

**Brief on
Justification of Use of Force
by the United States
against Iraq for Supporting
the International Terrorism**

Truth Seekers Group:

William Simpson
Nadežda Gric, # 2109
Dina Kalnina, # 2456
Eglė Milašauskaite, # 2112

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Summary of the brief

The United States can attack Iraq under the motivation of threat for the peace and security resulting from the terrorist attacks.

September 11th terrorist attacks can be qualified as an armed attack and that allows the use of self-defense under Article 51 of the United Nations Charter.

The United States can use force even against non-state entities, such as Al Qaeda. Iraq can be found liable under state responsibility for supporting terrorist organizations on its territory.

Iraqi support of terrorist organizations and therefore non-compliance with binding Security Council resolutions results in a threat to international peace and security and to security of the United States in particular. Although Security Council resolutions do not expressly authorize the use of force for non-compliance, the United States could use force under the control of international community, applying the principle of implied authorization.

If any of Iraqi public officials are found to be related or cooperating with terrorist organizations, it will be possible to state that Iraq has committed international wrongful act under Draft Articles of State Responsibility. These Draft Articles are binding because they are regarded as international customary law. However, the problem is that counter measures against responsible states do not include a military response, therefore the United States cannot use force on this ground.

Iraq poses threat to the United States through the possible possession of nuclear weapons, which in this case could be transferred to terrorist groups supported by Iraq. UN Security Council can impose sanctions for violations of Nuclear Non-Proliferation Treaty for Iraq, and may authorize the use of force in order to remove the danger. However, the United States can attack Iraq only on the basis of self-defense, if there was a real attack by nuclear weapons transferred to terrorists.

Can the US use force against Iraq under the motivation of threat against terrorism?

By William Simpson

Introduction

This brief paper will focus on the terrorist acts linked with Al Qaeda and the hypothetical response of the United States. In the light of the incidents of September 11th and the US response in Afghanistan, we will try to understand whether the United States can use force against Iraq under the motivation of threat against terrorism. More specifically, whether the United States can attack Iraq through the threat against Al Qaeda.

Terrorism and the concept of “armed attack” in Article 51 of the UN Charter

This legal argument will be possible only if there is an armed attack within the meaning of Article 51 if there is a state responsibility when this organization is supported by a state such as Iraq. In short, can we qualify Al Qaeda terrorist acts such as September 11th as an “armed attack”, which will enable the US to use force against Al Qaeda under the motivation of Self defense of article 51 of the UN Charter; and if so, can the United States attack Iraq under the motivation of terrorist acts? Once qualified as armed attack from Al Qaeda, which is supported by Iraq (link proved by United States Senate resolution), under the motivation of State responsibility.

Our main argumentation can be simplified in this summary:

First we will define terrorist threats as possibly qualified as an “armed attack”. Then we will try to understand whether the United States can use self-defense under Article 51 UN Charter. If yes, would this enable US to use its right of Self-defense against Al Qaeda (we will see it through *Nicaragua case*) and its right of Self-defense against Iraq because it supports Al Qaeda?

I’m going to start our argumentation and we will first remember when and under what circumstances a state can use force against another.

1. The basic use of force

1.1 As it is known, the international legal rule relating to the right of a state to resort to armed force – the *jus ad bellum* – is embodied in Article 2 (4) of the UN Charter which provides:

All members shall refrain in their international relation from the threat or use of force against the territorial or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the present Charter.

1.2 The term ‘use of force’ as opposed to the term ‘war’, as used in the Briand-Kellogg act in 1928¹ reflected a desire to prohibit transnational armed conflicts generally, not just conflicts arising from a formal state of war. It leads to the fact that Article 2(4) is generally viewed as outlawing any transboundary use of military force.

1.3 In addition to this prohibition on the use of force, there is an obligation under customary international law not to intervene the affairs of other state, including the use of armed force. In particular, the law on non-intervention has been shaped since the UN Charter by three prominent General Assembly resolutions. One resolution (Resolution 2131 of United Nations)² provides that no state has the right to intervene in the internal or external affairs of another state. Consequently, armed intervention and all forms of threats are condemned. And it concludes but mentioning that strict observance of these principles is an essential condition for peace between states.

1.4 There are basically two exceptions in the UN Charter to the prohibition on the use of force contained in Article 2(4) and customary rules on non-intervention. First, states may use force when so authorized by the UN Security Council. Second, states may use force in self-defense pursuant to Article 51, which provides:

¹ Briand-Kellogg Pact, a treaty between the United States and other powers providing for the renunciation of war as an instrument of national policy, August 27, 1928.

² Resolution 2131 of General Assembly entitled the ‘declaration on the inadmissibility of intervention in the domestic affairs of states and the protection of their independence and sovereignty.’

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed conflict occurs against a member of the UN, until the Security Council has taken the measure to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council.

1.5 Therefore, self-defense is permitted only when there was an “armed attack”. This link appears as such for most governments and scholars³ and for the International Court of Justice⁴.

1.6 The type of action that constitutes an “armed attack” has been defined in *Nicaragua v United States*⁵. The definition given by ICJ in this case of an armed attack is: when regular armed force cross an international border, and when a state sends “armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another state of such gravity as to amount to “an actual armed attack by regular forces”. By contrast, “assistance to rebels in the form of provision of weapons or logistical or other support” did not constitute an armed attack but such assistance could be regarded as an unlawful threat or use of force, or intervention in the internal or external affairs of a state.

When is a terrorist act an armed attack?

Nicaragua decision (if it still stands) defines a scale of action that might constitute an armed attack with the help of an analysis under Article 51.

> at the high end of the scale..... Armed attack

Here armed attack is presented as an “action such as regular armed force crossing an international border or a state sending armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another state of such gravity as to amount to an actual armed attack by regular force.”

³ This link appears for most governments and scholars in Schachter, *International law in theory and practice* (1991), pp. 112-13.

⁴ This link appears in the Military and paramilitary Activities, *Nicaragua v. United States*, 1986 ICJ.

⁵ Military and paramilitary Activities, *Nicaragua v. US*, 1986 ICJ 14, 103, 110 (June 27).

> At the low end of the scale Use of force

Use of force is viewed as an “action such as provisions of arms to the nationals of a state who are seeking to overthrow their government, for instances, assistance to rebels in the form of provision of weapons or logistical or other support.”

3.1 Where do the incidents of September 11th fall on this scale? In short, it was not an armed attack but a use of force and a conventional criminal act. For example hijackers are not armed bands, groups, irregulars or mercenaries.

3.2 On the aftermath of September 11th incidents, the UN Security Council unanimously passed a resolution on the terrorist attacks (UN Security Council Resolution 1368). “This resolution is ambiguous and contradictory“, says Antonio Cassese⁶ because it defines the terrorist attacks of September 11th as “a threat to the peace” and not as an “armed attack” legitimizing self -defense under article 51. Also the General assembly condemned “the heinous acts of terrorism” but neither characterized those acts as “attacks” nor recognized a right to respond in self -defense qualified it as a conventional crime by calling for “international cooperation to bring to justice the perpetrators, organizers and sponsors of the incidents”⁷.

So September 11th was qualified as a conventional crime than as an “armed attack”.

3.3 Prior terrorist acts on the base of “armed attack” were defined as induced replies under the motivation of self-defense, even if they didn’t met widespread acceptance by the global community.

In 1982, Israel invoked a right of self-defense to justify an incursion deep in Lebanon for purposes of eliminating the ability of Palestine Liberation Organization (PLO) to

⁶ Antonio Cassese, *Terrorism is also disrupting legal categories of international law*

⁷ General Assembly Resolution, UN GOAR, 56th Session, 1st plenary. Mtg./ agenda item 8/3. A/RES/56/1 (2001)

conduct terrorist actions in northern Israel. But that justification met with criticism from both Security Council (SC Resolution 508) and the General Assembly⁸.

In 1985, Israel bombed PLO headquarters in Tunisia in response to PLO terrorist attacks. It was the first draft of the mechanism of terrorist attack can be defined as armed attack and if so implies the right to self defense. But it was condemned by the UN Security Council in the resolution 573 (but the US abstained) and the UN General Assembly.

In 1986, a bomb exploded in Berlin, killing and wounding several US servicemen. The United States claimed the right of self-defense in bombing targets in Libya (the mechanism worked: terrorist attack → armed attack → right to self-defense). Indeed the terrorist attack was qualified by the United States as an “armed attack” implying self-defense under Article 51. The General Assembly condemned these bombings (General Assembly Resolution 38, 1986) but not UN Security Council⁹.

3.4 So is September 11th attack an armed attack? There are more convincing arguments qualifying September 11th as an “armed attack”.

3.4.1 Regarding the scale of the incident, September 11th was as dramatic as Pearl Harbor on December 7th 1941. The repercussions were severe on a lot of matters. For instance, The New York stock market was closed for six days and even after reopened, it experienced the largest point drop in its history¹⁰.

3.4.2 By the United States perception of it, it was a military attack. President Bush declared the national emergency and called to active duty the reserves of the United States armed force¹¹.

3.4.3 US perception of September 11th as an armed attack was accepted by other nation. Even NATO defined September 11th, if it could be determined that the

⁸ See Barry Levenfeld, *Israel Counter-Fedayeen Tactics in Lebanon: self-defense and reprisal Under Modern International law*, (1982).

⁹ UN Security Council resolution failed owing to the negative votes of three of the permanent members – France, UK and United States – in UN yearbook p. 253-54.

¹⁰ P.Blustein, C.Vinzant, *Stocks plummet as Wall Street reopens*, Washington Post, Sept 18th 2001.

incidents were directed from abroad against the US, ‘it shall therefore be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the allies in Europe or North America shall be considered an attack against them all’¹². On October 2, NATO determined that the facts were ‘clear and compelling’ that the incidents were directed from abroad against the US and so ‘it shall therefore be regarded as an action covered by Article 5 of the Washington Treaty’¹³.

3.4.4 The binary choice of Sept 11th between being regarded either as a criminal act or as a use of force amounting to an armed attack is not relevant. In fact September 11th can be characterized as both a criminal and an armed attack. At least since the establishment of the Nuremberg Tribunal, an act of aggression and a crime against humanity can be viewed both as criminal acts entailing individual responsibility and as a violation of use of force and human right norms implicating state responsibility.

3.4.5 There is some prior state practice supporting the view that terrorist bombing can be considered as an armed attack and implying self-defense. In 1998 Al Qaeda bombed the United States embassies in Africa¹⁴. The US invoked the right of self-defense and bombed Al Qaeda camps in Afghanistan and against Sudanese pharmaceutical plant. Nether Security Council nor General Assembly condemned the United States¹⁵. The Arab State also didn’t condemn the bombing (it has condemned only the bombing Al Qaeda camps in Afghanistan). Compared to the 80’s, something had changed.

3.4.6 The fact that the incidents were not undertaken directly by a foreign government cannot be viewed as disqualifying them from constituting an armed attack. For instance, the wording of Article 2(4) and Article 51 are different: Article 2(4) defines the use of force by one member against any state:

¹¹ Authorization for Use of Military, S.J. Resolution 23, 107th session of the US Congress, 2001.

¹² NATO press release of September 12, 2001, available at <http://www.nato.int/docu/pr/2001/p01-124e.htm>

¹³ Secretary General Lord Robinson - NATO press release October 2, 2001, available at <http://www.nato.int/docu/speech/2001/s011002a.htm>

¹⁴ Kenya and Tanzania, killing nearly 300 people, including 12 US citizens.

¹⁵ Sean D. Murphy, *Contemporary practice of the US Relating to International law*, 93 Am. J. International Law. 161, 164-65 (1999)

All Members shall refrain in their international relation from the threat or use of force against the territorial or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the present Charter.

While Article 51 is silent on who and what might commit an armed attack justifying self-defense:

Nothing in the present charter shall impair the inherent right of individual or collective self-defense *if an armed attack occurs against a member of the UN*, until the Security Council has taken the measure to maintain international peace.

The preeminent precedent regarding self-defense – the 1837 Caroline incident – stands not just for Secretary of State Webster’s proposition. This proposition states that self-defense is not only appropriate in case of necessity (“instant, overwhelming, leaving no choice of means, and no moment for deliberation”¹⁶), but also for the proposition that self-defense is permitted as a reaction to attack by non-governmental entities.

3.4.7 So, Article 51 preserves an inherent right of self-defense, that right prior to the adoption of the UN Charter included the right to respond to attacks from wherever they may come. Moreover, assuming that a close connection between Al Qaeda and Iraq does exist, which is demonstrated by the resolution authorizing the use of force against Iraq passed by the US Senate and House of Representatives on 11 October 2002. This resolution provides:

Whereas members of Al Qaeda, an organization bearing responsibility for attacks on the US, its citizens, and interests, including the attacks that occurred on September 11th, 2001, are known to be in Iraq;

¹⁶ The Caroline and MacLeod Cases, British and foreign state paper, 1848.

Whereas Iraq continues to aid and harbor other international terrorist organizations, including organizations that threaten the lives and safety of the US citizens.”

So we find *de facto* Iraq government responsible for the incidents of September 11th. In this regard the recent articles on state responsibility adopted by the International Law Commission provide a framework for analysis¹⁷. It depends on the fact that the *de facto* Iraqi government is responsible because of the omission of its organs in allowing Al Qaeda to operate from Iraq (articles 2, 4-5). As Michael Reisman stated: ‘State sponsored terrorism is the most noxious and dangerous of its species, yet its authors and architects evade all deterrence and prospect of punishment if the fiction is that states are not involved and only their agents are deemed responsible for terrorism.’¹⁸

4. Conclusion

So, *Nicaragua* case recognized “armed attack” as if it could, in other ways, be sending armed groups into a state and not only army crossing borders. Regarding this case US can respond through resort to proportionate military force against Iraq under the motivation of self-defense because the mechanism:

Terrorist attack → qualification as an armed attack → self-defense under Article 51

can work. So the United States can use force even against non-state entities (*Nicaragua case*) and the United States can attack Iraq because it helps Al Qaeda (because of the link between Iraq and Al Qaeda).

¹⁷ See part 3 of the present brief by Dina Kalnina

¹⁸ Michael Reisman, *International Legal response to terrorism*, 22 House J. Int'l 3,39 (1999)

The possibility of the United States to use armed force against Iraq because of non-compliance of Iraq with Security Council resolutions on terrorism

By Nadezda Gric

Introduction

The General Assembly and the Security Council have passed numerous resolutions condemning terrorism and requiring all states to refrain from providing any support of terrorist acts.

Supporting, providing safe haven and financing of terrorist organizations, such as Al Qaeda, constitute a threat to international peace and security and to the security of the United States in particular.

Iraq by undertaking these actions does not comply with abovementioned resolutions.

The non-compliance with SC resolutions is a failure to give the United Nations “every assistance” in accordance with Article 2(5) of the UN Charter.

Iraqi non-compliance with the Security Council resolutions prohibiting the support and financing of terrorist acts is one of the arguments for the possibility of the United States to use armed force against Iraq.

Binding Force of the Security Council Resolutions

The Security Council has the power to issue and adopt resolutions concerning important issues of international law. In order to prove that Iraqi non-compliance with resolutions adopted by this body may have certain legal consequences, it is necessary to show that resolutions have a binding force on the Member States.

Article 39 of the United Nations Charter gives the Security Council the power to “decide what measures shall be taken to maintain or restore international peace and security”.

Article 25 provides that the Member States “agree to accept and carry out the decisions of the Security Council” in accordance with the United Nations Charter.

Therefore the Security Council is authorized to take decisions, binding on Member States. The Security Council resolutions can be considered as measures to restore peace and security, also with regard to the conditions of their adoption.

These were the general guidelines for the resolutions to be considered binding. I will proceed with concrete resolutions, adopted by the Security Council in regards of terrorism and measures that need to be taken in order to eliminate it.

Resolution issued for Iraq

Security Council Resolution 687 of 3 April 1991¹⁹ was a cease-fire resolution issued in order to restore peace between Iraq and Kuwait after the Gulf War. It contains a lot of requirements for Iraq, such as to destroy its nuclear and biological weapons programs, and to declare the elements of its weapons of mass destruction programs. In addition to these obligations it requires Iraq not to commit or support international terrorism or “allow any organization directed towards commission of such acts to operate within its territory”²⁰. Since members of Al Qaeda are known to be in Iraq²¹ and since this organization continues to commit terrorist acts or is suspected of such actions, these facts constitute a clear non-compliance with Security Council resolution 687.

Resolutions issued for all states

The Security Council has also adopted the resolutions binding on all Member States.

Even before the September 11 terrorist attacks the Security Council has adopted **Resolution 1269 on 19 October 1999**²². This resolution calls upon all States to “prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism” and to “deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition”. Iraq does not comply with this and all the following resolutions, as we will see later.

¹⁹ Security Council Resolution 687, available at <http://www.un.org/Docs/scres/1991/scres91.htm> (last visited November 12, 2002)

²⁰ See Security Council resolution 687, paragraph 32.

²¹ Our group assumed that since the resolution authorizing the use of force by the United States was passed in the Senate, therefore, all the statements it contains were checked. In the absence of any real proof of Iraqi support for terrorism we have built our brief on this assumption.

Both Security Council and General Assembly have adopted resolutions condemning the attacks on the United States on 11 September 2001 immediately after the events. These resolutions reaffirm the condemnation of the terrorist attacks, request all states to take urgent measures to combat with terrorist organizations all over the world, and require to stop any support or financing of terrorists.

The Security Council has unanimously adopted its **Resolution 1368 of September 12, 2001**²³. The resolution “unequivocally condemns” the acts of international terrorism and regards them “as a threat to international peace and security”. It also calls on all states to “to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable”. Since Iraq is known to support the members of Al Qaeda, it can be argued that it does not comply with the requirements of this resolution.

It also has to be taken into consideration that in this resolution the inherent right of individual or collective self-defense in accordance with the Article 51 of the UN Charter was mentioned for the first time in connection with the terrorist attacks²⁴.

General Assembly Resolution 56/1 of September 18, 2001²⁵ is very similar to the resolution 1368 of the Security Council. Although it is not binding, it reaffirms the necessity to stop international terrorism. In this resolution the General Assembly calls on states to bring to justice the sponsors of the 11 September, 2001 attacks on the United States and emphasizes the responsibility for support of the terrorist organizations.

²² Security Council Resolution 1269, available at <http://www.un.org/Docs/scres/1999/sc99.htm> (last visited November 12, 2002)

²³ Security Council Resolution 1368, available at <http://www.un.org/Docs/scres/2001/sc2001.htm> (last visited November 12, 2002)

²⁴ *Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say*, at http://www.ejil.org/forum_WTC/ny-stahn.html

²⁵ General Assembly Resolution 56/1, available at <http://www.un.org/Depts/dhl/resguide/r56.htm> (last visited November 15, 2002)

Security Council Resolution 1373 of 28 September 2001²⁶ is considered to be the most important resolution concerning prevention of terrorist acts. It was adopted unanimously, which gives it a high value. There is also a reference that the Security Council is acting under Chapter VII of the Charter of the United Nations, and that makes it binding for all the states.

The resolution requires all Member States “to prevent and suppress the financing of terrorist attacks” and to “criminalize the willful provision of funds for terrorist attacks”. It prohibits the nationals or any persons and entities within the territories of the Member States to make any funds for the benefit of terrorist organizations. It also urges to take “necessary steps for prevention of terrorist acts” and to “deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens”. The Member States have to ensure that any person who supports terrorist acts is brought to justice and for that reason terrorist acts have to be established as serious criminal offences in national law.

It has to be pointed out that resolution 1373 calls upon Member States to “become parties as soon as possible to the relevant international conventions and protocols relating to terrorism”, especially emphasizing the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999. It was the first time the Security Council has requested such action from all states under Chapter VII of the UN Charter. However, this convention was neither signed nor ratified by Iraq.

Iraqi actions of supporting, financing and providing safe haven for the members of Al Qaeda terrorist organization are contrary to all abovementioned provisions and constitute a violation of the Security Council resolution 1373, which has a binding force on all Member States.

Security Council Resolution 1377 of 12 November 2001²⁷ reaffirms the previous resolution 1373 and calls on all States to implement it fully and urgently. It stresses again the “obligation on States to deny financial and all other forms of support and

²⁶ Security Council Resolution 1373, available at <http://www.un.org/Docs/scres/2001/sc2001.htm> (last visited November 12, 2002)

safe haven to terrorists and those supporting terrorism”. Such wording of the resolution leaves no choice for Iraq but to comply with the provisions of this and of all previous resolutions concerning prevention of the financing of terrorism. However, even in this case Iraq does not fulfill its obligations and leaves the resolution without proper consideration.

It is necessary to mention that both Security Council resolutions 1373 and 1377 stress that the financing, planning and preparation for acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations. Article 2 of the United Nations Charter states that members of the United Nations shall act in accordance with the purposes and principles of the Charter. Since Iraq is a member of the United Nations and since it is known for supporting of international terrorism, therefore it is in violation of the obligation imposed on it by the United Nations Charter.

Implied authorization

By the doctrine of implied authorization the United States may search for an authorization from the Security Council to use force in the wording of the resolutions.²⁸ In the resolutions mentioned above the Security Council condemns the support of terrorism and calls on states to use all the necessary means to combat with international terrorism. It can be argued that such wording expresses the implied will of the Security Council to let one or several states to use force in order to make Iraq comply with relevant resolutions.

The doctrine of implied authorization was used by the United States in establishing the no-fly zones in Iraq and in the recent United States claim to adopt the enforcement of the weapons inspections program²⁹.

²⁷ Security Council Resolution 1377, available at <http://www.un.org/Docs/scres/2001/sc2001.htm> (last visited November 12, 2002)

²⁸ J. Lobel and M. Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, American Journal of International Law, January 1999, available at

²⁹ *Supra* note 10.

Conclusion

After analysing the most important resolutions concerning the prohibition of supporting, financing or providing safe haven to the terrorist organizations, a conclusion can be made that Iraq is not complying with any of them. The non-compliance and therefore supporting terrorist organizations results in the threat to international peace and security, and to the peace and security of the United States in particular.

The Security Council resolutions themselves do not authorize the use of force for non-compliance or for the threat to the peace and security of any state resulting from the support of terrorist acts. However, the United States could use force under control of the international community in order to protect itself and the rest of the states from the terrorist acts of Al Qaeda and other organizations supported by Iraq. That would give the United States the opportunity to serve not only its own interests, but the interests of the community as well.

If the proper action from the Security Council is blocked by veto of the Member States or if Security Council does not take any appropriate action to force Iraq to comply with resolutions forbidding supporting and harboring of terrorist organizations, an implied authorization to use force may be used by the United States.

From all the arguments stated above it follows that by supporting and harbouring terrorist organizations, including the organizations that threaten the lives and safety of United States citizens, non-complying with the binding Security Council resolutions, and breaching its international obligations Iraq poses threat to the United States. Therefore, the consequence of performing such actions by Iraq shall result in forcing it to comply, even if that would mean the use of force against it by the United States.

State responsibility of Iraq

By Dina Kalnina

All analysis is made with an assumption that Iraq is harboring and supporting terrorists.

Issue:

Is Iraq as a state responsible for the terrorist acts of 11th of September? If yes, whether the United States can use an armed attack against it?

Facts:

- Drafts articles on Responsibility of States for Internationally Wrongful Acts were adopted by International Law Commission, established by the United Nations General Assembly in 1949. It has concluded its work in 2001³⁰.
- For the first time Drafts articles on Responsibility of States for Internationally Wrongful Acts were adopted in 1996.
- For the second time Drafts articles on Responsibility of States for Internationally Wrongful Acts with significant changes were adopted in 2001.

1. Is Iraq responsible for the breach of international conventions on terrorism?

Here the most significant United Nations conventions on terrorism will be discussed:

1. Convention for the Prevention and Punishment of Terrorism developed by the League of Nations in the 1930s. It is not working because the Convention never came into force³¹.
2. International Convention for the Suppression of Terrorist Bombings in 1997 by United Nations. The Convention aims to deny safe havens to persons wanted for terrorist bombings by obliging each state to prosecute such persons if they are not already extradited to another state that has issued an extradition request.

³⁰ International Law Commission, Report by the International Law Commission on the Work of its Fifty-Third Session, Apr. 23-June 1, July 2- Aug.18, 2001.

³¹ A. Martyn, *The Right of Self-Defense under International Law-the Response to the Terrorist Attacks of 11 September*, Parliament of Australia, available at <http://www.aph.gov.au/library/pubs/CIB/2001-02/02cib08.htm> (last visited November 15, 2002)

Unfortunately the United States and Iraq were not parties to that convention on the September 11th, 2001. It was ratified later by the United States (in June 2002) and entered in force in May 2001³², but not by Iraq.

3. International Convention for the Suppression of the Financing of Terrorism was adopted in 1999 by the United Nations. The Convention obliges states parties either to prosecute or to extradite persons accused of funding terrorist activities and requires banks to enact measures to identify suspect transactions. But the Convention On September 11th was still open for signature and so not yet in force. Iraq and the United States were not parties to it at the time of September 11 events, although later the United States has signed and ratified it in June 2002. The Convention came into force in April 2002³³.

2. What law governs state responsibility? Is it binding?

State responsibility is governed by international customary law. International Law Commission has codified these rules in Drafts articles on Responsibility of States for Internationally Wrongful Acts.

In many cases judges refer to the Draft articles and they are as binding as international customary law.³⁴

3. The type of state responsibility.

There is a discussion whether a state can have criminal responsibility. The Drafts articles on Responsibility of States for Internationally Wrongful Acts adopted in 1996 included state criminal responsibility.³⁵ In Drafts articles on Responsibility of States for Internationally Wrongful Acts adopted in 2001 specifically criminal responsibility is not included, but state responsibility as such is included with legal consequences.

Therefore Iraq cannot have criminal responsibility under draft articles.

But there can be another way to exercise criminal responsibility of a state. 'Even though state criminal responsibility has not been officially recognized, punitive consequences have been attached to states whenever the Security Council has

³² International Convention for the Suppression of Terrorist Bombings 1997, available at www.un.org (last visited November 13, 2002)

³³ International Convention for the Suppression of the Financing of Terrorism 1999, available at www.un.org (last visited November 13, 2002)

³⁴ Gabčíkovo-Nagymaros Project Case (Hungary v. Slovakia), ICJ Rep. 1994.

³⁵ Drafts articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 1996, Art. 19.

determined that such state action constitutes a breach of peace under Chapter VII of the United Nations Charter.” United Nations Security Council sanctions on Libya and Sudan on the basis that states have supported terrorist organizations is the evidence.³⁶ The United Nations Security Council has found September 11, 2001 attacks to be a threat to international peace and security.³⁷

4. What facts would prove that Iraq has committed an internationally wrongful act and is responsible for September 11, 2001 terrorist attack?

4.1. To prove that Iraq is internationally responsible as a state there it is necessary to prove that Iraq has committed an internationally wrongful act.

‘It is moreover well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect’.³⁸

4.2. ‘There is an internationally wrongful act when conduct consisting of an action or omission is attributable to the State under international law; and constitutes a breach of an international obligation of the State.’³⁹

4.3. Iraq would breach an international obligation in a case if any of its public officials would cooperate with terrorists responsible for the September 11, 2001 attack.

4.4. To prove the cooperation of any public official with terrorist sufficient evidence is necessary. The evidence could, for example, include any audiovisual record showing any stage of terrorist attack planning or any agreement of material or consultative help to terrorists by Iraqi public officials.

³⁶ M. Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, Harward International Law Journal. Vol. 43. Winter 2002, p. 96.

³⁷ M. O’Connel, *Lawful Responses to Terrorism*, Ohio State University Colledge of Law, at <http://jurist.law.pitt.edu/forum/forumnew30.htm>

³⁸ *Supra* note 5.

³⁹ Draft articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission. 2001. Ch. 1, Art. 2.

5. Has Iraq committed internationally wrongful act?

If it was proved that any Iraqi public official is related or cooperating with terrorists then Iraq has committed an internationally wrongful act. Article 7 of Draft articles on Responsibility of States for Internationally Wrongful Acts states that the actions of a government official or entity, even when exceeding their authority, are considered to be an act of the government under international law.

“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”⁴⁰

6. If Iraq is internationally responsible, what are the legal consequences and can armed force be used as a countermeasure?

6.1. “The State responsible for the internationally wrongful act is under an obligation to cease that act, if it is continuing and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.”⁴¹

6.2. “The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”⁴²

6.3. “Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination.”⁴³

6.4. If Iraq does not comply with the above-mentioned obligations (6.1 and 6.2), the United States of America “may take countermeasures in order to induce the State [Iraq] to comply with obligations.”⁴⁴

6.5. However, the “countermeasures shall not affect the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.”⁴⁵

⁴⁰ *Supra* note 10, at Part 1, Ch. 1, Art. 7.

⁴¹ *Supra* note 10, at Part 2, Ch. 1, Art. 30.

⁴² *Supra* note 10, at Part 2, Ch. 1, Art. 31.1

⁴³ *Supra* note 10, at Part 2, Ch. 2, Art. 34.

⁴⁴ *Supra* note 10, at Part 3, Ch. 2, Art. 49.

⁴⁵ *Supra* note 10, at Part 3, Ch. 2, Art. 50.

Conclusion:

Since The Draft articles on Responsibility of States for Internationally Wrongful Acts do not include a countermeasure where the use of military force is allowed, therefore the United States cannot use military force against Iraq even if Iraq is internationally responsible for committing internationally wrongful acts.

Use and threat of transfer nuclear weapons to terrorist organizations

By Egle Milasauskaite

Iraq is one of the states that may possibly possess nuclear weapons. In the past it has developed weapons of mass destruction and has used them not only against other country, but also against it's own people as well.

Iraq poses threat to the world with its capabilities to help terrorists to use nuclear weapons. As we have some evidence now that Iraq finances terrorists and gives assistance to groups that use terrorism to undermine Middle East peace. Iraq has trained Al Qaeda members in bomb making and poisons and deadly gases. Iraq has growing fleet of manned and unmanned aerial vehicles that could be used to disperse nuclear or biological, or chemical weapons across broad areas. It might be concern that Iraq is exploring ways of using these vehicles for missions targeting the U.S.⁴⁶

Iraq poses a critical threat to The U.S. or allies is through the use of nuclear weapons in two ways:

- 1) If Iraq was to transfer nuclear weapons to a terrorist group;
- 2) or if Iraq were to use those weapons against American or Allied forces in order to prevent or impede an American led invasion aimed at overturning the Iraqi regime.

Iraq could decide on any given day to provide nuclear weapons to a terrorist group or individual terrorists. Alliance with terrorists could allow the Iraqi regime to attack America without leaving any fingerprints.

Saddam Hussein is harboring terrorists and the instruments of terror. So, there is great risk that he will use the weapons of mass destruction (chemical, biological, nuclear weapons) or provide them to a terrorist network.

Is there a legal basis for the U.S to attack Iraq because it poses a threat through use of nuclear weapons?

⁴⁶ "Bush Fears Iraq Would Hit U.S. with Chem Weapons" by Steve Holland, available at: http://209.50.252.70/p_en/news/archives/00000895.htm

The proliferation of nuclear weapons of mass destruction is primary source of global non-stability and danger.²

The spread of nuclear weapons to additional states not only increases the risk of nuclear war among nations, but also increases the risk of nuclear terrorism.

Treaty of Non Proliferation of Nuclear Weapons

The Treaty on the Non-Proliferation of Nuclear Weapons concluded in 1968 and indefinitely extended by 175 States Parties in 1995 is of paramount importance.³

By the terms of article I, ‘Each State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly...’.

Article IV preserves the right of all Parties to develop peaceful uses of nuclear energy. Article VI provides ‘Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.’⁴

As it can be seen, this treaty is more concerned with the possession rather than the use of nuclear weapons. And nothing in this Treaty authorizes or prohibits the use or threat of use of nuclear weapons.

Iraq has signed Non-Proliferation of Nuclear Weapons Treaty and is a party to it. However, Iraq is not complying with this treaty by violating it.

Because of violations United Nations Security Council can impose sanctions for violations of UN Conventions such as NPT (Nuclear Non-Proliferation Treaty) and may, if it will be shown that the violations result in immediate danger to other nations, authorize the use of force to remove the danger⁵. Unfortunately, United States

² Proliferation of Weapons of Mass Destruction, available at: <http://www.acronym.org.uk/ukaiprol.htm>.

³ ICJ, Dissenting opinion of vice president Schwebel, available at: http://216.34.38.97/cgi-bin/public/imc/right_menu.cgi?who=Um

⁴ Treaty on the Non Proliferation of Nuclear Weapons, available at: www.unog.ch/disarm/distreat/npt.pdf+nuclear+nonproliferation+treaty&hl=en&ie=UTF-8

⁵ Advisory opinion of the ICJ on the legality of the threat or use of nuclear weapons, available at: <http://216.239.39.100/search?q=cache:Oau2OJF3FqkC:www.un.int/malaysia/GA/1Comm/1C15Oct02.html+threat++of+transfer+of+Nuclear+weapons+in+Iraq+ICJ&hl=en&ie=UTF-8>

couldn't attack Iraq because of violation of the treaty, though United Nations Security Council could authorize use of force against Iraq.

What ICJ is saying

In July 1996 the International Court of Justice (ICJ) gave an advisory opinion on the use or threat of use of nuclear weapons in response to a request from the UN General Assembly (UNGA res. 49/75K) ⁶. On the question of the legality of using nuclear weapons the Court was divided. It ruled that "a threat or use of nuclear weapons contrary to Article 2, paragraph 4 of the United Nations Charter...that fails to meet all the requirements of Article 51, is unlawful." Therefore, it followed that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law." However, the Court could not "conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake." The 7-7 split on this paragraph is misleading as some judges voted against because they disagreed that *any* threat or use of nuclear weapons could be lawful, while others opposed because they considered the self-defense criterion to be too narrow. ⁷

The ICJ was unanimous on the statement which provides: "There exists an obligation to pursue in good faith *and bring to conclusion* negotiations leading to nuclear disarmament in all its aspects under strict and effective international control". This unanimous opinion was not a misstatement of Article VI, as suggested by UK representatives in the UN GA First Committee in November 1996. It was an interpretation of the meaning of the Article VI obligation in light of other international legal consideration.

The ICJ ruled that use of nuclear weapons was illegal except in cases of self-defense. It was ruled that use of nuclear weapons is contrary to international law.

The ICJ gave only an advisory opinion, not a judgement or ruling. So, it means that the opinion of ICJ is not binding on any government. However ICJ opinion has made illegal

⁷ see International implications, Nuclear Proliferation

all aspects of the nuclear fuel cycle leading to nuclear weapons production.⁸ Uranium mining is a part of the nuclear fuel cycle that provides the raw materials for nuclear weapons production.

The conclusion of the Advisory Opinion of the ICJ of 1996 clearly stated that States Parties to the NPT have a legal obligation not only to pursue but also bring such negotiations to an early conclusion. This is consistent with the solemn obligation made by State parties under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) to pursue in good faith negotiations on effective measures relating to nuclear disarmament and of their determined pursuit of systematic and progressive efforts to reduce nuclear weapons globally, the ultimate goal being the elimination of those weapons.⁹

According to Acronym Institute, in all cases the best defense against the rouge or terrorists use of WMD is prevention: strengthening the international treaty and verification regimes; restricting access to the material and technology; monitoring possible production facilities.¹⁰

There are and some resolutions dealing with nuclear weapons.

General Assembly resolution 1653:

“The use of nuclear weapons and thermo-nuclear weapons is...a direct violation of the Charter of the United Nations; <..> is contrary to the rules of international law and the laws of humanity;[and]...is a war directed <..> against mankind in general.”¹¹

"Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization."¹²

UN Security Council Resolution 661 affirms right of individual or collective self-defense in response to Iraqi Attack.¹³

⁸ see international implications, nuclear proliferation

⁹ Nuclear Non Proliferation Treaty, available at:

www.unog.ch/disarm/distreat/npt.pdf+nuclear+nonproliferation+treaty&hl=en&ie=UTF-8

¹⁰ 1998 The Acronym Institute

¹¹ General Assembly resolution 1653, available at:

¹² *Id.*

Conclusion

If we could prove, that Al Qaeda is linked with Iraq in the September 11th attacks, the U.S could attack Iraq on basis of self-defense. On the other basis the U.S doesn't have a rights to use force against Iraq. However United Nations Security Council has power to impose sanctions for violations of UN Conventions and resolutions, and it may authorize the use of force to remove the danger.

¹³ UN Security Resolutions dealing with Iraq, Resolution 661, available at: <http://www.milnet.com/milnet/united-nations/>.

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