

## The Legality of the US Assaults against the Taliban

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*More than one year has elapsed since the occurrence of the US military assaults against the Taliban in Afghanistan, ensuing from the September 11th terrorist attacks on the World Trade Center Twin Towers in New York and the Pentagon in Washington D.C., but the legality of the US military interventions in Afghanistan has not yet ceased to be the subject of contradictions and passionate debates in the arena of international jurists, especially in the wake of the impending US attack against Iraq, which is more or less motivated by the similar grounds of being a pre-emptive<sup>1</sup> measure or self-defense against the potential Iraqi instigated or supported terrorist attacks.*

*This article purports to analyse and elucidate various legal issues stemming therefrom, on the basis of the prevailing international law and State practice, particularly the ones on whether or not the terrorist attacks in question were tantamount to an aggression that entitled the US to exercise its right of self-defense and whether the Taliban could be held accountable therefor. It also touches on the question of the need for a prior approval of the UN for an exercise of the right of self-defense and of the plausibility for the US to justify its military interventions in Afghanistan as a reprisal. The main theme of this article focuses, however, on the very contentious issue relating to a pre-emptive or anticipatory self-defense.*

### Introduction

Never before has Mankind ever witnessed so atrocious and devastating a terrorist attack as the ones on the World Trade Center twin towers in New York and on the Pentagon in Washington D.C. on September 11<sup>th</sup>, 2001, which have caused thousands of the most tragic innocent

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<sup>1</sup> Or anticipatory self-defense.

civilian casualties<sup>2</sup> and entailed disastrous economic and social concentric turbulence throughout the globe.<sup>3</sup> Such a traumatic humanitarian catastrophe has given rise to the tumultuous “War against Terrorists,” beginning with the US assaults against the Taliban in Afghanistan, which has been highly politicized<sup>4</sup> and provoked tremendous controversial literature and debates in the circle of international jurists world-wide. Thailand is no exception to such phenomenon.

There were, in effect, a lot of controversies and confusion in the public opinion in Thailand on the spur of the moment apropos the legality of the ensuing US assaults against the Taliban after the September 11<sup>th</sup> terrorist attacks and such controversies and confusion still persist even at this very moment. Hence, the attempt of the author to elucidate and shed some light on this very contentious issue on the basis of the prevailing State practice and international law.<sup>5</sup>

In Thailand, opinions on the legal issues relating to the US assaults against the Taliban were and still are divided into two diametrically opposite schools of thought, *viz*,

*Primo*, a number of critics and commentators, who are partisans of the thesis that the said US attacks were illegal, asserted that the terrorist attacks of this kind were not an act of aggression as defined by the UN GA Res. 3314 (XXIX) (1974), because they were perpetrated by a non-

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<sup>2</sup> As may be seen from the public debates at the Conference of the National Congress of Law at ESCAP in September 2001 under the topic of “The September 11<sup>th</sup> Terrorist Attacks in New York and Washington, D.C.”

<sup>3</sup> Even the World air transport giant like the American “United Airline” has been declared insolvent and bankrupt as a subsequent adverse economic repercussion arising from that calamitous event. (BBC World Service, August 15<sup>th</sup>, 2002)

<sup>4</sup> Due to the susceptibility of its consequence to degenerate into a global confrontation between Muslim and non-Muslim countries, because of the manipulation by the fundamentalist religious fanatics, who try to convert the conflict into a so-called “Holy War” or “Jihad.”

<sup>5</sup> The views expressed by the author in this article are purely academic, basing on the prevailing principles of international law and State practice, and do not necessarily reflect the stance of the Thai Government in this matter.

State entity or group of individuals and not by a State. One partisan of this same school of thought claimed that, according to the jurisprudence or practice of the International Court of Justice in the Nicaragua case, an aggression had to be committed by a regular armed force of a State, so the American attacks against the Taliban in Afghanistan could not be regarded as an exercise of the right of self-defense, because a bunch of terrorists who attacked the US was not an armed force of Afghanistan.<sup>6</sup> Some partisans of this same school of thought added further that even by assimilating the US armed intervention in Afghanistan to the notion of self-defense under penal law, the American claim to have launched the attacks against the Taliban in self-defense was not legally founded, because, an exercise of the right of self-defense had to be done **against the aggressor**, *at the moment of the aggression*, consequently, since the terrorist suicidal attacks, using the hi-jacked airplanes as assailing missiles in this case, were already over and the suicidal hi-jackers had perished in the attacks on the World Trade Center twin towers and the Pentagon, there should no longer be any legal ground for the US to strike back. This school of thought also contended that under the UN Charter, the right of self-defense could be exercised only with prior approval of the United Nations, so the US's resort to arms in this case was illegal because it was done without prior authorization of the UN. One of them went even further in his argument to maintain that the actions taken by the US could not even be justified as a reprisal, because an armed reprisal was illegal and prohibited under the UN Charter.

*Secundo*, the opposite school of thought asserted to the contrary that an aggression could be made not only by regular armies but also by irregular armies or unorganized forces, such as underground or clandestine fighters like guerrilla and terrorists, who conceal their identities and do not observe the *jus in bello*, and that, if it could be substantiated

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<sup>6</sup> View expressed at the 2001 National Congress of Law Conference by a participant from the Ministry of Foreign Affairs in his personal capacity.

that the hostilities were committed at the instigation of, or master-minded by a State, that State could be held accountable for such hostilities.<sup>7</sup> A partisan of this same school of thought rebutted the contention, which was claimed to be based on the jurisprudence of the ICJ in the Nicaragua case, that an adjudication of the ICJ had a relative effect which was legally binding only on the parties to the dispute in question, and in that particular case only, because the principle of *stare decisis* was not applicable to the ICJ,<sup>8</sup> the jurisprudence of the ICJ in the Nicaragua case could not, therefore, be a decisive legal ground for the determination of the plausibility of the American justifying arguments for the US counter-attacks against the Taliban Regime. *A fortiori* when neither the circumstances, nor the contentions of the parties to the dispute in the Nicaragua case and in this one are identical.

## **Legal Analysis of the Contentious Issues on the US Military Assaults against the Taliban**

### **Identification of the problems**

In the final analysis, the core issue on the legality of the American attacks against the Taliban Regime is fundamentally the question of whether, under the prevailing State practice and *lex lata*, particularly, *but not exclusively*, as enshrined in the UN Charter,<sup>9</sup> the legal ground for the American claim that the United States has attacked the Taliban Regime in the exercise of its right of self-defense was germane and cogent. In its essence, the legal justification advanced by the US for its armed interventions against the Taliban Regime was that the suicidal terrorist attacks

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<sup>7</sup> After all, under the penal law, the person who, whether by employment, compulsion, threat, hire, solicitation or instigation, or by any other means, causes another person to murder someone is just as guilty of the murder as the murderer himself without having to commit the murder with his own hands and is liable to the punishment as a principal. (Cf., for instance, Article 84, para. 1, of the Thai Penal Code, B.E. 2499)

<sup>8</sup> View expressed by another participant at the same National Congress of Law Conference, *ibid.*

<sup>9</sup> Cf. Article 2(4) of the UN Charter.

on the World Trade Center twin towers in New York and on the Pentagon in Washington D.C. by the hi-jacked civilian air-crafts were an act of aggression, for which the Taliban Regime was to blame, so the US was entitled to have recourse to arms against the Taliban, both individually by itself and in conjunction with the forces of NATO as a collective self-defense.<sup>10</sup>

The legal analysis of the main issue in this connection has, therefore, to be based on the determination of whether such terrorist attacks against the United States constituted an act of aggression, and if so, could the Taliban Regime be held accountable for the atrocities caused by the terrorist attacks in question.

### **Can the September 11<sup>th</sup> Terrorist Attacks be Regarded as an Act of Aggression?**

As rightly put by the second school of thought, an act of aggression could indeed be perpetrated not only by regular armies of a country, but also by irregular armies or unorganized armed forces, such as clandestine fighters like guerrilla and terrorists, because even the multiple subversive intervention perpetrated against a country could already be a tremendous threat to the security and stability of the target country and could thus be regarded as an act of aggression. *A fortiori* when they took the form of a series of systematic armed attacks by organized networks of well-trained fanatic terrorists, which are definitely more lethal than ordinary subversive acts.

True it is that the Definition of Aggression in the UN GA Res. 3314 (XXIX) (1974) may not be wide enough to cover the attacks by this type of irregular armed forces, but considering that the UN GA Res. 3314 (XXIX)

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<sup>10</sup> Under Article 5 of the NATO constituent instrument, "An attack on one is an attack on all." Hence, the legality and legitimacy for NATO to resort to a collective armed intervention in case of an aggression against anyone of its member countries, one of which is the United States.

(1974) was elaborated and adopted nearly three decades ago, and ever since, things have so radically and fundamentally changed that had it been foreseen then that present day terrorism would take the form of the omnipresent<sup>11</sup> trans-boundary networks of élite fanatic suicidal terrorists, who could and would readily inflict the most devastating calamity on the interests of the target country at any unexpected moment anywhere throughout the globe by the most atrocious means that would cause them the maximum possible disasters and casualties, taking civilians as the prime target<sup>12</sup> so as to spread terror and make the public feel constantly insecure due to the fact that terrorists are faceless unseen enemies who are ready to mercilessly attack the innocent and defenseless civilians anywhere and at any unexpected moment, and that the horrendous impacts of present day terrorism could attain such a magnitude as to become so dreadful and fiendish a threat against peace, security and freedom of the World Community at large, the coverage of the Definition of Aggression would have for sure been expanded to also include this type of situation. The GA Res.3314 (XXIX) (1974) in question was, in effect, elaborated and adopted under the circumstances, where the acts of terrorism were only isolated ones, and systematic attacks by organized international terrorist cliques in a series like the ones in this case were virtually inexistent, yet the UN General Assembly was obviously not totally unaware of such probability in the future. However, under the circumstances prevailing nearly 30 years ago, failing concrete precedents along that line, the moment must have been premature and not yet ripe enough in the eyes of the UN General Assembly then to explicitly include terrorist attacks in the Definition of Aggression. That was why the GA Res.3314 (XXIX) (1974) *designedly* says nothing about prohibiting a State from having recourse to the right of individual or collective self-defense when

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<sup>11</sup> Because they receive financial and logistic supports from fundamentalist Muslims from every corner of the Earth and globally synchronize that attacks in all possible ways and forms.

<sup>12</sup> Because civilians are the easiest and the most vulnerable preys.

that State is a victim in its own territory of subversive and/or *terrorist acts* by *irregular*, volunteer or *armed bands* organized or supported by another State or operated from the territory of that other State.

Nowadays, with the advent of the new form of systematic attacks **in a series** by organized international networks of elite fanatic **suicidal** terrorists against the worldwide interests<sup>13</sup> of a given country like the ones in the contemporary era that has rendered terrorism even more formidable and inhibiting than a conventional armed aggression, the Definition of Aggression as stipulated in the GA Res. 3314 (XXIX) (1974) has manifestly become in-exhaustive and chronically inadequate to cope with this new type of menace to global security and freedom. Consequently, while recognizing that the use of force fulfilling the *criteria* of an aggression as enshrined in the GA Res. 3314 (XXIX) (1974) can justify an exercise of the right of self-defense, it would not be pragmatic and may even be naïve to preclude the possibility for States to exercise the right of self-defense in the case, where an act of hostility, such as **a series of attacks** perpetrated by organized networks of cold-blooded underground or clandestine fighters like guerrilla and terrorists who have no respect for Human Rights and Humanitarian Laws is tantamount to or even worse than a conventional Aggression by regular armies of a foreign State, who are obligated to abide by the *jus in bello*. It may thus be concluded that the September 11<sup>th</sup> Terrorist Attacks equated to and could be regarded as an Act of Aggression.

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<sup>13</sup> Which could be even more formidable a threat than the one against the territorial integrity of a country itself, because in this globalization era the interests of a country, which include the security for the life of its nationals as well as for their businesses and properties, which could be just about anywhere throughout the globe. The terrorist attacks on the US Embassies in Tanzania and Kenya and on the US Consulate in Pakistan, another one perpetrated against a French giant oil tanker on the high seas, and the blow up of an American civilian aircraft by the so-called sweet bombs at Lockerby in Scotland, etc. are typical examples of this type of threat, the worst consequence of which is that it is a threat against the peace, security and freedom of the people of the target country, because its unpredictability and total inobservance of *jus in bello* will make people feel constantly insecure wherever they may be, especially in a foreign country where they cannot enjoy a full physical protection from their home country.

## Could the Taliban be held accountable for the September 11<sup>th</sup> Terrorist Attacks?

The most logical stance in this connection is to adopt the thesis of the second school of thought that the Taliban could be held accountable for the September 11<sup>th</sup> terrorist attacks, because a State has an obligation under the international law to prevent its territory from being used as the bases to launch hostilities or assaults in whatsoever forms against other countries. If any State refuses or is unable to comply with such an obligation, the injured country would be legally entitled to make armed interventions in the territory of such State<sup>14</sup> to eradicate and destroy the bases for such hostile operations and to bring the culprits to justice. After all, for the same rationale as under the penal law, where the person who, whether by employment, compulsion, threat, hire, solicitation or instigation, or by any other means, causes another person to murder someone is just as guilty of the murder as the murderer himself without having to commit the murder with his own hands and is liable to the punishment as a principal,<sup>15</sup> a country can likewise be an aggressor in the eyes of the international law without having to carry out an act of armed aggression against another country by itself. Therefore, if it can be substantiated that the hostilities were committed at the instigation of, or masterminded by a State, that State could be held accountable for such hostilities. Even condoning the hostilities originating in its territory against another country is already a *mala in se* that can warrant or call for a counter measure. A similar notion also exists in the *jus in bello* that in case of an armed conflict, international and internal alike, if an adjacent neutral State allows or is unable to prevent the transit of the adversary bellige-

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<sup>14</sup> It was on a similar legal ground that Israel raided the Antebbe Airport in Uganda to rescue the passengers of the hi-jacked Israeli civilian airplane, who were held as hostages by the hi-jackers, because Uganda refused to do it (The *post facto* proof of such a refusal was that many Uganda military officers were subsequently executed merely for not having been able to prevent or abort the Israeli raid.)

<sup>15</sup> Cf., for instance, Article 84, para. 1, of the Thai Penal Code, B.E. 2499



rent's troops through its territory, or condones any activities which are incompatible with its status of a neutral State, such as a recruitment or mobilization in its territory of a *corpus* of combatants for participation in such an armed conflict, the other belligerent is entitled to make an armed incursion into the territory of that State in order to put an end to such transit or delinquent activities. The same lesson can be drawn from the Nicaragua Case that, in order for a State to be entitled to act in individual and collective self-defense against another State, it is not required to substantiate that the irregulars operating in its territory act as the agents of the foreign State which supports them. It suffices to establish that the State in question is "*substantially involved*" in the sending of those irregulars on to its territory. The host State can be inculpated not only when that State did the sending, but also when it has a "*substantial involvement therein*." In the Nicaragua Case, Nicaragua's substantial involvement took the forms of providing arms, munitions, other supplies, *training*, command-and-control facilities, *sanctuary* (or harboring<sup>16</sup>) and *lesser forms* of assistance to the Salvadoran insurgents. The fact that the leadership of the Salvadoran insurgency *has been established in* and operated from Nicaragua, and moved into and out of El Salvador from and to their Nicaraguan bases with the support of the Nicaraguan Government is a *situation which in substance equates with Nicaragua's "sending"* of that leadership to direct the insurgency in El Salvador. In the case of the September 11<sup>th</sup> terrorist attacks, the "*substantial involvement*" of the Taliban regime was quite obvious, because it has, in violation of the principles of international law proclaimed by the UN,<sup>17</sup> manifestly supported terrorism by harboring Bin Laden and allowing him to organize and run terrorist training camps in various parts of Afghanistan and also

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<sup>16</sup> To use the term of President G. Bush.

<sup>17</sup> Cf., *inter alia*, Resolutions A/RES/48/122, A/RES/49/185, A/RES/50/186 and A/RES/52/133 of the UN General Assembly and Resolution S/RES/1373 (2001) of the UN Security Council, etc.

to finance the global terrorist network, especially the Al-Qaeda,<sup>18</sup> and harbored<sup>19</sup> this master-minder of several terrorist attacks on the United States, including the September 11<sup>th</sup> terrorist attacks in New York and Washington D.C. It is, therefore, beyond any shade of possible doubt that, from the legal stand-point, the Taliban could be held accountable for the September 11<sup>th</sup> terrorist attacks.

After all, as Professor Julius Stone, who is widely recognized as one of the century's leading authorities on the law of the use of force in international relations, rightly concluded<sup>20</sup> in respect of the Thirteen-Power<sup>21</sup> proposed draft of the definition of aggression that the purpose of the Thirteen Power provision was precisely to take away the right of individual and collective self-defense, the acceptance of which would have been at odds with the UN Charter and general international law, because: Firstly, *international law imputes responsibility to a State knowingly serving as a base of para-military activities, and gives the victim State rather wide liberties of self-defense against them. Secondly, none of the UN Charter provisions dealing with unlawful use of force offers any basis for distinguishing between force applied by a putative aggressor, or indirectly applied by him through armed bands, irregulars and the like. Thirdly, the General Assembly has more than once included at least some species of "indirect" aggression within its definition of "aggression." Fourthly, the most endemic and persistent forms of resorting to armed force have been in the context caught as "aggression" by the Soviet and*

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<sup>18</sup> Madam Bhutto, the previous Prime Minister of Pakistan, already warned the free World of the potential danger of Osama bin Laden master-minded terrorist attacks of a large magnitude only a few years before the occurrence of the September 11<sup>th</sup> terrorist attacks. (CNBC news on October 14<sup>th</sup>, 2001)

<sup>19</sup> To use the term of President George W. Bush.

<sup>20</sup> In his analysis of the travaux préparatoires of the drafting of the Definition of Aggression.

<sup>21</sup> Small and middle Powers.

Six Power<sup>22</sup> drafts<sup>23</sup> and condoned fully by the Thirteen Power Draft.<sup>24</sup>

The Thirteen-Power proposals were not accepted by the United Nations Special Committee on the Question of Defining Aggression, and neither were they accepted by the UN General Assembly. On the contrary, the UN General Assembly adopted the Definition of Aggression, which embraces the essence of the proposals of the Six Powers and the Soviet Union. Under its Article 3(g) an act of aggression includes the sending by or on behalf of a State of armed bands, groups, *irregulars* or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its *substantial involvement therein*. It was the view of the Six Powers that prevailed. Such activity is therefore a case of aggression unconditionally and without qualification, giving rise like any other direct aggression to response by self-defense under general international law and under Article 51 of the UN Charter. In other words, Article 3(g) includes in the Definition of Aggression “a form of indirect aggression in so far as it amounts in practice to an armed attack.”<sup>25</sup>

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<sup>22</sup> Australia, Canada, Italy, Japan, the United Kingdom and the United States.

<sup>23</sup> The Soviet Union’s draft definition enumerated among the acts of “armed aggression (direct or indirect) “The use by a State of armed force by sending armed bands, mercenaries, **terrorists**, or saboteurs to the territory of another State and engagement in other forms of subversive activity involving the use of armed force ....” According to the draft definition of the Six Powers, “The use of force in international relations, “overt or covert,” “direct or indirect” by a *State* against the territorial integrity or political independence of another State may constitute aggression when effected by means including: “(6) Organizing, supporting or major principles directing armed bands or irregular or volunteer forces that make incursions or infiltrate into another State; (7) Organizing, supporting or directing civil strife or **acts of terrorism** in another State; or (8) Organizing, supporting or directing subversive activities aimed at the violent overthrow of the Government of another State.” (A/8719, pp. 11-12)

<sup>24</sup> Cf. Professor Julius Stone (1977) *Conflicts through Consensus*. pp. 89-90.

<sup>25</sup> 1479<sup>th</sup> meeting of the Sixth Committee of the UN General Assembly, October 18<sup>th</sup>, 1974, A/C.6/SR.1479, para. 15.

## **Can the US assaults against the Taliban be regarded as an act of self defense?**

Having already established that the September 11<sup>th</sup> Terrorist Attacks were tantamount to an Act of Aggression<sup>26</sup> and that the Taliban could be held accountable therefor,<sup>27</sup> one can now proceed to the issue on whether or not the US attacks against the Taliban could be regarded as a self-defense?

With respect to an act of self-defense, the State practice in this matter deriving from the parliamentary debates in the UK<sup>28</sup> on January 8<sup>th</sup>, 2003, is that, to make a case for the war in self-defense, the danger or threat must be clear and imminent.<sup>29</sup> An *a contrario* interpretation thereof should be that whenever and wherever it is well-established that the danger or threat for the security of a country is clear and imminent, an exercise of the right of self-defense will be totally justifiable. With regard to the clarity and imminency of the threat and danger, it is beyond any shade of possible doubt that the Al Qaeda international terrorist network would attack US interests whenever and wherever it is possible to do so.<sup>30</sup> In the wake of such a threat and resolve of the terrorist networks, "If one has to wait to see the smoking gun before exercising the right of self-defense, it would already be too late"<sup>31</sup> and that was why the US was compelled to launch the attacks against the Al Qaeda and the Taliban Regime as a pre-emptive self-defense.<sup>32</sup>

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<sup>26</sup> Cf. Para 2 - 3 of p.4 and para 1 - 2 of p. 5.

<sup>27</sup> Cf. P. 6 - 7.

<sup>28</sup> The practice of a State can be deduced from the practice of its Executive, Legislative and Judiciary Powers.

<sup>29</sup> BBC World Service, Jan. 8<sup>th</sup>, 2003.

<sup>30</sup> The leaderships of the radical fundamentalist terrorists have repeatedly so declared *expressis verbis* at various occasions under the names of various movements or organizations having the common objectives to inflict an optimum of the devastating catastrophe on the US and passed into actions whenever and wherever chance permitted it.

<sup>31</sup> To use the formula of General Colin Powell, Secretary of State of the US.

<sup>32</sup> The question of a "pre-emptive self-defense" will be dealt with at a later stage.

One of the major principles governing this matter is that self-defense is impermissible after an attack has ended. Hence, the assertion of the first school of thought that since the terrorist suicidal attacks on the World Trade Center and the Pentagon were already over and the suicidal hi-jackers had perished in the attacks, there should no longer be any legal ground for the US to strike back. Such an assertion would have been valid if the terrorist attacks on the US had really ended, but in this case the attacks on the US could be deemed to be over only if the September 11<sup>th</sup> terrorist attacks were merely isolated ones, which was far from being the case, because in reality such attacks were part and parcel of the whole series of the terrorist attacks orchestrated against the US by various terrorist networks,<sup>33</sup> especially by the Al Qaeda and master-minded by Osama bin Laden with the support of the Taliban,<sup>34</sup> which included, *inter alia* the terrorist attacks on the US Embassies in Tanzania and Kenya in 1998<sup>35</sup> and on the US Consulate in Pakistan, the blow up of an American civilian aircraft in mid-air by sweet bombs at Lockerbie in Scotland, the sabotage of the World Trade Center by the car bombs placed in the underground parking of its twin towers some years before the September 11<sup>th</sup> attacks, etc. The subsequent anthrax attack that recently panicked the public in the US and the repeated calls and incitations on a Middle East TV<sup>36</sup> by the Al Qaeda in the name of Osama bin Laden to all Muslims to attack US interests, wherever they may be, are living proof that the series of terrorist attacks on the US are still going on and far from being over. The US attacks against the Al Qaeda and the

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<sup>33</sup> The leaderships of the radical fundamentalist terrorists have repeatedly so declared *expressis verbis* at various occasions under the names of various movements or organizations having the common objectives to inflict an optimum of the devastating catastrophe on the US and passed into actions whenever and wherever chance permitted it.

<sup>34</sup> Osama bin Laden himself gave a hint to that effect in the CD roms that he has disseminated (CNN news on September 20<sup>th</sup>, 2001.)

<sup>35</sup> Causing more than 200 casualties.

<sup>36</sup> Called "Al Jazeera."

Taliban could, therefore, be qualified as an act of self-defense, because the danger and threat against the US were still quite real, present and impending, and the US attacks targeted only its aggressors, *i.e.* the Taliban and the AL Qaeda, not Afghanistan and its people.

### **Can the US Attacks be Justified as a Reprisal?**

Pertaining to the issue of the legality of an armed reprisal, the extremist assertion that an armed reprisal is prohibited by the prevailing international law and the UN Charter is naïve and finds no echo in the actual State practice, because history has never witnessed any precedent of an obligation for a State to refrain from militarily counter-attacking an armed attack (**if it could**), even in the case of an armed intervention short of war, and such contention is certainly not in keeping with the natural law of self-preservation and therefore not admissible and adhered to by an adequate number of countries to constitute a *lex lata*, which is applicable *erga omnes*. Even in the event of an over-spill of internal armed conflict in a neighboring country into its territory, Thailand has never failed to retort by shooting back across the border every time that artillery shells dropped on the Thai side of the boundary and such an armed retortion has never provoked any protests nor condemnations by the World Community, and not even by the country against whom that armed retortion was made, which is a proof of the *opinio juris sive necessitatis* in the contemporary State practice that such an action is permissible under the prevailing international law if it was proportionately made. Besides, **and more importantly**, a reprisal, by its definition, is *an illegal act that becomes legal when proportionately made in retaliation or in response to a prior illegal act*. Hence, although the American counter-attacks in this case, being a use of force, should, in principle, be illegal, but when it was made in retaliation to a prior illegal use of force, such a use of force in retaliation has automatically become perfectly legal, provided only that it must not be disproportionate to the illegal use of force that warranted

such a reprisal.<sup>37</sup> An interpretation to the contrary would be an interpretation *in absurdum*, because it would render the definition of a reprisal totally meaningless. It is noteworthy, however, that, in this case, the US has never claimed to have launched the attacks against the Taliban as a reprisal, which would have been a *post facto* retaliatory measure, but rather as an exercise of its right of self-defense.

### **Can the US attacks against the Taliban be regarded as a pre-emptive or anticipatory self-defense?**

In order to answer to that query, a *sine qua non* is to first establish the existence of the concept of a “pre-emptive” or “anticipatory” self-defense as a *lex lata* in international law.

The concept of a pre-emptive or anticipatory measure or self-defense is nothing new to the circle of international jurists and State practice. It has long been an embarrassing and frustrating dilemma both for States and international authors, who, while being reluctant to entirely endorse and adhere to such a notion, that they view with scepticism and apprehension as a potential open door to abuses by Big Powers, have always been as equally reticent to dismiss it *in toto* due to the obvious impetus to provide a leeway for States to cope with security problems under irregular circumstances that warrant special preventive measures. Doctrine, which, under Article 38 of the Statute of the International Court of

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<sup>37</sup> The casualties caused by the premeditated crime against innocent civilians in the September 11<sup>th</sup> terrorist attacks were hundreds of times higher than the ones incidentally caused by the US counter-attacks against the Taliban. Besides, the civilians, who perished or suffered injuries in the US counter-attacks, could have avoided such consequence simply by evacuating the military targets upon the US ultimatum, so those who chose to remain in the vicinity of the military targets must be presumed to have done so at their own risk and peril, while the nearly 3,000 innocent civilians, which included nationals of the countries that had no quarrel with the Taliban at all, who were practically murdered in the September 11<sup>th</sup> terrorist attacks, were not given even the slightest warnings, let alone the chance to avoid the casualties and they did not choose to take the risk of the most sinister atrocious death by being buried alive **en masse**.

Justice, is a source of International law, does not reject the possibility to have recourse to a pre-emptive self-defense as the last resort<sup>38</sup> and in the Nicaragua Case, the ICJ did not make any ruling on or deal with the question of anticipatory self-defense only because this issue had not been raised, not because it dismissed such a concept. Besides, history of international relations has, as a matter of fact, witnessed a number of precedents along that line in the contemporary State practice,<sup>39</sup> and there also exist some principles in the legislation of civilized nations, which are very akin to the concept of an anticipatory self-defense.

Those who are hostile to the notion of a pre-emptive or anticipatory self-defense often raise a hypothetical pre-occupation on what if North Korea invades South Korea and China invades Taiwan under the banner of a pre-emptive or anticipatory self-defense?, which the first glance might raise the concerns of some people, but if one looks closely into this hypothesis, one would easily find that such a hypothesis is both absurd and completely improbable, because, in order to exercise the right of self-defense, the State claiming to use such a right must substantiate that it is under a real and impending danger of being aggressed by the State against whom it purports to exercise the right of self-defense, but it is obvious that Taiwan has neither the capability or possibility, nor a reason to invade or launch armed attacks against China,<sup>40</sup> nor South Korea to invade or attack North Korea.

It may be added here that the World Community abhors and

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<sup>38</sup> Cf. For instance, Gross, Emanuel "Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights versus the State's Duty to Protect its Citizens", Temple International and Comparative Law Journal, Fall 2001, p.1.

<sup>39</sup> NATO's military intervention in Kosovo and Israel's strategic military force policy aiming at neutralizing the terrorist organizations by targeting their leaders, etc., could be cited as ones.

<sup>40</sup> Which would manifestly be futile and suicidal.



condemns terrorism as a crime against Humanity,<sup>41</sup> which is “*unjustifiable under any circumstances*” because, contrary to the *jus in bello*, in order to spread terror, the terrorists deliberately choose innocent and defenseless civilians as their prime targets.<sup>42</sup> If terrorism could be used, instigated or master-minded by ruthless States or directly supported by them by condoning the acts of terrorism, or allowing their territories to be used as the bases for the terrorist operations or as the sites for terrorist training camps, or even indirectly in terms of a *post facto* assistance to the terrorists or their instigators by harboring, or giving them a safe haven or asylum, terrorism would never be eradicated, in which event the international community would be at the entire mercy of the terrorists and plunge into the abyss of total anarchy. No countries or governments should, therefore, be allowed to make use of or support terrorism in impunity. The Taliban Regime having, in violation of the principles of international law proclaimed by the UN,<sup>43</sup> manifestly supported terrorism by harboring Osama bin Laden and allowing him to organize and run terrorist training camps in various parts of Afghanistan and also

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<sup>41</sup> As may be seen from the proliferation of the resolutions of the UN Security Council and UN General Assembly that repeatedly reiterated the unequivocal condemnation of terrorism (Cf. *Inter alia*, Resolutions 2625(XXV) of the UN General Assembly and Resolution 1373(2001) of the UN Security Council (<http://www.un.org/terrorism/ga.htm> and <http://www.un.org/terrorism/sc.htm>))

<sup>42</sup> Because civilians are the easiest and the most vulnerable preys. Besides, taking civilians as the prime target would make the public feel constantly insecure due to the fact that terrorists are unseen enemies who are ready to mercilessly attack the innocent and defenseless civilians, anywhere and at any unexpected moment by the most atrocious means and try to cause the maximum possible disasters and casualties like in the cases of the September 11<sup>th</sup> terrorist attacks in New York and in Washington, D.C., and the terrorist attacks in well-packed buses and in a night club full of students, killing a large multitude of defenseless innocent civilians and students in Israel, etc..

<sup>43</sup> Cf., *inter alia*, Resolutions A/RES/48/122, A/RES/49/185, A/RES/50/186 and A/RES/52/133 of the UN General Assembly and Resolution S/RES/1373 (2001) of the UN Security Council, etc.

to finance the global terrorist network, especially the Al Qaeda,<sup>44</sup> and harbored<sup>45</sup> this master-minder of several terrorist attacks on the United States, including the September 11<sup>th</sup> terrorist attacks in New York and Washington D.C.<sup>46</sup> in violation of Resolution A/RES/54/164 of the UN General Assembly and Resolution S/RES/1373(2001) of the UN Security Council, could thus be held accountable for those atrocities, especially when the Taliban categorically refused to close down the terrorists training camps in Afghanistan and to extradite Osama bin Laden to the US in spite of the US ultimatum after the repeated and insistent requests for bin Laden's extradition.<sup>47</sup> The US counter-attacks were therefore quite legal not only as a reprisal, but also as a legitimate anticipatory self-defense,<sup>48</sup> *a fortiori* when the US attacks were exclusively limited to only

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<sup>44</sup> Madam Bhutto, the previous Prime Minister of Pakistan, already warned the free World of the potential danger of Osama bin Laden master-minded terrorist attacks of a large magnitude only a few years before the occurrence of September 11<sup>th</sup> terrorist attacks. (CNBC news on October 14<sup>th</sup>, 2001)

<sup>45</sup> To use the term of President George W. Bush.

<sup>46</sup> Bin Laden himself gave a hint to that effect in the CD roms that he has disseminated (CNN news on September 20<sup>th</sup>, 2001)

<sup>47</sup> The Taliban motivated their refusal to extradite Osama bin Laden by the argument that the US had no proof to substantiate that Osama bin Laden was involved in the terrorist attacks on the US, and that even if the US did have ones, it would still be out of question to let Osama bin Laden be tried in a non-Muslim country and that in the opinion of the Taliban Regime, Osama bin Laden was innocent. Under such delicate circumstances, if Osama bin Laden were really innocent, the normal course of action for him to take would be to prove his innocence in the court of law in an impartial non-Muslim country. Claiming to be entitled by the "*aut de dere, aut judicare*" principle to prosecute Osama bin Laden in the court of a Muslim country could not be a plausible solution to the problem, because it was obvious that the prosecution of Osama bin Laden would likely be a sham in a Muslim country's court, where Osama bin Laden would, in all likelihood, be venerated as a hero instead of being tried in a due process of law. Besides, under the prevailing international law, when and where there is a well-founded ground to believe that the prosecution could be a sham, the directly interested countries could demand the prosecution to take place in an impartial third country.

<sup>48</sup> Which is legally permissible in the event of an imminent threat of armed attack (N.B. In the Nicaragua Case, the ICJ did not make any ruling on or deal with the question of anticipatory self-defense only because this issue had not been raised.)

the military targets in compliance with the *jus in bello*,<sup>49</sup> and were designed to only exterminate the terrorist training camps and uproot the terrorist network in Afghanistan **to prevent future terrorist attacks** and also to neutralize the Taliban Regime's military potential that could and would jeopardize the life of the legally intervening US contingents, especially in the wake of the Taliban Regime's resolve not to surrender Osama bin Laden at all costs *even if they would have to fight to the last drop of their blood*.<sup>50</sup> It should also be added here that the United States and the allied forces attacked only the Taliban Regime and the terrorist strongholds, and did not wage war against Afghanistan *per se*.

### **The Legal Issue on the Requirement of a Prior Approval of the UN**

With regard to the **strict** requirement of a **prior** consent of the UN for the exercise of the right of self-defense, the partisans of such a contention were wrong, because the requirement by the UN Charter that the countries exercising the right of individual or collective self-defense must **promptly** inform the UN of such an action, implies that an exercise

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<sup>49</sup> The civilian casualties in the American assaults against the Taliban could have been spared, had those civilians quitted the military targets as they should and would normally have done upon the ultimatum preceding the impending military attacks. The civilians who refused to evacuate military targets under such circumstances would have to do so at their own risk and peril, in which case, according to the *jus in bello*, causing damages or even death to such civilians would not be a war crime, provided that the attacks on such military targets were really an impetus and that due precautions have been taken to avoid such casualties. If, however, the civilians could not leave the military targets because they were used by the Taliban regime as the human shield, it should have been the Taliban to blame and to be held accountable for those casualties, because they consciously and deliberately jeopardized and endangered the life of those civilians, otherwise the purposes of an ultimatum or of a declaration of war would be defeated. After all, under the penal law of any civilized nations, where an act is consciously committed when the perpetrator should have foreseen its consequence, such an act is tantamount to having been committed wantonly or intentionally. (Cf., for instance, Article 59, para. 2 of the Thai Penal Code, B.E. 2499)

<sup>50</sup> Declarations repeatedly made and reiterated on the CNN by the Taliban leadership.

of the right of self-defense could be made, if need be, **before** informing the UN. Account has to also be taken of the fact that on the spur of the moment in this case, the urgency of the matter did not permit the US to tarry, otherwise it would lose the element of surprise, and especially when it was obvious that, in such a highly politicized matter, it was obvious that a large number of UN member countries would surely use the delay tactic to holdback and neutralize, or at least dilute the efficiency and usefulness of any resolutions that the UN might eventually adopt.

Furthermore, there has obviously been a clear emerging trend of International Law or a *de lege ferenda* along the line that the approbation or authorization of a legitimate authority, such as the International Court of Justice or the United Nations, for an armed intervention can be given *post facto*. It was, in effect, precisely the case when the ICJ's ruling rejected the request by the Former Republic of Yugoslavia (FRY) for the indication of the interim provisional measures against the NATO alliances by mandating NATO to cease and pull back their military force in Yugoslavia and rejected that NATO had to compensate the FRY for the damage caused by their military intervention,<sup>51</sup> which was the Court's legal leeway around the law to allow NATO's military campaign in Yugoslavia to continue. In fact, there was strong support that NATO's military intervention in Kosovo did not entirely violate the UN Charter and international law. Besides, after NATO began its military campaign in Kosovo, the UN Security Council could have either ordered to terminate the campaign or monitor it. Since the UN did not terminate the campaign, they indirectly gave the impression that NATO had the support or at least a *post facto* approbation of the Security Council. Twelve out of fifteen members of the Security Council voted to reject the Russian resolution of March 26<sup>th</sup>, 1999, which was hostile to NATO's military intervention in Kosovo, thereby agreeing in effect that NATO's intervention was justified and could continue with the

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<sup>51</sup> Ibid.

support from the UN. Subsequently, on June 10<sup>th</sup>, 1999, the Security Council, in its Resolution 1244 that approved the Kosovo settlement, effectively ratified the NATO action, and formally gave NATO the Security Council's support.<sup>52</sup>

## Conclusion

It should also be added in conclusion that the purpose of the *jus in bello* in requiring combatants to wear uniforms and openly bear arms, and in prohibiting the use of distinctive signs to identify the protected NGOs, like the Red Cross and the Red Crescent Moon, for military operation purposes, is to avoid jeopardizing the life and security of civilians and those social workers, by enabling the combatants to distinguish military targets from non-military targets. Contemporary unconventional warfare conducted by irregular armies and unorganized forces such as the faceless guerrilla and terrorists who have neither the respect for the lives of defenseless innocent civilians, nor for the *jus in bello*, is nowadays common place and could not therefore be excluded from the application of the legal *criteria* and concept of an act of aggression,<sup>53</sup> otherwise the *jus ad bellum*, that regulates the use of force in international relations, would remain dead letter and unconventional warfare would be completely

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<sup>52</sup> The American Society of International Law, "NATO's Kosovo Intervention: Kosovo and the Law of Humanitarian Intervention." By Louis Henkin, October 1999.

<sup>53</sup> *A fortiori* when there still exist no universally accepted clear-cut and **exhaustive** legal definition of an aggression, which is applicable *erga omnes* under the prevailing *jus ad bellum*, the existing definition being in-exhaustive and still full of gaping lacunae, e.g. *inter alia*, with regard to a real and imminent threat of armed attacks. It was precisely on the basis of this notion of an anticipatory self-defense that President John F. Kennedy of the United States gave an ultimatum to the Soviet Union that the United States would launch a nuclear attack against the USSR, if the latter refused to remove the nuclear-warhead missiles from Cuba within 48 hours and would in all likelihood have carried out the threat if Soviet Union refused to concede to such demand, without waiting for the Soviet Union's attack to occur first. (N.B. Under the penal law of all civilized nations, an exercise of the right of self-defense is also permissible when the danger is obviously certain and imminent without having to wait for the occurrence of such danger.)

anarchic to the detriment of the World Community, which will, in that event, be at the entire mercy of terrorists for years and years to come. How else, for instance, could the free World combat the Anthrax disease terrorist attack, which has recently provoked a general panic in America, and other potential chemical and biological attacks, if not by tracking down their perpetrators and instigators to bring them to justice and by punishing the governments of the countries, which are behind or substantially involved in such diabolic cowardly indiscriminate attacks? Hence, the obligation of every State, enshrined in the General Assembly resolution 2625 (XXV), "... to refrain from organizing, supporting, promoting, financing, instigating, or tolerating ..., **terrorist**, ... against another State ...". To ensure efficacy and efficiency in the global fight against terrorism, a *sui generis* anti-terrorism legislation will be needed, because treating the terrorists as common law criminals, the way the US has done to the terrorists, who sabotaged the World Trade Center by planting and detonating a car bomb in its underground parking lot would be completely futile against the suicidal type of terrorist attacks, in which the perpetrators having perished in the attacks, the crime would have been committed in complete impunity. Hence, the need to hunt down and bring all accessories to the crime to justice. Under such a *sui generis* anti-terrorism legislation, the mere fact of belonging to or being a member of a terrorist clique or network should *per se* be criminally condemned and severely punished, there must not be a prescription for the crime of terrorism and a universal jurisdiction must be established in keeping with the prevailing State practice in this matter. Even an outrage of moral support should be prohibited because a furious sympathizing is only a short distance away from becoming militants.

In the ultimate analysis of the situation, the bitterest naked fact in this problem that Mankind is condemned to live with is that the World Community cannot afford to be at odds or on bad terms with Arab countries on account of the indispensable petroleum resources that the territories of such countries hold, while the Arab countries, being Muslim, cannot

afford, in their turn, not to show their solidarity with the Muslim countries and peoples in dispute with non-Muslim countries, regardless of the causes of the dispute. Besides, it is manifest that wayward bellicose countries that crave domination over other countries do still exist in the contemporary era and that such ruthless and hegemonic countries are apt to directly and indirectly utilize terrorism as the means to attain their tyrannous objective.

As long as not all countries in the World are genuinely willing to join their hands in the suppression of terrorism, some countries continue to openly and clandestinely harbor the terrorists, or give them an asylum or safe haven, suicidal terrorists are praised as heroes and venerated as martyrs, and enormous sums of money are given to their families as an incentive for the suicidal terrorists and a graveyard gift to their families, terrorism will never be eradicated. Under the prevailing circumstance freezing assets with terrorist links through fundamentalist militants<sup>54</sup> seems to be the only feasible sanction, but, alas, a sanction of this kind can have just limited effect that can only partially resolve the terrorism problems.

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