The legality of the October 7th 2001 attacks on Afghanistan under international law

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THE LEGALITY OF THE OCTOBER 7\textsuperscript{TH} 2001 ATTACKS ON AFGHANISTAN UNDER INTERNATIONAL LAW

A Thesis Submitted to the

Department of Law

In partial fulfillment of the requirements for
The LL.M. Degree in International and Comparative Law

By

Ahmed Ismail

December 2017
The American University in Cairo
School of Global Affairs and Public Policy

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THE LEGALITY OF OCTOBER 7TH 2001 ATTACKS ON AFGHANISTAN UNDER INTERNATIONAL LAW

Ahmed Ismail

Supervised by Professor Thomas Skouteris

ABSTRACT

The U.S. and U.K. attacks on the territory of Afghanistan on 7 October 2001 were not justified as a legal application of their inherent right to self-defense under international law. The attacks of 9/11 on the World Trade Center were not armed attacks by the State of Afghanistan; neither did the U.S. letter to the Security Council nor official documents and statements prove Taliban’s responsibility and effective control over al Qaeda’s terrorist operation on the U.S. soil. Even if the U.S. and U.K. invoked Article 51, considering 9/11 as armed attacks, the 7 October 2001 attacks on the territory of Afghanistan still did not satisfy customary law requirements of self-defense: necessity, proportionality, and immediacy. In addition, the U.S. and U.K. arguments for anticipatory use of force in the face of imminent threats by Afghanistan were not supported by evidence to the Council. Moreover, both governments did not receive Security Council authorization to use force in self-defense when they attacked Afghanistan.
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VI. Conclusion.
INTRODUCTION

One of the major goals of the United Nations Charter is the regulation of States’ use of force. This major goal serves the overall goal of the Charter, stated in its preamble, which is the maintenance of international peace and security between all States. To accomplish the UN Charter’s main goal, States should act together, in good faith, to fulfill the obligations imposed by it. Of course the United States stands as one of the most dominant States in the international realm, and especially in the field of international law, as it is one of the five permanent members of the Security Council. But did the United States in its international relations play down the rules imposed by the Charter in good faith? Did it apply the Charter’s rule while using force in response to the attacks by terrorist groups? It might be the importance of the thesis.

On September 11 2001, the United States was subject to one of the deadliest attacks in its history. Two flights, launched from a U.S. Northeast airport, were hijacked by terrorists and flown into the World Trade Center in the city of New York and the Pentagon in Washington, D.C. On the first speech to his people, the U.S. President accused the al Qaeda terrorist group of “committing these horrific attacks of war.” He claimed that his country had the right to respond in self-defense against Afghanistan as it “harbored” the terrorists responsible for the attacks. He first asked the government of Afghanistan to hand over Osama bin Laden, the head of the group, as the government had confidential evidence of his responsibility for the attack. Might be used in the intro before saying what my topic is.

Internationally, the Security Council responded by adopting the 1368 resolution on 12 September which strongly condemned the attacks on the U.S. and recognized them as threats to international peace and security. Another resolution, 1373, adopted on 28 September 2001, called all States to cooperate to respond to the attacks of 9/11 in accordance with the UN Charter. All States in the negotiations of both resolutions and in their addresses to the Council showed sympathy to the U.S. and expressed the need to take further actions (led by the Council). However, on October 7th 2001, the U.S. supported by NATO used its armed forces to attack Afghanistan after it sent a letter to the United Nations which reported the use of force as an exercise of its inherent right to self-defense following the 9/11 attacks. Therefore, the question raised here is whether the U.S. armed attacks on the territory of Afghanistan were justified under international law or not? Might be used in the intro before saying what my topic is. ALSO research question.

The reason why this question is crucial and valid is that the U.S., in its letter to the Council, justified attacking Afghanistan based on self-defense under Article 51. However, many serious doubts on the legality of these counter attacks have arisen after closer analysis. Concerns were raised on whether the 9/11 attacks on the World Trade
Center could amount to “armed attacks,” which would thereby trigger the right of the U.S. under Article 51 to attack as in the form of self-defense. Moreover, it is important to analyze the Security Council’s role in this war, as it did neither authorize nor prohibit the U.S. from attacking Afghanistan. Furthermore, it is unclear what was mentioned in U.S. letter to the Council and what exactly was the “central role” connection between Taliban and al Qaeda.. But even if the U.S. could categorize the attacks as armed attacks by a State due to a clear al Qaeda-Taliban connection, the question remains: did the U.S. satisfy customary law requirements of self-defense on 7 October or not? This thesis argues that the 9/11 attacks by terrorist organization al Qaeda do not amount to an armed attack which would give the U.S. the right to use force under Article 51. It further argues that even if the U.S. had the right of anticipatory use of force to deter future threats on its nationals, it still did not satisfy the customary law requirements of this right. Finally, it argues that although the U.S. reported its attacks to the Security Council on 7 October, the Council did not authorize a U.S. unilateral response, but rather called for a multilateral response led by the Council itself, through both the 1368 and 1373 resolutions. It can be concluded that the U.S. did not have a concrete legal basis for its attacks, based on further analysis of the rules of international law. What my thesis argues.

Part I of the thesis analyzes the current rules of international law on the resort to force found in treaties, customs, court rulings and general principles. Part II then applies these rules to the 9/11 incident to discuss on which basis the attacks could amount to armed attacks, aggression, or use of force. Part III assumes that the U.S. had the right under Article 51 to attack Afghanistan, considering it a future threat; it discusses to what extent was the U.S. still bound by customary law requirements in its anticipatory self-defense. Part IV clarifies that even if the U.S. had the right to act in self-defense, this right must have been exercised under the supervision of the Council, once found in compliance with resolutions 1368 and 1373.
II. The Legal Framework

The legal framework is an important aspect of any case in international law. This chapter will discuss three main legal provisions found in international law treaties, customs and general principles. These three provisions are essential in any discussion regarding the legality of resorting to force under international law. The first part of this chapter will discuss the prohibition of the threat or use of force found in the UN Charter and customary law. It will also argue States’ responsibility under international law when using force and the divergence between the scales of using force. The second part also will discuss the right of States to invoke self-defense as an exception of the general prohibition of using force. It will discuss the definition of armed attacks as a reason to invoke self-defense. It will also discuss the legality of anticipatory self-defense and the customary law requirements for legal self-defense found in historical cases. Finally, it will discuss the Security Council’s role as the only international authoritative body concerned with justifying the use of force or any other measures.

A. The Prohibition of the Use of Force

This part will discuss an important rule of international relations governing the use of force since the United Nations Charter codification in 1945. One of the main objectives of the United Nations Charter is found in Article 2 (4) “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.” Today, this article is considered to be the basis of any discussion related to the “use of force” in international relations. Humphrey Waldock, a British human rights jurist and international lawyer, said that Art 2(4) is the “cornerstone of peace in the Charter.” Louis Henkin, a former president of the American Society of International Law, said it is the “heart of the United Nations Charter.” This article imports the overall main goal of United Nations Charter in peacekeeping and limiting the “use of force” in threatening other State members.


The United Nations most important evolution was the limitations it imposed on States regarding the use of force. The Dumbarton Oaks Proposal for a General International Organization was the main basis for adopting the 1945 UN Charter. Oaks proposal said

4 Id.
that the main goal of the organization is to “maintain international peace and security.”\(^5\) The Oaks proposal main desire of limiting States was drafted later in Article 2 (4) of the UN Charter, which creates a general obligation to all States on the prohibition to use force.\(^6\)

a. The Prohibition of the “Threat or Use” of Force in Article 2 (4)

Oaks proposal aim was to limit States’ opportunities to use force; however it went beyond this provision to include the prohibition of “threats to the peace” and “other breaches to the peace.”\(^7\) In that sense, Article 2(4) is a “prohibitive law” and codifies the use of force by States in their international relations.\(^8\) There were plenty of debates considering the scale of the words “threat” and “force” and their meaning. In order to have clearer view on the meaning of the article it must be explained in three aspects. The first aspect of the article is that it is confined to the use of force by United Nations member States in their international relations.\(^9\) Internal conflicts, for example, are not covered by this article. The second aspect is that the article prohibits “force” not “war,” which means that it covers even the less grave form of the “use of force”.\(^10\) Thirdly, “force” in the article is not preceded by “armed,” which raised a number of debates on whether “force” includes economic and political force or it just violent force.\(^11\) There was an argument raised by States such as Brazil that “Force” in this article includes political and economic coercion.\(^12\) However, in the context of the article, the term force is “to denote violence whether electronic or kinetic but at the end it results to violence occurred or threatened.”\(^13\) Therefore the use of economic or political pressures is not within the scope of Article 2 (4) as a “threat or use of force,” unless they were coupled by violent force.\(^14\)

Article 2 (4) goes beyond the prohibition of the actual “use of force” and also prohibits the “threat” to use force. The article reference to “threat or use of force” and “war” shows a much broader range of prohibition.\(^15\) However, not every “threat” to use force is

\(^7\) Id. at 220.
\(^10\) Id.
\(^11\) Id.
\(^12\) MAX PLANCK INSTITUTION, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, USE OF FORCE, 268 (Rudolf Bernhardt ed., 4), (1992).
\(^14\) Id.
prohibited under the article, for a threat to be prohibited under the article it must “relate to a projected use of force that unlawful.”\textsuperscript{16} This understanding was confirmed in 1996 in the \textit{Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons}:

The notion of “threat” and “use” of force under Article 2, paragraph 4, of the Charter stand together in the sense that \textit{if the use of force itself in a given case is illegal, for whatever reason, the threat to use such force will likewise be illegal}. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter (emphasis added).\textsuperscript{17}

Moreover, Article 2 (3) of the Charter states that all State members should settle “their international disputes by peaceful means” in a manner consequent to the international law treaties, and customs. Therefore, the general prohibition on States to refrain from the use of force found in Article 2 (4) was strengthened by Article 2(3) requirements.\textsuperscript{18}

\textbf{b. The Provision Considering Territorial Integrity and Political Independence}

It is mentioned in Article 2 (4) that States, in some cases, shall refrain from the use of force against the “territorial integrity” and “political independence” of another state member. Although according to Article 4 of the Charter, only States eligible to become members of the United Nations Charter are bound by “the obligations contained in the present Charter.” However it is not pertinent as to whether a state recognizes another. In other words, \textit{de facto} governments are bound by the obligations of the Charter as well. It is generally accepted that a \textit{de facto} government is subjected to and protected by the article.\textsuperscript{19} However the elements of “territorial integrity” and “political independence” might be seen as loopholes in Article 2 (4). The narrow interpretation of Article 2 (4) presumes that the use of force toward another State in not forbidden under the article as long as it does not violate both elements.\textsuperscript{20} However, this narrow interpretation failed to give an understanding to the next phrase “or in any other manner inconsistent with the Purpose of the United Nations.” Dinstein said that “[t]his phrase creates a residual catch-all provision” which shows that the Charter’s intention was not to restrict the scope of the

\textsuperscript{17} Legality of the Use of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep. 226, 47, (1996).
prohibition. Moreover the preparation of drafting the Charter shows that these elements were not originally included in the article but also added for political reasons, with a “particular emphasis,” but not to restrict the prohibition to use force.22

This understanding is shown in the Corfu Channel Case when the United Kingdom used forcible intervention in Albanian waters to gather evidence to know who was responsible for mining the two British warships.23 The U.K. claimed that it did not violate Article 2 (4) by using force in Albanian territory as it did not threaten its territorial integrity or its political independence.24 However the International Court of Justice rejected this narrow interpretation of the article showing that:

It can only regard the alleged right of intervention as the manifestation of a policy of force such as has in the past give rise to most serious abuses and such as cannot find a place in international law. It is still less admissible in the particular form it would take here-it would be reserved for the most powerful states.25

This was constructed by the Court in the Nicaragua as a blanket condemnation of intervention even if it does not aim at political independence or political integrity.26 The Court in the Nicaragua quoted the International Court of Justice Report of 1949 when it mentioned "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations."27 Therefore any sort of interference by armed forces in another State, even if it does not aim political independence or political integrity, is considered a breach of Article 2 (4) unless it is explicitly allowed by the Security Council.28

2. Interaction between Customary Law and Article 2 (4).

The United Nations Charter serves as a starting point for the rules prohibiting the use of force, jus ad bellum; however, it is “difficult to accept the idea” that the Charter

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21 Id at 90.
22 Id.
24 Id.
establishes alone a “comprehensive regulatory regime for the use of force.” Other sources such as the general principles and customary law establish a “robust” framework for the legal rules governing the use of force. The UN Charter, customary law, and general principles are used comprehensively to regulate the States use of force under international law.

a. Is Article 2 (4) dead?

When States use force in their international relations they usually invoke the right of self-defense under Article 51. Therefore, many governments will “misinterpret or misrepresent the law or apply incorrect legal terminology to label their actions.” Governments that breach Article 2 (4) due to misunderstanding the law, whether intentional or not, could not present that there are no legal restraints on the interstate use of force. Moreover Security Council Resolutions tend not to clearly use the language of Article 2 (4) and Article 51. When they do refer to the Charter, in most cases, they cite the general rules of the Charter in the preamble. The conditions in the resolutions are limited to the general facts of the case to secure more condemnation. Nevertheless, only a few States were considered outlaws and condemned for breaching Article 2 (4), as per the Security Council and General Assembly. Examples include Portugal when it refused to leave its colonial territories and Israeli occupation of the West Bank and Gaza. In most cases the resolutions do not make a general pronouncement on the breach of a certain notion or rule.

A few writers have made the argument as to why the Security Council and General Assembly do not name States responsible for breaching Article 2 (4). One theory is that the decision falls to the political pandlings of the permanent members of the Council and their veto power. In that sense, the argument that Article 2 (4) is dead was raised and consequently new provisions on the right to use force were evolved in parallel. Authors such as D’Amato raised the argument that the absence of strict resolutions on

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30 Id.


32 Id.

33 Id.


35 Id.

36 Id at 15.

37 Id at 17.

38 Id.
the “use of force” according to Article 2 (4) by both the Security Council and the General Assembly could be seen as an emergence of the new right to use force. D’Amato’s argument was raised because States, when trying to justify their use of force, mostly embrace the argument of the emergence of a new customary right to use force powered by some traditional doctrines. On the other hand, O. Schechter in his book, In Defense of International Rules on the Use of Force said, “[n]o State has ever suggested [explicitly] that violation of Article 2 (4) opened the door to free use of force (emphasis added).” Unlike what was said by Thomas Frank that “[a]rticle 2 (4) has died again, and this time, perhaps for good” Dinstein said that “[t]he plea that Article 2 (4) is dead has never been put forward by any Government.” The question of “how far divergences from the prohibition on the use of force should be seen not as breaches, but rather as exceptions to or modifications of the prohibition” is very important in that sense to examine whether new rules could emerge from illegal practice of international law. The International Court of Justice in Nicaragua refused the claim of “emergence of new customary law” and that States; illegal practice of using force justifies a new birth of customary rule. The court commented striking the previous argument considering States behave and practice:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

Unlike what believed by scholars such as Frank and D’Amato, some State practices in violating the prohibition to use force stated in Article 2 (4) are neither an indication of Article 2(4)’s death nor the emergence of new customary rules, which override it. For a certain rule to die and for another rule to emerge, there must be an acceptance and practice from the majority of States on that rule, and to recognize the need for a replacement. According to O. Schechter, it seems that States never suggested that another international rule override Article 2 (4) because of its death. Some scholars, such as

39 Id at 19.
40 Id.
42 Id at 96.
44 Id.
Dinstein, when trying to justify a certain State use of force, do not argue that frequent violation of Article 2(4) is an indication of the birth of a new rule, which overrides any existing ones. However, they argue that certain incidents and episodes, such as the global terrorism phenomena, might alter the rules governing the use of force forming new “instant” customary laws, which still function parallel to Article 2 (4).46 They argue the emergence of new rules because of certain status, without raising the argument of Article 2 (4)’s death because of the existence of these new rules.47 Moreover, another important condition which should be met for a new rule to emerge, is that it must not contradict an existing jus cogens norms. This will be argued later in the section.

b. Similarities between Customary and Treaty Law on the Use of Force

The International Court of Justice in Nicaragua regarded the provisions of the Charter on the use of force open to change as it is “dynamic rather than fixed, and thus capable of change through years.”48 However, the parties agreed that the fundamental principle of the use of force in Article 2 (4) is customary law, and the Court accepted that without asking how far did the article’s prohibition evolve over time.49 The Court in Nicaragua argued what could amount as a “use of force” under Article 2 (4) was not what amounts to an “armed attack” under Article 51.50 The Court reached three conclusions considering whether customary law and treaty law are identical on the use of force.51 First, the Charter does not match exactly the customary law on the use of force and there are some variations between them, mostly being seen in self-defense rather than use of force.52 Secondly, in the case when treaty law and customary law overlap, they will still exist side by side in order to apply the latter if the adjunction cannot rely on the treaty law.53 Thirdly, although the Charter and customary law are not completely identical regarding regulating the use of force, there are no conflicts between both. The court found great

47 I am not supporting Dinstein argument of the emergence of new “instant” customary law because of presence global terrorism phenomena. He was raising this conclusion when arguing the legality of U.S. 7 October attacks on Afghanistan, however I raised this argument in that sense to clarify that even scholars who try to justify a certain act which might be seen as a breach of Article 2 (4), they do not assume the death of this article and the emergence of new rule which overrides it, but they argue that a new rule might emerge but still it is found side by side with the already existing one.
49 Id.
50 Id.
52 Id.
53 Id.
similarities between both in the *jus ad bellum* as customary law has “consolidated under the influence of the Charter.”\(^{54}\)

c. The Prohibition of the Use of Force as a Peremptory Norm

Article 53 of the Vienna Convention on the Law of Treaties did not mention what is a *jus cogens* rule; it shows to what extent the rule has hierarchy above other rules.\(^{55}\) It mentioned that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”\(^{56}\) then it described the criteria of a rule to consider *jus cogens* when it stated that the “peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”\(^{57}\) According to the ICTY Trial Chamber, the peremptory norm is “a norm that enjoys a higher rank in the international hierarchy than treaty law and even ordinary and customary rules.” In its commentary on the draft of the Vienna Convention, the International Law Commission mentioned that the Charter’s prohibition to use force is “a conspicuous example” of *jus cogens.*\(^{58}\) Moreover, the International Law Commission in 2001, while concluding its work on state responsibility, said “it is generally agreed that the prohibition of aggression is to be regarded as preemtory.”\(^{59}\)

3. State Responsibility for an Internationally Wrongful Act

A State is not a legal person that could be subjected to any penal sanctions such as a death sentence or imprisonment. The State bears different sorts of responsibilities and sanctions, as an artificial legal person, under international law. The essence of State responsibility is the reparation of the injury made by the international wrongful act.\(^{60}\) The reparation could be in a form of financial compensation to the damage caused to the other State. Diplomatic and economic measures taken against the State also could serve as reparation.\(^{61}\) Even if the international wrongful act was not made directly by the State, it still entails responsibility on persons who act as organs of it. Reparations could take the shape of satisfaction such as the ruling of the Court in the 2007 *Genocide* case.\(^{62}\)

\(^{54}\) *Id.*


\(^{57}\) *Id.*


\(^{61}\) *Id.*

International Court of Justice ruled in the *Genocide* that “satisfaction is the appropriate form of reparation for the breach of an obligation to prevent genocide.”\(^63\) The question worth asking is whether the State is responsible for the international wrongful act by non-state actors.

a. Law Commission 2001 Draft Articles on Responsibility of States

Article 1 of the Drafted Articles on the Responsibility of States mentions “every internationally wrongful act of a state entails the international responsibility of that State.”\(^64\) The articles of the Law Commission link non-state actor’s acts with the State responsible under different standards according to the support, control, acknowledgement of the act...etc. Article 5 of the text mentions “[t]he conduct of a person or entity which is not an organ of the State...but which is empowered by the law of that State...shall be considered an act of the State...provided the person or entity is acting in that capacity in the particular instance.”\(^65\) The article shows that the act of whatever entity or organization, which is not an organ of a State according to its statute and internal law, is still attributable to the State if the entity is acting according to the capacity and power given by that State.

Article 8 mentioned that the conduct of a person or group of persons is also attributable to the State if they are “acting on the instructions of, or under the direction or control of that State in carrying out the conduct.” It imposes another rule of the general rule of international law, which is the only conduct attributable to the State is that of its organs of government. Also the conduct of a person which is directed or controlled by a State is attributable to that State even if the person is not one of its organs.\(^66\) Article 11 of the same text adopted an even wider explanation of the State’s responsibility than Article 8. It clarified that even if the conduct “is not attributable to a State under the preceding articles” the State is still responsible for it if “the State acknowledges and adopts the conduct in question as its own.”\(^67\) The article extends the responsibility of States on their non-state actors. A State is responsible on, not only the acts controlled by it, but also the acts, which it adopts and acknowledges. In other words, a State still bears responsibility under international law even if it does not adopt the actions of non-state actors but acknowledged these actions and failed to take the necessary steps to prevent them.\(^68\)

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\(^65\) Id.


\(^67\) Id.

\(^68\) Id.
b. The Extent of State Control under Historical Cases

The mere question on cases which bear the responsibility of State is whether the act of non-state actors could be attributable to the State or not. In *Nicaragua* the Court stated that acts of mercenaries could be considered acts of the State only if the “degree of dependence on the one side and control on the other.”⁶⁹ Moreover it mentioned that “general control” over the mercenaries is not enough for a State to bear its responsibility because that does not mean that it enforced or directed them in that specific operation to violate other State territory under international law.⁷⁰ The Court said “[f]or this conduct to give rise to legal responsibilities” of the State, “it would in principle have to be proved that the State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed (emphasis added).”⁷¹ The arming and training the *Contra* rebel group could be seen as an involvement of the use of force against Nicaragua, however the court saw that the US committed a *prima facie* violation of the principle of non use of force while an act of intervention in the internal affairs of Nicaragua did not in itself amount to an armed attack attributable to it.⁷² The ICJ “theoretically drew a line” between terrorists who commit attacks as an organ of a certain State and terrorists who attack by their own with no State sponsoring their acts.⁷³ The standard given in *Nicaragua* for State responsibility is the “effective control” over the military operations made by the mercenaries or the non state actors.

On the other hand, the ICTY Appeals Chamber made a wider view of the extent of State control over non-state actors when said:

[C]ontrol by a State over subordinate armed forces or militias or paramilitary units may be of an *overall character*...The control required by international law may be deemed to exist when a State has a role in organizing, coordinating or planning the military actions of the military group, in addition to *financing, training and equipping or providing operational support to that group* (emphasis added).⁷⁴

According to *Tadic* doctrine it requires wider control by the State over non-state actors in order to consider the later as a *de facto* government and bear State’s responsibility. The

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Tadic doctrine support the view that for the auxiliaries to count as *de facto* government of a State it must act under the instructions of that State concerning the detail of every individual operation. Moreover, the State should exercise overall control and support over there logistic, arms, finance, etc.\(^{75}\) The ICTY saw that acts of Bosnian Serbs army could be “imputed” to the government of Serbia, as it had an “overall” control over their acts.\(^{76}\)

The test of “effective control” is more usable for the International Law Commission in the case of attribution than “overall control” as it argues that the Court intent in the ICTY when mentioned “overall control” that it means the overall control in the *jus in Bello* situation not the *jus ad bellum*.\(^{77}\) Moreover, in 2007 *Genocide* International court of Justice judgment referred to the degree of "effective control" that is required for auxiliaries rather than “overall control.”\(^{78}\) In 2005 *Armed Activities* the International Court of Justice reached the conclusion that what has to be known is whether the conduct of non-state actors was made "on the instructions of, or under the direction or control of" a given State.\(^{79}\) Article 8 of the Drafted Articles relied on the "effective control" standard when it mentioned “under the direction or control.”

c. Agreement and Consent of States on Military Assistance

It is important to understand that the prohibition of the use of force in Article 2 (4) does not strict States sovereignty to act in favor of their interests.\(^{80}\) Parties of any conflict can reach an agreement to solve their dispute by any mean they agree upon, even if it includes the use of force.\(^{81}\) State responsible on non-state actor’s attacks can reach an agreement with the victim State to turn over the appraisal to whatever domestic or international organ. Also according to Article 20 of the Draft Articles on State Responsibility a State which non-state actor activates on could ask the military assistance of other State to eliminate the terrorist on its territory. However, according to the article,


\(^{76}\) Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM J INT LAW, 905, 908 (Oct. 2010).


\(^{78}\) Id.

\(^{79}\) Id at 119.


\(^{81}\) Id at 119.
essence of the consent is that the extent of the act of the State called for assistance is “within the limits of that consent.”


At the time of 1945 UN Charter adoption, it was seen that the international community in the Pact of the Arab League, the Organization of American States Charter, and the Inter-American Treaty of Reciprocal Assistance, continued to do efforts to define what should amount as an aggressive act. The lack of an authoritative definition of aggression has its implications on the exercise of self-defense, since there are noticeable differences between the war of aggression and the war of self-defense. However, according to Treaties, State practice and international bodies condemning aggression, there was a need for the emergence of an international agreement considering the illegality of aggression, regardless of its motives. However, still it is problematic to define what amounts to an aggressive act until nowadays. Same as the difficulty in defining terrorism, “states prefer to be left to decide matters on a case-by-case basis [of aggression] without being beholden to the limitations of an entrenched definition.”

a. Definition of Aggression

Since the Proposal of Dumbarton Oaks on the formation of the United Nations Charter, Mr. Paul Boncour, a UN Reportuer, mentioned that most of States did not support the “amendment…to include a definition of aggression” in the Charter. Although the definition of aggression is nowadays widely accepted in the legal doctrine, still it is not universal. However, at least one paragraph of the General Assembly 1974 Definition of Aggression was used by the International Court of Justice in Nicaragua as a customary law. Although the General Assembly definition of aggression does not define armed attack it shows the governmental understanding that acts of aggression includes varieties of actions harbored by States such as “cross border attacks, naval ship attacks.” Article 3 (g) defined act of aggression as “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against

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84 Id.
85 Id.
86 Id., at 221.
88 Id., at 138.
89 Steven R. Ratner, Jus ad Bellum and Jus in Bello After September 11, 96 AM J INT LAW, 905, 907 (Oct. 2010).
another State.” Article 5 (2) made a distinction between “war of aggression” and “crime of aggression.” The article shows that crimes of aggression give rise to international responsibility but the war of aggression, which is graver, is a crime against peace, which could evolve to become an armed attack under Article 51 of the United Nations Charter.90 Moreover, Article 8 (1) of the International Criminal Court Statute made another distinction between the act of aggression and a crime of aggression in order to qualify as an act falls under the jurisdiction of the Court. According to the definition an act of aggression to qualify a crime of aggression it must by its “charter, gravity, and scale” constitutes a “manifest violation of the Charter.” According to the previous definitions, it seems that every use of force entails State Responsibility, but not consequently considered an armed attack. However, still different definitions call the need to argue two main conditions, gravity and source of an attack, in order to know the nature of the act whether a use of force, aggression, or armed attack.

b. The Gravity, Scale, and Effect of the Attack

The Court in Nicaragua stated that there is:

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 regular armed force.91

It drew a distinction between the grave forms of use of force “armed attack” and the less grave form, use of force.92 The Court said that provision of arms from the government of Nicaragua to the opposition in the neighboring States might be seen as an incursion from the government, but does not amount to an armed attack which raises the right to self-defense. Considering the condition of scale of the attack, the Court made the distinction between frontier incidents and armed attacks. Moreover, Eritrea Ethiopia Claims Commission included while mentioning frontier incidents as a less grave form of use of force “these relatively minor incidents were not of a magnitude to constitute an armed attack by either States against the other within the meaning of Article 51 of the UN Charter.”93 Unlike war of aggression, the circumstances and motivations of the frontier incident is not to carry out an armed attack with sufficient gravity from the definition of

aggression. However, an armed attack does not need to take the shape of a massive military operation. In the Oil Platforms case the Court concluded that it is not the gravity or scale of the attack which determines an armed attack, also the effect and character of an attack could be reasons to define the attack as armed under Article 51. The Court said that it “does not exclude the possibility that the mining of a single military vessels might be sufficient to bring into play the inherent right of self defense.” The inquiry of whether the act in question is an armed attack, aggression or use of force is based on the “quantum of force” used in the attack “gravity”, motivation, scale, and effects.


Every legal system authorize to its members the right to self-defense when necessary if their rights were attacked by certain serious violations. The issue in international law legal system is that law enforcement is not centralized unlike domestic legal systems, therefore in international law, self-defense has much broader role. The understanding of self-defense in international law as a “legitimate protection against a wide variety of violations of State rights and interests” found in Article 51 of the Charter and customary international law principles.

1. Self Defense as an exception of Article 2 (4).

Self-defense under Article 51 of the Charter is the exception of the general prohibition of using force stated in Article 2 (4). Article 51 which “has become the main pillar of the law of self defense” states that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations (emphasis added).” The article shows two important elements, to be satisfied “prior or subsequent” to the use of force by the State under self-defense and when “armed attack” occurs.

a. Meaning of Self Defense

94 Id.
97 Id.
98 Id.
International Court of Justice in 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons stated that the survival of a State “would be at stake” if it could not defend itself in any catastrophic scenario by exercising its right of self-defense. Self-defense could be taken by States in other forms such as breaking diplomatic relations, or using non forcible measures, however, the essence of self-defense according to Article 51 is the self-help by using armed means when States right is violated. It seems that Article 51 goes “hand by hand” with the prohibition of aggression, therefore the article must be read “in conjunction” with Article 2 (4) in order to clarify the exception of the prohibition to use of force under international law. While Article 2 (4) shows the general obligation for States to refrain the threat or use of force against each other, Article 51 draw the exception of this prohibition in the case if an “armed attack” occurs. Self-defense is a right which can be invoked by States, an option which they have if subjected to an armed attack, unlike the prohibition to use force which is a duty and obligation, States might decline the right to self-defense, even if an armed attack happened, and choose to use political measures in ending the dispute.

Moreover, scholars such as Jowett, Moore, and Wedlock have supported a view that the right of States to self-defense was found in customary law prior to the adoption of the Charter. Their argument were based on ICJ ruling in Nicaragua, when the U.S. argued that customary rules relating to the episode had been “subsumed” and “supervened” by the most recent treaty rules, the Court clarified that customary and treaty law “do not exactly overlap” on the issue of use of force, it added that Article 51 is “only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defense, and it is hard to see how this can considered other than of customary nature.” The Court did not suggest that there are overall differences between self-defense in customary law and in Article 51; on the contrary, it realized that the article did not define some important elements of self-defense, which alert the need to rely on customary law to find them. Therefore, the right of self-defense is customary international law and is “recognized as not having been created by the Charter by the wording of Article 51.” It is mentioned in the article that the right of self defense is an “inherent right.” This right became not only to States

104 Id at 189.
105 Id at 190.
108 Id, at 228.
members of the Charter but the right “devolved” to include all States. Article 51 thus; draw the “boundaries of legitimate self-defense not only for the purpose of the UN Charter, but also in general international law.”

b. Armed attack as a Condition of Self-defense.

States usually invoke their right to self-defense when they use any force against another State. The question raised here is whether the State invoking the right was subjected to an armed attack which requires it to act in self defense or not. In theory it is possible, but according to the vast majority of cases it seems very complex to determine the legal issue of who have the right. It became even more difficult, as mentioned before, when the Security Council mainly does not give “clear” resolution on who has the right and who breached the obligation of the legal provisions. Security Council Resolutions in that sense are closer to call cease fire rather than any attribution of responsibility without giving an affirmative justification under Article 51 of using force in an armed attack.

Article 51 provides that a State has the “inherent right” to act in self-defense whether individually or collectively “if an armed attack occurs” against it. Although the phrase “armed attack” seems clear on what it means, still State practice and argument relying on the article shows that it needs more consideration of its meaning. Ian Brownie, international law specialist, commenting on the reason why “armed attack” has no further explanation said, that the phrase might be regarded as being “sufficiently clear and self-evident” which does not embrace the need for further interpretation. The Court in Nicaragua pronounced that armed attack stated in Article 51 does not include only “merely action by regular armed forces” but also acts by non-state governments “which carry out acts of armed force…of such gravity as to amount” as an actual armed attack launched by the regular force of the aggressor State. The Court defined armed attacks as the attacks done only by a State, or by irregular forces on behalf of that State when the gravity of the attacks amount an actual armed attack by the regular armed forces of that

\[\textit{Id.}\]
\[\textit{Id.}\]
\[\textit{Id} at 85.\]
\[\textit{Id.}\]
The Court then added that an attack by irregular army sent on behalf of a State does not amount to an armed attack if the State’s role is assistance in providing “weapons or logistical or other support.” The State in question still bears responsibility on its assistance, however, this assistance does not amount to an armed attack, it could be regarded as a “threat or use of force, or amount to intervention in the internal or external affairs of other States.”

International Court of Justice observed in 2005 Armed Activities that “[a]rticle 51 of the Charter may justify a use of force in self defense only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interest beyond this pattern.” Eritrea Ethiopia Claims Commission stated in its Partial Award on jus ad bellum “as the text of Article 51 of the Charter makes clear, the predicate for a valid claim of self defense under the Charter is that the party restoring to force has been subjected to an armed attack.” It seems that the framers of the Charter when mentioned “armed attack” in Article 51 intended to strict this right from misinterpreting. The article does not mean that mere threats which falls beyond this pale of armed attack is not forbidden, it is still illegal but might lead to other enforcement actions and counter measures but not according to Article 51.

2. Anticipatory and Interceptive Self-defense.

There is a “restrictive interpretation” of Article 51 of the UN Charter which shows that States cannot use force in self-defense until they are attacked by another State, an attack which amount to an “armed attack” under Article 51. While other “broad interpretation” noted that “armed attack” is only “one instance” of Article 51 justifications of using force in self-defense, it added that instant overwhelming threat of an armed attack is another instance of self-defense justifications. In this part, different
arguments on whether States are justified to use force to deter an attack in an anticipate manner will be discussed.

a. Anticipatory use of force

The argument of anticipatory use of force is refused usually by the majority of States, the reason why when they act in anticipatory manner they tend not to lay down the argument of anticipatory self defense in order to provide the widest support available for their actions.\(^\text{126}\) However, the U.S. always raises the claim that “it can take preemptive military actions in exercise of its right to self-defense.”\(^\text{127}\) The United States Standing Rules of Engagement “posit the right to take actions in self defense not only in response to a hostile act, but even hostile intent.”\(^\text{128}\) It considers the “hostile intent” as an imminent threat to use force.\(^\text{129}\) Anticipatory self defense became more serious even after the horrific attacks of 9/11 on the US. A well known policy statement made by the US president Bush considering preemptive self defense named “Bush Doctrine” which was understood as the “right to counter threats before they morph into concrete action especially by terrorist.”\(^\text{130}\) Also Israel practiced anticipatory self defense when attacked Iraq at 1981 as it accused the later for building nuclear reactor which will be used in attacking Israel in the future.\(^\text{131}\) Security Council condemned the Israel act as violating the Charter on the bases that it failed to find peaceful means to solve the dispute moreover there was no evidence that Iraq was planning to attack Israel.\(^\text{132}\) The ICJ in Nicaragua based its decision on the norms of customary international law concerning self-defense in response to an armed attack, which already has occurred.\(^\text{133}\) It passed no judgment on the issue of response to an imminent threat. However, Judge Schwebel in his opinion in the case rejected the reading that Article 51 only applies when an armed attack occurs.\(^\text{134}\) Considering anticipatory self-defense, Dinstein made an opinion on the legality of the issue when he justified anticipatory self-defense relying on the evidence of an imminent attack, and the intelligence determining its time, he stated:

[t]he right to self defense can be invoked in response to an armed attack at an incipient stage, as soon as it becomes evident to the victim State (on the basis


\(^{128}\) Id.

\(^{129}\) Id.

\(^{130}\) Id, at 195.


\(^{132}\) Id, at 115.

\(^{133}\) Id.

of hard intelligence available at the time) that the attack is actually in the process of being mounted. There is no need to wait for the bombs to fall – or, for that matter, for fire to open – if certain that the armed attack is under way (even in preliminary manner). The Victim State can lawfully intercept (under Article 51) the armed attack, with a view to blunting its edge (emphasis added).135

Dinstein justifies anticipatory self-defense relying on practical logic basis, he said that a State which is about to be attacked should not wait until it is bombed from the aggressor State. He justified anticipatory self-defense under two considerable conditions; first is when the attacks are in the process of being actually mounted and, secondly, is when there are hard intelligence proofing the first claim.

I disagree with scholars who support “restrictive interpretation” of Article 51 that self-defense is justified only if an armed attack was launched by another State. However, I understand their noble objective of “strengthen universal peace” by drawing limits to the circumstance which justifies the exercise of self-defense.136 However, practically speaking I believe that even if the restrictive approach would be applied, it might limit some States from the use force in self-defense to anticipate act of aggression, however other powerful States such as (Israel, the US, and Australia) might not follow such pattern and will still argue their right to anticipatory self-defense on different basis.137 This restrictive approach might not be productive because the right is already exercised by the dominant States. What I see more productive is to justify the use of force in anticipatory self-defense but with certain boundaries and limits such as what is understood in Caroline incident, in the case when threats are imminent and overwhelming. On other words, State cannot attack another State using the argument of anticipatory self-defense as later forms threat to it, the victim State could only raise this argument when the attack is imminent and about to happen.

Another important limitation for practicing anticipatory self-defense was presented by Dinstein when he said that the existence of an imminent threat as a reason to justify anticipatory self-defense should be based on “hard intelligence.”138

I support this view, but I am adding that these hard intelligence and sources should be provided to an international body concerned such as the Council. The evidence

135 Id., at 200.
137 Myra Williamson at 242. She stated that the three States adopted the concept of preemptive self-defense as having legal basis in the customary law and called seriously for a re-review of international law to permit preemptive attacks.
proven an imminent threat is not to satisfy the State which claims self-defense, but the majority of the international community.

I believe that anticipatory self-defense is legal, when evidence proofs an overwhelming imminent attack based on hard intelligence, submitted to an official international body concerned. Even if it is not problematic to call for an amendment of Article 51 in the issue of justifying anticipatory self-defense, I will not support it on two different bases, first is that whether liked or not the right is already exercised, secondly is that adding new rules might be misused to benefit certain States interests?139 My opinion on the legality of anticipatory self defense.

It seems that although the majority of States opinion juries does not permit the right of anticipatory self-defense, they agreed upon an exception to that rule in the case when the “threat is imminent and the use of force is inevitable.”140

b. Interceptive Self-defense

Unlike anticipatory self-defense, interceptive self-defense is a reaction to certain events has already begun to happen however not fully complete.141 The cornerstone here is not who fired the first shot, but who started an apparently irreversible action which shows the readiness of an armed attack.142 Waldock, phrased it when said “[w]here there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier.”143 Moreover, according to the Oil Platforms judgment, a series of acts also could categorize as an armed attack, which justify self-defense. Such as what happened in 1967 Egyptian – Israeli war, although Israel was the first to fire, Egypt made a serious of acts, closing the straits of Tiran and ejecting UN emergency force from Sinai, which could be understood to form an armed attack justifying Israel self-defense.144 Interceptive self-defense is lawful under Article 51 however; it must be based on reliable and reasonable information available at the time of the action.145 States who support anticipatory self-defense argue the Caroline incident of 1837; however, they “misplace” their actions legal basis. The case has a historical position taken by the US Secretary of State Webster which considers nowadays as a part of customary law.146 According to

139 See generally, Myra Williamson at 241.
140 Id, at 242.
142 Id at 204.
143 Id.
144 Id at 207.
145 Id at 205.
Webster’s prospective, for self defense to be admitted, a State required to show “necessity of self defense, instant, overwhelming, leaving no choice of mean, and no moment of deliberation.”\textsuperscript{147}

3. Conditions Precedent to the Exercise of Self-defense

The requirements mentioned in Webster’s formula considered as part of the basic core of self-defense.\textsuperscript{148} Although these requirements are not referred to in the Charter, however, due to State practice and ICJ rulings, it is considered as part of customary international law.\textsuperscript{149} 

\textit{Nicaragua} and the Advisory Opinion on the \textit{Legality of the Threat or Use of Nuclear Weapons} “reaffirmed that necessity and proportionality are limits on all self defense, individual and collective.”\textsuperscript{150} These two conditions are accompanied with immediacy, although it is not “expressly recognized by the Court” still customary international law “fully confirms its existence” in \textit{Caroline} incident.\textsuperscript{151}

a. Necessity.

It means that, it is inevitable on the State acting in self-defense manner to establish that, an armed attack was launched by another State, in a definite manner, which it is forcibly, should respond. Judge Ago stated that in order to satisfy necessity element States acting should have no other means “of halting the attack other than recourse to armed force.”\textsuperscript{152} He added that if that State had other peaceful means to solve the dispute “it would have no justification for adopting conduct which contravened the general prohibition on the use of armed force.” State responding should have “no choice of means” other than using force. It should have no other peaceful options such as, peaceful solutions, diplomatic debates, or police information exchange, while responding other than to restore to force.\textsuperscript{153} It must fulfill the existence of necessity to rely on force in responding to the armed attack as there are no other peaceful means is within reach at that point. It depends on the time available between the armed attack and the use of self-defense counter measures. If the circumstances allow no pause the counter force could seen lawful, but if

\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{152} Judge Ago’s Addendum to the Eighth Report on state Responsibility, \textit{Yrbk. ILC} 1980, Vol II, Part 1, 69. See also Williamson at 235.
space and time were available, State should seek peaceful means. These efforts must be genuine attempts carried out in a good faith and not as a matter of “ritual punctilio.”

b. Proportionality.

It is the “essence of self-defense.” Different criteria of proportionality apply depending on the situation whether it is an armed attack or mere use of force. According to Ago, this principle must apply with some degree of flexibility. Proportionality is defined on the term of the original aggression on the victim State. In that sense, it is understood in the *jus ad bellum* context that the amount of force needed in defense should be equal to the initial attacks in order to repel them. The power used must be proportionate and not too excessive. It is also defined in the term of deterring and neutralizing future attacks, in this case, proportionality focuses on the “end game.” In another words, does the amount of the attack in response reduces the future threat. Therefore, proportionate acts are defined as “responses parallel in intensity to an initial aggression and designed to discourage future attacks.” The amount of force used should be necessary to repel ongoing attack, reduce future threat of attacks, and not too excessive. Also it has particular meaning in the context of a war of self-defense when “on-the-spot reaction or defensive armed reprisals are involved, proportionality points at a symmetry…in ‘scale and effects’ between the unlawful force and lawful counter-force.” The Court in *Nicaragua* saw that the US acts of mining the Nicaraguan ports and attacking oil installations could not be seen as proportionate to the aid received by the opposition in El Salvador from the government of Nicaragua. It is seen that the lawfulness of proportionality test is measured by its capacity to achieve the required results without unnecessary casualties.

c. Immediacy

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154 Dinstein, at 232.
156 Id.
158 Id.
160 Id.
161 Id.
It also considered as a “core element” of self-defense.\textsuperscript{164} Immediacy does not require that self-defense has to be exercise during the armed attack; it means, “[t]here must not be an undue time-lag between the armed attack and the exercise of self defense in response.”\textsuperscript{165} In other words, self-defense actions must be done in a “timely fashion” way when there is no significant delay between the armed attack and the victim State act of self-defense.\textsuperscript{166}

It could be argued that immediacy might conflicts theoretically with necessity requirement.\textsuperscript{167} Although States should seek peaceful means when available before acting in self-defense, the dispute still might not come to an end by these peaceful attempts, the thing that might lead to a time lag between the attack and the invocation of self-defense, therefore the proportionality requirement will not be satisfied in that case.\textsuperscript{168} However, still the State responding to an armed attack must be given reasonable time to prepare for the counter-measures and to find peaceful solutions as long as this delay is not as a matter of “\textit{ritual punctilio}.”\textsuperscript{169} States also must be given time to be able to change to its present situation to war status.

The Court in \textit{Nicaragua} relied on these conditions as other grounds for the illegality of the US attacks toward Nicaragua.\textsuperscript{170} It showed that even if the supply of arms by the government of Nicaragua to opposition forces in El Salvador could amount as an armed attack, the counter measures taken by the US could not be seen as legal self-defense as it was month later after the major offense made by Nicaragua.\textsuperscript{171} Therefore it did respect neither the necessity nor the immediacy conditions of self-defense.

The most controversial sort of self-defense by States invoking self-defense is the response to terrorist attacks. State in that sense responds to terrorist attacks which have already been made whether by a group of terrorist activated by their own, or harbored by another State. In the following situation State is supposed to respond to an attack which happened in the past. Therefore it is seen as a combination of protection of nationals abroad and anticipatory self-defense.\textsuperscript{172}

4. Attacks by non-state actors.

\textsuperscript{165} Id.
\textsuperscript{166} Id. at 236.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id at 107.
Although there is a “dominant interpretation” for Article 51 that it cannot be invoked unless an “armed attack” is launched by a State or its representative, de facto organ, this view came to an end by the 1990.\textsuperscript{173} It was more dominant, according to ICJ’s rulings and opinion in different cases at that time, that non-state actors attacks committed by private militias not as an organ of a State were considered criminal activities which are combated through “domestic and international criminal justice mechanism.”\textsuperscript{174} In this part the relation between a State and non-state actors will be discussed. Moreover, this part will question the amount of control needed by the State on non-state actors to consider the later as a de facto organ of the State’s government.

a. de facto Organ of State.

According to International Law Commission de facto organ is an armed group of irregulars, paramilitaries, contractors and like, which are supported and recruited by the government of a State to act against another State while it could remain out of the official structure.\textsuperscript{175} The ICJ in Nicaragua held that “it may considered to be agreed that an armed attack must be understood as including not merely action by regular armed force across an international border”\textsuperscript{176} also armed attack could be made by irregular army listed in Article 3 (g) of the 1974 Definition of Aggression.\textsuperscript{177} Moreover the Commission’s 1954 Draft Code of Offences against the Peace and Security of Mankind listed the offence of the organization or the encouragement “by the authorities of a state of armed bands for incursions into the territory of another State, direct support of such incursions, and even the toleration of the use of the local territory as a base operation by armed bands against another State.”\textsuperscript{178} Moreover, according to Nicaragua, for a group of terrorist to consider as a de facto organ of a State, arms supplying and logistical support is not enough as long as there is no control over their acts as mentioned before. Judge Schwebel stressed the words in Article 3 (g) that “substantial involvement therein” needed to proof the link between the State and the non-state actor to consider the later as a de facto organ of the State.\textsuperscript{179} The ICJ in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory stated that Article 51 recognizes self-defense in the case of an “armed attack by one State

\begin{itemize}
  \item \textsuperscript{174} Id.
  \item \textsuperscript{176} Case Concerning Military and Paramilitary Activities in and against Nicaragua, Nicar. v. U.S., I.C.J. 14, 103, (June 27, 1986)
  \item \textsuperscript{177} Dinsein, at 220.
  \item \textsuperscript{178} Id.
  \item \textsuperscript{179} Id at 221.
\end{itemize}
against another State.” The implication of the ICJ statements is that to claim that a State has the right to self-defense; the armed attack that the State suffers from must be executed by another State. In other words, the types of attacks which Israel claimed when invoked its right to self-defense were not an acts by a State, they were just attacks by non-state actors which do not function Israel’s right to self-defense under Article 51.

b. Non-state actors which are not organ of the State.

The responsibility of a State on non-state actors attacks activated on its land toward another State is unquestionable when evidence and information available proof that in such act they were acting in the capacity of that State. The debatable question here is whether acts of violence by non-state actors, not a de facto organ, of State A unleashed against State B may amount to an armed attack within the meaning of Article 51 of the Charter thereby triggering the right of self-defense. State A might be considered as “failed State” going through unstable situations; in that case, if non-state actor on its land made an attack, it might not be considered as an armed attack by the State itself, as there is no recognized government indeed. In the Corfu Channel of 1949, the Court mentioned that States are under an obligation “not to allow knowingly its territory to be used for acts contrary to the right of other States.” Still the victim State could take lawful forcible measures in the territory of that State which terrorist activated on, even if they do not consider as de facto government. The failed State could reach an agreement with the victim State in which the later can intervene in the territory of the earlier and take considerable counter-measures in order to eliminate the terrorist group. The issue becomes more complex, considering the previous example, when State A refuses to cooperate with State B in neither surrendering terrorists responsible nor to agree an armed intervention in its territory within the scope of the consent between both. Unlike armed attacks, in which States could conclude the necessity to repel the attack on-the-spot, terrorist attack gives States time for deliberation to conclude the best peaceful mean to end the dispute until Security Council is sized with the matter. According to

180 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, 2004 ICJ Rep, 43 (5) ILM 1009 (2004). See also, Myra Williamson at 268.
182 Id.
184 Id.
185 Id at 226.
Article 24 (1) of the Charter, the Security Council is the body charged with the main responsibility of maintaining international peace and security.


According to Article 51 a State could exercise self-defense “until the Security Council has taken the measures necessary to maintain international peace and security” (emphasis added). Article 51 also mentions that measures taken by States “shall be immediately reported to the Security Council.” Reading the text literally will raise the argument that self-defense is “provisional” right which only exists until the Council has taken whatever measures necessary. The exercise of self-defense should stop when the Council is seized with the issue. Therefore, it might be understood that any actions by States are temporary and not “a substitute for the collective action of the [Security Council]” (emphasis added). Moreover, the Article states that States exercise of self-defense should be reported to the Council. It did not clarify neither the inevitability of a report nor its form. Therefore, there are different questions which rise from reading the text of Article 51 such as, the question of when the Council could be determined as “sized” with a certain matter, what are the means available for it, what is the form of a Council report and whether it is obligatory, and finally whether a State may continue in self-defense deterring continuing threat even if the Council has “taken measures necessary.”


Security Council is entitled by the United Nations Charter to maintain peace and security by peaceful settlement of disputes, taking actions with respect to threats to the peace, make provisional measures for peacekeeping, and prevention of conflicts. According to Article 24 (1) of the Charter, the Security Council is the body charged with the main responsibility of maintaining international peace and security. To compile with its function, Article 39 imposes the Council to determine the “existence of any threat to the peace” and accordingly it “shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” States parties of the Charter should accept the recommendations

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189 Id.
191 Id., at 231.
194 Id.
and measures taken by the Council as stated in Article 25 that they “agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

The article shows that according to the Charter, the decisions and measures taken by the Council suppose to be binding to all State parties. However, still States have the right to act in self-defense according to Article 51 to repel an overwhelming attack until the Council has taken “necessary measures” to restore peace and security.

The difficulty arises from the previous provision is the question of who will decide whether “necessary measures” were taken by the Council in order to stop the State from acting in self-defense. There is a debate between scholars on that question, as the article does not clarify the answer. Waldock stated that the right of self-defense is continuing until the Council brings the action into an end, in other word, he means that the right of self-defense does not stop once the Council has took “necessary appropriate measures” but until it brings the self-defensive actions between States to an end. I think this view is very extreme, in some instance proven in history, the Council might not be able to end the dispute between States, so it is not understandable that States will continue their fights until the Council could bring the action to an end. Waldock interpretation also was criticized for being “politically native.” Myra Williamson stated that the Council may fail to even make “any pronouncement because of political rivalries” and still the self-defense should come to an end “once the objective has been achieved” while the Council may or may not took any actions. Therefore, although there is disagreement on the Council role once self-defense is taken by States, still Article 51 interpretation supports that the Council and not individual States is to determine “measures necessary” in order to maintain peace and security.

The measurements taken by the Council could be, according to Article 39, whether economic and diplomatic measurers mentioned in Article 41 “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations” or military measures, when the previous attempts fails, mentioned in Article 42 including “action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” Such action may include “demonstrations, blockade, and other operations by

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195 Id.
197 Id.
198 Id.
199 Id.
200 Id.
air, sea, or land forces of Members of the United Nations.”

Although Article 43 supposes that the Council could have a military force, according to special agreement, at the disposal of it whenever it asks for, the agreement has not been conclude until nowadays. The reason why the issue caused “division between permanent states and its blocs.” Moreover, under Article 36 (3), the Council is not expected to act as a judicial body; Judge Schwebel said that it is “a political organ which acts for political reasons.” Its role is to separate the parties and recommend what is the most peaceful appropriate method of peacekeeping for their dispute. It could recommend an adjunction to The International Court of Justice same as what happened in the Corfu Channel, only when it failed to evaluate the facts and evidence available; it recommended the parties to bring the dispute to the ICJ. Finally, in the case of armed conflict the Council entitled to adopt other measures such as cease-fire order, order to withdrawal forces, establishment of a truce, or conclusion of armistice agreement.

2. The Two Phase Rule.

When acting in a certain conflict, a State could not be the “final arbiter of the legality of its own act.” If every State, by its own, will justify its own acts as self-defense with no legal boundaries, the international legal system of holding force “would have been an exercise in futility.” Still State under attack has no choice but to respond in order to defend itself before more future damages. It does not have time to wait for any judicial or political body to interfere in the dispute while it is under attack. It could not wait for the Security Council notionial armed force shaped by Article 43 to repel the aggressor, it should act by itself. According to The Judgment of the International Military Tribunal at Nuremberg, the process of self-defense should take two separate stages; first, in practice the victim State has to judge for itself whether the necessity of the occasion called for an act of self-defense. Secondly, an international forum has to be reported immediately to the Council showing the justification of victim State act. In addition, Article 51

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202 Id.
204 Id.
206 Id.
207 Id.
208 Id.
209 Id.
210 Id.
211 Id at 235.
requires States to “immediately” report the measures of self-defense to the Council.\textsuperscript{212} The forum reported must have “plain notification of the invocation of the right of self-defense” plus showing clear evidence of State responsibility and the occurrence of an armed attack on the State victim. Depending on the report submitted, Dinstein suggests that the Council could take different modes of actions such as (1) give a retroactive approval of the act (2) ask for general cease-fire (3) demand withdrawal of forces to the original lines (4) insist of the cessation of the unilateral action of the defending State or (5) decide that the State engaging in self-defense is actually the aggressor.\textsuperscript{213}

It was debatable whether reporting to the Council is a requirement of self-defense as the Court in \textit{Nicaragua} held that the duty to report is not customary law.\textsuperscript{214} However, still in its opinion the Court said that the absence of the report may include that the State in question of its act is not convinced itself that it has the right to self-defense under the Charter.\textsuperscript{215} The Court was willing to take into consideration States view on their own actions, when they do not submit a report to the Council, as they are not convinced with their own actions.\textsuperscript{216} However, reporting to the Council is not a proof \textit{per se} of the legality of States actions.\textsuperscript{217} Most States would rather report their actions to the Council to assume legitimacy of their self-defense; however, the Council members, General Assembly and States might reject these claims despite the fact that the State fulfilled reporting requirements stated in Article 51.\textsuperscript{218} Still authors have different view on the provision of reporting to the Council. Dinstein and Bowett consider that reporting to the Council is a “mandatory, legal obligation” for States, others such as Greig and Judge Schwebel believe that it is just a procedural requirement which considers further proofs for the Council.\textsuperscript{219} However, the readings of both \textit{Armed Activities} and Eretria Ethiopia Claims Commission on the \textit{Jus ad Bellum}, shows that the duty to report to the Council is a “substantive condition and a limitation on the exercise of self-defense.”\textsuperscript{220} The Court implied that States are precluded from the right to invoke self-defense, if it failed in its duty to report to the Security Council.\textsuperscript{221} Therefore, although reporting is not a proof \textit{per

\textsuperscript{214}Id at 239.
\textsuperscript{215}Id.
\textsuperscript{217}Id.
\textsuperscript{218}Id, at 33.
\textsuperscript{219}Id, at 32.
\textsuperscript{221}Id.
se of the legality of the use of force in self-defense, still States have the duty to report the measures taken by them to the Council.


Some States when cannot secure explicit authority from the Security Council to use force, they justify their actions relying on an implied authorization by the Council.²²² The first emergence of such argument was made at 1993 by the USA and UK when the Council passed 688 Resolution condemning Iraq for the repression of the Kurds and Shiites. The Council demanded that Iraq should stop the repression and allow access to international humanitarian organizations. Although the Resolution did not authorize the use of force under Chapter VII, USA and UK referred to it in justify intervening the territory of Iraq.²²³ However, “they did not offer a full legal argument in justification of this action.”²²⁴ The action was criticized by Russia, China and Arab League under the demand of stopping acts which are not justified by the Council.²²⁵ However, USA and U.K. repeated that they were acting under an authorization found in Resolution 688. The same authorization was raised after the Resolution 687, when the Council obliged Iraq to destroy its weapons of mass destruction. Although Iraq formally accepted the resolution, it obstructed weapons inspectors which led to another military intervention by USA and UK.²²⁶ Also Russia did not accept the legality of the action as it mentioned that cease-fire in 687 Resolution does not mean a justification to use force without further Resolutions.²²⁷

The Council in 2001 passed two strong Resolutions after September 11 attacks, which authorize self-defense by the United States to repel the attack, however, no Resolution, authorized the USA to use force against Afghanistan in 7 October.²²⁸ However, some authors thought that USA could find a justification of its use of military force against Afghanistan in both 1368 and 1373 Resolutions as it expressed “its readiness to take all necessary steps” which according to their reading is an implicit encouragement for USA to seek authorization once its military plans are complete. The resolutions could “constitute an almost unlimited mandate to use force.”²²⁹ On the other hand authors saw

²²³ Id.
²²⁴ Id.
²²⁵ Id.
²²⁶ Id.
²²⁷ Id.
²²⁹ MICHAEL BYERS, TERRORISM: THE USE OF FORCE AND INTERNATIONAL LAW AFTER SEPTEMBER 11, 402,(2010),
that USA attacks violated international law as it is not authorized by the Council. They said that the Resolution ends by mentioning that the Council “remains seized of the matter” which means according to United Nations correspondent Phyllis Bennis, that the decision making is only in the hand of the Council to decide measures appropriate for the situation.\textsuperscript{230}

III. Afghanistan’s Responsibility on the Attacks of 9/11 under Article 2 (4) of the Charter

The U.S. exposed to one of the deadliest attacks ever happened in its history on the morning of September 11th 2001. Attack which caused about 3000 civilians killed and 6000 injury. At his first speech to the American People, Bush accused al Qaeda, a terrorist organization activated in Afghanistan, for doing such horrific act. He characterized the attack as an “act of war.” Bush made it clear in his speech reserving his State position on the right to response in self-defense manner against any State “harboring” terrorist. The United States Representative member to the Council letter considered that it is subjected to an “armed attack” which consequently raises the right to act, according to Article 51, in a self-defensive manner. The letter mentions that the United States has the right to act in self-defense “following the armed attacks that were carried out against the US on 11 September 2001 (emphasis added).” This Chapter will examine whether there was an armed attack on the day of 9/11 or it was a use of force prohibited under Article 2 (4). Moreover, it will argue whether these attacks are attributable to the State of Afghanistan under ILC Drafted Articles, customary law and other international law materials.


Although the U.S. did not clearly declare that Afghanistan is responsible for the armed attack, it stated in its letter to the Council that “al Qaeda had a central role in the attacks (emphasis added.” It added that “there is still much we do not know” as the issue still in its early stage. However, the U.S. letter to the council support that it was subjected to an “armed attack” on 9/11. The armed attack argument was supported by some European States when invoked Article 5 of the Washington Treaty. The U.S. strategy was not to declare that it has been subjected to an attack by terrorist militias but to attribute the 9/11 horrific attacks to the State of Afghanistan by linking al Qaeda with the government, Taliban.

1. Whether there was an “Armed Attack.”

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232 Id.
233 Steven R. Ratner, Jus ad Bellum and Jus in Bello After September 11, 96 AM J INT LAW, 905, 906 (Oct. 2010).
235 Id.
236 Id.
Different arguments could be raised to support the U.S. claim that it has been subjected to an armed attack. European States supported to the U.S. claim when the North Atlantic Council invoked Article 5 of the Washington Treaty for the first time in its history, which explains that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all. The fact that the NATO invoked Article 5 is seen serious concern from the European body to the claim that the hijacking was not a terrorist attack but an “armed attack” which requires defensive measures under the United Nations Charter.

The language of the two Security Council Resolutions adopted post 9/11 attacks could be understood as an “unlimited mandate to use force.” On 12 September 2001, in Resolution 1368, the Council strongly condemned the terrorist attack and expressed “its readiness to take all necessary steps.” Moreover, in 1373 Resolution, it was argued that the Council implicitly encouraged the United States to seek authorization to use its military force once it is ready. In the preamble paragraphs of both Resolutions, it is mentioned that the Council recognizes “the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations.” The references made in both resolutions to self-defense are interpreted that the acts of terrorism were recognized by the Council as “armed attacks.” Dinstein said, that if the right to “self-defense” is raised in both Resolutions, that means consequently that the Council recognizes the attack, which took place in 9/11 as “armed attack.”

As mentioned in the previous Chapter, according to Oil Platform, an attack to count as armed does not have to take the shape of a massive military operation. Moreover, an attack does not have to be made by a State to consider it armed. Therefore, al Qaeda’s attack could consider under international law as armed even without the interference of the regular force of the government of Afghanistan. The reason why, United States and the United Kingdom, did not mention in any of their formal documents that the attack was executed by the State government of Afghanistan. The UK said, “Osama Bin Laden could not operate his terrorist activities without the alliance and support of the Taliban

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238 Williamson, at 300.
240 S/Res/1368 (2001)
241 S/Res/1373 (2001)
In addition, the U.S. finds a connection between Taliban and al Qaeda when it mentioned in its letter to the Council “that Al Qaeda Organization which is supported by the Taliban regime in Afghanistan had a central role in the attack (emphasis added).” They did not claim that the attack was planned, or directed by the Afghani government; however, they still condemn the government of Afghanistan, Taliban, for their role in the attack that is “supporting, and harboring” al Qaeda terrorist organization. The U.S. shows that the support took the form of providing safe haven for the terrorist group in order to train, plan, and lunch their attacks.

According to the International Court of Justice in *Nicaragua*, to consider the act by non-state actor as armed attack, it must have some criteria found together which are; the source of the attack in one hand, gravity, scale, and effect in the other hand. If only one criteria is found, the act could be considered as aggression, mere use of force, short of war, anything but an armed attack. Applying the *Nicaragua* test mentioned in the previous Chapter on the case here, the second test of scale and magnitude is definitely fulfilled. Attack that targeted the U.S. causing the two World Trade Center’s wreckage and Pentagon destruction causing a major number of casualties, would be seen grave in character indeed. The gravity of 9/11 attack can amount to an armed attack made by the regular army of the State of Afghanistan. The debatable test here is the first criteria, which is; whether al Qaeda is considered a *de facto* organ of the State, and that the attacks were made in behalf of the government which has a substantial involvement therein. Dinstein said that attacks by non-state actors still could constitute an armed attack even if it is not announced in behalf of the State. He referred to both Resolution 405 and 419 (1977), when the Security Council referred to an “act of aggression” perpetrated by mercenaries against the State of Benin, without any suggestion that any other State was involved. However, the issue in 9/11 becomes more problematic, as mentioned in the previous paragraph; because neither did the U.S. nor the U.K. directly accused Taliban in their formal documents for carrying out the horrific attacks of 9/11.

2. Attributing Afghanistan’s Responsibility

Although the first criterion of *Nicaragua* test, source of the attack, is questionable in the U.S arguments, some authors projected the view that the government responsibility of

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247 Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM J INT LAW, 905, 906 (Oct. 2010).
250 *Id.*, at 227.
the attack is found in other interpretations of the case. Steven R. Ratner drew Taliban’s responsibility on the attack based on the U.S. “toleration theory.” He based his argument on President Bush speech to the U.S. people in response to the event when said “[w]e will make no distinction between the terrorist who committed these acts and those who harbor them (emphasis added).” According to Ratner, the U.S. drew the link between al Qaeda and Taliban as the later allowed parts of its territory which it control to be used by the earlier as a base operation for training and planning for different attacks. Steven added that although Taliban is not directly responsible for the attacks, President Bush effectively imputes responsibility of the Afghani government as it harbored al Qaeda in its territory, therefore, the U.S. legal position is the right to attack in self-defense the State of Afghanistan as it harbor the terrorist group accused for the attacks.

Dinstein made a comparison between the responsibility of the government of Iran in 1980 on the acts of militias, who were acting in their own initiative when they took over the U.S. Embassy staff as hostages in the case known as Iran Hostage, and the case of 9/11. The International Court of Justice held that the acts of the militias are attributable to the government as the later “completely failed to take the means at its disposal to comply with its obligations under international law (emphasis added).” The Court held that the Iranian government is responsible considering that it should have taken appropriate measures to protect the interests of the U.S. while it has “means at its disposal” to do so. Therefore, Iran considered an inactive State, which bears international responsibility of non-state actor’s acts. On the other hand, Dinstein saw that although Taliban was not accomplices with 9/11 attacks, before or during the attacks, it still bears responsibility as it refused to take any measures against the terrorist, refused Bush’s demands to hand them over, and continued to offer them safe shelters in its territory.

It seems that the U.S. government did not single out al Qaeda as its only targets. Linking al Qaeda’s acts with Taliban made the argument that the government of Afghanistan did breach Article 2 (4), by using force in an armed attack toward another State member of the United Nations Charter, even more applicable. However before declaring the war, the U.S. asked the Afghani government to hand over bin Laden, the

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251 Steven R. Ratner, Jus ad Bellum and Jus in Bello After September 11, 96 AM J INT LAW, 905, 908 (Oct. 2010).
252 Transcript of President Bush’s address, CNN, Sept. 21, 2001.
253 Steven R. Ratner, Jus ad Bellum and Jus in Bello After September 11, 96 AM J INT LAW, 905, 908 (Oct. 2010).
255 Id.
256 Id.
head of al Qaeda terrorist group. Bush in his speech alerted Taliban to deliver bin Laden when he said “[d]eliver to United States authorities all of the leaders of Al Qaeda who hide in your land...these demands are not open to negotiation or discussion...they will hand over the terrorists or they will share in their fate.”\textsuperscript{258} Bush also gave Taliban two weeks to hand over bin Laden and his terrorist organization and when the time limit came into an end and still the U.S did not deliver bin Laden, as Taliban refused to hand him, the U.S declared the war and Afghanistan became the first battleground of the war on terror in the whole region.\textsuperscript{259}

B. Other Considerations on the Criteria of 9/11 Attacks.

The U.S. and U.K. claims on the criteria of 9/11 attacks had been confronted with other legal arguments. Authors criticized the U.S. letter to the Council that defines the attacks as “armed attacks.” The following part re-reads the arguments which support U.S. and U.K. claims on the criteria of 9/11 attacks. It also applies the Law Commission Drafted Articles on the responsibility of the government of Afghanistan on the attacks made by al Qaeda terrorist organization.


The U.S. Permanent Representative to the United Nations, John Negroponte, mentioned in his letter to the Security Council that his State has the right to act in self-defense because of “the armed attacks that were carried out against the US on 11 September 2001.”\textsuperscript{260} However, he did not directly mention who is responsible for this armed attack. As mentioned before, he stated in the letter that al Qaeda had a “central role” in the attack and that it was “supported” by Taliban. It was more confusing when he stated in the letter that the U.S. is still trying to proof who is responsible for the attacks as the investigation still “in its early stage.” Moreover, the U.K. letter to the Security Council justifying its military action mentioned that self-defensive measures will be directed toward al Qaeda and “the Taliban regime that is supporting it.”\textsuperscript{261} According to their documents, neither did the U.S. nor the U.K. asserted that the attacks were directed by the government of Taliban. Moreover, the U.S. claim that Taliban supported al Qaeda in the attacks was vague. No evidence was submitted or showed to any official body. Two weeks after the 9/11 attacks, Secretary of State Colin Powell promised to show evidence of responsibility and the link between Taliban and al Qaeda on the attack, however, the U.S. decided that

\textsuperscript{258} Transcript of President Bush’s address, CNN, Sept. 21, 2001.
\textsuperscript{259} U.S. War in Afghanistan - Council on Foreign Relations. by Colonel Gian Gentile.
\textsuperscript{260} S/2001/946, U.S. Letter to the Security Council
it is not necessary to make public its evidence of responsibility.262 The U.K. also made a public report which state conclusions reached by the government on the responsibility of al Qaeda on the attacks supported by Taliban.263 However, the weakness of the report was concluded the next day by the BBC, which stated that “[t]here is no direct evidence in the public domain linking Osama Bin Laden to the 11 September attacks. At best the evidence is circumstantial.”264

The issue of linking Taliban with the attack became even more difficult when the Chief Spokesperson of Taliban condemned the attacks immediately and did not claim responsibly for them.265 Moreover, the Taliban ambassador to Pakistan stated on October 5, "[w]e are prepared to try [bin Laden] if America provides solid evidence of [his] involvement in the attacks on New York and Washington (emphasis added).”266 He also showed his government readiness to deliver bin Laden to a third State when evidence is provided. However, Washington responded that its demands were non-negotiable and refused to hand any evidence of responsibility.267 The inquire here is not to argue whether bin Laden committed the attacks or not, but to show to what extent did the U.S. and U.K. governments did not show any concrete evidence of responsibility to accuse neither al Qaeda for the attack, nor Taliban for the support. The evidence of responsibility should have been shown to everyone, “Washington might be satisfied with the evidence, but many others may not be.”268

Considering that NATO invoked Article 5 of the Washington Treaty does not mean consequently that it is a European support that what happened on 9/11 is an “armed attack” under international law.269 There are other European bodies such as The Parliamentary Assembly of the Council of Europe, which mentioned that the attacks were “criminal acts not acts of war.” It seems that NATO was motivated by other factors than the law in invoking Article 5, this was seen when the U.K. the NATO member, in its

267 Id.
268 Id.
269 Williamson, at 300.
documents did not refer to the attack as armed.\textsuperscript{270} The U.K. letter submitted to the Security Council in October 7 referred to the attack as an “operation of terror.”\textsuperscript{271} It seems that NATO’s invocation of Article 5, showing the right of States members to act collectively in self-defense whenever an armed attack happens, was over-weighted on the legal basis.\textsuperscript{272} In my opinion, NATO’s decision was based on political considerations rather than legal ones as the attacks of 9/11 had a wide spread sympathy.

It was discussed that according to both resolutions 1368, and 1373 when referred to the inherent right of self-defense, the Council recognized the attacks of 9/11 as “armed attacks.” This conclusion has some problems, as the Council never referred to the acts of 9/11 as “armed attacks” in both resolutions. Even the Council member’s statements in the debate prior to the adoption of the resolutions did not refer to the attacks as armed.\textsuperscript{273} It was argued that the language of the Council could be interpreted as an open mandate to use force in self-defense in response to an armed attack, however, if the language of the Council in 2001 compared with 1990 language, regarding (Iraq v. Kuwait) war, a great conceptual differences will be seen. On 1990, the Council passed 661 Resolution which recognizes the inherent right of self-defense “in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter (emphasis added).”\textsuperscript{274} It seems that the Council language was clear when it laid the responsibility directly on the aggressor State and did not escape accusing Iraq directly. It also gave Kuwait, the right to invoke self-defense under the justification of Article 51 and the permission of the Council.\textsuperscript{275} On the other hand, the paragraph of resolutions 1368 and 1373 only recognize and reaffirm “the inherent right of individual or collective self-defense” as recognized by the Charter. Mere difference is seen between both structures, in resolution 661 the Council used the term “armed attack” and specifically mentioned Article 51 of the Charter, which it did not do in post 9/11 resolutions. The comparison shows that in order to maintain international peace and security, the Security Council is prepared to use the specific term of “armed attack” only when it is convinced that an “armed attack” did actually occurred, therefore, the language adopted in both 1368 and 1373 resolutions shows that the Council was not convinced that 9/11 attacks were “armed attacks.”

2. Attribution of Responsibility under both, Nicaragua test and Law Commission 2001 Articles on Responsibility of States

\textsuperscript{271} Id.
\textsuperscript{272} Williamson, at 300.
\textsuperscript{274} S/Res/661, (1990)
\textsuperscript{275} Id.
According to *Nicaragua* test, acts of non-state actors could amount to an armed attack if both criteria of source, and gravity were fulfilled. The question of whether the terrorist attacks could be grave in nature or not is discussed in Part A.1. However, still the question of whether, according to U.S. and U.K. documents, Taliban’s support to al Qaeda could fulfill the first criteria of *Nicaragua* test, source of the attacks, and bear responsibility to the government of Afghanistan on it. The U.S. and U.K. arguments on the connection between Taliban and al Qaeda are based on the support given from Taliban to al Qaeda. However, the ICJ in *Nicaragua* mentioned that “provisions of weapons or logistical or other support” could not amount to an “armed attack.” Judge Jennings added that “mere provision of arms cannot be said to amount to an armed attack.” The issue here is that the source of the attack is not clearly mentioned in both letters submitted to the Council by the U.S. and U.K. Both States did not mention that the terrorist attacks were sent by or on behalf of Taliban, to bear it responsible. They did not even identify what type of support is given by the government to al Qaeda other than allowing parts of its territory to be used by it. Under international law, the level of “support” referred to by the U.S. and U.K. is insufficient to amount 9/11 as an “armed attack” by the government of Afghanistan, Taliban. Neither there were evidence given to the Council nor there was a claim made that the attacks were directed by Taliban.

The Court in 2005 *Armed Activities* quoted Article 8 of International Law Commission’s 2001 Draft Articles when mentioned that to count the act as a conduct of the State, the attack must be lunched “on the instructions of, or under the direction or control of a given State.” Moreover, when the test of “effective control” of *Nicaragua* applies on the case here, it will not meet neither the U.S. “harboring theory” nor the U.K. claim of the government support to al Qaeda. The ICJ in *Nicaragua* stated that “general control” over non-state actors is not enough to bear the responsibility of a State on a certain act; the State must be in an “effective control” over the “military or paramilitary operations in the course of which the alleged violations were committed.” The Court’s ruling means that, in order to bear responsibility of a State on a certain act, it has to be proven that the State directed and controlled that specific act. Furthermore, the Court saw that the U.S. supporting or aiding the Contra’s rebel group could be considered as a use of force but not as an armed attack. On the same scale given, *my opinion* is that if the evidence submitted proved that Afghanistan supported and provided safe haven to al

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Qaeda, Taliban could be accused for violating the principle of non use of force mentioned in Article 2 (4), as it harbored al Qaeda in its territory, but not committing an “armed attack” under Article 51, as it did not exercise effective control over al Qaeda in the 9/11 operation.

The International Law Commission adopted a very similar approach of the Nicaragua’s test on the attribution of State responsibility. According to Article 8, the conduct of non-state actors is attributable to the State if they were “acting on the instructions of, or under the direction or control of that state in carrying out the conduct.”

It was mentioned before that the U.S. and U.K. documents did not alleged that the attack was under the direction or control of Taliban. Although Taliban was welcomed by the majority of the Afghani people and established an effective control over most of its territory, as it could offer some stabilization to the State, still it is not considered as a dominant government which have the power over all of its territory, the thing is that Taliban also could not bear responsibility under the Corfu Channel test. Taliban did not “allow knowingly its territory to be used” by al Qaeda in order to attack the United States. This is shown in the condemnations made by the government immediately post the attacks of 9/11, and the promise to contribute in bringing responsible into justice. Unlike Tehran Hostage case, Taliban did not adopt the attack as its own, Aijaz Ahmad in his book “Iraq, Afghanistan and the Imperialism of Our Time” said that linking Taliban with the attack is hard because “they denounced the attack immediately and promised in no uncertain terms to help find the culprits.” Therefore the attack of 9/11 could not be attributed to Afghanistan on the bases of Article 11 of the Law Commission Draft Articles. Also Taliban did not have “means at its disposal” to protect the interests of the U.S. and prevent the attack of 9/11, therefore it also cannot bear responsibility on the precedent set forth in Tehran Hostage.

C. Conclusion.

The question of whether the U.S. was subjected to an “armed attack” at the morning of 9/11 is doubtful. The arguments which support the claim that the attack was armed, analyzes the invocation of Article 5 by NATO as a support from the European States that the hijacking was “armed attacks.” However, NATO’s invocation of Article 5 was influenced by political considerations rather than legal basis. In addition, there were other European bodies, which acknowledged the attacks as “criminal acts” not armed ones.

Therefore it cannot be argued that 9/11 attacks are armed as the European States recognized them as “armed attacks” when invoked Article 5 of the NATO. This argument is overstated.

Although, there is an argument that the Security Council Resolutions 1368 and 1373, when referred to the inherent right of self-defense, consider 11 September attacks as armed attacks. The Council, in both resolutions, had never used the term “armed attacks” nor directly referred to Article 51. Comparing both resolutions to resolution 661 (Kuwait v. Iraq), the Council does not seem ready to count the 9/11 acts as “armed attacks.” I also believe that the Council did not recognize 9/11 attacks as armed attacks because neither the U.S. nor the U.K were seen ready to submit any document to proof the responsibility of Taliban on al Qaeda’s attacks. Consequently, the Council was not sure that 9/11 attacks were “armed attacks” by the State of Afghanistan, and considering its main role in maintain international peace and security, it did not clearly mention in both resolutions that the U.S. has the right to self-defense under Article 51 as it was exposed to an armed attack, unlike the case for Kuwait on 1990.

Moreover, according to Nicaragua, both “source and gravity” tests must be fulfilled to consider the attack as armed, however, only the test of gravity was fulfilled in the 9/11 attacks. Taliban was not in “effective control” over al Qaeda’s operation, in order to attribute the terrorist attacks to it, and according to ILC Articles on Responsibility of States neither did Article 8 nor Article 11 fit the position of Taliban as it condemned the act immediately and promised to help find the criminals responsible, furthermore, the U.S. and the U.K did not prove that Taliban sent the terrorist groups to attack on behalf of the State of Afghanistan. Taliban also asked to surrender bin Laden and help in finding the terrorist responsible when evidence is submitted, however, the U.S. government refused this offer on the basis that evidence are classified. Moreover, there was neither a claim made by the U.S. government nor the U.K. that the attack was directed or controlled by the government of Afghanistan. In their documents, they both claimed that Taliban is responsible as it “harbor” al Qaeda in its territory, and according to Nicaragua test; general control, supporting arms or harboring terrorists do not amount to an armed attack, an “effective control” is needed over the terrorist group on the specific operation in question. However, U.S. and U.K. did not proof that connection. Therefore, the Nicaragua definition of armed attack, extent of control, and attribution are not satisfied in the case.

According to U.S. and U.K. claim that Taliban did “support” al Qaeda and offered it shelters on its territory, Afghanistan could be condemned for breaching the prohibition of non-use of force in Article 2 (4), if evidence is supported. Afghanistan might be responsible under international law for al Qaeda’s attacks; however, as mentioned before, responsibility of States under international law varies according to the role of the State, and the graveness of the attacks. In Nicaragua, the court stated that the U.S. supporting
and aiding *Contras* might be a use of force but does not amount to an armed attack. In *Tehran Hostage*, the government of Iran was responsible as it had means at its disposal but did not take measures to safeguard U.S. interests. In the case of Afghanistan, according to the U.S. arguments, the government role in 9/11 attacks was supporting and harboring al Qaeda, therefore it might be accused for a mere use of force, aggression, short of war, but its role in 9/11 does not amount to an armed attack. Also when compared to *Tehran Hostage*, Afghanistan did not have means at its disposal to stop 9/11 attacks. Afghanistan did not know all Qaeda’s intent of attacking the U.S. because it does not control all of its territory.

On the other hand, the U.S. and the U.K. did violate Article 2 (4) when attacked Afghanistan acting in self-defense under Article 51 as they did not prove clearly the attribution of the attack to the government, and because the elements of “armed attack” were still not satisfied. Therefore, the act made by the U.S. and U.K. is not a lawful act of self-defense under international law as the attacks of 9/11 are not “armed attacks” under international law.
IV. The Legality of the U.S. and U.K. Use of Force under Article 51

It was concluded in the previous Chapter that 9/11 attacks were not armed attacks which consequently functions the use of force in self-defense under Article 51 of the Charter. However, such as any other State, the U.S. when used force in attacking Afghanistan, it invoked the argument of self-defense in its letter to the Security Council and other political statements. According to 2005 Armed Activities the violation which does not fall under the armed attack’s pattern is not covered by Article 51 of the United Nations Charter. Article 51 states that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.” 286 This Chapter will argue other legal strategies seen in the U.S. and U.K. documents, which justifies their attacks on 7 October under Article 51. Then it will argue whether the customary law requirements of self-defense were fulfilled in the attacks or not.

A. U.S. and U.K. Arguments Justifying their Use of Force

Still the official documents of both governments of the U.S. and U.K. could be formulated on other legal basis of self-defense to justify their attacks on 7 October. This Part will discuss the argument of anticipatory self-defense seen in the U.S. Congress Legislation, letter to the Council, U.K. government report on 9/11 attack, and its letter to the Security Council. In addition, it will discuss in brief other grounds for the U.S. and U.K. that they might invoke to justify their attacks on Afghanistan.

1. Anticipatory Self-defense Arguments

The argument of anticipatory self-defense was seen in the U.S. and the U.K letters to the Security Council. Also the U.S. Congress adopted The Authorization for the Use of Military Force Resolution which permit the President to use force to protect the nation from future attack, as there are evidence in 9/11 Commission Report that the terrorists are willing to commit future attacks toward the US. 287 In the report of the U.K. government, Responsibility for the Terrorist Atrocities in the United States, Blair showed evidence that his State has the right to attack Afghanistan as the terrorist groups are willing to commit further attacks. 288

a. U.S Letter to the Council and Congress Legislation

In response to the terrorist attacks of 9/11, the Congress passed S.J.Res. 23 which allows the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”\(^{289}\) The US intent to use force in anticipatory self-defense was clear in the resolution when the permission was given to the President “in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons (emphasis added).”\(^{290}\) According to the Congress Legislation, the U.S. has the right not only to attack Afghanistan because of the 9/11 armed attacks, but also to protect its people from any future attacks that might come. The Congress was justifying the use of force in anticipatory self-defense to the U.S. President.

Evidence of al Qaeda’s responsibility on the attack and its willingness to commit further attacks was referred to in both FBI and CIA interrogations for its members in 9/11 Commission Report.\(^{291}\) Also the U.S. President stated in his speech that the U.S. government has classified evidence of responsibility of al Qaeda on the attack and the support provided from Taliban.\(^{292}\) However, when asked the government of Afghanistan to deliver al Qaeda’s leaders, he refused to show evidence when said that his demands are “not open to negotiation or discussion.”\(^{293}\) In addition, it was remarkable in his statements of policy on “anticipatory self-defense” that the U.S. government is willing to counter terrorist threats before even they plan a concrete action, a policy which named “Bush Doctrine.”\(^{294}\)

In its letter to the Security Council, the U.S stated that it was responding to the “ongoing threat to the United States and its nationals.”\(^{295}\) Also the U.S. justification of the attacks was in order to “prevent and deter further attacks on the United States.” The U.S. letter shows that the intent in its actions in Afghanistan was coupled by its argument of preventing future loss. According to the US, the actions of self-defense under Article 51 might need other requirements “[w]e may find that our self-defense requires further actions with respect to other organizations and other States.”\(^{296}\) The other requirements are, acting in self-defense against the armed attack of 9/11 coupled with preventing future attacks. Therefore the representative letter showed that the U.S. actions in Afghanistan


\(^{290}\) Id.


\(^{292}\) Transcript of President Bush’s address, CNN, Sept. 21, 2001.

\(^{293}\) Id.


\(^{296}\) Id.
were designed “to prevent and deter further attacks on the United States.” According to the U.S. letter to the Security Council and the Congress legislation, it was seen that not only the U.S. was acting in a self-defensive manner because of the armed attack happened in 9/11, but also it was acting in anticipatory self-defense in order to prevent any future threat.

b. U.K. Letter to the Council and HMG’s Report

Unlike the U.S, the UK letter to the Security Council shows that its justification of using force was not a “direct response to the events of 11 September 2001 per se.” In other words the U.K. letter shows that, when deployed force, it was not acting only in response to the 9/11 attacks, there were other justifications for its use of force. The letter stated that the force used was “to avert the continuing threat of attacks from the same source [Afghanistan] (emphasis added).” The thing is that the U.K raised the argument of anticipatory self-defense directly when it joined the U.S. in attacking Afghanistan on 7 October. The justification of using force was drawn clearly in preemptive manner to stop “continuing threats of attacks” from al Qaeda. Moreover, Mr. Blair in his speech to the British people said that “we have a direct interest in acting in our self-defense to protect British lives.” Mr. Blair clearly drew his government role in the attack, as it is not just acting collectively with the U.S, but also acting in the British people’s interests in protecting them from future attacks.

According to interrogations and evidence, the U.K. government report on 9/11 attacks, HMG’s Report, concluded that the attacks were planned and carried out by al Qaeda terrorist organization coupled with a support from the Taliban regime. It stated that in the future the organization has the will to commit further attack against the British people “[t]hat organization has the will…to execute further attacks…Both the United States and its close allies are targets for such attacks (emphasis added).” The report shows that one of the main key of the attack is protecting its nation from future attacks, the thing that is considered an argument to anticipatory self-defense. The U.K. when attacking Afghanistan, it was acting to prevent “further attacks” by the organization accused for 11 September attacks. In addition, the Report stated that the British government has

297 Id.
301 Id.
303 Id.
evidence of al Qaeda’s responsibility of the attack and its intention to execute future ones. The actions of both U.K. and U.S. were seen anticipatory in nature.  

Although the U.S. intention to use force in anticipatory self-defense was clear, it did not explicitly raised this argument directly in its official documents. They referred to the argument of, the probability that the terrorist group might commit future attacks, but it did not state it clear that their governments have the right to act in anticipatory self-defense. The reason is that anticipatory self-defense doctrine is not accepted by the majority of States and is not acceptable under Article 51, only when coupled with other customary law requirements. However former Secretary of State, George Shultz, did not accept that the argument of self-defense could not be used to prevent future attacks when said “[i]t is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations.” In Nicaragua, the Court did “shied away” from addressing anything about anticipatory self defense, however, in his dissenting opinion, Judge Schwebel rejected a reading that Article 51 is only applicable “if, and only if, an armed attack occurs.” I also think that concept which prohibits anticipatory self-defense entirely is not realistic. Preventing States from deterring imminent act of aggression will not fulfill the Charter main goal of maintaining peace and security. In contrary, the damage caused to a State waiting until the requirements of an armed attack are complete might exceeded the damage of anticipatory attack to stop an aggression. However, I still support that anticipatory self-defense should have certain conditions to be lawful under international law.

Authors such as Dinstein thinks that even supporters of anticipatory self-defense doctrine must concede that the probability of future attacks based on false evidence will accelerate, which consequently will trigger the right of self-defense to prevent an attack even if it did not hold a serious threat at all. However, considering September 11 attacks, Dinstein thought that the “grave nature” of the attacks justified the use of force in anticipatory self-defense, even when there is no immediate need to carry out these attacks, to elaborate non-state actors terrorist groups, such as al Qaeda, which formed, according to his argument, an “instant customary international law” due to the presence

305 CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE, 111, (Malcolm D. Evans ed., Phoebe N. Okowa ed., Oxford University Press 2000) (2000). Anticipatory self-defense is not accepted under article 51. However, according to customary law, it could be function when coupled with immediacy provision. These customary law requirements will be discussed in detail in the next part.
of the global terrorism phenomena. He thinks that the global concerns of terrorism worldwide alerted the need to embrace new norms and laws in order to be capable of fighting this danger which he discussed as a formation of new “instant customary” rules.

2. Other Possible Legal Justifications for the Use of Force in Self-defense

Scholars raised different arguments which the U.S. and the U.K. could relied upon when used force in self-defense. Michel Byers stated that there are three arguments for both States, other than invoking the inherent right of self-defense to justify their use of force. These arguments are the Security Council authorization, humanitarian intervention, and intervention by invitation. This part will discuss these three legal justifications in brief.

a. Security Council Authorization

In resolution 1386, the Council strongly condemned the 9/11 attacks but did not directly authorized force, however, it was argued that the Council words when showed “its readiness to take all necessary steps” is understood as an implicit encouragement for the U.S. to use its military army, acting in self-defense, whenever it is ready. On 28 September the language of the Council in resolution 1373 could be argued as an “almost unlimited mandate to use force.” Byers clarified his point by mentioning that the resolution should not be read as a direct authorization to use force, however, it provides the U.S. with a tenable argument, for political reasons, when it decides to use force to prevent terrorist attacks. He added that, in resolution 1373, the Council when stated that all States shall take “necessary steps to prevent the commission of terrorist acts” gave this benefit to other States, to invoke resolution 1373 and block terrorist attacks.

Still the U.S. did not argue that its use of force was based on an implicit Security Council authorization. It did not rely on resolution 1373 while using force because of the fact that China and Russia could also rely on it in the future when use of force. Also the U.S. government might thought that relying on the phrase “all necessary steps” would

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310 Id.
311 Id., at 402.
312 Id.
313 Id.
fail, as the Council mainly uses clearer and stronger language when authorize the use of force.315

b. Humanitarian Intervention

After the 9/11 attacks, both the U.S. President and U.K. Prime Minister always tend to use human rights and humanitarian situations in Afghanistan.316 President Bush in his address to the U.S. people while accusing al Qaeda terrorist group for the attack, he mentioned that Taliban is not “only repressing its own people, it is threatening people everywhere by sponsoring and sheltering and supplying terrorists.”317 The President added while explaining the link between both Taliban and al Qaeda that “[b]y aiding and abetting murder, the Taliban regime is committing murder.”318 Moreover, in its letter to the Council, the U.S. offered help by providing the Afghani people with “food, medicine, and supplies.” These assertions when seen in the context of the President statements could form a passage that the U.S. thought about invoking humanitarian intervention argument.319

Blair in his speech also referred to humanitarian arguments when mentioned that he “believe[s] the humanitarian coalition to help the people of Afghanistan to be as vital as any military action itself (emphasis added).”320 He added that his government with the U.S. will “do what can to minimize the suffering of the Afghan people (emphasis added).”321 It was seen after the 9/11 attacks that both administrations frequently regarded Taliban’s human right abuses in women’s dress, religious restrictions, food supplies, and educational problems.322

Neither did the U.S. government nor the U.K. base their arguments of the use of force on human right intervention doctrine.323 Maybe it would reduce its ability to use force or maybe because most human rights abuses provide no legal basis for military

315 Id.
316 Id, at 330.
317 Transcript of President Bush’s address, CNN, Sept. 21, 2001.
318 Id.
321 Id.
intervention.\textsuperscript{324} It seems that both administrations were aware that invoking the argument of humanitarian intervention in response to an armed attack would probably preclude this claim from the outset.\textsuperscript{325}

c. Intervention by Invitation

According to Article 20 of the International Law Commission Drafted Articles on Responsibility of State, the U.S. can intervene in the territory of Afghanistan based on the latter’s consent providing that the U.S. actions “remains within the limits of that consent.”\textsuperscript{326} The U.S. government could have recognized North Alliance as the government of Afghanistan and seek its authorization to use force in its territory.\textsuperscript{327} It could have regarded Taliban as rebel group as it was only recognized by three States and rose to power recently.\textsuperscript{328} However, the U.S. did not seek this justification because it was not clear which regime is the legitimate government in representing the State of Afghanistan.\textsuperscript{329} Also according to Article 20 the U.S. action in Afghanistan should “remain within the limits of that consent” which will might cause a reluctant in the U.S. actions.

The U.S. did not rely on any of these justifications when attacked Afghanistan. If it relied on one of these arguments, other States would probably object, because according to the previous cases of fighting terrorism, international support for such arguments was missing.\textsuperscript{330} However, the nature of the situation in 11 September gave the U.S. an opportunity to choose to invoke its inherent right of self defense according to the United Nations Charter rather than applying any other justification.\textsuperscript{331} It was a strategic choice by the U.S. government to justify its attacks under self-defense in order to lose the legal constrains found in other humanitarian intervention, Council authorization, and, intervention by invitation arguments.\textsuperscript{332} The question left here is whether the U.S. and the U.K. escaped all the legal constrains when invoked their right to self-defense.

\textsuperscript{325}MICHAEL BYERS, TERRORISM: THE USE OF FORCE AND INTERNATIONAL LAW AFTER SEPTEMBER 11, 405, (2010), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5575&context=faculty_scholarship
\textsuperscript{327}MICHAEL BYERS, TERRORISM: THE USE OF FORCE AND INTERNATIONAL LAW AFTER SEPTEMBER 11, 403, (2010), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5575&context=faculty_scholarship
\textsuperscript{328}Id.
\textsuperscript{329}Id.
\textsuperscript{330}Id. at 410.
\textsuperscript{331}Id.
\textsuperscript{332}Id.
B. Counter Arguments of the U.S. and U.K. Justifications to Use Force

The arguments raised by both administrations on the future threats which threaten both States and the inevitability to use force to eliminate these threats are seen illegal considering the weak evidence presented by both bodies. Also, for the sake of the argument, if 11 September is an armed attack which gives the right to the U.S. to act according to Article 51, still self-defense under international law needs other customary law requirements to be lawful. This part will argue the weak basis of both the U.S. and the U.K. in justifying their anticipatory self-defense claim. Also it will assume that the U.S. had the right to act in self-defense then will argue whether this right was applied correctly according to international law.

1. The Legality of the U.S. and U.K. Anticipatory Self-defense Claims

Policy statements made by both the U.S. and U.K. administrations show that they draw the justification of their act not only as they were exposed to an armed attack, but also on the justification of preventing future attacks, anticipatory self-defense claim.333

a. Anticipatory Self-defense under Customary Law

There is a “restrictive approach” that under Article 51, a State could not invoke self-defense unless the other State has already made a full armed attack.334 This approach means that States can invoke their right to self-defense only when an armed attack with sufficient magnitude, satisfies the requirements of responsive self-defense under Article 51, has occurred.335 Scholars which support this restrictive view relay on the overall goal of the United Nation Charter in “maintaining international peace and security” by limiting the capability of States to use force in every dispute.336 However, it is unreasonable that States should wait and witness the launching of an armed attack while they are not able to invoke their right to repel it. State might plot into a serious damage if it followed this restrictive approach. However another more concrete customary approach, which I also agree with, was seen in the 1837 Caroline incident.

It is frequently argued that the legal application of anticipatory self-defense is traced back in 1837 Caroline incident, when the U.S. Secretary of State at that time, Daniel Webster, made the claim that for self-defense to be admitted it is required to “show a

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333 The argument of whether 9/11 was an armed attack triggering the right of self-defense under article 51, was discussed in Chapter III. It was concluded that 9/11 might be an aggression, or a mere use of force, however, it is not an armed attack which raises the right of the U.S. to invoke article 51 of the Charter.
335 Id.
336 Id.
necessity of self defense, instant, overwhelming, leaving no choice of mean, and no moment of deliberation.”337 It is understood from Webster’s doctrine that international law permits anticipatory self-defense in another State territory only when there is necessity of self-defense and when the attack is imminent. This doctrine is widely accepted as an “authoritative customary international law.”338

Although *Caroline* endorsed anticipatory self-defense, still there are constrains which face the application of it according to the requirements given in Webster’s doctrine.339 Waldock said, for a legal application of anticipatory self-defense doctrine, there must be “convincing evidence…of an armed attack being actually mounted…though it has not passed the frontier (emphasis added).”340 Anticipatory self-defense is limited based on the necessity of the military action knowing that the attack is overwhelming; these limitations require solid evidence to proof its existence.341 The evidence must be proven by the State claiming its right to use force, according to *Oil Platform*, the burden of proof for the existence of an armed attack rests on the State invoking its right to self-defense.342

*My opinion on* the “formation of a legal anticipatory self-defense” is that it must be based on solid evidence, gathered by concrete intelligence, submitted by the State victim, to the international body concerned, that an armed attack is overwhelming. Like what was stated by Dinstein, in order to invoke the right to self-defense, it is not sufficient to wait for “the bombs to fall – or…fire to open”, however, the victim State has the right to invoke Article 51 even when the armed attack at “an incipient stage” once its solid intelligence proved that an “attack is actually in the process of being mounted.”343 Dinstein name this type of anticipatory legal actions as interceptive self-defense.344


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339 *Id*, at 18.
343 *Id*, at 200.
344 According to Dinstein, interceptive self-defense is a legal use of force which means the “reaction to an event has already begun to happen although it is not fully complete and developed.” *Id*, at 201.
One might say that the evidence collected by FBI and CIA proves a future threat toward the U.S. justifying its anticipatory self-defense. As mentioned before, Colin Powell promised to show evidence of responsibility and then withdrew his promise. Seymou Hersh, a political writer, cited officials from both FBI and CIA stating that the reason why evidence of responsibility was not announced is the “lack of solid evidence.” Moreover, U.S politicians always refer to the 9/11 Commission Report and the information it has, considering al Qaeda’s intention to commit future attacks. Whenever the Commission refers to any evidence, it always cites evidence gathered by the FBI and CIA interrogations of al Qaeda and Taliban operatives in prison. NBC quoted Michael Ratner, the president of the Center for Constitutional Rights, when doubted the concreteness of the evidence gathered, he said “[m]ost people look at the 9/11 Commission Report as a trusted historical document. If their conclusions were supported by information gained from torture, their conclusions are suspect.” It seems that the evidence cited in 9/11 Law Commission, which was not submitted to any international official body lacks credibility. That means that it could not be relied upon when invoking an anticipatory self-defense right and use armed force in attacking another State.

One might say that although the Commission Report evidence are not concrete enough, still the U.S. finds its justification to attack Afghanistan in the Congress authorization to the President to use force, and the evidence stated in the British government report of future threat by al Qaeda. Considering the Congress Legislation to use force, it is discussed in Chapter II the nature of the prohibition to use force as a preemptory norm. Article 44 (5) of the Vienna Convention on the Law of Treaties, shows the nature of a jus cogens norm and how other norms could not prevail it. The article states, “if only part of a treaty conflicts with an existing jus cogens the whole of the treaty is void.” Applying this concept on the Congress Legislation it could be concluded that the legislation to use force is contrary to international law rules, therefore is void. The Congress authorized the President to use force without an authorization from the international body concerned, Security Council, and without supporting evidence presented, neither to public nor to any international body, of responsibility or future threat to the U.S. people. According to Article 39, the Council is the only body concerned to authorize the use of force internationally. Congress Legislation contradicts the Charter rules and the jus cogens

346 Id.
347 Id.
348 Id
349 Id
norm of the prohibition to use force, therefore void. Moreover, a vote in the national legislation could not override international obligations justifying a State to act contrary to international law.\footnote{Michael Albert and Stephen R. Shalom, 47 Questions and Answers on the War in Afghanistan, (Oct. 2001), available at http://www.globalissues.org/article/280/47-questions-and-answers-on-the-war-in-afghanistan.} Considering the conclusion reached by the British government of the terrorist organization intent to commit future attacks, the weakness in the report was concluded by the BBC the next day when said that the report has “\textit{no direct evidence in the public domain} linking Osama Bin Laden to the 11 September attacks (emphasis added).”\footnote{David Ray Griffin, \textit{Osama bin Laden Responsible for the 9/11 Attacks? Where is the Evidence?} (Oct. 2009), available at http://www.globalresearch.ca/osama-bin-laden-responsible-for-the-9-11-attacks-where-is-the-evidence/15892.} Subsequently, also the report has no direct evidence of al Qaeda or Taliban’s intention to commit future attacks against the U.K. or the U.S.

The U.S. and the U.K. based their arguments of anticipatory self-defense on weak evidence. In 9/11 Commission Report, the evidence of the terrorist organization intent to commit future attacks was doubtful as it was argued that members of al Qaeda were tortured during interrogations in order to give information. After re-reading the British government report on 9/11, it was concluded that there are no direct evidence presented on the future threat argument. Also Congress Legislation could not be seen as a ground for the justification of the attack. The U.S. and U.K. “used force in self defense to prevent non-imminent future attacks” based on weak evidence.\footnote{MYRA WILLIAMSON, TERRORISM, WAR AND INTERNATIONAL LAW, 328, (Alison Kirk ed., Elaine Coupe ed., Nikki Dines ed., Patrick Cole ed., University of Waikato New Zealand 2009) (2009).} In order to consider an anticipatory self-defense legal, it must be proved by the State victim that an armed attack is overwhelming according to concrete evidence submitted to the body concerned. The U.S. and U.K. use of force could not be seen as a legal application of anticipatory self-defense under international law.


According to Chapter II, it was discussed that although necessity, proportionality, and immediacy are not stated in Article 51 of the United Nations Charter as requirements of self-defense, they are still considered “limits on all self defense, individual and collective.”\footnote{CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE, 106, (Malcolm D. Evans ed., Phoebe N. Okowa ed., Oxford University Press 2000) (2000).} Assuming that what happened in 9/11 was an armed attack satisfies all its requirements giving the right to the U.S. to invoke self-defense under Article 51, still State acting in self-defense under international law should satisfy the requirements stated in Webster’s formula. Thomas Frank said, “for the purpose of argument, the September 11 attack could be construed to be an armed attack. U.S. would still have to meet the tests
of necessity and proportionality in order to qualify as self-defense.” This part will discuss whether the U.S. exercised its right to self-defense within the bounds of necessity, proportionality, and immediacy.

a. Necessity

U.S. and U.K use of force must be exercised under the necessity provision. The use of force must have been instant, overwhelming, leaving no choice of means. In other words, the US must have worked hard to avoid the war and found other peaceful diplomatic solutions.\(^{355}\) The threat of an immediate attack against the U.S. had “subside” after 11 September attacks.\(^ {356}\) Moreover, as concluded earlier, the U.S. and U.K when acted in a self-defense manner, their arguments were to prevent future threats, as they were not under a full-scale armed attack back then. Therefore, the force used in self-defense cannot be seen under customary requirement of necessity, as a reason to stop an imminent threat of armed attack because there are no instant threats.

The efforts made by the U.S. in order to end the dispute in peaceful means were not serious. Taliban was welling to surrender bin Laden, the head of al Qaeda terrorist organization, if evidence were provided. The Taliban ambassador to Pakistan showed that Taliban could put bin Laden into trail even before the evidence is shown by the U.S. administration when said ’’[u]nder Islamic law, we can put him on trial according to allegations raised against him and then the evidence would be provided to the court.”\(^{357}\) However, Bush twice refused Taliban’s offer to turn bin Laden to third State, he demanded to hand over bin Laden immediately and unconditionally “dead or alive.”\(^{358}\) He also stated that the U.S. “demand are not open for negotiation” when asked by the government of Afghanistan to hand evidence of responsibility.\(^ {359}\) The U.S. leaders seemed not ready to negotiate to reach a peaceful solution.

According to necessity condition, the U.S. should have presented the evidence of bin Laden’s responsibility, and negotiated the possibility of his extradition or submitting him


\(^{359}\) Transcript of President Bush’s address, CNN, Sept. 21, 2001.
into a trial. However, it seems that the U.S. did not negotiate with the government of Afghanistan in a good faith. The evidence suggests that the U.S. already has taken the decision to use force when it warned a war since the U.S. President first speech when said “[d]eliver to United States authorities all of the leaders of Al Qaeda…or… share in their fate.” The U.S. efforts to solve the dispute peacefully were not seen genuine but an act of “ritual punctilio.”

The necessity to use force in self-defense did not exists in 7 October U.S. operation against Afghanistan, since there was no imminent attack. The fact that the U.S. acted in self-defense after three weeks from the 11 September attacks shows that the necessity was not “overwhelming.” Moreover, the U.S. did not take advantage of the time lag between the 11 September attacks and the 7 October operation to make serious attempts in finding other peaceful solutions other than war. There were a lot of opportunities for the U.S. and the U.K. to seek other peaceful options. However, the U.S. and the U.K chose to go to war.

b. Proportionality

In the context of Jus ad bellum, it means, that the amount of force used in self-defense must be proportionate, and not too excessive, to the threatened harm. The self-defense must be only with the force necessary, nothing “unreasonable or excessive.” In the 9/11 case, the inquiries which should be noticed by the U.S. is what are the threats and where they come from. The U.S. is under a threat which comes from al Qaeda terrorist

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362 Id.
363 Id.
364 Id. at 318.
365 Id.
366 Id.
367 Id.
369 Id
members as they hijacked domestic airplanes and used them as bombs to explode the World Trade Centers.\textsuperscript{370}

In terms of threats caused by al Qaeda, and according to the future threat argument raised by the U.S., proportionate use of force would be the use of force not in terms of the original aggression, but the use of force required to “neutralize and deter future aggression” which might be caused in the future.\textsuperscript{371} In other words, the U.S. use of force should be parallel to the intensity of the future attacks predicted by al Qaeda or Taliban in order to deter or reduce them.\textsuperscript{372}

In response to these threats, the U.S. used its entire military arsenal to attack al Qaeda campuses in the territory of Afghanistan.\textsuperscript{373} The attacks continued to expand to reach the civilians buildings and airports.\textsuperscript{374} It also expanded to include an aim to outset the Afghani government, Taliban, in order to install a new government.\textsuperscript{375} However when analyzing the 9/11 attacks, they were lunched from the U.S. soil, when the terrorist hijacked two domestic airplanes which were lurching from Northeastern United States airports heading to California. The terrorist committed the attacks of 9/11 were hidden in the U.S. territory.

The U.S and U.K attacks on October 7 were not reasonable, as the immediate threats seem to be from the terrorist “sleeping” in the U.S. soil.\textsuperscript{376} It is not reasonable to attack terrorists in another territory for a threat caused by terrorists activated in the territory of the State acting in self-defense. Also the objective of changing the regime in Afghanistan does not fit the reasonableness of the proportionality requirement, as the Taliban regime was still welcomed by the people of Afghanistan for providing some State stability.\textsuperscript{377} This objective also contradicts the Charter’s self-determination purpose and the right of States to survive as sovereign entity stated in Article 1 (2).\textsuperscript{378}

\begin{footnotes}
\item[370] The argument of the ongoing threats exposed to the U.S. and U.K could be found in the U.S. letter to the Security Council, Bush speech to the nation, U.K. government report, and British Prime Minister’s speech after the attack.
\item[372] Id.
\item[374] Id.
\item[375] Id.
\item[376] Id.
\end{footnotes}
reasonable to follow a strategy, which eliminate threats of terrorism from the U.S territory itself other than attacking Afghanistan.

Also the U.S. and U.K. attacks were excessive on the basis of time limit and number of casualties. In the sense of casualties numbers, it was argued by Marc W. Harold that the number of civilians casualties caused by the U.S. and U.K. air bombing in Afghanistan exceeded the number of casualties in 9/11 attacks.\(^{379}\) However, the argument of comparing the numbers of casualties might be, to some extent, doubtful, as there are disagreements between studies on the number of casualties caused by the U.S. and U.K. invasion and whether the variations were considered as a reason of direct or indirect use of force “landmines, unexploded ordnances strikes and the long-term effects of warfare.”\(^{380}\) However, still the U.S and U.K. attacks in the territory of Afghanistan are excessive as they continued for 10 years. This expansion in time limit in order to eliminate future threat is not proportionate to the attacks of 9/11 or the argument of preventing further threats.

According to the U.S. and U.K, their legitimate purpose is to defeat al Qaeda terrorist organization in order to secure their territories from further threats. The lawfulness of the attack under proportionality standard is measured by the capacity of the U.S and U.K to achieve the desired result.\(^{381}\) However, the expansion of using force in self-defense to include overthrowing Taliban regime, attacking terrorist in another territory while the threats seem to be from terrorists in their own territory, the number of civilian casualties due to the excessive power used, and the expansion of the attack’s time limit does not stand as proportionate.\(^{382}\) Neither did the U.S. nor the U.K. follow the legal basis of using force proportionately in self-defense under Caroline standard.

c. Immediacy.

According to Chapter II, immediacy does not mean that self-defense must be exercised while the armed attack is in progress.\(^{383}\) The State acting in self-defense still must be given a “reasonable” time to do its counter-measures.\(^{384}\) In other words, there must be no


\(^{384}\) *Id.*
“undue time-lag” between the armed attack and the use of force in self-defense.\textsuperscript{385} To conclude whether the U.S meet the immediacy standard of acting in self-defense, and whether the three weeks delay is still justified under immediacy standard of self-defense, I will apply the case on a two notable provisions given by Dinstein in his argument of immediacy in the war of self-defense.\textsuperscript{386}

The first provision stated by Dinstein which has to be noticed while arguing the immediacy of any use of force under self-defense is that the “war of self-defense does not have to commence within a few minute, or even a few days, from the original armed attack.”\textsuperscript{387} In the context of 11 September attacks, it means that the U.S. is not suppose to shift to the status of war without been given a reasonable time to consider the measurements needed, whether to prepare its military equipments, doing negotiations between the Congress and the government on using its armed force, or studying the scale of the hostility. Three weeks is a fair time for the U.S. to get ready to lunch its counter self-defense attack for its plans to eliminate the threats of terrorists. The use of force in self-defense in the Gulf War 1990 shows that the time lag could reach a half year and still the response is lawful under\textit{Caroline} standards.\textsuperscript{388} However, according to Article 51 of the Charter, States have the right to use force in self-defense if there was “no moment of deliberation” until the Security Council is sized with the matter taking the necessary measures to maintain international peace and security.\textsuperscript{389} The Security Council made two resolutions, which did not authorize the use of force in self-defense, as will be discussed in detail in the next Chapter, but it called all States to work together and cooperate taking lawful measures in order to prevent terrorism future threats.\textsuperscript{390} According to the resolution; dialogue, diplomacy, or exchanging police information were seen the measurements imposed by the Council for the dispute.\textsuperscript{391} Therefore, although the three weeks time-lag between the terrorist attack and 7 October might be seen reasonable for the U.S. to prepare a counter attack, still neither the U.S was authorized by the Council to use force nor it seek peaceful settlement for the dispute in question, as it had more than a moment for deliberation to do so.

The second provision stated by Dinstein is that, even if the time between the original attack and the self-defense is longer than usual, still the immediacy standard is meet if the

\begin{thebibliography}{9}
\bibitem{385} Id.
\bibitem{386} Id, at 267.
\bibitem{387} Id.
\bibitem{388} Id at 268.
\end{thebibliography}
delay in response is justifiable in the sense of trying peaceful negotiation for the dispute. In another words, if State A attacked State B, instead of using force acting in self-defense, State B could negotiate peacefully with State A to find other settlements for the dispute. If the negotiation between States failed, State B, the victim State, still has the right to invoke its use force in self-defense even if it took long time in the negotiation as long as serious peaceful attempts took place in this long period. In the case of 11 September attacks, the U.S. indirectly refused to solve the dispute peacefully with the government of Afghanistan. The U.S refused to submit evidence of bin Laden’s responsibility to the Afghani government or to any official international body concerned. In addition, it refused the offer presented by the government’s ambassador in Pakistan to hand bin Laden to a third State when evidence is supported. The U.S. negotiations with the government of Afghanistan were not considered serious, as it lacks cooperation and transparency. In addition, there were no enough efforts made to determine whether the government of Afghanistan fulfilled the objectives of the U.S. or not. In that sense, the three weeks time lag is seen unreasonable stretching of time. The U.S delay in responding is not justifiable as it did not negotiate in order to maintain peace, but to show reasonableness of using force. U.S negotiations were a matter of political formalities to show peaceful intent.

Although immediacy might be reasonable in the sense of the time required for the U.S. to prepare for the attack in self-defense, still it might be considered unreasonable as it did not seriously seek peaceful negotiation and refuse every effort made during the time lag. It worth mentioning that there are arguments which believe that the U.S. immediacy standard was meet in 7 October, however they still argues that necessity and proportionality standard are not meet. C. Conclusion

The U.S. did not act in legal self-defense under Article 51 when used force in Afghanistan on 7 October. According to Article 51 of the United Nations Charter, States have the right to act in self-defense if it was subjected to an “armed attack”, however it
was concluded in Chapter III that 9/11 was not an armed attack triggering the right to act in self-defense according to Article 51.

The argument that the Congress legislation could stand, as a legal ground for the U.S. to attack Afghanistan is not accepted on two bases. Firstly, the prohibition to use force is a preemiptory norm, therefore according to Article 44 (5) of the Vienna Convention on the Law of Treaties, “if only part of” the Legislation contradicts “an existing jus cogens” the whole of the Legislation is “void.” In this case, the Congress authorized the President to use force, however it is not concerned with justifying the use of force on the international sphere, the only body which is concerned to authorize force internationally is the Security Council. Therefore, the Congress breached the general obligation of the “prohibition to use force” jus cogens norm when authorized the U.S. to use force contrary to the Council and consequently the whole of the Congress authorization is void. Secondly, States when joined the United Nations they accepted the laws of the Charter to exist in their policy and legal application of law whether in their national or international domain. Therefore, national legislations do not over ride already existing international law.

The U.S. and U.K. also raised the argument of “future threats” that might come from al Qaeda terrorist groups. According to the readings of the U.S. letter to the Council, the U.S. intent when attacking Afghanistan is to “prevent and deter further attacks on the United States.” Also the U.K. showed interests in attacking Afghanistan to “avert the continuing threat of attacks from the same source.” These two argument shows that both administrations intent was not only acting in self-defense as they were subjected to an armed attack, but also acting in anticipatory self-defense to prevent future attacks as they have evidence of the organization well to commit further attacks. As mentioned before I believe that anticipatory self-defense is legal under international law. It will not be logic that a State has to wait until an armed attack hits it causing damage then starts to invoke its right to self-defense under Article 51. However, I still believe that for an anticipatory self-defense to be legal it must be under these conditions; first is that the attack by the aggressor State should be overwhelming, second, is that the evidence of an overwhelming attack should be based on concrete evidence, third, these evidence should have been submitted to the international body concerned, Security Council. Applying these conditions on the case of 7 October attacks, it would not be legal for the U.S. or the U.K. to use force back then.

Analyzing the attacks of 9/11, the imminent threats of future attacks are seen from terrorist sleeping in the U.S. soil not from Afghanistan. The attacks of 9/11 were launched from the U.S. airport using domestic airplanes. However, there were no terrorist attacks launched from the territory of Afghanistan. The thing here is that Afghanistan does not seem to form an imminent threat to neither the U.S. nor the U.K territory in
order to see the attacks on 7 October as a legal anticipatory self-defense, and if it does form an imminent threat, concrete evidence should support the claim of an overwhelming attacks threats from the territory of Afghanistan to prove the legality of an anticipatory use of force by the US and UK. The U.S. cited evidence gathered by interrogations from FBI and CIA to al Qaeda’s operators in prison, however, these evidence are doubtful, as it was argued that prisoners said incorrect information as they were subjected to torture. It was also concluded that the British government report on 9/11 attacks HMG’s Report does not have any evidence of neither a direct responsibility of bin Laden on the attacks, nor his willingness to commit further ones. Moreover, if one's might be seen prejudiced on the U.S. claims on its evidence, still the U.S. does not seem ready to submit them to any other body even the Council. The U.S. letter to the Council notifies that it has “obtained clear and compelling information” on al Qaeda and Taliban responsibility on the attacks, however, they did not submit these evidence to the Security Council. When Afghanistan asked for evidence, the U.S. said that the evidence was classified. It seems that the U.S. took the decision of war since the first day when President Bush said “[d]eliver to United States authorities all of the leaders of Al Qaeda…or… share in their fate.”

Although I support the legitimacy of anticipatory self-defense in general, still there are three main conditions must have been followed to justify its application, which were not followed by the U.S. prior to the use of force on 7 October. First, the future overwhelming argument was not satisfied, as the threats seems to be from inside the U.S. and no threats were seen from the territory of Afghanistan. Secondly, if the U.S. believes that future threats might come from the territory of Afghanistan, these claims must be concrete evidence based on hard intelligence. However, the U.S. cited evidence in 9/11 Commission Report which were gathered by torturing al Qaeda’s members and are considered doubtful. The U.K. Government Report stated that Afghanistan forms future threats toward its nation, however, no direct evidence proved this claim in the report. Finally, the evidence of imminent attacks, that might justify the use of force in anticipatory, should have been submitted to the Security Council; however, the U.S. claimed confidentiality. U.S. and U.K. attacks on Afghanistan do not seem as a legal application of anticipatory self-defense.

Finally, if 9/11 was seen as an armed attack which justifies the U.S. to act in self-defense according to Article 51, still necessity, proportionality, and immediacy in Caroline standards must be meet. Although the satisfaction of immediacy standard is negotiable, still the U.S. attacks were not necessary or proportionate. It might be argued that the three weeks delay is a reasonable time lag for the U.S. to reconsider its military status; however, it still did not use this time to peacefully settle the dispute. Moreover, the U.S and U.K attacks were not a response to instant, overwhelming threats, and that narrowed all the other options but to go to war. It seems that there was no overwhelming
attack, the threat of further ones had subside after the 9/11 attacks, therefore to support its argument under Caroline necessity condition, the US had to try other peaceful forms to deter future attacks. Although Taliban was welling to hand over bin Laden or put him into trial when evidence submitted of his responsibility, the U.S. refused any negotiation with Afghanistan when the President said “demands are not open to negotiation or discussion.” The U.S. had other choice of means to settle the dispute peacefully. However, its efforts were not considered serious but a matter of “ritual punctilio.”

The U.S. and U.K. attacks on 7 October must fulfill another condition of Caroline which is proportionality. The attacks were not proportionate to neutralize and deter future attacks argument by both administrations. The U.S. attacks were heavy as it used most of its military arsenal in the territory of Afghanistan. Moreover, the number of the casualties caused and the extension in the period of the attacks over 10 years could not seen proportionate. Moreover, proportionality is measured by the capacity to achieve the objective needed, the argument of the U.S. to overthrow the Taliban regime does not fall under proportionality. It is an excessive unneeded exercise of power toward the government of Afghanistan; it contradicts also a concrete rule of the Charter, which is the right of States to survive as sovereign entity. Therefore the attacks are not proportionate to the threat claimed by both administrations, they exceeded the objective of deterring further attacks.

To sum it all up, U.S. and U.K. attacks are not legal self-defense under international law because of three arguments. First the U.S. was not subjected to an “armed attacks” on 9/11 which trigger the right to invoke self-defense under Article 51. The attacks were anything but armed; therefore, other measurements could have taken place rather than using force on 7 October. Secondly, U.S. did not strengthen the claim of its right to attack Afghanistan as an application of anticipatory self-defense to prevent future attacks. It was concluded that threats of an attack from the territory of Afghanistan were not imminent. Moreover, it seems that neither the U.S. nor the U.K. had solid evidence of an overwhelming attack to submit to the international body concerned to prove legitimacy of the anticipatory self-defense. Finally, it was assumed that if 9/11 was an armed attack which gives the U.S. the right to use armed force in Afghanistan under Article 51, still Caroline standards of necessity, proportionality and immediacy were not applied on 7 October. The U.S. and U.K. objective changed on different scales considering the time limit, number of casualties, and removing the government of Afghanistan.
V. Security Council Role in the Aftermath of 11 September Attacks

According to Article 24 (1) of the United Nations Charter, Security Council is entitled with the maintenance of international peace and security. The reason why Bush administration knew the fact that his State’s response should be under an authorization from the Council. In this Chapter it will be examined whether the U.S. and U.K were justified to use force in Afghanistan on 7 October or not.

A. The U.S. and U.K. Unilateral Response Justifications.

It was concluded in Chapter III that 1368 and 1373 Security Council resolutions did not characterize the attacks of 11 September as armed attacks which would trigger the U.S. right to act under Article 51 by using force against Afghanistan. However there are other arguments related to the Council could support the U.S. and U.K. attacks on 7 October. In this part it will be discussed that still both resolutions could constitute an authorization for both administrations to use force. Moreover, the letter by both administrations show that they followed the legal pattern presented in Article 51 that “measures taken by members...shall be immediately reported to the Security Council.” Moreover, the Council is the international body concerned with maintaining international peace and security, in the case when the U.S. and U.K. are breaching the law, it would impose that they are the aggressor States, which was not the case in 7 October.

1. Security Council 1368, and 1373 Resolutions

It was mentioned in Chapter II that States have the right according to Article 51 to use force in response to an armed attack until the Council is sized with the matter. On 12 September, the Council adopted 1368 resolution that draw the pattern of response on the terrorist attacks. It was mentioned before, in Chapter III, that it was seen as an implied authorization by the Council to the U.S. to use force when it stated that it recognizes “the inherent right of individual or collective self-defense.” Moreover, in the negotiation prior to the adoption of the resolution, Mr. Cunningham on behalf of the U.S. suggested the actions, which probably will be followed by his government when called all States to “stand together with the United States to win the war against terrorism” (emphasis added). The statement by Mr. Cunningham in the negotiations prior to 1368 resolution suggests another course of actions to the episode when it used the word “war.”

398 S/Res/1368 (2001)
The Council’s more substantive response was drawn on 28 September in resolution 1373 when it stated “the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts (emphasis added).”\textsuperscript{400} The resolution 1373 language could be read as an “almost unlimited mandate to use force.”\textsuperscript{401} Moreover it stated in the resolution that the Council expressed “its readiness to take all necessary steps” to deter terrorism, which also could be read as an implicit authorization to the U.S. to use armed force acting in self-defense.\textsuperscript{402} It was argued that although both resolutions did not directly authorize the use of force, however, they still give an acceptable argument for the use of military actions in Afghanistan. Other authors such as Thomas Franck, argued that both resolutions authorized the U.S. to “use force against the Taliban, and they do so without creating a new set of self-defense laws.”\textsuperscript{403} Frank thinks that the authorization is well read in both resolutions language without the need to find other interpretations in the rules of self-defense. However, both the U.S. and the U.K. did not rely on both resolutions when used force on 7 October in the Operation Enduring Freedom but still according to Michel Byers they provide both administrations with “at-least-tenable argument once they decide for political reasons to use force to prevent terrorism.”\textsuperscript{404}


One of the main roles of the Council mentioned in Chapter II is that it should receive international forum from States acting in self-defense, considering the flow of the events, the cause of invoking self-defense, and evidence of responsibility of the aggressor State.\textsuperscript{405} According to the Council investigations to the evidence provided, it has the option whether to give “it’s retroactive…approval to the exercise of self-defense” by the State or it could decide that the State “engaged in…self-defense” is the aggressor State.\textsuperscript{406}

\textsuperscript{400} S/Res/1373 (2001)
\textsuperscript{401} MICHAEL BYERS, TERRORISM: THE USE OF FORCE AND INTERNATIONAL LAW AFTER SEPTEMBER 11, 402 (2010), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5575&context=faculty_scholarship
\textsuperscript{402} Id.
\textsuperscript{406} Id., at 237.
On 7 October, the U.S and U.K. reported their actions against Afghanistan in their letter to the Security Council. The U.S report stated that it was acting together with the U.K. under Article 51 “in the exercise of its inherent right of individual and collective self-defense following the armed attacks that were carried out against the United States on 11 September 2001.” The report stated that the U.S. has classified evidence of responsibility of al Qaeda and Taliban support of the 9/11 attacks. However, the U.S. did not state the exact evidence proving the link between the attack and the terrorist organization. Bush in his speech refused to show evidence when stated that his demand “are not open to negotiation or discussion.” When asked again for evidence, the U.S. administration refused to show evidence as they were classified, it decided, “it was not necessary to make public its evidence against Mr. Bin Laden (emphasis added).”

Authors such as Dinstein, speaking generally and not on the U.S. war on Afghanistan, stated that even if evidence were classified they must be shown to the Security Council. He added that ambiguous evidence reported to the Council might create a “smokescreen” of the legality of any self-defense act. However, Judge Schwebel argued the issue of classified evidence in Nicaragua, clarifying that it’s not obligatory for States to public its evidence of measurements they follow in their acts of self-defense. He said that measurements taken by States in self-defense might be “overt or covert.” He added that covert actions also might not be reported to the Security Council, as the duty to report is just a procedural matter that does not “deprive a State of the substantive right of self defense.” Therefore, not supporting evidence on the responsibility of 9/11 attacks in their reports to the Council is not a concrete proof of an illegal use of force by the U.S. or the U.K. in their attacks of 7 October 2001. It might be reasonable for the U.S. not to show evidence as it might affect its intelligence sources which could help in preventing further threats and attacks by terrorists. That was the case to the U.S. administrations when refused to show evidence as they were classified.

3. The Council did not Condemn the U.S. and U.K use of force in Afghanistan

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408 Transcript of President Bush’s address, CNN, Sept. 21, 2001.
411 Id.
412 Id.
413 Id.
414 Id.
The Security Council has the power, under the United Nations Charter, to consider whether the use of force by the U.S. and the U.K. is justified under self-defense or not. It could give its retroactive approval on the attack once it is satisfied with the legal grounds submitted by both States. Also it could conclude that the attacks were illegal and demand the withdrawal of the forces engaged. The fact that the Council remained silent on the matter and did not condemn U.S. and U.K. attacks could be argued as an implicit agreement that the war was “legitimate exercise of self-defense.” If the Council did regard retroactively that the acts by both administrations are illegal under the United Nations Charter, it would have condemn them. Some authors such as Kirgis F, *Israel’s Intensified Military Campaign against Terrorism*, and Miller J, *The Legal Implications of the Response to September 11*, argued that the Councils “lack of response” is implied as an acceptance of the legality of self-defense. They added that although questions were raised considering the U.S. and U.K. tactics in the operation, governments did not challenge “the right of the United States to do so” which could be seen as an indication to the expansion of the right to self-defense to include “governments that harbor or support terrorist groups which commit armed attacks in other countries.” Security Council reaction or negative response and governments reservations on commenting on the legality of the U.S. and U.K. attacks are argued as an implicit approval from the Council to their use of force under the United Nations Charter.


According to Article 51, States under an armed attack have the “inherent right of…self-defense” to act without an authorization from any international official body. The requirements of an armed attack give the right for States to act even without the consent of the Security Council as they are left with “no plausible means short of military action” so they have no option but to repel the attack otherwise a serious damage will be caused if they waited. States in this phase are the first arbitrator for the legality of their acts; however, under Article 51, they have this right until the Security Council took “measures

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417 Id.
419 Id. at 305.
420 Id.
421 Id.
necessary to maintain international peace and security.”  

Three points will be discussed in this part, first whether the Council in both resolution 1368 and 1373 authorized the “unilateral” use of force, secondly, if the report submitted by both States on 7 October justifies their attacks, and finally whether the Council silence is read as an agreement of both States attacks.


If the U.S. had the right to use force to act in self-defense after 9/11 terrorist attacks, this license ends once the Council is seized with the matter. Indeed, the Council showed its readiness to take measures following the terrorist attacks on the U.S. in both resolutions 1368 and 1373. Moreover, the Council, as the international body concerned under Article 39 for taking actions to restore peace, could decide whether military, diplomatic, or economic measures, could be taken by the U.S. in response to the attacks of 9/11. As the international organ responsible for shaping the response, the Council adopted both resolutions that did not authorize the use of force, but drew a broad array of means when criminalized terrorist attacks, ordered freezing the support of terrorism, demanded exchanging police information, capture and prosecute terrorism. Therefore, in reading both resolutions, it could be understandable that the Council did not outline that the U.S. has the right to respond by using force in Afghanistan. According to Gregory Maggs, an American international law professor, he stated that the resolution did not “say what the right to self-defense entails… and it did not say that the United States had a right to act in self-defense in response to the attack by al Qaeda.” The Council did not stand silent in response, but ordered, according to both 1368 and 1373 resolutions, measures other than unilateral military use of force.

According to what is stated in both resolutions 1368 and 1373, the council did not authorize the use of force and especially unilateral use of force. At the end of both resolutions, the Council decided to “remain seized of these matters.” Phyllis Bennis, a former United Nations correspondent, mentioned that according to “UN diplo speak” when the Council decides to remain seized with a certain matter it means that the “decision-making remains in the hands of the Council itself, not those of any individual

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nation.” According to the language adopted in both resolutions on 12 and 28 September, it is shown that the response remains in the hands of the Council. The resolutions show that since terrorism is a threat to international peace and not only the U.S. but also all humanity, therefore the issue is in its “realm of responsibility.” Michel Byers observed that the Council did not legalize the use of force but “encouraging the US to seek authorization once its military plans were complete (emphasis added).” He means that the Council observed that the U.S. must take a further step when it uses force. This step should be requesting the authorization of the Security Council and its approval. Fredric Kirgis added that the Council “indicated that it intended to remain in charge of any use of force” when it expressed in the text of the resolutions its readiness to “take all necessary steps” in deterring international terrorism. The Council indicated that it is “ready to take further steps” but did not authorize States to take steps in unilateral response. In that sense the argument that the Council language is understand as an authorization to the U.S. to use unilateral force, is doubtful.

Moreover, it was argued that the Council intention was to act multilaterally in response to the episode. When statements from Council members, in the negotiations prior to the adoption of resolution 1368, are observed, it is understandable that they requested a multilateral response led by the Security Council. Unlike the U.S. statement mentioned by Mr. Cunningham, other States members statements identified the attacks of 9/11 as an attack on all humanity, which calls the need for an “international, global, or multi-lateral response” led by the Council itself not by the U.S individually. States representatives stressed the criminality of the attacks and its affect on the humanity and called the need for a global response. In addition, United Nations Secretary General, Kofi Annan, argued in favor of a multilateral response, when said on 24 September 2001 that the attacks of 9/11 “was a blow, not against one city or one country” but attacks on all nations, he added that the response is to “build…a universal coalition [in order to] give global legitimacy to the long-term struggle against terrorism (emphasis added).” Kofi Annan

429 Id.
433 Id.
434 Id., at 296.
435 UN GAOR, A/56/PV.7, General Assembly 56th Session, 7th plenary session, 24 September 2001, Secretary General at 1. See also, Id at 299.
point was to call the nations, in addition to the U.S., to act under multilateral response coverage to deter the continuing struggle of terrorism.\(^{436}\)

Comparing representative’s statements and the language of 1368 and 1373 resolution with the acts made by the U.S. on 7 October, it seems that there are gaps between the Council intention to act in a multilateral response and the U.S. unilateral response.\(^{437}\) Government representatives speaks prior to the adoption of resolution 1368, Security Council intention understood in 1368 and 1373 resolutions, and Secretary General statement to the General Assembly shows that the Council’s response commensurate with the argument of multilateral response led by the Council as the 9/11 attacks were on all humanity and threaten international peace and security of all nations not just the U.S. Thus, U.S. lack authority to attack Afghanistan under the justification of Security Council resolutions. However, still the resolutions give the U.S. the right to obtain an authorization from the Council to use military force which would legitimize its act.\(^{438}\)

2. U.S. letter to the Council does not Justifies 7 October Attacks.

According to the United Nations Charter, a State using force under Article 51 has to submit a report to the Security Council, which describes a “minimum plain” reasoning of self-defense invocation and provides clear evidence connecting the Aggressor State to the attack and proof its responsibility.\(^{439}\) On 7 October U.S. reported its attack on Afghanistan when its representative to the Council stated, “[m]y Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks (emphasis added).”\(^{440}\) The U.S. representative recognized his State right to use force against Afghanistan under self-defense without clear evidence neither stated publicly in his letter nor submitted to the Council in a confidential way.\(^{441}\) It was argued in the previous part that the U.S. did not show evidence in its report to the Council as they were classified, however, if evidence could not be made fully public at least it must have been


\(^{437}\) Id., at 397.


submitted to the international official body concerned, the Security Council.\textsuperscript{442} The U.S. might be convinced with the evidence it has, however, others are not, evidence must have been shown whether to the Council or at least to a neutral State, to proof legitimacy of the attack. Arguing what was observed by Judge Schwebel, that States acting in self-defense have the option not to show their evidence as they might be “covert”, Dinstein said that nothing in the text of the Charter imposes limits to the duty of States to report only overt measurements, “limitations of the reporting duty to overt operations is not congruent with the Charter.”\textsuperscript{443} In other words, although confidential evidence might not be publicly shown, however, still the U.S. have the duty to submitted to the Council reasonable evidence of the 7 October attacks. It might be seen that the U.S. itself was not convinced with the evidence it has, as it escaped in more than an occasion the question of the evidence.

State when providing a report to the Council considering a claim to use force in exercising its right of self-defense does not mean the Council approval to that claim. Submitting a report to the Council does not guarantees that the claims stated in it will be accepted.\textsuperscript{444} The U.S. report on 7 October which stated that it was about to launch an armed attack on Afghanistan does not proof \textit{per se} that the attacks were legitimate use of force, still an authorization from the Council to use that force is needed to consider its attacks as legitimate exercise of using force.\textsuperscript{445}

3. The Council Negative Response is not a Proof of the Legitimacy of the Attacks.

Not condemning the attacks of 9/11 whether by the Council or the States members does not suggests that the Council agreed that the attacks were legitimate and that the member have no reservations on the justification of the attacks.\textsuperscript{446} The Council was criticized for not making any clear announcement on the legality or illegality of the U.S. attacks on Afghanistan, however, the Council like the rest of the whole international community was affected by the profoundness and ugliness of the horrific 9/11 attacks.\textsuperscript{447} The Council kept the matter of justifying or avoiding an attack on Afghanistan vague, the climate at that time was an “overwhelming sympathy for the US and underwhelming sympathy for Afghanistan.”\textsuperscript{448} Moreover, even if States would have reservations considering the

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\textsuperscript{444} Id. at 241.
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\textsuperscript{446} Id.
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\textsuperscript{447} Id.
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\textsuperscript{448} Id. at 307.
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legality of the attack, they would have not declared them. Any criticisms would have been viewed as an “anti-American” rather than “pro-international law” argument.\textsuperscript{449} Christian Gray made an argument that the Council stays silent in the cases when there is one of the permanent members of veto states is involved.\textsuperscript{450} Sikander Ahmed Shah added that States abstained from condemning the attacks on Afghanistan as the fear of losing “privileges and assistance from the United States or economic and non-economic punitive retaliatory measures from the sole hegemonic power in the world.”\textsuperscript{451} Therefore, the somewhat “muted world response” on the legality of the U.S. attacks on Afghanistan 7 October could not be viewed as a “passive acceptance” and support on the legality of the U.S. U.K. war.\textsuperscript{452} Moreover, the Council failure to note validity of the actions or condemn them retroactively, show the Council sympathy with the U.S. not its authorization for the war.\textsuperscript{453} No “definitive findings” on the legality of the U.S. U.K. attacks could be based on the Council actions or lack of reaction.\textsuperscript{454} 

C. Conclusion.

According to resolutions 1368 and 1373, the Council is not authorizing a unilateral armed attack on Afghanistan. The U.S. when attacked Afghanistan it took advantage of the international widespread sympathy with the horrific attacks toward it on 11 September 2001. In re-reading both resolutions, their language are closer to shaping the Council intent to a multilateral response in deterring terrorism threats led by it, not as an authorization for the U.S. to respond unilaterally. However, still the Council language argued as an encouragement to the U.S. to ask for a Security Council authorization to use force once its military plans are ready. The Council when stated that it “remain seized of this matters” shows its responsibility to draw forms of counter-actions to the episode, whether military, economic, or political. The shape of these counter-actions were seen in States representatives debate prior to the adoption of 1368 resolution which are contrary to the actions taken by the US. States called for the need for a global response led by the Council as the terrorist attacks were attacks on all humanity not only on the US. Moreover, multilateral response argument was stated directly in the General Assembly when the UN Secretary General, Kofi Annan urged the need to build a universal coalition in order to fight terrorism as the attacks were on all humanity. It argued that the Secretary
General address was, however, after a realization that the U.S. will sideline the Security Council responding unilaterally without seeking for its sanctions.455

The 1368 and 1373 Security Council resolutions called all States to unify to deter terrorism by different means; police investigations, exchanging information or any other means “led by it” without authorizing a unilateral response by the U.S. on the State of Afghanistan. Though, there are confusions on what both resolutions “affirmatively” authorize.456 Generally speaking, if one might say that the language of both resolutions are not clear on what they directly authorize, still they are clear on what they do not authorize.457 Unlike what was said by Frank, the resolutions show no facts of a clear authorization for the U.S. to use force.458

Two points must be argued considering both the U.S. and U.K. letters to the Council on 7 October. Firstly, is that the U.S. and the U.K. did not cite any evidence of responsibility on the attacks whether in their letters to the Council, 9/11 Commission Report, or HMG’s report. Secondly is that reporting to the Council is not a proof per se that the use of force was legitimate. The U.S. refused to show evidence to Afghanistan when it asked for, as they were classified, also it did not hand the evidence to the Security Council. The U.S. should have shown evidence, at least to the Council. The guilt of Afghanistan, which called for a use of force in an armed attack, should have been proven by “amassing of evidence.”459 Theses evidence, according to international law Article 51, should have been “immediately reported” to the Security Council or even to any “other appropriate international agencies.”460 The Council should determine punishments and means of implementations relying on the facts proven by the evidence submitted, even before the U.S. launches its attacks on 7 October.461 According to Article 39, the Council might subject Afghanistan, if satisfied with the evidence, to any punishments, whether measures not involving armed force such as political pressures, and economic coercion, or armed measures such as approving a military invasion by the US. In accordance with the weak evidence provided, Arab League, Islamic World, and the Council were not convinced

455 Id, at 299.
457 Id. Still the U.S. did not rely on the Security Council resolutions to justify its attacks on Afghanistan as mentioned before in Chapter VI. See also, MICHAEL BYERS, TERRORISM: THE USE OF FORCE AND INTERNATIONAL LAW AFTER SEPTEMBER 11, 403 (2010), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5575&context=faculty_scholarship.
460 Id.
461 Id.
with the legality of the attacks. It seems that Washington is the only organ that was satisfied with this evidence.\textsuperscript{462} It seems that having no access to concrete intelligence sources to cite in its report was the reason why neither did the U.S. seek an authorization from the Security Council nor submitted this evidence to any international body.\textsuperscript{463}

The world silence cannot be considered as a passive acceptance of the war on Afghanistan. Although the Council and other States had reservations on the U.S. attacks, they could not explicitly show them, as they might be seen as contradicting the U.S. interests in securing its own nation and people after the 9/11 grave attacks. They were affected also by the climate of sympathy followed the attacks.\textsuperscript{464} The fear of losing privileges given by the U.S. was the reason why governments did not accuse the U.S. attacks on Afghanistan. Moreover, the Council when condemn 9/11 attacks could be compared to what was stated by Lobel J on 1998 after the U.S. missiles strike on Sudan and Afghanistan, he said that “any direct confrontation between the Security Council and the United States…is certain to fail.”\textsuperscript{465} The U.S. policy is clear, he said, “[i]t will veto any resolution calling for an investigation into the attack.”\textsuperscript{466}

\textsuperscript{462} \textit{Id.}
\textsuperscript{465} \textit{Id}, at 295.
\textsuperscript{466} \textit{Id}. Christian Gray also stated that in general, authors and policy makers criticized the Council for its lack of actions. She added, most probably the Council doesn’t name the state responsible on the use of force as it might be one of the permanent members veto states. \textit{See, Gray} at 17.
VI. Conclusion

When international law provisions, including the United Nations Charter, customary law, ICJ’s rulings, and general principles, are applied to the October 7 2001 U.S.-U.K. military response in the territory of Afghanistan in the aftermath of the 9/11 terrorist attacks, it can be concluded that these attacks were unlawful. States have the right to use force under two circumstances, neither of which was found in the US-UK war. These two circumstances include using force in self-defense after being subject to an armed attack, and obtaining authorization by the Security Council. Although the U.S. justified its use of force as an application of its inherent right to self-defense in its letter to the Council, the acts were still not legitimate for three main reasons.

First, on the day of 11 September 2001, the U.S. was not exposed to an “armed attack” under the comprehensive definition of Article 51 of the Charter, which would have given it the right to use force in self-defense. The U.S. claimed that Taliban were responsible since they “harbor” al Qaeda. However, according to Nicaragua test, in order to count the Taliban government responsible for al Qaeda, it must have an “effective control” over the operation of 9/11, supporting arms, or providing safe-haven do not amount to an armed attack. The U.S. did not prove the Taliban’s effective control on the attacks rather it stated in the letter to the Council that it had a “central role” and supported al Qaeda in the attacks. If the U.S. could provide evidence of a direct connection between al Qaeda and Taliban, as the latter supported the former with weapons, training, or safe harboring, Afghanistan might have been considered responsible for a mere use of force or aggression as it violated the prohibition stated in Article 2 (4). Nevertheless, it could not be responsible for an armed attack on the U.S., which gives it the right under Article 51 to use force in self-defense.

Second, according to the U.S. letter to the Council, assuming that it suffered an armed attack on 9/11 which gives it the right to act according to Article 51 to “prevent and deter further attacks” or according to the U.K. argument to “avert the continuing threat of attacks from the same source”, still the U.S. is bound by the customary law requirements to act in legal anticipatory self-defense. The U.S. failed to meet necessity, proportionality, and immediacy self-defense requirements when it attacked Afghanistan on 7 October. The attacks were not necessary- there were other options available to the U.S. and U.K., such as a police investigation, extradition, or diplomatic negotiations. Moreover, the U.S. attacks did not include the proportionate objectives of self-defense which was seen in the waiver of the Afghani government or the extension in time of the attack. The evidence showed that the U.S. attempt to end the dispute peacefully was not serious. Moreover, to attack another territory in anticipatory self-defense, the threat must be imminent and based on concrete evidence supported to the Council. The U.S. letter to the Council referred to evidence of the Taliban’s support and intent to commit future
attacks, however, it did not submit them to any international official body. The evidence of both the U.S. and U.K of an imminent Taliban threat were questionable as they were gathered by torturing prisoners. The U.S. and U.K. attacked Afghanistan under the argument of self-defense as it formed an overwhelming threat, however, it did not satisfy customary law requirements. The only threat seemed to be from terrorists inside the U.S. territory, and there was no necessity to go bomb Afghanistan, as there was no evidence to prove future threats by it.

Finally, although the Security Council declared in both resolutions 1368 and 1373 that the 9/11 attacks were threats to international peace and security, it did not authorize the U.S. to use force in self-defense against Afghanistan. Moreover, the U.S. and U.K. reports to the Council, were not proof per se of the legality of their attack, and yet still the Council must have clearly authorized them to use force. The Council language in both resolutions called for a multilateral response led by the Council, and not a unilateral attack by the U.S. However, the Council gave the U.S. the opportunity to call for an authorization once its military plans were ready. Although the U.S. did not argue that the Security Council resolutions justified its use of force, still the attacks should be considered illegal, as the Council did not authorize them.