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# The EU Response to the Paris Terrorist Attacks and the Reshaping of the Right of Self-Defence in International Law

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*Abstract*: After the terrorist attacks in Paris on 13 November 2015, French President François Hollande invoked Article 42(7) TEU, requesting bilateral aid and assistance from other EU Member States. In this regard, as it was the case with the terrorist actions of 11 September 2001, one of the most disputed issues was whether the Paris incidents constituted an "armed attack", requisite to trigger the right of self-defence in light of the wording of Article 51 of the United Nations Charter. After a careful examination, we reached the conclusion that, even if it can be said that, for the time being, the existing rule in international law in both conventional law (Article 51 of the UN Charter) and customary law allowing states to have recourse to the use of force in self-defence can only be legally exercised in the presence of an armed attack committed by a state, it can also be argued that current state practice appears to be heading in another direction. It must be recalled that for the drafters of Article 51 of the UN Charter the right of self-defence was already "inherent". Had they been in the current situation, perhaps they would have extended this right to include cases of terrorist attacks of great dimensions.

*Keywords*: Self-Defence- Terrorism- Mutual Assistance Clause of Article 42 (7) TEU- Article 51 of the UN Charter

## (A) INTRODUCTION

As a result of the 2004 train attacks in Spain, the European Union (EU) inserted mutual defence measures into the Lisbon Treaty. This move was inspired by Article 5 of the North Atlantic Treaty[1] and Article 5 of the modified Western European Union Treaty,[2] which oblige all Member States to come to the defence of a state that is subject to a relevant attack. Thus, Article 42(7) of the Treaty on European Union (TEU) stipulates, "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter." After the terrorist attacks in Paris on 13 November 2015, French President François Hollande invoked Article 42(7) TEU, requesting bilateral aid and assistance from other EU Member States. At the 3426th meeting of the Foreign Affairs Council of the European Union, held on 17 November 2015, the

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1 "The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security."

2 "If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power."

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defence ministers expressed their unanimous and full support for France and their readiness to provide all the necessary aid and assistance to that country.[3] It was the first time in EU history that the defence ministers unanimously decided to activate Article 42(7) TEU, also called the "mutual assistance clause." As pointed out by the High Representative *of the European Union for Foreign Affairs and Security Policy*, no formal decision or conclusion by the Council would be required to implement Article 42(7) TEU, and external offers of support could consist of material assistance, including the provision of support in theatres of operation in which France was engaged.[4]

In this crisis, not dissimilar to the terrorist actions of 11 September 2001, one of the most disputed issues was whether the Paris incidents constituted an "armed attack", requisite to trigger the right of self-defence in light of the wording of Article 51 of the United Nations Charter of 1945 (hereinafter UN Charter). That article provides:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

The question arises due to the absence in the UN Charter of any definition of the expression "armed attack" and, in particular, to Article 51's silence on the matter of the necessary personality of the perpetrator of such an attack, or of the authority on behalf of which such an attack must be committed, for it to justify self-defence. Traditionally, it has been understood that armed attacks have to emanate from a state, but some see UN Security Council Resolutions 1368 (2001) and 1373 (2001),

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[3] Council of the European Union, Meeting No. 3426, Brussels, 16 November 2015. French authorities requested, in particular, either support – by pooling of capabilities – for France's operations in Iraq and Syria, or support for France in other theatres so as to enable it to reduce some of its engagements there and redeploy its troops (see: European Parliament, "Activation of Article 42(7) TEU – France's request for assistance and Member States' responses," European Council Briefing, December 2015). With regard to military assistance, the United Kingdom engaged in airstrikes in Syria and announced that it would allow French aircraft to use the Royal Air Force's Akrotiri base in Cyprus. On 4 December 2015, the German parliament decided to honour the German government's request to send up to 1200 troops to support France (see: Deutscher Bundestag, Drucksache 18/6866, 1 December 2015). Some other Member States have decided to increase their contributions to EU and/or UN missions in the Sahel, Mali, the Central African Republic and the Mediterranean. As for non-military cooperation, several Member States have already expressed their support for stepping up intelligence sharing and foreign policy cooperation, the latter within the framework of the International Syria Support Group negotiations on Syria (*ibid.*). In February 2016, US Defence Secretary Ash Carter expressed his satisfaction that the other states participating in the international campaign to defeat the so-called Islamic State in Iraq and the Levant (ISIL or Da'esh) in Syria and Iraq had increased their efforts in the previous months and days (see: T. Moon Cronk, "Carter: Counter-ISIL Defense Ministers Unanimously Support Objectives", *DOD News*, 11 February 2016, accessed on 1 September 2016).

[4] Council of the European Union, Outcome of the Council Meeting, 3426th Council meeting, Foreign Affairs, Brussels, 16 and 17 November 2015. France had already engaged in bilateral talks with the other Member States to specify the aid and assistance they would provide, given that the bilateral nature of the support meant that it would not be a uniform contribution by all Member States. According to the High Representative *of the European Union for Foreign Affairs and Security Policy*, Article 42(7) TEU is meant to activate bilateral aid and assistance and the role of the EU/European External Action Service would be limited to coordination or facilitation of what France and the other Member States decided ("the European Union can facilitate this and coordinate this, whenever and however it is useful and necessary"). See: European Parliament, "The EU's mutual assistance clause: First ever activation of Article 42(7) TEU", Briefing November 2015.

which recognized, in the context of the 2001 terrorist attacks on New York, Washington, D.C. and Pennsylvania, "[...] the inherent right of individual or collective self-defence in accordance with the Charter",[5] as a first step towards claiming the right of self-defence in response to terrorist attacks.

Should the responses of the EU Member States to the Paris attacks, activating the mutual assistance clause, be seen as a move towards the formation of a new customary rule reshaping the content of the right of individual or collective self-defence in accordance with Article 51 of the UN Charter and customary law? Or rather should the invocation of Article 42(7) TEU be considered illegitimate, or even a violation of the UN Charter law on self-defence? In this regard, it should be noted from the outset that the right of self-defence is not rooted solely in conventional international law through Article 51 of the UN Charter. On the contrary, the right of self-defence was a mainstay of discussions about war and peace, in both natural law and *jus gentium* traditions, even before the 'state' had become the normative authority in international affairs.[6] More recently, though, the 1986 decision of the International Court of Justice (ICJ) in *Nicaragua v USA* significantly appears to confirm that the right of self-defence also exists in customary international law. The Court sustained that opinion on the basis that the UN Charter itself employs the term "inherent right" in Article 51,[7] as well as on the consensus shown by the adoption of the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (UN General Assembly Resolution 2625 (XXV) of 24 October 1970). For the Court, that resolution "[...] demonstrates that the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law".[8]

In order to clarify these matters, this paper will first address the scope of Article 51 of the UN Charter and of customary law before the 2001 terrorist attacks. Second, it will examine new developments on the matter since the 2001 attacks on the Twin Towers. Finally, it will try to reach a conclusion regarding the controversial issue of the emergence of a new norm of customary law allowing states to exercise the right to self-defence against terrorist attacks in international law.

## (B) SCOPE *RATIONE PERSONAE* OF THE RIGHT OF SELF-DEFENCE ACCORDING TO ARTICLE 51 OF THE UN CHARTER AND CUSTOMARY LAW UNTIL THE TERRORIST ATTACKS OF 2001 IN THE UNITED STATES OF AMERICA

From the point of view of methodology, in order to ascertain whether the interpretation of the expression "armed attack" embodied in Article 51 of the UN Charter can trigger the right of self-defence in the context of terrorism, it is necessary to develop an interpretation of this expression in

5 SC Res. 1368 (2001) 12 September 2001. For its part, Resolution 1373 (2001) reaffirmed "[...] the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)". See: SC Res. 1373 (2001) 28 September 2001.

6 S. Neff, *War and the Law of Nations: A General History*, (Cambridge University Press, Cambridge, 2008), at 7-158.

7 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1986) 14, at 102, para. 193.

8 *Ibid.*, at 103, para. 193.

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relation to the rules set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, as adopted by the ICJ in its jurisprudence. Recall that Article 31, which for the ICJ reflects customary international law, sets forth the general rule of interpretation, according to which "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty".[9] Moreover, as the text of Article 31(3) of the 1969 Vienna Convention on the Law of Treaties provides, "There shall be taken into account, together with the context, [...] any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".[10] An examination of such subsequent practice can thus shed more light on the evolution of customary law regarding the issue of the right of self-defence.

Finally, in connection with the supplementary measures set out in Article 32 of the Vienna Convention, the ICJ has noted that "[...] recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion".[11]

To examine the status of customary law and for the purposes of clarity, this section will be divided into two subsections: a) the interpretation of the expression "armed attack" in accordance with most of the elements provided for in Articles 31 and 32 of the Vienna Convention on the Law of Treaties; and b) the examination of state practice and the practice of the UN Security Council. The practice of the Security Council provides an optimal framework for studying the practice of states, due to its great responsibilities in connection with security issues and, in particular, with regard to Article 51 of the UN Charter.

### (1) Interpretation of the Expression "Armed Attack" According to the Provisions of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, without Taking State Practice into Account

Prior to discussing the scope *ratione personae* of the expression "armed attack", it is necessary to explore the *ratione materiae* of that expression so as to grasp at least its basic content.

An analysis of the *text* of Article 51 of the UN Charter would seem to encourage an interpretation whereby the expression "armed attack" should be interchangeable with the word "aggression" (for instance, the French wording used in Article 51 is "agression armée", even if its meaning is not exactly the same). In fact, due to the absence of any relevant treaty law definition of the former, extensive use has been made of the Definition of Aggression annexed to UN General Assembly Resolution 3314 of

[9] *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Reports (1994) 6, at 21-22, para. 41.

[10] When called upon to interpret the provisions of a treaty, the ICJ has itself frequently examined the subsequent practice of the parties in the application of that treaty. See: *Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Reports (1999) 1045, at. 1076, para. 50.

[11] *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Reports (1994) 6, at 21-22, para. 41.

14 December 1974 (hereinafter, Definition of Aggression) in the context of self-defence.[12] In the *Nicaragua* case, the ICJ itself noted, "There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks",[13] and advanced, with the aim of illustrating that agreement,[14] the description contained in Article 3(g) of the Definition of Aggression.[15] Moreover, in the same case, the Court used the terms "armed attack" in English and "agression armée" in French as a condition to exercise the right to self-defence,[16] echoing the wording of Article 51 of the UN Charter.

In sum, while the Definition of Aggression may be a helpful guideline to explore the scope *ratione materiae* of the right of self-defence, the concept of "armed attack" could in certain respects actually be broader than the one provided for in Resolution 3314 (XXIX).[17]

In any case, in light of the non-exhaustive nature of the list of acts considered acts of aggression included in Resolution 3314 and of the jurisprudence of the ICJ, and with regard to the *ratione*

[12] It has also been the case in connection with the definition of the crime of aggression in the context of international criminal law. In this regard, see *infra* the section concerning new developments in the definition of aggression and the adoption of new obligations of mutual assistance.

[13] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), ICJ Reports (1986) 14, at 103, para. 195.

[14] *Ibid.*, at 103-104. It should be recalled that the Definition of Aggression originated in the attempt by several delegations at the United Nations Conference on International Organization, held in San Francisco from 25 April to 26 June 1945, to define or explain the term "aggression". However, at the time, it was thought that a preliminary definition of the term went beyond the scope of the Charter and that the modern techniques of warfare rendered any definition of "aggression" impossible (see: Report of Mr Paul-Boncour, Rapporteur, on Chapter VIII, Section B, Doc. 881 (English) III/3/46, 10 June 1945, United Nations Conference on International Organization, Vol. 12, p. 505). Later, at the proposal of the Soviet Union, in Resolution 378 (V) of 17 November 1950, the UN General Assembly decided to refer the task of elaborating a definition of the term "aggression" to the International Law Commission (*Official Records of the General Assembly, Fifth Session, Annexes*, Agenda Item 72, Doc. A/C.1/608, 4 November 1950, pp. 4-5). After a considerable period of work by the codification organ, a draft definition was taken up by the General Assembly at its twenty-ninth session, in 1974. Finally, on the recommendation of the Sixth Committee, the General Assembly, on 14 December 1974, adopted without a vote Resolution 3314 (XXIX), to which the Definition of Aggression was annexed. On this issue see Elizabeth Wilmshurst's note on the Definition of Aggression, General Assembly Resolution 3314 (XXIX), 14 December 1974, for the United Nations Audiovisual Library of International Law.

[15] Definition of Aggression, Annex to GA Res. 3314 (XXIX), 14 December 1974. Article 3 stipulates that: "Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression: (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; (c) The blockade of the ports or coasts of a State by the armed forces of another State; (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

[16] "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" (*ibid.*, para. 195); "Dans le cas de la légitime défense individuelle, ce droit ne peut être exercé que si l'Etat intéressé a été victime d'une agression armée".

[17] In this sense, see: T. Ruys, *'Armed Attack' and Article 51 of the UN Charter Evolutions in Customary Law and Practice* (Cambridge University Press, Cambridge, 2010), at 139.

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*materiae*[18] considerations for the right to exercise self-defence, it seems clear that a state must be the victim of a use of force of considerable gravity. Being the object of other less important uses of force will not trigger the right to self-defence. Indeed, Resolution 3314 not only explicitly states, in Article 4 of the Definition of Aggression, that other conducts not enumerated there can be considered as aggression[19] but also implicitly affirms that, for such an assessment to be made, all circumstances of each particular case must be taken into consideration.[20] On the other hand, as Article 2 explicitly provides, self-defence cannot be justified if "[...] the acts concerned or their consequences are not of sufficient gravity". For its part, in its judgment of 27 June 1986 on the merits of the *Nicaragua* case, the ICJ used the criterion of the gravity, understood as "scale and effects", of a use of force to legitimize recourse to self-defence.[21]

With regard to the scope *ratione personae* of the expression "armed attack" in Article 51 of the UN Charter and whether it covers the acts of terrorist groups, in view of the above considerations, mainly Article 3(g) of the Definition of the Aggression, it seems clear that terrorist acts can indeed be considered armed attacks, provided they are of sufficient gravity and can be attributed to a state.[22] Recall that, according to the text of that provision, an act of aggression could consist of "(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein".

This interpretation is consistent with the ICJ's jurisprudence, which has always refused to extend the right to self-defence to non-state actors. Only when the acts of non-state entities amount to an aggression and engage the responsibility of a state can the victim state have recourse to self-defence. Indeed, in the *Nicaragua* case the Court saw self-defence exclusively as a relationship between states. Likewise, in its advisory opinion for the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, it took into consideration only the possibility of states possessing nuclear weapons for use in self-defence.[23] Thus, in the *Nicaragua* case, the Court noted that it saw no reason to deny that

> "[...] in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by

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[19] "The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter."

[20] The preamble of the Resolution provides, "*Believing* that, although the question whether an act of aggression has been committed *must be considered in the light of all the circumstances of each particular case*, it is nevertheless desirable to formulate basic principles *as guidance* for such determination". Likewise, Article 1 reads: "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" (Emphasis added in both texts).

[21] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1986) 14, at 103, para. 195, and at 127, para. 247.

[22] In that sense, see, for instance: V. Silvy, *Le recours à la légitime défense contre le terrorisme international* (Connaissances et Savoirs, Paris, 2013), at 93.

[23] For the Court, "In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence" (see: *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports (1996) 226, at 246, para. 47).

> regular armed forces. 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."[24]

Here the Court places the problem of the classification of armed attacks in the context of the criteria for attributing responsibility to a state for the acts of a person or group of persons. The Court itself helped to delimit the criteria that were ultimately embodied in Article 8 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts,[25] emphasizing the need for "effective control".[26] According to that provision, "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".

As for the analysis of the *context* of Article 51, it is necessary to begin with Article 2(4) of the UN Charter, which is the cornerstone of the interpretation of the use of force in accordance with the Charter. Its wording is well known: "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." It is obvious that, with this wording, the drafters of the UN Charter intended to extend the prohibition of war embodied in the Brian-Kellogg Pact to small-scale uses of force. Indeed, as Tom Ruys has put it, "the final phrase, which speaks of force 'inconsistent with the purposes of the UN Charter', serves as a residual 'catch-all' provision, making clear that Article 2(4) constitutes a comprehensive ban against all uses or threats of force, regardless of their impact and gravity".[27] Nevertheless, in the UN system, the general prohibition of the use of force embodied in Article 2(4) has two exceptions: first, the use of force, directly or indirectly, by the Security Council, whenever it determines that a threat to the peace, a breach of the peace, or an act of aggression has occurred (Articles 39, 42 and 53 UN Charter); second, the recourse to self-defence provided for in Article 51 as an expression of the drafters' conviction that the Security Council might not always be in a position to respond in due course to acts of aggression. Thus, the Charter explicitly allows Member States to resort to military force in order to defend themselves in case of an armed attack as a temporary measure until the Security Council can assume its responsibilities on the matter. As the ICJ stated in the *Nicaragua* case, "The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations".[28]

Therefore, the context of Article 51 is not particularly helpful for concluding once and for all if there is room for the right of self-defence in the face of armed attacks committed by terrorist groups.

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[24] See: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1986) 14, at 103-104, para. 195.

[25] See *Yearbook of the International Law Commission, 2001*, vol. II (Part Two).

[26] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1986) 14, at 64-65, para. 115.

[27] See Ruys, *supra* n. 17, at 56-57.

[28] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1986) 14, at 97, para. 181.

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In general lines, the context of the Charter speaks against any expansion of the right to use force in international law and in favour of placing the management of any security crisis in the hands of the Security Council. That interpretation is consistent with the object and purpose of the Charter. It is well known that the principal aim of the Charter is the creation of an organization and a correlative system in order to prevent war and maintain international security as much as possible,[29] as stated mainly in Article 1(1) (purposes of the UN). According to that provision, the highest purpose of the world organization is "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace [...]". Nevertheless, Article 51 of the Charter considers temporary self-defence a use of force not inconsistent with the purposes of the United Nations, as set forth in Article 2(4). This argument is reinforced by the fact that the Charter itself calls the right of self-defence "inherent", which implies something that existed before the Charter and is independent of it. Moreover, by using the expression "armed attack" in the text of Article 51 and neglecting to indicate who the author of such an attack must be, the Charter clearly stresses the factor of the gravity of the use of force suffered, relegating the question of the scope *ratione personae* of the right of self-defence to second or third place.

In view of the above, it is useful to review the preparatory works for the UN Charter and the circumstances in which it was drafted. These factors would seem to support the interpretation provided in Article 51, whereby armed attacks can only be directed by states, due to the common perception of international peace and security at the time following two "world" wars waged by state combatants. Indeed, nothing in the *travaux préparatoires* suggests that the drafters had in mind the use of force by irregular or armed bands, let alone by terrorist groups. As we have seen, the final version of Article 51 speaks only of "armed attacks" without any further specification.[30]

The origin of this provision lies in the context of the attempt to harmonize the operation of regional arrangements and agencies with the general provisions of the future Charter, in particular, those relating to the use of force. More precisely, the goal was to discover the best means of incorporating the prevailing Inter-American system within the new United Nations model, with special reference to the obligations of solidarity assumed under the Act of Chapultepec of 6 March 1945.[31] According to the third point of that declaration,

> [...] every *attack of a State* against the integrity or the inviolability of the territory, or against the sovereignty or political independence of an American State, shall, conformably to Part III hereof, be considered as an act of aggression against the other States which sign this Act. In any case invasion by armed forces of one *State* into the territory of another trespassing boundaries established by treaty and demarcated in accordance therewith shall constitute an act of aggression.[32]

[29] The preamble of the Charter clearly underlined the motives behind the adoption of the text, stating, "We the peoples of the United Nations determined: to save succeeding generations from the scourge of war [...]".

[30] On this matter see, for instance: Ruys, *supra* n. 17, at 369-370.

[31] In this regard, see: L. M. Goodrich; E. Hambro, *Charter of the United Nations. Commentary and Documents* (World Peace Foundation, Boston, 1946), at 175.

[32] Inter-American Reciprocal Assistance and Solidarity (Act of Chapultepec), 6 March 1945, Resolution approved by the Inter-American Conference on Problems of War and Peace at Mexico, 6 March 1945. Emphasis added.

As this text expressly states, at the time, only the actions and reactions of states were taken into consideration.[33] Therefore, during the drafting of the Charter at the San Francisco Conference, the possibility of foreseeing the expansion of the right of self-defence to include cases of armed attacks committed by non-state actors was inconceivable.

Based on the foregoing review of the textual and contextual elements of Article 51 of the UN Charter, and leaving aside for the moment the issue of state practice, we can conclude that in order to allow the exercise of the right to self-defence, the Charter essentially requires the commission of an armed attack, understood as a use of force of great dimensions. The drafters of the Charter were not so concerned with the *ratione personae* requirements for the exercise of that right and, thus, the question remains unsettled if we look exclusively at the text. However, when the circumstances and preparatory works for Article 51 are taken into consideration, it must be noted that, at the time of its drafting, only states could be the authors of armed attacks and, therefore, only their acts could trigger the exercise of the right to self-defence.

### (2) State Practice in the Context of the Activity of the UN Security Council

In the decades following the adoption of the UN Charter, state practice regarding Article 51 took place mainly in the context of decolonization.

In the 1950s and 1960s, states invoked the right of self-defence in response to attacks made by armed bands considered to be acting as instruments of other states. This was the case, for example, with the Israeli occupation of the entire Sinai Peninsula on the grounds that armed units were carrying out recurring raids into its territory from the Egyptian *fedayeen* bases.[34] In that case, the Security Council did not take an official position because France and the United Kingdom vetoed a United States draft resolution[35] noting that the forces of Israel had penetrated deeply into Egyptian territory in violation of the armistice agreement between Egypt and Israel.[36] In this same period, the United States of America justified its intervention in Vietnam as an exercise of collective self-defence, arguing that South Vietnam had been the subject of both direct and indirect armed attacks.[37]

Thereafter, throughout the global decolonization period, states once again justified cross-border interventions based on their rights of self-defence against the attacks of national liberation movements from abroad. Examples would include the interventions of Portugal, Israel, South Africa and Southern Rhodesia in different countries.[38] In most of these cases, the Security Council denounced

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[33] In this sense, see also: Foreign Relations of the United States: Diplomatic Papers, 1945, General: The United Nations, Volume I, United States Government Printing Office, Washington, 1967, at 665-666.

[34] UN Doc. S/PV.749, 30 October 1956, § 33 (Israel).

[35] Letter dated 29 October 1956 from the representative of the United States of America to the President of the Security Council concerning "The Palestine question: steps for the immediate cessation of the military action of Israel in Egypt" (S/3710). The draft resolution also called on UN members "[..] to refrain from the use of force or threat of force in the area in any manner inconsistent with the Purposes of the United Nations".

[36] See UN Doc. S/PV.749. The result of the vote was 7 in favour, 2 against, with 2 abstentions.

[37] On this matter see: 'The legality of United States participation in the defense of Viet-Nam', *Department of State Bulletin* (Volume 54, Jan.-Mar. 1966), online, at 82.

[38] See: (1) Portugal: Complaint by Senegal concerning Portugal: (1963) UNYB 24–26; Communications concerning Portuguese Guinea (1964) UNYB 120–121; Complaints by Senegal and Portugal (1965) UNYB 134–136; Relations between

the interventions, but founded its response on grounds other than the right of self-defence.[39] Only in very few cases did the Security Council refer to that right. In Resolution 546 (1984) of 6 January 1984, the Security Council expressed its concern about "[...] the renewed escalation of unprovoked bombing and persistent acts of aggression, including the continued military occupation, committed by the racist régime of South Africa in violation of the sovereignty, airspace and territorial integrity of Angola" and reaffirmed "[...] the right of Angola, in accordance with the relevant provisions of the Charter of the United Nations and, in particular, Article 51, to take all the measures necessary to defend and safeguard its sovereignty, territorial integrity and independence".[40] In Resolution 574 (1985) of 7 October 1985, the Security Council reiterated its preoccupation and condemned South Africa for its premeditated and unprovoked aggression against the People's Republic of Angola, again reaffirming Angola's right to take all measures necessary to defend itself in accordance with Article 51 of the UN Charter.[41]

Geopolitical conditions unique to the 1970s and early 1980s provided states with greater confidence to invoke the right of self-defence explicitly in the context of "terrorism", which represented a momentous discursive shift in global conflict. That was the case, for instance, of Israel, which began to justify its right of self-defence on the grounds of the recurrent terrorist attacks it was suffering from Lebanese territory and the admitted inability of the Lebanese authorities to control their own territory.[42] Nevertheless, the Security Council did not accept Israel's arguments and, in Resolution 313(1972), "[...] demanded that Israel immediately desist and refrain from any ground and air military

other African States and Portugal (1966) *UNYB* 121–122; Relations between Portugal and Guinea, Portugal and Senegal, Portugal and Zambia (1967) *UNYB* 131–132; Relations between African States and Portugal (1968) *UNYB* 159–160; Relations between African States and Portugal (1969) *UNYB* 135–145; (2) Israel: The situation in the Middle East (1968) *UNYB* 191–232; The situation in the Middle East (1970) *UNYB* 223–240; The situation in the Middle East (1971) *UNYB* 177–178; The situation in the Middle East (1972) *UNYB* 157–171; The situation in the Middle East (1973) *UNYB* 178–182; Questions related to the Middle East (1978) *UNYB* 295 *et seq.*; Questions related to the Middle East (1979) *UNYB* 325 *et seq.*; Questions related to the Middle East (1980) *UNYB* 347 *et seq.*; Middle East (1982) *UNYB* 428 *et seq.*; Middle East (1985) *UNYB* 285–293; Middle East (1988) *UNYB* 217–220; (3) South Africa and Southern Rhodesia: Matters relating to Africa (1976) *UNYB* 163–171; Matters relating to Africa (1977) *UNYB* 206–221; Matters relating to Africa (1979) *UNYB* at 218 *et seq.*; (1980) *UNYB* 252–266; Africa (1981) *UNYB* 214–222; Africa (1982) *UNYB* 310–318; Africa (1983) *UNYB* 169–180; Africa (1984) *UNYB* 177–184; Africa (1985) *UNYB* 178–196; Africa (1986) *UNYB* 155–168; Africa (1987) *UNYB* 163–176; Africa (1988) *UNYB* 158–161.

[39] (1) Portuguese interventions: SC Res. 178 (1963) 24 April 1963; SC Res. 204 (1965) 19 May 1965; SC Res. 268 (1969) 28 July 1969; SC Res. 273 (1969) 9 December 1969; SC Res. 275 (1969) 22 December 1969; (2) Israeli interventions: SC Res. 248 (1968) 24 March 1968; SC Res. 256 (1968) 16 August 1968; SC Res. 262 (1968) 31 December 1968; SC Res. 280 (1970) 19 May 1970; SC Res. 316 (1972) 26 June 1972; SC Res. 332 (1973) 21 April 1973; SC Res. 450 (1979) 14 June 1979; SC Res. 467 (1980) 24 April 1980; SC Res. 573 (1985) 4 October 1985; (3) South African or Southern Rhodesian interventions: SC Res. 393 (1976) 30 July 1976; SC Res. 403 (1977) 14 January 1977; SC Res. 455 (1979) 23 November 1979; SC Res. 447 (1979) 28 March 1979; SC Res. 454 (1979) 2 November 1979; SC Res. 475 (1980) 27 June 1980; SC Res. 466 (1980) 11 April 1980; SC Res. 527 (1982) 15 December 1982; SC Res. 545 (1983) 20 December 1983; SC Res. 546 (1984) 6 January 1984; SC Res. 567 (1985) 20 June 1985; SC Res. 571 (1985) 20 September; SC. Res. 574 (1985) 7 October 1985; SC Res. 568 (1985) 21 June 1985; SC Res. 577 (1985) 6 December 1985; SC Res. 580 (1985) 30 December 1985; SC Res. 581 (1986) 13 February 1986; SC Res. 602 (1987) 25 November 1987; SC Res. 606 (1987) 23 December 1987.

[40] SC Res. 546 (1984) 6 January 1984.

[41] SC Res. 574 (1985) 7 October 1985.

[42] (1972) *UNYB* 239.

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action against Lebanon and forthwith withdraw all its military forces from Lebanese territory".[43] It was also the case of the United States of America, which justified certain interventions in the Middle East as self-defence as well, for example, in the incident of the seizure of its embassy in Teheran on 4 November 1979,[44] and coined the so-called 'Shultz doctrine'. According to that doctrine, states that were unwilling to prevent terrorist attacks from their territory would be liable to a forcible response in exercise of the right of self-defence.[45] In the case of the American hostages in Teheran, the Security Council did not elaborate upon the principles of self-defence, but rather developed its interpretation in relation to the violation of international obligations arising from diplomatic and consular conventions, calling upon "the Government of Iran to release immediately the personnel of the Embassy of the United States of America being held at Teheran, to provide them with protection and to allow them to leave the country".[46] At the same time, it recalled states' responsibility "to 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".[47]

Another important case of alleged self-defence was the repeated incursions by Turkey and, to a lesser extent, Iran against Kurdish fighters operating from Iraqi soil after the 1990–1991 Gulf War. Responding to complaints lodged by Iraq with the Security Council, Turkey argued that its incursions into Iraqi territory were due to that country's inability to prevent the use of its territory for the staging of terrorist acts against Turkey. Under those circumstances, Turkey's actions were legitimate and could not be regarded as a violation of Iraq's sovereignty: "No country would be expected to stand idle when its own territorial integrity is incessantly threatened by blatant cross-border attacks of a terrorist organization based and operating from a neighboring country, if that country is unable to put an end to such attacks".[48] In contrast, Iraq condemned those actions and "[...] categorically rejected the justifications advanced by Turkey for its open aggression, namely, its right to protect its national security against terrorist elements, specifically the Kurdish Workers' Party, and to pursue them even into Iraqi territory until they were extirpated".[49] In response to these developments, the Security Council abstained from seizing the opportunity to make any reference to the right of self-defence in connection to terrorist attacks, perhaps sensibly, given the complicated political upheavals that followed the First Gulf War.

Finally, in the early 2000s, in the context of the events in the African Great Lakes region and the conflict in the Democratic Republic of the Congo between its government, supported by Angola, Namibia and Zimbabwe, and various rebel groups, loosely allied with the neighbouring countries of

43 SC Res. 313 (1972) 28 February 1972.

44 On this matter, see: Relations between Iran and the United States (1979) UNYB 307-312.

45 See on this point: Ruys, *supra* n. 17, at 422.

46 SC Res. 457 (1979) 4 December 1979.

47 *Ibid.*

48 *Letter dated 24 July 1995 from the Charge d'Affaires a.i. of the permanent mission of Turkey to the United Nations addressed to the President of the Security Council*, UN doc. s/1995/605, 24 July 1995.

49 (1996) UNYB 237.

Burundi, Rwanda and Uganda,[50] both the Democratic Republic of the Congo and Rwanda claimed to be acting in accordance with Article 51 of the UN Charter. Rwanda stated before the Security Council that the government of the Democratic Republic of the Congo had "allied itself with the planners and perpetrators of the Rwandan genocide". Therefore, Rwanda asked the Security Council to re-examine the circumstances that had led Rwanda "to intervene militarily in the Democratic Republic of the Congo, in exercise of the inherent right of self-defence, pursuant to Article 51 of the Charter of the United Nations".[51] In contrast, the Democratic Republic of the Congo argued that it was within its legitimate rights to take all necessary measures to respond to the Rwandan armed aggression in accordance with Article 51 of the Charter, including soliciting assistance from the Member States of the Southern Africa Development Community through the invocation of a natural right to collective and individual self-defence.[52] In the end, through Resolution 1304 (2000), the Security Council affirmed that Rwanda had violated the sovereignty and territorial integrity of the Democratic Republic of the Congo and demanded that Rwanda withdraw all its forces from the territory of the Democratic Republic of the Congo without further delay, although again without elaborating any further on the right of self-defence.[53]

It thus seems difficult to identify any customary rule recognizing the right of self-defence in these cases, which concern armed attacks carried out by groups considered to be "terrorists". While some states would continue to justify their repulsion of terrorist activity through unilateral agreements and recourse to a customary right, they did so without the agreement of the majority of states or the Security Council's acceptance.[54]

### (c) Scope *ratione personae* of the right of self-defence according to Article 51 of the UN Charter and customary law after the terrorist attacks of 2001 in the United States of America

As already noted, in the *Nicaragua* case, the ICJ said that, at the time of the adoption of Resolution 3314, the consensus on the exception to the prohibition of force constituted by the right of individual or collective self-defence showed that it was already a matter of customary international law.[55] Building on that statement, this section will try to ascertain whether or not a new customary norm is in the process of being formed. In this regard, it should be noted that prior to the UN Charter, as long as the use of force was completely legal, there was no need to invoke any right to self-defence,[56] even if it was, as Article 51 of the UN Charter later confirmed, an inherent right.

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50 (2000) *UNYB* 114.

51 Repertoire of the practice of the Security Council 2000-2003, 1007.

52 *Ibid.*

53 SC Res. 1304 (2000) 16 June 2000.

54 According to Vianney Silvy, state terrorism, i.e. the employ by the state of terrorism, can be equated to an aggression, while purely private terrorism was traditionally considered a simple crime to be persecuted and punished through international cooperation. See: V. Silvy, *supra* n 22, at 139.

55 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1986) 14, at 103, para. 193.

56 In this sense, see: Ruys, *supra* n. 17, at 53-54.

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### (1) State Practice with Regard to the Right of Self-Defence, Mainly in the Context of the UN Security Council's Activity Following the 2001 Attacks on the Twin Towers

The international trend of responding to terrorist attacks based on self-defence carried into the new millennium, largely due to the catastrophe of the 2001 attacks. As is well known, on 11 September 2001, four civilian airplanes were hijacked by terrorists in the United States of America and deliberately crashed in New York, Washington, D.C., and Pennsylvania, resulting in the loss of thousands of innocent lives.[57] Almost immediately, the UN Security Council condemned the terrorist attacks through Resolution 1368 (2001) of 12 September 2001, adopted unanimously. It also expressed its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001 and to combat all forms of terrorism, in accordance with its responsibilities under the UN Charter. The Council further recognized "[...] the inherent right of individual or collective self-defence in accordance with the Charter".[58] A couple of weeks later, through Resolution 1373 (2001) of 28 September 2001 (also adopted unanimously), the Security Council asserted that terrorist acts constituted a threat to international peace and security and expressed its deep concern about the increase of acts of terrorism in various regions of the world. Moreover, it decided that all states were to prevent and suppress the financing of terrorist acts and called on states to work together urgently to achieve these goals. In that respect, the Security Council reaffirmed "[...] the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)".[59] However, it should be noted that the Security Council seems to have taken those decisions under the conviction that the 2001 attacks involved the responsibility of a state for its implication in the terrorist attacks. Furthermore, the Security Council had already called upon the Taliban regime on more than one occasion to refrain from harbouring and training terrorists and their organizations.[60] That is probably why, in Resolution 1372 (2001), the Security Council reaffirmed the principle established by the General Assembly in its declaration of October 1970 (Resolution 2625 (XXV)),[61] whereby "[...] every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts".[62]

Some weeks later, on 7 October 2001, the United States and the United Kingdom commenced a military operation called "Enduring Freedom" against the Taliban in Afghanistan. In a letter dated the same day, the US announced to the President of the Security Council that, together with other states, it had already initiated "[...] actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001".[63] The same letter stated that the US government had obtained, since the date of the

57 (2001) UNYB 60.
58 SC Res. 1368 (2001) 12 September 2001.
59 SC Res. 1373 (2001) 28 September 2001.
60 See, for instance: SC Res. 1193 (1998) 28 August 1998; SC Res. 1214 (1998) 8 December 1998; SC Res. 1267 (1999) 15 October 1999; and SC Res. 1333 (2000) 19 December 2000.
61 Before 2001, the Security Council had already reiterated that principle in Resolution 1189 (1998) of 13 August 1998.
62 SC Res. 1373 (2001) 28 September 2001.
63 UN Doc. S/2001/946.

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attacks, "[...] clear and compelling information that the Al-Qaeda organization, which [was] supported by the Taliban regime in Afghanistan, had a central role in the attacks".[64] Furthermore, according to the US, the aforementioned attacks committed by the Al-Qaeda organization had been made possible by the decision of the Taliban regime to allow those parts of Afghanistan under Taliban control to be used by that organization as a base of operation.[65] It is also worth mentioning that a group of other states - the United Kingdom, Canada, France, Australia, Germany, the Netherlands, New Zealand and Poland – informed the Security Council in this period that they, too, had participated in US-led military actions against Al-Qaeda and the Taliban regime in Afghanistan, alleging that they were acting in accordance with the inherent right of individual or collective self-defence.[66]

As for the North Atlantic Treaty Organization (NATO), the North Atlantic Council met on the same day of the terrorist attacks in the US. The following day, the Council agreed that if it was determined that the attacks were directed from abroad against the US, they should be regarded as an action covered by Article 5 of the Washington Treaty, which, as already noted, provides that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.[67] In that sense, on 2 October 2001, the US informed the North Atlantic Council that an investigation had clearly determined that the individuals who carried out the attacks belonged to the worldwide terrorist network known as Al-Qaeda, headed by Osama bin Laden and protected by the Taliban regime in Afghanistan.[68] Therefore, on 4 October, the North Atlantic Council decided — at the request of the US— to take eight measures, individually and collectively, to fight against terrorism, thereby operationalizing Article 5 of the Washington Treaty for the first time in the organization's history.[69] On 8 October 2001, the North Atlantic Council met to review the situation and stated that even if Operation Enduring Freedom was not a military operation of the organization itself, but rather a military operation led by the US and the UK with the military support of other NATO Allies, the Alliance itself would continue to provide military and other support, taking whatever defensive measures it considered necessary.[70] The invocation of Article 5 of the Washington Treaty and the measures undertaken by the organization were of tremendous relevance because they entailed the materialization of the right of collective self-defence in the face of an attack, of considerable proportions, committed by a terrorist organization.

Additional support came from the EU, which, through two letters addressed by the representative of Belgium to the Secretary-General of the United Nations dated 8 and 17 October 2001, conveyed its profound sympathy to the US. For the EU, the terrorist attacks of 11 September 2001 represented an assault upon the open, democratic, tolerant and multicultural institutions of its Member States. In this context, the EU declared its full solidarity with the US and offered its wholehearted support for

64 *Ibid.*
65 *Ibid.*
66 Repertoire of the practice of the Security Council 2000-2003, 1005-1006.
67 Statement by the North Atlantic Council, Press Release (2001) 124, 12 September 2001.
68 Statement by NATO Secretary General, Lord Robertson, 2 October 2001.
69 Statement to the Press by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision on Implementation of Article 5 of the Washington Treaty following the 11 September Attacks against the United States.
70 Statement by NATO Secretary General, Lord Robertson, Press Release (2001) 138, 8 October 2001.

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the actions taken in self-defence, in conformity with the UN Charter and Security Council Resolution 1368 (2001).[71]

The Organization of American States also supported the military operation in Afghanistan, through a resolution of the Ministers of Foreign Affairs of Member States meeting as an organ of consultation in application of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty). That declaration stated that the 11 September 2001 attacks were in fact attacks against all American states and that in accordance with all the relevant provisions of the Rio Treaty and the principle of continental solidarity, all states party to the Rio Treaty should provide effective reciprocal assistance to address such attacks. At the same time, the resolution recalled the inherent right of states to act in the exercise of the right of individual and collective self-defence in accordance with the UN Charter and with the Rio Treaty.[72]

Along the same lines, a November 2001 letter from the representative of Chile to the Secretary-General of the United Nations transmitted a statement on the subject of international terrorism issued by the Ministers for Foreign Affairs of the Rio Group, an international organization made up of Latin American and Caribbean states. In the statement, the body expressed its strong support for the action undertaken to combat terrorism and its conviction that it was conducted in exercise of the right of self-defence and in accordance with the UN Charter.[73]

This interpretation could likewise be seen to prevail in parts of Europe and Africa at the time. At its 4414th meeting on 13 November 2001, the UN Security Council held an open debate on the situation in Afghanistan in which the representatives of Norway and Egypt, for example, were at pains to stress that military operations were being pursued in Afghanistan in connection with individual and/or collective self-defence.[74]

The popular support shown for military operations against Al-Qaeda in Afghanistan among the community of nation states, and the heightened inclination to consider these actions in the framework of self-defence, appeared to create the conditions for the development of a customary rule in relation to self-defence in response to terrorist attacks – attacks of a similar nature, it was increasingly accepted, to "armed attacks" as set out in Article 51 of the UN Charter.[75] The extent to which this interpretation was confirmed through subsequent state practice remains now to be seen.

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71 Annex to the letter dated 8 October 2001 from the Permanent Representative of Belgium to the United Nations addressed to the Secretary-General, UN Doc. S/2001/967. In addition, in a letter dated 20 November 2001 addressed to the UN Secretary-General, the representative of Belgium presented the conclusions of the General Affairs Council of the European Union on Afghanistan, highlighting its unreserved support for the coalition's action "undertaken in self-defence and in conformity with Security Council resolution 1368 (2001) of 12 September 2001" (see: Repertoire of the practice of the Security Council 2000-2003, 1006).

72 Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs, Doc. OEA/Ser.F/II.24 RC.24/RES.1/01, 21 September 2001.

73 *Repertoire of the practice of the Security Council 2000-2003*, at 1006.

74 *Repertoire of the practice of the Security Council 2000-2003*, at 1005-1006.

75 In that sense, for Michael N. Schmitt, "[...]in the days preceding October 7th, there was nearly universal consensus that the September attacks justified a forceful response in self-defence. Correspondingly, the international community clearly considered the response that began on October 7th an appropriate exercise of that right". See: M. N. Schmitt, "Deconstructing October 7th: A Case Study in the Lawfulness of Counterterrorist Military Operations", in *Terrorism and International Law: Challenges and Responses. Contributions presented at the "Meeting of independent experts on Terrorism and*

As conflict began to engulf Lebanon and northern Israel in July 2006, following the crisis of the Hezbollah attack across the Blue Line (the border demarcation set up after Israel withdrew from Lebanon in 2000), Israel was prepared to claim before the UN Security Council that it should act to uphold its "right to act in accordance with Article 51 of the Charter of the United Nations and exercise its right of self-defence" when attacked.[76] At subsequent debates held by the Security Council regarding Israel's response and the situation in Lebanon, several state representatives recognized Israel's right to act in self-defence, but at the same time cautioned that Israel should ensure that its actions were proportionate and measured, in accordance with international law.[77] For Lebanon, the Israeli action/reaction was "disproportionate aggression".[78] At a meeting held on 20 July 2006, the Council heard a briefing by the Secretary-General on the crisis in Lebanon in which the Secretary-General, while reiterating his condemnation of Hezbollah's attacks on Israel and acknowledging Israel's right to self-defence under Article 51 of the UN Charter, warned against the excessive use of force.[79] At a subsequent meeting, several state representatives recognized Israel's right to self-defence against terrorism but also called on Israel to commit to showing caution and restraint in the exercise of this right.[80] The subject of the Middle East situation was also raised at the 2006 G8 summit in Saint Petersburg. While recognizing the responsibility of Hamas and Hezbollah at the origin of the upheaval, the G8 leaders called upon Israel to exercise its right to self-defence with utmost restraint[81] and to be mindful of the strategic and humanitarian consequences of its actions.[82]

Similarly, amid the crisis that befell Mali in 2012, the right of self-defence in the presence of attacks committed by terrorist groups was also invoked. In January 2012, the Tuareg movement known as the *Mouvement national pour la libération de l'Azawad*, along with Islamic armed groups including Ansar Dine, Al-Qaeda in the Islamic Maghreb and the *Mouvement pour l'unicité et le jihad en Afrique de l'Ouest*, in addition to deserters from the Malian armed forces, initiated a series of attacks against government forces in the north of the country.[83] In March 2012, a mutiny led by disaffected soldiers formerly defeated by armed groups in the north resulted in a military *coup d'état*. Upon taking power, the military junta suspended the Constitution and dissolved the government institutions. Only through the mediation of the Economic Community of West African States (ECOWAS), in August

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*International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law" organized by the International Institute of Humanitarian Law, Sanremo, 30 May - 1 June 2002 and the "Seminar on International Humanitarian Law and Terrorism" organized by the International Institute of Humanitarian Law in co-operation with the George C. Marshall Center, Sanremo, 24 - 26 September 2002*, at 41.

[76] Repertoire of the Practice of the Security Council 2004-2007, 1024.

[77] *Ibid.*

[78] *Ibid.*

[79] UN Doc. S/PV. 5492, 20 July 2006.

[80] UN Doc. S/PV.5493, 19 (Slovakia); UN Doc. S/PV.5493 (Resumption 1), 4 (Peru); 7 (Denmark); 12 (France); 19 (Brazil); 27 (Australia); 39 (Canada); and 41 (Guatemala).

[81] G8 2006 Summit, Middle East, St. Petersburg, 16 July 2006.

[82] For Tatiana Waisberg, "The overwhelming international community support of Israel's claim of self-defense against Lebanese territory confirms the dramatic shift promoted by reactions to the September 11, 2001, terrorist attacks." (see: T. Waisberg, *War on Terror and the New International Order: Shaping International Law Use of Force Discourse at the 21st Century* (CreateSpace, Charleston, 2012), at 187-188.

[83] MINUSMA, United Nations Stabilization Mission in Mali, Background.

2012, was a government of national unity formed.[84] The precarious situation in Mali was compromised again when, in January 2013, several terrorist elements from the country took control of a series of towns. The deterioration of the political situation in Mali led the transitional authorities to request the assistance of France to defend the state's sovereignty and restore its territorial integrity.[85] In response, on 11 January 2013, a French-led military operation called "Operation Serval" was launched against terrorist and associated elements; the operation turned out to be instrumental to improving the security of the country.[86] When the new situation in Mali and the related French intervention were later discussed in the Security Council on 22 January 2013, the representative of Niger sustained that France's intervention in Mali was legitimate and legal by virtue of the specific request made by the authorities of Mali under relevant provisions of the UN Charter, mainly Article 51, "[...] which enshrines the principle of individual and collective self-defence".[87] For its part, in letters to the President of the Security Council, France made no explicit reference to Article 51 of the UN Charter but offered the assurance that its actions were offered in response to a request for assistance from the Interim President of the Republic of Mali.[88] More specifically, France informed the Security Council that its armed forces supported Malian units to destroy terrorist elements from the north perceived to be threatening the very existence of Mali and the lives of its people.[89]

Lastly, in face of the recurrent terrorist attacks by the Islamic State in Iraq and the Levant (also known as Da'esh), the Security Council affirmed in Resolution 2249 (2015), adopted on 20 November 2015, a week after the Paris attacks and the invocation by France of the mutual assistance clause embodied in Article 42(7) of the TEU, that Da'esh "[...] constitutes a global and unprecedented threat to international peace and security".[90] However, after condemning the numerous horrifying terrorist attacks perpetrated by Da'esh in the strongest terms,[91] the Security Council went little farther than to reaffirm "that those responsible for committing or otherwise responsible for terrorist acts, violations of international humanitarian law or violations or abuses of human rights must be held accountable".[92] Still, the Security Council was prepared to call upon Member States of the United Nations to take all necessary measures, in compliance with international law (and in particular the UN Charter), as well as international human rights, refugee law and humanitarian law, on the territory under the control of Da'esh in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts and to destroy the safe havens they had established over significant parts of Iraq and Syria.[93] It should also be noted that this resolution refrained from any invocation or recognition of the right to self-defence, as indeed the Security Council had done in its resolutions of 2001 after Al-Qaeda's

84 *Ibid.*
85 *Ibid.*
86 *Ibid.*
87 UN Doc. S/PV. 6905, 22 January 2013, 14.
88 *Repertoire of the Practice of the Security Council 2012-2013*, at 91.
89 *Ibid.*, at 92.
90 SC Res. 2249 (2015) 20 November 2015.
91 *Ibid.*, para. 1.
92 *Ibid.*, para. 4
93 *Ibid.*, para. 5.

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terrorist attacks in the US.[94] However, in that context, some states, such as France[95] and Germany,[96] had already declared that they could resort to the use of force on the grounds of the right of self-defence.

While this account of state practice may not be exhaustive, it shows increasing support for extending the right to self-defence to include in the face of attacks conducted by terrorist groups, which is probably another indication of the growing importance of non-state actors in today's international society.[97]

### (2) State Practice: New Developments Regarding the Definition of Aggression and New Collective Self-Defence Pacts

Since the 2001 terrorist attacks, there have been substantial developments in Africa with regard to the definition of aggression in international law and the adoption of new pacts including obligations of mutual assistance.

First, on 31 January 2005, the Assembly of the African Union adopted the African Union Non-Aggression and Common Defence Pact, which contains a definition of aggression that takes into account armed attacks committed by non-state actors. Specifically, Article 1 of the Pact provides the following definition:

> "Aggression" means the use, intentionally and knowingly, of armed force or any other hostile act by a State, a group of States, an organization of States or *non-State actor(s)* or by any foreign or external entity, against the sovereignty, political independence, territorial integrity and human security of the population of a State Party to this Pact, which are incompatible with the Charter of the United Nations or the Constitutive Act of the African Union. The following shall constitute acts of aggression, regardless of a declaration of war by a State, group of States, organization of States, or *non-State actor(s)* or by any foreign entity: [...] xi. the encouragement, support, harbouring or provision of any assistance for the commission of *terrorist acts* and other violent trans-national organized crimes against a Member State.[98]

In addition to the definition, Article 4 of the Pact provides: "[...] a) State Parties undertake to provide mutual assistance towards their common defence and security vis-à-vis any aggression or threats of aggression; [...]". This declaration seems to be quite similar to the mutual assistance clause embodied in Article 42(7) of the TEU and is highly significant in the context of the present research.

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94 A commentary on the Security Council resolution can be found in: M. Weller, "Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence Against Designated Terrorist Groups", *EJIL Analysis*, November 25, 2015.

95 *Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council*, UN Doc. S/2015/745, 9 September 2015.

96 On this point, see: A. Peters, "German Parliament decides to send troops to combat ISIS – based on collective self-defense 'in conjunction with' SC Res. 2249", *EJIL Analysis*, 8 December 2015.

97 For Tatiana Waisberg: "Looking at the broader international conjuncture, the latest jurisprudential and doctrinal progress related to the question involving the equation of acts of terrorism to armed attacks is connected to a broader phenomenon intrinsic to contemporary international law: the presence and participation of nonstate actors in world affairs. Terrorist groups, human rights associations, and civil societies, notwithstanding their differences, are all part of the same phenomenon in the sense that they limit the will of the state and influence international decisions and paradigm shifts in international law". See: Waisberg, *supra* n. 82, at 72-73.

98 Emphasis added.

Theoretically at least, if a state party to the Pact is the subject of a terrorist attack, it will be entitled to have recourse to the right of self-defence and to call upon the other states party for assistance.

In the same line, some months later, several African states adopted the Protocol on Non-Aggression and Mutual Defence in the Great Lakes Region.[99] This text also contains a definition of aggression that takes into consideration the acts of non-state actors.[100] Moreover, in Article 8(10), the signatory states affirm that "[n]othing in the provisions of this Article shall affect the right of individual or collective self-defence in the event of an armed attack, or the failure, after notification or request, to intercept and disarm members of an armed group pursued by the defence and security forces of a Member State".[101]

These two instruments are of great relevance in both conventional law and customary law, insofar as they reflect the *opinio juris* of African states, which did not take part in the alliance against Al-Qaeda and Afghanistan in 2001 but clearly consider that the right of self-defence can be invoked in the face of attacks committed by non-state actors in general and by terrorist groups in particular.

In the universal sphere, the definition of the crime of aggression adopted through the amendment of the Rome Statute of the International Criminal Court (ICC) at the first Review Conference of the Statute in Kampala, Uganda, in 2010, also sheds light on the status of the *opinio juris* regarding the possible extension of the right of self-defence to attacks committed by non-state actors.

It was originally foreseen that the ICC would have jurisdiction over the crime of aggression from the start. However, due to the circumstances of the Statute's adoption at the Rome Conference, in particular the discussion of the issue of the relationship of the Security Council with the ICC, that outcome was postponed.[102] Thus, Article 5(1)(d) of the Rome Statute determined that the ICC would have jurisdiction over the crime of aggression, while Article 5(2) provided that this jurisdiction was to be exercised only after a provision was adopted defining the crime and setting out the conditions under which it should be exercised.[103] According to Article 123, seven years after the entry into force of

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[99] Second Summit of the International Conference on the Great Lakes Region, Protocol on Non-Aggression and Mutual Defence in the Great Lakes Region.

[100] "[...] Aggression: the use, intentionally and knowingly, of armed force or any hostile act, as referred to in Article 1(3)(g to k), perpetrated by a State, a group of States, an organization of States or an armed group or by any foreign or external entity, against the sovereignty, political independence, territorial integrity and human security of the population of a Member State, contrary to the Constitutive Act of the African Union, the African Union Non-Aggression and Common Defence Pact or the Charter of the United Nations. [...]"

[101] *Ibid.*

[102] See: Draft Statute for the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June-17 July 1998, A/CONF.183/2/Add.1, 14 April 1998.

[103] The actual exercise of jurisdiction is subject to a decision to be taken after 1 January 2017 by the same majority of states parties to the Rome Statute as is required for the adoption of an amendment to the Statute and one year after the ratification or acceptance of the amendments by 30 states parties, whichever is later. The Conference also agreed that a situation in which an act of aggression appeared to have occurred could be referred to the Court by the UN Security Council, acting under Chapter VII of the UN Charter, irrespective of whether it involved states parties or non-states parties. Moreover, while acknowledging the role of that organ in determining the existence of an act of aggression, the Conference agreed to authorize the Prosecutor, in the absence of such determination, to initiate an investigation on his or her own initiative or upon request from a state party. In order to do so, however, the Prosecutor would have to obtain prior authorization from the Pre-Trial Division of the Court. It was also agreed that, under those circumstances, the Court would not have jurisdiction in respect to crimes of aggression committed on the territory of non-states parties or by their nationals

the Statute, a Review Conference was to be convened by the Secretary-General of the United Nations to consider any amendments to the Statute, including the list of crimes contained in Article 5. Such a conference was held in Kampala, Uganda, from 31 May to 11 June 2010, and it adopted, among other things, a definition of the crime of aggression.[104] Therefore, under the new Article 8 bis (1) of the Rome Statue, the crime of aggression consists of "[...] the planning, preparation, initiation or execution by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of an aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations". Moreover, Article 8 bis (2) also considers an act of aggression "[...] the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any manner inconsistent with the Charter of the United Nations". The article then lists the same acts that UN General Assembly Resolution 3314 (XXIX) qualifies as acts of aggression.

Importantly, then, for those states that have adopted it, this definition of aggression reflects a crime committed by a political or military leader of a state. According to that definition, the crime of aggression cannot be committed by non-state actors such as organized armed groups or terrorist groups. A strict reading of the Statute therefore implies that terrorist groups cannot commit acts of aggression. It thus follows that the actions of such groups cannot provide the necessary condition for the exercise of the right of self-defence in response by states.

### (3) The Question of the Right of Terrorist Groups to Self-Defence in Cases before the ICJ after the 2001 Attacks on the Twin Towers

Since the attacks on the Twin Towers and UN Security Council Resolutions 1368 (2001) and 1373 (2001), the ICJ has continued to defend its previous position whereby self-defence is only a right of states.

In the *Wall* case, Israel raised the question of the exercise of self-defence against "private" terrorist attacks coming from Palestinian territory, as Palestine is not yet considered a "state" in international law. Indeed, for Israel, the construction of a fence in order to halt terrorist attacks was a measure wholly consistent with the right of states to self-defence enshrined in Article 51 of the Charter and Security Council Resolutions 1368 (2001) and 1373 (2001).[105] In its advisory opinion of 9 July 2004, the Court refused to take Article 51 of the UN Charter into consideration in the case, above all because Israel did not claim that the attacks against it were imputable to a foreign state, and explicitly affirmed that "Article 51 of the Charter [...] recognizes the existence of an inherent right of self-

or with regard to states parties that had declared that they did not accept the Court's jurisdiction over the crime of aggression (see: Review conference of the Rome Statute of the International Criminal Court, Kampala, 31 May –11 June 2010, Official Records, at 6).

[104] Review conference of the Rome Statute of the International Criminal Court, Kampala, 31 May –11 June 2010, Official Records, Resolution RC/Res.6 of 11 June 2010, Annex I, Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression.

[105] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports (2004) 136, at 194, para. 138.

defence *in the case of armed attack by one State against another State*".[106] Furthermore, with regard to UN Security Council Resolutions 1368 (2001) and 1373 (2001), the Court noted that Israel exercised control in the Occupied Palestinian Territory and, as Israel itself had stated, the threat that it regarded as justifying the construction of the wall originated within, and not outside, that territory. This situation differed from those hypothesized by the Security Council resolutions, leaving Israel incapable of invoking those resolutions in support of its claim to be exercising a right of self-defence.[107]

After concluding that Article 51 of the Charter was not relevant to the *Wall* case, the Court moved on to consider whether Israel could rely on a state of necessity, which would preclude the wrongfulness of the construction of the wall.[108] Beginning with the acknowledgement that Israel had to face numerous indiscriminate and deadly acts of violence against its civilian population, the Court noted that it had the right, and indeed the duty, to respond in order to protect the life of its citizens, but the measures that it should take nonetheless had to conform with applicable international law.[109] In short, the Court found that Israel could not rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall and its associated regime.[110] These measures had previously been declared by the Court to be contrary to international law, as they were seen to impede severely upon the progression of the Palestinian people towards self-determination, and moreover they constituted breaches of a number of Israel's obligations under international humanitarian law and the human rights instruments applicable to it.[111]

The Court's findings in this case may make it possible to refine our stance on the right to self-defence and those circumstances in which it can be exercised. For the Court, states seem to have an inherent right, even a duty, to defend themselves from attacks. Under certain circumstances, if the attack amounts to an aggression and if, therefore, in line with the Statute, it emanates, directly or indirectly, from another state, the defensive reaction of the victim state can be considered a legitimate exercise of self-defence. In other circumstances, the defensive reaction of the victim state might be legitimate in international law, but would not be considered an exercise of the right of self-defence.

In separate opinions and declarations appended to the advisory opinion, some judges were quite critical of the Court's decision in terms of the Court's interpretation of Article 51 of the UN Charter, according to which states can have recourse to self-defence only in cases of armed attacks committed by states. For Judge Kooijmans, while it was true that it had been the generally accepted interpretation for more than fifty years that "armed attacks" had to be committed by states in order to legitimize the recourse to self-defence,[112] Resolutions 1368 (2001) and 1373 (2001) had introduced a new element regarding "acts of international terrorism" that had to be taken into consideration. According

[106] *Ibid.*, para. 139. Emphasis added.
[107] *Ibid.*
[108] *Ibid.*, at 194, para. 140.
[109] *Ibid.*, at 195, para. 141.
[110] *Ibid.*, para. 142.
[111] *Ibid.*, at 184, para. 122, and at 193-194, para. 137.
[112] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports (2004) 136, Separate opinion of Judge Kooijmans, at 230, para. 35.

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to Judge Kooijmans, the Court had regrettably by-passed that new element, "[...] the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence".[113] Meanwhile, Judges Buergenthal and Higgins underlined that nothing in Article 51 of the UN Charter should be read as reserving the right to self-defence for cases of armed attacks made by states.[114] Finally, Judge Buergenthal also stressed that Resolutions 1368 (2001) and 1373 (2001) supported a more flexible construction of Article 51 of the Charter than the formalistic one that the Court had followed in its advisory opinion.[115]

In the *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*) case, the Democratic Republic of Congo argued, among other things, that Uganda had violated the principle of both conventional and customary law of non-use of force in international relations, including the prohibition of aggression. For the Congolese, Uganda had perpetrated that violation by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory, and by actively extending military, logistic, economic and financial support to irregular forces operating there.[116] In contrast, according to the Court, while Uganda claimed to have acted in self-defence, it never claimed to have been subjected to an armed attack by the armed forces of the Democratic Republic of the Congo.[117] To the Court, there was no satisfactory proof of the direct or indirect involvement of the Government of the Democratic Republic of the Congo in the alleged attacks. The attacks did not emanate from armed bands or irregulars sent by the Democratic Republic of the Congo or on behalf of that state, in the sense of Article 3(g) of the Definition of Aggression.[118] Judge Kooijmans was critical of this opinion: "If armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State".[119] He added, "It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require."[120]

For all those reasons, the Court found that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the Democratic Republic of the Congo were not present.[121] Having replied that the circumstances of the case did not allow for any recourse to the right of self-defence, the Court avoided responding to the contentions of the parties as to whether and under what

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[113] *Ibid.*

[114] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports (2004) 136, Declaration of Judge Buergenthal, at 242, para. 6; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports (2004) 136, Separate opinion of Judge Higgins, at 215, para. 33.

[115] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports (2004) 136, Declaration of Judge Buergenthal, § 6.

[116] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*), ICJ Reports (2005) 168, at 187, para. 25.

[117] *Ibid.*, at 222, para. 146.

[118] *Ibid.*, at 223 , para. 146.

[119] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*), ICJ Reports (2005) 168, Separate opinion of Judge Kooijmans, at 314, para. 30.

[120] *Ibid.*

[121] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*), ICJ Reports (2005) 168, at 223, para. 147.

conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.[122]

## (D) CONCLUSIONS

To appreciate the novelty of the EU Member States' response to the Paris terrorist attacks, activating the mutual assistance clause embodied in Article 42(7) TEU and thereby moving closer to the formation of a new customary rule in regards to individual and collective rights of self-defence in accordance with Article 51 of the UN Charter and customary law, it is necessary to examine the textual and contextual elements of Article 51 of the UN Charter of 1945, as well as state practice since then, mainly in the context of the activity of the UN Security Council.

It can be concluded that the text of the UN Charter requires, as a necessary condition to exercise the right to self-defence, exclusively to be in presence of an "armed attack", understood as the use of force of great dimensions. In contrast, the drafters of the Charter did not take into consideration any *ratione personae* requirements for the exercise of that right, which is why the question of the international subjectivity of the authors of the actions enabling the self-defence of the victim state remains unsettled. To this end, it was necessary to examine the circumstances and preparatory works for Article 51. At the time of its drafting, only states could be the authors of armed attacks, and therefore only their acts could trigger the exercise of a right to self-defence. It is critical not to forget the central, almost exclusive role of states in international society from the seventeenth century on, and especially in the twentieth century, given their preeminent responsibility in causing, conducting, and repenting for the two World Wars. Composed in 1945, Article 51 was designed to harmonize the operation of regional arrangements and agencies with other general provisions in the UN Charter, in particular regarding the use of force. More specifically, the drafters of Article 51 had in mind the obligations of solidarity assumed under the Act of Chapultepec of 6 March 1945 in the Inter-American system, which expressly mentioned that the acts of aggression should be committed by states.

There is thus a need to examine in greater depth the idiosyncratic practice of states in the context of twenty-first century conflicts. Before the 2001 terrorist attacks in the US, it could not be argued that a customary rule recognized the right of self-defence in cases of armed attacks carried out by terrorist groups. Nor was it conceivable that the subsequent practice of the parties to the UN Charter would allow such an interpretation of Article 51. That possibility had increasingly been unilaterally claimed by some states starting in the last decades of the twentieth century, in the wake of the wave of decolonization, but without the agreement of the majority of states or the Security Council's acceptance.

The overwhelming support for the US and UK intervention in Afghanistan after the 2001 terrorist attacks on US soil, from both many states and some international organizations, offers evidence of increasing support for the extension of the right of self-defence to include serious terrorist attacks.

[122] *Ibid.*

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Significant importance must be given to the fact that, on 4 October, the North Atlantic Council decided —at the request of the US— to take eight measures, individually and collectively, to fight terrorism, operationalizing Article 5 of the Washington Treaty for the first time in the organization's history.[123] Moreover, the UN Security Council itself recognized in that context "the inherent right of individual or collective self-defence in accordance with the Charter" in Resolutions 1368 (2001) and 1373 (2001). In my view, the fact that there was a connection between the terrorist group Al-Qaeda and the Taliban regime in Afghanistan, and that Afghanistan could accordingly share some responsibility for those terrorist attacks, strips this event of some of its importance as a precedent for the formation of a new customary rule, but not completely.

The definition of the crime of aggression adopted through the amendment of the Rome Statute of the ICC at the first Review Conference of the Statute in Kampala, Uganda, in 2010, appears to suggest that those states that have adopted this definition have to acknowledge that these acts are committed by a political or military leader of a state. Therefore, the crime of aggression cannot be committed by non-governmental actors such as organized armed groups or terrorist groups. It thus follows that, strictly speaking, retaliation by victim states cannot be justified on the grounds of "self-defence", even though such a reading flies in the face of what appears to be the development of customary rules to provide for self-defence in response to terrorist attacks. In contrast, for the African states that adopted, in 2005, the African Union Non-Aggression and Common Defence Pact and, in 2006, the Protocol on Non-Aggression and Mutual Defence in the Great Lakes Region, the acts of non-state actors can be considered aggression and accordingly entail the right of self-defence. Moreover, in the case of the 2005 African Union Pact, the states parties are obliged to come to the aid of the attacked state, much in the same line as the obligation assumed in European law under Article 42(7) TEU.

Another central element in this analysis is the ICJ's jurisprudence. In this regard, since the attacks on the Twin Towers and UN Security Council Resolutions 1368 (2001) and 1373 (2001), the ICJ has continued to defend its previous position according to which self-defence is only a right of states. Indeed, neither in the 2004 *Wall* case nor in the 2005 case concerning the *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*) did the Court recognize the possibility of extending that right to non-state actors. In declarations and separate opinions, dissenting judges have begun to express their feelings that this is an outdated argument, proposing an updated interpretation of the Charter in the current context of international terrorism.

Even if it can be said that, for the time being, the existing rule in international law in both conventional law (Article 51 of the UN Charter) and customary law allowing states to have recourse to the use of force in self-defence can only be legally exercised in the presence of an armed attack committed by a state, it can also be argued that current state practice appears to be heading in another direction.[124] It must be recalled that for the drafters of Article 51 of the UN Charter the right of self-

[123] Statement to the Press by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision on Implementation of Article 5 of the Washington Treaty following the 11 September Attacks against the United States.

[124] In this sense, see also: A. Peters, *supra* n.96.

defence was already "inherent". Had they been in the current situation, perhaps they would have extended this right to include cases of terrorist attacks of great dimensions.

In view of this complete context, the invocation of Article 42(7) TEU in response to a serious terrorist attack, such as those that unfortunately wracked Paris in November 2015, cannot be considered a violation of Article 51 of the UN Charter. The unanimous support of the EU Member States is telling; many seem to be prepared to entertain a new interpretation of Article 51 of the UN Charter, at least of the portion regarding the scope *ratione personae*.[125]

In any case, from my personal point of view, I cannot help but agree with the plea against the abusive invocation of self-defence as a response to terrorism recently launched by Olivier Corten and other international law professors and scholars in considering that at present there is a "[...] serious risk of self-defence becoming an alibi, used systematically to justify the unilateral launching of military operations around the world".[126] Current international law provides for a range of measures to fight terrorism, beginning with the prosecution and trial of individuals who commit acts of terrorism.[127] States' reactions have to be weighed in accordance with the other rules governing the use of force in international law and the other ways they have to defend their rights more broadly.[128] To allow victim states to use force immediately after a terrorist attack could lead to the erosion of the system provided for in Chapter VII of the UN Charter. Together with other recent developments in the field of the use of force, such as the invasion of Iraq in 2003, an abusive recourse to the right of self-defence could fling international law back a century, to a time when the use of force was almost completely free and legal, or even further, into the Middle Ages, when states were but one of several entities capable of waging war.

Still, international law is made more by states and international organizations than by scholars. Thus, we will have to wait for new developments in state practice, or ICJ jurisprudence, to further clarify the personal scope of the right of self-defence, which is one of the most pressing questions in international law today. A balance must be found between the need for state security, on the one hand, and the guarantees provided for in the UN Charter, human rights law and humanitarian law, on the other.

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[125] It should be noted that the European Parliament, under European Resolution of 22 November 2012 on the EU's mutual defence and solidarity clauses: political and operational dimensions, had already expressed its conviction that the mutual assistance clause embodied in Article 42(7) TEU should have a broad scope, both *ratione materiae* and *ratione personae*. Indeed, the Parliament took the view that: " [...] even non-armed attacks, for instance cyberattacks against critical infrastructure, that are launched with the aim of causing severe damage and disruption to a Member State and are identified as coming from an external entity could qualify for being covered by the clause, if the Member State's security is significantly threatened by its consequences, while fully respecting the principle of proportionality [...]" (European Parliament resolution of 22 November 2012 on the EU's mutual defence and solidarity clauses: political and operational dimensions, para. 13).

[126] See the document "A plea against the abusive invocation of self-defence as a response to terrorism".

[127] *Ibid.*

[128] I agree with Tatiana Waisberg when she affirms that: "The acceptance or rejection of a claim of self-defense in concrete situations may not in any way supplant the abstract right of every state to defend its population and territory from foreign armed attacks, whether carried out or planned by states or by nonstate actors hosted in third states offering passive support. This right is positive and valid under international law". See: Waisberg, *supra* n. 82, at 203-204.