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Operation Trip to Atlantic City in Light of the Right of Self-Defense

Cover Page Footnote

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Abstract:

On May 2, 2011, a covert operation – codenamed *Operation Trip to Atlantic City* – led to the death of Osama bin Laden in Pakistan. Certain observers justified the raid as follows: as bin Laden continued to pose an imminent threat to the United States, and as Pakistan was unable or unwilling to prevent Al-Qaida from using its territory as a base for launching attacks, the United States was authorized to use military force in self-defense against bin Laden in the sovereign territory of Pakistan. This article’s purpose is to assess the validity in law of such a justification through the analysis of scholarly schools of thought, State practice and decisions of the International Court of Justice. Given that self-defense can be invoked only in the case of *ongoing* armed attack *by a State* – an opinion confirmed by the Court – this article demonstrates that the conditions of invocation and implementation of the right of self-defense were not fulfilled *in casu* for at least two reasons. Firstly, after analyzing the ‘unwilling and unable’ test as well as the theory of complicity in light of the rules of attribution for responsibility of States for internationally wrongful act, it is concluded that the threatening activities of Al-Qaida could not be attributed to Pakistan. Secondly, after identifying the legal purpose of the right of self-defense and analyzing the requirement of immediacy, it is concluded that no military operation in the name of self-defense can be lawfully carried out in anticipation of an attack and, in particular, to address an imminent threat.

Introduction

In the early hours of May 2, 2011, a commando of the very efficient US Navy Special Forces – the Navy SEALs – conducted a covert operation. This was often referred to in code as ‘The Trip to Atlantic City’ which subsequently led to the death of Osama bin Laden, the head of Al-Qaida⁽¹⁾. Bin Laden was hidden in a compound in Abbottābād, a Pakistani city located approximately fifty kilometers north of Islamabad. The US Government justified the operation

(1) Regarding the preparation of this operation, see notably Siobhan Gorman, Julian E. Barnes, ‘Spy, Military Ties Aided bin Laden Raid’, *The Wall Street Journal*, May 23rd, 2011.

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through the right of self-defense. Indeed, standing before the Senate Committee on the Judiciary, Attorney General Eric H. Holder Jr. declared on May 4th that “[the killing of bin Laden] was justified as an act of national self-defense”⁽²⁾.

Although the legal reasoning for the invocation of the right of self-defense in the case of the bin Laden operation was not clearly detailed and officially expressed, some legal and former legal advisors for the American Administration provided – sometimes on a personal level – certain statements, observations or speculations as to the position of the Obama Administration on the matter. In our opinion, these observations were probably not so distant from what could be a more official standpoint. Thus, on May 19th, the State Department Legal Adviser Harold H. Koh stated in the forum of discussion *Opinio Juris*: “[...] bin Laden continued to pose an imminent threat to the United States that engaged our right to use force, a threat that materials seized during the raid have only further documented”⁽³⁾. Then, on the same day and in the same forum of discussion, Marty Lederman⁽⁴⁾ stated: “Under the relevant sovereignty rules, it is generally the case (this is simplifying a bit) that even where international law warrants Nation A’s use of force against non-state actors in self-defense and/or in an armed conflict, Nation A cannot use such force against such targets in the sovereign territory of State B unless State B either consents to such use of force, or State B is unable or unwilling to interdict the threat itself.”⁽⁵⁾ Marty Lederman also quoted John B. Bellinger who stated in 2006 when he was State Legal Adviser: “As a practical matter, though, a state must be responsible for preventing terrorists from using its territory as a base for launching attacks. And, as a legal matter, where a state is unwilling or unable to do so, it may be lawful for the targeted state to use military force in self-defense to address that threat.”⁽⁶⁾

After having rejected the assumption that Pakistan would have consented *ex*

(2) Statement of the Attorney General, Eric H. Holder Jr., before the United States Senate Committee on the Judiciary, at a hearing entitled ‘Oversight of the U.S. Department of Justice’, May 4th, 2011, available at <http://judiciary.authoring.senate.gov/hearings/hearing.cfm>. See also the statement of the spokesperson of the White House, dated May 4th, 2011, ‘We acted in the nation’s self-defense’, Office of the Press Secretary, Press Briefing by Press Secretary Jay Carney, available at <http://www.whitehouse.gov/the-press-office/2011/05/04/press-briefing-press-secretary-jay-carney-542011>.

(3) See Harold H. Koh in the forum *Opinio Juris*, under the post ‘The Lawfulness of the U.S. Operation Against Osama bin Laden’, May 19th, 2011, available at <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden>.

(4) Marty Lederman was Deputy Assistant Attorney General in the Department of Justice’s Office of Legal Counsel from 2009 to 2010 and Attorney Advisor in the Office of Legal Counsel from 1994 to 2002.

(5) See Marty Lederman in the forum *Opinio Juris*, under the post ‘The U.S. Perspective on the Legal Basis for the bin Laden Operation’, May 19th, 2011, available at <http://opiniojuris.org/2011/05/24/the-us-perspective-on-the-legal-basis-for-the-bin-laden-operation/>.

(6) See John B. Bellinger, *Legal Issues in the War on Terrorism*, conference given at the London School of Economics, October 31st, 2006, available at http://www2.lse.ac.uk/PublicEvents/pdf/20061031_JohnBellinger.pdf.

ante facto to an American intervention – and the Pakistani authorities did deny having been informed of the American operation⁽⁷⁾ – Marty Lederman briefly applied the “unwilling or unable” test⁽⁸⁾ to the present case, a doctrine moreover invoked on several occasions by President Obama⁽⁹⁾. Merely speculating as to the Administration’s views, Lederman declared that it is possible that for the Obama Administration “Pakistan was effectively ‘unable’ to ameliorate the threat from bin Laden, in the sense that tipping off the Pakistani officials would have posed a significant risk of compromising any prospect of incapacitating him”⁽¹⁰⁾. CIA Chief Leon Panetta indeed affirmed on May 3rd that it had been decided not to inform Pakistan of the operation because “any effort to work with Pakistanis could jeopardize the mission. They might alert the targets.”⁽¹¹⁾ It is worth mentioning – and it is not surprising – that the Government of Pakistan rejected such statements. On May 9th, Prime Minister Gilani notably stated: “Allegations of complicity or incompetence are absurd. We emphatically reject

(7) See Ministry of Foreign Affairs, Pakistan, *Death of Osama bin Laden - Respect for Pakistan's Established Policy Parameters on Counter Terrorism*, May 3rd, 2011, available at http://www.mofa.gov.pk/Press_Releases/2011/May/PR_152.htm.

(8) On the ‘unwilling or unable test’, see the interesting contribution of Ashley S. Deeks, ‘Unwilling or Unable’: Toward a normative Framework for Extraterritorial Self-Defense’, *Va.J. Int'l L.*, vol. 52, 2011-2012, pp. 483-550.

(9) The spokesperson of the White House pointed out that “the President, even before he was President, when he was a candidate, had a very clear idea about the approach he would take as President towards Osama bin Laden. In August of 2007, he said, ‘If we have actionable intelligence about high-value terrorist targets and President Musharraf won't act, we will.’ In July of 2008, he said, ‘We must make it clear that if Pakistan cannot or will not act, we will take out high-level terrorist targets like bin Laden if we have them in our sights.’ And he repeated statements like that.” Office of the Press Secretary, *Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan*, May, 2nd 2011, available at <http://www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-press-secretary-jay-carney-and-assistant-president-homela>.

(10) Marty Lederman, *supra* note 5. See also Ashley S. Deeks, ‘Pakistan's Sovereignty and the Killing of Osama Bin Laden’, *ASIL Insights*, May 5th, 2011, available at <http://www.asil.org/insights110505.cfm>: “Based on the facts that have come to light to date, the United States appears to have strong arguments that Pakistan was unwilling or unable to strike against Bin Laden. Most importantly, the United States has a reasonable argument that asking the Government of Pakistan to act against Bin Laden could have undermined the mission. The size and location of the compound and its proximity to Pakistani military installations has cast strong doubt on Pakistan’s commitment to defeat al Qaeda.”

(11) See Massimo Calabresi, ‘CIA Chief: Pakistan Would Have Jeopardized Operation’, *Time*, May 3rd, 2011, available at <http://swampland.time.com/2011/05/03/cia-chief-breaks-silence-u-s-ruled-out-involving-pakistan-in-bin-laden-raid-early-on/>. That Osama bin Laden got supports in Pakistan leaves little room for doubt; more difficult however is to know whether this support came directly from members of the Pakistani government (secret services, army) or not. John Brennan, Assistant to the President for Homeland Security and Counterterrorism, declared during a press conference at the White House: “I think it’s inconceivable that bin Laden did not have a support system in the country that allowed him to remain there for an extended period of time. I am not going to speculate about what type of support he might have had on an official basis inside of Pakistan.” Office of the Press Secretary, *supra* note 9. See also Adam Entous, Julian E. Barnes, Matthew Rosenberg, ‘Signs Point to Pakistan Link’, *The Wall Street Journal*, May 4th, 2011, available at <http://online.wsj.com/article/SB10001424052748704322804576303553679080310.html>.

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such accusations.”⁽¹²⁾

The statements, observations and speculations mentioned above may be summarized as follows: as bin Laden continued to pose an imminent threat to the United States, and as Pakistan was unable or unwilling to prevent Al-Qaida from using its territory as a base for launching attacks because the country was colluding with these non-state actors and consequently complicit in their activities, the United States was authorized to use military force in self-defense against bin Laden in the sovereign territory of Pakistan.

In the opinion of the present writer, and taking into consideration scholarly works, international jurisprudence and State practice, Operation *Trip to Atlantic City*, as summarized above, does not comply with the law *de lege lata*, and, in particular, with the customary law of self-defense enshrined in the Article 51 of the UN Charter. This Article requires: “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”.

It will be shown *infra* that the conditions of invocation and implementation of the right of self-defense have not been met in the case of Operation *Trip to Atlantic City*, and for these reasons the raid against bin Laden could not and should not have been justified by that right. Regarding the former condition, the view of the present writer is that the right of self-defense can only be invoked in the case of *ongoing armed attack by a State*⁽¹³⁾. The requirement for an armed attack to exist has been confirmed in the *Nicaragua* case by the International Court of Justice which held that such an attack is “the condition *sine qua non* required for the exercise of the right of [...] self-defence”⁽¹⁴⁾. Furthermore, as it will be established, every armed attack within the compass of Article 51 of the UN Charter must be attributed to a State. However, after having analyzed the theory of complicity and having determined how it interlinks with the rules of attribution mentioned in the Draft Articles on Responsibility of States for Internationally Wrongful Act, it will be concluded that the activities of Al-Qaida, including their immediate threat against the United States, were not and could not be attributed to Pakistan (I). With regard to the condition of implementation of the right of self-defense, after having analyzed the inherent

(12) Ministry of Foreign Affairs, Pakistan, *Speech of the Prime Minister in the National Assembly on the Abbottabad Incident*, May 9th, 2011, available at http://www.mofa.gov.pk/Press_Releases/2011/May/PM_09_05_2011.htm.

(13) Eric Corthay, *La lutte contre le terrorisme international, De la licéité du recours à la force armée, Bâle, Helbing Lichtenhahn, 2012, at 93.*

(14) *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *ICJ Reports* 1986, para. 237 [hereinafter *Nicaragua* case]. See also, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, *ICJ Reports* 2003, para. 51 [hereinafter *Oil Platforms* case].

purposes underpinning any action in self-defense, as well as the consubstantial requirement of immediacy, it will be concluded that Operation *Trip to Atlantic City* – i.e. a military operation carried out in order to address an imminent threat and prevent future attacks – could not be justified by the current right enshrined in Article 51 of the UN Charter (II).

I. The requirement of attribution of an injurious act to a State

It has been stated by certain observers that Operation *Trip to Atlantic City* against bin Laden could have been justified by the right of self-defense. Also, the International Court of Justice held that an armed attack is “the condition *sine qua non* required for the exercise of the right of [...] self-defence”⁽¹⁵⁾. As two of the most important actors *in casu* are Osama bin Laden and Pakistan, it would be interesting to answer the question whether an armed attack must be in law the act of a State or whether it can simply and only be the act of private individuals acting as such.

Moreover, it has been implicitly stated that Pakistan was “unable or unwilling” to address the imminent threat posed by bin Laden⁽¹⁶⁾, or in other words that Pakistan did not appear to be able or did not wish to prevent future attacks or deter bin Laden from carrying out terrorist attacks notably against the United States. It is therefore necessary to determine whether in that case Pakistan was in breach of its obligation of due diligence, and if so, whether it could have been accomplice of the future attacks that bin Laden was allegedly about to launch, and whether such complicity could have engaged the international responsibility of Pakistan for the prospective injurious acts of bin Laden and his henchmen.

1. Armed attacks are acts of States

Terrorist attacks, as those perpetrated in New York (2001), Bali (2002), Casablanca (2003), Madrid (2004) or London (2004), show that non-state actors are capable of severely endangering national and international peace and security with at the very least the same degree of effectiveness and horror as the conduct of any conventional armed forces. Some scholars and certain members of the international community assert that an armed attack giving rise to the right of self-defense can be carried out by individuals or groups of individuals – the examples are very often those of terrorist groups – even when those entities have no sufficient connection with a State for attributing their violent conduct to

(15) *Nicaragua case, ibid.*

(16) *See supra* note 5.

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that State⁽¹⁷⁾. In light of the explanations provided by many scholars, the decisions of the International Court of Justice, and the analysis of the UN Security Council Resolutions, we are to conclude that, in law, an armed attack triggering a reaction in self-defense must be attributed to a State.

1.1. The doctrinal debate

Scholars are divided on the interpretation of Article 51 of the UN Charter. On one hand, part of the literature gives a very broad interpretation of Article 51, first sentence. Within this group, some scholars rely on a literal interpretation of the Article to claim that nothing in its letter limits the exercise of the right of self-defense to the only case an armed attack is carried out by a State⁽¹⁸⁾. This opinion, according to which ultimately an armed attack could also be perpetrated by non-state actors, is notably shared by Yoram Dinstein. In his book entitled *War, Aggression and Self-Defense*, Dinstein writes that “for an armed attack to justify countermeasures of self-defence under Article 51, it need not be committed by another State”⁽¹⁹⁾. Then, he makes it clear that “[a]rmed attacks by non-State actors are still armed attacks, even if commenced only from – and not by – another State”⁽²⁰⁾.

Moreover, without focusing explicitly on the term “armed attack” *per se*, some scholars argue that the first sentence of Article 51 ultimately reflects a natural right of self-defense which emerged long before the adoption of the UN Charter in 1945 – the *locus classicus* systematically invoked to defend such an opinion is the *Caroline* case⁽²¹⁾ – and which included the right to respond to an attack or an immediate danger whoever the author of the attack or the danger is, it is to say a State or non-state actors whose conduct is not attributed to any

(17) See James E. S. Fawcett, ‘Intervention in International law. A Study of Some Recent Cases’, *Collected Courses of the Hague Academy of International Law*, 1961-II, at 363 [hereinafter *Collected Courses...*]; Guy B. Roberts, ‘Self-Help in Combatting State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals’, *Case W.Res.J.Int’l L.*, vol. 19, num. 2, 1987, at 268; Ruth Wedgwood, ‘Responding to Terrorism: The Strikes Against bin Laden’, *Yale J.Int’l L.*, vol. 24, num. 2, 1999, at 564; Thomas M. Franck, ‘Terrorism and the Right of Self-Defense’, *AJIL*, vol. 95, num. 4, 2001, at 840; Jordan J. Paust, ‘Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond’, *Cornell Int’l L.J.*, vol. 35, num. 3, 2002, at 534; Enzo Cannizzaro, ‘Entités non-étatiques et régime international de l’emploi de la force. Une étude sur le cas de la réaction israélienne au Liban’, *RGDIP*, t. 111, 2007, at 352; Separate Opinion of Judge Kooijmans in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports* 2005, para. 30 [hereinafter *Republic Democratic of the Congo case*].

(18) See Declaration of Judge Buergenthal and Separate Opinion of Judge Kooijmans in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* 2004, resp. para. 6 and para. 36 [hereinafter *Wall case*].

(19) Yoram Dinstein, *War, Aggression and Self-Defence*, 3rd ed., Cambridge, Cambridge University Press, 2001, at 192.

(20) *Ibid.*, at 214.

(21) For an explanation of the facts of the incident, see Robert Y. Jennings, ‘The Caroline and McLeod Cases’, *AJIL*, vol. 32, num. 1, 1938, at 82-99.

State⁽²²⁾. Thus, Dereck W. Bowett stated: “The situation may arise in which the threat to a state’s political independence originates in the conduct of individuals or groups of individuals for which no state bears international responsibility. The most obvious example is the case in which a state uses due diligence, and therefore fulfils the duty imposed on it by international law, but is still unable to prevent individuals from organizing a hostile expedition or conducting other activities involving an immediate danger to another state’s political independence. In these circumstances the state on whose territory these preparations or activities occur is not in breach of any duty and, therefore, no action in self-defence can be directed against it by the state threatened by these preparations or activities. This is not to say that the threatened state is powerless to do anything to protect itself; it may take action in self-defence but such action must be directed solely at the individuals or groups responsible for the threat to or violation of its rights.”⁽²³⁾

On the other hand, another part of the literature, to which we subscribe, contends that an armed attack, to be qualified as such, must be an act of a State and that Article 51 of the UN Charter cannot be interpreted as authorizing the use of force in self-defense against non-state actors⁽²⁴⁾. Indeed, we have serious reservations with regard to the opinion according to which the act that triggers a reaction in self-defense might be the conduct of a person or group of persons which is not attributed to a State. We are rather of the opinion that the act which triggers an action in self-defense must be an internationally wrongful act, i.e. an act of State. In the Addendum to the eighth report on State responsibility, Roberto Ago considered that “the State takes action [in self-defense] after

(22) See notably Humphrey Waldock, ‘The Regulation of the Use of Force by Individual States in International Law’, *Collected Courses...*, t. 81, 1952-II, at 463-464, and 498; Barry Levenfeld, ‘Israel’s Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law’, *Colum.J.Transnat’l L.*, vol. 21, num. 1, 1982-1983, at 28; Sean D. Murphy, ‘Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the U.N. Charter’, *Harv.Int’l L. J.*, vol. 43, num. 1, 2002, at 50.

(23) Dereck W. Bowett, *Self-Defence in International Law*, Manchester, Manchester University Press, 1958, at 55-56. See also Roy Emerson Curtis, ‘The Law of Hostile Military Expeditions as Applied by the United States’, *AJIL*, vol. 8, num. 2, 1914, at 236.

(24) On the traditional interpretation of Article 51 according to which an armed attack is to be an act of the State, see *inter alia* Joseph L. Kunz, ‘Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations’, *AJIL*, vol. 41, num. 4, 1947, at 878: an armed attack “must not only be directed against a state, it must also be made by a state or with the approval of a state”; Hans Kelsen, ‘Collective Security and Collective Self-Defense under the Charter of the United Nations’, *AJIL*, vol. 42, num. 4, 1948, at 791: an armed attack is conducted “by one state against another”; see also as a more recent literature, Eric P. J. Myjer, Nigel D. White, ‘The Twin Towers Attack: an Unlimited Right to Self-Defence?’, *JCSL*, vol. 7, 2002, at 7; Marcelo G. Kohen, ‘Is the Legal Argument for Self-Defence against Terrorism Correct?’, in: Wybo P. Heere (ed.), *From Government to Governance, The Growing Impact of Non-State Actors on the International and European Legal System*, The Hague, TMC Asser Press, 2003, at 290; Giovanni Distefano ‘La crise libanaise de l’été 2006 à l’aune du ius contra bellum’, *Journal of Sharia and Law*, vol. 22 (2008), at 33-45.

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having suffered an international wrong, namely, the non-respect of one of its rights by the State against which the action in question is directed”⁽²⁵⁾. Then, when clarifying the nature of the ‘wrong’, Ago underscored that “the only international wrong which, exceptionally, makes it permissible for the State to react against another State by recourse to force, despite the general ban on force, is an offence which itself constitutes a violation of the ban”⁽²⁶⁾. When non-state actors launch an attack against a State from the territory of another one but their conduct is not attributed to any State, no internationally wrongful act is committed by them. In particular, no violation of the fundamental principle on the prohibition of the use of force as embodied in the Article 2, paragraph 4, of the UN Charter, and consequently no armed attack – the most severe form of the use of armed force – in the meaning of Article 51 occurs because the principle on the prohibition of the use of force applies only to States and in their relations with others. Therefore, according to Ago, in such a situation the victim State is not authorized to invoke the right of self-defense, although it is still lawful for the nation to take appropriate security measures within its territory in order to defend its citizens and maintain peace and security.

1.2. The jurisprudence of the International Court of Justice

The International Court of Justice, which is the principal judicial organ of the United Nations and whose task is mainly to explain the state of international law on particular points at a specific moment, has recalled many times that an armed attack is and must be understood as being an act of State. In 1986, in the *Nicaragua* case, the Court linked and quasi assimilated the concept of armed attack mentioned under Article 51 of the UN Charter with the concept of aggression used in the Annex (Definition of Aggression) to the Resolution 3314 (XXIX) of the General Assembly⁽²⁷⁾. Article I of the Annex defines the concept of aggression as “[...] the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition”. In the *Oil Platforms* case of 2003, when answering the question whether the United States was authorized to exercise self-defense against Iran, the Court held that “[...] in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which *Iran was responsible*; and that those attacks were of such a nature as to

(25) Roberto Ago, ‘Addendum to the eighth report on State responsibility: The internationally wrongful act of the State, source of international responsibility’, *Yearbook of the International Law Commission*, Vol. II, Part One, 1980, at 54, para. 89 [hereinafter *Y.B. Int’l L. Comm’n*].

(26) *Ibid.*

(27) *Nicaragua* Case, *supra* note 14, para. 195.

be qualified as ‘armed attacks’ within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force”⁽²⁸⁾. After having examined the arguments presented on each side, the Court “[found] that the evidence indicative of Iranian responsibility for the attack on the *Sea Isle City* [was] not sufficient to support the contentions of the United States” and concluded “that the burden of proof of the existence of an armed attack by Iran on the United States, in the form of the missile attack on the *Sea Isle City*, has not been discharged”⁽²⁹⁾. One year later, in the *Wall* case, when answering the question whether the construction of a wall between Israel and Palestine could be justified by the right of self-defense, the Court held that “Article 51 of the Charter [...] recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.”⁽³⁰⁾ However, as “Israel [did] not claim that the attacks against it are imputable to a foreign State” the Court concluded that Article 51 of the UN Charter had no relevance in this case⁽³¹⁾.

1.3. The wording of the UN Security Council Resolutions

Those who consider that an armed attack can be perpetrated by individuals even when their conduct is not attributed to a State refer sometimes to the Resolutions 1368 and 1373 adopted by the Security Council in the wake of the 9/11 terrorist attacks. In the third paragraph of the preamble of Resolution 1368 the Security Council recognized “the inherent right of individual or collective self-defence in accordance with the Charter”⁽³²⁾. Therefore, some authors affirm that the Security Council recognized the right for the United States to react in self-defense against Al-Qaida irrespective of the fact that their terrorist attacks had not been attributed to any State⁽³³⁾. However, such an interpretation of the wording of the aforementioned resolutions did not win unanimous support⁽³⁴⁾. Indeed, it is important to note that these two resolutions are the only ones that refer to the right of self-defense among the many resolutions adopted by the

(28) *Oil Platforms* case, *supra* note 14, para 51 (emphasis added).

(29) *Ibid.*, para. 61.

(30) *Wall* case, *supra* note 18, para. 139.

(31) *Ibid.*

(32) The Security Council reaffirms the same right in Resolution 1373 (2001).

(33) See Separate Opinion of Judge Koojimas and Declaration of Judge Buergenthal in *Wall* case, *supra* note 18, para. 35 and para. 6 resp.; Separate Opinion of Judge Simma in *Republic Democratic of the Congo* case, *supra* note 17, para. 11. See also Thomas M. Franck, ‘Terrorism...’, *supra* note 17, at 840; Christopher Greenwood, ‘International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’, *SDILJ*, vol. 4, 2003, at 17.

(34) See for example Vera Gowlland-Debbas, ‘What Responses to Counter-Terrorism? Or the Problem of Accountability’, in: Heere Wybo P. (ed.), *supra* note 24, at 274.

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Security Council after terrorist attacks⁽³⁵⁾. Thus, we may doubt the consistency of the Security Council practice. In fact, we prefer to embrace the opinion of Olivier Corten who suggests that the recognition of the right of self-defense by the Security Council in its Resolutions 1368 and 1373 should be interpreted as a reminder of a relevant international rule which can apply only if its whole conditions of implementation are fulfilled⁽³⁶⁾. We maintain that one of these conditions is that armed attacks be attributed to States, this having been reaffirmed on several occasions by the International Court of Justice, not only before, but also after September 2001⁽³⁷⁾.

2. The rules of attribution and the theory of complicity

As explained above, an armed attack – the condition *sine qua non* required for giving rise to the right of self-defense⁽³⁸⁾ – is and can only be the conduct of a State. In other words, in order to assess if a terrorist act is susceptible to being referred to as an armed attack, it is *inter alia* necessary to determine if such an act is attributable to a State, and for that we need to apply the rules of attribution mentioned under Chapter II of the Articles on Responsibility of States for Internationally Wrongful Acts⁽³⁹⁾. Chapter II specifies the limitative conditions under which a conduct is attributable to a State⁽⁴⁰⁾. However, *in casu* none of these conditions have been invoked by the United States to declare that the activities of Al-Qaida, and in particular the imminent threat posed by bin Laden, were attributable to Pakistan. Indeed, never once did the Obama Administration contend that bin Laden and his group were *de jure* organs of Pakistan (Art. 4), or that their conduct was carried out on the instructions or under the direction or control of Pakistan (Art. 8), or that their actions had been acknowledged and adopted by the Pakistani authorities *ex post facto* (Art. 11).

Nevertheless, many scholars and law practitioners who have justified the legality of Operation *Trip to Atlantic City* have declared or endorsed the opinion that when a State is ‘unwilling or unable’ to prevent individuals from using its territory for launching terrorist attacks, it may be lawful for the targeted State to

(35) See for example Resolution 1438 (2002) condemning the terrorist attacks in Bali, Resolution 1440 (2002) condemning the act of taking hostages in Moscow, Resolution 1450 (2002) condemning the terrorist bomb attack at the Paradise Hotel in Kikambala (Kenya) and the attempting missile attack on Arkia Israeli Airline flight 582 departing Mombasa (Kenya), Resolution 1530 (2004) condemning the bomb attacks in Madrid, and Resolution 1611 (2005) condemning the terrorist attacks in London.

(36) Olivier Corten, ‘Vers un renforcement des pouvoirs du Conseil de sécurité dans la lutte contre le terrorisme?’, in: Bannelier Karine, *et al.* (ed. by), *Le Droit international face au terrorisme*, CEDIN-Paris I, Pedone, Cahiers internationaux num. 17, 2002, at 264.

(37) See *supra* notes 27 to 31.

(38) *Nicaragua case*, *supra* note 14, para. 237.

(39) See Annex to Resolution 56/83 of the General Assembly [hereinafter ILC Articles].

(40) The Iran-United States Claims Tribunal has affirmed that “in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State”, *Kenneth P. Yeager v. The Islamic Republic of Iran, Iran-U.S. C.T.R.* vol. 17, 1987, at 101-102.

use force in self-defense in order to address that threat⁽⁴¹⁾. This raises the question of whether a new condition of attribution has emerged, and more exactly whether a failure to prevent or punish terrorist attacks conducted by non-state actors justifies inferring the host State's *complicity* in the individuals' acts, and consequently regarding the terrorist acts as the conduct of the host State.

2.1. The theory of complicity and the standard of due diligence

According to the theory of complicity, "an action committed by an individual can be attributed to the State as a source of international responsibility, provided that other factors were involved in its commission, particularly failure to prevent the act or to react *a posteriori* and that such omissions derived directly from the State, i.e., from its organs"⁽⁴²⁾. This theory, still invoked today by some scholars in the context of the fight against terrorism⁽⁴³⁾, was derived from Grotius who considered that the nation participated in a crime committed by a person if nothing was done to prevent the crime or to punish or hand over the offender⁽⁴⁴⁾. According to this controversial theory, the actions carried out in the territory of the victim State by private entities residing in the territory of the host State are attributed to that latter State, not because the private entities would have acted on its behalf, on its instructions, or under its direction or control – what is not the case when individuals remain entirely outside the machinery of the host State –, but simply because the host State has failed to fulfill its *ex ante facto* duty of not tolerating the preparation in its territory of actions directed against the victim State, or its *ex post facto* duty of prosecuting and punishing the offenders for their wrong⁽⁴⁵⁾. In other words, States would be

(41) See *supra* notes 3 to 6.

(42) Roberto Ago, 'Fourth Report on State Responsibility, The internationally wrongful act of the State, source of international responsibility', *Y.B. Int'l L. Comm'n*, vol. II, 1972, at 121, para. 139. This theory is rejected by Ago.

(43) Sean D. Murphy, *supra* note 22, at 51; Yoram Dinstein, 'Comments on the Presentations by Nico Kirsch and Carsten Stahn', in: Walter Christian, *et al.* (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Heidelberg, Springer, 2004, at 920; Michael Byers, 'Not yet havoc: geopolitical change and the international rules on military force', *Review of International Studies*, vol. 31, supplement, 2005, at 58; Davis Brown, 'Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and other Responses', *Cardozo J.Int'l & Comp.L.*, vol. 11, num. 1, 2003, at 17 and 52.

(44) Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, Amsterdam, MDCXLVI, lib. II, at 366 ff. The theory of complicity was also invoked after Grotius; see notably Emmerich De Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758), in: James B. Scott (ed.), *The Classics of International Law*, Washington, Carnegie Institution of Washington, 1916, Vol. I, Book II, Chap. VI, para. 74; Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, Banks Law Publishing, 1916, at 217; James L. Brierly, 'The Theory of Implied State Complicity in International Claims', *BYIL*, vol. 9, 1928, at 42 ff, esp. at 49.

(45) Roberto Ago, 'Fourth Report on State Responsibility...', *supra* note 42, at 119-120, para. 135.

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complicit and would be held responsible for the conduct of individuals when they fail to fulfill their international obligations of vigilance, protection and control. Such an obligation of due diligence can be broadly defined as a requirement for each State to protect other States, as well as the representatives and the nationals of these other States, against the illicit acts carried out or about to be perpetrated by individuals, when these acts are conceived, prepared and/or carried out within its territory or under its jurisdiction⁽⁴⁶⁾. The International Court of Justice has long recognized “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”⁽⁴⁷⁾

2.1.1. Scope of the obligation of due diligence

The obligation of due diligence is composed of two duties: to prevent as well as to repress wrongful acts of individuals⁽⁴⁸⁾. With regard to international terrorism, due diligence means in particular that States should not let their territories become springboards for terrorist attacks against third States⁽⁴⁹⁾. States must abstain from any passive or active support to terrorists acting or about to act against other States or nationals of other States and must take measures to *prevent* and *repress* any terrorist activity. Concerning the preventive side, due diligence means that not only must States abstain from tolerating the organization of terrorist activities on their territories (passive support), but that they must also abstain from providing any support or encouragement to terrorists who plan attacks against another State (active support). In concrete terms, States must ensure that their territories do not host any terrorist installations or training camps and must refrain in particular from funding, arming, training, and providing logistical support to terrorist groups. Concerning the repressive side, due diligence implies that States must arrest, prosecute, bring to justice or extradite terrorists and their accomplices.

Obligations of due diligence relating to terrorism have been expressed in many legal instruments, and in particular in several resolutions of the General

(46) See also Hersch Lauterpacht, ‘Revolutionary Activities by Private Persons against Foreign States’, *AJIL*, vol. 22, num. 1, 1928, at 126; Condorelli Luigi, ‘L’imputation à l’Etat d’un fait internationalement illicite: solutions classiques et nouvelles tendances’, *Collected Courses...*, t. 189, 1984-VI, at 111-114; Riccardo Pisillo-Mazzeschi, ‘The Due Diligence Rule and the Nature of International Responsibility of States’, *GYIL*, vol. 35, 1992, at 34 ff.; Jean Salmon (dir.), *Dictionnaire de droit international public*, Bruxelles, Bruylant, 2001, at 770; François Dubuisson, ‘Vers un renforcement des obligations de diligence en matière de lutte contre le terrorisme?’, in: Bannelier Karine, *et al.* (ed. by), *supra* note 36, at 141-157.

(47) *Corfu Channel case*, Judgment, *ICJ Reports* 1949, at 22.

(48) See the arbitral award of Max Huber related to the *Biens britanniques au Maroc espagnol (Spain v. United Kingdom)*, 1st May 1925, *RLAA*, vol. II, at 645: “la responsabilité de l’Etat peut être engagée [...] non seulement par un manque de vigilance dans la prévention des actes dommageables, mais aussi par un manque de diligence dans la poursuite pénale des fauteurs, ainsi que dans l’application des sanctions civiles voulues”.

(49) Dinstein Yoram, ‘Comments...’, *supra* note 43, at 922.

Assembly and the Security Council⁽⁵⁰⁾. An example of such documents is the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, a document annexed to Resolution 2625 (XXV) of the General Assembly. The eighth and ninth paragraphs related to the fundamental principle on the prohibition of the use of force – paragraphs which reflect the customary law⁽⁵¹⁾ – provide:

“Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”

Several years later, the General Assembly adopted resolutions pertaining more specifically to the fight against international terrorism in which the measures that States are urged to implement after the perpetration of terrorist acts were added to the measures that States are requested to adopt before such a perpetration. Thus, the *Declaration on Measures to Eliminate International Terrorism* – annex to Resolution 49/60, adopted in December 9th 1994 – states:

“5. States must also fulfill their obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism and are urged to take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism, in particular:

(a) To refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens;

(b) To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of their national law

(50) See the list of General Assembly and Security Council Resolutions on terrorism, available at <http://www.un.org/en/terrorism>.

(51) See *Nicaragua case*, *supra* note 14, para. 191.

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[...]"⁽⁵²⁾.

2.1.2. Limits to the obligation of due diligence

The obligation of vigilance is not absolute. It is an obligation of conduct and not of result. Indeed, in the *Genocide Convention* case the International Court of Justice held: "it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide [...]"⁽⁵³⁾. The principle thus established, with regard to the prevention of the acts of genocide, can be generalized. In other words, a State in whose territory non-state actors foment terrorist acts against other States is not "under an obligation to succeed, whatever the circumstances, in preventing the commission" of such terrorist acts. Two criteria must be examined in order to appreciate if, by its behavior, a State has fulfilled its obligation of due diligence: a) its knowledge of the acts – i.e. their planning, funding, etc. – injurious to other States, and b) the implementation of all means available to it. When a terrorist attack has been conducted by non-state actors from the territory of State A against State B, if State A was, in good faith, not aware of the preparation of that attack, or if it had unsuccessfully put into action all available means to halt that attack, then State A has not infringed its obligation of due diligence and therefore has not engaged its international responsibility.

The first criterion – the knowledge by the host State of a particular conduct – has been recalled by the Court. In the *Corfu Channel* case, for example, it was held that "Albania's obligation to notify shipping of the existence of mines in her waters depends on her having obtained knowledge of that fact [...]"⁽⁵⁴⁾. As regards international terrorism, acts – or their planning – of non-state actors injurious to other States can be brought to the knowledge of the host State in various manners. This is the case, notably, when the host State participates in one way or another (e.g. plan, encourage, aid) in the terrorist act⁽⁵⁵⁾, when it tolerates the operation in question, or when it is informed by intelligence services or by the victim State itself about the planning, preparation and

(52) This Resolution was invoked by the Minister for Foreign Affairs of Turkey in 1996 who stated that "shelter and support" provided by the Syrian Arab Republic to the PKK (group described as a terrorist organization by Turkey) contradict "the commitment of all Member States, under the Declaration contained in the annex to General Assembly resolution 49/60". Letter dated 21 June 1996 from the Minister for Foreign Affairs of Turkey addressed to the Secretary-General and to the President of the Security Council, UN Doc. S/1996/479.

(53) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, para. 430 [hereinafter *Genocide Convention* case].

(54) *Corfu Channel* case, *supra* note 47, at 22.

(55) *Nicaragua* case, *supra* note 14, para. 118 and para. 256.

imminent commission of acts of terrorism from its territory⁽⁵⁶⁾. However, in the context of the fight against international terrorism, the knowledge test is not systematically satisfied. Indeed, in spite of the serious and professional work provided by its intelligence services, the host State is sometimes not aware of what is being plotted by terrorist groups, and this is due to the clear fact that the planning – and in particular the funding – of non-state actors' terrorist operations often occurs in the greatest secrecy.

The second criterion means that the host State has the obligation to implement – by making a reasonable effort and acting in good faith – all available measures in order to avoid its territory being used by individuals who would conduct acts injurious to others States, or to repress *ex post facto* such acts⁽⁵⁷⁾. It is worth noting that States are not required to do the impossible. The host State is merely requested to act – i.e. to prevent, to repress – to the extent that it can and in compliance with the law it is bound to. In that situation, the obligation of conduct is considered as fulfilled and the host State cannot be accused of tolerating or acquiescing to the terrorist activities, even if it has not been able to efficiently prevent or repress such activities⁽⁵⁸⁾. In the *Genocide Convention* case, the Court held that the obligation of States parties to the Convention is “to employ all means *reasonably* available to them, so as to prevent genocide so far as possible”⁽⁵⁹⁾. The Court also stated: “A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.”⁽⁶⁰⁾ In the context of the fight against international terrorism, the statement of the Court means that when a State, which has the capacity to prevent non-state actors from planning and launching terrorist attacks from its territory, deliberately decides not to react and stop such attacks, then that State is in breach of its obligation of due diligence. However, the host State does not engage its responsibility when it is unable to prevent or to repress the attacks⁽⁶¹⁾. In the *Iranian Hostages* case, the Court

(56) Richard B. Lillich, John M. Paxman, ‘State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities’, *Am.U.L.Rev.*, vol. 26, num. 2, 1977, at 275.

(57) See Robert Jennings, Arthur Watts (ed.), *Oppenheim's International Law*, vol. I: *Peace*, London, New York, Longman, 9th ed., 1996, at 549; see also Roy Emerson Curtis, *supra* note 23, at 224 ff.

(58) See *Republic Democratic of the Congo* case, *supra* note 17, para. 301: “the Court cannot conclude that the absence of action by Zaire's Government against the rebel groups in the border area is tantamount to ‘tolerating’ or ‘acquiescing’ in their activities”.

(59) *Genocide Convention* case, *supra* note 53, para. 430 (emphasis added).

(60) *Ibid.*

(61) See André Nollkaemper, ‘Attribution of Forcible Acts to States: Connections between the Law on the Use of Force and the Law of State Responsibility’, in: Niels Blokker, Nico Schrijver (ed.), *The Security*

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linked the violation by Iran of its obligation of due diligence with the violation of its treaty and customary obligations⁽⁶²⁾ relating to the protection of the diplomatic and consular staff. Thus, in regard to the first phase of the events, the Court concluded that the Iranian authorities “failed to use the means which were at their disposal to comply with their obligations”⁽⁶³⁾, i.e. to prevent or to bring to a halt the attack by pro-government militants against the United States’ Embassy in Tehran and the Consulates at Tabriz and Shiraz on 4 and 5 November 1979 respectively, as well as to protect the premises, staff and archives of the mission⁽⁶⁴⁾. The Court held that such failures were not a “lack of appropriate means”⁽⁶⁵⁾. Evidence of this arose from the fact that on several occasions of a similar kind, before and after the 4th and 5th November, the Iranian authorities had been able to intervene “quickly and effectively” to protect and clear foreign embassies and consulates, thus frustrating or terminating invasions or attempted invasions⁽⁶⁶⁾. Without mentioning *expressis verbis* a violation of the obligation of due diligence, the Court held that the inaction of the Iranian authorities entailed a breach of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, and the 1955 Treaty of Amity, Economic Relations, and Consular Rights⁽⁶⁷⁾.

Establishing whether a State has employed all means reasonably available is a matter that must be determined in light of the circumstances specific to each case. Indeed, as noted by Garcia Amador “[t]he learned authorities are in almost unanimous agreement that the rule of “due diligence” cannot be reduced to a clear and accurate definition which might serve as an objective and automatic standard for deciding, regardless of the circumstances, whether a State was “diligent” in discharging its duty of vigilance and protection. On the contrary, the conduct of the authorities must, in each particular case, be judged in the light of the circumstances.”⁽⁶⁸⁾ Such a judgment is never easy to formulate, as each party involved in a specific confrontation usually tends to raise and put forward arguments deriving from its own interpretation or view of the reality. Thus, for example, during the war between Israel and Hezbollah in 2006, Israel

Council and the Use of Force, Theory and Reality – A Need for Change?, Leiden, Boston, Martinus Nijhoff Publishers, 2005, at 161.

(62) *United States Diplomatic and Consular Staff in Tehran*, Judgment, *ICJ Reports* 1980, para. 430 [hereinafter *Iranian Hostages case*].

(63) *Ibid.*, para. 68.

(64) *Ibid.*, para. 63.

(65) *Ibid.*

(66) *Ibid.*, para. 64 and 65.

(67) *Ibid.*, para. 67.

(68) F. V. Garcia Amador, ‘International responsibility: Second report’, *Y.B. Int’l L. Comm’n*, 1957, at 122, para. 7.

accused Lebanon of having “allowed to be amassed in the southern part of its territory” thousands of rockets⁽⁶⁹⁾. In response the Lebanese Government retorted that it “has spared no effort with regard to national dialogue and a political process to arrive at a situation in which the State [...] can extend its sovereignty over all its national territory”⁽⁷⁰⁾.

Although it is *a priori* difficult to determine whether a State has employed all means reasonably available to prevent or repress non-state actors’ conducts and consequently discharged itself of its obligation of due diligence, the International Court of Justice has however provided for some parameters to facilitate that assessment. In the *Genocide Convention* case, the Court held that an important parameter to take into account was “the capacity to influence effectively the action of persons likely to commit, or already committing, genocide”⁽⁷¹⁾. For the Court, “[t]his capacity itself depends, among other things, [...] on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.”⁽⁷²⁾ When applied to the context of the fight against international terrorism, the Court’s statement would mean, for example, that the stronger the links between terrorist groups, which plan acts injurious to other States, and the authorities of their host State are, the more important the capacity of that State to influence effectively the terrorists in order to convince them not to implement their deadly operations is. Therefore, the more important the capacity to influence is, the higher the threshold required to consider as reasonable the available means employed by the host State is. In the event that the ties between non-state actors and their host State are very intense, it may be claimed that the implementation of the measures available to the State would reach the required threshold of reasonableness only if that State effectively succeeds in stopping the terrorist act in preparation on its sovereign territory.

Finally, it is difficult to assess *in abstracto* whether a host State, which has sufficient material capacity to prevent or repress terrorist acts injurious to other States but at the same time where a large part of the population is favorable to the cause of terrorists, would breach its obligation of due diligence or not by refusing to react effectively against the terrorists. In this case, the means available to the State are very limited; a military or police operation carried out against those terrorists could cause a political suicide for the authorities and

(69) Israel, UN Doc. S/PV.5503, 31 July 2006, at 4.

(70) *Ibid.* at 5.

(71) *Genocide Convention* case, *supra* note 53, para. 430.

(72) *Ibid.*

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some internal unrest, and could eventually increase the threat to peace in the region, which is certainly not the wish of the United Nations for whom one of the main purposes is “to maintain international peace and security”⁽⁷³⁾. The question of how the host State can duly discharge the obligation concerned calls for an assessment *in concreto*. Measures available to the State may certainly be limited, but they are not, however, nonexistent. The social and political configuration of the country – however complex it may be – does not clear the host State of its responsibility⁽⁷⁴⁾. As the obligation of due diligence is one of conduct and not one of result, the host State could still bring its internal situation to the attention of the international community – i.e. to the Security Council and the General Assembly⁽⁷⁵⁾ – and request help in order to deal with a complex internal context that might lead to international friction or dispute with the State targeted or about to be targeted by the terrorists. If, in doing so, the host State employs all means reasonably available, then it does not engage its international responsibility, even if terrorist operations or terrorists are not prevented in time or repressed effectively.

2.2. The theory of complicity in light of actual State practice

The theory of complicity has sometimes been invoked to justify a military operation in self-defense against terrorists. Indeed, the intervening State has sometimes contended that the country from whose territory private individuals have prepared and carried out terrorist actions is held responsible for these actions because that country was not able to prevent them – for example, the country aided and harbored terrorists, organized, instigated, assisted in terrorist acts – or to repress them appropriately.

In order to determine whether the theory of complicity, as a condition of attribution of acts of private individuals to a State, has emerged as a new rule of customary law, it is necessary to identify and analyze the State practice accepted as law. Indeed, the make-up of a custom depends on two basic elements. In the *Libya/Malta* case, the International Court of Justice noted that “the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States”⁽⁷⁶⁾. In other words, the two elements to take into account when identifying the existence or emergence of a rule of customary law are “the material facts that is the actual behavior of states, and the psychological or subjective belief that such behavior is ‘law’.”⁽⁷⁷⁾ The essential components of

(73) See Art. 1, para. 1, of the UN Charter.

(74) See Richard B. Lillich, John M. Paxman, *supra* note 56, at 269-270; *contra* Richard A. Falk, ‘The Beirut Raid and the International Law of Retaliation’, *AJIL*, vol. 63, num. 3.1969, at 415-443.

(75) See Art. 35 of the UN Charter.

(76) *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, 3 June 1985, *ICJ Reports* 1985, para. 27.

(77) Malcolm N. Shaw, *International Law*, Cambridge, Cambridge University Press, 6th ed., 2008, at 74.

the actual practice engaged in by States – i.e. what they say, what they do, even their silence – are its consistency and uniformity. In the *Asylum* case, the International Court of Justice declared that a customary rule must be “in accordance with a constant and uniform usage practised by the States in question”⁽⁷⁸⁾. The existence of a rule of customary law cannot be inferred from an actual State practice which is not constant and uniform.

In the case of Operation *Trip to Atlantic City*, certain legal and former legal advisers contended, more or less explicitly, that the United States had the right to use force in self-defense on the territory of Pakistan to address the imminent threat posed by bin Laden, as Pakistan was unwilling or unable to prevent bin Laden and his terrorist group from using the Pakistani territory as a base for launching attacks⁽⁷⁹⁾. In their view, this implies that because Pakistan was unwilling or unable to prevent bin Laden’s terrorist operations, the country would have been complicit with the terrorists and therefore their conduct (e.g. threatening, planning and implementing operations against other countries) would have been attributable to Pakistan.

Before May 2011, the ‘unwilling or unable’ test, as well as the theory of complicity construed as a cause of attribution, had been invoked by some States – especially by Israel, Iran, and the United States. This was notably the case during the Israeli airstrike against the international airport of Beirut (1968), the Israeli raid in Southern Lebanon (1974), Operation *Peace for Galilee* (1982), the Iranian airstrikes against the Mujahidin e-Khalq Organisation’s camps in Iraq (1999), and Operation *Enduring Freedom* (2001)⁽⁸⁰⁾. Thus, with respect to Operation *Enduring Freedom*, for example, President George W. Bush stated in September 2001: “By aiding and abetting murder, the Taliban regime is committing murder.”⁽⁸¹⁾ A few weeks later, the US Permanent Representative to the United Nations, John D. Negroponte, stated that “the United States of America, together with other States, has initiated actions in the exercise of its inherent right or individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.” Then, Negroponte pointed out that the attacks and the ongoing threat to his country posed by Al-Qaida “have been made possible by the decision of the

(78) *Colombian-Peruvian Asylum Case*, Judgment, *ICJ Reports* 1950, at 276 [hereinafter *Asylum case*].

(79) See *supra* notes 3 to 6.

(80) Eric Corthay, *supra* note 13, at 189-204.

(81) President George W. Bush, *Address to a Joint Session of Congress and the American People*, 20 September 2001, available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>. See also Resolution 796 (1293/01) of the Organization of American States, dated 19 September 2001: “those that aid, abet or harbour terrorist organizations are responsible for the acts of those terrorists”.

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Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation”⁽⁸²⁾.

It is worth mentioning that many States have also condemned the military operations mentioned *supra* as being aggressions, acts of aggression, reprisals, or violations of the international law⁽⁸³⁾. For example, in 1968 the Security Council “[condemned] Israel for its premeditated military action in violation of its obligation under the Charter and the cease-fire resolutions”⁽⁸⁴⁾, and in 1974 the Security Council “condemn[ed] Israel’s violation of Lebanon’s territorial integrity and sovereignty and call[ed] once more on the Government of Israel to refrain from further military actions and threats against Lebanon”⁽⁸⁵⁾. Even in 2001, some States firmly condemned Operation *Enduring Freedom*. Cuba, for example, stated that “a powerful State must not invoke the right to self-defence in order unilaterally to unleash a war that might have unpredictable effects on a global scale”⁽⁸⁶⁾. Many States however remained silent on the legality of the operation, but it is not easy to determine whether such a silence was the expression of their approbation or, on the contrary, of their condemnation of the operation.

Nevertheless, with regard to the operations mentioned *supra*, the amount of difficulty in drawing any valid conclusion in law – i.e. a confirmation or rejection of the theory of complicity as a condition of attribution – from the declarations or conduct of the third States must be stressed, because they rarely explained precisely the legal reasons why they supported or rejected the conduct of the intervening States: existence, or not, of an armed attack? Attribution, or not, of the terrorist conduct to the host State in general? Recognition, or not, of the theory of complicity in particular?

2.3. Terrorists’ conduct and States’ conduct: two differing acts

Before determining whether the conduct of bin Laden can be attributed to Pakistan, it is necessary to assess whether the country has breached its obligation of due diligence. As it is not clear – the views expressed by organs of the US and Pakistani Governments were conflicting – whether Pakistan was unwilling or simply unable “to ameliorate the threat from bin Laden”⁽⁸⁷⁾, it is necessary to analyze both assumptions.

First, based on what was mentioned *supra* regarding the scope of the

(82) *Ibid.*

(83) See Eric Corthay, *supra* note 13, at 189-204.

(84) UN Security Council Resolution 262 (1968).

(85) UN Security Council Resolution 347 (1974).

(86) UN Doc. A/56/PV.13, 1st October 2001, at 15. Other firm condemnations came from Iraq and North Korea, see UN Doc. A/56/PV.51, 13 November 2001, and UN Doc. A/56/PV.52, 14 November 2001.

(87) See *supra* note 6.

standard of due diligence, it must be contended that the alleged fact that Pakistan was ‘unable to prevent’ bin Laden from using the national territory for threatening other States, in particular the United States, and launching terrorists attacks, does not automatically imply a violation of its obligation, as due diligence is an obligation of conduct and not of result and because a State that employs all reasonable means available to prevent or repress injurious acts fulfills its obligations⁽⁸⁸⁾. Furthermore, in the event Pakistan wasn’t aware of the presence of bin Laden in the national territory, that country cannot be accused of breaching its obligation as the existence of a duty of due diligence depends on the country having obtained knowledge of the fact that someone preparing injurious acts was on its territory⁽⁸⁹⁾.

Then, and contrariwise, in the event that Pakistan was unwilling to take measures against bin Laden – i.e. in good faith the country had the capacity for neutralizing bin Laden but didn’t want to – the legal consequences for the country are totally different. In that case, Pakistan would have breached its obligation of due diligence as the country would have refused to employ all reasonable means available in order to act appropriately.

It is worth noting that a violation of the obligation of due diligence by Pakistan doesn’t at all imply that Pakistan engages its international responsibility for the injurious conduct of bin Laden and his acolytes. Indeed, acts committed by private individuals acting as such cannot be considered as acts of the State and therefore the latter is not held responsible for the acts of the formers⁽⁹⁰⁾. Nevertheless, actions of private individuals might reveal the existence of an internationally wrongful act – an action or omission of organs of the State –, and it is that very wrongful act which would entail the international responsibility of the State. The International Law Commission’s Special Rapporteur Roberto Ago explained why the act of the individual could not be considered as an act of the State by using the example of someone who succeeded in entering the premises of a foreign embassy and causing damage: “There is no doubt that if the offender was, for example, a police officer acting in his official capacity, the State would have been specifically accused of having violated its obligation to respect the inviolability of the embassy premises and archives. If it was established that, since the offender was a private individual, the State was not accused of having violated the inviolability of the embassy but of having breached a totally different obligation – namely to ensure, with due

(88) See *Genocide Convention case*, *supra* note 53, para. 430.

(89) See *by analogy*, *Corfu Channel case*, *supra* note 47, at 22.

(90) Roberto Ago, ‘Fourth Report on State Responsibility...’ *supra* note 42, at 96, para. 63.

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diligence, that such crimes do not occur – the inferences of that finding should be coherently drawn. The State would not be held responsible for the action of the individual but for the omission committed in connexion with that action by the organs responsible for surveillance.”⁽⁹¹⁾

In that context, the acts of individuals are described as ‘catalysts’, and what is attributed to the State and might involve its international responsibility are not the catalysts *per se* but State conduct which is revealed by the catalysts⁽⁹²⁾. Roberto Ago clearly stated: “Actions and omissions by individuals who are and remain individuals are not attributed to the State under international law and do not become ‘acts of the State’ which, as such, may involve its responsibility towards other States. The acts of private individuals which cause injury to foreign States, to their representatives or to their subjects are often the occasion of an internationally wrongful act of the State, but of a wrongful act which is represented by the conduct of State organs. Moreover, they often constitute an external event which assumes the value of a catalyst causing the wrongfulness of the conduct of those organs with respect to the actual situation. But the State is internationally responsible only for the action, and more often for the omission, of its organs which are guilty of not having done everything within their power to prevent the individual’s injurious action or to punish it suitably in the event that it has nevertheless occurred.”⁽⁹³⁾

In the context of the fight against international terrorism, the catalysts – i.e. the conduct of terrorists acting as private individuals – might highlight the violation of the due diligence obligation by the State in whose territory terrorist actions are conceived and prepared, in other words the violation of the duty to prevent terrorist attacks and/or to punish their acts injurious to the other States. Such a breach arises notably when the host State uses indirect force, examples of which are listed in the annex to Resolution 2625 (XXV) of the General Assembly: organizing, assisting in terrorists acts in another State, acquiescing in organized activities within its territory, etc. ⁽⁹⁴⁾. When infringing its due diligence obligation, the host State engages its international responsibility towards other States and is required to cease the wrongful conduct and to make full reparation for the injury caused⁽⁹⁵⁾.

For its part, the target State – *in casu* the United States – has the right to take countermeasures against the host State – i.e. Pakistan – in order to induce the

(91) *Ibid.*, para. 65.

(92) *Ibid.* See also Luigi Condorelli, ‘L’imputation à l’Etat...’, *supra* note 46, at 100-101.

(93) Roberto Ago, ‘Fourth Report on State Responsibility...’, *supra* note 42, at 123, para. 140.

(94) See *supra* note 50.

(95) See ILC Articles, *supra* note 39, Art. 28, 30 and 31.

latter to comply with its international obligations⁽⁹⁶⁾ – for example the obligation not to infringe the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the UN Charter and referred to in the annex to Resolution 2625 (XXV). However, the targeted State is not allowed to unilaterally use armed force against the host State and to invoke self-defense as a justification for its action⁽⁹⁷⁾, as the acts attributed to that latter State (i.e. assisting, acquiescing, etc.) do not constitute an armed attack which is, as already mentioned, “the condition *sine qua non* required for the exercise of the right of [...] self-defence”⁽⁹⁸⁾. Indeed, in the *Nicaragua* case, the International Court of Justice held: “As regards certain particular aspects of the principle [prohibiting the use of force], it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.”⁽⁹⁹⁾ Then, the Court added: “In determining the legal rule which applies to these latter forms, the Court can again draw on the formulation contained in the Declaration” on Friendly Relations (General Assembly Resolution 2625 (XXV))⁽¹⁰⁰⁾. Finally, as regards the Declaration, the Court stated: “Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force. In particular, according to this resolution: [...]

‘Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.’”⁽¹⁰¹⁾

For the reasons mentioned above, it is unlawful to hold the host State responsible for the terrorist ‘operations’ of private individuals under the pretext that the country is unable or unwilling to prevent or repress those operations. Moreover, the same conclusion applies in regards to the ‘preparation’ of terrorist operations that causes an imminent threat to other countries.

(96) *Ibid.*, Art. 49.

(97) See Antonio Cassese, ‘The International Community’s ‘Legal’ Response to Terrorism’, *JCLQ*, vol. 38, num. 3, 1989, at 597; Jordan J. Paust, *supra* note 17, at 540.

(98) *Nicaragua* case, *supra* note 14, para. 237. See also *Oil Platforms* case, *supra* note 14, para. 51.

(99) *Nicaragua* case, *supra* note 14, para. 191.

(100) *Ibid.*

(101) *Ibid.*

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Finally, as further evidence of the rejection by customary law of the theory of complicity as a condition of attribution of private individuals' conduct to their host State, it is interesting to note that the International Law Commission, which is responsible for the codification and progressive development of international law, did not include the theory of complicity in the limitative conditions of attribution listed in the Draft Articles on Responsibility of States for internationally Wrongful Acts presented to the General Assembly in 2001 *after* the 9/11 terrorist attacks⁽¹⁰²⁾.

II. The purpose of an action in self-defense

In the case of Operation *Trip to Atlantic City*, it has been stated: “where a state is unwilling or unable to [prevent terrorists from using its territory as a base for launching attacks], it may be lawful for the targeted state to use military force in self-defense to address that threat.”⁽¹⁰³⁾ This raises the question of the inherent purpose of self-defense. Although scholars and States agree on some specific and limited purposes for which a military operation can be launched in self-defense, since 1945 – and especially in the context of the fight against international terrorism – some scholars and Members of the international community however have been trying to broaden the rationale for self-defense.

1. From halting an armed attack to preventing an attack

The very large majority of States and scholars agree that the purpose of a military operation launched in self-defense is to halt and/or to repel an armed attack⁽¹⁰⁴⁾. Roberto Ago underscored that “the objective to be achieved by the conduct in question [i.e. self-defense], its *raison d'être*, is necessarily that of repelling an attack and preventing it from succeeding, and nothing else”⁽¹⁰⁵⁾. In the opinion of the present writer, the term ‘preventing it from succeeding’ might be interpreted as meaning ‘defeating an ongoing armed attack’⁽¹⁰⁶⁾.

For many years, however, some scholars have been invoking other more controversial purposes for the right of self-defense. According to those scholars,

(102) See Resolution 56/83 of 12 December 2001 in which the General Assembly took note of the articles.

(103) See *supra* note 6.

(104) See notably Antonio Cassese, ‘Article 51’, in: Jean-Pierre Cot, Alain Pellet (dir.), *La Charte des Nations Unies: Commentaire article par article*, Paris, Economica, 2nd ed., 1991, at 775; Oscar Schachter, ‘The Right of States to Use Armed Force’, *Mich.L.Rev.*, vol. 82, num. 5 & 6, 1984, at 254; Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Oxford, Clarendon Press, 1994, at 232; Judith Gardam, ‘Necessity and Proportionality in Jus ad Bellum and Jus in Bello’, in: Laurence Boisson de Chazournes, Philippe Sands (ed.), *International Law, The International Court of Justice and Nuclear Weapons*, Cambridge, Cambridge University Press, 1999, at 280; Olivier Corten, François Dubuisson, ‘L’hypothèse d’une règle émergente fondant une intervention militaire sur une ‘autorisation implicite’ du Conseil de sécurité’, *RGDIP*, t. 104, num. 4, 2000, at 71.

(105) Roberto Ago, ‘Addendum to the eighth report on State responsibility...’, *supra* note 25, at 69, para. 119.

(106) See Luigi Condorelli, ‘Les attentats du 11 septembre et leurs suites: où va le droit international?’, *RGDIP*, t. 105, 2001, at 838.

actions in self-defense are not only authorized to halt and/or repel an armed attack, but also to prevent attacks and deter attackers from launching operations in the future⁽¹⁰⁷⁾. Emmerich De Vattel had already contended, more than two hundred years ago, regarding the right to security: “It is safest to prevent the evil when it can be prevented. A nation has a right to resist an injurious attempt, and to make use of force and every honourable expedient against whosoever is actually engaged in opposition to her, and even to anticipate his machinations [...]. Finally, the offended party have a right to provide for their future security, and to chastise the offender, by inflicting upon him a punishment capable of deterring him thenceforward from similar aggressions, and of intimidating those who might be tempted to imitate him.”⁽¹⁰⁸⁾ This stretching out of the self-defense’s purpose has often been invoked in the context of the war against terrorism, notably because terrorist operations are so sudden and sporadic that it is therefore much easier to prevent or repel terrorist attacks than to halt ongoing ones.

2. Rejection of far too broad a security argument

Under the banner of self-defense some States have been using force in order to prevent and/or deter future attacks⁽¹⁰⁹⁾. Actually, what they call self-defense today is nothing more than the implementation of the nineteenth century concept of self-help (or self-preservation, self-protection). At that time, the two concepts were very similar; both expressed the right for the State to ensure its own security. Ian Brownlie observes that “[s]elf-defence was regarded either as synonymous with self-preservation or as a particular instance of it.”⁽¹¹⁰⁾ Furthermore, in the *Caroline* affair that began in 1837, the two notions were indistinctly associated⁽¹¹¹⁾. Thus, during the nineteenth century the right of self-defense (or self-help) could be invoked in many differing situations. Humphrey Waldock noted: “legitimate self-defence has three main requirements: (1) An actual infringement or threat of infringement of the rights of the defending

(107) See notably Louis Henkin, ‘The Use of Force: Law and U.S. Policy’, in: Henkin Louis, *et. al.* (ed.), *Right v. Might, International Law and the Use of Force*, New York, London, Council on Foreign Relations Press, 1989, at 45; Oscar Schachter, *International Law in Theory and Practice*, Dordrecht, Boston, Martinus Nijhoff Publishers, 1991, at 154; Jost Delbrück, ‘The Fight Against Terrorism: Self-Defense or Collective Security as International Police Action? Some Comments on the International Legal Implications of the ‘War Against Terrorism’’, *GYIL*, vol. 44, 2001, at 17.

(108) Emmerich De Vattel, *The Law of Nations; or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, (ed. by Joseph Chitty), Philadelphia, T. & J. W. Johnson, 1853, Book II, Chap. IV, para. 50 and 52.

(109) Sometimes the right of self-defense is also invoked to rescue nationals in a foreign State without the consent of that State. See Eric Corthay, *supra* note 13, at 250 ff.

(110) Ian Brownlie, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963, at 43.

(111) See Robert Y. Jennings, *supra* note 21, at 82 ff.

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State; (2) A failure or inability on the part of the other State to use its own legal powers to stop or prevent the infringement; and (3) Acts of self-defence strictly confined to the object of stopping or preventing the infringement and reasonably proportionate to what is required for achieving this object”⁽¹¹²⁾. In other words, self-defense could be invoked for example to prevent or deter non-state actors from launching terrorist attacks. However, during the 1920s’ and 1930s’ the concept of self-defense has progressively emerged as an exception to the prohibition of war, first, and the prohibition of the use of force, then. Simultaneously, the scope of the customary law of self-defense, and notably the objective of self-defense, has been significantly narrowed. Linos-Alexandre Sicilianos, who analyzed State practice during the inter-war period, came to the conclusion that self-defense was perceived at that time as only a reaction, a reaction against an attack, an armed attack or an invasion⁽¹¹³⁾. Therefore, during the 1930s and especially at the time of the adoption of the UN Charter in 1945, the purpose of the right to self-defense had been limited to the one of halting and repelling an armed attack. But has the customary law in that matter evolved subsequently?

Since 1945, the use of force to prevent or repel terrorist attacks has been resorted to by some States, notably the United States, Israel and Iran. All have invoked self-defense as a justification for their action. It was, *inter alia*, the case at the time of US Operation *Eldorado Canyon* (1986), US airstrikes against the headquarters of the Iraqi Intelligence Service (1993), US raids in Sudan and Afghanistan (1998), Iranian strikes against the Mujahidin e-Khalq Organization camps in Iraq (1999), Operation *Enduring Freedom* (2001), and Israeli airstrikes against the Ain es Saheb Palestinian camp in Syria (2003)⁽¹¹⁴⁾. For instance, Operation *Enduring Freedom* was justified by the US Permanent Representative to the United Nations as follows: “In response to [the 9/11 terrorist] attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States.”⁽¹¹⁵⁾

It is worth noting that the international response to all those operations showed clear divisions between States. Disparity in the official views was

(112) Humphrey Waldock, *supra* note 22, at 463-464.

(113) Linos-Alexandre Sicilianos, *Les réactions décentralisées à l’illicite: des contre-mesures à la légitime défense*, Paris, LGDJ, 1990, at 297.

(114) See Eric Corthay, *supra* note 13, at 241-250.

(115) UN Doc. S/2001/946, 7 October 2001. See also the declaration of the Chargé d’affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations (UN Doc. S/2001/947): “These forces have now been employed in exercise of the inherent right of individual and collective self-defence, recognized in Article 51, following the terrorist outrage of 11 September, to avert the continuing threat of attacks from the same source.”

pronounced; reactions varied from strong support to no less strong condemnation on that matter. Moreover, there was no warranty that *those* States' response – i.e. their declarations, conducts, silence, etc. – had not been influenced by the emotional climate, the actors involved, or some consideration of political expediency, instead of by their *opinio juris*⁽¹¹⁶⁾. Therefore, because “it is not possible to discern in [State practice] any constant and uniform usage, accepted as law, with regard to [that matter]”⁽¹¹⁷⁾, in the opinion of the present writer, preventing or repelling an attack or an armed attack is currently not recognized by the international law as being part of the valid and limitative purposes of any action in self-defense. Consequently, Operation *Trip to Atlantic City* – i.e. the use of force by the United States to address the threat posed by bin Laden – could not be justified by the right of self-defense.

Preventing terrorist acts, deterring terrorists from launching attacks, stopping and repelling their operations, or rescuing nationals abroad, are good examples of what legitimate national security interests are. Nevertheless, implementation of such measures cannot be justified by the right of self-defense. In law, another path must be found. In the *Armed Activities on the Territory of the Congo* case, the International Court of Justice held: “Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.”⁽¹¹⁸⁾

As already mentioned above, the *raison d'être* of self-defense is to repel an ongoing armed attack and simultaneously prevent it from succeeding. This is the essence of any action in self-defense⁽¹¹⁹⁾. Any other objective that could be pursued by a victim State – such as the desire to punish the aggressor or to prevent future attacks – must be considered as secondary and incidental to the real purpose of self-defense. Determining the exact purpose of self-defense is important, because the compliance of the action taken in self-defense with the customary⁽¹²⁰⁾ requirements of the necessity, proportionality and immediacy – which are “essential conditions for the admissibility of the plea of self-defence in a given case”⁽¹²¹⁾ – is appreciated in the light of this purpose. The requirement

(116) Regarding Operation *Enduring freedom*, see notably Elizabeth Nielsen, ‘State Responsibility for Terrorist Groups’, *U.C. Davis J. Int'l L. & Pol'y*, vol. 17, 2010-2011, at 184.

(117) *Asylum* case, *supra* note 78, at 277.

(118) *Democratic Republic of the Congo* case, *supra* note 17, para. 148.

(119) See *supra* note 104.

(120) *Nicaragua* case, *supra* note 14, para. 176.

(121) Roberto Ago, ‘Addendum to the eighth report on State responsibility...’, *supra* note 25, para. 119.

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of necessity is described by Roberto Ago as follows: “The reason for stressing that action taken in self-defence must be *necessary* is that the State attacked [...] must not, in the particular circumstances, have had any means of *halting the attack* other than recourse to armed force.”⁽¹²²⁾ Then, Ago contended that “[t]he requirement of the *proportionality* of the action taken in self-defence [...] concerns the relationship between that action and its purpose, namely – and this can never be repeated too often – that of *halting and repelling* the attack”.⁽¹²³⁾

3. The condition of immediacy

The condition of immediacy is closely linked to the objective of self-defense. The former raises the question of when an action in self-defense can be launched: before, during or after an armed attack? In the context of the bin Laden Operation, it has been posited that the United States used military force in self-defense to address an “imminent threat”⁽¹²⁴⁾; that is to say that the US Navy Special Forces intervened before an attack was actually launched by the head of Al-Qaida from the territory of Pakistan. Before assessing the compliance of Operation *Trip to Atlantic City* with the requirement of immediacy, it is essential to briefly outline the Obama doctrine of self-defense.

3.1. The Obama doctrine

The Obama Administration, as well as its predecessor, supports an expansive interpretation of the right of self-defense. Indeed, in the 2009 *Operational Law Handbook*, it is stated: “some States, including the United States, argue that an expansive interpretation of the UN Charter is more appropriate, contending that the customary law right of self-defense (including anticipatory self-defense) is an inherent right of a sovereign State that was not ‘negotiated’ away under the Charter”⁽¹²⁵⁾. Same formulation is found in the 2006 *Operational Law Handbook* written under the Bush Administration⁽¹²⁶⁾. According to the US Government, the roots of anticipatory self-defense were found in the 1837 *Caroline* case: “Secretary Webster posited that a State need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self-defense if the circumstances leading to the use of force are ‘instantaneous, overwhelming, and leaving no choice of means and no moment for

(122) *Ibid.*, para. 120 (emphasis added).

(123) *Ibid.*, para. 121 (emphasis added).

(124) *See supra* note 3.

(125) International and Operational Law Department, *Operational Law Handbook*, The Judge Advocate General’s Legal Center & School, U.S. Army, Charlottesville, Virginia, 2009, at 4 and 5, available at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2009.pdf. *See also* the *Operational Law Handbook* of 2007, at 4, available at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2007.pdf.

(126) International and Operational Law Department, *Operational Law Handbook*, The Judge Advocate General’s Legal Center & School, U.S. Army, Charlottesville, Virginia, 2006, p. 4, available at <http://www.fas.org/irp/doddir/army/law0806.pdf>.

deliberation.”⁽¹²⁷⁾ Then, referring to the 2002 and 2006 *National Security Strategy*, the 2009 Handbook explains that the expansion of use of force doctrine made by the Bush Administration from anticipatory to preemptive self-defense was due to the necessity of facing the threat posed by “rogue States and their terrorist clients” who “expressed desire to acquire and use weapons of mass destruction”⁽¹²⁸⁾.

The main difference between anticipatory self-defense (also called preventive self-defense) and preemptive self-defense is about the understanding of the concept of imminence. The right of anticipatory self-defense that originated in the *Caroline* case (or at least at that time) “has been predicated upon knowing, with a reasonable level of certainty, the time and place of an enemy’s forthcoming attack”⁽¹²⁹⁾. On the contrary, preemptive self-defense can be invoked “even if uncertainty remains as the time and place of the enemy’s attack”⁽¹³⁰⁾. Both doctrines of self-defense refer to the ‘imminence’ of the attack, but both of them apply two different meanings for that concept. For the former the attack is imminent because it is ‘immediate’, while for the latter the attack is imminent because it is ‘certain and inevitable’⁽¹³¹⁾.

The Obama Administration does not depart from the Bush doctrine of preemption; on the contrary, not only has the current Administration endorsed the doctrine of its predecessor but it has also clarified the concept of imminence related to preemptive self-defense. Indeed, quoting Michael Schmitt, the 2009 *Operational Law Handbook* mentions two cumulative conditions in order for the test of imminence to be fulfilled: “states may legally employ force in advance of an attack, at the point when (1) evidence shows that an aggressor has committed itself to an armed attack, and (2) delaying a response would hinder the defender’s ability to mount a meaningful defense”⁽¹³²⁾. Schmitt contends that “the correct standard for evaluating a preemptive operation must be whether or not it occurred during the *last possible window of opportunity* in the face of an attack that was almost certainly going to occur”⁽¹³³⁾.

(127) *Operational Law Handbook* (2009), *supra* note 125, at 6.

(128) *Ibid.*, (footnotes omitted).

(129) *Operational Law Handbook* (2007), *supra* note 125, at 7.

(130) National Security Council, *The National Security Strategy of the United States of America*, March 2006, at 18, available at <http://merln.ndu.edu/whitepapers/USnss2006.pdf>.

(131) *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, para. 54: “That does not exclude, in the view of the Court, that a ‘peril’ appearing in the long term might be held to be ‘imminent’ as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.”

(132) *Operational Law Handbook* (2009), *supra* note 125, at 7.

(133) Michael N. Schmitt, ‘Preemptive Strategies in International Law’, *Mich.J.Int’l L.*, vol. 24, num. 2, 2002-2003, at 535.

*[Operation Trip to Atlantic City in Light of the Right of Self-Defense]***3.2. Critics towards the doctrine of anticipatory self-defense⁽¹³⁴⁾**

The merits of the right of anticipatory self-defense – i.e. preventive or preemptive self-defense – have been rejected by many scholars who have analyzed the content and scope of the customary law of self-defense just before the adoption of the UN Charter, and have interpreted the letter and spirit of Article 51 of the UN Charter. Moreover, the study of actual State practice subsequent to the adoption of the UN Charter, confirmed by the view of the International Court of Justice, comes also to the conclusion that to date the alleged right of anticipatory self-defense has no place in international law. Consequently, *Operation Trip to Atlantic City* – i.e. the use of force by the United States to address an imminent threat before that peril is carried out – cannot be justified by the customary law of self-defense enshrined in Article 51.

3.2.1. The customary law of self-defense before the adoption of the UN Charter

Many scholars asserted the existence of a customary law of preventive self-defense, originated in the *Caroline* case (1837)⁽¹³⁵⁾. As already mentioned above, Humphrey Waldock, for example, stated that an action in self-defense could be triggered in case of “*threat of infringement of the rights of the defending State*”⁽¹³⁶⁾. We have already agreed on the fact that during the nineteenth century the content and scope of the right of self-defense was very large, allowing the launch of a military operation in order to put an end to an imminent threat and prevent an infringement of the rights of the targeted State⁽¹³⁷⁾. However, we have also explained that during the first part of the twentieth century the scope of the customary law of self-defense had been significantly narrowed and that States had perceived self-defense only as a reaction to an attack and not as an action to prevent a specific conduct⁽¹³⁸⁾.

3.2.2. The letter and spirit of Article 51 of the UN Charter

Moreover, Article 51 of the UN Charter provides that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs*”. A textual interpretation of the provision leads to a rejection of the doctrine of anticipatory self-defense. Indeed, the wording “if an armed attack occurs” is clear and does not mean “if the threat of

(134) For convenience purposes, in the following paragraphs the concept of anticipatory self-defense embraces the two concepts of preventive and preemptive self-defense.

(135) See for instance Humphrey Waldock, *supra* note 22, at 498; David M. Ackerman, ‘International Law and the Preemptive Use of Force against Iraq’, *Congressional Research Service Report for Congress*, 11 April 2003, at 1, available at <http://www.au.af.mil/au/awc/awcgate/crs/rs21314.pdf>; Thomas M. Franck, ‘What Happens Now? The United Nations after Iraq’, *AJIL*, vol. 97, num. 3, 2003, at 619.

(136) Humphrey Waldock, *supra* note 22, at 463-464 (emphasis added).

(137) See Eric Corthay, *supra* note 13, at 78-81.

(138) See Linos-Alexandre Sicilianos, *supra* note 113, at 297.

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defense to emerge, actual practice of “the international community of States as a whole”⁽¹⁴⁴⁾, – a practice that reflects their *opinio juris* – must have been constant and uniform. This is what we need to determine.

Since 1945, some States, notably the United States and Israel, have resorted to the use of force in anticipation of terrorist attack. All have invoked self-defense as a justification for their action. It was, *inter alia*, the case during the Israeli airstrikes against Palestinian camps in the North of Lebanon (1975), Israeli Operation *Litani* (1978), US Operation *Eldorado Canyon* (1986), and Operation *Enduring Freedom* (2001)⁽¹⁴⁵⁾. The 1986 strike against Libya is a particularly interesting example. On April 14th, President Ronald Reagan declared: “Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight – a mission fully consistent with Article 51 of the UN Charter. We believe that this *preemptive* action against terrorist installations will not only diminish Colonel Qadhafi’s capacity to export terror, it will provide him with incentives and reasons to alter his criminal behavior.”⁽¹⁴⁶⁾ Nowadays, the US military doctrine considers the operation as an example of anticipatory self-defense. Thus, the 2007 *Operational Law Handbook* notes: “The United States in particular, in actions such as OPERATION ELDORADO CANYON (the 1986 strike against Libya) and the 1998 missile attack against certain terrorist elements in Sudan and Afghanistan, has increasingly employed anticipatory self-defense as the underlying rationale for use of force in response to actual or attempted acts of violence against U.S. citizens and interests.”⁽¹⁴⁷⁾

Once more, it must be stressed that the operations mentioned *supra* show a radical division between States. Few of them accepted a legal right of anticipatory self-defense. Many condemned the resort to force *in concreto* and qualified the military operations notably as aggressions⁽¹⁴⁸⁾ or acts of aggression⁽¹⁴⁹⁾. An instance of this is given by the Lebanese Representative to

(144) See Art. 53 of the *Vienna Convention on the Law of Treaties*, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

(145) See Eric Corthay, *supra* note 13, at 241-250.

(146) President Ronald Reagan, ‘President’s address to the nation, Apr. 14, 1986’, *Dep’t St.Bull.*, vol. 86, num. 2111, 1986, at 2 (emphasis added).

(147) *Operational Law Handbook* (2007), *supra* note 125, at 6.

(148) The following States have qualified *Operation Litani* as an aggression: Lebanon, UN Doc. S/PV.2071, 17 March 1978, para. 12; Jordan, UN Doc. S/PV.2071, 17 March 1978, para. 77; Syria, UN Doc. S/PV.2071, 17 March 1978, para. 88; Egypt, UN Doc. S/PV.2072, 18 March 1978, para. 7; Kuwait, UN Doc. S/PV.2072, 18 March 1978, para. 34; Viet Nam, UN Doc. S/PV.2072, 18 March 1978, para. 65; URSS, UN Doc. S/PV.2073, 18 March 1978, para. 36.

(149) It was notably the case during the 1975 Israeli raid against Palestinian camps in Lebanon. See Egypt, UN Doc. S/PV.1859, 4 December 1975, para. 113; URSS, UN Doc. S/PV.1860, 5 December 1975, para. 6; Cameroun, UN Doc. S/PV.1861, 8 December 1975, para. 13; China, UN Doc. S/PV.1861, 8 December 1975, para. 37; Mauritania, UN Doc. S/PV.1861, 8 December 1975, para. 44; Belarus, UN Doc.

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concerned *having been the victim* of an armed attack.”⁽¹⁵⁴⁾ And finally in paragraph 232, the Court held: “The exercise of the right of collective self-defence presupposes that *an armed attack has occurred*.”⁽¹⁵⁵⁾

In the *Oil Platforms* case, whose judgment was rendered after the invasion of Iraq by the United States, the International Court of Justice also implicitly confirmed that the doctrine of anticipatory self-defense has no place in international law. Indeed, in paragraph 51 the Court held: “in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that *attacks had been made* upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as “armed attacks” within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force”⁽¹⁵⁶⁾. Therefore, the Court states that the implementation of the right of self-defense requires the existence of an armed attack, and not only the existence of a threat of attack; a condition not fulfilled in the case of *Operation Trip to Atlantic City*.

Conclusion

Operation Trip to Atlantic City could not be justified by the right of self-defense as the conditions of invocation and implementation of that right were not fulfilled *in casu*. Indeed, self-defense can only be triggered in the case of ongoing armed attack by a State. However, in recent years, Pakistan – and neither probably other countries – has not engaged its international responsibility for injurious acts committed or about to be committed by Al-Qaida from its territory, regardless of whether the country was unable or unwilling to prevent imminent threats or to punish previous activities. In addition, self-defense is justified in law only to halt and/or repel an armed attack and not to prevent prospective ones. This requirement of immediacy is enough to explain the difficulty of justifying use of force against terrorists, whose attacks are sudden and sporadic, by the right of self-defense.

So, what were the other but lawful military options for the United States? Setting aside the idea of an intervention following an authorization delivered by Pakistan – the United States had considered but rejected that option – the only other possibility would have been to resort to the second exception to the principle prohibiting the use of force: the system of collective security. The United States could have referred the existence of an imminent threat posed by bin Laden to the Security Council which, after having determined the existence of a threat to the peace, could have decided to take measures to address, if

(154) *Ibid.*, para. 195 (emphasis added).

(155) *Ibid.*, para. 232 (emphasis added).

(156) *Oil Platforms* case, *supra* note 14, para. 51 (emphasis added).

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possible efficiently, that threat⁽¹⁵⁷⁾. Having said that, whatever decisions the Security Council would have envisaged under Chapter VII of the UN Charter – for example, to authorize States to use all necessary measures to arrest bin Laden on the territory of Pakistan – it would have taken a certain time for the decision to be adopted and implemented, a sufficient amount of time that would have certainly allowed bin Laden to flee and find a safe haven far away.

Finally, lawful or not, the use of armed force in the context of the fight against terrorism is often counterproductive. Conducted to halt or to prevent terrorist attacks, or to deter terrorists from acting, the use of armed force generally causes an escalation of violence and a spiral of reprisals. Armed violence induces more terrorism, and both of them generate innocent victims, a burning sense of injustice and a dangerous grudge. In order to defeat terrorism, the international community should strive to eliminate the conditions favorable for the emergence and rise of terrorism. Measures to implement could be the elimination of ethnic and religious discriminations, the end of foreign occupations, the establishment of the rule of law, the peaceful settlement of disputes, the promotion of tolerance and dialogue among civilizations, as well as education of all classes everywhere, to mention a few⁽¹⁵⁸⁾. These measures are a huge undertaking in that they require a sustainable effort over many years, measures however that remain crucial and indispensable.

(157) See Chapter VII of the UN Charter, and in particular Art. 39.

(158) For other ideas, see notably the report of the Secretary General, *Uniting against terrorism: recommendations for a global counter-terrorism strategy*, UN Doc. A/60/825, 27 April 2006.

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ملخص "رحلة الى أتلانتيك سيتي" في ضوء حق الدفاع عن النفس

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في ٢ مايو ٢٠١١، عملية سرية التي أُطلق عليها اسم رحلة إلى اتلانتيك سيتي، أدت إلى وفاة أسامة بن لادن في باكستان، برر بعض المراقبين الغارة على النحو التالي:
حيث واصل بن لادن يشكل تهديداً وشيكاً للولايات المتحدة، وكانت باكستان غير قادرة، أو غير راغبة في منع تنظيم القاعدة من استخدام أراضيها كقاعدة لشن هجمات، مما يسمح للولايات المتحدة استخدام القوة العسكرية في الدفاع عن النفس ضد بن لادن في الأراضي الخاضعة لسيادة باكستان.

الغرض من هذا المقال هو تقييم الصلاحية في القانون من مثل هذا التبرير من خلال تحليل المدارس العلمية في الفكر والممارسة الدولية، وقرارات محكمة العدل الدولية. في حالة الهجوم المسلح فقط المستمر من قبل الدولة، وهو الرأي الذي أكدته المحكمة الدولية.

كما يوضح هذا البحث أن ظروف الاحتجاج وإعمال الحق في الدفاع عن النفس لم تتحقق في أحوال الحاجة القصوى لسببين على الأقل؛ أولاً، بعد تحليل اختبار "غير راغبة وغير قادرة" وكذلك نظرية التواطؤ في ضوء قواعد الإسناد للمسؤولية الدولية عن فعل غير مشروع دولياً، فإنه يستنتج أن أنشطة تهدد تنظيم القاعدة لا يمكن أن تعزى إلى باكستان. ثانياً، بعد تحديد الغرض القانوني للحق في الدفاع عن النفس وتحليل متطلبات الفورية، ويمكن القول أن أي عملية عسكرية باسم الدفاع عن النفس، يمكن أن تتم بصورة قانونية، وذلك تحسباً لأي هجوم قد يقع وعلى وجه الخصوص للتصدي لأي تهديد وشيك.