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Daniel H. Joyner
University of Alabama - School of Law, djoyner@law.ua.edu

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The Legality of U.S. Strikes Under International Law

By Daniel H. Joyner

As the United States continues the military phase of the recently proclaimed "war on terrorism," attention has turned, among international law scholars, to the legality of U.S. strikes within the territory of countries that the U.S. claims harbor or aid terrorist groups.

And while international law concerns routinely take a back seat in the minds of policy and law makers to matters of perceived policy imperative, when the dust from the current campaign inevitably clears, we will be forced to live with the decisions we make now, and with their precedential effect on international relations, which is likely to be significant. Thus, a moment's reflection upon the degree to which our current and prospective actions are in harmony with established principles of international law is warranted.

The Right to Self-Defense

The U.S. ambassador to the United Nations, John Negroponte, recently delivered a letter to the U.N. Security Council in which was stated the official U.S. position that military strikes thus far executed in Afghanistan have been carried out in reliance on the self-defense article of the U.N. Charter. The letter stated further that "[w]e may find that our self-defense requires further actions with respect to other organizations and other states,"[1] though it did not specify which states are being considered as potential targets.

The substantive law for examining any international act of force by states that are members of the United Nations can be found in various provisions contained in the United Nations Charter. The most comprehensive of these provisions can be found in Article 2(4) of the Charter which states "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."

This provision has come to be understood as a broad and binding nonintervention norm and has generally been interpreted by international legal scholars to provide a blanket prohibition on international acts of force by members of the United Nations (including, notably, the United States and the United Kingdom) that violate, directly or indirectly, the territory or internal sovereignty of another state.

However, the Charter does provide, in Article 51 and Chapter VII, limited exceptions to this blanket prohibition. These exceptions are to be found in cases of legitimate self-defense and authorization of force by the U.N. Security Council.

The right of self-defense under the Charter authorizes defensive action by the victim state "if an armed attack occurs against a member of the United Nations."[2] The words "if an armed attack occurs" have traditionally been interpreted to mean that defensive action can only be taken after a state has actually been attacked by another state. Thus, textually, there is little support for a right of preemptive or anticipatory self-defense in the United Nations Charter.

The Facts

At this point, an examination of the facts is necessary. In this case, there has undeniably been a serious violation of the territorial integrity of the United States from a foreign source constituting an armed attack on U.S. soil. This prompts many, including many in positions of policymaking, to feel that international use of force by the United States directed at a variety of terrorist organizations within a variety of foreign states with varying degrees of connection to the Sept. 11 attacks is completely justifiable on self-defense grounds.

It is at this juncture, however, that the facts of the current case begin to pose analytical problems for examining the legality of current and future U.S. military strikes under international law. The traditional paradigm for invocation of the self-defense clause of the U.N. Charter has, of course, been a response to an attack on the victim state traceable to a foreign nation against whom the victim state now plans to retaliate for the purpose of repulsing the aggression and ceasing its further continuance. The notable difference in the present case, of course, is that the links to state sponsorship of the terrorists who carried out the Sept. 11 attacks are more tenuous and the support itself (though further investigation may reveal otherwise) seems at this point to have been limited to knowledgeable failure to expel terrorist cells from within state borders on one end of the spectrum and to active financial backing and sympathy on the other end.

These less than direct contacts with the actual prosecution of the Sept. 11 attacks against the United States make the case for a broad war against state aiders and abettors of terrorism a novel proposition, and one the legality of which is, quite frankly, an arguable question under a strict textual reading of the self-defense provision of the U.N. Charter, and arguments in support of the legality of such a campaign, it must be said, grow less tenable as the links between a state and the terrorist cells actually involved in the acts of terrorism become more distant.

As the facts are currently understood, and without the benefit of full disclosure of evidence the United States and its allies have thus far gathered, it seems that a compelling case has been made that the Al Qaeda organization, headed by Osama bin Laden, was materially connected to the acts of terrorism on U.S. soil on Sept. 11. It has also been established that not only have bin Laden and Al Qaeda been given sanctuary in Afghanistan in full knowledge of the general nature of their terrorist activities (as witnessed by the rash of training camps across the country, a knowledge of the existence and purpose of which cannot realistically be disavowed by the Taliban leadership), but there are further reports of evidence that Al Qaeda has enjoyed financial and other support, through both direct and indirect means, from the Taliban government.

Under these facts, much of the current U.S. led military campaign against Al Qaeda and other targets located within Afghanistan is arguably justifiable and rests upon a reasonably sound international law foundation. Assuming that material facts are verifiable, such a legal justification would proceed as follows: attacks on U.S. soil took place; Al Qaeda was material in planning and carrying out the attacks; the Taliban government both actively and passively supported Al Qaeda through harboring Al Qaeda in Afghan territory and otherwise facilitating their operations.[3] These facts, coupled with later statements by Taliban officials endorsing the Sept. 11 actions,[4] arguably give rise to a greater degree of state liability under international law for acts committed by non-state actors than would have arisen had Al Qaeda simply been based in Afghanistan and not enjoyed the de facto government's substantive support and open approbation.[5]

In the opinion of the present author, a strong argument can be made that due to the significant level of support given Al Qaeda by the Taliban, Afghanistan's ruling regime rendered itself legally susceptible to resulting military measures taken by the United States in its territory, at least to the degree that those measures expressly targeted Al Qaeda and related forces located therein.[6]

A Larger War on Terrorism

Thus far in the war on terrorism, the United States is on relatively stable legal ground.[7] However, a wider war on terrorism, which statements of high-ranking U.S. officials would seem to indicate is in its formative stages in U.S. policymaking circles, presents more significant analytical problems. The parameters of such a wider and prolonged war hav not been made entirely clear, but as the scope of the campaign enlarges both to include bringing to justice all terrorist cells affiliated with Al Qaeda, be they in whatever nation they might, and even further to

confront and subdue other terrorist groups throughout the Middle East and elsewhere who have little or no direct connection to the Sept. 11 attacks, the U.S. and its allies are likely to find both international political support for their anti-terror coalition waning and international legal criticism intensifying.

However, the practice of states in the area of international use of force has established considerable precedent for expanding the recognized scope of the right of self-defense under the U.N. Charter to include acts of force by a state which has not yet been attacked but which, upon compelling evidence, believes that an attack by another state is imminent. Examples of such practice include Israel's 1981 bombing of a nuclear reactor in Iraq, which Israel claimed was justified as anticipatory self-defense because the reactor was to be used to manufacture nuclear weapons for use against Israel (though the Israeli attack was later censured by the Security Council as premature in light of the fact that the reactor had not yet come on line, and thus was not a potential threat at the time it was attacked). The United States has also invoked the doctrine of anticipatory self-defense to justify its actions in the past, most relevantly in the cases of the 1986 bombing of Libya, which the United States claimed was a preemptive strike on the capabilities of state-sponsored terrorists who had carried out a bomb attack on U.S. soldiers at a nightclub in Berlin, and the 1998 missile attacks in Afghanistan and Sudan following the bombings of U.S. embassies in Tanzania and Kenya.

As previously noted, the United States and its allies are dealing with a largely revolutionary paradigm of armed aggression and the legality of responses thereto. The magnitude of the terrorist attacks on the United States and the resulting loss of life and collateral effects on the nation have been unprecedented. So too is the task of uncovering the identities of the attackers and their web of support and funding, some

of which is bound to be traceable to individuals or agencies with state attributes. And while, traditionally, acts of pure reprisal by a state which has been the victim of a terrorist attack, against another state due to the terrorists' origin therein have not been viewed as permissible under international law, never has there been a terrorist attack the character of which has been so comparable to a state-sponsored act of war in its destructive impact.[8]

Furthermore, the continued statements of such terrorist groups, notably from the Al Qaeda organization, but also from other fundamentalist groups not directly associated with bin Laden, make clear that the Sept. 11 attacks were not isolated events and that a continued and very real threat from these organizations yet exists, making legitimate desires by the United States, which has been explicitly mentioned in these threats and perhaps other potential target states, to pursue preemptive action against the terrorist groups themselves and states without whose support such future attacks would be impossible.[9]

This "new breed" of terrorists, whose force capability has been proven to be on par with direct state action, may indeed require a progression in the law of international use of force in order to clarify the doctrine of self-defense to unambiguously include within its legitimizing ambit preemptive acts of force against terrorist organizations within other states.

However, to justify violations of the territorial sovereignty of foreign states and the forceful apprehension or elimination of terrorists and their supporters within their borders under a doctrine of anticipatory self-defense, the presence of three key elements is likely to be required absolutely by the international law community.

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Direct State Sponsorship

The first is direct state sponsorship. It is probable that a finding of knowledgeable failure by a state to expel terrorist groups from its borders will not be sufficient to justify the invocation of the doctrine of anticipatory self-defense in the forceful intervention by the United States and/or its allies into the territory of the target state. Such a defense, if accepted by the international community, would cast far too wide a net over potential candidates for U.S. intervention, and would include many states in the Middle East and elsewhere who desire to aid in a global campaign against terrorism, but who are unable to crack down seriously on known terrorist organizations in their countries because they lack the enforcement capabilities to carry out such a broad domestic police action, which if attempted would inevitably provoke such groups to retaliate, thus escalating conflict in the region and possibly destabilizing legitimate and relatively progressive moderate governments.

Indeed, states like Egypt and Saudi Arabia, while cognizant of the existence of terrorist cells within their boundaries cannot realistically be expected to root out all such groups, even if put under considerable diplomatic and economic pressure by the United States and the international community. An analogy to organized crime syndicates in U.S. cities during the 1920s seems apt, but without the possibility of rescue by in this case nonexistent super-national regulators. Some, including former Secretary of State Henry Kissinger, believe the United States should fill such a role and provide assurances of added security to bolster domestic crackdown efforts.[10] This seems, however, to be a formula for excessive U.S. force dilution around the world unparalleled in other proposals put forward thus far. In the present author's opinion, it is entirely unrealistic, and would present serious national sovereignty and military mission concerns, for the United States to be put in a position of providing substantial domestic policing support for nations attempting to crack down on terrorist elements within their borders.[11]

Thus, a standard of knowledgeable failure to expel would leave to the United States and its allies a great deal of discretion regarding which states are worthy of being the targets of anti-terrorism outside intervention, and on what scale.

While this may be palatable to those who trust the judgement of the great western powers in choosing where and when to use force, the purpose of having a body of international law covering the area of international use of force (which was a primary goal of the United Nations Charter) has always been to assure that the acts of every individual state will be measured by the same standard without regard to economic status or military might. Such a non-limiting standard would seriously weaken the restrictions set forth in Article 2(4) of the U.N. Charter and would establish a dangerous precedent upon which other states could justify interventions based on the fact alone of a target state's failure to quell known terrorist movements within its borders.

However, as the famed *Nicaragua* decision of the International Court of Justice makes clear, the liability of a state may be established for interventions into the territory of another state conducted by non-state agents but with state support.[12] Thus, if a clear money trail could be established, linking a state government to willful or knowledgeable funding of the relevant terrorist activities, this fact would present a strong argument that the funding state has materially participated in the acts themselves and thus that invasions of their territory for the purpose of killing or apprehending the terrorists would be defensible under a doctrine of anticipatory self-defense.

Future Terrorist Attacks

The second element the presence of which will likely be required is compelling evidence of imminent future attacks by the specific terrorist groups to be targeted. Interventions into the territory of other states cannot be justified on purely punitive or retaliatory grounds. As the name implies, anticipatory self-defense will only

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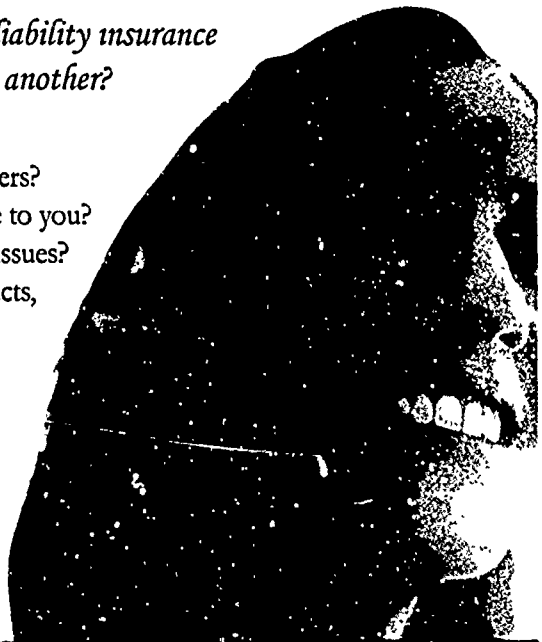

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be invocable upon a finding of clear evidence that an attack on the state or states wishing to use force under that doctrine is imminent. This evidence need not necessarily be shared with all who wish access to it, but disclosure to responsible, friendly foreign governments will be useful not only in garnering increased international support for the proposed intervention, but also in allowing objective scrutiny of the evidence, which will in turn aid the intervening state in its later claims of anticipatory self defense against counterclaims of *post-hoc* manufacture of incriminating evidence to justify strikes.

Proportionality

The final element of any assertion of self-defense is proportionality. Responses to aggression must not be significantly disproportionate to the underlying aggressive actions themselves. This is most importantly gauged by the degree to which civilian property is incidentally destroyed and lives are lost in excess of a reasonable calculus based on the gravity of the attacks to which such force is in response. In the case of the recent attacks on New York City and Washington, D.C., that standard will likely leave considerable leeway for U.S. and allied response, due to the magnitude of the destruction and number of lives lost, which should have a material bearing on the calculus of threat which such actions seek to preempt. However, as the anti-terror campaign progresses, the United States will need to be mindful of this standard both in its selection of targets, including number and character of target states, and in its use of ordnance, lest the response to the attacks on U.S. soil and the continued threats to U.S. interests of which those attacks are indicative be deemed to have exceeded its concededly broad mandate.

Conclusion

If all three of the above elements are not present, the doctrine of anticipatory self-defense will likely fail as a justifying principle, and liability under international law for non-compliant international uses of force by United Nations members will likely result, if those actions are not taken with the legitimizing sanction of the U.N. Security Council through resolution grounded in Article VII of the U.N. Charter. This fact could very likely limit the currently envisioned U.S.-led campaign against terror in its selection of targets and in its duration, which will be unwelcome restrictions to policy makers in Washington and other capitals — but one must consider the alternative.

Unrestrained international uses of force and weak international law constraints have brought about untold suffering over the centuries, as the sole discretion regarding whether or not military operations against a foreign nation were justifiable, if a part of strategic calculus at all, has largely been left to the powerful states who had the resources necessary for such campaigns. On some occasions, outside evaluation of the merits of such decisions yields strong international support for the resulting intervening actions, as in the present case. However, at the current stage in the evolution of international law, in which international norms are often enforced only through voluntary coalitions of powerful states, if those same states do not voluntarily regulate themselves and bring their own behavior into compliance with international law regarding legitimate uses of force, their subsequent attempts to regulate the behavior of less well meaning states by reference to the same legal principles will surely be severely compromised.

No one is benefited from an international system in which hypocrisy of the powerful reigns, and especially not in an area of international interaction as vital as communal regulation of international use of force. Therefore, the great nations of the world, who are now engaged in a cause the worthiness of which few doubt, must temper their justified outrage with respect for international law and work within its limiting, but necessary, confines as an investment in their own security and protection from those states who will in the future be mindful of precedents set now, and who may seek to engage in regrettable acts against which the world will be able to assert only increasingly hollow claims of affronted principle. ●

Daniel H. Joyner is an associate with Alston & Bird LLP, Atlanta, Ga. Joyner received his B.A. from Brigham Young University and his J.D. from Duke Law School. Joyner is the author of a number of law journal articles on international law topics. The opinions expressed herein are solely those of the author and do not necessarily represent the opinions of Alston & Bird LLP.

ENDNOTES

1. UN Doc. S/2001/946, available at http://www.un.int/usa/s-2001-946.htm.
2. UN Charter, Art. 51.
3. In Ambassador Negroponte's words "[t]he attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad." UN Doc. S/2001/946, available at http://www.un.int/usa/s-2001-946.htm.
4. See "Mullah Omar – in his own words," Guardian, September 26, 2001, Features, pg.3 (interview translation).
5. See Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, INTERNATIONAL & COMPARATIVE LAW QUARTERLY, Volume 51(2) (2002). There are of course questions concerning the status of the Taliban regime, officially recognized by only a handful of states, under international law and whether that regime had developed the requisite attributes for state responsibility to attach. However, with their forceful passing and with the emergence of a relatively Western friendly and beholden government in Kabul, it is unlikely that a cognizable challenge to coalition actions in Afghanistan will be brought within the foreseeable future. See also *United States Diplomatic and Consular Staff in Tehran* (1980) I.C.J. Rep. 3 at 36, para. 74 (Iranian government's liability for the actions of non-state actors arising from endorsement of those actors' deeds).
6. Some elements of U.S military action in Afghanistan, in particular coalition actions in pursuance of strategic collaboration with internal opposition forces with the overt intention of overthrowing the de facto government of Afghanistan, may prove more difficult to reconcile with the non-intervention norm embodied in Article 2(4) of the United Nations Charter and with classical international law which generally prohibits international involvement in civil wars. See the *Nicaragua* Case, I.C.J. Rep. 1986.
7. This article will not address the merits of claims of justification under law forwarded by allies of the United States in the current strikes on Afghanistan. Those claims are based largely on Article V of the treaty establishing the North Atlantic Treaty Organization (NATO), which was invoked shortly after September 11th, and which purports to authorize all NATO members to come to the aid of a member who is attacked. This recital of authority is however clearly controverted by the same members' obligations under the UN Charter, discussed previously, which by their terms preempt all other obligations in the area of international use of force. For more on this point, see Daniel H. Joyner , *The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm*, forthcoming in the EUROPEAN JOURNAL OF INTERNATIONAL LAW. Thus, justification for non-U.S. involvement in military strikes in Afghanistan in the war on terrorism can only be based on the doctrine of anticipatory self defense, discussed in more detail hereafter.
8. See Michael Akehurst, AKEHURSTS MODERN INTRODUCTION TO INTERNATIONAL LAW, 316 (7th edition, Peter Malanczuk ed.) (1997).
9. See *Bin Laden's sole post-September 11 TV interview aired: Fugitive al Qaeda leader vows fight to the death*, CNN.com, January 31, 2002, available at http://www.cnn.com/2002/US/01/31/gen.binladen.interview/; *Voice of radical Islam grows louder in Indonesia*, CNN.com, October 3, 2001, available at http://www.cnn.com/2001/WORLD/asiapcf/southeast/10/03/indo.radicals/index.html.
10. From a speech given by Secretary Kissinger at a Carnegie Bosch conference October 5, 2001.
11. See *Court Challenge for U.S. Troops*, CNN.com, February 6, 2002, available at http://www.cnn.com/2002/WORLD/asiapcf/southeast/02/05/phil.legal.us/index.html.
12. See 1986 I.C.J. Reports 14 at 103, para. 195 in which the Court concluded that legitimate self-defense could be pleaded by a state responding to 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 (*inter alia*) an actual armed attack conducted by regular armed forces, or its substantial involvement therein."