

Is there Still a Chance of Revitalizing the United Nations Security Council?

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[1] As professor Antonio Cassese rightly said in a public speech on September 26, the terrorist attacks on the US not only caused an unbearable number of innocent victims, but they are also disrupting some of the most important international legal categories that seemed to be consolidated until September 11, 2001. (1) [2] The collective security system put into place after World War II was based on the principle of banning the use of force in international relations, as article 2, para.4 of the UN Charter clearly establishes. (2) The prohibition to use (or even to threaten the use of) armed force has also become part of the *jus cogens*, which means that – or at least it meant until a few days ago – a derogation from this principle is considered impossible. According to the UN Charter and to customary international law, the only exceptions provided to the principle enshrined in Article 2, para. 4 are: a) the use of force made by the Security Council (hereinafter SC) under Article 42, (3) and b) the use of force in individual or collective self-defence under Art. 51 of the Charter. (4) As it is well known, the United Nations system never worked as it was meant to be. Nevertheless, its underlying principles – in particular the prohibition to use force – were never in such danger of being undermined as it is presently the case. [3] Many States often claimed in the past to have used force in self-defence, even when the preconditions for the exercise of the right of self-defence were not present. These States were repeatedly condemned by the international community and their armed actions deemed unlawful. (5) Indeed, since 1990, there has been a general agreement among States regarding the so called "authorization system", according to which the SC, in case of a threat to the peace, breach of the peace or act of aggression, may delegate to member States, acting nationally or through regional organizations or arrangements, the task of using armed force in order to reach a set of different purposes, obviously linked to the maintenance of peace and security. (6) The authorization *regime*, albeit selective, allowed the SC to maintain a certain degree of control over the operations conducted by the "coalitions of the willing", in light of the fact that authorizations were generally given within a limited time-frame and member States were to report to the SC. Unfortunately, at present, the authorization *regime* seems to have collapsed. [4] In recent years, after the authorization system already emerged as a concrete option, there were already many more or less evident breaks in the system itself. To give just one example, there was actually little opposition when the US bombed Afghanistan and Sudan in 1998 - clearly as a retaliatory action for the killing of civilians in the bombing of United States embassies in Nairobi and Dar-es-Salaam in 1998 - without any prior SC authorization. Then, in 1999, a deep hole in the system opened with the NATO bombing of Serbia for "humanitarian purposes", once again without any prior authorization by the SC. On that occasion the SC was not able to authorize member States because of the lack of agreement among its permanent members. The SC adopted a few resolutions that some considered an implicit authorization, but that would rather have to be seen as an admission of weakness. Nonetheless, it was widely held that - in light of the allegedly overriding humanitarian motivations – this had been an exceptional case, while it surely should not set a precedent for unauthorized humanitarian – or of any other kind - armed interventions. (7) Now the authorization system seems to have totally cracked down, leaving room for the US to take the lead in the new 'war' against terrorism under the cover of self-defence. The question now is whether it is still possible to give it a new lease of life. There are compelling reasons why the international community should agree on decisive action into this direction. [5] SC resolution 1368, adopted on 12 September, 2001, recognizes the right of self-defence, but it does not recommend any concrete measure nor does it - implicitly or explicitly - authorize the use of force. What it does is to characterize the acts of terrorism as a threat to international peace and security. It has been observed that this resolution is contradictory because its text acknowledges the right of self-defence (which States may exercise if they are victims of an armed attack) while determining the existence of a threat to the peace and not of an armed attack or act of aggression. (8) While there is certainly truth to this, it is important to keep in mind that comparable inconsistencies are not unprecedented in SC resolutions and that in the past they did not impair action by the Security Council. In the wake of the Iraqi invasion of Kuwait in 1990, the SC immediately adopted measures not involving the use of force (i.e. economic and other sanctions) under Chapter VII, at the same time as affirming the inherent right of individual and collective self-defence. (9) A few months later, the SC authorized member States to use all necessary means, including the use of armed force, to assist Kuwait in repelling Iraqi attack. (10) This is surely not to be taken as a late praise of "Operation Desert Storm" (and even less a praise of the events in its aftermath). On the contrary, that particular operation can be seen as precisely an example to stay away from, as it was conducted on the basis of a blank authorization setting no time-limit and no clear-cut objectives. A recollection of these resolutions was rather intended to remind that it is hopefully not too late for the SC to step in and take control of the situation, even if, on 12 September, it mentioned the inherent right to self-defence of all member States. [6] A prompt return to the authority of the SC would, indeed, be the only way to stick to the general legal framework that has governed international relations in the past fifty years. One must fear that, if the US unilaterally come to the decision to use armed force on a large scale without a SC authorization, this would clearly mean a step backwards, a move back towards the times when the use of force was allowed as a lawful means for protecting States' interests. We should make an effort (not only as lawyers, but as European citizens by exercising pressure on our governments) to say out loud and clearly, that the unilateral use of force against Afghanistan or against any other states supposedly supporting terrorist organizations (but not directly involved in or responsible for

the 11 September attacks on the US) *can by no means be characterized as an exercise of the right of self-defense.*⁽¹¹⁾ Moreover, even if one were to assume that a terrorist attack of such horrific and devastating dimensions could be characterized as an armed attack, it is still not an armed attack *by a State* unless it is proven that the terrorists that planned and committed those acts were *de facto* agents of that State. At this moment, one State, namely Afghanistan, is the expected target of the US reaction, although we are clearly missing a sufficient link to blame the attacks on that very State. [7] In order not to be equivocated, a number of things still need to be stressed. Sheltering terrorists is indeed a grave crime and States responsible for hosting and supporting terrorist organizations must surely be induced to detain and hand over those responsible for terrorist acts for prosecution and punishment. However, this may not be achieved as a matter of self-defense but, instead, in form of coordinated and well-planned multilateral efforts. Indeed, the best possible response relies on prevention. Regrettably and tragically, the 11 September attacks cannot be reversed. The most effective thing that the international community can do is to engage in efforts to prevent such attacks in the future and to punish – by the means of law – those bearing responsibility for the crimes committed. There have been numerous suggestions as to the most appropriate form of prosecuting alleged terrorists. We should not forget that the attacks caused the death of people from some 60 different countries, which all have thus an appropriate jurisdictional link to bring suspected terrorists to trial.⁽¹²⁾ [8] Concludingly: as regards the question of the use of armed force, if terrorism can be considered a threat to international peace and security (and it certainly can as the Security Council already affirmed), then a *limited use of force* could be legitimate in order to destroy terrorists' logistical infrastructures and military means. But *only the SC could render such a use legitimate by expressly authorizing States - preferably more than one – to such action and by maintaining a certain control over the actions taken.* [9] It is not too late and we all should stand for this option. The widespread political agreement on struggling against terrorism is giving the world the opportunity to infuse new energy into the UN collective security system (or what is left of it).⁽¹³⁾

(1) Speech given at a roundtable on: *"The Consequences of the Attack on the US"* (European University Institute, Florence, 26 September 2001; on file with the author). To be published in the EUROPEAN JOURNAL OF INTERNATIONAL LAW (forthcoming).

(2) Art.2, 4: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

(3) Art. 42: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations".

(4) Art.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, 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."

To be precise also Article 53 (Chapter VIII) of the UN Charter provides for a possible exception since it establishes: "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council (...)"

(5) Israel, in particular, always claimed to have a right to 'anticipatory self-defense' in order to avoid armed attacks by neighboring countries. However, the international community never acknowledged such a right.

(6) The Security Council has authorized the use of force in order: 1) to repel an armed attack (Korea, Kuwait); 2) to ensure strict implementation of economic measures previously adopted by the SC itself (Former Yugoslavia; Somalia; Haiti and many other cases); 3) to establish a secure environment for humanitarian relief operations (Somalia, Bosnia-Herzegovina, Rwanda); 4) to restore peace and security after internal conflicts or disorders (Albania, East Timor) and also 5) to restore a democratically elected government pulled down by a military junta (Haiti). For a recent and detailed survey on the authorization system, see Niels Blokker, *Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'*, in EUROPEAN JOURNAL OF INTERNATIONAL LAW 2000 (11), 541-68 (also available on-line at <http://www.ejil.org/journal/Vol11/No3/index.html>)

(7) See Simma, NATO, *the UN and the Use of Force: Legal Aspects*, in 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1-22 (1999); Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, *ibidem*, 23-30 (both articles are available on-line at <http://www.ejil.org/journal/Vol10/No1/index.html>). See also Cassese, *A Follow-up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, in 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 791-800 (1999).

(8) Cassese, cited in footnote 1.

(9) SC res. 661, adopted on 6 August 1991.

(10) SC res.678, adopted on 29 November 1990.

(11) For a detailed description of the content of the right to self-defense, see Cassese, *supra* footnote 1.

(12) Were the International Criminal Court (ICC) already there, it could exercise its jurisdiction over these acts. In light of their gravity and of their characteristics, persons allegedly responsible for committing them could be prosecuted for crimes against humanity which, according to the definition contained in article 7 of the ICC Statute, include acts of murder when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

(13) While concluding this article (28 September), the UNSC unanimously adopted a very important resolution (res. 1373). The SC reaffirmed that terrorist acts constitute a threat to international peace and security. It also reaffirmed the inherent right of individual and collective self-defence. As reported in the SC press release (SC/7158): "Under terms of the text, the Council decided that all States should prevent and suppress the financing of terrorism, as well as criminalize the wilful provision or collection of funds for such acts. The funds, financial assets and economic resources of those who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts and of persons and entities acting on behalf of terrorists should also be frozen without delay.

The Council also decided that States should prohibit their nationals or persons or entities in their territories from making funds, financial assets, economic resources, financial or other related services available to persons who commit or attempt to commit, facilitate or participate in the commission of terrorist acts. States should also refrain from providing any form of support to entities or persons involved in terrorist acts; take the necessary steps to prevent the commission of terrorist acts; deny safe haven to those who finance, plan, support, commit terrorist acts and provide safe havens as well.

By other terms, the Council decided that all States should prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other countries and their citizens. States should also ensure that anyone who has participated in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice. They should also ensure that terrorist acts are established as serious criminal offences in domestic laws and regulations and that the seriousness of such acts is duly reflected in sentences served.

By further terms, the Council decided that States should afford one another the greatest measure of assistance for criminal investigations or criminal proceedings relating to the financing or support of terrorist acts. States should also prevent the movement of terrorists or their groups by effective border controls as well.

Also by the text, the Council called on all States to intensify and accelerate the exchange of information regarding terrorist actions or movements; forged or falsified documents; traffic in arms and sensitive material; use of communications and technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction.

States were also called on to exchange information and cooperate to prevent and suppress terrorist acts and to take action against the perpetrators of such acts. States should become parties to, and fully implement as soon as possible, the relevant international conventions and protocols to combat terrorism.

By the text, before granting refugee status, all States should take appropriate measures to ensure that the asylum seekers had not planned, facilitated or participated in terrorist acts. Further, States should ensure that refugee status was not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation were not recognized as grounds for refusing requests for the extradition of alleged terrorists." The Council also established a Committee of the Council to monitor the resolution's implementation and called on States to report within 90 days on actions taken to that end.