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International Terrorism and the Use of Force against Non-State Actors

After the 9/11 terrorist attacks against the United States, some States have adopted stronger repressive measures against alleged terrorist groups, sometimes unilaterally. One could bear in mind the very recent crisis in Gaza, in January 2009, and also the Colombian attacks against members of the Revolutionary Armed Forces of Colombia (FARC) located within Ecuador, in March 2008.

Under international law, a State can use armed force only when it has been the victim of an armed attack and only against the State that has committed such an attack. This is provided by Article 51 of the UN Charter, and also by customary international law, according to which individual or collective self-defence is allowed only if an armed attack occurs against a State.

In State practice prior to the end of the Cold War, a number of States claimed that international law allowed self-defence against a State that was deemed to be a sponsor of a terrorist attack, i.e. a State that had made the attack possible through its support to the terrorist groups involved. After 1989 the question of the use of force against international terrorism has developed into the most recent issue of the use of force against non-State actors. This last question arose out of the awareness that the terrorist threat typically comes from groups of private individuals that can hardly be referred to a State, i.e. groups that, while operating in the

territory of a State, are not under the control of the State's government. The question then is whether international law allows a State to use force against non-State actors when such force is directed against another State in whose territory a terrorist group operates and the latter is not itself responsible for the terrorist acts.

Use of Force against Alleged Terrorist Organizations Representing a "Local" Threat

On several occasions, until the '80s, Israel resorted to the use of force against States held responsible of harbouring alleged terrorist Palestinian organisations perpetrating attacks within its territory.

From a legal point of view the question consists of demonstrating that a terrorist attack is attributable to a State. In fact, only in this specific hypothesis the self-defence reaction would be lawful, as declared by Israel according to article 51 of the UN Charter. However the attributability of a terrorist attack to a State is not an easy question. International law provides that an act of private individuals can be considered as an act of State only if it is possible to demonstrate that private individuals or groups of individuals have acted as *de facto* organs of a State or under its direction and control. This principle was set out by the International Court of Justice (ICJ) in the well-known judgment of June 27, 1986

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Abstract

International law admits the use of force against terrorist groups which are hardly referable to a specific State only under certain circumstances. This could happen when a State is unable to repress terrorist organisations operating in its territory and, furthermore, when it clearly asks the international community for some intervention in order to fight these groups. However the use of force should be proportionate and necessary to deter the specific threat at hand.

In addition, State practice shows that, in face of organisations on the terrorist nature of which there is a *consensus* at the international community level, it is not necessary to demonstrate a strict link between them and a particular State. To the contrary it seems that one or more States can use force against another State when the latter gives shelter to terrorist organisations in its territory and does not provide adequate measures in order to repress them, despite the repeated requests to do so by the international community.

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(*Nicaragua v. United States case*)¹.

The ICJ was called to establish whether the unlawful acts committed by the Nicaraguan *contras*, accused among other things of terrorist attacks against civilians, were attributable to the United States because of their funding, supply of weapons and logistic support provided to the *contras*. However the ICJ clearly affirmed that a mere funding or training of groups of private individuals did not amount, in itself, to evidence of direct responsibility of a State. On the contrary, it was necessary to prove the direction and control by the State of the single unlawful acts perpetrated by private individuals².

The criterion established by the ICJ was then codified in the International Law Commission Draft Articles on State Responsibility in 2001³. In particular, Article 8 provides that an act of private individuals can be attributed to a State if these individuals operate under the instructions of, or under the direction and control of that State. Later on, the ICJ dealt with a similar problem in the *Congo v. Uganda* case (judgment of December 19, 2005). The Court rejected Uganda's claim that its use of force against the Democratic Republic of Congo (DRC) was justified under the right of self-defence because the DRC was supporting anti-Uganda rebels⁴.

Bearing in mind these principles, when the use of force by the

Israelis against terrorist attacks has been justified pursuant to Article 51 of the UN Charter, these military interventions have been condemned by most States as disproportionate and, moreover, it was considered hard to attribute the attacks to a specific State.

For instance, on October 29, 1956, when the Israeli armed forces resorted to the use of force against Egypt in order to destroy the *fedayeen* operation base therein settled, in which alleged terrorist attacks were organised, Israel declared that it reacted in self-defence pursuant to Article 51 of the Charter claiming that «it cannot seriously be suggested that these activities are not the direct responsibility of the Government of Egypt»⁵.

On March 21, 1968 Israel intervened again with its armed forces within Jordan's territory at Karameh, in order to strike the terrorist bases therein settled from which, according to Israel, with Jordan's consent, attacks against Israeli civilian targets were orchestrated. The majority of States condemned this military response as an aggression as did the Security Council with resolution no. 248, March 24, 1968⁶.

A few months later, on December 28, 1968, following the Beirut raid, Israel claimed that it constituted a reaction to a previous attack of Arabic terrorists against the Israeli national airline *El Al* in Athens, stating that «toleration and support offered by certain States, including Lebanon, to non-State forces engaged their direct responsibility»⁷. However, this intervention too was condemned by the majority of States and by

the Security Council with resolution no. 262, December 31, 1968⁸. Even the United States affirmed that there was no evidence of Lebanon's direct responsibility for the events that took place in Athens⁹.

These are some of the examples of the practice where the importance of proof of State involvement in alleged terrorist acts in order to justify the use of force shows its relevance. Firstly, it is the States themselves who invoked self-defence, that have always gone all the way to show the direct responsibility of the State they reacted against. Moreover, the condemnation of the international community was based, in addition to the excessiveness of the reaction, on the lack of evidence of a direct responsibility of the State subjected to the military intervention.

Nor can the analysed practice be considered as an exception in the case of terrorist attacks committed by private individuals because of their particular entity. Actually, the characterization of certain acts as terrorist was made by the State subjected to the military attack but was not shared by the majority of States. In the *contras* case, for instance, Nicaragua and El Salvador held that the *contras* perpetrated acts of terrorism against civilians; in reality, this label was given by the State subjected to the attacks and, as a matter of fact, the ICJ dealt with the matter as if concerning the possibility of holding the State responsible for «unlawful attacks» perpetrated by the *contras* regardless of their classification as terrorist acts.

¹ http://www.icj-cij.org/docket/files/70/6_503.pdf.

² Cf. paragraphs 108-115 of the judgment.

³ http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

⁴ <http://www.icj-cij.org/docket/files/116/10455.pdf> (cf. para. 146).

⁵ Cf. UN Doc. S/PV.749, p. 15.

⁶ Available at the UN website (www.un.org).

⁷ Cf. UN Doc. A/C.6/SR. 1580.

⁸ Available at the UN website (www.un.org).

⁹ Cf. UN Doc. S/PV.1460, para. 73, p. 6.

Also in reference to Israel's military interventions in the practice so far examined, on several occasions, as well as condemning Israel's military reaction, a certain number of States were doubtful as to the terrorist classification of the attacks Israel claimed to have the right to defend itself from.

For instance, in March 1968 when the Karameh attack in Jordan took place, during the Security Council debates, they took the opportunity to stress the lawfulness of the Palestinian conflict and to specify that so-called terrorism – condemned by Israel as attacks perpetrated against civilian targets – actually was nothing but the Arabic movements' resistance to the Israeli occupation. Amongst them, also the French delegate stated that «mon gouvernement a déjà, à maintes reprises, eu l'occasion de souligner que les actes dits de terrorisme sont la conséquence presque inévitable de l'occupation militaire»¹⁰.

A further element to be underlined in the above reviewed practice is that the alleged terrorist attacks some States claimed they had to defend themselves from, represented a *local threat*, i.e. against States that, rightly or wrongly, were considered to be the oppressors as they denied the Palestinian people their right to self-determination.

Briefly, practice shows that for the purposes of self-defence – as repeatedly invoked by Israel – it was necessary to demonstrate that the alleged terrorist act could be attributed to the State on the basis of strict criteria not limited to evidence of merely supporting groups of private individuals or of consenting to the use of its territory or still of not adopting proportionate preventive measures

¹⁰ Cf. UN Doc. S/PV.1402, p. 5.

in order to prevent the attacks. Hence the majority of States condemned the Israeli attacks as aggressions rather than self-defence. Even the more recent practice suggests that a generic support to terrorist organisations could not justify an armed reaction in self-defence. For example, when on March 1, 2008, Colombia attacked members of the Revolutionary Armed Forces of Colombia (FARC) located in Ecuador, it justified its action under the right to use force in self-defence. However, the Organisation of American States (OAS) determined that Colombia's attack against FARC in Ecuador violated Ecuador's sovereignty and territorial integrity¹¹. It is noteworthy to underline that in this case too the alleged terrorist organisation represented a "local" threat.

Use of Force against Terrorist Organizations Perceived by the Whole International Community as a Threat

In the practice subsequent to the '80s there are cases where the evidence of the State's involvement in terrorist attacks appeared to be less strict, in the sense that, although it may be difficult to hold a State directly responsible for an attack, the international community's reaction was to some extent more permissive or at least less critical.

For instance, this happened with the 1998 United States strikes on terrorist bases in Afghanistan and a pharmaceutical factory in Sudan following the attacks to the US Embassies in Kenya and Tanzania. On that occasion in a

¹¹ Cf. the Permanent Council's resolution no. 930 (1632/08) of March 5, 2008, at http://www.oas.org/consejo/resolutions/res_930.asp.

letter sent to the UN Security Council the US referred to the operation base of Bin Laden in Sudan, claiming that the raids «were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Laden organisation»¹².

In this case no specific reference was made to the direct responsibility of Sudan and of Afghanistan in the attacks and the response of the international community has been rather cautious or at least the military intervention of the US did not give rise to strong criticism, nor was any action undertaken by the United Nations to condemn the use of force as it instead happened previously.

Besides, concomitantly to these attacks the United States were claiming before the Security Council the difficulty to make a direct connection between the new terrorist groups and a State and, in particular, by holding Al Qaeda responsible for the attacks, the Anti-terrorism Coordinator of the American State Department had identified it as having the characteristics of a global and deterritorialised organisation stating that «today's terrorist threat comes primarily from groups and loosely-knit networks with fewer ties to governments. Bin Laden's organisation operates on its own, without having to depend on a State sponsor for material support»¹³.

In this sense, when faced with a global threat perceived by the whole international community, and not by a *single* State subjected to the attack, there

¹² Cf. UN Doc. S/1998/780.

¹³ In «American Journal of International Law», 94, 2000, p. 367.

seems to be a more tolerant approach to military interventions notwithstanding the objective difficulty of holding the State subjected to the use of force responsible for the acts of terrorism. This however does not rule out the need of proof of the substantial involvement of the State which, besides the knowledge of the presence of terrorist bases within its territory, not only does it not adopt the necessary measures to prevent and repress terrorist attacks, but it also refuses to comply with the reiterated requests of the international community to cooperate in order to suppress terrorism.

It must be noted that, following the attacks of Nairobi and Dar el Salam, the Security Council adopted resolution no. 1267 (1999) calling for a series of obligations on the Member States of the United Nations to face the threat imposed by Al-Qaeda whose base was situated in Afghanistan and supported by the Taliban regime.

This became even more apparent with the military reaction against Afghanistan following the September 11, 2001 attacks. In this case too, many scholars affirmed the difficulty of attributing the attacks to the Taliban regime or to Afghanistan, and yet the response of the international community was more lenient. In fact, not only the majority of States did not criticise the United States' military response, but it has even supported that reaction offering in many cases a tangible support. Apart from the United Kingdom which participated in the armed reaction against Afghanistan, other States granted access to their air space and to other facilities. Amongst these, in addition to the NATO allies, Saudi Arabia, Philippines, Georgia, Oman, Pakistan, Qatar, Tajikistan, Turkey and Uzbekistan. Such States as

China, Egypt, Mexico and Russia have declared their support to the United States and, although the 56 Member States of the Organisation of the Islamic Conference asked the United States not to extend the military action outside Afghanistan, it did not criticise the United States' resort to force¹⁴.

Moreover, the US military reaction was followed by a series of Security Council resolutions where obligations on all States in order to face the threat posed by Al-Qaeda and perceived by all States were established¹⁵.

The latest cases can therefore be considered to be of an exceptional nature due to the general response of almost all the international community to a global threat on the terrorist nature of which no State has raised any doubt. Therefore, these latest hypotheses differ from the military interventions, mainly conducted by Israel in the '80s, against States it claimed were sponsoring terrorist organisations. In those cases, when faced with a local threat, on the terrorist nature of which many States expressed their perplexity, the international community's response to the use of military force has been quite critical not only because the military reaction was disproportionate compared to the attacks but also for the difficulties in demonstrating a concrete direct State responsibility for the attack. Proof of State responsibility in an allegedly terrorist attack was held to be particularly decisive and had to be established on the basis of strict criteria rather than on a mere and elusive involvement of the State.

¹⁴ In «American Journal of International Law», 96, 2002, p. 248.

¹⁵ Cf. for example resolution no. 1373 (2001) adopted by the Security Council on September 28, 2001.

To the contrary, according to State practice, evidence of attribution to a State of attacks of the entity of those perpetrated against the United States and launched by a terrorist organisation such as Al-Qaeda able to pose a concrete threat for any State, was evaluated in a less strict manner.

In sum, to the end of the use of force, the responsibility criterion for terrorist acts would seem to apply differently according to the specific context, i.e. it seems to be more strict if the State subjected to the attack considers it to be attributable to terrorist organisations on the nature of which not all States agree and that in any case appears to be a local threat. To the contrary, when the terrorist organisations pose a threat perceived as such by the majority of the States belonging to the international community, that is to say that the majority of States regards it as necessary to adopt suitable measures to tackle them and support the States who received the terrorist attack, proof of direct responsibility seems to apply less strictly. A substantial involvement is still required but not necessarily attribution on the basis of the criteria identified in the ILC Draft Articles and as set out by the ICJ¹⁶.

Finally, it should be taken into account that in other cases proof of attribution is not even relevant to the use of force. This is the event, occurred in the practice, where a State clearly states its inability to control part of its territory where terrorist organisations are actively operating and asks for the intervention of the international community. Mention should be made in this respect of the Israeli-Lebanese conflict in 2006 which, although Israel stated that it was acting in self-defence against the attacks of

¹⁶ Cf. *supra* footnotes 2-4.

the Hezbollah operating in southern Lebanon, is hard to place under self-defence. Namely, in this case more than the difficulty of attributing the attacks to Lebanon there was the awareness that the Lebanese Government had no *de facto* control over the territory where the terrorist groups operated¹⁷. This was clear from Lebanon's requests of intervention to the international community in order to repress those groups where the Government could not do so with its own means. It is exactly for this reason that, it appears to us, the international community has not condemned the reaction *per se*, but rather the fact that Israel had stricken disproportionately also against governmental targets and that the reaction could be allowed only in so far as limited to oppose the threat coming from southern Lebanon where the Government was not able to exercise a *de facto* control over its territory.

Conclusions

The foregoing discussion shows that international law admits the use of force against terrorist groups which are hardly referable to a specific State, or against non-state actors, only under certain circumstances. This could happen, in particular, when a State is unable to repress terrorist organisations operating in its territory and, furthermore, when it clearly asks the international community for some intervention in order to fight these groups. However the use of force should be proportionate and necessary to deter the specific threat at hand.

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Apart from these exceptional situations, should a State recur to the use of force against another State, the former has to demonstrate the involvement of the latter in a terrorist attack according to the strict criteria identified by the ICJ and by the International Law Commission as well.

Finally, when State authorities are unable to exercise effective control in part of their territory where terrorist organisations are operating and they request some form of aid by the international community, the use of force seems to be allowed to the extent that it is proportionate and necessary to deter the specific threat coming from the territory where State authorities are unable to exercise their control.

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¹⁷ Cf. the UN Security Council debates, S/PV.5489.