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# State Responsibility and International Liability: recent developments in the practice of States and international organizations

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**STATE RESPONSIBILITY AND INTERNATIONAL LIABILITY :**  
**RECENT DEVELOPMENTS IN THE PRACTICE OF STATES**  
**AND INTERNATIONAL ORGANIZATIONS**

by

**SOMPONG SUCHARITKUL\***

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**STATE RESPONSIBILITY AND INTERNATIONAL LIABILITY :  
RECENT DEVELOPMENTS IN THE PRACTICE OF STATES  
AND INTERNATIONAL ORGANIZATIONS <sup>1)</sup>**

by *Sompong SUCHARITKUL* <sup>2)</sup>

**I. INTRODUCTION**

The conscience of mankind was shocked by the events of 11 September 2001, which set the stage and a new accelerated pace for the progressive development of international law on the topic of State Responsibility,<sup>3)</sup> with particular regard to its application to a breach of the primary rule of international law governing international liability.<sup>4)</sup> Under this primary rule, a State is liable, irrespective of fault or the presence of lawfulness, for its failure to prevent the occurrence of harm or infliction on another State or States of injurious consequences arising out

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<sup>1)</sup> This is an essay in honour of Professor Gaetano Arangio-Ruiz, forming part of a collection of studies dedicated to the distinguished international jurist.

<sup>2)</sup> Sompong Sucharitkul, Distinguished Professor of International and Comparative Law, Associate Dean of Golden Gate University School of Law; B.A. (Hons.), B.C.L., M.A., D.Phil, and D.C.L. (Oxford); Docteur en Droit (Paris); LL.M. (Harvard), Member of the Institut de Droit International.

<sup>3)</sup> See the Report of the International Law Commission, 53rd Session, UN Doc. General Assembly Supplement No.10(A/56/10) on State Responsibility, paras. 29-77, James Crawford, Special Rapporteur.

<sup>4)</sup> *Ibid.*, Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, paras. 78-98, Pemmaraju Sreenivasa Rao, Special Rapporteur.

of activities initiated or conducted in the territory within its jurisdiction or control.<sup>51</sup> An examination will be made in this study of the practice of States and of relevant international and regional organizations in response to the apparent urgent universal call for the cessation, suspension and immediate termination or discontinuance of such nefarious activities. In the mean time, the forces of destruction continue vigorously to threaten and to terrorize the global community. International terrorists persist in their relentless efforts to inflict untold pain, sorrow and sufferings, accompanying the menacing reign of terror, striking innumerable indiscriminate fatal blows at countless members of the international community, regardless of their creed, religion, belief, gender, age, nationality or political ideology and affiliation.

General principles of the law of State Responsibility appear intimately involved in connection with circumstances precluding wrongfulness, such as counter-measures<sup>61</sup> and self-defence.<sup>71</sup> It is of primary interest to ascertain the legal consequences of an internationally wrongful act, in particular the rights of the injured State<sup>81</sup> and the obligations of the State which has committed the internationally wrongful act,<sup>91</sup> as well as the rights and obligations of third

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<sup>51</sup> The duty of care is placed squarely on the State, from whose territory harmful activities emanated, transgressing national boundaries, or activities otherwise within its jurisdiction or control. Liability is therefore based on the territoriality principle or the principle of jurisdiction or control of the State which is held to be strictly if not indeed absolutely liable for the injurious harms.

<sup>61</sup> In Draft Articles on State Responsibility, adopted at second reading by the Drafting Committee of the International Law Commission, UN Doc. A/CN.4/SR.2662, appendix to the Report of the ILC, New York 2000, GA Doc. Supplement No.10(A/55/10) at pp. 110 *et seq.* Part II, Chapter II : Counter-measures, especially Articles 50-55, as well as Article 23 : Counter-measures in regard to an internationally wrongful act.

<sup>71</sup> See *Ibid.*, Draft Article 22 : Self-defence.

<sup>81</sup> See *Ibid.*, Draft Articles 43 and 44 : The right of the injured State or States to demand compliance and the form of reparation.

<sup>91</sup> See *Ibid.*, Draft Article 28 : Legal consequences of an international wrongful act; Article 29 : The continuing obligation of the State responsibility to perform the obligation breached; Article 30 : Obligation to cease and desist and non-recurrence; and Article 31 : Obligation to make reparation.

States.<sup>10]</sup> Theories based on the practice of States and of competent international and regional organizations will be examined in the light of the on-going crisis that continues to threaten the peace and security of mankind.

In addition to a critical analysis of the relevant part of the law of State Responsibility, attention will also be directed to two other areas of international legal development in contemporary international law and practice. The first concerns the primary rule of law on the international liability of a State for injurious consequences arising out of acts not prohibited by international law. The second relates to the concerted international actions and measures in pursuit of individual offenders perpetrating organized crimes under the law of nations, the grave crime of international terrorism, targeting primarily one State in particular, symbolizing the free world but ultimately directed against the international community as a whole, being a serious crime under international law designated as an offence against the peace and security of mankind. The crime of "international terrorism", as such, should be revisited in the context of the events of 11 September 2001.

## II. STRICT INTERNATIONAL LIABILITY FOR STATES GENERATING INTERNATIONAL INJURIES

Strict or absolute international liability of States may be traceable to Draft Article 27 (former Article 35) of State Responsibility, which states that the existence of circumstances precluding wrongfulness in this Chapter (Chapter V of Part I) is without prejudice : a) to the respect for the obligation in question or its extent if the circumstance precluding wrongfulness no longer exists; or b) to the question of compensation for the injuries or material losses suffered as the result of that international wrongful act.<sup>11]</sup> Therefore, even where wrongfulness is precluded, a State may still be liable for the injurious consequences it has effectively caused or

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<sup>10]</sup> See *Ibid.*, Draft Articles 41 and 42 : Consequences of grave violations of obligations owing to the international community as a whole (*erga omnes*).

<sup>11]</sup> See *Ibid.*, Draft Article 27 [35] at pp. 116-117.

allowed to occur, or indeed failed to prevent. On this general principle is based a primary rule of law fastening strict or absolute liability on to the State on whose territory or under whose jurisdiction or control activities conducted thereon or thereunder have resulted in transnational harms or inflicted injuries or material losses across and beyond the limits of its national jurisdiction or territorial boundaries.

This primary duty on the part of the State to prevent the occurrence of harms across its frontiers and beyond has initially developed from transboundary pollution or emission of transfrontier air pollutants as in the case of Trail Smelter between the United States and Canada in 1938 and 1941.<sup>121</sup> The origin of this primary obligation under contemporary international law has its foundation in the Roman Law and anglo-American common law, as evidenced by the Latin maxim : *sic utere tuo ut alienum non laedas*, which literally means "use your property in such a way as not to harm others". This concept of liability is based on restrictive enjoyment of one's own property, or limited and regulated use of proprietary rights subject to the need to prevent harm to others. It appears to be a primary obligation towards the international community as a whole or an *obligatio erga omnes*, so that there is a primary duty on the part of every State to undertake precautionary measures that are consistent with obligation to prevent harm.<sup>131</sup>

This was emphatically endorsed by Principle 21 of the Stockholm Declaration 1972 in these words :-

*"Principle 21 : States have, in accordance with the Charter of the United Nations and the Principles of International Law, the sovereign rights ..... and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to ..... other States or ..... areas beyond the limits of national*

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<sup>121</sup> 3 Report of International Arbitral Awards (RIAA) 1905 (Trail Smelter Arbitral Tribunal 1938-1941).

<sup>131</sup> See e.g., Report of the ILC covering the work of its 44th Session, ss. 112-276., UN Doc. A/47/10 (1992), reprinted (1992) 2 Yearbook of ILC, Part 2, at 1. 18-41, UN Doc. A/CN 41, Ser. A/1992/Add/1 (Part 2).

*jurisdiction*".<sup>14]</sup>

This principle has been identified with the primary rule of strict liability initially for environmental damage to neighbouring States. In time, the rule has been extended to cover injuries and losses suffered by persons beyond the immediately adjacent territories. Settlements of bilateral disputes between States illustrate far reaching coverage of this rule of law as in the Lake Lanoux Arbitration (1957)<sup>15]</sup> and in the settlement of the Gut Dam Claims (1969).<sup>16]</sup> In these cases, the rule that a State must refrain from harming its neighbours, received further application with far wider implication. A State must also prevent harm in the territories of adjacent States and beyond. It has given rise to the European Polluter Pays Principle as in the pollution of the River Rhine<sup>17]</sup> which runs across western Europe from Switzerland through the Federal Republic of Germany to the Netherlands and Belgium. The losses and injuries were suffered by the communities in the riparian States.

In the Corfu Channel Case (1949),<sup>18]</sup> it should be observed that the International Court of Justice held Albania liable for failure to warn international shipping of the existence of mines within its waters, of which Albania ought to have known. In any event, the knowledge of their existence was imputed to Albania with the consequential duty to warn the sea-faring nations of the existence of the danger to enhance the safety in international navigation through the

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<sup>14]</sup> Stockholm, 5-11 June 1972; UN Doc. A/CONF 48/14 (1972); reprinted in 11 ILM 1416 (1972).

<sup>15]</sup> France v. Spain, 24 International Law Reports 101 (Arb.Trib. 1957).

<sup>16]</sup> USA v. Canada, 8 ILM 118 (Lake Lenoux Claims Tribunal 1969).

<sup>17]</sup> Convention Relating to the Protection of the Rhine against Chemical Pollutants (with annexes), Dec. 3, 1976, UNTS I-17511. Compare the Convention on the Prevention of Marine Pollution by Dumping of Waste and other Matters, Dec. 29, 1972, 11 ILM 1291 (1973). See also the Brussels Convention on Establishment of an International Fund for Compensation of Oil Pollution Damage, Dec. 18, 1971, 834 UNTS 17-46.

<sup>18]</sup> UK v. Albania, 1949, ICJ Report 4 (Merits April 9). Albania was held liable because "*nothing was attempted by the Albanian authorities to prevent the disaster. The grave omissions involved the international responsibility of Albania.*"

international waterway, the Corfu Channel.

This rule of strict or absolute liability under international law is based on the analogy of private law, common law as well as civil law. The law of land-owners' liabilities or liabilities of occupiers of premises has its counterpart. The vicarious liability of an owner of a dangerous animal, such as a tiger or a vicious dog, may entail the possibility of noxal surrender.

In the case under review, the fact that Afghanistan, not only did not attempt to prevent the disaster from occurring but also failed to surrender the alleged offenders who caused the injuries and losses to the United States and the international community. In addition to these grave omissions, the Afghan Taliban authorities also attempted to conceal the truth and refused to disclose the hide-outs or whereabouts of the Al Qaida within Afghan territories under Afghan jurisdiction and control. Without at this stage examining the degree of guilt and complicity of the Taliban authorities for the international acts of terrorism of 11 September 2001 and the continuing threats of terror, it is sufficiently if not abundantly clear that the host State, Afghanistan, from where the attacks originated, must bear the responsibility under the primary rule of international law : *sic utere tuo ut alienum non laedas*. The liability of Afghanistan is established beyond doubt.

### III. QUANTIFICATION OF COMPENSATION

Once liability of a State is established for the injuries and losses suffered by others, the next step is to assess the quantum of reparation to wipe out the consequences for which that State is liable.<sup>191</sup> In the instance under examination, it was calculated that the expenses incurred by the Al Qaida terrorist group for the attacks were only under half a million US dollars without including the lives of the terrorists engaged in that series of suicidal attacks. The direct losses in terms of human lives and physical destructions of buildings were valued at least ten thousand times more, that is to say, over five billion US dollars. The resulting losses in terms of earnings and replacement values of material damage to properties far exceeded five hundred billion US

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<sup>191</sup> See the Chorzow Factory Case, Germany v. Poland, PCIJ Ser. A, No.9, p.31 (1927).



dollars without counting the losses of profits suffered by insurance companies and the losses incurred on the business of civil and commercial aviation, both national, international and world-wide and the consequential losses of the tourist industries. The toll on world economy runs into trillions of US dollars.

The losses and sufferings as a consequence of one single day of terrorist acts are already exorbitant, even using very conservative estimates. It is far beyond the capacity of one country, let alone a least developed country of central Asia to afford to repay the injured States which comprise primarily the United States of America and also the rest of the international community of the free world.

*Restitutio in integrum* is an apparent impossibility, physically or otherwise, as losses of human lives could not be resuscitated in this as well as in any other case. Reparation is beyond the capacity of the actual wrongdoers, including those who perished in the self-induced disasters and those who disclaimed liability but continued to threaten the world with repetition of such catastrophes. Unless and until the demand of the international terrorists was met, they were promised no peace for the world. Their demand could also expand without the ability of the free world to satisfy, since it was an unending and endless demand.

#### IV. SELF-DEFENCE AND COUNTER-MEASURES

In the circumstances, it is significant that the international community takes stock of the current situation. The injured State, the United States of America, and other injured States whose nationals were victims of the 11 September 2001 attacks, could not be expected to sit idly by, waiting for the on-coming wave of terrorist attacks, unannounced, unadvertised, unscheduled and unprepared. If a wild ferocious beast was let loose from a menagerie or a circus and was known to have killed, or a vicious dog was unleashed that killed a child, it has become everybody's business to put a stop to further attack and wanton killing of human beings by the savage animal or the vicious dog. The wicked quadrupeds could surely be put to death in an effort to suspend and prevent further killings and losses of life. In no way different from pirates on the high seas, international terrorists are *hostes generis humani*, or enemies of mankind and

can be arrested, prosecuted, tried and punished by any State. An end must be put to these unnecessary sufferings brought about by terrorist activities organized and permitted or tolerated by Taliban Government in the territory of Afghanistan under its jurisdiction and control.

#### A. SELF-DEFENCE, INDIVIDUAL AND COLLECTIVE

Article 51 of the Charter reaffirms that *"nothing in the present Charter shall impair the inherent right of individual and collective self-defence if an armed attack occurs against a Member of the United Nations..."*<sup>201</sup> In the instance under review, not only did armed attacks occur against the United States, but the United States continues to be threatened with repeated attacks by the same group that launched the first series of attacks.

Measures taken by the United States and other injured States in the exercise of their right of individual and collective self-defence could be legitimately taken in conformity with Article 51. What is required is simply that the measures be immediately reported to the Security Council. It is clear that the Security Council was apprised of the situation and the measures taken in collective and individual self-defence were reported immediately, if not indeed before their initiation, to the Security Council, in such a way that they did "not affect the authority and responsibility of the Security Council to take at any time such action as it deems necessary in order to maintain and restore international peace and security".

##### a) The United Nations

In fact, the Security Council, on 12 September 2001, at its 4370th meeting, adopted Resolution 1368 (2001),<sup>211</sup> *"recognizing the inherent right of individual and collective self-defence in accordance with the Charter.*

*"1. Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington DC and Pennsylvania and*

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<sup>201</sup> See Article 51 of the Charter of the UN, 22 USCA ss.287-287t.

<sup>211</sup> UNSC Resolution 1368 (2001) S/RES/1368 (2001), Sept. 12, 2001.

*regards such acts, like any act of international terrorism, as a threat to international peace and security.....*

*"5. Expresses its readiness to take all necessary steps to respond to terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations."*

The Security Council further declared in Resolution 1373 (2001)<sup>221</sup> of 28 September 2001, *"5. .... that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations....."* and *"4. Notes with concern the close connection between international terrorism and transnational organized crime ..... and in this regard emphasizes the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security."*

b) The North Atlantic Treaty Organization (NATO)

The North Atlantic Treaty Organization (NATO) came into being by virtue of the Washington Treaty (1949)<sup>231</sup> consistently with the purposes and principles of the Charter of the United Nations, primarily to enable the United States to come to the assistance of Western European members under the auspices of the collective defence treaty organization. The key provision is Article 5 under which *"the Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all"*.<sup>241</sup> The Parties also consequently agree *"that, if such an attack occurs, each of them, in 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, or in concert with the other Parties, such action as it deems necessary, including the use of armed*

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<sup>221</sup> UNSC Resolution 1373 (2001) S/RES/1373 (2001), Sept. 28, 2001.

<sup>231</sup> Done in Washington DC, April 4, 1949, entered into force, Aug. 24, 1949; for the United States, 63 Stat. 2241, TIAS No.1964, 4 Bevans 828, 34 UNTS 243.

<sup>241</sup> See *Ibid.*, Article 5.

*force, to restore and maintain the security of the North Atlantic Area*"<sup>251</sup>.

NATO as a collective defence organization has lived through several crises, priding itself with the success of the Alliance in ensuring freedom of its members during the Cold War and in making possible a Europe that was whole and free. On the other hand, the Soviet Union was disintegrated after the fall of the Berlin Wall and Yugoslavia followed suite in its disintegration which called for NATO attention and concerted watchful and careful reactions. NATO was thus born in circumstances that have fundamentally changed today, with the dissolution of the Warsaw Pact and the participation of the Russian Federation and the Ukrainian Republic as close associates, there would seem to be very little *raison d'être* left for NATO to continue its existence, at least in the form in which it originally came to life. NATO was aptly transformed into an organization for collective self-defence against a new danger, international terrorism which NATO condemned as a serious threat to peace and stability.<sup>261</sup>

The responses of NATO to the events of 11 September 2001 were prompt and spontaneous. The Council met that same night to express its solidarity with the United States of America and reaffirmed the NATO nations unanimous condemnation of these barbaric acts committed against a NATO member State. It underscored the urgency of intensifying the battle against terrorism, a battle that the NATO countries - indeed all civilized [free] nations - must with all allies stand united in their determination to combat this scourge.<sup>271</sup> On 12 September 2001, NATO reaffirmed Treaty commitments in dealing with terrorist attacks against the United States and was prepared to regard the attacks as covered by Article 5 : *"if it is determined that*

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<sup>251</sup> See *Ibid.*, Article 5 : *"..... Any such armed 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 and maintain international peace and security"*. This is a verbatim recital of Article 51 of the Charter, in its relevant part.

<sup>261</sup> See the tribute paid to the Alliance by the Heads of State and Government of NATO when they met in Washington, DC, in 1999, cited in the Statement by the North Atlantic Council on Sept. 12, 2001, NATO Press Release (2001) 124.

<sup>271</sup> NATO Press Release, Sept. 11, 2001, PRICP (2001) 122.

*this attack was directed from abroad...*<sup>28]</sup>

On 2 October 2001, Frank Taylor, the United States Ambassador at large and coordinator for counter-terrorism briefed the NATO Council, and as a result of the information furnished, it was determined that the individuals who carried out the attacks belonged to the terrorist network of Al Qaida, headed by Osama bin Laden and protected by the Taliban regime in Afghanistan.<sup>29]</sup> As the attacks had been directed from abroad, i.e., outside the United States of America, they were regarded as an action covered by Article 5 of the Washington Treaty, thereby setting in motion the NATO machinery for collective defence of the United States, the injured member State of NATO.

On 9 October 2001, one week later, the Supreme Allied Commander Europe (SACEUR) issued a press release,<sup>30]</sup> marking a historic first for NATO, for the first time in its 52 years of existence, NATO assets were being made available to continental United States, on the latter's request, pursuant to Article 5. Two of the five NATO Airborne Warning and Control Systems Aircraft (AWACS) began deploying to the United States from NATO base in Geilenkirchen, Germany. The remaining aircraft would follow in the next few days. These NATO aircraft, manned by multinational crews from twelve NATO nations, provided a critical air surveillance and early warning capability in operation. In addition, NATO naval assets were assigned to a new mission. The Standing Naval Force Mediterranean (STANAV-FORMED) consisting of nine ships from eight NATO countries, would set sail to provide an allied military presence in the Eastern Mediterranean and to demonstrate NATO resolve to support the global campaign against terrorism. NATO promised to provide additional support requested by the United States on order of the North Atlantic Council.<sup>31]</sup>

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<sup>28]</sup> See the Statement by Lord Robertson, Secretary General of NATO after the Council Meeting in the evening of 12 September 2001, PR (2001) 124.

<sup>29]</sup> NATO updated : Invocation of Article 5 confirmed, Oct. 2, 2001.

<sup>30]</sup> SHAPE News Release : Public Information Office, B-71010 SHAPE, Belgium.

<sup>31]</sup> See NATO HQ., Brussels, Oct.4, 2001, Statement to the Press by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision on Implementation of Article 5 of the Washington Treaty. Audio file (.MB3/3 214Kb). At the request of the

Apart from the statements of European partners of the United States in support of its campaign to combat terrorism,<sup>32]</sup> individual member States like the United Kingdom,<sup>33]</sup> France<sup>34]</sup> and Germany<sup>35]</sup> have decided to participate in the air and ground operations to combat terrorism in Afghanistan.

The military operations led by the United States as the injured State in self-defence supported by the collective effort of its NATO allies received prior blessings from the Security Council Resolution 1368 (2001), operative paragraph 5, expressing the Security Council's readiness *"to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations"*.<sup>36]</sup>

## B. COUNTER-MEASURES

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United States, the NATO Allies agreed to take eight measures, individually and collectively to expand the options in the campaign against terrorism, especially facilitating air traffic for military flights related to operations against terrorism.

<sup>32]</sup> See, e.g., NATO and Russia, Sept. 13, 2001; Euro-Atlantic Partnership Council, Sept. 12, 2001, PR (2001) 123, and NATO-Ukraine Commission, Sept. 14, 2001, PR (2001) 126.

<sup>33]</sup> The UK began military operations together with the United States, see Statement by NATO Secretary-General, Lord Robertson, Oct. 8, 2001, PR (2001) 138; Audio file (.MP3/1.304 Kb). Permanent Representatives of the USA and the UK briefed NATO Council on the operation to strike against Al Qaida terrorist training camp and military installation of the Taliban regime in Afghanistan.

<sup>34]</sup> See *Ibid.*, NATO Permanent Representatives welcomed France's intention to provide increased support by French AWACS aircraft in Bosnia-Herzegovina as back fill to facilitate NATO deployment.

<sup>35]</sup> See *Ibid.*, Other NATO Allies pledged direct military support. Subsequently, the Bundesrat has voted in favour of German participation in the campaign.

<sup>36]</sup> See Note 20 *supra*.

The Security Council Resolution 1368 (2001),<sup>371</sup> paragraph 5, cited above in connection with the readiness of the Council to take "*all necessary steps to respond to the terrorist attack...*" is reminiscent of the magic formula adopted in Resolution 678 (1990)<sup>381</sup> authorizing member States cooperating with the Government of Kuwait, to use "*all necessary means [including the use of force] to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions to restore international peace and security in the area*".<sup>391</sup> In both situations, Iraq and Afghanistan or Kuwait and the United States, the two notions of "self-defence" and "counter-measures" have played their parts.

In Kuwait situation, "Operation Desert Shield" signifying self-defence, i.e., the defence of Saudi Arabia and United Arab Emirates stopped where began "Operation Desert Storm".<sup>401</sup> Self-defence and counter-measures are both circumstances precluding wrongfulness. In regard to the events of 11 September 2001, the United States is entitled to resort to self-defence, individual as well as collective, as previously discussed, and also almost simultaneously to apply counter-measures, not only as circumstances precluding wrongfulness, but also as remedial counter-measures.

a) The United Nations

In Resolutions 1368 (2001) and 1373 (2001),<sup>411</sup> the Security Council, determined to

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<sup>371</sup> See *Ibid.*, Note 20 *supra*.

<sup>381</sup> See Security Council Resolution 678 (1990). See Agora : the Gulf Crisis in International and Foreign Relations Law : UN Police Action in Lieu of War "The Old Order Changeth", Franck & Patel, 85 AJIL (1991), and "Until What? Enforcement Action or Collective Self-Defence?", Burns Weston, 85 AJIL (1991), p. 506.

<sup>391</sup> See Sompong Sucharitkul, The Process of Peace-Making following Operation "Desert-Storm", in 43 Austrian Journal of Public and International Law, 1-130 (1992).

<sup>401</sup> See *Ibid.*, at pp. 7-12, especially section 2 : The Borderline between Self-Defence and Counter-Measures, pp. 10-12. See also Yoram Dinstein, War, Aggression and Self-Defence, pp. 142-143 (1988).

<sup>411</sup> Sept. 28, 2001, S/SER/1373 (2001).

combat by all means all forms of terrorism, specifically decided that "*all States shall prevent and suppress the financing of terrorist acts, freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist act,*" and also "*take necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information*". The Security Council also called upon all States "... (c) to cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts". The Council also declared "*that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations*".

Consistently with the collective self-defence efforts to avert and repel on-coming attacks by the terrorists, counter-measures are considered legitimate, not only to compel the cessation of an internationally wrongful act (*ex nunc*), but also to wipe out the consequences of that act (*ex tunc*) and also to prevent further recurrence or repetition of the wrong committed (*ex ante*). The *ex ante* measures are preventive and include all precautionary means designed to pre-empt the perpetration of recurring wrongful acts.<sup>421</sup>

The two Security Council Resolutions have paved the way for third States to cooperate with the United Nations and with the collective measures undertaken by the injured States and their allies, either individually or regionally, by responding to the calls of the Security Council to combat terrorism by all necessary means.

b) Association of South-East Asian Nations (ASEAN)

To illustrate the kind of concerted actions adopted by third States or States not directly affected by the attacks of 11 September 2001, the example of the Association of South-East

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<sup>421</sup> See Sompong Sucharitkul, State Responsibility and International Liability under International Law, 18 Loyola of Los Angeles International and Comparative Law Journal, pp. 821-839, (1996).



Asian Nations (ASEAN) appears to be noteworthy..

(1) Initial reactions from ASEAN

Following the events of 11 September 2001, ASEAN Secretary General wrote to United States Secretary of State on 12 September 2001,<sup>43]</sup> conveying deepest condolences to the American people and characterizing the events as an evil act, not only against America and the American people, but also against human civilization. Again on the same day an official Statement was issued at Hanoi by ASEAN Economic Ministers and the European Union (EU) Commission,<sup>44]</sup> strongly condemning the terrorist attacks in New York City and Washington, D.C. on 11 September 2001 and underlining the need for international community to strengthen cooperation in combating terrorism around the world. Again on 13 September 2001, the Chairman of ASEAN Standing Committee addressed a letter to United States Secretary of State condemning "*all acts of terror and seeking closer cooperation with the United States and all other countries to combat them*".<sup>45]</sup> Coming as it did from the Minister of Foreign Affairs of Brunei Darussalam, a distinctly Islamic State Member of ASEAN, this condemnation is not without significance.

(2) ASEAN Summit

ASEAN Heads of State/Government met in Bandar Seri Begawan for the Seventh Summit on 5 November 2001, and, among other things, adopted the 2001 ASEAN Declaration on Joint

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<sup>43]</sup> See a letter by Rodolfo C. Severino, Jr., to Secretary Powell, Sept. 12, 2001.

<sup>44]</sup> See ASEAN Ministerial Statement on International Terrorism, Hanoi, Sept. 12, 2001.

<sup>45]</sup> Letter of H.E. Mohamed Holkiah, Minister of Foreign Affairs and Chairman of ASEAN Standing Committee to H.E. Collin L. Powell, Secretary of State of the United States of America, Sept. 13, 2001.

Action to Counter Terrorism,<sup>461</sup> which runs, in part, :

*"We, the Heads of State/Government of ASEAN, gathered in Bandar Seri Begawan for the Seventh ASEAN Summit,*

*" ... Reaffirming our primary responsibility in ensuring the peaceful and progressive development of our respective countries and our region...*

*"Deeply concerned over the formidable challenge posed by terrorism to regional and international peace and stability as well as to economic development...*

*"Do hereby...*

*"Believe terrorism to be a direct challenge to the attainment of peace, progress and prosperity of ASEAN and the realization of ASEAN vision 2020; ...*

*"Commit to counter, prevent and suppress all forms of terrorist acts in accordance with the Charter of the United Nations and other international law, especially taking into account the importance of all relevant UN resolutions;*

*"Ensure that, in observing the above, all cooperative efforts to combat terrorism at the regional level shall consider joint practical counter-terrorism measures in line with specific circumstance in the region and in each member country ...*

*"Approve fully the initiatives of the Third ASEAN Ministers Meeting on Transnational Crime (AMNTC) held in October 2001 to focus terrorism and deal effectively with the issue at all levels and endorse the convening of Ad Hoc Experts Group Meeting special Session of SOMTC and AMMTC that will focus on terrorism".*

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<sup>461</sup> 2001 ASEAN Declaration, [Http://ww/aseansec.org/newdata/200/.../asean/.../declaration.htm](http://ww/aseansec.org/newdata/200/.../asean/.../declaration.htm). For statements from EU, Joint Declaration by Heads of State and Governments, and Council Conclusions, EU-US Ministerial Statement on Combating Terrorism, OAS Declaration of Solidarity from the House of The Americas, and OECD Secretary-General, see 40 ILM 1254-1275 (2001).

To strengthen further ASEAN's counter-terrorism efforts, the ASEAN Ministers concerned were tasked to follow-up on the implementation of this declaration to fight terrorism.

## V. INTERNATIONAL TERRORISM AS AN OFFENCE AGAINST THE PEACE AND SECURITY OF MANKIND

"Acts of terrorism" have been defined by the 1937 Convention for the Prevention and Punishment of Terrorism<sup>471</sup> as "*criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or group of persons or the general public*".

An "act of terrorism" may be upgraded to the status of "international terrorism" on account of its internationality. It presupposes the involvement of at least two States, the State responsible for the terrorist act directly or by imputation and injured State or victim State against which the terrorist act is directed. Or a terrorist act can be directed against the public at large, or the international community as a whole, hence it is against the peace and security of mankind. As such, there are two elements, the victim which is primarily a State, an international organization or the international community as a whole, and the author or perpetrator of the act of terrorism, which can be committed by individuals or groups of persons, and may involve an active role by a State, a group of States, an international organization, or a group of international organizations.<sup>481</sup>

As indicated, the NATO Council, on 2 October 2001, determined that the acts of international terrorism committed against the United States were directed from outside the United States, hence the commencement of operation of Article 5 of the Washington Treaty of 1949. This finding is significant in the light of United Nations Security Council Resolutions, especially

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<sup>471</sup> See generally Sompong Sucharitkul, International Terrorism and the Problem of Jurisdiction, 14 Syracuse Journal of International Law and Commerce, pp. 141-181. For a detailed discussion on definitional questions, see pp. 142-155.

<sup>481</sup> See Sompong Sucharitkul, Terrorism as an International Crime; Questions of Responsibility and Complicity, in 19 Israel Yearbook on Human Rights (1989), pp. 249-258. See also Yorum Dinstein, *ibid.*, sec. II : Terrorism as an International Crime.

Resolution 1368 (2001), calling on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stressing that those responsible aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable".

While these words do not amount to conviction, they go a long way to legitimize collective efforts to pursue those accountable to be brought to justice. The crimes for which they would be charged are crimes defined in the draft code prepared by the International Law Commission<sup>491</sup> as offences against the peace and security of mankind, notably "terrorism".

Not unlike the offence of piracy *ex jure gentium*, for which the alleged offenders are treated as enemies of mankind, subject to universal jurisdiction, international terrorists are equally enemies of mankind and could be arrested and tried anywhere, nationally as well as internationally. Subject to the proviso that due process of law must be maintained, since enemies of mankind are themselves human beings entitled to human rights protection.

It matters not what court of law may be deemed competent and appropriate or "*forum conveniens*" by a national jurisdiction, especially that of the injured State, e.g., the United States Military Tribunal. The offenses charged could be regarded as offenses against the laws of international armed conflict under the General Convention of 1949 as well as other courts under the Code of Offence against the Peace and Security of Mankind.

## VI. CONCLUSION

The preceding analysis of some legal issues involved in the measures undertaken by the United States in concert with its Collective Defence Alliance and in conjunction with its friends in the free world who rallied behind the positions and actions taken by the United States and the Security Council of the United Nations appears to suggest some tentative conclusions.

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<sup>491</sup> See UN Doc. A/CN.4/383, April 13, 1983, Compendium of Relevant International Instruments 18-28, (1983). See Article 24 of the Code adopted in 1991, UN Doc.A/CN.4/405, 1991.

The inherent right of self-defence has received a further boost of strength and diversification of the types of measures that can be adopted to pre-empt further attacks against the United States and other victims of international terrorism.

Legitimate counter-measures as a means to prevent further recurrence of internationally wrongful act have also obtained a more solid backing in the quasi unanimous support voiced by the free world, without exception and regardless of religious belief.

The terrorists implicated in the perpetration of terrorist acts stand a fair chance of being arrested, prosecuted and brought to justice under the rule of law with all the due process respected.

Rules of international law in regard to international liability for injurious harms, offenses against the peace and security of mankind, and the concepts of self-defence and counter-measures, as circumstances precluding wrongfulness in the law of State Responsibility, appear to have taken giant steps forward. These positive evolutions of international norms may provide a measure of consolation for the losses humanity has suffered at the hands of international terrorists, the last of which hopefully have been seen and will not re-emerge in any form or manifestation in the face of overwhelming global determination. Out of the scourge of international terrorism, the Security Council appears to have emerged omnipotent, if not yet ultimately triumphant.

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San Francisco, December 2001