

THE SEPTEMBER 11 TERROR ATTACKS

AN AUSTRALIAN RESPONSE[†]

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and

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I. INTRODUCTION

In 2001, a new chapter in international law and relations was written when the United States was subjected to terror attacks on its mainland on September 11. In responding to these attacks, the United Nations Security Council should act promptly, pursuant to Chapter VII of the 1945 United Nations Charter (the Charter), to take whatever action is needed to restore international peace and security and to bring those responsible for the attacks and any later attacks (military, chemical or biological) to justice. Any steps to bring the perpetrators to justice and the administration of that justice should be taken by the United Nations and the Security Council should immediately establish an international criminal tribunal to try the perpetrators.

II. THE RIGHT TO SELF-DEFENCE

Besides Security Council action under Chapter VII, States have a separate right of individual or collective self-defence against armed attack under international law. As reiterated by the International Court of Justice (ICJ) in *Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua case)*,¹ the right to self-defence is based on customary international law that co-exists with the law established by the Charter. This principle is expressly preserved by Article 51:

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¹ (*Nicaragua v United States*) [1986] ICJ Reports 14, 94, 102-103.

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, *until the Security Council has taken measures necessary to maintain international peace and security*.²

It is clear that where another State (in this instance, Afghanistan or its Taliban leaders, at least) provides bases or refuge for the attackers, the State under attack or under the threat of attack may use armed force against the former State in exercise of the right of self defence.³ During *The Caroline*⁴ incident in 1837, American Secretary of State, Daniel Webster, enunciated the test for establishing the right of self-defence under international law.⁵ The test requires a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation".⁶ The act must also involve "nothing unreasonable or excessive"⁷ because "the act, justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it".⁸ Subsequent case law has since developed and refined these principles.

The ICJ emphasised these criteria of proportionality and necessity in *Nicaragua*.⁹ In its Advisory Opinion in *Legality of the Threat or Use of Nuclear Weapons*,¹⁰ it also held that "States must never make civilians the object of attack and consequently never use weapons that are incapable of distinguishing between civilian and military targets".¹¹

² Emphasis added.

³ Lauterpacht H (editor), *Oppenheim's International Law* (1992, 9th edition, Longmans, London) 419.

⁴ 29 British and Foreign State Papers 1137; 30 British and Foreign State Papers 195.

⁵ See Shearer IA, *Starke's International Law* (1994, 11th edition, Butterworths, London) 488.

⁶ Per American Secretary of State, Daniel Webster, in correspondence with British authorities regarding *The Caroline*, a vessel that supplied groups of American nationals who conducted raids into Canada: see Shaw MN, *International Law* (1991, 3rd edition, Cambridge University Press, Cambridge) 692.

⁷ *Ibid.*

⁸ *Ibid.* The Nuremberg International Military Tribunal in *re Goering* endorsed this: (1946) 13 *International Law Reports* 203.

⁹ See the Judgment on Merits at para 187-201.

¹⁰ [1996] ICJ Reports 66.

¹¹ *Ibid.*; see Shaw MN, *International Law* (1991, 3rd edition, Cambridge University Press, Cambridge) 692.

The use of armed force and the violation of another State's territory under international law may be justified as self-defence where:¹²

1. an armed attack is launched, or immediately threatened, against a State's territory;
2. there is an urgent necessity for defensive action against that attack;
3. there is no practicable alternative and another state or authority which has the legal powers to stop or prevent the infringement does not use them;
4. the action taken by way of self-defence is limited to what is necessary to stop or prevent the infringement; and
5. in a case of collective self-defence, the victim of an armed attack has requested assistance.

The first three situations are clearly satisfied in the context of the terror attacks on the United States on September 11, particularly in light of the apparently cogent evidence of the threat of further attacks, and the Taliban's refusal to surrender the prime suspect (Osama bin Laden), and refusal to cease operating terrorist training camps.¹³ Any United States action in the exercise of a right of self-defence is, however, limited under international law to actions necessary to stop or prevent an actual or threatened attack. Further, any action that exceeds those limits or is punitive (not preventative) action, objectively speaking, falls into the category of reprisals, which are unlawful under international law.¹⁴ It is, of course, inherently difficult for a State exercising a right of self-defence to determine objectively when such operations have ceased.

¹² Lauterpacht H (editor), *Oppenheim's International Law* (1992, 9th edition, Longmans, London) 422.

¹³ Agence France-Presse, "Taliban braces for showdown with US", 1 October 2001, at <www.afghanradio.com/news/2001/october/oct1n2001.html>.

¹⁴ See 1970 Declaration on Principles of International Law, Section on the Principles on the Use of Force para 6 that expressly prohibits reprisals: Harris DJ, *Cases and Materials in International Law* (1998, 5th edition, Sweet & Maxwell, London) 915. However, there seems to be some controversy today in relation to the use of the expression "reprisal", especially within the context of countermeasures: Shearer IA, *Starke's International Law* (1994, 11th edition, Butterworths, London) 472; note also the Advisory Opinion of the ICJ in *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Reports 66.

Article 51 of the Charter requires United Nations members to report immediately to the Security Council the measures taken in the exercise of the right of self-defence. Such measures do not in any way restrict the Security Council's authority and responsibility to act, as it deems necessary, to maintain or restore international peace and security under Chapter VII, more specifically Article 39 (see below). If the attacks on Afghanistan meet the requirements of necessity and proportionality, they are lawful. Any action beyond those limits is unlawful. For example, threats to attack other States would probably exceed the limits of the right of self-defence unless there is evidence that those States were also responsible in some way for the attacks on the United States.

III. SECURITY COUNCIL ACTION UNDER CHAPTER VII

The above limits do not apply in the same way to Security Council action under Chapter VII of the Charter. It is thus incumbent upon the Security Council to take action to restore the international peace and security shattered by the attacks on the United States. It clearly has the power to do so under the Charter. Article 1(1) provides that one of the purposes of the United Nations is:

[t]o maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Further, Chapter VII empowers the Security Council to:

1. determine the existence of any threat to the peace, breach of the peace or act of aggression (Article 39);
2. make recommendations, or decide what measures shall be taken to maintain or restore international peace and security (Article 39);
3. employ measures not involving the use of armed force to give effect to its decisions (Article 41); and

4. upon deciding that such measures "would be inadequate or have proved to be inadequate" to *"take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security"*¹⁵ (Article 42).

The United Nations is uniquely positioned to respond to the international crisis following the terror attacks on September 11 for the following reasons.

First, as recently as 30 July 2001 the Security Council resolved that the "situation in Afghanistan" constituted a threat to international peace and security in the region,¹⁶ thus invoking Article 39 of the Charter. This resolution followed three of its earlier resolutions¹⁷ pursuant to Chapter VII of the Charter, which demanded that the Taliban:

1. cease the provision of sanctuary and training for international terrorists and their organisations;
2. take appropriate and effective measures to ensure that the territory under its control is not used for terrorist installations and camps or for the preparation or organisation of terrorist acts against other States or their citizens;
3. co-operate with international efforts to bring indicted terrorists to justice; and
4. surrender Osama bin Laden to appropriate authorities in the United States where he had been indicted for the bombings of the United States Embassies in Kenya and Tanzania on 7 August 1998.

In those resolutions, which imposed increasingly severe sanctions on Afghanistan, the Security Council strongly condemned the continuing use of Afghan territory under the Taliban's control to shelter and train terrorists and plan terrorist acts. The resolutions reaffirmed that the suppression of international terrorism was essential for the maintenance of international peace and security. In each resolution, the Security Council resolved to remain seized of the matter. However, the matter of which it is seized does not as yet constitute "measures necessary to

¹⁵ Emphasis added.

¹⁶ Security Council Resolution 1363 on 30 July 2001.

¹⁷ Security Council Resolutions 1214, 1267 and 1333 on 8 December 1998, 15 October 1999 and 19 December 2000 respectively.

maintain international peace and security" so as to preclude collective self-defence by the United States and the United Kingdom.

Second, since September 11, the Security Council has passed two resolutions responding to the terror attacks. On 12 September 2001, it unanimously passed Resolution 1368, stating that it regarded the attacks as a threat to international peace and security. In this resolution,¹⁸ it expressed its "readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations", including its resolve to remain seized of the matter.

On 28 September 2001, the Security Council passed Resolution 1373 reaffirming Resolution 1368 and an earlier resolution condemning all acts of terrorism.¹⁹ The Security Council stated specifically in Resolution 1373 that it was acting under Chapter VII and reaffirmed that the acts of September 11, like any other act of international terrorism, constituted a threat to international peace and security.

These two Resolutions were the trigger for more concrete action by the Security Council.

In both resolutions, the Security Council explicitly asserted the inherent right of individual or collective self-defence in accordance with the Charter. On 8 October 2001, Kofi Annan, referring to "the US and British military response to those attacks", stated that they had since "set their current military action in Afghanistan in that context".²⁰ The day before, United States Secretary of State, Colin Powell, had advised Kofi Annan of the strikes on Afghanistan, and President Bush similarly advised "that the US military had launched strikes against al Qa'ida terrorist training camps and military installations of the Taliban regime in Afghanistan".²¹ Following the request of the United States and the

¹⁸ See Clause 5.

¹⁹ Security Council Resolution 1269 on 19 October 1999.

²⁰ US Department of State, "UN Secretary-General affirms US right to self-defense", International Information Programs, 8 October 2001 at <<http://usinfo.state.gov/topical/pol/terror/01100903.htm>>.

²¹ "Taliban will pay a price: Bush", Dawn (the Internet Edition), 8 October 2001 at <www.dawn.com/2001/10/08/top2.htm>.

United Kingdom, the Security Council met on 12 November 2001 to discuss threats to international peace and security caused by terrorist acts and to be briefed by representatives of the United States and the United Kingdom on the latest developments in Afghanistan.²²

Accordingly, by that date at the very latest, the Security Council should have taken decisive action pursuant to Article 42 of the Charter. The United States had, in accordance with Article 51, reported to the Security Council the measures it had taken to that date in the exercise of its right of self-defence. It then became incumbent upon the Security Council to take "measures necessary to maintain international peace and security" as contemplated by this provision. Additionally, it had the power to authorise the members of the United Nations to use all necessary measures to uphold and implement the relevant Security Council resolutions so as to restore international peace and security.

There is a fairly recent precedent for such action. Following the invasion of Kuwait in August 1990 by the military forces of Iraq, the Security Council:²³

determined the existence of a breach of international peace and security and, acting under Chapter VII, authorised Member States to use all necessary means to restore international peace and security and to uphold a resolution demanding that Iraq withdraw immediately.

A similar Security Council resolution in relation to September 11 would ensure that any further action, including military action, was specifically authorised by the Security Council, which has the power to withdraw or limit that authority if the use of force exceeded the parameters of what is lawful. On 8 October 2001, Kofi Annan stated:²⁴

²² UN Doc S/PV.4413.

²³ Security Council Resolutions 660 and 678 on 2 August 1990 and 29 November 1990 respectively.

²⁴ Annan, "'To defeat terrorism, we need a sustained effort and broad strategy that unite all nations', says Secretary-General", SG/SM/7985, AFG/149, 8 October 2001 at <www.un.org/News/Press/docs/2001/sgsm7985.doc.htm>. Earlier, on 24 September 2001, Kofi Annan urged the General Assembly to respond to the terror attacks by reaffirming the role of law: Barrow, "UN seeks anti-terror role", BBC News, 24 September 2001 at <http://news.bbc.co.uk/1/hi/english/world/americas/newsid_156100/1561373.stm>.

To defeat terrorism, we need a sustained effort and a broad strategy that unite all nations, and address all aspects of the scourge we face. The cause must be pursued by all the States of the world, working together and using many different means – including political, legal, diplomatic and financial means.

There is no inconsistency between the Security Council authorising the use of all necessary means to restore international peace and security (which it has stated is threatened by the terrorist attacks) and in the United Nations pursuing its campaign to encourage widespread ratification and enforcement of existing United Nation treaties against international terrorism.

The primacy of the role of the Security Council in relation to a threat to international peace and security is emphasised in the leading works on international law, such as Professor Lassa Oppenheim's *International Law*.²⁵ They also emphasise that the Security Council, or perhaps even the ICJ, is the ultimate arbiter of the legitimacy of actions taken in the right of self-defence.²⁶

IV. AUSTRALIA'S ROLE

There is a very real reason why it is in Australia's interest to urge the Security Council to pass a resolution specifically authorising military action in Afghanistan. This is because, absent such a Security Council resolution, there is at the very least a question mark as to the legitimacy of Australia's involvement in any military action against Afghanistan.

The Australian government, supported by the Opposition, appears to rely on the ANZUS Treaty signed in 1952 between Australia, New Zealand and the United States as authorising Australia's participation in military action by the United States in Afghanistan in response to the

²⁵ Lauterpacht H (editor), *Oppenheim's International Law – A Treatise, Volume II on Disputes, War and Neutrality* (1948, 7th edition, Longmans, London) 158-159. This treatise has been described as "probably the most influential English textbook of international law": Schmoeckel, "The internationalist as a scientist and herald", (2000) 11:3 *European Journal of International Law* 699.

²⁶ Shearer IA, *Starke's International Law* (1994, 11th edition, Butterworths, London) 25.

terror attacks of September 11.²⁷ It is not, however, entirely clear whether this Treaty, which implicitly relies upon Article 51 of the Charter to justify collective measures in response to an armed attack, applies in this context.

The relevant provisions of the ANZUS Treaty are different from Article 5 of the NATO Treaty, signed in Washington DC on 4 April 1949.²⁸ Article 5 provides that an armed attack against one or more of its member States in Europe or North America shall be considered an attack against them all. It further provides that every member, in exercise of the right of individual or collective self-defence, will assist the other members, if attacked, by taking such action as is deemed necessary (including the use of armed force) to restore and maintain security in the North Atlantic area.

The day after the terror attacks, on September 12, the members of NATO met to discuss the risks to the NATO Alliance posed by terrorism. They invoked Article 5 of the NATO Treaty to justify their participation in the proposed military action initiated by the United States in exercise of the collective right of self-defence.²⁹ This was the first time in NATO's history that Article 5 had been invoked.³⁰

The provisions of the ANZUS Treaty are less clear. The emphasis of this Treaty is on regional security in the "Pacific Area" but this is not defined. Article IV provides:

Each Party recognises that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.

This provision also provides that any such armed attack shall be reported immediately to the Security Council and measures taken as a

²⁷ See Howard, Address to the Australian Defence Association, Melbourne, 25 October 2001, Prime Minister of Australia, News Room at <www.pm.gov.au/news/speeches/2001/speech1308.htm>.

²⁸ This treaty is sometimes referred to as "the Washington Treaty".

²⁹ NATO, "NATO and the scourge of terrorism: What is Article 5?" NATO Issues, 21 September 2001 at <www.nato.int/terrorism/five.htm>.

³⁰ Ibid.

result shall be terminated when the Security Council undertakes measures necessary to restore and maintain international peace and security.

Article V provides:

[F]or the purpose of Article IV, an armed attack on any of the Parties is deemed to include an armed attack on the Metropolitan territory of any of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific.

It is clearly arguable that the terror attacks on the United States are not "in the Pacific Area" so that Australia's right (and duty) to participate in collective self-defence under the Treaty are not activated. For this reason, Australia's participation in military action in Afghanistan may be challenged as unlawful. To remove this possibility, it is therefore in Australia's interests to procure a formal Security Council resolution authorising all United Nations members to use force to remove the threat to international peace and security caused by the attacks.

V. THE TRIAL OF THOSE RESPONSIBLE

Does the United Nations have the political will to take the necessary action to bring the perpetrators to justice? It would appear so.

Within 48 hours of the terror attacks, both the Security Council and the General Assembly joined with Kofi Annan in condemning the attacks. Both bodies voted to support actions taken against those responsible, including the States that aided them. At the opening of its annual session in New York on 12 September 2001, the General Assembly "expressed its outrage" at the attacks the day before and called for "international cooperation to bring the perpetrators and the organisers of terrorism to justice".³¹ The Security Council passed Resolution 1368 unanimously, and Clause 5³² referred to the Security Council's

³¹ United Nations Economic and Social Commission for Western Asia, "UN General Assembly condemns terror attacks against US", UN Press Release, 12 September 2001 at <www.escwa.org.lb/information/press/un/12sep_condemn.html>.

³² Refer page 6 above.

readiness to take all necessary steps to respond to the terrorist attacks and combat terrorism.

On 21 September 2001, Kofi Annan reaffirmed the "complete solidarity of the United Nations with Americans in their grief" and the "world wide resolve to fight terrorism as long as it is needed".³³ He also stated:³⁴

*The United Nations is uniquely positioned to advance this effort. It provides the forum necessary for building a universal coalition and can ensure global legitimacy for the long-term response to terrorism.*³⁵ United Nations Conventions already provide a legal framework for many of the steps that must be taken to eradicate terrorism... these conventions must be implemented in full.

The United Nations treaties against international terrorism to which Kofi Annan referred to include:

1. 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft;
2. 1970 Convention for the Suppression of Unlawful Seizure of Aircraft;
3. 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;
4. 1979 Convention Against the Taking of Hostages; and
5. 1997 International Convention for the Suppression of Terrorist Bombings.

The United Nations should therefore take all necessary measures to bring to justice the perpetrators of the September 11 terror attacks. Its willingness to do so has been demonstrated in the clearest of terms by a statement released on 8 October 2001 by Kofi Annan.³⁶ He stated that immediately after the terror attacks on September 11, the Security

³³ Annan, "Fighting terrorism on a global front", New York Times, 21 September 2001 at <www.un.org/News/press/docs/2001/20010921.sgsm10.htm>.

³⁴ Ibid.

³⁵ Emphasis added.

³⁶ US Department of State, "UN Secretary-General affirms US right to self-defence – Annan urges 'a sustained effort' to defeat terrorism", International Information Programs, 8 October 2001 at <<http://usinfo.state.gov/topical/pol/terror/01100903.htm>>.

Council "expressed its determination to combat, by all means, threats to international peace and security caused by terrorist acts."³⁷ Those responsible for the terrorist attacks, including those who aided and abetted them, should be tried by an international criminal tribunal established by the Security Council, not by the United States. Although the United States has jurisdiction to prosecute, it would be inappropriate for the victim in this instance to be the prosecutor, judge and jury.

There is a precedent for the establishment of an international criminal court where the Security Council has determined (as it has in the case of the terror attacks of September 11) that a situation constitutes a threat to international peace and security. Examples are the International Criminal Tribunal for Yugoslavia (ICTY)³⁸ and the International Criminal Tribunal for Rwanda.³⁹

The Security Council, having already resolved that the attacks of September 11 were a threat to international peace and security, should now act under Chapter VII of the Charter and immediately establish an international tribunal for the purpose of prosecuting those responsible. The deterrent effect of the prompt establishment of a tribunal to bring the perpetrators to justice cannot be underestimated. Few who witnessed the spectacle of Slobodan Milosevic's recent appearance in the ICTY sitting in The Hague would underestimate the salutary effect of the administration of justice by an independent international criminal court.⁴⁰

VI. CONCLUSION

Those who would prefer to see Osama bin Laden and his accomplices assassinated rather than brought to justice should consider that not only would that be potentially unlawful under international law, but it would give them the martyrdom they so desire. Bin Laden had stated:⁴¹

³⁷ Ibid.

³⁸ Security Council Resolution 827, 3217th Meeting, 25 May 1993, UN Doc S/RES/827 (1993).

³⁹ Security Council Resolution 955, 3453rd Meeting, 8 November 1994, UN Doc S/RES/955 (1994).

⁴⁰ Welt, "Former Yugoslav president puts NATO and The Hague Tribunal in the defendant's chair", 12 February 2002 at <www.iacenter.org/yugo_milospirker.htm>.

⁴¹ See CNN, "Excerpts from Peter Arnett's interview of Osama bin Laden on CNN, 1997", Retour a la page d'accueil de cje, 1997 at <www.chretiens-et-juifs.org/BIN_

[W]e see that getting killed in the cause of Allah is a great honor wished for by our Prophet...Being killed for Allah's cause is a great honor achieved by only those who are the elite of the nation. We love this kind of death for Allah's cause as much as you like to live. We have nothing to fear for. It is something we wish for.

Those responsible for the attacks of September 11 and any subsequent attacks should therefore be dealt with according to international law. This prospect should have a greater deterrent value than the threat of martyrdom. Further, those involved in the prevention of terrorism, whether a State, individual, the armed forces or a soldier should act with the moral and legal authority of the United Nations, the body specifically created after the last World War to perform such actions.

LADEN/Bin_Laden_CNN_1997.htm>; US Department of Defense, "Transcript of Osama bin Laden videotape", CNN.com./US, 13 December 2001 at <www.cnn.com/2001/us/12/13/tape.transcript/>; CNN.com, "Peter Arnett: Osama bin Laden and returning to Afghanistan", 5 December 2001 at <www.cnn.com/2001/COMMUNITY/12/05/gen.arnett/cnna>.