Nicholas Rostow, *Before and After: The Changed UN Response to Terrorism since September 11th*, 35 Cornell J. Int'l L. 475, 481 (2002), available at <<http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1512&context=cilj>> (accessed Mar. 7, 2016); Jane E. Stromseth, *New Paradigms for the Jus ad Bellum?*, 38 Geo. Wash. Int'l L. Rev. 561, 566 (2006).

¹² *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*, U.N. SCOR, U.N. Doc. S/2001/946 (2001), at <<http://www.hamamoto.law.kyoto-u.ac.jp/kogi/2005kiko/s-2001-946e.pdf>> (accessed

There is not one Security Council resolution that explicitly declares the attack on Afghanistan to be in accordance with Art. 51.¹³

It is correct that the Security Council, 'recognized' and 'reaffirmed' the right of self-defence in the aftermath of 09/11, in Resolutions 1368 and 1373. However, both resolutions were adopted *prior* to the initiation of any hostilities on October 7, 2001. The Security Council could obviously not declare that *any action subsequently* undertaken by the USA would necessarily conform to the prerequisites of the right of self-defence as laid down in Art. 51.¹⁴ Furthermore, Afghanistan was not even explicitly mentioned in those resolutions as a possible target of the use of force.¹⁵ The phrases the Security Council employed in reaction to 09/11 were thus markedly different from the language used in Resolution 661 (1990) authorizing the use of force against Iraq: then the Security Council had declared it was

*[a]ffirming the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter . . .*¹⁶ (second emphasis added).

Mar. 7, 2016); *Letter Dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, U.N. Doc. S/2001/947 (2001), at <<http://www.hamamoto.law.kyoto-u.ac.jp/kogi/2005kiko/s-2001-947e.pdf>> (accessed Mar. 7, 2016); see excerpts in *Operation Enduring Freedom and the Conflict in Afghanistan: An Update* 10 (House of Commons Library Research Paper 01/81, October 31, 2001), <<http://researchbriefings.files.parliament.uk/documents/RP01-81/RP01-81.pdf>> (accessed Mar. 7, 2016).

¹³ Noëlle Quéniévet, *The World after September 11: Has It Really Changed?*, 16 Eur. J. Int'l L. 561, 576 (2005), available at <<http://www.ejil.org/pdfs/16/3/309.pdf>> (accessed Mar. 7, 2016) doi: 10.1093/ejil/chi131 (she argues that the Security Council 'preferred to abstain from judging the legality of the British and American intervention'); Eric P.J. Myjer & Nigel D. White, *The Twin Towers Attack: An Unlimited Right to Self-Defence?*, 7 J. Conflict & Sec. L. 5, 9–13 (2002) (they describe the Security Council's reaction as one of 'deliberate ambiguity', and accuse it of 'doing its best to ignore the crucial issue of the legal basis of the US response'); John Quigley, *The Afghanistan War and Self-Defense*, 37 Val. U. L. Rev. 541, 553–54 (2003), available at <<http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1287&context=vulr>> (accessed Mar. 7, 2016) (in his view the Security Council reaction was one of 'inaction' and 'silence' in response to Operation Enduring Freedom); Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 Eur. J. Int'l L. 993, 996 (2001), available at <<http://www.ejil.org/pdfs/12/5/1558.pdf>> (accessed Mar. 7, 2016) doi:10.1093/ejil/12.5.993 [hereinafter Cassese, *Terrorism*]; Christine Gray, *International Law and the Use of Force* 206–07 (3rd ed., Oxford University Press).

¹⁴ Jan Wouters & Frederik Naert, *Shockwaves through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism*, in *Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue* 411, 446 (Cyrille Fijnaut et al., eds.) (Martinus Nijhoff 2004).

¹⁵ Moir, *supra* n. 11, at 53; Quigley, *supra* n. 13, at 549; Jörg Kammerhofer, *The Armed Activities Case and Non-State Actors in Self-Defence Law*, 20 Leiden J. Int'l L. 89, 99–100 (2007), available at <http://papers.ssrn.com/abstract_id=1551758> (accessed Mar. 7, 2016).

¹⁶ S.C. Res. 661, Preamble, para. 7, U.N. Doc. S/RES/661 (Aug. 6, 1990), at <<https://www.treasury.gov/resource-center/sanctions/Documents/661.pdf>> (accessed Mar. 7, 2016).

Ruys and Verhoeven have correctly pointed out that the Security Council, in Resolutions 1368 and 1373, avoided any explicit reference to an 'armed attack' having occurred, and instead only described them as a 'threat to international peace and security.' This implies the Council – far from confirming an Art. 51 situation – was in truth 'hesitant in accepting the right of self-defence in response to attacks by private actors.'¹⁷ Reisman has gone even further, and claims that the language used by the Security Council, especially in Resolution 1368, actually 'kept' terrorist acts 'from falling under Article 51's right of self-defence.'¹⁸

Furthermore, even if a different view of Security Council Resolutions 1368 and 1373 were taken, the underlying situations in Afghanistan in 2001 and Syria in 2015 are not comparable. Thus Resolutions 1368 and 1373 can in any case not be automatically applied to Syria. At the time many argued that the Taliban Government of Afghanistan was at least 'harbouring' Al-Qaeda terrorists, if not even actively cooperating with them, allegedly justifying the use of force against that state. Nobody is claiming that Syria is tolerating or actively supporting ISIS. In fact, it is uncontroversial that the Syrian Government is itself, with Russian support, attempting to fight the ISIS terrorists. Obviously that raises different issues as to whether the use of force against Syria is justified.

The conclusion must therefore be that neither did the Security Council in 2001 declare Operation *Enduring Freedom* to be in accordance with Art. 51, nor would such a declaration be automatically applicable to the Syrian situation.

3.2. Are ISIS Terrorist Actions against Iraq and France 'Armed Attacks' According to Art. 51?

In order to justify the use of force in collective self-defence under Art. 51 it is necessary for an 'armed attack' to be occurring against a member of the UN.

¹⁷ See Tom Ruys & Sten Verhoeven, *Attacks by Private Actors and the Right of Self-Defence*, 10(3) *Journal of Conflict & Security Law* 312 (2005) doi:10.1093/jcsl/kri016; Myjer & White, *supra* n. 13, at 9–11 (they make the same point); Sean D. Murphy, *Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter*, 42 *Harv. Int'l L.J.* 41, 46 (2002) [hereinafter Murphy, *Terrorism*] (he makes a similar point in respect of the General Assembly's Resolution in reaction to the events of September 11, 2001 (Resolution 56/1 (2001)). See also Wouters & Naert, *supra* n. 14, at 446; Mikael Nabati, *International Law at a Crossroads: Self-Defense, Global Terrorism and Preemption (A Call to Rethink the Self-Defense Normative Framework)*, 13 *Transnat'l L. & Contemp. Probs.* 771, 780 (2003) (he points out that GA Resolution 56/1 'explicitly declines to characterize the acts as an armed attack under Article 51 of the Charter').

¹⁸ W. Michael Reisman, *International Legal Dynamics and the Design of Feasible Missions: The Case of Afghanistan*, in *The War in Afghanistan*, *supra* n. 11, at 59, 64–65, available at <<http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1118&context=ils>> (accessed Mar. 7, 2016) [hereinafter Reisman, *International Legal Dynamics*] (he bases this conclusion on the fact that the Council, in Resolution 1368, chose to refer to 'threats to the peace,' instead of 'breaches of the peace' or 'acts of aggression,' when categorizing the attacks of 09/11; he also refers to Resolution 1378 (2001) in which the Council had declared its support for 'international efforts to root out terrorism,' but that these efforts were to 'be in keeping with the Charter of the United Nations;' in Reisman's view this is 'code for the Charter's prohibition on the unilateral use of force in any circumstance other than exigent self-defense').

There can be little doubt that ISIS actions in Iraq and France meet one of the controversial aspects of the definition of the term 'armed attack,' namely the 'gravity' criterion, referred to by the ICJ. In 2014 alone more than 17,000 civilians were killed in Iraq, almost double the number of 2013. The steep rise is mainly attributed to ISIS activities in the country.¹⁹ On November 13, 2015, various simultaneous terrorist attacks were carried out in France for which ISIS later claimed responsibility: 130 civilians were killed,²⁰ more than 350 civilians injured.²¹ Furthermore, it seems likely the terrorists were originally planning to kill thousands of spectators at a football match in the *Stade de France* in St. Denis.²² Overall, these attacks were the worst in France since World War II.²³ The gravity of the ISIS terrorist activities is thus undoubtedly sufficient to meet any reasonable application of the controversial 'scale and effect' criteria outlined by the ICJ.

Whether an attack has to meet additional criteria in order for it to be classified as an 'armed attack' under Art. 51 is very controversial.

3.2.1. *State Involvement in Attack is Not Necessary under Art. 51*

The question that has aroused most controversy is whether an 'armed attack,' as demanded in Art. 51, can only be carried out by a state, or whether it can originate from any other source as well. This is particularly relevant when deciding whether a state can resort to the use of force in self-defence under Art. 51 in response to a terrorist attack. It is, after all, the very nature of terrorist attacks that they are often not carried out by states, or at the behest of states. Demanding state participation in any attack for it to be judged an 'armed attack' would thus preclude an attacked state's recourse to Art. 51 in response to most terrorist attacks. This is particularly relevant as far as the bombing campaign against ISIS targets in Syria is concerned. After all, it is beyond doubt that the state of Syria neither supports ISIS nor tolerates, *i.e.* 'harbours,' ISIS terrorists on its territory. Rather, Syria itself is attempting to combat ISIS and has availed itself of Russian support in this quest.

¹⁹ *Civilian Death Toll in Iraq Doubles to 17,000 in 2014 'Due to Rise of ISIS'*, RT (Jan. 1, 2015), <<https://www.rt.com/news/219223-iraq-civilian-death-toll/>> (accessed Mar. 7, 2016).

²⁰ *Paris Death Toll Rises to 130*, RTÉ News (Nov. 20, 2015), <<http://www.rte.ie/news/2015/1120/747897-paris/>> (accessed Mar. 7, 2016).

²¹ Mary B. Marcus, *Injuries from Paris Attacks Will Take Long to Heal*, CBS News (Nov. 19, 2015), <<http://www.cbsnews.com/news/injuries-from-paris-attacks-will-take-long-to-heal/>> (accessed Mar. 7, 2016).

²² Stacy Meichtry et al., *Behind François Hollande's Snap Decision at Stade de France and the Unfolding Terror in Paris*, The Wall Street Journal (Nov. 15, 2015), <<http://www.wsj.com/articles/behind-francois-hollandes-snap-decision-at-stade-de-france-and-the-unfolding-terror-in-paris-1447634427>> (accessed Mar. 7, 2016).

²³ Tracy McVeigh & Emma Graham-Harrison, *Parisians Throw Open Doors in Wake of Attacks, but Muslims Fear Repercussions*, The Guardian (Nov. 14, 2015), <<http://www.theguardian.com/world/2015/nov/14/paris-attacks-people-throw-open-doors-to-help>> (accessed Mar. 7, 2016).

There are, broadly speaking, two lines of argument in support of the argument that state participation in an 'armed attack' is *not* a requirement of Art. 51. Both rely on a literal interpretation of the wording of Art. 51, especially in comparison to the wording of Art. 2(4). While Art. 2(4) requires '*all Members*' to 'refrain . . . from the threat or use of force against . . . *any State*,' Art. 51 *only* refers to armed attacks occurring '*against a Member of the United Nations*,' *without* specifying from whom the attack must originate. Based on the wording of Art. 51, the argument goes, any 'armed attack,' no matter who carries it out, is sufficient to trigger the right of self-defence²⁴ (emphases added).

This interpretation is, some argue, confirmed by the legal discussions surrounding the *Caroline* incident of 1837, usually analyzed in the context of anticipatory self-defence. In 1837 the American ship *Caroline*, which was in the hand of Canadian rebels, was set on fire by British troops while moored in American territorial waters, and two people were killed. The Americans subsequently demanded compensation from the British, who in return claimed to have acted in self-defence. Although the question of whether the British had acted in self-defence was contentious between the two states, the fact the Canadian rebels were non-state actors was, judging by the notes, obviously not deemed relevant by the two states. Some therefore conclude that the Anglo-American exchange of notes confirms that the right of self-defence has always also been available in response to attacks carried out by non-state actors.²⁵

The slight *difference* between the two strands of thought in support of the view that, under Art. 51, attacks carried out by non-state actors, are sufficient, is one more

²⁴ Moir, *supra* n. 11, at 47; Ruys & Verhoeven, *supra* n. 17, at 311; Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 Am. J. Int'l L. 839, 840 (2001); Murphy, *Terrorism*, *supra* n. 17, at 46, 51; Carsten Stahn, *Terrorist Acts as 'Armed Attack': The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27 Fletcher F. World Aff. 35, 35–36 (2003), available at <http://dl.tufts.edu/file_assets/tufts:UP149.001.00054.00005> (accessed Mar. 7, 2016); Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond*, 35 Cornell Int'l L. J., 533, 534–35 (2002), available at <<http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1518&context=cilj>> (accessed Mar. 7, 2016); Stromseth, *supra* n. 11, at 566; Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 Yale J. Int'l L. 559, 564 (1999), available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3277&context=fss_papers> (accessed Mar. 7, 2016); Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 Int'l & Comp. L.Q. 963, 969–70 (2006); Dinstein, *Terrorism*, *supra* n. 11, at 45–46; *Idem*, *War, Aggression and Self-Defence* 245–47 (4th ed., Cambridge University Press 2005) doi:10.1017/CBO9780511841019 [hereinafter Dinstein, *War*]

²⁵ Paust, *supra* n. 24, at 535; W. Michael Reisman, *International Legal Responses to Terrorism*, 22 Hous. J. Int'l L. 3, 42–46 (1999), available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2029&context=fss_papers> (accessed Mar. 7, 2016) [hereinafter Reisman, *International Legal Responses*]; Guy B. Roberts, *Self-Help in Combatting State-Sponsored Terrorism: Self Defense and Peacetime Reprisals*, 19 Case W. Res. J. Int'l L., 243, 268–69 (1987), available at <<http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1726&context=jil>> (accessed Mar. 7, 2016); Wilmshurst, *supra* n. 24, at 970; Dinstein, *War*, *supra* n. 24, at 248–49; for extracts of the notes exchanged between Britain and the USA in 1841–42, see <http://avalon.law.yale.edu/19th_century/br-1842d.asp> (accessed Mar. 7, 2016).

of emphasis than of substance. While some simply rely on a literal reading of Art. 51, others acknowledge that the authors of the Charter, in the immediate aftermath of World War II, did not envisage massive terrorist attacks, so automatically assumed that armed attacks could only be carried out by states.²⁶ The latter, however, insist that times had changed, because terrorist organizations had since then gained the ability to carry out armed attacks on states. The wording of Art. 51 made it possible to now interpret its content in such a way, so as to include attacks not launched by states in the definition of 'armed attack'.²⁷

It cannot be disputed that the arguments just set out do have some merits. The literal interpretation of Art. 51 is certainly in accordance with Art. 31(1) Vienna Convention on the Law of Treaties, the provisions of which are, despite having only been codified in 1969, generally seen as reflective of longstanding international customary law.²⁸ Furthermore, the arguments are seemingly reinforced by NATO's decision, on September 12, 2001, to invoke Art. 5 of the North Atlantic Treaty, in response to Al-Qaeda's attacks on the USA. Article 5 also requires an 'armed attack' in order to justify mutual assistance.²⁹ In addition, France's invocation, in the aftermath of the terrorist attacks on November 13, 2015, of Art. 42(7) TEU, which requires an 'armed aggression' against a Member State of the EU and explicitly refers to Art. 51, met a positive response from the other 27 EU Member States.³⁰

²⁶ Moir, *supra* n. 11, 47; Murphy, *Terrorism*, *supra* n. 17, at 46, 51; Stuart G. Baker, *Comparing the 1993 Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 Ga. J. Int'l & Comp. L., 99, 107–08 (1994), available at <<http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1412&context=gjicl>> (accessed Mar. 7, 2016); Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 Wis. Int'l L.J. 145, 156 (2000); Rein Müllerson, *Jus ad Bellum: Plus ça change (le monde), plus c'est la même chose (le droit)?*, 7(2) Journal of Conflict & Security Law 172, 177 (2002) doi:10.1093/jcsl/7.2.149; Niaz A. Shah, *Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law's Response to Terrorism*, 12(1) Journal of Conflict & Security Law 104, 108–111 (2007) doi:10.1093/jcsl/krm006 (his stance seems contradictory: he argues that Art. 51 includes 'the activities of non-state actors in the case of an armed attack,' but then goes on to claim that the use of force against 'non-state actors' is only justified when the acts are 'attributable to a state').

²⁷ Moir, *supra* n. 11, at 47; Murphy, *Terrorism*, *supra* n. 17, at 46, 51; Stahn, *supra* n. 24, at 41–43; Baker, *supra* n. 26, at 108; Erin L. Guruli, *The Terrorism Era: Should the International Community Redefine Its Legal Standards on Use of Force in Self-Defense?*, 12 Willamette J. Int'l L. & Disp. Res. 100, 108–09 (2004); Shah, *supra* n. 26, 104–08; Sir Franklin Berman, *The UN Charter and the Use of Force*, 10 Sing. Y.B. Int'l L. 9, 10–11 (2006), available at <<http://www.commonlii.org/sg/journals/SGYrBkIntLaw/2006/3.pdf>> (accessed Mar. 7, 2016); Müllerson, *supra* n. 26, at 171–79; Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* 183 (Manchester University Press 2005); Christopher Greenwood, *International Law and the 'War against Terrorism'*, 78(2) International Affairs 307 (2002) doi:10.1111/1468-2346.00252 (he accuses adherents of the opposite view of 'strange formalism').

²⁸ Ruys & Verhoeven, *supra* n. 17, at 290; Wouters & Naert, *supra* n. 14, at 430.

²⁹ *Statement by the North Atlantic Counsel*, NATO (Sep. 12, 2001), <<http://www.nato.int/docu/pr/2001/p01-124e.htm>> (accessed Mar. 7, 2016); Franck, *supra* n. 24, at 840.

³⁰ *Terror-Serie in Paris: Frankreich beantragt offiziell Hilfe bei der EU*, Spiegel Online (Nov. 17, 2015), <<http://www.spiegel.de/politik/ausland/frankreich-beantragt-offiziell-hilfe-bei-der-europaeischen-union-a-1063179.html#>> (accessed Mar. 7, 2016).

3.2.2. *State Involvement in Attack is Necessary under Art. 51*

Nevertheless, arguments that are more convincing can be made in favor of the opposite point of view, namely of requiring state participation in any armed attack that triggers the right of self-defence under Art. 51.

The drafters of the Charter would simply not have deemed it necessary to specify, in Art. 51, possible perpetrators of an 'armed attack,' as it would have been self-evident to them that such an attack could *only* be carried out by a state. The difference to Art. 2(4) is that non-state actors, such as secessionist insurgents, could conceivably also resort to the prohibited use of force.³¹

A purely textual interpretation of Art. 51 does, however, most likely not only contradict the Charter drafters' intentions, but is also difficult to reconcile with the Charter's aims. Allowing the use of force in self-defence against a state *not involved* in an 'armed attack,' simply based on the fact that the perpetrators happen to be within that state's territory would necessarily not only undermine the Charter's aim of preserving peace, but would also threaten the concepts of sovereign equality and of sovereignty as such.³² It robs the sovereign state that is willing to combat the terrorists on its territory of the possibility of deciding how to go about that endeavour, and, even more importantly, with whose support.

Since an armed attack by a non-state actor would, under such a literal interpretation of Art. 51, automatically trigger the right of self-defence, the victim state would be justified in ignoring another state's independence and sovereignty by attacking presumed 'terrorist bases' on that other state's territory (with all the resulting risks of civilian casualties, etc.). This would occur even if the attacked state could not be accused of any violation of international law. Such a state of affairs would necessarily run the risk of turning a major terrorist attack into a war, thus possibly even furthering the terrorists' cause.³³ Application of a purely textual understanding of Art. 51 to the India-Pakistan conflict, as far as the troubles in Kashmir are concerned, should give any adherent of the opposite view pause for thought.³⁴

³¹ Richard H. Heindel et al., *The North Atlantic Treaty in the United States Senate*, 43 Am. J. Int'l L. 633, 645 (1949) doi:10.2307/2193257; Ian Brownlie, *International Law and the Use of Force by States* 278–79 (Oxford University Press 1963 (reprint 1968)) (he states that it is 'doubtful' whether the phrase 'armed attack' could possibly apply to the activities of armed bands or other irregulars).

³² Cassese, *Terrorism*, *supra* n. 13, at 997; Travalio, *supra* n. 26, at 179–80.

³³ Cassese, *Terrorism*, *supra* n. 13, at 997; Ian Johnstone, *The Plea of 'Necessity' in International Legal Discourse: Humanitarian Intervention and Counterterrorism*, 43 Colum. J. Transnat'l L. 337, 369 (2005); Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 Yale J. Int'l L. 537, 542–43, 556 (1999); Travalio, *supra* n. 26, at 156–57, 159, 179–80; Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 Am. J. Int'l L. 415, 438 (1969); Reisman, *International Legal Dynamics*, *supra* n. 19, at 70–71 (in a general discussion of the legality of the use of force in the aftermath of terrorist attacks, he points to that danger; he cites the example of Afghanistan's President Karzai, in June 2008, threatening neighbouring Pakistan with 'cross-border attacks' to deal with the 'militants' there, thereby relying on Afghanistan's right of self-defence as justification; Pakistan reacted by reminding Karzai of its 'sovereignty,' despite acknowledging the presence of militants in the Afghan-Pakistani border area).

³⁴ Steven R. Ratner, *Jus ad Bellum and Jus in Bello after September 11*, 96 Am. J. Int'l L. 905, 917–18 (2002), available at <<http://users.polisci.wisc.edu/kinsella/ratner.pdf>> (accessed Mar. 7, 2016).

The argument that, based on the *Caroline* incident of 1837, a strict interpretation of Art. 51 is unjustified, is also not convincing. As the Anglo-American exchange of notes demonstrates, the phrase ‘armed attack’ was neither discussed, nor even mentioned in the exchange between the two states: a consequence of the fact that an ‘armed attack’ was not a prerequisite of the right to use force in self-defence in 1837, in contrast to the situation under the Charter. The views on self-defence expressed by the British and American representatives in 1841–42 can therefore have no bearing on the interpretation of the phrase ‘armed attack.’

That Art. 51 should be understood as requiring an ‘armed attack’ to be attributable to a state is also confirmed by state practice and *opinio juris*.³⁵ Prior to the terrorist attacks of September 11, 2001, most states assumed and argued that any armed attack triggering the right of self-defence must be attributable to a state.³⁶ As even Judge Kooijmans of the International Court of Justice [hereinafter ICJ] – despite arguing that changes in the law may have taken place in the aftermath of 09/11 – acknowledged in his separate opinion in the *Wall* case, the view that an ‘armed attack’, as understood in Art. 51, had to be carried out by another state had been ‘the generally accepted interpretation for more than 50 years.’³⁷ This was notably also the position taken by the USA, the International Law Commission,³⁸ and NATO.³⁹

³⁵ These are relevant criteria as confirmed by Art. 31(3)(b) Vienna Convention on the Law of Treaties (1155 U.N.T.S. 331, 340).

³⁶ Ruys & Verhoeven, *supra* n. 17, at 290–91, 312; Myjer & White, *supra* n. 13, at 7; Kammerhofer, *supra* n. 15, at 100; Murphy, *Terrorism*, *supra* n. 17, at 46, 51; Cassese, *Terrorism*, *supra* n. 13, at 997; Gray, *supra* n. 13, at 199; Moir, *supra* n. 11, at 47–48, 52 (although he personally disagrees with this interpretation of Art. 51; he acknowledges that the ICJ’s judgement in the *Nicaragua* case – analyzed in detail later – in that respect ‘was probably justified in light of the practice of states, and of the Security Council’).

³⁷ Legal Consequences of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 35 (July 9) (separate opinion Judge Kooijmans) [hereinafter Legal Consequences]; see also John F. Murphy, *Afghanistan: Hard Choices and the Future of International Law*, in *The War in Afghanistan*, *supra* n. 11, at 79, 98–99, available at <<http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1119&context=ils>> (accessed Mar. 7, 2016) (writing in 2008–09, states that there was ‘considerable scholarly comment in support of the notion that there is no right of self-defense under Article 51 against an armed attack by a non-state actor’); Gazzini, *supra* n. 27, at 139.

³⁸ Draft Articles on State Responsibility, in Report of the International Law Commission, U.N. GAOR, 32nd Sess., Supp. No. 10, U.N. Doc. A/35/10 (1980), reprinted in 2(2) Y.B. Int’l L. Comm’n 1, 52–53 (1981), U.N. Doc. A/CN.4/SER.A/1980/Add.I (Part 2), U.N. Sales No. E.81.V.4 (Part II), at <http://legal.un.org/ilc/publications/yearbooks/english/ilc_1980_v2_p2.pdf> (accessed Mar. 7, 2016); the International Law Commission was, however, more hesitant in *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission, U.N. GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), reprinted in 2(2) Y.B. Int’l L. Comm’n 1, 75 (2007), U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), U.N. Sales No. E.04.V.17 (Part 2), at <http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf> (accessed Mar. 7, 2016).

³⁹ *The Alliance’s Strategic Concept*, NATO (Apr. 24, 1999), <http://www.nato.int/cps/en/natolive/official_texts_27433.htm?selectedLocale=en> (accessed Mar. 7, 2016) (especially ¶¶ 10 (‘Security; Deterrence and Defence’) and 24). The way of the Concept (¶ 24) is formulated it is clear that terrorist attacks were not seen as ‘armed attacks’ covered by Arts. 5 and 6 of the Washington Treaty: ‘Any armed attack on the territory of the Allies, from whatever direction, would be covered by Articles 5 and 6 of the

The Foreign Relations Committee of the US Senate, when reporting on the North Atlantic Treaty to the full Senate prior to ratification, defined the term 'armed attack' in Art. 5 of the North Atlantic Treaty as follows:

The committee notes that Article 5 would come into operation *only when a nation* had committed an international crime *by launching an armed attack* against a party to the treaty.⁴⁰ (emphasis added).

Three staff members on the US Senate Committee on Foreign Relations at the time concurred with this assessment in a subsequent article elaborating further:

But what is an armed attack? Does any violence perpetrated upon any member or upon any of its nationals constitute an armed attack under the Treaty? Since the principal objective of the Treaty is to safeguard the security of the North Atlantic area, only such armed attacks as threaten that security are contemplated. *This rules out violence of irresponsible groups and refers, as Article 51 of the Charter clearly contemplates, to an armed attack of one state against another.* Purely internal disturbances and revolutions are not included, although aid given to revolutions by outside Powers can conceivably be considered an armed attack.⁴¹ (emphasis added).

Similarly, the *Definition of Aggression*⁴² (Art. 1), passed unanimously by the General Assembly, defined an act of aggression as follows:

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. (emphases added).

This obviously reflects widespread consensus, as far as the necessity of state attribution is concerned. The fact that Resolution 3314 (1974) did not define the term 'armed attack' is not relevant in this context, as there can be no serious doubt that an 'armed attack,' as understood in Art. 51, is probably the most serious manifestation of an act of aggression.⁴³

Washington Treaty. However, Alliance security must also take account of the global context. *Alliance security interests can be affected by other risks of a wider nature, including acts of terrorism, sabotage and organised crime, and by the disruption of the flow of vital resources.* (emphasis added).

⁴⁰ Excerpts from the *Executive Report of the Committee on Foreign Relations*, U.S. Senate, Executive Report No. 8, 81st Congress, 1st session, June 6, 1949, reprinted in 20 Dep't St. Bull. 787, 789 (1949).

⁴¹ Heindel et al., *supra* n. 31, at 645.

⁴² Annex to UNGA Resolution 3314 (XXIX) of December 14, 1974.

⁴³ Wouters & Naert, *supra* n. 14, at 431; Gray, *supra* n. 13, at 199–200.

Resolution 3314, passed in 1974, refutes the argument that states, certainly at that time, interpreted Art. 51 in such a way so as to include attacks carried out by non-state actors. It is far-fetched to assume that states would have wanted to exclude some of the manifestations of an 'armed attack' under Art. 51 from the definition of aggression.⁴⁴ This is further confirmed by Art. 3(g) of the *Definition of Aggression*, which explicitly deals with non-state actors, and declares their actions to be acts of aggression *only* in those cases when they have been 'sent by or on behalf of a State,' or when another state is otherwise 'substantially involved.'

Denying the necessity of state participation in an 'armed attack' would thus lead to the unsatisfactory conclusion that terrorist attacks would qualify as 'armed attacks' under Art. 51, but would not be deemed to be 'acts of aggression' under the unanimously passed *Definition of Aggression*.

It may be countered that Resolution 3314 is out-dated and has been overtaken by events.⁴⁵ Still, when this resolution was adopted in 1974, terrorists were already steadily strengthening their capabilities. It is also the case that the resolution, generally viewed as reflective of customary international law, has so far not been repudiated or disowned by any state. Although not directly relevant to the issue discussed here, it should be noted that the state parties to the Rome Statute of the International Criminal Court, have, in their resolution of June 11, 2010, in fact again relied on Art. 3(g) of the *Definition of Aggression* in their attempt to define the equivalent crime.⁴⁶

3.2.3. *The International Court of Justice's View*

The ICJ, too, has indicated that it believes that an armed attack under Art. 51 must be imputable to a state.⁴⁷ In the 1986 *Nicaragua* case the ICJ had the opportunity to deal with the use of force by non-state actors, when it had to decide whether US-support for the Nicaraguan rebels, the *Contras*, in their armed struggle against the Nicaraguan Government, amounted to an 'armed attack' against that state. *Inter alia*, the Court declared:

In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. . . . There appears now to be *general agreement* on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action

⁴⁴ Roberts, *supra* n. 25, at 263.

⁴⁵ Reisman, *International Legal Responses*, *supra* n. 25, at 39.

⁴⁶ *The Crime of Aggression*, Annex I, Art. 2, ICJ Resolution RC/Res.6 (2010), at <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf> (accessed Mar. 7, 2016).

⁴⁷ Johnstone, *supra* n. 33, at 367–68; Moir, *supra* n. 11, at 24–25 (he, however, seems to disagree with the ICJ's interpretation).

by regular armed forces across an international border, *but also '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' (inter alia) an actual armed attack conducted by regular forces, 'or its substantial involvement therein.* This description, contained in Article 3 paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. . . . But the Court *does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.* Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.⁴⁸ (emphases added).

By relying on Art. 3(g) of the *Definition of Aggression*, when interpreting the term 'armed attack,' the ICJ emphasized that state involvement was necessary for sufficiently grave acts, committed by 'armed bands,' to be classified as 'armed attacks.' This conclusion is further confirmed by the fact that the ICJ proceeded to exclude even a state's 'mere' provision of weapons or logistical support for such an attack by 'armed bands' from the concept of 'armed attack.'⁴⁹

As far as the *Nicaragua* judgement, handed down in 1986, is concerned it is – again – sometimes argued that the ICJ's view had been overtaken by events.⁵⁰ However, in much more recent rulings, the ICJ seems to be inclined to confirm its earlier view on the matter.

In its 2004 Advisory Opinion as to the legality of the Israeli-constructed wall on occupied Palestinian territory, the ICJ declared:

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack *by one State against another State.* However, Israel does not claim that the attacks against it are imputable to a foreign State.⁵¹ (emphasis added).

⁴⁸ Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. USA*), 1986 I.C.J. 14, ¶ 195 (June 27) [hereinafter *Military and Paramilitary Activities*].

⁴⁹ Murphy, *Terrorism*, *supra* n. 17, at 44; Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 Int'l & Comp. L.Q. 401, 407–08 (2002), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5575&context=faculty_scholarship> (accessed Mar. 7, 2016) doi:10.1093/iclq/51.2.401 [hereinafter *Byers, Terrorism*]; Kammerhofer, *supra* n. 15, at 105, 107, 109; Lobel, *supra* n. 33, at 541; Gray, *supra* n. 13, at 200.

⁵⁰ Reisman, *International Legal Responses*, *supra* n. 25, at 39; Johnstone, *supra* n. 33, at 370; Travalio, *supra* n. 26, at 173–74; Müllerson, *supra* n. 26, at 183–85 (he, however, uses this argument in respect of the threshold of state responsibility developed by the ICJ in the *Nicaragua* case).

⁵¹ Legal Consequences, *supra* n. 37, ¶ 139.

This statement leaves little room for doubt as to the ICJ's view on the matter and was certainly understood that way by judges not agreeing with this interpretation of Art. 51.⁵² Nevertheless, it has been argued that the ICJ's statement should not be taken literally, as the ICJ was dealing specifically with alleged incidents originating from territory occupied by Israel itself.⁵³ Based on the clarity of the ICJ's statement, however, that argument has no basis in fact, as also confirmed by the disagreeing judges' interpretation of it.⁵⁴

That the ICJ continues to be unwilling to reinterpret Art. 51 in such a way, so as to allow any 'armed attack' – no matter whether a state was involved or not – to suffice is also strongly implied by its 2005 judgements in the *Armed Activities* cases.⁵⁵ Uganda's claim of self-defence – based on attacks carried out by an Ugandan rebel group (the Allied Democratic Forces (ADF)), very likely partly based in the DRC – made in the face of the Democratic Republic of Congo's allegation of the illegal use of force on the part of Uganda was rejected by the Court.⁵⁶ It declared:

It is further to be noted that, while Uganda claimed to have acted in self-defence, it *did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC*. The 'armed attacks' to which reference was made came rather from the ADF. The Court has found above (paragraphs 131–135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. *The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974*. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.⁵⁷ (emphases added)

⁵² Legal Consequences, *supra* n. 37, ¶ 33 (separate opinion of Judge Higgins) ('I do not agree with all that the Court has to say on the question of the law of self-defence. In paragraph 139 the Court quotes Article 51 of the Charter and then continues "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State." There is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defence is available only when an armed attack is made by a State.');

¶ 35 (separate opinion of Judge Kooijmans); ¶ 6 (declaration of Judge Buergenthal).

⁵³ Ruys & Verhoeven, *supra* n. 17, at 305; Johnstone, *supra* n. 33, at 374–75; Berman, *supra* n. 27, at 10 (he simply describes the ICJ's view as 'strange'); Dinstein, *Terrorism*, *supra* n. 11, at 46 (he, nevertheless, disagrees with the ICJ's decision); Gazzini, *supra* n. 27, at 184.

⁵⁴ Ruys & Verhoeven, *supra* n. 17, at 305; Murphy, *supra* n. 37, at 99.

⁵⁵ Kammerhofer, *supra* n. 15, at 89, 96, 105.

⁵⁶ *Id.* at 91.

⁵⁷ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 146 (December 19) [hereinafter *Armed Activities*].

In by now familiar vein, it has been argued that the ICJ's had, as far as Art. 51 is concerned, not taken a clear position, because Uganda's statements regarding the justification of its actions had, as the ICJ acknowledged, been contradictory, and Uganda had not been able to prove many of its allegations against the DRC. The view that the ICJ did not specifically deal with 'armed attacks' carried out by non-state actors is allegedly further confirmed by a statement the ICJ made elsewhere in the judgement:⁵⁸

Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.⁵⁹

The ICJ, however, made this statement after having just rejected Uganda's claim of self-defence, due to a lack of imputability to the DRC in the previous paragraph. Having acknowledged that many of the attacks relied on by Uganda in its defence had actually taken place,⁶⁰ and having further acknowledged that the ADF was perhaps indeed partly operating from Congolese territory,⁶¹ the ICJ, nevertheless, denied that any 'armed attack' imputable to the DRC had taken place, and therefore rejected Uganda's claim of self-defence. Furthermore, its reliance, once again, on Art. 3(g) of the *Definition of Aggression* strongly suggests that the ICJ still regards imputability to a state of any attack as a necessary requirement of any claim of self-defence under Art. 51. This interpretation of the judgement is once again also confirmed by the statements made by those judges who disagreed with the ICJ's reasoning on the matter.⁶²

It must therefore be concluded that the ICJ as late as 2005, and thus after the terrorist attacks of 09/11, still adhered to the view that an attack must be attributable to a state for it to be judged an 'armed attack' according to Art. 51.⁶³

⁵⁸ Dinstein, *Terrorism*, *supra* n. 11, at 49 (Dinstein claims the majority of judges at the ICJ had 'glossed over' the issue); Murphy, *supra* n. 37, at 99 (Murphy claims the Court had 'arguably backed off' from its earlier statements on self-defence it had made in its 2004 Advisory Opinion); Berman, *supra* n. 27, at 10 (in this context Berman, without elaborating, claims that the ICJ had 'more by its silences than by clear words' corrected 'the unfortunate aspects of its earlier decision in the *Nicaragua* case'); Gray, *supra* n. 13, at 202.

⁵⁹ *Armed Activities*, *supra* n. 57, ¶ 147.

⁶⁰ *Id.* ¶¶ 132–33.

⁶¹ *Id.* ¶ 135.

⁶² *Id.* ¶¶ 20–32 (separate opinion of Judge Kooijmans); to some extent, *see also id.* ¶¶ 8–14 (separate opinion of Judge Simma).

⁶³ Kammerhofer, *supra* n. 15, at 112–13.

3.2.4. Conclusion as to the Justification of the Use of Force in Syria under Art. 51

Interpreting Art. 51 in such a way so as to require the imputability of any attack to a state, before the victim state can resort to the use of force in self-defence, is much more in line with the UN Charter's aims and principles than the contrary view. Letting an armed attack by non-state actors suffice would greatly endanger world peace, and would raise serious issues as far as sovereignty and sovereign equality are concerned.⁶⁴ This is also confirmed by the ICJ's jurisprudence, which in 2005, and thus after the attack on Afghanistan in 2001, maintained that an armed attack needed to be imputable to another state for the resort to force in self-defence to be justified under Art. 51. The *Armed Activities* cases are particularly relevant to the Syrian situation as the ICJ had implied that the presence, on Congolese territory, of the Ugandan rebels was perhaps due to the DRC's 'inability to control events along its border',⁶⁵ making the Congolese comparable to the Syrian situation.

It must thus be concluded that neither Iraq nor France can claim to be acting in self-defence under Art. 51 when attacking Syrian territory so that Germany is consequently barred from claiming to be acting in collective self-defence. Iraq's claim to self-defence is further undermined by the fact that many of the terrorist attacks are carried out by Iraqi citizens on Iraqi territory, which makes the situation comparable to the one in the Israeli-occupied territories. As already pointed out by the ICJ, however, it rejected Israel's self-defence argument as far as attacks emanating from there were concerned.

4. Customary International Law

The conclusion that the use of force against ISIS in Syria cannot be reconciled with Art. 51 does not necessarily mean that the military action is contrary to international law. It is possible that new rules have developed in customary international law as far as a state's response to terrorist attacks is concerned.⁶⁶

Some argue that the international legal rules on the use of force in response to terrorist attacks have evolved because of the growth of international terrorist organizations, and the development of their capacity to launch massive attacks. After

⁶⁴ Kammerhofer, *supra* n. 15, at 105, 110 (Kammerhofer adds another argument in favor of assuming that an 'armed attack' under Art. 51 must be imputable to a state: targeting individuals who committed terrorist attacks is not a use of force banned under Art. 2(4); he therefore concludes that an 'armed attack' under Art. 51 must be imputable to a state, in order for the use of force against the 'host state' to be justified under Art. 51; although the argument has some merit, it is not wholly convincing; it could just as well be argued that Art. 51 justifies the use of force against the 'host state,' based on the fact that the attack by the non-state actor was severe enough to qualify as an 'armed attack'); see also Vedder, *supra* n. 2.

⁶⁵ *Armed Activities*, *supra* n. 57, ¶ 135.

⁶⁶ Antonio Cassese, *The International Community's 'Legal' Response to Terrorism*, 38 *Int'l & Comp. L.Q.* 589, 591 (1989). doi:10.1093/iclqaj/38.3.589

all, recent terrorist activities have caused the deaths of thousands of people, such as in the case of the Al-Qaeda attacks on the USA in 2001 or current ISIS activities in / against Iraq.

Notably, the USA and Israel have claimed to be legally entitled to combat terrorists in other states. In 1986, US Secretary of State Shultz declared:

It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations . . . or from using force against states that support, train and harbour terrorists or guerrillas. International law demands no such result.⁶⁷

Whether this proposition has gained sufficient international support to justify the conclusion that it reflects customary international law must now be examined in detail. It should, first of all, be pointed out that Arts. 2(4), 51 do not – *per se* – create a bar to the development of new rules in customary international law on the use of force.⁶⁸ As the ICJ emphasized in the *Nicaragua* case, customary international law on the use of force exists side by side with the Charter rules.⁶⁹ Although the ICJ, in 1986, argued that customary international law and Arts. 2(4), 51, had become near identical since the Charter had come into force, it did allow for some differences in detail, and by doing so certainly allowed for the development of new rules in the future.⁷⁰

Such new rules would not necessarily contravene the generally accepted *jus cogens* status of the ban on the use of force. It is overwhelmingly agreed that the *jus cogens* status applies to the core of the ban on the use of force, but does not automatically outlaw all changes in the detail of when the use of force is exceptionally permitted.⁷¹

Before proceeding to examine whether any such new rules have developed in customary international law, it should be noted that there is one major problem when assuming such new rules exist – the lack of a consensual definition of the term ‘terrorist’.⁷²

⁶⁷ George Shultz, *Low-Intensity Warfare: The Challenge of Ambiguity, Address before the Low-Intensity Warfare Conference, National Defense University, Washington D.C. (Jan. 15, 1986)*, reprinted in 25 I.L.M. 204, 206 (1986) (Shultz’s remarks, as quoted here, are sometimes referred to as ‘the Shultz Doctrine’); Quigley, *supra* n. 13, at 558.

⁶⁸ Moir, *supra* n. 11, at 11; Myjer & White, *supra* n. 13, at 16–17; Wouters & Naert, *supra* n. 14, at 427.

⁶⁹ Military and Paramilitary Activities, *supra* n. 48, ¶¶ 172–81.

⁷⁰ *Id.* ¶¶ 172–81; Moir, *supra* n. 11, at 11; Myjer & White, *supra* n. 13, at 16–17; Wouters & Naert, *supra* n. 14, at 427.

⁷¹ Cassese, *Terrorism*, *supra* n. 13, at 1000; Müllerson, *supra* n. 26, at 169.

⁷² Ben Saul, *Defining Terrorism in International Law* 5 (Oxford University Press 2006); Rostow, *supra* n. 11, at 475, 480, 488–89; Jackson N. Maogoto, *America’s War on Terror: Rattling International Law with Raw Power?*, 32(2) Newcastle Law Review 35 (2004); Quéniwet, *supra* n. 13, at 562–64; Roberts, *supra* n. 25, at 248–51; Gazzini, *supra* n. 27, at 181.

As this is not particularly relevant in respect of ISIS as there is, if not universal, certainly absolutely overwhelming consensus within the international community that this is a terrorist organization – it suffices to refer to that often quoted statement ‘one man’s terrorist is another man’s freedom fighter,’⁷³ in order to pinpoint the complexities surrounding the topic.⁷⁴

The conflicts surrounding India / Kashmir and Israel / Palestine are just two examples of when states have come to very different conclusions, as to whether specific groups should be categorized as ‘terrorist’ or not,⁷⁵ leading to potentially explosive disputes when trying to apply apparent customary international law rules in response to ‘terrorist’ attacks.⁷⁶ The evolving attitude towards fighters of *Partiya Karkerên Kurdistan* (Kurdistan Workers’ Party) [hereinafter *PKK*] before and after the problem of ISIS emerged is another example of the difficulties involved. Nevertheless, as there can be no doubt that ISIS is a terrorist organization, this problem can be put aside in the context discussed here.

There are three basic constellations, as far as terrorist attacks are concerned, to which states have responded by using force against another state. As the international community’s reaction to these events may lead to differing conclusions on the precise content of customary international law, these constellations must be judged separately.

The three categories are as follows: *firstly*, a state resorted to the use of force against a state it accused of either having let its officials carry out a terrorist attack, or of having directly instructed a group of people to carry out the attack. This was, for example, the case when the USA attacked Libya in 1986 following a terrorist attack against a discotheque in Berlin frequented by US military personnel. The USA accused Libya of having ordered the attack.

Secondly, a state has responded to a terrorist attack by not only attacking the alleged terrorist bases, but by also launching military action against the state in which the terrorists were located when that state was accused of having tolerated the presence of the terrorists on its territory, *i.e.* ‘harboured’ them. This was the case in 2001 when the USA and the UK attacked Afghanistan and alleged that the Taliban government had harboured the Al-Qaeda terrorists.

⁷³ A statement sometimes attributed to former US President Reagan. See Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 Harv. Int’l L.J. 1, 12 (2002), available at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1883&context=faculty_scholarship> (accessed Mar. 8, 2016); Roberts, *supra* n. 25, at 249.

⁷⁴ Saul, *supra* n. 72, 121–22 (Saul also lists a few examples where public perception has rapidly evolved, especially in Western states (Nelson Mandela, Yasser Arafat, Gerry Adams); Slaughter & Burke-White, *supra* n. 73, at 9, 11–12.

⁷⁵ Saul, *supra* n. 72, at 2, 50, 188; Wedgwood, *supra* n. 24, at 561 (referring to Öcalan, the *PKK* leader).

⁷⁶ Quéniwet, *supra* n. 13, at 564 (she provides further examples where states disagree on the classification of specific groups as ‘terrorists’).

And *thirdly*, as a result of a terrorist attack, a state has responded by directly targeting alleged terrorist bases in another state without that state being accused of any wrong-doing in that respect beyond not being capable of dealing with the terrorist threat. This is the relevant category as far as the use of force against Syrian territory is concerned. It has already been pointed out that Syria is not accused of being in any way complicit as far as ISIS terrorist activities are concerned.

This last constellation is therefore the one that needs to be examined in more detail. Has customary international law developed in such a way so as to permit an attack on terrorist bases in another state without that state's consent?

This constellation has in the past not been as common as many assume. Analyzing the 1998 US airstrikes on Afghanistan and Sudan, following the Al-Qaeda terrorist attacks on the US Embassies in Kenya and Tanzania, the Congressional Research Service [hereinafter CRS], for example, concluded 'the fact remains that this is the first time the U.S. has . . . (2) launched such a strike within a territory of a state which presumably is not conclusively, actively and directly to blame for the action triggering retaliation . . .'⁷⁷

Nevertheless, there have been a number of such cases in state practice. Again, notably Israel has, beginning in the late 1940^s – early 1950^s, frequently relied on that justification, when launching attacks on neighbouring states. Israel repeatedly attacked alleged terrorist bases in Egypt, Jordan, Lebanon, and Syria. These attacks were, however, routinely condemned by the UN Security Councils as 'reprisals,' and therefore as contrary to international law, and as violations of the Armistice Agreements Israel had signed with its neighbours.

In 1985 a group called 'Force 17,' associated with the Palestine Liberation Organization [hereinafter PLO], killed three Israelis on their yacht off Cyprus. Israel claimed a right of self-defence, and responded by destroying the PLO-Headquarters in Tunis in an air raid.⁷⁸ This action was condemned by the Security Council in a resolution passed by an overwhelming vote, with only the USA abstaining.⁷⁹ The Security Council declared that it '[c]ondemns vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct . . .'⁸⁰

⁷⁷ Raphael F. Perl, *Terrorism: U.S. Response to Bombings in Kenya and Tanzania: A New Policy Direction?* 3 (CRS Report 98-733 F, September 1, 1998), <<http://nsarchive.gwu.edu/NSAEBB/NSAEBB55/crs19980901.pdf>> (accessed Mar. 8, 2016) [hereinafter Perl, *Terrorism: U.S. Response*].

⁷⁸ Ruys & Verhoeven, *supra* n. 17, at 292; Gray, *supra* n. 13, at 195–96.

⁷⁹ Moir, *supra* n. 11 at 27; Ruys & Verhoeven, *supra* n. 17, at 293; Murphy, *Terrorism*, *supra* n. 17, at 46–47; Byers, *Terrorism*, *supra* n. 49, at 407; Reisman, *International Legal Responses*, *supra* n. 25, a 38; Wouters & Naert, *supra* n. 14, at 419; Gazzini, *supra* n. 27, at 192 (n. 53); Gray, *supra* n. 13, at 196.

⁸⁰ S.C. Res. 573, ¶ 1, U.N. Doc. S/RES/573 (Oct. 4, 1985), at <[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/573\(1985\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/573(1985))> (accessed Mar. 8, 2016).

Although perhaps less relevant to the development of customary international law, given the two states' racist regimes, and the nature of the resistance against them, South African attacks on alleged ANC terrorist bases of the *Armée Nationale Congolaise* (National Congolese Army) [hereinafter ANC] in neighbouring Angola,⁸¹ and Southern Rhodesia's incursions into Mozambique⁸² fared little better. In a resolution passed in 1980, for example, the Security Council declared South Africa's attacks on ANC bases to be 'a flagrant violation of the sovereignty and the territorial integrity' of Angola.⁸³

The US response to the embassy bombings in Africa in 1998 poses the most difficult questions, as far as the development of customary international law is concerned. In August 1998 the US embassies in Kenya and in Tanzania suffered simultaneous terrorist attacks; 235 people were killed, many more injured, and both embassies were severely damaged.

The USA blamed Al-Qaeda for the attack, and decided to launch cruise missile attacks on alleged terrorist bases in Afghanistan and on a chemical factory in Sudan, the latter allegedly a facility that was producing chemical weapons and was partly owned by Osama Bin Laden.⁸⁴ These actions were justified as measures taken in self-defence.⁸⁵ International reaction to these attacks was muted, especially as far as the attacks on Afghanistan were concerned.⁸⁶ A request by Sudan and others for the Security Council to deal with the matter was not heeded.⁸⁷

⁸¹ Ruys & Verhoeven, *supra* n. 17, at 292–93; Gray, *supra* n. 13, at 136–37.

⁸² U.N. Security Council Resolution 411 (1976) (the UN Security Council 'strongly condemned' Southern Rhodesia's recent acts of aggression against the People's Republic of Mozambique).

⁸³ S.C. Res. 475, ¶ 1, U.N. Doc. S/RES/475 (Jun. 27, 1980), at <[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/475\(1980\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/475(1980))> (accessed Mar. 8, 2016). Many other resolutions on the incursions of South African troops into Angola were passed, such as Resolution 387 (1976), Resolution 428 (1978), and Resolutions 447 and 454 (both 1979). The UK Representative to the *International Conference for Immediate Independence of Namibia* declared on July 8, 1986: 'South Africa has also, in defiance of international law, continued its armed incursion into Namibia's neighbours, particularly Angola, thus imperilling their sovereignty and creating a grave danger to peace and security in the region.' A sentiment repeated in a statement issued by the Foreign Office on August 13, 1986, in response to further South African incursions into Angola. Both quoted in *United Kingdom Materials on International Law 1986*, 57 Brit. Y.B. Int'l L. 487, 621–22. See also Ruys & Verhoeven, *supra* n. 17, at 293.

⁸⁴ Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, Am. J. Int'l L. 161, 161–63 (1999), available at <<http://myweb.clemson.edu/~maloney/download/RussianNucs/journ-cut/seanmurphy.pdf>> (accessed Mar. 8, 2016) [hereinafter Murphy, *Contemporary Practice*]; Reisman, *International Legal Responses*, *supra* n. 25, at 47–49; Lobel, *supra* n. 33, at 537.

⁸⁵ Murphy, *Contemporary Practice*, *supra* n. 84, at 162–63; Reisman, *International Legal Responses*, *supra* n. 25, at 47–49; Gray, *supra* n. 13, at 197.

⁸⁶ Murphy, *Contemporary Practice*, *supra* n. 84, at 164–65; *Idem*, *Terrorism*, *supra* n. 17, at 49–50; Wouters & Naert, *supra* n. 14, at 442–44; Gray, *supra* n. 13, at 197.

⁸⁷ Murphy, *Contemporary Practice*, *supra* n. 84, at 165; Ruys & Verhoeven, *supra* n. 17, at 295; Gray, *supra* n. 13, at 197.

The muted reaction to the 1998 attacks is often argued to evidence the emergence of new rules in customary international law, allowing at least the use of force against terrorist bases located in other states.⁸⁸

This, however, seems doubtful. As Gray has pointed out, states supportive of the US, were 'careful not to adopt the US doctrine of self-defence'.⁸⁹ Furthermore, especially the attacks on Sudan did come in for some heavy criticism.⁹⁰ It was expressly condemned by the Arab League, which, however, did not mention the attack on Afghanistan.⁹¹ Pakistan deemed the attack on Afghanistan illegal,⁹² and, as Pakistani airspace had been violated, claimed its sovereignty had not been respected.⁹³ Iran, Iraq, Libya, Yemen, and, notably, Russia also declared both the attacks on Afghanistan and Sudan to be illegal.⁹⁴

Scepticism as to the legality of the US attacks was also expressed at the subsequent summit of the Non-Aligned Movement.⁹⁵ Having condemned the terrorist attacks in Kenya and Tanzania in the preceding paragraph, the assembled leaders went on to declare:

The Heads of State or Government emphasised that international co-operation to combat terrorism should be conducted in conformity with the principles of the United Nations Charter, international law and relevant international conventions, and *expressed their opposition to selective and unilateral actions in violation of principles and purposes of the United Nations Charter*. In this context, they called upon the competent United Nations

⁸⁸ Murphy, *Terrorism*, *supra* n. 17, at 49–50; Stahn, *supra* n. 24, at 48; Johnstone, *supra* n. 33, at 372; Gazzini, *supra* n. 27, at 192–93.

⁸⁹ Gray, *supra* n. 13, at 197; Wouters & Naert, *supra* n. 14, at 443 (quoting Gray); Ruys & Verhoeven, *supra* n. 17, at 295; Murphy, *Contemporary Practice*, *supra* n. 84, at 165 (he makes a similar point, when stating that 'other states' had 'expressed support . . . or at least understanding for the attacks'); Michael Byers, *War Law, International Law and Armed Conflict 63* (Atlantic Books 2005) [hereinafter Byers, *War Law*] (he makes the point that, as far as Germany, France, and the UK were concerned, US President Clinton made sure their support was forthcoming by telephoning the respective leaders in advance of the attacks and ensuring their support, without them being able to consult their legal advisors; such a chain of events would, of course, undermine the attempt to attribute legal significance to those states' statements, as far as the 1998 attacks are concerned).

⁹⁰ Quigley, *supra* n. 13, at 560–61; Lobel, *supra* n. 33, at 544–47; Wouters & Naert, *supra* n. 14, at 443–44.

⁹¹ Murphy, *Contemporary Practice*, *supra* n. 84, at 165; Ruys & Verhoeven, *supra* n. 17, at 295; Reisman, *International Legal Responses*, *supra* n. 25, at 49.

⁹² Moir, *supra* n. 11, at 30.

⁹³ Byers, *War Law*, *supra* n. 89, at 63.

⁹⁴ Murphy, *Contemporary Practice*, *supra* n. 84, at 164; Moir, *supra* n. 11, at 30; Ruys & Verhoeven, *supra* n. 17, at 295; Byers, *War Law*, *supra* n. 89, at 63; Reisman, *International Legal Responses*, *supra* n. 25, at 49; Wouters & Naert, *supra* n. 14, at 443–44; Gray, *supra* n. 13, at 197; Lobel, *supra* n. 33, at 538 (Lobel adds China, and UN Secretary General Kofi Annan to the critics / opponents of the 1998 airstrikes).

⁹⁵ Byers, *Terrorism*, *supra* n. 49, at 407; Lobel, *supra* n. 34, at 538; Gray, *supra* n. 13, at 197.

Organs to promote ways and means to strengthen co-operation, including the international legal regime for combating international terrorism.⁹⁶ (emphasis added).

Lastly, there seem to have been some doubts within the US Government, as far as the legality of the 1998 airstrikes under international law are concerned. In two Reports for Congress, from 1998 and 2001, the CRS analyzed the 'arguments against' / the 'risks' of using force against terrorists in other states. In its Report of September 1, 1998, dealing explicitly with the 1998 airstrikes, the CRS stated that '[s]uch a policy: (1) undermines the rule of law, violating the sovereignty of nations with whom we are not at war . . .'⁹⁷

This concern was reiterated in its Report of September 13, 2001, where one of the 'risks' of the use of 'military force' against terrorists listed was the '(6) perception that U.S. ignores rules of international law.'⁹⁸

Based on these reactions, it is not possible to assert that the 1998 US response to the terrorist attacks created customary international law, allowing the targeting of terrorist bases in other states. Not only was sufficient affirmation of the legality of the action lacking, but those states analyzing the legality of the US response tended to raise doubts as to their compatibility with international law.⁹⁹ When it is considered that both Afghanistan and Sudan had, by 1998, become something akin to pariah states, this becomes even more remarkable.¹⁰⁰

The conclusion must therefore be that prior to the attack on Afghanistan in 2001 no rule in customary international law had developed allowing states to respond to terrorist attacks by attacking terrorist bases in other states, thereby violating their sovereignty.¹⁰¹

Many have, however, argued that Operation *Enduring Freedom* against Afghanistan in 2001, led to changes as far as customary international law is concerned. As has already been pointed out the attack on Afghanistan in 2001 is only of limited relevance as far as Syria is concerned. Even if Afghanistan had developed into a precedent for a new rule in customary international law, its application to Syria would be doubtful. Afghanistan was accused of 'harbouring' Al-Qaeda, Syria is accused of no such thing.

⁹⁶ *Final Document of the 12th Summit of the Non-Aligned Movement (Durban, South Africa, 2–3 September 1998)* ¶ 159, <<http://www.nam.gov.za/xiisummit/chap1.htm>> (accessed Mar. 8, 2016).

⁹⁷ Perl, *Terrorism: U.S. Response*, *supra* n. 77, at 4.

⁹⁸ Raphael F. Perl, *Terrorism, the Future, and U.S. Foreign Policy* 8 (CRS Issue Brief IB95112, September 13, 2001), <<http://nsarchive.gwu.edu/NSAEBB/NSAEBB55/crs20010913.pdf>> (accessed Mar. 8, 2016).

⁹⁹ Lobel, *supra* n. 33, at 538; Gray, *supra* n. 13, at 197–98.

¹⁰⁰ Lobel, *supra* n. 33, at 556.

¹⁰¹ Cassese, *Terrorism*, *supra* n. 13, at 996; Lobel, *supra* n. 33, at 557 (he argues that the US, in 1998–99, would actually have opposed the creation of any such rule in customary international law out of fear of other states exploiting it).

Nevertheless, it is instructive to consider how the international community has subsequently responded to the use of force against terrorist targets in other states. Although there have been numerous terrorist attacks since 09/11, which have been condemned by the Security Council, the Council has avoided referring to the right of self-defence in any of its resolutions.¹⁰² This is especially significant as many of these subsequent resolutions were passed in reaction to attacks attributed to Al-Qaeda (such as the Madrid bombings of 2004, or the London bombings of 2005).¹⁰³ Resolutions 1368 and 1373 therefore obviously did not set a precedent, as far as the reaction of the Security Council to terrorist attacks is concerned. As has already been pointed out, even these two resolutions, moreover, avoid any explicit reference to an 'armed attack' against the USA having actually taken place.¹⁰⁴

Furthermore, the Security Council, in Resolution 1456 (2003) – which deals with the struggle against terrorism in more general terms – refrained from mentioning the right of self-defence, or the use of force.¹⁰⁵ The Council limited itself to the statement that it was 'reaffirming' that 'any acts of terrorism are criminal and unjustifiable'¹⁰⁶ and emphasized:

States must ensure that any measure taken to combat terrorism comply [*sic*] with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law; . . .¹⁰⁷

The lack of reference to the use of force in response to terrorism is also noticeable in *The United Nations Global Counter-Terrorism Strategy*, passed by the General Assembly in 2006,¹⁰⁸ and in the Inter-American Convention against Terrorism, adopted by the OAS in 2002.¹⁰⁹

¹⁰² Ruys & Verhoeven, *supra* n. 17, at 312; Gray, *supra* n. 13, at 227–28.

¹⁰³ See, e.g., U.N. Security Council Resolution 1440 (2002) in response to the taking of hostages in a Moscow theatre; Resolution 1450 (2003) – bomb attack in Kenya; Resolution 1465 (2003) – bomb attack in Colombia; Resolution 1516 (2003) – bomb attacks in Istanbul; Resolution 1530 (2004) – bomb attacks in Madrid; Resolution 1611 (2005) – bomb attacks in London.

¹⁰⁴ Ruys & Verhoeven, *supra* n. 17, at 312.

¹⁰⁵ Gray, *supra* n. 13, at 228.

¹⁰⁶ S.C. Res. 1456, Preamble, para. 4, U.N. Doc. S/RES/1456 (Jan. 20, 2003), at <<http://www.refworld.org/docid/3f45dbdb0.html>> (accessed Mar. 8, 2016).

¹⁰⁷ *Id.* ¶ 6.

¹⁰⁸ *The United Nations Global Counter-Terrorism Strategy*, G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (2006), at <<http://www.refworld.org/docid/468364e72.html>> (accessed Mar. 8, 2016) (passed without a vote); see also Gray, *supra* n. 13, at 228.

¹⁰⁹ Inter-American Convention against Terrorism, Jun. 3, 2002, S. Treaty Doc. No. 107-18, OAS Treaty A-66 (2002).

State practice, since the launch of Operation *Enduring Freedom*, does also not confirm the existence of newly-created customary international law in favor of the use of force in response to terrorism.

Russia / Chechen terrorists in Georgia (2002). Notably the USA has taken the view that other states should not have the right to resort to the use of force against terrorist bases abroad. When Russia, in August / September 2002, decided to launch airstrikes against Chechen rebel bases in Georgia, and informed the Security Council it would take 'necessary measures to defend itself,' it came in for harsh criticism from the USA.¹¹⁰

Significantly, the USA agreed with the Russian view that the Chechen rebels were terrorists,¹¹¹ and acknowledged that Georgia had not dealt with the threat from these terrorists on its territory, despite undisputed repeated Russian warnings.¹¹² In reaction to the Russian airstrikes on Chechen guerrilla bases in Georgia, the USA, nevertheless, declared it 'deplored the violation of Georgia's sovereignty,'¹¹³ and later informed the Russian Government it took 'strong exception to the possibility of Russian military intervention against Chechen rebels in Georgia' in the future.¹¹⁴

Israel / Palestinian terrorists in Syria (2003). In October 2003, following a terrorist attack on a restaurant in Haifa, Israel launched an air raid against Syria on the grounds that it was targeting Islamic Jihad bases there.¹¹⁵ This military action met with strong international condemnation.¹¹⁶ The UN Secretary General declared that he

strongly deplores the Israeli air strike on Syrian territory earlier today. He is especially concerned that this further escalation of an already tense and difficult situation has the potential to broaden the scope of current conflicts in the Middle East, further threatening regional peace and security. The

¹¹⁰ Gray, *supra* n. 13, at 230–31.

¹¹¹ Anatol Lieven, *The Secret Policemen's Ball: The United States, Russia and the International Order after 11 September*, 78(2) *International Affairs* 252 (2002) doi:10.1111/1468-2346.00249. This is also confirmed by the former US Secretary of State, Condoleezza Rice, in her memoirs (No Higher Honour A Memoir of My Years in Washington 99 (Simon & Schuster 2011)).

¹¹² *Correspondent Report*, Voice of America (Aug. 28, 2002), <<http://www.globalsecurity.org/wmd/library/news/russia/2002/russia-020828-335d9eb7.htm>> (accessed Mar. 8, 2016); Nick P. Walsh, *British Anti-Terror Units to Train Georgian Army: MoD and Secret Service Help to Fight Rebels Linked to al-Qaida*, *The Guardian* (Nov. 21, 2002), <<http://www.theguardian.com/world/2002/nov/21/alqaida.terrorism>> (accessed Mar. 8, 2016); Ian Traynor, *Kidnap Suspects Abound in Notorious Pankisi Gorge*, *The Guardian* (Nov. 8, 2002), <<http://www.theguardian.com/world/2002/nov/08/uk.iantraynor>> (accessed Mar. 8, 2016); Gray, *supra* n. 13, at 230–31.

¹¹³ Nick P. Walsh, *US Rebukes Russia for Pankisi Raid*, *The Guardian* (Aug. 26, 2002), <<http://www.theguardian.com/world/2002/aug/26/chechnya.nickpatonwalsh>> (accessed Mar. 8, 2016).

¹¹⁴ *US Warns Russia over Georgia Strike*, *BBC News* (Sep. 13, 2002), <<http://news.bbc.co.uk/1/hi/world/europe/2254959.stm>> (accessed Mar. 8, 2016).

¹¹⁵ Gray, *supra* n. 13, at 236.

¹¹⁶ *Id.* at 236–37.

Secretary-General urges all concerned to respect the rules of international law and to exercise restraint.¹¹⁷

Spain, France, Germany, and China explicitly declared the Israeli action to be in violation of international law, as did Mexico and Jordan.¹¹⁸ The UK referred to the actions as 'unacceptable,' while the US limited itself to 'calling for restraint.'¹¹⁹

Israel / Hezbollah in Lebanon (2006). Following a cross-border attack on Israel in July 2006, carried out by Hezbollah, which resulted in the death of eight Israeli soldiers, and the abduction of another two, Israel, in response, notified the Security Council of its intentions to resort to its rights under Art. 51 if necessary. This was followed by Israel's launch of a massive assault on Lebanon where Hezbollah operates.¹²⁰

The international community was divided in its response to the Israeli actions. While many – though by no means all – Western states, at least initially, showed some sympathy for Israel's reaction,¹²¹ Arab and other predominantly Muslim states, as well as China and Venezuela, condemned the attack on Lebanon as a violation of international law.¹²² The Non-Aligned Movement, representing 118 states, declared:

The Heads of State or Government *expressed* strong condemnation of the relentless Israeli aggression launched against Lebanon and the serious

¹¹⁷ *Secretary-General Strongly Deplores Israeli Air Strike on Syrian Territory*, United Nations Information Service (Oct. 6, 2003), <<http://www.unis.unvienna.org/unis/pressrels/2003/sgsm8918.html>> (accessed Mar. 8, 2016).

¹¹⁸ Gray, *supra* n. 13, at 236–37.

¹¹⁹ *Id.* at 237.

¹²⁰ *Id.* at 237–44.

¹²¹ *Id.* at 238. For US and German reactions, see, e.g., *In quotes: Lebanon Reaction*, BBC News (Jul. 13, 2006), <http://news.bbc.co.uk/1/hi/world/middle_east/5175886.stm> (accessed Mar. 8, 2016); for British reaction, see *Britons Warned on Lebanon Crisis*, BBC News, <http://news.bbc.co.uk/1/hi/uk_politics/5180116.stm> (accessed Mar. 8, 2016). There were, however, some Western states that immediately condemned the Israeli attacks as contrary to international law, such as Spain (*El embajador israelí lamenta la 'completa falta de comprensión' de España en el conflicto con Libano*, Informativos Telecinco.com (Jul. 14, 2006); see also <<http://www.gettyimages.co.uk/detail/news-photo/spanish-prime-minister-jose-luis-rodriguez-zapatero-briefly-news-photo/71488269>> (accessed Mar. 8, 2016)), and Norway (Nina Berglund, *Norway Condemns Israeli Attacks on Lebanon*, Aftenposten (Jul. 13, 2006) (*Aftenposten* has since stopped its English-language service, but see *Norge fordømmer Israels angrep*, VG Nyheter (Jul. 30, 2006), <<http://www.vg.no/nyheter/utenriks/stoltenberg-regjeringen/norge-fordoemmer-israels-angrep/a/124908/>> (accessed Mar. 8, 2016))). See also *Middle East Crisis: Diplomacy: Old Divisions Resurface*, The Guardian, Jul. 18, 2006, at 5.

¹²² Gray, *supra* n. 13, at 238. Venezuela withdrew its ambassador in protest (see *Venezuela Recalls Ambassador From Israel*, The Washington Post (Aug. 3, 2006), <<http://www.washingtonpost.com/wp-dyn/content/article/2006/08/03/AR2006080301386.html>> (accessed Mar. 8, 2016)), as far as Islamic states are concerned (see Final Communiqué of the Annual Coordination Meeting of Ministers of Foreign Affairs of Member States of the Organization of the Islamic Conference ¶ 32, at <<http://www.oic-oci.org/english/conf/fm/acm/FC-ACM-06-FINAL.pdf>> (accessed Mar. 8, 2016)).

violations by Israel of the Lebanese territorial integrity and sovereignty, and in this regard *charged* Israel with full responsibility for the consequences of its aggression.¹²³

As the Israeli attack continued, moreover, even many of Israel's erstwhile supporters began to view the use of force by Israel as 'disproportionate'.¹²⁴

Ethiopia / Somalia (2006–07). Ethiopia belatedly attempted to justify its 2006–07 intervention in Somalia's civil war against the Union of Islamic Courts [hereinafter UIC] as self-defence, based on alleged UIC plans to launch 'terrorist attacks' against Ethiopia.¹²⁵ However, there were so many factors that led to Ethiopia's decision to intervene, it is difficult to assert any of the facts.¹²⁶ For example, Ethiopia's foe, Eritrea, supported the UIC, while Ethiopia supported the virtually powerless Transitional Federal Government.¹²⁷ It also remains unclear, whether the UIC could reasonably be classified as a terrorist organization, even though the USA tended to claim that it was.¹²⁸ Certainly, the whole episode received so little international attention and attracted so little comment, that it cannot serve as a precedent in any way.¹²⁹

Turkey / Kurdish terrorists (PKK) in Iraq (2007–08). In response to repeated terrorist attacks, carried out by PKK terrorists, often based in the Kurdish-controlled areas of Northern Iraq, the Turkish Parliament approved a measure allowing the Turkish Government to deploy forces to Iraq without that state's consent.¹³⁰ It was not in dispute that Iraq, at the time, was incapable of dealing with the situation in northern Iraq. In late 2007 – early 2008 Turkey mounted some air raids on Iraq, and on occasion Turkish ground troops crossed the border into Iraq.¹³¹ Turkey did not report these

¹²³ *Final Document of the 14th Summit Conference of Heads of State or Government of the Non-Aligned Movement (Havana, Cuba, 11–16 September 2006)* ¶ 142, <[http://namiran.org/Files/14thSummit/Final+Document+\(NAM+2006-Doc.1-Rev.3\).pdf](http://namiran.org/Files/14thSummit/Final+Document+(NAM+2006-Doc.1-Rev.3).pdf)> (accessed Mar. 8, 2016); Gray, *supra* n. 13, at 243.

¹²⁴ See, e.g., European Union statement and Russian Government statement (*In quotes: Lebanon Reaction*, *supra* n. 121); see also Gray, n. 13, 238–39, 241.

¹²⁵ Despite apparently having sent troops to Somalia as early as summer 2006, the Ethiopian Government denied having any soldiers there. Only in December 2006 did the Ethiopian Government acknowledge the fact, and then proceeded to claim self-defence, without, however, ever reporting its actions to the Security Council, as it would have been obliged to do under Art. 51. See Gray, *supra* n. 13, at 244, 248, 250.

¹²⁶ *Id.* at 244–52.

¹²⁷ *Id.* at 246.

¹²⁸ *Id.* at 249, 251.

¹²⁹ *Id.* at 249–51.

¹³⁰ *Id.* at 143; Tom Ruys, *Quo Vadis Jus ad Bellum?: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq*, 9 *Melb. J. Int'l L.* 334 (2008), available at <<http://documents.mx/documents/quo-vadis-jus-ad-bellum.html>> (accessed Mar. 8, 2016).

¹³¹ Gray, *supra* n. 13, at 142–43.

actions to the Security Council, and did not offer any legal justification for them.¹³² It was perhaps for that reason that international reaction was more muted.

However, as far as there was international reaction, it was – in the main – not positive. The EU warned Turkey against using force on Iraqi territory.¹³³ In a statement in reaction to the Turkish Parliament's authorization to do so, the EU emphasized: 'The EU and Turkey have regularly reiterated that they remain committed to the independence, sovereignty, unity and territorial integrity of Iraq.'¹³⁴

Even the USA initially opposed Turkish military intervention,¹³⁵ although it later became increasingly ambivalent.¹³⁶

The Western European Union, too, sought refuge in ambiguities. While reiterating Turkey's respect for Iraq's sovereignty, and emphasizing Turkey's right to 'protect its citizens' against terrorist acts carried out by the *PKK*, it also called on Turkey to 'refrain from any disproportionate military action in its fight against *PKK* terrorism.'¹³⁷

Despite international reaction to Turkish incursions into Iraq in 2007 thus being less adverse than in previous cases, the negative attitude expressed by many states, and the lack of any legal reasoning seem to confirm that even those states most closely associated with the 'war on terror' do not find it possible to claim a right to use force against terrorists in other states based on customary international law. The fact that Turkey itself refrained from providing any legal justification for its actions, further undermines the claim that a new rule of customary international law has been created.

More recent events. In March 2008 Colombian troops attacked alleged *FARC* camps¹³⁸ within Ecuador. Colombia claimed to be acting in self-defence.¹³⁹ Nevertheless, the Permanent Council of the OAS, on March 5, 2008, passed a resolution condemning

¹³² Gray, *supra* n. 13, at 143.

¹³³ *EU Urges Turkey Not to Attack Kurdish Rebels in Iraq*, DW (Oct. 17, 2007), <<http://www.dw-world.de/dw/article/0,,2828232,00.html>> (accessed Mar. 8, 2016).

¹³⁴ Quoted in *id.*

¹³⁵ Simon Tisdall, *US Struggles to Avert Turkish Intervention in Northern Iraq*, *The Guardian* (Mar. 23, 2007), <<http://www.theguardian.com/world/2007/mar/22/turkey.kurds>> (accessed Mar. 8, 2016); Gray, *supra* n. 13, at 143.

¹³⁶ *President Bush and Prime Minister Tayyip Erdogan Discuss Global War on Terror*, *The White House* (Nov. 5, 2007), <<http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071105-3.html>> (accessed Mar. 8, 2016).

¹³⁷ *Terrorist Activities on the Turkey/Iraq Border: Report Submitted on Behalf of the Political Committee by Robert Walter, Rapporteur (United Kingdom, Federated Group)*, Assembly of Western European Union, 53rd Sess., Doc. A/1994 (2007), at <<http://arsiv.setav.org/ups/dosya/17845.pdf>> (accessed Mar. 8, 2016). The Report in the following year (*Terrorist Activities on the Turkey/Iraq Border – Part II: Report Submitted on Behalf of the Political Committee by Robert Walter, Rapporteur (United Kingdom, Federated Group)*, Assembly of Western European Union, 55th Sess., Doc. A/2017 (2008), at <<http://arsiv.setav.org/ups/dosya/17846.pdf>> (accessed Mar. 8, 2016)) went slightly further in that it, for the first time, 'confirmed Turkey's right of self-defence,' but then went on to again call on Turkey 'to refrain from disproportionate military action.'

¹³⁸ '*FARC*' stands for '*Fuerzas Armadas Revolucionarias de Colombia*' ('Revolutionary Armed Forces of Colombia'). This group is considered to be a terrorist organization by many states.

¹³⁹ *Ecuador Pulls Diplomat from Bogota*, CNN (Mar. 2, 2008), <<http://edition.cnn.com/2008/WORLD/americas/03/02/chavez.colombia/index.html?iref=allsearch>> (accessed Mar. 8, 2016); Ruys, *supra* n. 130, at 357–58.

the Colombian incursion as 'a violation of the sovereignty and the territorial integrity of Ecuador and of principles of international law.'¹⁴⁰

In a repetition of events described above, Turkey, in 2011, again entered Iraqi territory in order to combat *PKK* terrorists. Turkey once more refrained from offering a legal justification, or informing the Security Council and international reaction was again muted. Furthermore, the true attitude of the Iraqi Central Government and the Kurdish regional government to the Turkish actions in northern Iraq remained ambiguous.¹⁴¹

In October 2011, Kenyan troops entered Somali territory to combat Al-Shabaab terrorists, blamed for abductions of foreign tourists in Kenya. Kenya claimed to have received the prior consent of the officially recognized Somali Government.¹⁴²

Regarding the recent and current 'targeted killings' of terrorists in Yemen and in Pakistan, carried out by the USA, it is generally assumed that both Yemen¹⁴³ and Pakistan¹⁴⁴ have, certainly in the past, given their consent to these actions.

¹⁴⁰ Permanent Council of the Organization of American States, OAS Doc. CP/RES.930 (1632/08) (March 5, 2008), at <<http://www.oas.org/council/resolutions/res930.asp>> (accessed Mar. 8, 2016); Ruys, *supra* n. 130, at 358.

¹⁴¹ Sebnem Arsu, *Turkey Vows to Keep up Attacks on Militants in Iraqi Kurdistan*, International Herald Tribune, Aug. 24, 2011, at 3; Justin Vela, *Turkey Launches Raid into Iraq after an Attack by Kurdish Rebels*, The Independent (Oct. 20, 2011), <<http://www.independent.co.uk/news/world/middle-east/turkey-launches-raid-into-iraq-after-attack-by-kurdish-rebels-2373151.html>> (accessed Mar. 8, 2016); *Iraqi Politicians Condemn Turkish Bombing of Iraqi Kurds*, Radio Free Europe (Aug. 20, 2011), <<http://www.rferl.org/articleprintview/24302813.html>> (accessed Mar. 8, 2016); Karzan Kanabi, *Turkey-PKK Clashes May Reignite Civil War, Says Kurdish Presidency*, AK News (Aug. 18, 2011); Sebnem Arsu, *Turkey Vows to Pursue Kurdish Attackers*, International Herald Tribune, Oct. 20, 2011, at 4. As far as the Iraqi / Iraqi Kurdish attitude is concerned, many reports stress the official protests lodged by both the national and the regional governments in Iraq against the Turkish incursions. On the other hand, the *International Herald Tribune* reported that the Iraqi Government was offering the Turkish Government a joint offensive against the *PKK* in northern Iraq, and many reports point out that the Kurdish regional government was attempting to 'sit on the fence,' as far as Turkey's actions in Iraq are concerned.

¹⁴² *Kenianische Armee rückt in Somalia vor*, Frankfurter Allgemeine Zeitung, Oct. 19, 2011, at 6; Daniel Howden, *Kenya Plans Fresh Assault in Somalia after Hostage Dies*, The Independent (Oct. 20, 2011), at <<http://www.independent.co.uk/news/world/africa/kenya-plans-fresh-assault-in-somalia-after-hostage-dies-2372977.html>> (accessed Mar. 8, 2016).

¹⁴³ For example, on November 29, 2010, the *International Herald Tribune* reported, referring to a cable from the Ambassador at the US Embassy in Yemen to Washington D.C. dated January 4, 2010 (leaked via Wikileaks), the following on a conversation between Yemen President Ali Abdullah Saleh and US Gen. David H. Petraeus (Scott Shane & Andrew W. Lehren, *Leaked Cables Offer Raw Look at U.S. Diplomacy*, N.Y. Times (Nov. 28, 2011), <http://www.nytimes.com/2010/11/29/world/29cables.html?pagewanted=all&_r=0> (accessed Mar. 8, 2016)): 'For instance, it has been previously reported that the Yemeni government has sought to cover up the American role in missile strikes against the local branch of Al Qaeda. But a cable's fly-on-the-wall account of a January meeting between the Yemeni president, Ali Abdullah Saleh, and Gen. David H. Petraeus, then the American commander in the Middle East, is breathtaking.' See also *General Petraeus' Meeting with Saleh on Security Assistance, AQAP Strikes* ¶ 5, at <https://search.wikileaks.org/plusd/cables/10SANA44_a.html> (accessed Mar. 8, 2016): 'We'll continue saying the bombs are ours, not yours,' [President] Saleh [of Yemen] said, prompting Deputy Prime Minister Alimi to joke that he had just "lied" by telling Parliament that the bombs in Arhab, Abyan, and Shebwa were American-made but deployed by the ROYG [Republic of Yemen Government]; Robert Booth & Ian Black, *WikiLeaks Cables: Yemen Offered US 'Open Door' to Attack al-Qaida on Its Soil*, The Guardian (Dec. 3, 2010), <<http://www.guardian.co.uk/world/2010/dec/03/wikileaks-yemen-us-attack-al-qaida>> (accessed Mar. 8, 2016).

¹⁴⁴ Pakistan has officially condemned the American strikes on Pakistani territory. It is, however, widely assumed that Pakistan has privately granted the US permission to carry out such strikes (see, e.g., Greg

That there is no new rule in customary international law, permitting the use of force against terrorist targets in other states without consent, is also implied by Iraq's reaction to Turkey's incursions in December 2015. Despite there being reports that Turkey had sent troop reinforcements to Iraq in order to help reconquer Mossul from ISIS, the Iraqi Government condemned Turkey's actions as a violation of international law bar its consent and demanded Turkey's immediate withdrawal. Turkey denied sending troops and claimed it was only replacing soldiers deployed there in agreement with the Iraqi Government.¹⁴⁵

It must therefore be concluded that customary international law does not (yet) allow the use of force against terrorist bases in other states without those states' consent. Germany can therefore not claim its actions to be justified under customary international law.

5. Conclusion

Germany's planned participation in the Western-led bombing campaign against ISIS targets in Syria is currently unlawful. It has been shown that Security Council Resolution 2249 and Art. 42(7) TEU do not authorize the use of force beyond what is already justified under Art. 51 of the UN Charter.

While the ISIS activities in Iraq and the terrorist attacks on France certainly meet the gravity criterion of the 'armed attack' requirement in Art. 51 it was argued that the more convincing view is that any such attack must be imputable to the state bombed. There can be no doubt that ISIS activities are not imputable to Syria as the Syrian Government is itself involved in a military campaign against the terrorist organization. At most Syria can be accused of currently being incapable of dealing with the problem. This, however, is not sufficient to invoke Art. 51. As neither Iraq nor France can claim to be acting in self-defence against Syria, Germany can consequently not be acting on the basis of collective self-defence.

It was then discussed whether customary international law had developed in such a way to allow the use of force in such cases. Based on an analysis of state practice it was argued that state's have, at best, taken an inconsistent, if not overwhelmingly negative attitude to other states' actions in that respect. There is therefore insufficient evidence to claim that customary international law has evolved in a way that it permits such military action.

Bruno, *U.S. Drone Activities in Pakistan*, Council on Foreign Relations (Jul. 19, 2010), <http://www.cfr.org/publication/22659/us_drone_activities_in_pakistan.html#p6> (accessed Mar. 8, 2016) (alleges a possible secret agreement in 2008 between the two states). Furthermore, a UN report has called upon states such as Pakistan to 'publicly disclose the scope and limits of any permission granted for drone strikes on their territories' (Charlie Savage, *U.N. Report Highly Critical of U.S. Drone Attacks*, N.Y. Times, Jun. 3, 2010, at A10, available at <<http://www.nytimes.com/2010/06/03/world/03drones.html>> (accessed Mar. 8, 2016)).

¹⁴⁵ *Streit um türkische Truppen im Irak*, DW (Dec. 6, 2015), <<http://www.dw.com/de/streit-um-t%C3%BCrkische-truppen-im-irak/a-18897402>> (accessed Mar. 8, 2016).

The possibility that new norms may be emerging cannot be ruled out. However, given states' inclination to applaud allies' actions while deploring other states' use of force in similar circumstances, it seems doubtful whether that will happen any time soon.

Based on the overwhelmingly negative outcome of the Western states' more recent military activities in the Middle East that is probably for the best. It remains to be seen whether the effort in Syria will be more successful. Any scepticism in that respect is certainly not groundless.

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