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# SELF-DEFENCE AGAINST TERRORIST ATTACKS

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***Abstract*** *The article analyses the concept of self-defence against non-state actors – terrorist groups. The events of last decades where non-state actors (terrorist groups) had carried out attacks amounting to armed attack in sense of Article 51 of UN Charter left a dilemma for states whether the right to self-defence encompasses as well actions against non-state entities. The state practice illustrated in present article supports the idea that self-defence is possible against whoever committed armed attack, be it a state or non-state entity. The article also discusses the standard of action against states harbouring terrorists.*

***Keywords:*** *: armed attack, terrorist groups, self-defence, unwilling or unable test*

## Introduction

"Those youths that destroyed Americans with their planes, they did a good deed. There are thousands more young followers who look forward to death like Americans look forward to living." (Hofman, 2003). These words were spoken by Al Qaeda spokesman Suliman Abu Geith after 2001 September 11 attacks on New York and Washington DC. They reflect the ambitions of terrorists in the modern international community: terrorists have declared war on the United States and its allies, that is, almost on all of Western culture. The above words also reflect the determination of terrorists to act using all means possible, not safeguarding even their own lives, as this war is, in their view, a holy war. The United States has also declared war - but not on civilization or culture, but on terrorism.

Although there have been positive developments in the fight against terrorism in the last decade of the 20th century, terrorism has not disappeared and remains a relevant problem in the 21st century. The states themselves are no longer engaging in open warfare, but outraged national groups are seeking justice through brutal coercion. In last decades terrorism gained another impetus - it is now based not only on ideological but also on fundamental incentives.

The means of terrorist combat are changing, and terrorists even gain access to the weapons of mass destruction, destroying important civilian targets. However, even without weapons of mass destruction, terrorists are able to pose a major threat and cause a great deal of damage: during 9/11, the means of the tragedy were the aircrafts, which were hijacked with knives and martial arts. After hijacking four planes, the terrorists directed two of them to the World Trade Center, one to the Pentagon, and the fourth was likely intended to fly to the White House, but was probably crashed near Shanksville, Stony Creek Township, Pennsylvania. During these events the death toll events exceeded the number of victims in the Pearl Harbor attack, killing approximately 3,000 people of 85 nationalities. Recent events in Iraq and Syria, where the Islamic State, by announcing its caliphate, simultaneously controlled an area nearly the size of the United Kingdom, also leave no doubt about the changing, growing potential of terrorist groups. Thus, it can be argued that some terrorist attacks are not inferior in scale to military action by states. The latter, in turn, also take retaliatory (sometimes military) action to defend themselves against this growing threat.

The purpose of this article is to analyse the use of self-defence measures against armed attacks by terrorist groups, and the corresponding state practice regarding this question. The

main question is whether presently international law allows self-defence against terrorist groups (non-state actors) and under what conditions. The methods used to achieve this purpose are analytical, comparative, teleological.

**Self-defence as an exception to the prohibition of the use of force**

The principle of the use of force, according to the United Nations (UN) Charter (1945), Article 2(4) means that no military force is allowed between states: "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." The two exceptions to this principle are the authorisation of the use of force by the Security Council in situations where there is threat to peace, breach of peace or act of aggression, and self-defence of states against armed attack.

Article 51 of the UN Charter (1945) states that "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." Most of the scholars argue that this Article, together with Article 2 (4) of the UN Charter, now defines and restricts the right to self-defence (it previously included preventive action) and is now allowed in cases of armed attack and only in cases of armed attack (Shaw, 1997, p. 777). However, there are also those who believe that the beginning of an article stating that "no provision of this Charter restricts the inherent right to self-defence" means that there is still a customary right of self-defence which applies in other cases and that Article 51 then applies. when an armed attack occurs. However, in the Nicaraguan case, the International Court of Justice (ICJ) linked the customary right of self-defence to the existence of an armed attack (*Nicaragua v. United States of America,* 1986).

Self-defence must meet certain requirements established in customary law. First and foremost, self-defence must meet the requirement of necessity - that is, peaceful means of resolving the conflict must be used first and the use of force must be the last resort. Once the attack is already underway, then the need to respond by force is clear (Schmitt, 2003). However, if only force is threatened, the use of non-military means may be effective and the use of force may not be necessary.

Proportionality is the second condition for self-defence. This principle does not require the state to respond in self-defence, using only as much force as was used against it. In this way, the state would either remain unable to defend itself or excessive use of force would be justified (Schmitt, 2003). A proportionate response is a response that uses as much force as is necessary to repel an attack. On the one hand, it allows the state to defend itself effectively, on the other hand, it requires that excessive force is not used.

The third requirement - imminency - is relevant when we talk about a situation where the attack has not yet taken place. Self-defence actions in this case may take place during the last window of opportunity in order to use all possibilities to resolve the conflict by peaceful means. An attack in this case must be imminent (Schmitt, 2003, p. 93).

**Self-defence against terrorist actions**

Neither Article 51 of the UN Charter nor, for example, Article 5 of the North Atlantic Treaty mention that an armed attack must be carried out by the state. However, G. Gaja claimed that the concept of armed attack in Article 51 can be linked to the definition of aggression in French (fr. *agression armee*), and the definition of aggression explicitly refers to acts of the

state (Gaja). Byers is also of the opinion that terrorist acts do not in themselves confer a right to self-defence. According to him, most states would not support actions that would open the territory of these states to attack whenever terrorists are suspected of operating from their territory (Byers, 2002).

However, there are arguments to the contrary. As already mentioned, in the Nicaragua case (1986) the ICJ linked the concept of an armed attack to the act of the State, but it cannot be said that the concept of an armed attack is identical to that of an aggression, as the ICJ itself argued in that case (*Nicaragua v. United States of America*, p. 101) that aggression should be distinguished from other, lighter forms of the use of force, and further in the case argued that the use of force may fall outside the notion of armed attack (*Nicaragua v. United States of America*, p. 127). Consequently, a distinction should be made between aggression, armed attack (which gives rise to the right to self-defence) and lighter forms of the use of force prohibited by Article 2 (4) of the UN Charter. It follows that the reference in the definition of aggression to acts of the State does not automatically mean that an armed attack can only be carried out by the State.

Consequently, if a terrorist attack has not been carried out directly by any state, there is no reason to believe that it should not be considered an armed attack. Although the concept of armed attack has traditionally been used to describe the actions of a state, Article 51 of the UN Charter does not stipulate that the attack must be carried out directly by another state. Indeed, Article 2 (4) of the Charter uses the words "the use of force by a Member State against any State" and this phrase is not repeated in Article 51, so that Article does not specify who may carry out an armed attack giving the right to self-defence. The right to self-defence, before the adoption of the UN Charter, included the right to react to attacks, whoever their author was (Murphy, 2002), and consequently, the right of self-defence now includes the right to defend oneself against attacks by non-state actors.

It can also be said that if an armed attack is committed not by the State, there is no reason to prove that the armed attack justifying the right of self-defence took place, because if the attacker is not a State, he cannot benefit from the prohibition of the use of force established in Article 2 (4) of the UN Charter (Guruli, 2004). Although theoretically possible, it is very likely that in reality this entity will still be located in one or more of the States protected by Article 2 (4). This underlines the importance of identifying the state against which self-defence actions should be directed after an armed attack by a non-state actor. However, this issue is separate and distinct from seeking to determine whether an armed attack has taken place that would justify the use of force.

**State practice in relation to the use of force against terrorists**

Even though the ideas of scholars of international law abound and are of explanatory importance in international law, it is only the state practice that is decisive in determining what is the content of the rules of international law, as the states are the sole creators of the rules of international law. The *opinio juris* of states is decisive in stating what the customary law is, and as well the opinion of the state and its position is crucial in formulating the treaties as only by the direct action of the state - signing the treaty - a state may be bound by contractual obligations. Therefore, to answer the question of use of force against terrorist groups it is important to look at what states individually or in international forums have stated regarding such a question.

In previous state practice, allegations that terrorist acts amounted to an armed attack were often not generally accepted. For example, the Security Council of UN (SC) did not justify

Israel's actions in 1982 against Lebanon, although Israel claimed to have invaded it to counter the abilities of the Palestine Liberation Organization (PLO) to carry out terrorist activities in northern Israel (Security Council, 1982a, 1982b, 1982c). Similarly, in 1985, the Security Council condemned Israeli action against Tunisia in response to PLO attacks (Security Council, 1985). However, there have been cases where states have taken the view that terrorist bombings could be considered an armed attack giving the right to self-defence. In 1998, when Al Qaeda organised the bombing of US embassies in Kenya and Tanzania, killing 300 people, 12 of them Americans, the US exercised its right to self-defence and attacked terrorist training camps in Afghanistan and a pharmaceutical factory in Sudan that allegedly produced chemical weapons. While some states have condemned these attacks, others have supported them. Neither the General Assembly of the UN, nor the Security Council condemned these actions. Even the League of Arab States only condemned the attack on a Sudanese chemical plant but stated nothing about action against Afghanistan (Murphy, 2002).

C. Stahn argues that the previous critical attitude of states towards the use of force in response to terrorist acts was largely due to factual evidence and the context of the events, rather than a categorical denial of the right to self-defence in the event of terrorist acts (Stahn, 2003). For example, when the United States bombed Libya in 1986, the criticism of US action in response to the La Belle disco attack was largely focused on two aspects: first, whether a single assassination of a US soldier abroad could justify the use of armed force, and second, whether US action met the requirements of necessity and proportionality (Stahn, 2003). On the contrary, in 1993, a rocket attack on Iraq in response to a failed assassination attempt on former U.S. President Bush has sparked only minor controversy. Many states either supported or did not oppose US action, only China explicitly condemned it (Gray, 2004).

Admittedly, it must be acknowledged that there is a possibility that the authors of the UN Charter did not foresee that an entity other than the State may carry out an armed attack. This possibility may be based on the fact that the provisions of the UN Charter on the use of force were a response to the Second World War and were primarily intended to regulate inter-state conflicts.

However, under the Vienna Convention on the Law of Treaties, the intentions of the parties to the contract may not be given more weight than the wording of Article 51 itself. Furthermore, the fact that one important provision on the use of force (Article 2 (4)) does not refer to the State and the other (Article 51) does not imply that the latter provision should not have been so limited (Vasiliauskienė, 2008).

## International reaction to 9/11 terrorist attacks and self-defence actions of USA in Afghanistan

State and international organisations' reaction to 11 September 2001 proves that the wider explanation of Article 51 is supported by the states.

For military action against Al Qaeda and the Taliban to be legitimate, the question to be answered is whether Al Qaeda attacked only the World Trade Center and the Pentagon, or did it attack the United States itself? (Brown, 2003). The answer can be based on Al Qaeda's willingness and ability to go to war against the United States. Usama Bin Laden had repeatedly called for war with the United States: in 1996, he issued a speech calling on all Muslims to a holy war against U.S. forces in Saudi Arabia, with particular emphasis on terrorist measures. In 1998, Bin Laden and three other terrorist commanders issued a statement, which was considered to be a religious order (fatwa) for all Muslims, stating that killing Americans and their allies - soldiers and civilians - was the personal responsibility of every Muslim (Brown, 2003).

Therefore, there was a clear desire by Al Qaeda to carry out aggression against the United States, not only against its citizens, but also against the state itself. In fact, not every crazy group that implies grandiose declarations needs to be bombarded right away. However, Al Qaeda is a special case because it had repeatedly demonstrated its ability to carry out what it said in real action - that is, in a series of large-scale attacks on US targets. These targets included U.S. forces in Yemen, U.S. embassies in Kenya and Tanzania, and the World Trade Center and the Pentagon. The group was also believed to have contributed to the attack on U.S. forces in Somalia, as well as the bombing of the U.S. military training center in Riyadh, and planned to attack U.S. citizens celebrating the new millennium (Brown, 2003). Therefore, Al Qaeda not only wanted to, but had a real chance to carry out an armed attack against the United States, not only against its citizens.

The resolutions of Security Council, adopted after September 11 events, emphasizing the inherent right of individual and collective self-defence, implicitly acknowledged that these events amounted to an armed attack, regardless of who committed them (Security Council, 2001a, 2001b). They were adopted before anti-terrorist actions were launched and when the suspicion fell on an international terrorist group. Resolution 1368 (2001) was passed the day after the attacks, when no one had yet considered the possibility that any state might be "behind these attacks." This position of the Security Council is confirmed by the fact that it never expressed its disagreement when the US informed it of its intention to realize its inherent right to individual and collective self-defence (United States of America, 2001).

State practice after 9/11 events also confirms the view that self-defence action is also possible against a non-state actor. No allegation has been made from States that customary self-defence law or Article 51 can be applied only in cases where the acts in question are carried out by the State. On the contrary, there was very clear evidence, such as NATO's decision to invoke Article 5 of the Washington Treaty for the first time in its history, that events must be considered an armed attack giving the right to self-defence: "The Council agreed 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, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all." (North Atlantic Council, 2001)

## Self-defence against ISIS and *opinio juris* of states

The Islamic State (former name Islamic State in Iraq and the Levant, hereinafter referred to as ISIS) at its highest moments stood with al-Qaeda as one of the most dangerous jihadist groups, after its gains in Syria and Iraq. In June 2014, the group formally declared the establishment of a "caliphate" – a state governed in accordance with Islamic law, or Sharia, by God's deputy on Earth, or caliph. By 2014, Islamic State in Iraq had occupied large parts of territory in Iraq and Syria (Vasiliauskienė, 2016). It was estimated by US National Counterterrorism Center that ISIS In 2014 controlled a territory in Tigris-Euphrates river basin similar to the size of United Kingdom (Vasiliauskienė, 2016). At its peak, it is estimated that ISIS had about 30,000 militants (Reyes Para, 2021).

The international coalition aimed at fighting ISIS was formed, and it received broad support from many states. As the webpage of the coalition states, "The Coalition's 83 members are committed to tackling Daesh on all fronts, to dismantling its networks and countering its global ambitions. Beyond the military campaign in Iraq and Syria, the Coalition is committed to: tackling Daesh's financing and economic infrastructure; preventing the flow of foreign terrorist fighters across borders; supporting stabilisation and the restoration of essential public

services to areas liberated from Daesh; and countering the group's propaganda." (Global Coalition).

These actions were based on the principle of collective self-defence: Iraq had requested that the United States help it defend itself against ISIS and its armed action. "While the Iraqi government has consented to foreign military action against ISIS within Iraq, the Syrian government did not. Rather, Syria protested that the airstrikes in Syrian territory were an unjustifiable violation of international law" (Reyes Para, 2021). Iraq informed Security Council about its actions of individual self-defence (Iraq, 2014), and the US - about collective self-defence on behalf of Iraq (United States of America, 2014). Same notification was provided by United Kingdom (United Kingdom, 2014). France, which was one of the coalition partners, firstly limited its action to the territory of Iraq, but later, after the attacks, also declared its individual right to self-defence and stated to the Security Council that "In accordance with Article 51 of the Charter of the United Nations, France has taken actions involving the participation of military aircraft in response to attacks carried out by ISIL from the territory of the Syrian Arab Republic." (France, 2015)[1]

The United States have stressed that ISIS is a serious threat to Iraq, as it continued attacks from safe havens in Syria. According to US government, "These safe havens are used by ISIL for training, planning, financing, and carrying out attacks across Iraqi borders and against Iraq's people." (United States of America, 2014). Further, it stressed that "ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. 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." (United States of America, 2014).

This test of "unwilling or unable", used by the United States, is nowadays used also by many of the states participating in anti-terrorist military action to determine whether a state where the terrorists are located may be attacked in self-defence. This test is not yet universally accepted by the states. In 2016 a researcher exploring state opinions on this question distinguished 10 states, explicitly mentioning this test in their documents and declarations (Chachko, Deeks, 2016)[2], three states (Belgium, Iran, South Africa) were implicitly using this test, the position of some other states was ambiguous[3]. Six states had clearly stated their objections to such rule (Syria, Venezuela, Ecuador, Cuba, Brazil, Mexico). Thus, this rule still is in formulation and does not yet enjoy universal acceptance.

## Conclusions

Self-defence is one of the exceptions to the principle of the use of force established in the UN Charter and in customary international law which allows the use of force in the case of

[1] „In a letter dated 20 September 2014 addressed to the President of the Security Council (S/2014/691), the Iraqi authorities requested the assistance of the international community in order to counter the attacks perpetrated by ISIL. In accordance with Article 51 of the Charter of the United Nations, France has taken actions involving the participation of military aircraft in response to attacks carried out by ISIL from the territory of the Syrian Arab Republic."

[2] United States, United Kingdom, Germany, The Netherlands, Czech Republic, Canada, Australia, Russia, Turkey, Israel.

[3] France, Denmark, Norway, Portugal, Members of the GCC, Egypt, Iraq, Jordan and Lebanon, Colombia, Uganda, Rwanda, Ethiopia, India

armed attack against a state. Self-defence action needs to conform to the requirements of necessity and proportionality. Self-defence may be exercised also when the armed attack is imminent.

Classical understanding of an armed attack was that it was usually perpetrated by state forces, but in the last decades terrorist organisations have developed military capabilities equalling or exceeding those of states and were able to carry out actions amounting to armed attacks. The challenge of defending a state against terrorist attacks amounting to armed attack is that in many cases the terrorist actions may not be attributed to a state, and thus states started using self-defence against non-state actors. Thus, the interpretation of the right of self-defence was extended to include self-defence against non-state actors, as it is illustrated by the resolutions of UN Security Council, NATO and practice of states.

The cases of self-defence after 9/11 attacks and against ISIS organisation on request by Iraq and as well as a self-defence measure by France were not met by many objections in international arena. However, the underlying test used by the states participating in these operations (a state "unwilling" or "unable" to fight against a terrorist group) is still developing and for the moment is not considered yet a rule of customary international law.

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