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# International Law and the Use of Force: America's Response to September 11

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# International Law and the Use of Force: America's Response to September 11

**Muna Ndulo**

The September 11 terrorist attacks on the World Trade Center and the Pentagon shocked the world and drew universal condemnation. The following day, the United Nations General Assembly passed a resolution that strongly condemned the attacks and urged international cooperation to bring those responsible to justice.<sup>1</sup> On September 12, the Security Council adopted Resolution 1368,<sup>2</sup> which unequivocally condemned the terrorist acts and characterized them as a threat to international peace.<sup>3</sup>

Despite international agreement on the attacks' heinousness, debates ensued regarding an appropriate response, specifically in terms of the kind of actions permissible under international law. Other controversial issues include how to prosecute those who planned and ordered the aggression and whether to classify these acts as war, terrorism, or crimes against humanity. The answers to these questions are important in determining the legality of the United States' response, which began on October 7 as an assertion of the right of self-defense in the form of military action in Afghanistan that was designed to destroy the infrastructure and personnel of Al Qaeda, the terrorist network that America holds responsible for the devastation of September 11. This article examines the use of force in international law and its application to recent events.

## **The Use of Force under the United Nations Charter**

The creation of the United Nations signaled a remarkable move to entrust decisions concerning the use of force and efforts to maintain international peace and security to a multinational institution. Following the carnage of World War II, the United Nations Charter of 1945 introduced the notion of a general prohibition on the unilateral use of force by sovereign states<sup>4</sup> and called for the peaceful settlement of disputes.<sup>5</sup> The Charter gives the Security Council the primary responsibility for maintaining international peace and security, and of identifying threats to international peace.<sup>6</sup> If such a threat is apparent, the Security

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Council can authorize the use of sanctions against the aggressor state.<sup>7</sup> If the Security Council deems sanctions or other non-military measures inadequate, it may authorize the use of force as a last resort to help maintain international peace and security.<sup>8</sup>

Besides prohibiting the unilateral use of force, the Charter explicitly authorizes the use of force in self-defense. Article 51 provides that "Nothing in

the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>9</sup> Thus, self-defense includes the right both to repel an armed attack and to take the war to the aggressor state in order to prevent renewed aggression.

As defined in Article 51, the right of self-defense envisages a situation in which a state has perpetrated an armed attack against another state. It is doubtful, however, that this conception includes an attack perpetrated by non-state actors unless their actions can be attributed to a state. Also, the right of self-defense is predicated on an “armed attack,” making the definition of “armed attack” highly relevant and—perhaps inevitably—hotly disputed. The U.S. itself has interpreted “armed attack” to include certain terrorist activities. Following the 1988 bombing of PanAm flight 103, President Reagan described the U.S.’s subsequent attacks on Libya as fully consistent with Article 51 of the United Nations Charter. However, one should note that the bombing of Libya was widely condemned and the U.S.’s claimed justification for the action generally rejected by U.N. member states.

Conversely, one can argue that targeting entities in charge of or directly engaged in an armed attack, including non-state actors, is a permissible measure of self-defense under Article 51 of the U.N. Charter.<sup>10</sup> On this basis, a military mission to capture and arrest those ordering and/or directly engaged in an ongoing program of demonstrated hostility would also be permissible under the Charter as an act of self-defense, for lending support to terrorists who attack another state is effectively a use of force against both the territorial integrity and political independence of that state.

## Necessity vs. Proportionality

There are two qualifications to the use of force in self-defense: necessity and proportionality. “Necessity” means that the need of self-defensive action must be immediate and overwhelming, leaving no possibility of choosing among alternative means and no moment for deliberation.<sup>11</sup> The rule of proportionality prohibits excessive use of force, in the sense of the old adage that one must not ward off a fist fight with a gun. As Secretary-General Kofi Annan remarked several years ago, “We must fight terrorism and do our utmost to banish it from the face of the earth. But the force we use to fight should always be proportional and focused on the actual terrorists. We cannot fight them by using their own method of inflicting indiscriminate violence and terror on innocent civilians, including children.”<sup>12</sup>

Various sources of international law provide further insight into what constitutes excessive force. For example, in 1966, the International Court of Justice held that “States must never make civilians the object of attack and must consequently never use weapons that are incapable of

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distinguishing between civilian and military targets.”<sup>13</sup> The terrorist attacks of September 11 pose, therefore, the legal dilemma of how to respond proportionally when the initial attack was itself unreasonable and excessive, particularly in its having been intentionally directed at civilians.<sup>14</sup> Nevertheless, to hold an entire nation accountable for the acts of a few does not appear to be lawful, for collective punishment would, by definition, entail the unjustifiable suffering of innocent populations.



*The United Nations Security Council*

This stricture is especially pertinent to the phenomenon of state-sponsored terrorism. Individual terrorists perpetrated the September 11 acts but they could not have done so without a state providing them sanctuary and logistical support. The U.S. has claimed that it has strong and compelling evidence that implicates Afghanistan in the September 11 attacks. Assuming this evidence is convincing, one must decide whether or not Afghanistan is liable for the acts of Al Qaeda. For Afghanistan to be liable, the evidence must show that Al Qaeda acted under its authority or that the Taliban regime was part of the Al Qaeda conspiracy.

If the September 11 attacks can be attributed to Afghanistan, an application of the law leaves no doubt that the U.S. has suffered an armed attack that entitles it to exercise self-defense against Afghanistan. It should also be noted that Article 51 requires a state exercising its right of self-defense to report the measures it has taken to the Security Council. In a letter to the President of the Security Council, dated October 7,<sup>15</sup> the United States reported that, in response to the September 11 attacks and in accordance with all states' inherent right to individual and collective self-defense, the U.S. armed forces were initiating actions designed to prevent and deter further attacks on its territory and interests. These actions would include military

strikes against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.<sup>16</sup> Although the United States is entitled under international law to use force to punish those responsible for the armed attacks committed against it, international support for American action will be greater if the facts pointing to the entities responsible for the terrorism of September 11 become clearer.

Questions inevitably have arisen about the proportionality of the campaign against Afghanistan—especially because the campaign has covered the entire country. Even more questions would arise should the United States choose to extend the campaign to Iraq and other nations that the United States perceives as supporting terrorism. Such an extension would beg the questions of what specific armed attacks those countries were involved in to justify the United States' exercise of self-defense and whether U.S. military initiatives met the condition of necessity.

### **Self-Defense and Security Council Actions**

Because Article 51 preserves the inherent right of individual state or collective self-defense against an armed attack, Security Council authorization is not necessary for actions permitted by the theory of

self-defense. Notably, however, this right continues only until the Security Council has taken the measures necessary to maintain international peace and security. One view holds that the aggrieved state and its friends and allies may decide for themselves to exercise their rights of individual and collective self-defense until either peace is restored or the Security Council, by its own affirmative vote, decides that self-defense has gone too far and has itself become a threat to international peace.<sup>17</sup> A countervailing view argues that when the Security Council assumes jurisdiction, the injured party's right to self-defense is suspended until the Council affirmatively decides it cannot deal effectively with the problem.<sup>18</sup> A third view opines that the customary law of self-defense is not abridged in any way by the Charter and remains intact until the Security Council has dealt successfully with the controversy. Yet another view is that Article 51 is not an affirmative grant of a right of self-defense but a description of circumstances in which the exercise of an "inherent right" is not precluded by the Charter.<sup>19</sup> Those circumstances, however, are subject to a temporal limit; they endure only until the Security Council has taken measures to maintain peace and security.<sup>20</sup>

In practice, it does not matter which interpretation of Article 51 one adopts, for each of the five permanent members of the Security Council hold veto power in any Council vote.<sup>21</sup> With respect to the present military operation against Afghanistan, any action by the United Nations Security Council that does not accord with American plans will almost certainly attract an American veto. In addition, should the Security Council take any action, the question of whether the measures are sufficient to maintain international peace will be subject to the same considerations.

## **Coordinating an International Response to Terrorism**

The events of September 11 have demonstrated more than ever the need for a coordinated international response to terrorism. The events showed that innovations in global communications have given international standing to some local terrorist groups, while terrorist organizations with global reach use rapid international transportation to hit, run, and hide. In addition, perpetrators of terrorism in one country frequently use other states as safe havens or for fund-raising, sometimes hiding among emigrée diaspora communities. They may receive training abroad and use foreign countries for staging terrorist acts or as launching bases for their operations elsewhere. Some terrorist organizations are engaged partly in legitimate trade, and others in drugs and weapons smuggling. Most do not operate in a vacuum but rather alongside non-violent militant groups pursuing the same objectives by peaceful means. Terrorist organizations are global entities; they permeate all

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jurisdictions. The fight against terrorism cannot succeed without commensurate international cooperation and strategic insights into terrorist operations. The international community should adopt and enforce existing conventions on terrorism, and must work toward the elaboration of a comprehensive treaty to deal with this scourge.<sup>22</sup>

U.N. Security Council Resolution 1373, adopted by the Security Council on September 28, is a good start toward such a comprehensive treaty.<sup>23</sup> It is a wide-ranging resolution that calls on all states both to prevent and suppress the

financing of terrorism and to criminalize the willful provisioning or collection of funds for such acts. It also calls on states to freeze the funds, assets, and economic resources of persons who commit or attempt to commit terrorist acts, and of persons and entities who act on behalf of terrorists. Further, the Resolution calls on states to prohibit nationals, persons or entities in their territories from making funds, financial assets, economic resources, financial or other related services available to persons who commit or attempt to commit, facilitate or participate in the commission of terrorist acts. According to the Resolution, states must also refrain from providing any form of support to entities or persons involved in terrorist acts, take the necessary steps to prevent the commission of terrorist acts, and deny safe haven to those who finance, plan, support, and commit terrorist acts.

Significantly, Security Council Resolution 1373 is binding on all U.N. member states; it was adopted under Chapter Seven of the United Nations Charter, which authorizes the Security Council to take measures to maintain international peace and security. The primary difficulty with Resolution 1373 is that it does not provide common legislative and enforcement standards. For example, the Resolution does not define what constitutes a “severe punishment” for a terrorist act, or at what point a state is doing “all in its power” to stop terrorists from operating in its territory.

In spite of these omissions, Security Council Resolution 1373 can form the basis of a comprehensive treaty because it identifies major factors that facilitate terrorist operations. An ideal comprehensive treaty would also provide the following: extradition measures that would ensure the apprehension and prosecution of terrorists, wherever they might reside; punitive standards by which the international community could hold states that harbor terrorists accountable; financial regulations that would make the financing of terrorist activities difficult; and facilitated international information exchange regarding terrorist activities.

## **What Else is Needed to Combat Terrorism?**

Whatever the world does in response to terrorist violence, its measures should not entail harsh security controls that tend to undermine civil liberties and international freedom. At the same time, the world should ensure that those who commit acts of terrorism are put on trial in accordance with the principles of law. The tragic events of September 11 should not lead to more prejudice or tolerance of prejudice in an already too-prejudiced world. The international community must redouble its efforts to eradicate poverty, inequality, and armed conflicts throughout the world, for these factors create the perfect breeding grounds for terrorists. Such efforts would entail the development and advocacy of socio-economic policies, framed under the auspices of the World Bank, the International Monetary Fund, and the World Trade Organization, that reduce the inclination to engage in heinous violence for ideological reasons. In short, the political grievances that give terrorists a constituency must be addressed and, to some degree, resolved.

Every effort must be made to rid the world of dictatorial and undemocratic regimes. Corruption, for instance, facilitates the production of false and forged documents, which are essential to the movement of terrorists and the execution of their murderous plans. Experience has taught the world that pursuing effective action against criminal organizations of every type is always more difficult against a background of corruption and irresponsible regimes. Thus, terrorism must be fought with increased support for democratization programs, judicial reform, conflict resolution, poverty alleviation, economic reform, and health and education enhancement programs.

1. General Assembly Resolution 561, United Nations General Assembly Official Record, 56th Session, 1st plenary mtg., at 1, United Nations Document A/56/L.1 (2001).
2. Security Council Resolution 1368, adopted at the 4370<sup>th</sup> meeting on September 12, 2001, United Nations Security Council Official Record.
3. *See id.*
4. United Nations Charter, Article 2, paragraph 4: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."
5. United Nations Charter, Article 2, paragraph 3: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."
6. *See* United Nations Charter, Article 39: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security."
7. *See* United Nations Charter, Article 42.
8. *See id.*
9. United Nations Charter, Article 51.
10. *See* Jordan Paust, "War and Responses to Terrorism," *American Society of International Law Insights* (American Society of International Law), Sept. 2001, available at <http://www.asil.org/insights.html> (last visited Jan. 20, 2002).
11. *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986 International Court of Justice, paragraph 282.
12. *See* Statement by Secretary-General Kofi Annan (Nov. 18, 1999), at [http://www.undcp.org/press\\_releases.html](http://www.undcp.org/press_releases.html) (last visited Jan. 20, 2002).
13. *Legality of the Threat or Use of Nuclear Weapons*, 1966 International Court of Justice, paragraph 78.
14. *See* B. Welling Hall, "Addendum Relating to Self-Defense," *American Society of International Law Insights* (American Society of International Law), Sept. 2001, available at <http://www.asil.org/insights.html> (last visited Jan. 20, 2002).
15. The text of the letter from the U.S. Ambassador to the United Nations is available through the U.S. Department of State International Information Programs. *See* [\[usinfo.state.gov/topical/pol/terror/01100813.htm\]\(http://usinfo.state.gov/topical/pol/terror/01100813.htm\) \(last visited Jan. 20, 2002\).](http://</a></li>
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16. *Id.*
17. *See* Michael J. Glennon, "The Constitution and Chapter VII of the United Nations Charter," 85 *American Journal of International Law* 74, 81 (1991).
18. *See* Thomas M. Franck & Faiza Patel, "United Nations Police Action in Lieu of War: The Old Order Changeth," 75 *American Journal of International Law* 63, 64 (1991).
19. Eugene V. Rostow, Agora: "The Gulf Crisis in International Law and Foreign Relations Law, Continued," 85 *American Journal of International Law*, 511 (1991).
20. Abraham Chayes, "The Use of Force in the Persian Gulf," in *Law and Force in the New International Order* 1 (Loris Damrosch & David Scheffer, eds., 1991).
21. The five permanent members of the U.N. Security Council are the United States, France, the United Kingdom, the Russian Federation, and China.
22. Before embarking on what should be done, however, one should examine what has already been accomplished on this subject. In terms of aircraft hijacking, the following international agreements are already in place: the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (Sept. 14, 1963, 1969 United Nations Treaty Series 222); the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Dec. 16, 1970, 1973 United Nations Treaty Series 106.); and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Aircraft (Sept. 23, 1971, 1974 United Nations Treaty Series 178). Two more recently adopted treaties are relevant to the creation of an effective regime against terrorism: the International Convention for the Suppression of Terrorist Bombings (General Assembly Resolution 52/164, United Nations General Assembly Official Record, 52nd Sess., U.N. Doc. A/RES/52/164 (1997)), and the Convention for the Suppression of the Financing of Terrorism (General Assembly Resolution 54/109, United Nations General Assembly Official Record, 4th Sess., U.N. Doc. A/RES/54/109 (1999)). Another important legal instrument to consider is the Convention for the Suppression of the Financing of Terrorism, adopted in 1999.
23. United Nations Security Council Official Record, 4385th mtg., United Nations Document S/RES/1373 (2001).



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