

## THE TWIN TOWERS ATTACK: AN UNLIMITED RIGHT TO SELF-DEFENCE?

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### **ABSTRACT**

*This introductory article considers the limited role of international organizations (the UN and NATO) in Operation Enduring Freedom against Afghanistan. Both organizations have played a peripheral role, legitimating but not regulating the use of force by the United States. This seems to be part of a continuing process of attempting to widen customary rights while eroding the effective powers of organizations. The consequences for collective security and the international legal order are immense.*

## 1 INTRODUCTION

When a state claims to have been subject to an armed attack against it, the norms and structures of international law should come into play. These do not simply exist at the substantive level (customary or treaty), where it is acknowledged that a victim state, in exercising its right of self-defence, can take proportionate military measures to respond to the attack against it. They also exist at an institutional level, where the UN Security Council has primary responsibility for issues of peace and security, with the power to take non-military and military measures to deal with a threat to the peace, breach of the peace or act of aggression. In addition, a collective self-defence organization, of which the victim state is a party, is also a potential actor, given that these entities are based around the maxim of an attack against one being an attack against all. The purpose of this article is to explore the interplay between the claimed right of self-defence and the competence and role of the United Nations and NATO in the case of the terrorist attacks against the United States of 11 September 2001.

There can be no misunderstanding that adequate measures were needed to respond to the blatant terrorist attacks in the United States. This is clear from the determination by the Security Council only a day after the attacks that they amounted to 'a threat to international peace and security'.<sup>1</sup> It made this determination in Resolution 1368 in which it calls upon all states 'to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks'. The Security Council furthermore expressed its readiness 'to take all necessary steps to respond to the terrorist attacks of September 11 2001'. There can be no doubt that the Security Council was acting on the basis of its primary responsibility for the maintenance of international peace and security.<sup>2</sup> In resolution 1368 it implicitly recognized that there existed a 'Chapter VII-situation' thereby opening up the possibility of taking mandatory measures including,

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<sup>1</sup> SC Res. 1368, 12 Sept. 2001.

<sup>2</sup> Art.24(1) of the UN Charter.

if necessary the use of force.<sup>3</sup> This implied determination under chapter VII was made explicit in the follow-up resolution 1373, which expressly refers to chapter VII when imposing measures short of the use of force.<sup>4</sup> When considering the next step up the ladder of powers possessed by the Council, it is notable that with the exception of cases of (collective) self-defence, it is only the Security Council that can make use of its monopoly on the use of force, be it directly or via a mandate.

## **2 PRACTICE AND THE LAW**

The rapid reaction of the Security Council seems to indicate that it fully recognized its responsibility in this situation to maintain or restore international peace and security. That impression was reinforced by its subsequent action. For on 28 September it adopted a further resolution (Resolution 1373) with a number of very concrete and far-reaching decisions aimed at the prevention and suppression of terrorist acts. States for instance will have to adopt measures under their criminal law to prevent the financial support of terrorist acts; that terrorist acts in a broad sense are established as serious criminal offences in domestic law. Furthermore states are called upon to report within three months to a special Security Council commission on the measures they have taken to implement this resolution. The Security Council has imposed anti-terrorist chapter VII obligations on states before, prohibiting states from certain forms of mainly economic relations with states allegedly supporting terrorism (Libya, Sudan and Afghanistan).<sup>5</sup> The resolutions on Afghanistan show that the Security Council was already attempting to secure the extradition of bin Laden. Resolution 1373 represents a further development in the Security Council's battle against terrorism in that it is truly legislating for the international community as a whole (even non-members). The resolution obliges them to change their domestic law in the form of general criminal offences as opposed to the past pattern of specific 'trading with the enemy' clauses. By targeting terrorists and their financial support in any state, as opposed to targeting a handful of 'pariah' states the Security Council has made a huge leap in the field of international criminal justice. Furthermore, in its resolutions to date on the events of 11 September, it has manifested a clear preference to deal with the matter within the realms of its rapidly evolving criminal justice competence rather than under its competence to authorize military action. Both are aspects of the Council's collective security role, but consist of very different strategies. The Council's competence in criminal justice matters is

<sup>3</sup> It is noticeable that Resolution 1368 does not take any action under chapter VII or make an explicit reference thereto. It does however determine a threat to international peace, one of the 'triggers' found in the gateway provision to chapter VII – article 39. In this way it shares a similarity with SC Res. 688, 3 April 1991, which determined that the situation in Iraq constituted a threat to the peace, but did not authorize chapter VII military, or non-military, action.

<sup>4</sup> See art.41 of the UN Charter.

<sup>5</sup> SC Res. 748, 31 March 1992 (Libya); SC Res. 1054, 26 April 1996 (Sudan); SC Res. 1267, 15 Oct. 1999 (Afghanistan); SC Res. 1333, 19 Dec. 2000 (Afghanistan).

designed to achieve peace through justice, while its military competence is designed to achieve peace through force. It might be tempting to suggest that dealing with the perpetrators of the 11 September attack (beyond those who died) would appear to be a criminal justice matter as opposed to a military one. However, such are the weaknesses of international legal procedures that it is quite feasible to see attempts to capture terrorists being undertaken by military measures.

In the Gulf Crisis in 1991, the Security Council condemned the Iraqi invasion and demanded its withdrawal from Kuwait,<sup>6</sup> and followed this up by the adoption of a resolution imposing economic sanctions against Iraq.<sup>7</sup> In parallel the United States and its allies prepared to defend Saudi Arabia from further Iraqi expansion and also to defend Kuwait, at the request of the governments of those states. Eventually the responses of the Security Council and the United States were brought together with the adoption of Resolution 678 that authorized the use of force against Iraq. In the current crisis the Security Council responded to the attacks on 11 September by condemnation and by the imposition of chapter VII non-military measures. At the same time, the United States took the position that the terrorist attacks amounted to an armed attack against which self-defence by military means was allowed. It based its justification for military action, in other words, on the inherent right to (collective) self-defence as embodied in article 51 of the Charter. Unlike the Gulf Crisis, there appears to have been no attempt to seek Security Council approval of the military action, despite the efforts of the US and the UK to build an international 'coalition' against terror. The coalition against Iraq was brought under the umbrella of the UN in 1990, the coalition against terror was not so brought.

The categorization of the terrorists attacks on New York and Washington as an 'armed attack' within the meaning of article 51 is problematic to say the least. Furthermore, the United States-led response is difficult to fit within the framework of collective self-defence, at least as elaborated by the International Court in the *Nicaragua* case. The reasons will be briefly outlined here. The atrocities committed on 11 September appear to have the 'scale and effects' necessary to distinguish them from actions that may fall short of an armed attack.<sup>8</sup> However, they were committed by individuals, not acting, directly at least, on behalf of a state. Self-defence, traditionally speaking, applies to an armed response to an attack by a state. Thus to justify armed counter-measures against Afghanistan, the United States has to establish that the terrorists were not only directed by the al-Qaeda network in Afghanistan, but also that the actions of these terrorists could be attributed to the Taliban government in that country. Furthermore, there has to be 'substantial involvement' by the Taliban government in the activities of the al-Qaeda network to establish that an indirect aggression or armed attack has been undertaken by Afghanistan against the United States.<sup>9</sup> Assuming the links in this chain can be

<sup>6</sup> SC Res. 660, 2 Aug. 1990.

<sup>7</sup> SC Res. 661, 6 Aug. 1990.

<sup>8</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, 1986 ICJ Rep. 14 at 103.

<sup>9</sup> Art.3(g) of the Definition of Aggression – relied on to define an indirect armed attack in the *Nicaragua* case, 1986 ICJ Rep. para. 195.

established, the defensive response has to be immediate as well as proportionate. Here there are problems too for the immediacy appears to have been lost. This is not the same as the Falklands war in 1982 for instance, when the British took several weeks to respond to the Argentinian invasion. The armed attack in that situation was continuing in the form of an occupation of the islands, and the UK response was continuous though somewhat ponderous. In the current crisis the attack was over and the response appeared more in the shape of punitive reprisals, actions that are generally viewed as illegal in international law,<sup>10</sup> although the United States and Israel have practised them regularly. Of particular note in this regard is the United States' response to the terrorist attacks on its embassies in Ethiopia and Kenya in 1998 with strikes against Afghanistan and Sudan. It may be to counter the reprisal accusation that the US and the UK attempted to portray 'Operation Enduring Freedom' against Afghanistan as part of a continuing 'war' against terrorism,<sup>11</sup> with the attack of the 11 September as the latest shot by terrorists in a continuing conflict. Furthermore, there are problems in proportionality. Does an attack against a small part of the United States, albeit one with devastating consequences for the people in the area hit, justify an armed response against a whole country, with the aim not only to root out the terrorists but to destroy and remove the effective, though unrecognized, government? In addition the military support being given by the United States, in particular to the Northern Alliance in Afghanistan, can only be justified if Afghanistan, through the links identified above, has committed an armed attack against the United States. Otherwise the US arming and support for the rebels is as illegal as its arming and support for the Contras was back in the 1980s.<sup>12</sup>

Nevertheless, the United States' position that the terrorist attacks of 11 September could be regarded as an 'armed attack' in the meaning of this clause quickly found broad support. Outside the context of the Security Council, the United States found support for its position in western states. First there is the support by NATO in its declaration of 12 September 2001, although it was a conditional one. For it had to be established first that these attacks 'were directed from abroad'.<sup>13</sup> The European Union in a declaration by the European Council of 21 September went a step further and made it clear that 'on the basis of Security Council Resolution 1368, a riposte by the US is legitimate'.<sup>14</sup> When on 2 October NATO members were convinced that the attack was directed from abroad, NATO

<sup>10</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625, 24 Oct. 1970.

<sup>11</sup> See similar arguments made by Israel on the basis of an 'accumulation of events', Y. Dinstein, *War, Aggression and Self-Defence* (3<sup>rd</sup> ed., 2001) 203.

<sup>12</sup> *Nicaragua* case, 1986 ICJ Rep. 119.

<sup>13</sup> 'The Council agrees that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty . . .'; NATO press release (2001)124, 12 Sept. 2001.

<sup>14</sup> Conclusions and plan of action of the Extraordinary European Council Meeting of 21 September 2001; SN140/01.

declared that it therefore would ‘... be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all’.<sup>15</sup> This means that NATO member states can take such action as they deem necessary in the exercise of the collective right of self-defence. Finally on 7 October the United States together with the United Kingdom started to apply military force against Afghanistan, where the terrorist networks that were held responsible for the attacks were supposed to be located.

In accordance with article 51 of the Charter, on 7 October both the United States and the United Kingdom made their first reports to the Security Council.<sup>16</sup> This raises the question whether the Security Council was of the opinion that under chapter VII of the Charter, specifically article 51, there was a case of legitimate self-defence, or that it solely was of the opinion that there was a threat to international peace and security in the sense of chapter VII, specifically article 39. In either case the Security Council cannot sit back, but it should actively work towards an end-situation. In the former case primarily article 51<sup>17</sup> will be its frame of reference, in the latter case it will be article 39<sup>18</sup> of the Charter, which provides the criteria for a chapter VII determination.

### **3 CHAPTER VII-SITUATION WITH OR WITHOUT SELF-DEFENCE**

The qualification that the combined terrorist attacks amount to an armed attack legitimizing self-defence found broad support in states, even Russia. It is, however, strange that the Security Council did not adopt a resolution, whereby it explicitly determined that the terrorist attacks amounted to such an armed attack. Resolution 1368 does not make that determination, as is wrongly assumed. The Security Council did make a determination of the occurrence of an armed attack, however, in the case of the Iraqi invasion in Kuwait on 2 August 1990. In that case the

<sup>15</sup> Statement by NATO Secretary General Lord Robertson, 2 October 2001 <<http://www.nato.int/docu/speech/2001/s011002a.htm>>.

<sup>16</sup> Letters of the Permanent Representatives of the US and the UK to the President of the Security Council dated 7 October 2001, S/2001/946 and S/2001/947.

<sup>17</sup> ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security’.

<sup>18</sup> ‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and 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’.

invasion was immediately qualified as ‘a breach of international peace and security’<sup>19</sup> and shortly thereafter, only four days later, in Resolution 661 the Council explicitly recognized the right to self-defence in this particular situation.<sup>20</sup> Apparently not all members of the Security Council, amongst which China (the only veto-member left outside the ‘coalition’), and possibly also Russia when it came to voting, were of that opinion in the case of the Twin Tower attack. Possibly this careful attitude can also be explained by the unclear political and legal consequences of such a determination.

In the preambular part of both adopted resolutions (1368 and 1373), however, there is a confirmation of the right to self-defence in general terms. Interestingly in the first resolution (1368) there is a general reference (‘recognizing’) to the inherent right to self-defence in conformity with the Charter, whereas the second resolution (1373) not only reaffirms this right, but also refers to the reiteration of this right in this first resolution.<sup>21</sup> Therefore, in order to exclude any possible doubt that in the concrete case of the Twin Tower-attacks the Security Council was of the opinion that there is an armed attack allowing for self-defence in accordance with article 51 of the Charter, the Security Council should have adopted such a resolution in the immediate aftermath of the attack. For such a resolution to be adopted it is of course necessary that the United States convince the Security Council of the causal chain of events leading to bin Laden and terrorist networks in Afghanistan or other states. This is even more necessary since the United States in its letter to the Security Council of 7 October 2001 leaves open the possibility of also taking military actions in the exercise of its right to self-defence against sovereign states other than Afghanistan.<sup>22</sup> As long as the Security Council has not more explicitly endorsed the concrete right to self-defence by the United States and its allies, as was the case in Kuwait, an unclear situation has arisen. For it is clear that self-defence is not a type of ‘open’ right which can be applied according to the defender’s wishes. Self-defence, of course, has to answer to the rules of international law, in particular the principles of necessity, proportionality and immediacy as well as the restrictions of article 51 of the Charter, and also of course the law of armed conflict. At an early stage therefore the Security Council should have made it clear without a shadow of a doubt, whether it was of the opinion that there solely is an article 39 situation, or a chapter VII self-defence situation. In the latter case, furthermore, it is up to the Security Council to make clear if and when it is of the opinion that it has taken adequate measures – the necessary measures – which will stop or suspend the right to self-defence, or whether it is of the opinion that

<sup>19</sup> SC Res. 660, 2 Aug. 1990.

<sup>20</sup> ‘Affirming the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter’, SC Res. 661, 6 Aug. 1990.

<sup>21</sup> ‘Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)’, SC Res. 1373, 28 Sept. 2001.

<sup>22</sup> ‘We may find that our self-defence requires further actions with respect to other organizations and other States’, see n. 16.

states, be it collectively or not, can continue to defend themselves until the measures have proven to be adequate.

Without this clarity confusion arises as to the legal basis of the US-led response. The Council, in its resolutions, seems to have opted instead for a position of deliberate ambiguity to satisfy the competing political demands within it. The resolutions only generally recognize the right of self-defence. They do not make a specific determination in the case in front of it of a breach of the peace or an act of aggression within the meaning of article 39 which would have strongly indicated that there was an attack within the meaning of article 51 in this case. Furthermore, the resolutions do make an explicit determination of a threat to the peace that suggests that there is a situation that should be dealt with not under the rubric of unilateral or multilateral self-defence, but under the collective security provisions of the UN Charter. The end result of Security Council determinations and US-led military action is that it appears that the US is dealing with a situation, which threatens international peace, *in lieu* of the Security Council, since there is no question of authorization by the Security Council. In essence this appears to be a continuation of the approach taken by NATO in its response to the Kosovo crisis in 1999, when the NATO members took military action against the FRY without any Security Council authorization, though the Security Council had determined that there existed a threat to the peace.<sup>23</sup>

#### **4 SELF-DEFENCE AND THE ROLE OF THE SECURITY COUNCIL**

In the western view there is a case of self-defence. However the limits to this right, both regarding the legality of resort to force (the *jus ad bellum*) and the law of armed conflict (*jus in bello*), and the role of the Security Council thereby appear to be less clearly defined. It can be questioned for instance whether the western states are aware that after a period of time the ‘immediacy’ decreases and there is less of a ‘necessity’ for an urgent military reply. These then are being replaced by more diplomatic means such as coalition building and other non-military means. These are general principles of law.

Besides we are dealing with self-defence within the United Nations regime – the system of collective security. Under this system self-defence is subject to restrictions (in other words is finite). For self-defence is only allowed ‘until the Security Council has taken measures necessary to maintain international peace and security’. In other words states will not have to wait until the Security Council has done ‘its work’ and has ‘solved’ the conflict by restoring the *status quo ante*. By ‘doing nothing’ and waiting for Security Council action, an attacked state may well be fatally compromised. This will be more so in the case when decision making within the Security Council is blocked by the threat or use of a veto. Also in case of a sudden (acute) attack one could not expect the victim state to suspend its right of

<sup>23</sup> SC Res. 1199, 28 Sept. 1998.

self-defence after the very first Security Council resolution, for instance one calling on the attacker to withdraw its forces.<sup>24</sup> There should, however, come a moment, whereby on the basis of the character of the decisions by the Security Council, in other words measures to maintain international peace and security, and the extent to which they have been carried out, the right to self-defence stops. It is in fact up to the Security Council to determine this moment in order to exclude any misunderstanding. Only if it is apparent that the Security Council is unable to decide,<sup>25</sup> or, after the self-defence has been terminated, those measures of the Security Council have shown to be inadequate and the conflict continues undiminished, this right to self-defence is revived.

The reason for dwelling so extensively upon this mechanism is clear, for it should be understood that the Security Council has an active duty to take the necessary measures to maintain or restore international peace and security. In this respect the member states have given the Security Council a clear responsibility, that cannot be misunderstood. As is evident in the matter of the Twin Tower attack the Security Council has taken a number of measures under chapter VII. It, however, omitted to make explicitly clear whether it was concerned with measures as referred to in article 51. But even if we regard the preambular references in both resolutions (1368, 1373) as such, that is not the end of the story. The Security Council will have to take care that it takes *adequate* measures to replace the military action of the collectivity of self-defenders, *in casu* the United States and its allies. It can thereby make use of a whole range of means as described in the Charter of the United Nations and in particular in chapter VII, but to start with all diplomatic means should be employed by the United Nations in order to build an effective coalition of likeminded states. Just as in the case of the Iraqi invasion in Kuwait it thereby can make use of measures progressive in weight, ultimately the mandate to use force on its behalf. For in the final instance it could decide to mandate the coalition of states to use force on behalf of the Security Council. It thereby cannot but tie the use of force to an explicit goal, and also ensure the mandate is being pursued and achieved by the duty to report back to the Security Council. Thereby the Security Council makes clear that it is in charge of the action taken on its behalf.<sup>26</sup>

<sup>24</sup> See art.40 of the UN Charter.

<sup>25</sup> It may be argued that if this is a result of a capricious and self-serving use of the veto, then the General Assembly should be able to give guidance on this matter, just as it has been argued that it be able to recommend that military action be taken in the face of such vetoes in the Security Council – see N.D. White, ‘The Legality of Bombing in the Name of Humanity’ (2000) 5 *Journal of Conflict and Security Law* 27.

<sup>26</sup> Further resolutions adopted by the Security Council leave doubt as to whether the Council is in full control, for of the resolutions adopted by it in the wake of the terrorist attacks, none seems to answer this criterion. SC Res. 1377 (12 Nov. 2001) is clearly a follow-up to Res. 1373; SC Res. 1378 (14 Nov. 2001) is an endorsement of the arrangement regarding a new government in Afghanistan, and Res. 1383 (6 Dec. 2001) is an endorsement of the Bonn agreement of 5 Dec. 2001. Of the three resolutions that take chapter VII decisions only SC Res. 1386 of 20 Dec. 2001 is relevant, for SC Res. 1388 (15 Jan. 2002) concerns exemptions in relation to Ariana Afghan Airlines, and SC Res. 1390 (16 Jan. 2002) follows the criminal justice track of previous resolutions like Res. 1373.



After the successful prosecution of the ‘war’ against the Taliban and the conclusion of the Bonn Agreement in December establishing an interim administration for Afghanistan,<sup>27</sup> the Security Council did authorize the use of military force under chapter VII of the UN Charter (Resolution 1386). The Council authorized member states participating in the International Security Assistance Force (ISAF) to take all necessary measures to fulfil its mandate to assist the Afghan interim government to maintain security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations could operate in a secure environment.<sup>28</sup> ISAF was so mandated for 6 months, at least initially. It is interesting to note that annex I of the Bonn Agreement, which requested the Security Council to establish a security force, saw the mandate as potentially wider – ‘to assist in the maintenance of security for Kabul and its surrounding areas. Such a force could, as appropriate, be progressively expanded to other urban centres and other areas’.<sup>29</sup>

This resolution did not remove the confusion in the legal position regarding the use of force, for it was not clear that even this action authorized by the Council constituted ‘necessary measures’ within the meaning of article 51. The United States continued bombing, albeit at a lower level of intensity, presumably in the continued exercise of its right of self-defence. Indeed, in the letter sent by the United Kingdom to the Security Council in which it volunteered to lead ISAF, the United Kingdom stated that United States central command will have ultimate authority over ISAF so as to prevent any conflicting actions and to ensure that there is no interference with the successful completion of Operation Enduring Freedom.<sup>30</sup> In accepting the UK’s offer the Security Council could be said to have again abdicated its primary responsibility to the United States. Even so, the resolution authorizing the use of force was so opaque on this and other matters, including the lack of any precision in the mandate for the UK-led force. It is still unclear whether the Security Council considered that there was a legitimate case of self-defence, the only apparent consensus being that there was, and continues to be, a threat to international peace. This was again re-iterated in resolution 1386. The Council seems to be doing its best to ignore the crucial issue of the legal basis of the US response. This lack of legal clarity leaves the Security Council far from the centre stage in the situation in Afghanistan. This is a pity, for as with Kosovo, it is the UN that is left with the main responsibility for helping to re-build the country.<sup>31</sup>

<sup>27</sup> SC Res. 1383, 6 Dec. 2001 which endorses the Bonn Agreement of 5 Dec. 2001.

<sup>28</sup> SC Res. 1386, 20 Dec. 2001.

<sup>29</sup> Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, UN doc. S/2001/1154, 5 Dec. 2001.

<sup>30</sup> UN doc. S/2001/1217, 9 Dec. 2001.

<sup>31</sup> Recognized in SC Res. 1378, 14 Nov. 2001.

## 5 THE ROLE OF NATO

Strangely enough it is unclear what NATO's role was in this conflict. For NATO is an international organization established to co-ordinate the collective self-defence commitment of the state parties to the Washington Treaty. It issued a statement to the effect that it considered that the terrorist attacks amounted to an armed attack in the sense of article 5 of this treaty, and was therefore an attack on them all.<sup>32</sup> Invoking article 5 signifies that each of the parties is committed to come to the rescue of the one attacked thereby exercising their collective right to self-defence. In other words each of them should (in the way each of them deems necessary) come to the assistance of the United States. Given the history of the Washington Treaty, the NATO-organization with its Council and subsidiary bodies like the Defence Committee, the Military Committee or Regional Planning Groups, in addition to NATO's strategic doctrine, NATO trained military etc., a NATO-led military response or a significant contribution to US self-defence might have been expected. In that response each of the 19 member states could then determine the level of its involvement within the meaning of article 5 of the treaty.<sup>33</sup> NATO's commitment, however, seems to amount to the invocation of article 5, and in terms of military action we have, in the words of NATO's Ministers of Foreign Affairs 'US-led military operations against the terrorists'.<sup>34</sup> These operations are supported to varying degrees by individual states, prominently the UK. For these individual contributions, however, article 51 of the UN Charter would have been sufficient. This begs the question of why, other than for cosmetic reasons, it was necessary to invoke article 5 of the NATO treaty.

Two recent documents released by NATO at the close of ministerial meetings do not provide convincing arguments. In one released by ministers of foreign affairs, meeting as the North Atlantic Council, after a reference to the fact that article 5 had been invoked, it is stated that 'accordingly, we have decided to support, individually and collectively, the ongoing US-led military operations against the terrorists who perpetrated the 11 September outrages and those who provide them

<sup>32</sup> See n. 15.

<sup>33</sup> 'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an armed attack against them all and consequently they agree that, if an armed attack occurs, each of them, in the exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken measures necessary to restore or maintain or restore international peace and security'.

<sup>34</sup> 'We consider the events of 11 September to be an armed attack not just on one ally, but on us all, and have therefore invoked Article 5 of the Washington Treaty'; NATO's response to terrorism, statement issued at the Ministerial Meeting of the North Atlantic Council, 6 Dec. 2001, M-NAC-2(2001)159.

with sanctuary'.<sup>35</sup> The examples of the military activities given in the statement, 'NATO surveillance aircraft patrolling US airspace', or 'Alliance naval forces . . . deployed to the eastern Mediterranean to demonstrate NATO's solidarity and resolve', do not point convincingly to NATO collective defence operations. Furthermore, the statement by NATO Defence Ministers<sup>36</sup> does not shed much light on the question in what way NATO, as an international organization, has made use of its collectively prepared military power, for in content it is similar to the Council statement. Remarking that the 'Alliance is already in a position to contribute significantly to the struggle against terrorism due to the ongoing transformation of its forces, military structures, and defence planning procedures that have been underway since the end of the Cold War. Indeed, following 11 September, both individually and collectively, the Allies are already making such a contribution. In conjunction with the invocation of Article 5, we have opened our airspace to aircraft involved in the coalition operations, deployed Airborne Warning and Control Aircraft to help patrol American airspace, sent a naval force to the eastern Mediterranean, taken steps to strengthen the protection of sensitive facilities, and increased exchanges of information and intelligence'.<sup>37</sup> None of these activities appear to be classic NATO operations with its special command and communications facilities. They appear more to alleviate the US presence at places other than the conflict zone, thereby leading to a US-led and overwhelmingly dominated operation with a 'NATO-face'. If there is a real involvement of NATO based upon article 5, why has there been no reporting back to the Security Council as foreseen in article 5 of the Washington Treaty<sup>38</sup> in conformity with article 51 of the Charter? Would it be because '[s]uch measures shall be terminated when the Security Council has taken the measures necessary to resolve and maintain international peace and security', which is the final paragraph of article 5, in conformity with article 51 of the Charter.

Such a low level of involvement by NATO further calls into question the continuation of the organization, at least in its classic defence pact form. NATO's considerably more decisive actions in Bosnia in 1995 (under UN mandate) and in Kosovo in 1999 (not under a UN mandate), and its subsequent leading of the UN mandated operations in Bosnia (IFOR/SFOR) and Kosovo (KFOR), were not taken in collective self-defence. NATO's development of a very imprecise notion on 'non-article 5' operations,<sup>39</sup> shows that its practice has gone far beyond the relatively limited contract made by the parties in 1949. NATO parties must re-make the legal basis of the organization, moving it more to a constitutionally ordered organization, allowing for greater growth, subject of course to the clear limitations of international law.

<sup>35</sup> *Ibid.*

<sup>36</sup> Statement on combating terrorism: Adapting the Alliance's Defence Capabilities, NATO press release, (2001)173, 18 Dec. 2001.

<sup>37</sup> *Ibid.*

<sup>38</sup> ' . . . Any such attack and all measures taken as a result thereof shall immediately be reported to the Security Council . . . '.

<sup>39</sup> Alliance's Strategic Concept 1999, NATO Press Release NAC-S(99)65, 24 April 1999, para. 47.

## 6 CONCLUSION

When the Security Council fails to go beyond resolutions like 1368 and 1373, and does not engage itself actively to maintain peace and security, preferring instead a more remote attitude, it neglects its primary duty to restore and maintain peace and security. This is not an unlikely scenario given the fact that both the United States and the United Kingdom as permanent members of the Security Council have a veto and thereby can block any resolution that is not to their liking. In such an instance, however, the resolutions that have been adopted would appear to have had a more 'cosmetic' purpose. More in particular, the response to the Twin Towers attack may contribute to a development of international law, which would place self-defence outside the context and thereby outside the limits of the Charter of the United Nations. In that way the Security Council would lose its crucial supervisory role on the only permitted use of military force outside itself. This is the more so since it not only concerns the use of military force against non-state actors within Afghanistan, but the United States furthermore has indicated that it does not exclude self-defence operations within or against other states, and that these operations might take years to come. Inaction by the Security Council would thereby lead to further erosion of its regulation of the use of force.

Erosion of Security Council authority to deal with situations that fall within chapter VII appears to have become, either by accident or design, part of the policy of powerful states, particularly the United States. It is interesting to remember that in two previous clear cases of attacks within the meaning of article 51, on South Korea in 1950 and Kuwait in 1990, the United States-led coalition, although initially responding under the rubric of article 51, moved its operations under article 42 as responses to breaches of the peace.<sup>40</sup> This was primarily done for the purposes of achieving greater legitimacy for their military actions. However, in cases where the response does not appear to come, at least clearly within the meaning of article 51, Kosovo in 1999, and Operation Enduring Freedom against Afghanistan in 2001, the US and its allies failed to secure the necessary UN authority. In the case of Kosovo this was because of perceived Chinese and Russian opposition that would have resulted in the use of the veto for any proposed authorizing resolution. In the case of Afghanistan, this may not have been the case, rather the desire by the US and its allies to operate to deal with a situation that threatens international peace outside the framework of article 42. In both cases the end result appears to be a military action taken on the back of a Security Council resolution which determined a threat to the peace without containing any authorizing language. At the same time the use of force is bolstered by claims to be operating within customary rights, the controversial right of humanitarian intervention in the case of Kosovo, and the right of self-defence, rather widely interpreted, in the case of Afghanistan. This practice has thus resulted in the simultaneous erosion of Security Council authority under chapter VII and a purported widening of the customary law exceptions to the ban on the use of force in international relations embodied in article 2(4) of the UN Charter.

<sup>40</sup> SC Res. 83, 27 June 1950 (Korea); SC Res. 678, 29 Nov. 1990 (Kuwait).

The presence of additional or wider customary rights is not necessarily an anathema to the idea of collective security embodied in the UN, though it can be strongly argued that if these rights are recognized as wide ranging and subjective, then it is no longer possible to talk about collective security. If this is the case, while not necessarily returning to the pre-1919 period of a virtually unlimited right to go to war, international relations will have reached a point where force is permitted in so many instances that the regulation of it no longer makes any sense.