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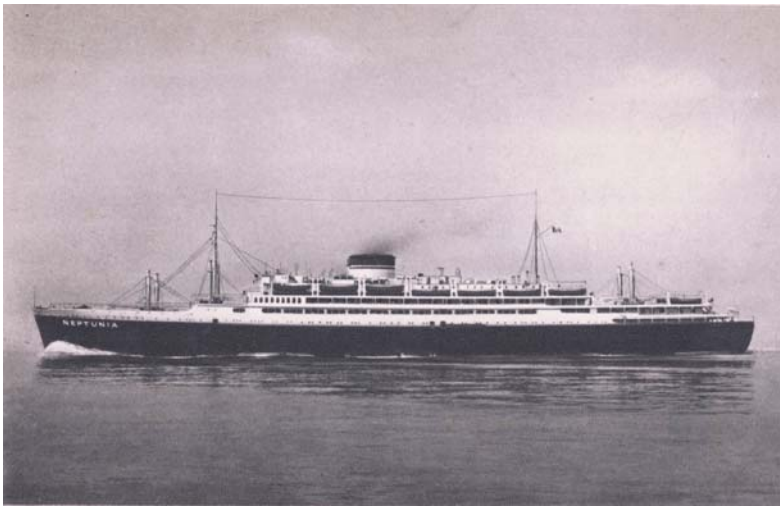

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THE USE OF FORCE AGAINST INTERNATIONAL TERRRORISM: EVERYTHING CHANGES, NOTHING REMAINS STILL

El uso de la fuerza armada contra el terrorismo internacional: todo cambia, nada permanece

L'emploi de la force contre le terrorisme international: tout passe et rien ne demeure

María José CERVELL HORTAL[1]

ABSTRACT: This article analyses the legality of international society's reactions to terrorism with the use of force. It considers, in particular, the cases where States have interpreted the use of force prohibition and the right to self-defence extensively and whether international rules are evolving to permit more effective protection against the terrorist threat.
KEY WORDS: Use of force, self defence, terrorism.

RESUMEN: Este artículo analiza la legalidad de las reacciones armadas de la sociedad internacional ante el terrorismo. Se valora, en particular, en qué casos los Estados han interpretado de manera extensiva la prohibición del uso de la fuerza y el derecho de legítima defensa y en qué medida las normas internacionales pueden estar evolucionando para permitir una respuesta más efectiva frente a la amenaza terrorista.
PALABRAS CLAVES: uso de la fuerza, terrorismo, legítima defensa.

RESUMÉ: Cet article analyse la légalité des réactions armées de la société international devant le

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terrorisme. Il évalue, particulièrement, dans quels cas les États ont interprété d'une manière extensive la prohibition de l'emploi de la force, le droit de légitime défense et si les normes internationales pourraient évoluer pour permettre un réponse plus effective face au terrorisme.
MOT CLÉ: Emploi de la force, terrorisme, légitime défense.

I. INTRODUCTION

The prohibition on the use of force, included in article 2.4 of the Charter of the United Nations, was conceived in 1945 as a solution to tackle State abuses and ensure international stability. More than seventy years later, the incursion of new actors, and conflicts and threats of an entirely different nature to those at that time have outgrown the Charter's provisions.

The prohibition on the use of force only allows for two exceptions: firstly, the Security Council may carry out armed actions in accordance with chapter VII of the Charter, and with agreement from the majority of its members (including, of course, permanent members); secondly, the States may also do so, but only in the exercise of their right to self-defence (article 51). In this way, the Charter provides that States may only breach the article 2.4 prohibition under very specific circumstances (self-defence), although the truth is that the boundaries have been overstepped on many occasions. Specifically, this has occurred when States have wanted to take a stand against international terrorism and considered that the collective security system the Security Council is responsible for did not ensure their security. Up to what point does current International Law allow a response to the international terrorism threat that uses force? Does its gravity justify a more flexible interpretation of the prohibition? Is it possible to allege self-defence as a response to terrorist attacks?

The following pages will address these questions, in an attempt to clarify what choices are permissible within the framework of the current international legal system, the existing loopholes and the possibility that some of the regulations are evolving to allow a better defence against terrorism.

II. PROHIBITION ON THE USE OF FORCE AND THE INSURGENCE OF INTERNATIONAL TERRORISM: FIRST RESPONSES FROM THE INTERNATIONAL COMMUNITY

The main innovation in the Charter of the United Nations was the prohibition on the use or the threat of use of force under its article 2.4, which, as

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the International Court of Justice (ICJ) would classify it years later, is a "cornerstone" of the text[2]. The General Assembly resolution 2625 (XXV), of 24 October 1970, enshrined it as a legal principle and jurisprudence confirmed its customary nature[3].

The Charter also arbitrated alternative mechanisms for protecting member States which, under the new regulations, could not now react by using force. The Security Council has the monopoly on the use of force, although the States may also exercise it, but only in individual or collective self-defence (article 51), in the event of an armed attack occurring, and complying with strict requirements. In spite of the prohibition, there have been many examples of the use (and abuse) of force (some of which invoked, specifically, the fight against international terrorism) – the NATO attack on Kosovo (1999), justified on humanitarian grounds; the war in Afghanistan (2001-2002), justified as self-defence against the attacks against the United States on 11 September 2001; the Iraq war (2003), started due to the possession of weapons of mass destruction[4]; Russia's actions in Georgia (Abkhazia, 1992, 1998, 2008 and South Ossetia, 2008) and in Ukraine (2014-2015) supporting pro-Russian movements and alleging protection of its nationals; the Lebanon war (2006) and Gaza (2008-2009) where Israel also invoked self-defence; the International coalition bombings in the fight against Da'esh in Syria and Libya (2014-2015); the intervention of Saudi Arabia, at the head of several Arabian states, in the Yemen (2015); Turkey's intervention, alleging self-defence against the threat of the PKK terrorist group in the Syrian region of Afrin (January 2018); and the Israeli attacks on Iranian targets in Syrian territory (May 2018).

The terrorist phenomenon has, above all during the last few years, become one of the main threats to peace and security in international society.

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[2] Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, p. 223, para. 148.

[3] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, *ICJ Reports 1986*, p. 14 (paras. 188 y 190).

[4] Later not proven, as confirmed on 6 July 2016 by the so-called *Chilcot Report* on the UK's part in the Iraq war. This was drawn up at the request of the Prime Minister, Gordon Brown, in 2009 (*Report of the Iraq Inquiry, section 4, Iraq's weapons of mass destruction*, pp. 604-611, available at http://www.iraqinquiry.org.uk/the-report/).

On the sidelines of the international treaties[5] and other initiatives which have been mediated to deal with it, and which are not the subject of this article, the Security Council has taken a prominent role in their control.[6] Its activity intensified after the Al Qaeda attacks on the USA (2001) and, since then, it has passed a high number of resolutions with sanctions which are specifically aimed at castigating and preventing terrorism, with the support of the Counter-Terrorism Committee, which was formed by resolution 1373 (2001). The incursion of Da'esh (the self-proclaimed Islamic State) in 2014, forced it to intensify its activity in the fight against terrorism and impose new measures, the majority of which were on the same lines as those already in force against other terrorist organisations, but some of which were more specific in the light of the new features of the one appearing.[7]

The majority of these resolutions contained measures which did not involve the use of force, but some of them (resolution 1373 [2015] and, above all, resolution 2249 [2015] against the Islamic State) have been particularly controversial. Not one of them expressly and clearly approved the use of force against international terrorism, but, instead, opted (in some cases more controversial than others, as we shall see) to include vague references to self-defence or backing up actions taken by the States on the basis of exer-

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[5] Although those treaties are numerous (nineteen, twelve of which were prior to 2001), a general international treaty, which may be considered a mandatory legal framework, does not exist (in spite of the fact that the General Assembly continues to insist on the matter, see A/RES/72/123, 18 December 2017 About those treaties effectiveness, see Salinas de Frías, A. M., "Lucha contra el terrorismo internacional: no sólo del uso de la fuerza pueden vivir los Estados", *Revista Española de Derecho Internacional*, vol. 68,2, 2016, pp. 229-252; p. 233).

[6] On the measures adopted by the Organisation against terrorism, see Blanc Altemir, A., "La respuesta de la Organización de las Naciones Unidas al terrorismo internacional", Gutiérrez Espada, C. (dir.) and Cervell Hortal, Mª. J. (coord.), *Derecho Internacional, Alianza de Civilizaciones y terrorismo global*, Diego Marín Librero Editor, 2011, pp. 49-90 (for the General Assembly measures, see pp. 58-73 and for the Council's, pp. 73-89). See also Díaz Barrado, C. M., "El marco jurídico internacional de la lucha contra el terrorismo", in *Lucha contra el terrorismo y Derecho Internacional, Grupo de Trabajo nº 6/04, Cuadernos de Estrategia*, vol. 133, Instituto Español de Estudios Estratégicos, pp. 51-77 (pp. 63-68).

[7] Fundamentally, measures for financial control and controlling foreign fighters (for these issues, see Cervell Hortal, Mª. J.,"El Derecho Internacional: ¿una herramienta eficaz en la lucha contra el Daesh?", en Cervell Hortal, Mª. J. (dir.), *Estado Islámico, Naciones Unidas, Derecho Internacional y Unión Europea,* Comares, 2017, pp. 37-96 (pp. 42-57).

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cising that right, because the conditions traditionally demanded to do so did not occur.

III. THE USE OF FORCE IN SELF-DEFENCE AGAINST TERRORISM: IS THIS CONCEPT TOO RIGID?

The failure of the collective security system, practically from the first days of the United Nations Organisation, meant that the States, which were not protected by a Security Council that was blocked by the right of veto, were tempted to resort to the form of self-defence provided for in article 51 of the Charter far more than was planned. The appearance of new players in international society, in which rebel groups or terrorist movements made space for themselves, and the change in the nature of the conflicts, also fed broader interpretations.

In fact, today, self-defence is considered to be acceptable not just in the face of armed attacks as they were understood to be when the Charter was drawn up (mainly State A army invades or attacks State B territory), but also in the face of indirect armed aggression, staged by irregular groups directly sent or controlled by a State. The ICJ expressly accepted this in the *Nicaragua case*, although it showed itself to be more reluctant to do so given *minor uses* of force which were not equivalent to an armed attack.[8]

More problems pose other questions which are still not clearly answered today, specifically, the exercise of the right to self-defence against non-state actors or the reaction to unfulfilled attacks. These are not contemplated in the Charter, but some States see them as the only way out, to solve problems arising in present-day international society, even if this involves transgressing the traditional parameters for the right of self-defense and the prohibition of the use of force in more cases than were originally envisaged.[9] Although it is

[8] Later cases would qualify what was meant by minor uses of force (Case concerning oil platforms (Islamic Republic of Iran v. United States of America), Judgment of 6 November 2003, *ICJ Reports 2003*, para. 64 and Case concerning armed activities on the territory of the Congo... *cit.,* note 2, paras. 146 y 147.

[9] Although terrorism has boosted this possibility, it is not new. Many years ago (1970) Thomas Franck asked who had *killed* article 2.4 of the Charter ("Who killed article 2(4)? or: changing norms governing the use of force by States", *American Journal of International Law*, vol. 64, 5, 1970, pp. 809-837), sustaining that the prohibition on the use of force depended on the collective security system functioning and that, in as far as this did not function, the

true that, on some occasions, their reasoning has been capricious and difficult to justify, on others, they simply sought to meet needs which did not exist in 1945.

The right to self-defence in accordance with a strict interpretation of the Charter, is only possible when an armed attack occurs, it is of sufficient size and it comes from a State (either acting directly or with others that it has a clear link with). The Charter also imposes an additional obligation – immediate reporting of the measures taken to the Security Council which, according to the wording of article 51, should then take charge of the actions to keep international peace and security. However, the right to self-defence also needs other conditions for it to be correctly exercised: immediacy of response, need and proportionality, all of which are absent from the Charter, but the requirement for which has been endorsed by jurisprudence. The former is the consolidated, legal content in force, although perhaps it is not in line with present-day reality, in as far as its rigidity does not always ensure that those attacked are able to react in a suitable manner.

The Al-Qaeda attacks against the United States on 11 September 2001 marked, without doubt, a before and after in the fight against terrorism. On 12 September the Security Council passed resolution 1368 (2001), classifying the terrorist acts "as a threat to international peace and security", while also expressing their willingness to take "all necessary steps to respond". However, it did not confirm that an armed attack had occurred and the references to self-defence are limited to a mere recognition in the Preamble of the existence of the right under the Charter of the United Nations. Resolution 1373 (2001), passed some days later (28 September), which adopted a considerable number of sanctions to cut terrorist groups' financing and support off at the roots, did not include any measure involving the use of force either, and references to self-defence were as scarce as in resolution 1368 (2001).

A few days later, the United States attacked Al Qaeda training camps and military facilities in Afghanistan, informing the Council that it had "initiated actions in the exercise of its inherent right of individual and collective

need to continue to be bound by it was questionable. The argument was hazardous, because advocating that a regulation is no longer in force simply because those who should ensure its performance are incapable of doing so seems to be going too far and, in fact, criticism was not long in coming (Henkin, L., "The reports of the death of article 2 (4) are greatly exaggerated", *American Journal of International Law*, vol. 65, 3, 1971, pp. 544-548).

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self-defence following the armed attacks that were carried out against the United States on 11 September"[10]. Nevertheless, the attacks did not originate in a State (the links of the terrorist organisation with Afghanistan had not been proven), the attacks did not fit into the description of armed attack included in the 1974 resolution 3314 (XXIV) nor, at any event, did they fulfil the requirements for necessity and proportionality.[11]

Self-defence began to become a perfectly valid argument, at least for some States, in the fight against terrorism. The actions which, as we shall see, were taken years later against Da'esh have confirmed this. Two main problems

[10] Doc. S/2001/946 and 2001/947.

[11] Authors, in fact, expressed opinions on the matter with zeal. The Spanish were particularly critical of the war in Afghanistan. In this respect, see, Calduch Cervera, R., "La incidencia de los atentados del 11 de septiembre en el terrorismo internacional", *Revista Española de Derecho Internacional*, vol. 53, 1 y 2, 2001, pp. 173-204; González Vega, J. A., "Los atentados del 11 de septiembre, la operación Libertad duradera y el derecho de legítima defensa", *Revista Española de Derecho Internacional*, vol. 53, 1 y 2, 2001, pp. 247-272; Gutiérrez Espada, C., "¿No cesaréis de citarnos leyes viendo que ceñimos espada? A propósito del 11 S", *Anuario de Derecho Internacional*, vol. 17, 2001, pp. 25-38 and, by the same author, "El uso de la fuerza en los Informes del Grupo de Alto Nivel (2004), del Secretario General (2005) y, a la postre, en el Documento final de la Cumbre de Jefes de Estado y de Gobierno", *Anuario de Derecho Internacional,* vol. XXI, pp. 13-50 (pp. 32-33); Ramón Chornet, C., "La lucha contra el terrorismo internacional después del 11 de septiembre de 2001", *Revista Española de Derecho Internacional*, vol. 53, 1, 2001, pp. 273-288; Remiro Brotóns, A., "Terrorismo, mantenimiento de la paz y nuevo orden", *Revista Española de Derecho Internacional*, vol. 53, 1, 2001, pp. 125-171. Taking the opposite line, Bermejo García, R., "El Derecho Internacional frente al terrorismo: ¿nuevas perspectivas tras los atentados del 11 de septiembre?", *Anuario de Derecho Internacional*, vol. 17, 2001, pp. 5-24. The Spanish were not the only ones opposing the American reaction: Condorelli, L., "Les attentats du 11 Septembre et leurs suites: où va le Droit International", *Revue Génerale de Droit International Public*, 2001, pp. 829-848; Corten, O. and Dubuisson, F.,"Opération liberté inmuable: una extensión abusive du concept de légitime défense", *Revue Génerale de Droit International Public*, 2002, pp. 51-78; Corn, G. S., "Legal basis for the use of armed force", in Corn, G. S.; Schoettler, J. A.; Brenner-Beck, D; Hansen, V. M.; Dick Jackson, R. B.; Talbot Jensen, E. y Lewis, M. W., *The war on terror and the law of war. A military perspective,* Oxford University Press, New York, 2005, pp.1-33 (pp. 10-11). Myjer, E. P. J. y White, D., "The twin towers attack: an unlimited right to self-defence", *Journal of Conflict and Security Law*, 2002, 7, 1, pp. 5-17 (p. 7) *,* were more understanding of the American posture, although critical of the Security Council, whose inaction, according to these authors, was what provoke the United States to act. Iovane, M. y De Vittor, F., "La doctrine européenne et l'intervention en Iraq", *Annuaire Français de Droit International*, vol. XLIX, 2003, pp. 3-16*,* gives a general overview of the European doctrine.

arise when it comes to accepting this new trend: firstly, if, traditionally, armed attack emanates from a State, whether it is possible to consider that an attack emanating from a group that has no links to any State as a detonator to self defence; and secondly, whether the arguments defended by some States for reacting in self-defence to terrorist attacks which have still not been carried out are admissible. We will deal with these questions in the following sections.

1. ARMED ATTACK AND NON-STATE ACTORS

The first condition on a State so that it may use the force is that a previous armed attack exists. This follows from article 51 and has also been confirmed by the International Court of Justice.[12] The Charter of the United National does not expressly envisage that this attack must be exclusively originated in a State, but as the self-defence right was conceived as an exception to article 2.4, which prohibits the use of force *on the States*, it was thought that only them were affected by article 51.

Resolution 3314 (XXIX), of 14 December 1974, includes a Definition of Aggression, article 3 of which is the mandatory reference when determining the existence of an attack.[13] Its sub-paragraphs include acts (direct invasion, bombardment, blockade of the ports by another State (paragraphs a-f)) and also (paragraph g) acts committed by irregular groups, armed bands or mercenaries, as long as they are sent by or acting on behalf of a State and are of equal gravity.

The resolution is, ultimately, based on a traditional concept of attack, in which the State is present in some way[14] and where it is necessary that such force takes a certain form. However, the fundamental scenario this resolution

[12] Nicaragua case (1986), *op. cit.*, note 3, p. 103, para. 195; Case concerning oil platforms (Islamic Republic of Iran v. United States of America), *op. cit.*, note 8, pp. 186-187; Case on legal consequences of the construction of a wall in the occupied Palestinian territory, Advisory Opinion of 9 July 2004,*ICJ Reports 2004*, p. 194 and Case concerning armed activities on the territory of the Congo, o*p. cit.*, note 2, pp. 222-223 (although the latter simply presumed the existence of an armed attack, for which reason its reflections on the matter are minor).

[13] The ICJ itself has always referred to this resolution when it comes to determining the existence, or not, of an armed attack (see, for example, Nicaragua Case, *op. cit.*, note 3, pp. 103-104, para. 195 or Armed activities on the territory of the Congo case, *op. cit.*, note 2, p. 223, para. 146).

[14] This was confirmed by the ICJ in the Case about the legal consequences of the construction of a wall in Palestine, *op. cit.* note 12*,* para. 139.

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was based on is not the same today, and its content seems insufficient when it comes to terrorist actions which, due to their gravity, could be considered to be armed attacks, but where there is not always a direct link to any State.

The decisive moment when the validity of the traditional concept of self-defence began to be questioned was, as noted, in 2001, after the Al-Qaeda attacks on American targets. The United States became its most staunch defender, although other States[15] and also some authors began to appear more open to the possibility.[16] It is true that previously some had already

[15] Regarding the USA, see the US National Security Strategies, 2002 (p. 5), 2006 (p. 8), 2010 (p. 20) and 2015 (p. 7), available at <http://nssarchive.us/>. The US also declared that, "The inherent right of self-defense is not restricted to threats posed by States" (*Report on the legal and policy frameworks guiding the United States' use of military force and related national security operations*, December 2016, <https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf>, p. 9).

[16] Amongst others, Bethlehem, D., "Self-defence against an imminent or actual armed attack by nonstate actors", *American Journal of International Law*, vol. 106, 2012, no. 4, pp. 769-777;Bermejo García, R., *op. cit.,* note 11, pp. 23 and 24 and, by the same author, "La legítima defensa y el Derecho Internacional en los albores del siglo XXI", *Los nuevos escenarios internacionales y europeos del Derecho y la Seguridad*, Colección Escuela Diplomática, 2003, no 7, Madrid, pp. 127-141, p. 138 and "La paz y seguridad internacionales en el sistema de Naciones Unidas: algunas reflexiones en torno al uso de la fuerza y evolución en su septuagésimo aniversario", in Pons Rafols, X., *Las Naciones Unidas desde España, 70 Aniversario de las Naciones Unidas, 60 Aniversario del ingreso de España en las Naciones Unidas*, Barcelona, Anue, 2015, pp. 169-192; Cassese, a., "Article 51", in Cot, J. P.; Pellet, W. y Forteau, M (dirs.), *La Charte des Nations Unies, Commentaire article par article,* Paris, Economica, 3rd ed., 2005, pp. 1329-1360, p. 1352 (qualifies if they are massive attacks of considerable gravity); Dinstein, Y., *War, aggression and self-defen*ce, Cambridge, Cambridge University Press, 4ª ed., 2005, pp. 204-208; Franck, T. M., "Terrorism and the right of self-defense", *American Journal of International Law*, vol. 95, 2001, pp. 839-843, p. 840; Gutiérrez Espada, C., "Sobre la prohibición del uso de la fuerza armada en los últimos sesenta años (1945-2015), in Pons Rafols, X., *Las Naciones Unidas desde España, 70 Aniversario de las Naciones Unidas, 60 Aniversario del ingreso de España en las Naciones Unidas*, Barcelona, Asociación para las Naciones Unidas en España (ANUE), 2015, pp. 125-150, pp. 138-139; Kretzmer, D., "The inherent right to self-defence and proportionality in Jus ad bellum", *European Journal of International Law*, vol. 24, 2013, no. 1, pp. 235-282, pp. 246-250; Murphy, S., "Self-Defense and the Israeli Wall Advisory Opinion: an *ipse dixit* from the ICJ?",*American Journal of International law*, Vol. 99, 2005, no. 1, pp. 62-76;ÍD., "Terrorism and the concept of armed attack in article 51 of the UN Charter", *Harvard Journal of International Law*, Vol. 43, 2002, no. 1, pp. 42-51, p. 51 y Randelzhofer, A., "Article 51", in Simma, B.; Mosler, H.; Randelzhofer, A.; Tomuschat, C. y Wolfrum, R. (eds.): *The Charter of the United Nations. A commentary*, Vol. I, 2nd ed., 2002, Oxford, Oxford

attempted to justify the use of the force they had used against certain armed groups acting outside their borders and whose connections with other States were non-existent (or, at least, unclear), but these were isolated situations which, in the majority of cases, gave rise to fierce condemnation.[17]

In 2007, the IDI (Institut de Droit International) accepted the activation of article 51 given an armed attack by a non-state actor, but only where this attack was launched "from space outside the jurisdiction of any State"[18], which clearly limited the possibilities of exercising the right. Furthermore, a few years later, the *Tallinn Manual on the International Law applicable to cyber warfare* (2013, 2017) was clearer, taking as read the acceptance of self-defence against non-state actors, supporting its confirmation in the fact that article 51 did not, either in theory or in practice, prevent it and setting the date the Al-Qaeda attacks were launched against the United States and the subsequent Security Council resolutions (1368 and 1373)[19] as its start. In 2016 the International Law Association (ILA) accepted (although it acknowledged that this was not unanimous), "a growing recognition - including state practice - that there are certain circumstances in which a state may have a right of self-defence against non-state actors operating extraterritorially"[20].

University Press, pp. 788-806, p. 802 and Tams, C. J., "The use of force against terrorists", *European Journal of International Law*, vol. 20, 2009, no. 2, pp. 359-397.

[17] Hence, India against Pakistani groups (1948), Morocco against the Polisario Front (end of the 70's); Israel repeatedly (plane hijack in Entebbe in 1976, bombing PLO barracks in Tunisia in 1985 or the incursions into the Lebanon in 1978 and 1982) or the United States (to attack Libya in 1986 invoking the attacks on American citizens (explosion of a device in the *La Belle* discotheque in Berlin, doc. S/17990, 14 April 1986) and Iraq in 1993 (after the assassination attempt on President Bush, doc. S/PV.3245, 27 June 1993), and in response to the Al Qaeda attacks on the American embassies in Kenya and Tanzania in 1998 (*vid.* doc S/1998/780, 20 August 1998). In this regard, Pozo Serrano, P. "La legítima defensa frente a actores no estatales a la luz de la práctica del Consejo de Seguridad de las Naciones Unidas", *Anuario Español de Derecho Internacional*, vol. 24, 2018, pp. 481-498 (pp. 485-486).

[18] Resolution of 27 October 2007 (10éme Commission: Problèmes actuels du recours à la force en Droit International. A. Légitime défense), para. 10.

[19] *Tallinn Manual on the International Law applicable to cyber warfare*, Cambridge University Press, Cambridge University Press, Cambridge, 2013, pp. 58-59, para. 16, norm 13 and *Tallinn Manual 2.0 on the International Law applicable to cyber operations*, Cambridge University Press, Cambridge, 2017, p. 345, para. 18, norm 18.

[20] ILA, *Report on Aggression and the Use of Force*, International Law Association, Johannesburg Conference, 2016, p. 11.

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The possibility of admitting self-defence against non-state actors was, therefore opened up, although it did so little by little.[21] The incursion of Da'esh onto the international stage further fuelled the possibility of arguing self-defence against terrorism. After Iraq asked the Security Council for help in September 2014, due to the terrorist organisation's acts in its territory, the United States responded alleging, expressly, in order to justify its intervention, (collective) self-defence against the continued threat of Islamic State attacks in Iraq. But it also reserved its right to act in Syria, as it understood that a large part of the attacks from the group came from there. Self-defence was, therefore, forced to the maximum. It was used, with no problems, against non-state actors, but also to attack the territory of a State - Syria – which, unlike Iraq, had not requested any help, nor had it consented to any action being taken (see the following paragraph).

On 20 November 2015, the Security Council passed resolution 2249, paragraph 5 of which exhorts all member States, "that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq". The question is whether this consisted of approval of the actions against Da'esh by the International Coalition, and recognition that it welcomed the arguments of self-defence, not just in Iraq, but also in Syria. The resolution was not passed in accordance with chapter VII of the Charter, as it should have been, but various States seized on it to back up and legitimise their arguments for self-defence in the fight against

[21] It should also be admitted that some authors have been seen to be very cautious about the possibility, on the understanding that it is still not possible to talk about a true *opinio iuris* which would permit it. Antonopoulos, C., "Force by armed groups as armed attack and the broadening of self-defence", *Netherlands International Law Review*, vol. 55, 2008, pp. 159-180, p. 18); Byers, M., "Terrorism, the use of force and International Law after 11 September", *International and Comparative Law Quarterly*, vol. 51, 2, 2002, pp. 401-414, p. 411: "…there is relatively little support for a right of anticipatory self-defence, as such, in present day customary international law –either generally or in respect of terrorist acts"; Charney, J. I., "The use of force against terrorism and International Law", *American Journal of International Law*, vol 95, 4, 2001, pp- 835-839; Dubuisson, F., "La guerre du Liban de l'été 2006 et le droit de légitime défense", *Revue Belge de Droit International*, vol 39, 2, 2006, pp. 529-564, p. 562-563 or Enabulele, A.O., "Use of force by international/regional non-state actors: no armed attack, no self-defence", *European Journal of Law Reform*, vol. 12, 2010, pp. 209-229, p. 216.

Da'esh's terrorism. This was the case of Egypt, which defended it after the decapitation of several of its subjects (February 2015); in Russian, after an air crash over the Sinai Peninsula on 8 October 2015 with several Russians on board; in France, which began to justify its actions, not by the collective self-defence in favour of Iraq, but individually, due to the attacks suffered in Paris[22], or the United Kingdom, or Germany[23]. Even the European Union invoked the mutual defence clause in article 42.7 of the Treaty of the European Union ("If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter") after the Paris attacks[24].

It may be an exaggeration to assert that resolution 2249 (2015) can, on its own, justify an extension of the concept of self-defence to encompass non-state actors, but the truth is that is seems that some States are starting to have a clear idea that self-defence is a perfectly valid argument against non-state actors.

2. THE USE OF FORCE AGAINST A STATE WHICH DOES NOT CONTROL THE ACTIONS OF A TERRORIST MOVEMENT

The argument that it is also possible to exercise the right to self-defence against attacks from terrorist groups has also gone further, with some supporting the possibility that a State may also use force in another's territory, without their consent, if the latter is incapable of, or does not wish to, putting a stop to the terrorist groups operating from it. This is what is known as the

[22] See Alabrune, F., "Fondements juridiques de l'intervention militaire française contre Daech en Irak et en Syrie", *Revue Générale de Droit International Publique*, vol. 120, 1, 2016, pp. 41-50. Also see Frances's declarations in the Security Council meeting that passed the resolution: doc. S/PV.7565, 20 November 2015.

[23] Doc. S/PV.7565, 20 November 2015, p. 9 and doc. S/2015928, respectively.

[24] *Outcome of the Council Meeting 3426th, Council Meeting Foreign Affairs*, Brussels, 16 and 17 November 2015, doc. 14120/15 (OR. en) PRESSE 69 PR CO 61.On the article's mechanism, Gouttefarde, F., "L'invocation de l'article 42.7 TUE ou la solidarité militaire europeenne a l'épreuve de la guerre contre le terrorisme", *Revue Générale de Droit International Publique*, vol. 120, 2016, no. 1, pp. 51-67 y González Alonso, L. N., "¿Daños jurídicos colaterales? La invocación del artículo 42.7 del Tratado de la Unión Europea y la lucha contra el terrorismo internacional", *Revista Electrónica de Estudios Internacionales*, vol. 32, 2016, pp. 1-23 and Piernas López, J. J., *Respuestas normativas de la Unión Europea a la amenaza del Estado Islámico (Daesh),* Comares, Granada, 2018, pp. 205-233.

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unwilling or unable to act theory. Its main argument turns on the idea that every State is ultimately responsible for controlling its territory and preventing acts of terrorism against others occurring or being organised within it or from it, in such a way that, if it does not do so, the victim State may replace it in the role and take direct action (including armed) against the terrorist groups.

This theory was precisely the basis used by the United States to justify its attacks in Syria, in 2014, to halt Da'esh.[25] In fact, it has, from the beginning, been linked to the terrorist phenomenon[26] and other States have also intermittently resorted to it to justify armed action in others' territory: Turkey in its incursions into northern Iraq against Kurdish terrorists in 1996;[27] Russia, when attacking Chechen bases in Georgia in 2002;[28] Israel in its incursions into the Lebanon against Hezbollah in 2006;[29] Colombia, when invading Ecuador in pursuit of FARC rebels in 2008;[30] and Kenya in its incursions into Somalia in 2011.[31]

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[25] The letter sent to the Secretary General and the President of the Security Council on 23 September 2014, clearly stated that " States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located *is unwilling or unable to prevent the use of its territory for such attacks*", doc. S/2014/695, 23 September 2014.

[26] In particular, the inactivity of the Ugandan government was one of the arguments raised by Israel, in 1976, to invade its territory to free the passengers (Israelis) of an aeroplane hijacked by Palestinian terrorists, doc. S/PV.1939, 9 July 1976. The Israeli representative denounced the lack of security at the airport (para. 70) and the collaboration of the Ugandan authorities with the terrorists, defending the action with the inherent right to self-defence (para. 101).

[27] Doc. S/1996/479, 2 July 1996. On the matter, Ruys, T., "*Quo vadit jus ad bellum?* A legal analysis of Turkey's military operations against the PKK in Northern Iraq", *Melbourne Journal of International Law*, vol. 9, 2008, no. 2, pp. 334-364.

[28] Doc. S/2002/1012, 12 September 2002 (Letter from the Russian Representative) and the response from Georgia (doc. S/2002/1035, 16 September).

[29] Israel alleged, in fact, that it was responding to "an act of war" and many States supported it (doc. S/PV. 5489, 14 July 2006, p. 6).

[30] Colombia expressly alleged self-defence (see doc. S/2008/146), although Ecuador and Venezuela talked about aggression to classify Colombia's action. The OAS condemned the action (doc. CP/Res 930 [1631/08], 5 March 2008), but the United States supported it.

[31] Lubell, N., *Extraterritorial use of force against non state actors*, Oxford, Oxford University Press, 2010, pp. 31 et seq, and Trapp, K. N., "Back to basics: necessity, proportionality, and the right

The theory, even though it has been presented as having a clear objective (defence against terrorist groups acting from another State's territory without any control), raises numerous misgivings of a legal nature. Ultimately, however much it is alleged that the use of force is not *against* the State itself, but that it is undertaken *in* its territory, article 2.4 is being contravened and it territorial integrity breached. This does not seem to have mattered to the US government, which has shown itself to be a staunch defender of the argument. The December 2016 *Report on the legal and policy frameworks guiding the United States' use of military force and related national security operations,* which describes the guidelines followed by the Obama Administration when it came to using force outside US borders, directly embraced it[32] and not just in relation to acting against Da'esh but also as a general rule. The *National Security Strategy*, adopted in December 2017 under the Trump Administration, openly declares that the United States will take direct action against terrorists threatening American interests "regardless of where they are"[33]. Nonetheless, to date, its acceptance has been rather limited[34] and it would appear that, at least for the moment, only Da'esh and the gravity of its actions have led to the theory carrying more weight than it had up until now. We cannot, therefore, talk about a clear *opinio iuris* ready to enshrine it. What is more, the States' support for it has mainly taken place within the context of the war against Da'esh, that is to say, in an unprecedented situation with specific features that just about became more understandable with it. The ICJ, however, has rejected actions of this type in the past, when it refused to admit that, in the *case concerning armed activities on the territory of the Congo*, that the lack of action by the Congo-

of self-defence against non-state terrorist actors", *International and Comparative Law Quarterly*, vol. 56, 2007, no. 1, pp. 141-156.

[32] *Op. cit.*, note 15, pp. 9 and 10. This states that, "In some cases, International Law does not require a State to obtain consent from the State on whose territory force will be used against a non-state armed group […]", because the States must defend themselves if "the government of the State where the threat is located is unable or unwilling to prevent the use of its territory by a non-state actor for such attacks".

[33] *National Security Strategy*, December 2017, p. 11 <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

[34] Only 3 other States (Canada, Australia and Turkey) have expressly mentioned it (see Cervell Hortal, M. J., "Sobre la doctrina unwilling or unable State (¿podría el fin justificar los medios?)", *Revista Española de Derecho Internacional,* vol. 70, 1, 2018, pp. 77-100, pp. 91 and 92).

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lese Government was equivalent to tolerating or consenting to the activities of the groups acting in its territory.[35] It should also be noted that, in 2016, the ICJ now, as we know, admitted self-defence against non-state actors, but showed its preoccupation with the possibility of going further and qualified that where non-state groups operate within the borders of a State, "the victim state may have a right to self-defence against the armed group, but not against the state". Therefore, the attack must be finely tuned so that it does not affect the State's governmental and/or national institutions in any way whatsoever, because, otherwise, article 2.4 of the Charter would, in effect, be breached.[36] Therefore, it would appear that there are numerous arguments against the theory, which takes self-defence against non-state actors to extremes and which, at any event, would appear to be made-to-measure for the specific situation in Syria with Da'esh.[37] Generalising it for future situations would, at least for the moment, lack any solid legal basis.

3. SELF-DEFENCE AGAINST TERRORIST "THREATS"

Preventive self-defence is one of the matters that has sparked the most debate about this legal form. Even since the Charter was passed, the doctrine

[35] See paras.. 276, 301 and 303 of the judgment. In this regard, Gutiérrez Espada, C. and Cervell Hortal, M. J., "La prohibición del uso de la fuerza en la sentencia de la CIJ de 19 de diciembre de 2005 (asunto sobre las actividades armadas en el territorio del Congo, República Democrática del Congo c. Uganda)", *Revista Española de Derecho Internacional*, vol. 58, 2006, no. 1, pp. 239-256, p. 25.

[36] ILA, *Report on Aggression and the Use of Force*, International Law Association*, op. cit.* note 21, pp. 12 and 13.These measures should be "proportionate and be limited to those strictly necessary in the context of self-defence against the non-state actor" (p. 12).

[37] Even the most critical have acknowledged it. The ILA states as follows, "The military operations on Syrian territory against the so-called Islamic State have, in particular, demonstrated the readiness of a number of states to invoke Article 51 in the context of operations against a non-state actor" (p. 11). On the other hand, it seems to me that the statement that although we cannot talk about the inability or unwillingness to act theory as customary, we can say that the events in Syria can be classfieid as a catalyst which has fed it, is rather reckless (Flasch, O., "The exercise of self-defence against ISIL in Syria: new insights on the extraterritorial use of force against non-state actors", *Journal on the use of force and International Law*, vol. 3, 2016, no. 1, pp. 37-69, p. 64).

has been divided on the matter[38], but the *restrictionist*[39] posture was in the majority, backed up, as we shall see, by ICJ jurisprudence, which was also based on a literal interpretation of article 51 ("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...." (italics added)) to argue that self-defence was only permitted against actual (*consummated)* attacks.

Once again the terrorist phenomenon has fanned debate, as the States have advocated self-defence against attacks emanating from terrorist groups even in cases where they have not taken place. Once more, the 11-S attack marked an inflection point. Although the United States went to extremes to defend self-defence in the matter, including "latent" threats, the United Nations has been more cautious. The 2004 Report by the High Level Group defended that self-defence against *imminent* attack, although controversial, could be considered to be a "principle of International Law" [40]. The following year, the Report by the Secretary General, "In larger freedom. Towards develo-

[38] The so-called expansionists defended themselves with various arguments: the actual wording of article 51, confirming that "nothing in the present Charter will impair the *inherent* right of individual or collective self-defence" (italics added), and, also, the preparatory work (which expressly excluded the possibility of preventive self-defence, *vid. United Nations Conference of International Organization*, vol. 11, pp. 72-73).

[39] Abi-Saab, G., "Cours général de Droit International Public", *Recueil des Cours de l'Académie de Droit International de La Haye*, vol. 207, 1987, pp. 9-463 (pp. 359-379); Brownlie, I.: *International law and the use of force by States*, Oxford University Press, Oxford, 1963, pp. 275-278; Lamberti Zanardi, P., *La legittima difesa nel diritto internazionale*, Giuffré, Milano, 1972 (pp. 191 y ss.) and Randelzhofer, A., *op. cit*., note 16, pp. 788-806. Also, Corten, O.: *Le droit contre la guerre. La interdiction du recours à la force en droit international contemporain,* Pédone, Paris, 2014, p. 665; Dominicé, C., La societé international à la recherche de son équilibre. Cours Général de Droit International Public (2006)", *RCADI*, vol. 370, 2013, p. 9-392, p. 295; Glennon, M. J., "The fog of law: self-defense, inherence, and incoherence in article 51 of the UN Charter", *Harvard Journal on Law and Public Policy*, vol. 25, 2, 2002, pp. 539-558; p. 554; Gray, C., *International Law and the use of force*, Cambridge University Press, Cambridge, 2008,p. 160; Iovane, M. and De Vittor, F., *op. cit.* nota 11, pp. 3-16 (see also the authors on the side of this train of thought, cited therein) and Lachs, M., "The development and general trends of international law in our time", *Recueil des Cours de l'Academie de Droit International*, 1980, vol. 169, pp. 9-377. An overview of the premise of preventive self-defence, with particular reference to Spanish authors and their points of view, can be consulted in Cocchini, A.: "Intentando definir la legítima defensa preventiva", *Anuario Español de Derecho Internacional*, vol. 34, 2018, pp. 499-524.

[40] See para. 189, doc. A/59/2005, of 21 March.

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pment, security and human rights for all" (21 March 2005)[41], also admitted the concept against imminent attacks, although, unlike the United States, it rejected it in the case of *latent* threats. At its meeting in 2007, the IDI stated the right to a State's self-defence "arises in the event of an armed attack in progress, or manifestly imminent"[42]. Similar conclusions were drawn in the *Tallin Manual on cyber warfare* (2013, 2017)[43] and the International Law Association Report on Aggression (2016), although the latter stated that it was only acceptable where States were facing clear and actual danger of a specific imminent attack"[44].

If there has been a key factor in the change of opinion on self-defence against *unconsummated* attacks, it has been Jihad-type international terrorism and I would venture to say that the definitive blow was, in particular, struck by Da'esh's actions. It has, in fact, been its threat which has spurred the as yet reluctant States to consider that self-defence was also valid if, as in the case of this group, the States were under continuous threat.[45] This was because Da'esh was not just another terrorist organisation. It controlled a significant amount of territory in Iraq and Syria, it had managed to establish a pseudo-State under the dictates of the most radical version of Islam, and it never missed an opportunity to declare open warfare against the West.

The conviction that they could not wait to be attacked, given a threat of this calibre, is also what was on the mind of the States who agreed to become a part of the International Coalition against the Islamic State which, since 2014, has taken action (and not just armed) against it. It should be

[41] Doc. A/59/2005, of 21 March, para. 124.

[42] IDI, 10th resolution, 27 October 2007, *op.cit.*, note 19, para. 3.

[43] The Group of Experts in charge of drafting it accepted this idea although admitted that it is not exactly what is recognised in article 51 of the Charter (*Tallinn Manual… cit.*, note 19 p. 63, norm 15, para. 2; *Tallinn Manual 2.0… cit.*, note 19, p. 350, norm 73, para. 2).

[44] *ILA, Johannesburg Conference* (2016), *Use of force. Draft Report on Aggression... cit.*, note 20, pp. 10-11.

[45] This was revealed by Da'esh statements, for example after the Paris attacks in 2015 which stated: "Cette ataque n'est que le debut de la tempète et un avertissement pour ceux qui veulent méditer et tirer des leçons". See Weckel, P.: "La France entre en guerre contre le pseudo-califat", *Bulletin Sentinelle* 452, 14 November 2015. And a similar message made public after those in March 2016 in Brussels (État Islamique, Belgique, *Fash Infos, Comuniqué sur l'expedition* bénie de Bruxelles contre la Belgique croisée, communiqué made public on 22 March 2016).

remembered that, in 2014, Iraq invoked collective self-defence due to, "the serious threat constituted by international terrorist organisations"[46]. In July 2015, Turkey justified some cross-border actions into Syria with the threats from terrorist groups.[47] Belgium committed to air strikes, also on Syria, after the attacks it suffered in March 2016 (up until then it had limited itself to supporting the Coalition). The United States based its intervention in Syria and Iraq on the constant threat from the Islamic State.[48] France, traditionally more cautious about preventive self-defence, changed its conduct after a direct attack, admitting that it was all in line with, "the exceptional nature of the threat posed by Da'esh"[49]. The terrorist organisation also seems to have provoked a more understanding attitude to armed reactions to threats in the United Kingdom.[50] It should also be remembered that resolution 2249 (2015) exhorted the States to take the necessary measures, "to *prevent* and suppress" (italics added) terrorist acts by Da'esh.

Therefore, it would appear that the incursion of Da'esh has tipped the balance in favour of accepting self-defence against imminent attacks. However, although it may seem understandable that this is so given the exception threat of the calibre this terrorist group, to start to generalise it could be tricky and dangerous. There are, nonetheless, States that seem to be comfortable using this argument for other terrorist organisations. For example, Turkey (January 2018) did so when attacking the region of Afrin, which was under Kurdish control but in Iraqi territory, alleging the "terrorist threat" involved in PKK actions and, it specified, it was also acting given the Syrian government's lack of control in the region.[51] However, there are many more States,

[46] Doc. S/2014/695.

[47] *The New York Times*, 24 July 2015 (http://www.nytimes.com/2015/07/25/world/europe/turkey-isis-syria-airstrikes.html).

[48] Doc. S/2014/695, 23 September 2014.

[49] See its intervention in the Council meeting where resolution 2249 (2015) was passed: doc. S/PV.7565, 20 November 2015, p. 2. See also Alabrune, F., *op. cit.,*note 22, p. 46.

[50] This has been felt in various quarters. For example, on 27 April 2016, the House of Commons published its second report *The Government's policy on the use of drones for targeted killing, Second Report Session 2015-16*, (HC 574, HL Paper 2016, p. 43, para. 3.24; see also p. 45) in which it recognised the existence of a right to self-defence against imminent attacks.

[51] Doc. S/2018/53. See the condemnation of the attack by A. Peters en "The Turkish Operation in Afrin (Syria) and the silence of the lambs", *EJIL Talk*, 30 January 2018.

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above all in Latin America, Africa and Asia, who are wary of a concept that, without doubt, could cause problems when applied.[52]

IV. CONCLUSIONS

The Charter of the United Nations conceived the prohibition on the use of force as an essential element for the stability of the new international society it created. However, article 2.4 would appear to be more a preachment in the desert than a present practice among States. The beginning of the new century, and the challenges posed by international terrorism, have contributed to placing compliance with the prohibition even further in danger. In spite of everything, the States have made efforts to find a legal basis to justify armed action against terrorism and self-defence has been the most used argument.

These are new times, it seems, for self-defence, where the possibility of exercising it against non-state actors and against unconsummated, but imminent, attacks has opened up. If, after the 2001 attacks, a trend began which was more open to accepting it in these cases too, the incursion of Da'esh terrorism seems to have consolidated it a little more, and has even lead to cases of dubious legality (attacking the territory of States which do not control or direct the terrorist organisation but, simply, are unable or unwilling to do so).

Those are, overall, debates whose conclusions are still unclear. The format for the prohibition on the use of force and self-defence needs to be adapted to the circumstances of the complex present-day world, which pose challenges which are very different to those existing in 1945. A new practice which is more generous with the limits of the prohibition on the use of force, even if still limited, seems to have begun, but care must be taken – the security of the States cannot be defended at any price, or be the excuse for crossing the limits of legality. It seems, therefore, that the set of rules regulating the use of force need urgent review in order to offer the States the responses they demand.

[52] See Final Document, 17th Summit of Heads of State and Government of the Non-Aligned Movement, 17 - 18 September 2016, para. 258.34.

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