SELF-DEFENCE AGAINST NON-STATE ACTORS – METHODOLOGICAL CHALLENGES*

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'[T]he method chosen is the message – a message not only about who we are but about what our discipline should be.'[1]

1. Introduction

After the 9/11 attacks many scholars were concerned with the impact that international terrorism and the war on terror was having on the international legal rules on the use of force. Was the international legal system capable of responding adequately to the challenges arising from this new state of affairs? Are traditional jus contra bellum norms still applicable post 9/11? How comprehensive and deep were the impacts of the legally relevant events and how much was the right to self-defence broadened by state practice? Is the use of force against non-state actors well-founded in case of an armed attack and who has to be the perpetrator of such an attack? How close should the link be between a state and a non-state actor for attributing a certain act to the state? Is this link relevant at all?

Scholarly literature related to these issues is divided into two groups of professionals whose findings appear to be irreconcilable. According to the

* The present article solely aims to illustrate how methodological and dogmatic differences can determine the scientific result from the outset and undermine the legitimacy of the international legal order and the idea of rule of law. Neither the present article nor its author denies the inherent and unquestionable right of any country to defend itself and fight against international terrorism within the limits of international law. Criminal acts of terrorism and international terrorism are to be condemned, prosecuted and punished. These barbaric acts are unjustifiable whatever considerations – of a political, philosophical, ideological, ethnic, religious or any other nature – may be invoked.

1 Steve Ratner - A.M. Slaughter, '*The Method is the Message - Symposium on Method in International Law*', 93 AJIL (1999) 410.

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first group, a radical change has occurred in international law as a result of the fact that the international legal system reacted favorably in a very short time to the 9/11 events and to the Bush doctrine. Inter-state warfare is replaced by the war on terrorism and the fight has become asymmetric. That is to say, the perpetrators of conflict usually cannot be linked to one single state, they use the civil population as a human shield, they attempt to acquire weapons of mass destruction, their attacks are indiscriminate and their fundamentalist aims are ideologically motivated.

This group of scholars is usually of the opinion that aggressive non-state actors deserve an immediate, or even preventive military response. Although such action entails risks, the risk of inaction is even higher.[2] As a result of the reactions of states, customary international law has gone through a considerable transformation and the UN Charter system has been fundamentally amended. The core rule on the general prohibition of use of force has died, or has only partly survived, but in either case has proven unable to prevent the right of self-defence from broadening in a considerable way. Some militarily active states and the unprecedented reaction of the Security Council in September 2001 resulted in the abolishment of the customary attribution criteria of the law of self-defence.[3] Indeed, wars of self-defence can be waged even for decades.[4]

According to the second group of scholars, the impact that 9/11 and the war on terror has had on international law has been greatly exaggerated. Furthermore, terrorism is a criminal act reflecting the powerlessness and frustration of the perpetrator. Military responses of states are often motivated by similar reasons. They are funded on a mistaken and historically refuted concept that violence can be eliminated with violence on the long run. This is especially counterproductive in the case where terrorism is partly motivated by social, economic or ideological reasons. Besides the fact that violence is

2 This view is best reflected by the wording of the 2002 National Security Strategy of the United States of America: *'The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack.'* www.state.gov/documents/organization/63562.pdf (23.12.2013)

3 See e.g. the writings of Yoram Dinstein, Anthony D'Amato, Thomas M. Franck, Anthony Clark Arend or Michael Reisman. See especially Thomas M. Franck, '*Recourse to Force. State Action Against Threats and Armed Attacks*', CUP 2002.

4 Yoram Dinstein, '*War, Aggression and Self-defence*', CUP, 2005, pp. 235-236.

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a descending spiral, it undermines the international legal order, it violates a jus cogens norm, and it destabilizes the international relations of states.[5]

Examination of scholarly literature on use of force issues shows that the main reason for the divergent opinions presented above is methodological. These differences in methodology are so significant that they determine the divergent results from the outset. While international legal scholarship often underestimates the importance of methodology (the well-foundedness, the presence or the lack thereof), the chosen method or its absence is not only a message about who we are but also about our own discipline. The different schools of international law use different methodologies in evaluating state practice and determining the content of customary international law. These schools are necessarily of equal legitimacy and it is only a question of choice to opt for one or the other.

The proliferation of writings showing methodological shortcomings has become particularly salient since 9/11. Many writings that are intended to be international legal scholarship use purely political or IR arguments, without properly referring to sources of international law.[6] Some have already drawn attention to methodological problems in the field concerning the use of force.[7] But while Corten and others argue that the debates are more about the method than about the content, the present author is of the view that in many cases the method itself is the content.

2. Examples for methodological anomalies in the field of self-defence post 9/11

Through the following four case studies the paper aims to demonstrate how methodological inaccuracies or the lack of a coherent methodological approach can have a direct influence on the very content and the outcome

5 See e.g. the writings of Ian Brownlie, Tom Farer and Christine Gray. See especially Christine Gray, '*International Law and the Use of Force*', OUP, 2008.

6 Although a significant challenge to international legal scholarship, the present paper does not address this issue.

7 Michael Byers, '*The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq*', 13 EJIL (2002) pp. 21-41; Olivier Corten, '*The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate*', 16 EJIL (2005) pp. 803-822.. See also Karl Zemanek, ARIEL (2010) pp. 201-202.; Gray: op. cit. pp. 117-119.

of a legal research. Some authors draw far-reaching legal consequences from the Tehran hostage case, the continuous use of force in Iraq since 1990, the legal evaluations of Security Council resolution 1368 (and 1373) and the 2006 Lebanon War. However, the present author argues that there is no evidence for a paradigm shift after 9/11 and especially not in these often quoted cases.

2.1 The Tehran case – The non-attribution of a non-existent armed attack

Supported by the mechanism of article 11 of the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts,[8] the Tehran case[9] is considered by some scholars as the most important example of an armed attack committed by non-state actors against an embassy being finally attributed to a state. Dinstein, for example, concludes from the *'armed attack'* against the US Embassy in Tehran that an *'armed attack'* can be committed against an embassy and that, more generally, the nature of such an attack is independent of the locale of the act in question. According to Dinstein, the ICJ in 1980 confirmed that the attack by non-state actors against an embassy triggers the right of self-defence. In this case the Court attributed the attack by the non-state military groups to Iran, qualified their act as *'armed attack'* and *'registered'* the American plea as a self-defence mission.[10]

However, contrary to Dinstein's interpretation, an attack against an embassy is not an armed attack[11] and in line with this traditional interpretation, the attack against the US embassy in Tehran did not qualify as an armed attack either. Moreover, the attack against the embassy was not attributable to Iran from a jus ad bellum point of view. The most severe diplomatic and legal conflict between Iran and the United States was the result of the riots and revolution of November 1979. Armed groups and individuals

8 *'Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.'*

9 United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, p. 3.

10 Dinstein: op. cit. pp. 197-198.

11 See e.g. Randelzhofer, '*Article 51*'. In Bruno Simma: The Charter of the United Nations. A Commentary, 2002, p. 798.

loyal to Grand Ayatollah Ruhollah Khomeini overthrew Mohammad Reza Shah Pahlavi's regime. On 4 November 1979 students and armed individuals attacked and occupied the US embassy in Tehran. The fifty-two American citizen were held hostage for 444 days (from 4 November 1979 until 20 January 1981). It was evident from the beginning that the attack was not directed or controlled by the new Iranian authorities. This is clearly reflected in President Jimmy Carter's State of the Union address in January 1980, where the President referred to the hostages as *'innocent victims of terrorism and anarchy'*.[12]

The International Court of Justice stated that Iran was not, at the outset, responsible for the attacks against the embassy due to the lack of sufficient link with the attackers.[13] Subsequently, Iran became responsible for the acts from a state responsibility point of view since Khomeini acknowledged and adopted the conduct in question. By this declaration, what was initially a private act became an act of state from the state responsibility point of view.[14]

Although the ICJ examined the conflict exclusively from a state responsibility perspective, Dinstein builds his argument on the Court's

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[12] President James E. Carter, State of the Union Address The Capitol, Washington, D.C. January 23, 1980.

[13] *'No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of officia1 status as recognized "agents" or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact on the occasion in question the militants acted on behalf on the State, having been charged by some competent organ of the Iranian State to carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of the State.'* Tehran case, para. 58.

[14] *'The seal of official government approval was finally set on this situation by a decree issued on 17 November 1979 by the Ayatollah Khomeini…The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible.'* Tehran case, para. 73.

'armed attack' terminology and concludes that it is possible to commit an armed attack against an embassy.[15] The ICJ admittedly used the expression *'armed attack'* in paras. 57, 61, 64, 65, 66, 68 and 91. But the term was not used in the sense of Article 51 of the UN Charter in context of the right to self-defence. No substantial part of the judgment is concerned with use of force issues; the Court only examined state responsibility questions. In order to rule on state responsibility, the ICJ was concerned with the quality of the link between the new Iranian regime and the armed individuals who attacked and seized the US embassy during the various phases of the revolution. Unfortunately, the Court did indeed use the term *'armed attack',* which is slightly misleading. But by carefully reading the original text of the judgment it becomes clear what the Court meant by this terminology.

The ICJ found that the armed individuals who attacked the US embassy *('strong armed group of several hundred people')*[16] were not acting under the direction or control of the new Iranian regime.[17] They were consistently referred to as an *'invading group*', or *'militants*'. By examining Iran's responsibility, the Court referred back to the activities of 4 November by using the following language:

'Some eight months earlier, on 14 February 1979, the United States Embassy in Tehran had itself been subjected to the armed attack *mentioned above (paragraph 14), in the course of which the attackers had taken the Ambassador and his staff prisoner.'*[18]

The part of the judgment summarizing the factual circumstances of 4 November (paragraph 14) reads as follows:

'At about 10.45 a.m. on 14 February 1979, during the unrest in Iran following the fall of the Government of Dr. Bakhtiar, the last Prime Minister appointed by the Shah, an armed group attacked *and seized the*

15 Dinstein: op. cit. p. 197.
16 Tehran case, para. 17.
17 Tehran case, paras. 57-61.
18 Tehran case, para. 64. Emphasis added.

United States Embassy in Tehran, taking prisoner the 70 persons they found there, including the Ambassador.'[19]

From the two interdependent parts of the judgment set out above, it becomes clear that the ICJ did not use the term *'armed attack'* in the context of Article 51 of the UN Charter but it simply referred to its every day meaning.

This interpretation is also confirmed by paragraph 17:

'At approximately 10.30 a.m. on 4 November 1979, during the course of a demonstration of approximately 3,000 persons, the United States Embassy compound in Tehran was overrun by a strong armed group *of several hundred people.'*[20]

To describe the events of 4 November the ICJ also used other legally not relevant expressions like *'assault',*[21] *'invade'*[22] or simply *'attack'.*[23] With regard to the findings of the Court that these acts were not attributed to Iran at the time they were performed, and because the judges did not address use of force issues,[24] it cannot be concluded that the ICJ's judgment confirms that the 4 November attack was an armed attack within the meaning of the UN Charter.

Moreover, the United States did not report to the Security Council that it had become a victim of an armed attack and did not notify it about the putative self-defence action. Nevertheless, the US notified the President

19 Tehran case, para. 14. Emphasis added.

20 Tehran case, para. 17. Emphasis added.

21 *'During the three hours or more of the assault…'* Tehran case, para. 18.

22 '*On 5 November 1979, a group invaded the British Embassy in Tehran but ejected after a brief occupation.'* Tehran case, para. 19.

23 *'[D]uring the attack on 4 November…'* Tehran case, paras. 24., 26.

24 *'At the same time, however, the Court must point out that neither the question of the legality of the operation of 24 April1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court. It must also point out that this question can have no bearing on the evaluation of the conduct of the Iranian Government over six months earlier, on 4 November 1979, which is the subject-matter of the United States' Application. It follows that the findings reached by the Court in this Judgment are not affected by that operation.'* Tehran case, para. 94.

of the Council on 9 November about the violation of the *'sanctity of diplomatic personnel and establishments'*.[25] As time elapsed and the presidential elections approached, the pressure on President Carter forced the US to reevaluate the situation retrospectively. After the Security Council failed to adopt the American proposal sanctioning Iran on 13 January, the US broke off diplomatic relations with Iran and decided to launch a humanitarian rescue mission. The US only notified the Security Council on 25 April 1980, alleging that it exercised the right to self-defence against a seemingly permanent armed attack started at 4 November.[26]

In the meantime, the Security Council adopted two resolutions with the support of the US. Neither of them qualified the events as armed attacks or anything coming close to that. SC resolution 457 (1979) drew attention to the *'dangerous level of tension between Iran and the United States of America'* and urged *'the Governments of Iran and of the United States of America to exercise the utmost restraint in the prevailing situation'*. The resolution did not invoke Chapter VII of the UN Charter but urged the parties to exercise restraint in the situation. [27]

Two month later SC resolution 461 (1979), using the same language, concerned itself with only the *'increased tension'* between the parties and noted that in the long run the situation could have *'grave consequences for international peace and stability'*. The Security Council referred to the 4 November events as *'seizure and prolonged detention of persons'* and *'continued detention of the hostages',* without mentioning Article 2(4) or 51 of the UN Charter even once. The Secretary-General was again asked to report about his good offices efforts.[28]

The US reaction to the fatal attack on its consulate in Benghazi in 2012 is also in line with the previous state practice and the ICJ's interpretation of the scope of Article 51. During the attack, Ambassador Christopher

[25] Tehran case, para. 28.

[26] *'[I]n exercise of its inherent right of self-defence with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our Embassy.'* Tehran case, para. 32.

[27] S/RES/457, 4 December 1979, 2178th meeting.

[28] S/RES/461, 31December 1979, 2184th meeting. The resolution was adopted with 11 yes voted including the US, the UK and France.

Stevens was killed together with three other US diplomats. Although the attack was overwhelming and the US ambassador to Libya was one of its victims, the US did not regard the tragic events as a use of force issue. US Secretary of State Hillary Clinton immediately stated that *'There is never any justification for violent* acts *of this kind.'*[29] President Obama characterized the killing as an *'outrageous attack'*.[30]

2.2 A permanent war of self-defence (1990-2003)?

Yoram Dinstein regards the notion of war as one of the central concepts of his influential work *'War, Aggression and Self-defence'*.[31] Consequently *'war'* and *'war on terror'* became legal categories par excellence in terms of the use of force. Dinstein applies the quantitative notion of *'war'* also in the context of the right to self-defence: *'War as an act of self-defence denotes comprehensive use of counter-force in response to an armed attack'*.[32]

The concept of a *'war of self-defence'* significantly broadens the scope of Article 51 and narrows the general prohibition of Article 2(4). Dinstein mentions two possible scenarios for a war of self-defence. The first one is illustrated with the example of the 1990 Gulf War. From the critical moment (being August 1990 when Iraq invaded Kuwait) the status of the belligerents was set for good. The aggressor's status was not altered by the long ceasefire period and thus continued until March 2003 and beyond. Hence the US-UK led military action was just a new stage in the decade long war of self-defence and cannot be evaluated on the basis of a new armed attack by Iraq.[33]

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[29] Karen DeYong-Michael Birnbaum: '*U.S. ambassador to Libya, 3 other Americans killed in Benghazi*', The Washington Post, 12 September 2012.

[30] Matt Spetalnick and Hadeel Al Shalchi, 'Obama vows to track down ambassador's killers', Reuters 12 September 2012. www.reuters.com/article/2012/09/12/us-libya-usa-attack-idUSBRE88B0EI20120912 (03.01.2014)

[31] Dinstein, '*War, Aggression and Self-Defence*', CUP 2005. The fourth and fifth edition (2012) does not differ in regard of the relevant parts. The fourth edition is used because usually this version is quoted by those relying on Dinstein.

[32] Dinstein: op. cit. p. 235.

[33] Dinstein: op. cit. pp. 235-236.

The second scenario of the war of self-defence is originally initiated by a non-state actor whose attack is later endorsed by a state. In this scenario the metaphor of a *'war against terrorism'* turns into a real war. Dinstein's example is Al-Qaeda's attack against the US. Since the Taliban protected Bin Laden, the regime exposed itself to America's war of self-defence. This transformed the conflict to a classical inter-state war between the United States and Afghanistan.[34]

Dinstein's concept of war has far reaching consequences on the post 1945 jus ad bellum system. It becomes irrelevant whether a state is involved in a defensive or an offensive action. The military activity can last for decades without being interrupted by a ceasefire. The party exercising its alleged right to self-defence is not obliged to refer to Article 51 anymore and is authorized to wage this war until the final (total) victory.[35] During the war the defending party is not restrained by any time limit or geographic restrictions; the war of self-defence can take place anywhere *'within the region of war'*.[36]

Consequently, the conditions of proportionality and necessity become obsolete once the legal character (lawfulness-unlawfulness) of the original act is established. According to Dinstein's understanding, the basic conditions of the right to self-defence reflected in state practice and the practice of the ICJ become moot and are simply *'unsuited for an investigation of the legitimacy of a war of self-defence'*. Considering the fact that the criteria of necessity and proportionality are well-established in customary international law,[37] one can only guess why the author does not even raise the theoretical possibility that the very concept of a war of self-defence is *contra legem.*

[34] Dinstein: op. cit. pp. 235-236.

[35] Dinstein: op. cit. p. 242.

[36] Dinstein: op. cit. p. 240.

[37] See Nicaragua case (Merits), ICJ Reports 1986, p. 14, para. 176; Advisory opinion on the legality of the threat or use of nuclear weapons, ICJ Reports 1996, p. 226, para. 41, Oil Platform case (Iran v. USA), ICJ Reports 2003, p. 161, paras. 76-77; Armed activities case (DRC v. Uganda), ICJ Reports 2006, p. 6, para. 147. See also Gray: International Law and the Use of Force, 2008, pp. 148-152 and James A. Green: The International Court of Justice and Self-Defence in International Law, Hart Pub., 2009, pp. 63-109.

The application of Dinstein's self-defence war theory in practice would imply that the 1990 Gulf War did not terminate after Iraq's defeat, the ceasefire in 1991 and the several relevant SC resolutions implementing *'measures necessary to maintain international peace and security'*[38] but continued well after March 2003. As a result the US and the UK were not required to legalize their military operations in March 2003 as they were in a permanent self-defence situation against Iraq.[39]

This concept of a war of self-defence implies the followings:

- The right to self-defence does not terminate but creates a permanent situation exempted, which can last even for decades, from the general ban of Article 2(4) (e.g. Iraq between 1990-2003 and even after);
- The 'war' becomes detached from Article 51 of the UN Charter and customary international law by making moot the requirements of proportionality and necessity;
- Self-defence measures 'short of war' empty the well-established notion of armed attack by opening the way for armed responses against all violations of Article 2(4).

Dinstein's concept has not been adopted even by states like the US or the UK.[40] Indeed it is entirely unclear how the right to self-defence in Chapter VII of the UN Charter could be made a legal title for regime change and the forceful transformation of the political, economic and social structure of another UN member state. This not only violates the proportionality and necessity principles[41] but is clearly antithetic to the right to self-defence and the entire collective security system. All measures that have a substantive and long-lasting effect on international peace and security

38 See for example S/RES/678, 29 November 1990, 2963rd meeting and S/RES/687, 3 April 1991, 2981st meeting.

39 Dinstein op. cit. pp. 235-236, 242, 273-277.

40 See Christopher Greenwood, '*International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*', 4 San Diego Int'l L. J. (2003) 33-36 and William H. Taft IV and Todd F. Buchwald, '*Preemption, Iraq and International Law*', 97 AJIL (2003) 557-563.

41 See e.g. Carlsten Stahn, '*Collective Security and Self-Defence After the September 11 Attacks*', Tilburg Foreign Law Review 10 (2002) 10-42, pp. 32-33.

as well as those that are not necessarily defensive actions come under the competence and responsibility of the Security Council.[42]
If one accepts the right to self-defence to be an exceptional legal category[43] one must also accept that it is anachronistic from a structural point of view with its reference to the concept of war. Otherwise, an exceptional self-defence situation would be transformed into a comprehensive self-defence war, negating the most basic jus contra bellum rules. Dinstein's distinction between a war of self-defence and measures short of war in a self-defence situation is therefore in contradiction with customary international law and opens Pandora's box. It aims to legalize the 2003 US intervention against Iraq in a manner that is contrary to the law and also the intentions of the states concerned: the right of the US *'remains legally intact for the duration of the war'*.[44] Due to the '*renewal of the exercise of the right of collective self-defence'*[45] this highly ambiguous and anachronistic concept creates a permanent self-defence situation significantly restricting the role of law in inter-state conflicts.

2.3 SC resolution 1368 and 1373 as key documents of a paradigm shift?

Many scholars interpret SC resolutions 1368 and 1373 as evidence for a radical change in the legal regulation of the use of force.[46] But these resolutions were neither legally nor factually capable of transforming the system in such a drastic way. SC resolutions do not qualify as sources of law; moreover the two aforementioned resolutions were laconic and appeared to be rather ambiguous. As Antonio Cassese has rightly pointed

[42] Ibid. p. 34. Dinstein also seems to accept the exceptional nature of the right to self-defence and the function and purpose of the collective security system as well as the broad discretional powers of the Security Council. Dinstein: op. cit pp. 176-177 and 280-289.

[43] See for example Dinstein, op. cit. pp. 177-178 and 184-185.

[44] Dinstein: op. cit. p. 277.

[45] Ibid. See also pp. 297-300.

[46] See e.g. Dinstein: op. cit. p. 207., Thomas Franck, '*Terrorism and the Right of Self-defense*', 95 AJIL (2001) 841.; Jonathan Somer, '*Acts of Non-State Armed Groups and the Law Governing Armed Conflict*', ASIL Insight, Vol. 10, Issue 21, August 24, 2006.; Benjamin Langille, '*It's 'instant custom': How the Bush Doctrine became law after the terrorist attacks of September 11, 2001*', 26 B.C. Int'l & Comp. Law Review (2003) pp. 145-156.

out in relation to resolution 1368: '*This resolution is ambiguous and contradictory'*.[47]

Those who interpret these resolutions as evidence of and tools for the radical transformation of the legal system submit that the Security Council was both legally capable and also willing to take a leading part in the alleged paradigm shift that took place after the 9/11 attacks. According to this view President Bush's statements, the two SC resolutions and the supportive international environment substantially broadened the scope of Article 51 of the UN Charter and at the same time narrowed the scope of what is probably most important jus cogens norm enshrined in Article 2(4).

In fact the text of resolution 1368 is much more deliberately ambiguous than it was presented to be in the legal literature after its adoption. Without opening the path towards a paradigm shift, the resolution enables the territorial state (namely the US) to react lawfully to the 9/11 attacks.[48] The text and language of the resolution has to be interpreted carefully, well beyond the question of its binding character.[49]

Michael Byers observes that resolutions of the Security Council have to be interpreted according to the general rules of customary international law.[50] As a consequence, the interpretation of SC resolutions is a professional (legal) process, highly dependent on questions of methodology. This is true even despite the fact that the Security Council is primarily a political

47 Antonio Cassese, *'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law'*, 12 EJIL (2001) 993-1001, p. 996.

48 Frowein, *'Der Terrorismus als Herausforderung für das Völkerrecht'*, 62 ZaöRV (2002) 879-907, pp. 886-887.

49 *'The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, al1 circumstances that might assist in determining the legal consequences of the resolution of the Security Council.'* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 16, para. 114.

50 Michael Byers: The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq, 13 EJIL (2002) 21-41., p. 27.

body deliberating and deciding on political questions. Its biding decisions are no exceptional rules; they cannot be detached from previous and later decisions, nor from the broader legal context determined by the UN Charter and finally from the peculiar political and human circumstances.

Although the preamble of resolution 1368 recognized the inherent right to self-defence in general,[51] the binding text of the decision only states that international terrorism is a threat to international peace and security.[52] The operative part of the resolution made it clear that the perpetrators, organizers and sponsors of the terrorist attacks must be brought to justice and stressed that those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of the acts will be held liable. Cassese has rightly drawn attention to the fact that nowhere did the resolution classify the 9/11 events as an armed attack which would have triggered the right to self-defence.[53] To on the contrary it referred to *'horrifying terrorist attacks'*.

But even an explicit reference to the concrete events would not have changed anything. In this case the resolution would have referred to a terrorist group being in an extremely close, symbiotic relationship with Afghanistan's de facto government.[54] Consequently, resolution 1968 did

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51 *'Recognizing the inherent right of individual or collective self-defence in accordance with the Charter'*

52 *'Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security'*

53 Cassese, Terrorism is Also Disrupting Some Crucial Legal Categories of International Law, p. 996.

54 *'Usama Bin Laden's Al Qaida and the Taleban régime have a close and mutually dependent alliance. Usama Bin Laden and Al Qaida provide the Taleban régime with material, financial and military support. They jointly exploit the drugs trade. The Taleban régime allows Bin Laden to operate his terrorist training camps and activities from Afghanistan, protects him from attacks from outside, and protects the drugs stockpiles. Usama Bin Laden could not operate his terrorist activities without the alliance and support of the Taleban régime. The Taleban's strength would be seriously weakened without Usama Bin Laden's military and financial support… The attack could not have occurred without the alliance between the Taleban and Usama Bin Laden, which allowed Bin Laden to operate freely in Afghanistan, promoting, planning and executing terrorist activity.'* UK report on the Responsibility for the Terrorist Atrocities in the United States, 11 September 2001. https://www.fas.org/irp/news/2001/11/ukreport.pdf (26.07.2013).

not say anything which was not declared already in the 1990s.[55] From the preamble, it could be inferred at best that the scale and effect of the attack was so significant that it could qualify as an armed attack provided that all other conditions would have been met. Hence it did not exclude the possibility of an armed attack being dependent upon further investigations and considerations. This reading is also supported by NATO's declaration of 12 September where the Organization made further action according to Article 5 dependent on the findings of whether the 9/11 attacks were *'directed from abroad'*. To conclude, the resolution refers to terrorist attacks and not an armed attack and nowhere does it name who would actually be entitled to exercise the right to self-defence and against whom.[56] With a view to the ambiguous language and similarities to previous SC resolutions the importance of 1368 is highly exaggerated.[57]

It is worth comparing the 9/11 situation with former cases where the Security Council explicitly recognized the right to self-defence. SC resolution 84, for instance, qualified the attack against South Korea as an armed attack and recommended that the member states assist the victim in defensive military actions and in the restoration of international peace and security. The same resolution authorized the member states to use the UN flag.[58] The 1990 Gulf crisis could be cited as another example, with SC resolution 661 explicitly referring to the right to self-defence under Article 51 of the UN Charter triggered by Iraq's armed attack against Kuwait.[59]

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55 The best example is probably GA resolution 49/60 on the Declaration on Measures to Eliminate International Terrorism, which states that terrorism poses a threat to international peace and security and that states must fulfil their obligations under the UN Charter and general international law with respect to combating international terrorism. A/RES/49/60, 9 December 1994.

56 Hofmeister, Hannes, '*'To harbour or not to harbour? Die Auswirkungen des 11. September auf das Konzept des „bewaffneten Angriffs" nach Art 51 UN Charta'*, 62 ZÖR (2007) 475-500, pp. 483-484.

57 Carsten Stahn, '*Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say*', EJIL Discussion Forum on the WTC Attacks, Vol. 12, No. 5 (2001).

58 S/1588, 7 July 1950, 476th meeting.

59 *'Affirming the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter.'* S/RES/661 (1990), 6 August 1990.

There is a striking difference between these examples and the language of SC resolution 1368. This becomes even more poignant if one gives due regard to the considerable differences manifested in the circumstances of their adoption. In all three cases (South Korea, Kuwait and 9/11), there was consensus between the members of the Security Council regarding the assessment of the situation and the legality of the use of force in response to the attacks. Hence, there was no obstacle for the victim state and for the states providing assistance (the US was involved in all three instances) to adopt a resolution favorable to their interests. According to those who claim a central role for SC resolution 1368, the assessment of the post 9/11 situation was unambiguous within the Council. Notwithstanding the above, and contrary to the previous practice of the Security Council, the resolution failed to qualify the events as an armed attack and to recognize the United States' right either to self-defence against Afghanistan, or the Taliban or horribile dictum against Osama bin Laden. To the contrary, the Council made it clear that, acting under Chapter VII, it is ready to take all necessary steps to restore international peace and security according to Articles 39-42. Unfortunately, the US did not take advantage of the unanimously supported offer but opted for a more risky and legally less clear option by launching a disproportional and open-ended war of self-defence.

There is nothing in resolution 1368 linking the mere fact of the terrorist attack to the right to self-defence.[60] The text leaves open for subsequent investigations the decision of whether the attack, which was serious enough to constitute an armed attack, was attributable to a state or to a de facto regime. During the deliberations prior to the adaptation of SC resolution 1368, none of the members of the Security Council (the US and the UK included) mentioned self-defence, Article 51 or the notion of armed attack or any legally similar concept. Members of the SC qualified the 9/11 events as follows: '*traumatic events'* and '*barbaric terrorist acts'* (Mauritius), '*tragic events'* and *'barbarous attacks'* (Mali), *'terrible catastrophe', 'unprecedented outbreak of terrorism'* and *'crime'* (Ukraine), *'great tragedy'* and *'acts of terrorism'* (Singapore), *'unacceptable… odious crime… against innocent people'* (Tunisia), '*attack of barbarism*

[60] S/RES/1368 (2001), 12 September 2001, 4370th meeting.

and evil against innocent people… attack on all humanity and values of humanity' (Ireland), '*serious terrorist attacks'* and *'seriously endanger human society… seriously potential danger to international peace and security'* (China), '*horrible acts of terrorism'* (Jamaica), '*despicable, cowardly acts of terrorism'* (Bangladesh), '*senseless and cowardly acts against innocent people'* and '*attack directed against all of us'* (Norway), '*attack… against the community of civilized people'* (Columbia) and '*attack upon all mankind'* and '*monstrous acts'* (France).[61]

From the detailed analysis of the records taken during the deliberations it becomes clear that the members of the Council regarded the 9/11 events as a grave crime instead of an armed attack within the meaning of Article 51 of the UN Charter and evaluated the situation in the context of collective security measures and international criminal law. It was only the Russian permanent representative who qualified the events as *'unprecedented act of aggression from international terrorism'*.[62] Although this wording is somewhat unfortunate, it can be easily explained with the increased sympathy Russia wanted to express towards its American partner. And even in this case, the wording remained within the context of collective security measures by implicitly referring to Article 39 of the UN Charter and not mentioning the right to self-defence.

One could of course argue that an international crime and an act triggering the right to self-defence do not exclude each other and that the Security Council could in any event qualify an armed attack as a threat to international peace and security.[63] While the parallel applicability of the different legal regimes (such as individual criminal responsibility, collective security system and partly the right to self-defence) means that these categories do not mutually exclude each other, the vague language of resolution 1368, the jus cogens nature of the legal rule concerned as well as the lack of relevant *opinio juris* of the SC members shown above,

61 S/PV.4370, 12 September 2001.

62 Ibid.

63 Article 39-42 and 51 can be applied simultaneously until the Security Council adopted a resolution necessary to maintain or restore international peace and security. SC resolution 83 (1950) stated that South-Korea has been the victim of an armed attack by North-Korea and simultaneously qualified the situation as a threat to international peace and stability. S/1511, 27 June 1950, 474th meeting.

makes it utterly incapable of serving as evidence for a paradigm shift in the rules governing the use of force.

Besides the fact that resolution 1368 was adopted in an emotionally overheated atmosphere only one day after the attack, nobody had reliable information on the perpetrators of the attack. It is salient that even at the time of the adaptation of SC resolution 1373, on 28 September, there were still many unanswered questions about the identity of the perpetrators and those who had possibly aided and supported them.[64] The diplomats and experts who took a leading role in the formulation of the language of resolution 1373 have admitted that they did not and could not take all possible consequences of their decision into consideration.[65] It was unclear against whom the US could have exercised the right to self-defence if this right would have been interpreted extensively according to the alleged post 9/11 paradigm. Were 20-30 states regarded as possibly legitimate targets in the mind of the members of the Council when they unanimously supported the resolution?

The *contra legem* and extensive interpretation raise further unanswerable questions that threaten to overstretch the framework of the right of self-defence and the whole jus contra bellum system. How many non-nationals have to join a terrorist organization to qualify its acts as being directed from abroad? If the members are non-nationals but all come from different countries then which state is the legitimate target of a self-defence action? If after the terrorist attack the perpetrators return to their homeland, to states who tolerate them or recklessly do not identify them as terrorists,[66] then could these states be all lawfully targeted for the violation of the due diligence principle according to SC resolution 1368 and 1373? The answer appears to be plainly obvious: interpreting these resolutions in the light of the Bush-doctrine leads to an absurd result coupled with the total abolishment of the current jus contra bellum system built on Articles 2(4) and 51 of the UN Charter.

64 See S/RES/1373 (2001), 28 September 2001, 4385th meeting.

65 *'Diplomats who drafted the text, which was passed surprisingly quickly, now admit they did not take into consideration all the possible consequences of the resolution.'* Carola Hoyos: UK to chair UN sanctions committee, Financial Times (US edition), 4 October 2001, p. 2.

66 See e.g. the US and Germany directly before the 9/11 attacks.

2.4 Self-defence against non-state actors: the 2006 Lebanon precedent

On 12 July 2006, Hezbollah militants killed 8 members of the Israel Defense Forces (IDF) on Israeli territory. Two further IDF soldiers were captured and dragged to Lebanon. In response, Israel bombed Lebanese territories for several weeks, including the Beirut airport. The conflict was settled by SC resolution 1701, which emphasized the international community's support for the territorial integrity, sovereignty and political independence of Lebanon but also called upon the Lebanese government to control its southern territories and the activities of the attendant militants.[67] Israeli Prime Minister Ehud Olmert made it clear on the very day of the 12 July attack that the action along the border and within Israel was not a terrorist attack but an attack by a state, namely Lebanon. Olmert unmistakably attributed the attack to Lebanon by regarding Hezbollah as a member of the Lebanese government:

'This morning, actions were carried out against IDF soldiers in the North. At this time, the security forces are operating in Lebanese territory. The cabinet will convene this evening in order to approve the continuation of the activity. I want to make it clear: This morning's events were not a terrorist attack but the action of a sovereign state that attacked Israel *for no reason and without provocation. The Lebanese government, of which Hizbullah is a member, is trying to undermine regional stability. Lebanon is responsible and Lebanon will bear the consequences of its actions.'*[68]

In the Knesset on 17 July 2006 Prime Minister Olmert underscored that Israel does not regard Hezbollah as an independent terrorist organization. He attributed the attack against Israeli soldiers and territories to another state by holding Iran and Syria responsible for those acts:

'The campaign we are engaged in these days is against the terror organizations operating from Lebanon and Gaza. These organizations are nothing but 'sub-contractors' *operating under the inspiration, permission,*

[67] S/RES/1701 (2006), 11 August 2006, 5511th meeting.

[68] Jerusalem Post: Prime Minister Ehud Olmert's remarks at his press conference with Japanese Prime Minister Junichiro Koizumi. http://www.jpost.com/LandedPages/PrintArticle.aspx?id=27856 (24.07.2013) Emphasis added.

instigation and financing of the terror-sponsoring and peace-rejecting regimes, on the Axis of Evil which stretches from Tehran to Damascus. Lebanon has suffered heavily in the past, when it allowed foreign powers to gamble on its fate. Iran and Syria *still continue to meddle, from afar, in the affairs of Lebanon and the Palestinian Authority, through Hizbullah and the Hamas.'* [69]

Israel's official position was shared by Benjamin Netanyahu, then Likud leader and now Prime Minister, who in August 2006 qualified Hezbollah as a de facto Iranian state organ: *'…an Iranian Army division… a war conceived, organized, trained and equipped by Iran, with Iran's goal of destroying Israel…'.* [70]

The unchanged pre-9/11 state practice on the requirement of attribution of an armed attack to a state is confirmed by both Pakistan and Turkey. Pakistan has protested for years against US strikes violating its territorial integrity. Similarly Pakistan immediately protested against Operation Neptune Spear on 2 May 2011. The Afghanistan-launched raid on bin Laden's compound in Abbottabad was not authorized by Pakistan and President Asif Ali Zardari publicly condemned the military action.[71] In other instances Pakistan gave its approval to limited military actions thus not coming even close to any exception of a violation of Article 2(4) of the UN Charter.[72]

Turkish practice regarding military actions against the infrastructure of the Kurdistan Workers' Party (PKK) also reveals that Turkey does not exercise self-defence against non-state actors. Over the past two decades Turkey, through its bombing of northern Iraq, has repeatedly violated Article 2(4). These military actions were never reported to the Security

69 http://www.mfa.gov.il/mfa/pressroom/2006/pages/address%20to%20the%20knesset%20by%20pm%20olmert%2017-jul-2006.aspx (24.07.2013) Emphasis added.

70 The New York Times, 13 August 2006. http://www.nytimes.com/2006/08/13/world/middleeast/13israel.html?pagewanted=print (07.08.2013).

71 Official statement, Office of the Spokeperson, Islamabad P.R.No.152/2011, Press Release on Death of Osama bin Laden; Asif Ali Zardari: Pakistan did its part. The Washington Post, 2 May 2011.

72 See e.g. Secret memos 'show Pakistan endorsed US drone strikes', BBC, 24 October 2013. http://www.bbc.co.uk/news/world-asia-24649840 (25.10.2013).

Council and at no other forum did Turkey rely on the right to self-defence, referring instead to national security interests.[73]

Moreover, in a letter dated 7 October 1996, the Permanent Representative of Turkey to the UN informed the President of the Security Council that *'[T]he declaration of the temporary danger zone cannot be in any way a violation of the territorial integrity of Iraq, as Turkey has neither any claim of sovereignty over this area, nor is there a question of military occupation.'*[74] Consequently Turkey, by interpreting Article 2(4) in an extremely narrow way, did not regard its *'legitimate security measures'* as a violation of the general ban on the use of force:

'The singular aim of the temporary danger zone declared along the strip of land parallel to the Turkish-Iraqi border is to bar the infiltration of terrorist elements into Turkey from Iraq. Its objective is to act as a deterrent and to put a stop to the terrorist activities that have intensified in the region adjacent to our border as a result of events of the last few weeks… Therefore, the Turkish Government categorically rejects the claim that the legitimate security measures taken by Turkey against terrorist activities originating from northern Iraq, and targeting Turkish territory and population, aim at violating Iraqi sovereignty or constitute military aggression.'[75]

Since Turkey continues to violate Iraqi territories without reporting its actions to the Security Council and claiming the right to self-defence, it lacks any relevant *opinio juris* in regard to a substantial change in law in the context of self-defence against non-state actors.

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73 Chrisitne Gray, '*International Law and the Use of Force*', pp. 140-143.

74 Identical letters dated 7 October 1996 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General and to the President of the Security Council, UN doc A/51/468.

75 Ibid.

3. Conclusion

The four case studies aimed to demonstrate how methodology can have a direct influence on the very content and the outcome of legal research. Although the ICJ used the expression *'armed attack'* in the Tehran hostage case, careful analysis shows that the Court did not refer to a self-defence issue, but rather to a factual character of the attack in its every day meaning. The theory on the continuous use of force in Iraq since 1990 as an everlasting, permanent self-defence war is based on coherent reasoning if one accepts the concept of war after the entry into force of the UN Charter. But this anachronistic theory is contrary to the Charter and is also in contradiction with state practice. The legal evaluations of Security Council resolution 1368 and 1373 are both highly superficial and rush to conclusion without analyzing them with enough suspicion. Finally, the analysis of the 2006 Lebanon War shows that if we consider *opinio juris* as a definitional part of customary international law, we have to look beyond the factual circumstances and evaluate the psychological element, too.

Therefore the present author argues that the method itself is the content in many use of force cases. This has manifested itself especially after 9/11, when many authors attempted to prove that due to a paradigm shift the right to self-defence had considerably broadened and consequently the prohibition enshrined in Article 2 (4) of the UN Charter had lost its general character. The method itself is the content because the legality of a certain armed activity will depend on what we regard as a source of international law, and how we identify, apply and interpret it. Supposing that scholars bother with these questions at all. While the various legal methods and schools enrich science, and international law ensures plenty of opportunity for legal schools to contribute to legal literature, international law has its objective frontiers. Namely the boundaries provided by the normative character of legal science.

Only a few years after the end of the Cold War, *Rosalyn Higgins* elaborated on the functions of international law and while analyzing the interventions in Grenada (1983), Nicaragua (1981-1984) and Panama (1989) she noted the following:

'*[I]f one shares the belief in the preferability of democracy over tyranny, and if one is committed to the policy-science approach to international law, whereby trends of past decisions are to be interpreted with policy objectives in mind, does it necessarily follow that one would have viewed all these actions as lawful? I think not… I do not believe that the policy-science approach requires one to find every means possible if the end is desirable.'*[76]

Applying a policy-science approach or a different method or no method at all, it would be urgently necessary to revert to the original sources of international law and analyze them in line with thorough methodology, as strict as possible to avoid controversies and inconsistencies which ultimately undermine the legitimacy of the Charter system.

SUMMARY

Self-Defence Against Non-State Actors – Methodological Challenges

GÁBOR KAJTÁR

After the 9/11 attacks many scholars were concerned with the impact that international terrorism and the war on terror was having on the international legal rules on the use of force. Did the concept of War on Terror and the Bush-Doctrine amount to a paradigm change in terms of the norms of jus contra bellum? Examination of scholarly literature on use of force issues shows that two completely different answers are given to the above question. The finding of the present article is that the main reason for the divergent opinions is methodological. These differences in methodology are so significant that they determine the divergent results from the outset. While international legal scholarship often underestimates the importance of methodology (its well-foundedness, its presence or the lack thereof),

[76] Rosalyn Higgins, '*Problems and Process. International Law and How We Use It*', OUP, 1995, p. 6.

the chosen method or its absence is not only a message about who we are but also about our own discipline.

The paper presents four case studies aiming to demonstrate how methodology can have a direct influence on the very content and outcome of the legal research extending radically the scope of self-defence in the same time. (1) Although the ICJ used the expression 'armed attack' in the Tehran Hostage case, careful analysis shows that the Court did not refer to a self-defence issue, but rather to a factual character of the attack in its every day meaning. (2) The theory on the continuous use of force in Iraq since 1990 as an everlasting, permanent self-defence war is based on coherent reasoning if one accepts the concept of war after the entry into force of the UN Charter. But this anachronistic theory is contrary to the Charter and is also in contradiction with state practice. (3) The legal evaluations of Security Council resolution 1368 and 1373 are both highly superficial and rush to conclusion without analyzing them with enough suspicion. (4) Finally, the analysis of the 2006 Lebanon War shows that if we consider opinio juris as a definitional part of customary international law, we have to look beyond the factual circumstances and evaluate the psychological element, too. Instead of a conclusion it seems important to underline that while the various legal schools enrich scientific discourse and international law ensures plenty of opportunity for legal methods to contribute to legal literature, international law has its objective frontiers. Namely, the boundaries provided by the normative character of law. Crossing these frontiers might lead to false results and ultimately also promotes the weakening of the UN Charter system.

RESÜMEE

Selbstverteidigung gegen nicht-staatliche Akteure – Methodologische Herausforderungen

GÁBOR KAJTÁR

Nach den Terroranschlägen vom 11. September 2001 beschäftigte einen bedeutenden Teil der internationalen juristischen Fachliteratur die Frage, wieweit sich das Völkerrecht in Bezug auf die Gewaltanwendung verändert hat. Wurden die Normen des jus contra bellum vom Krieg gegen den Terrorismus und der Bush-Doktrin in Form eines Paradigmenwechsels verändert? Die Antworten auf diese Fragen können zwei Gruppen zugeordnet werden, je nachdem, ob sie diese Frage bejahen oder verneinen. Die wichtigste Behauptung der vorliegenden Studie ist, dass die grundsätzlich unterschiedliche Meinung dieser beiden Gruppen über den heutigen Stand des Völkerrechts von Anfang an determiniert ist. Methodologisch herrschen nämlich zwischen denjenigen, die das Gewaltverbot weit bzw. eng auslegen, derartige Unterschiede, dass das Wesen der Diskussion immer mehr auf Grund der methodologischen Abweichungen erfasst werden kann. Die vom Verfasser gewählte Methode – oder das bewusste oder unbewusste Weglassen dieser – vermittelt eine Botschaft. Sie enthält gleichzeitig eine Botschaft über denjenigen, der Wissenschaft betreibt, und auch darüber, wie er seine Wissenschaft sieht.

Die Studie stellt vier Beispiele vor, bei denen die methodologischen Unterschiede das Ergebnis der Untersuchung in bedeutendem Maße beeinflussten und dadurch den Kreis der rechtmäßig anwendbaren zwischenstaatlichen Gewalt erweiterten. Der erste Fall stellt die Entscheidung in der Angelegenheit der Teheran-Geiseln (1980) vor, die von vielen auf irrtümliche Weise so interpretiert wird, dass der Internationale Gerichtshof das Recht auf Selbstverteidigung gegen einen bewaffneten Angriff auf die Botschaften anerkannte. Der andere Fall stellt die Unrichtigkeit der Konzeption der permanenten Notwehrsituation im Irak (1990-?) vor. Die dritte Analyse zweifelt die

Bedeutung im Paradigmenwechsel der Resolutionen Nr. 1368 und 1373 des Sicherheitsrates (2001) an. Schließlich wird am Beispiel des israelisch-libanesischen Krieges von 2006 darauf hingewiesen, dass es im Laufe der Analyse des Gewohnheitsrechts außerordentlich wichtig ist, auch die opinio juris der Staaten in Betracht zu ziehen. Die Studie weist darauf hin, dass auch das Völkerrecht seine Grenzen hat, deren Beachtung in bedeutendem Maße eine methodologische Aufgabe darstellt. Das Ausbleiben dessen führt zu fehlerhaften Ergebnissen und schließlich zur Abnahme der Legitimation der internationalen Rechtsordnung.