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The Right of Self-Defence under International
Law—the Response to the Terrorist Attacks of
11 September

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Response to the Terrorist Attacks of 11 September

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Introduction

The events of 11 September and the subsequent military response by the United States and its allies raise some difficult issues in international law. Does an attack by a non-state terrorist group give rise to the right of self-defence as understood under international law? Under what circumstances was the Taliban regime as the Afghani government itself a legitimate target for military action under the self-defence doctrine? To what extent was the United States entitled to dictate the terms by which the Taliban regime should act before the military action would cease against it and Al Qaeda bases on Afghani soil?

Only the first issue can be answered—yes—with any degree of confidence. The others are clouded with uncertainty. To some extent this uncertainty reflects the shift of international law away from an emphasis on regulating relations between sovereign states (countries) towards having to incorporate the actions of non-state groups within the legal framework. As part of this shift, the responsibility of governments for the actions of non-state groups such as the international terrorist network Al Qaeda is receiving increasing attention. The periodic use of military force by the United States against such organizations and so-called 'state sponsors of terrorism' during the 1990s appears to be forcing a change in accepted state practice and hence (arguably) influencing the boundaries of international customary law.¹ However, given that the United States is likely to be motivated primarily by national interests, it would be useful for the United Nations General Assembly to authorise the International Law Commission to codify exactly what are the principles applying to the doctrine of self-defence under international law.

This paper begins with a short chronology tracing the major relevant events from 11 September through to the ongoing airstrikes by the United States and its allies during October. This is followed by a review of the status of terrorism under international law. It then looks at the question of legal responsibility for the 11 September attacks, including under what circumstances the Taliban might be deemed to share some form of responsibility. The paper goes on to examine the legal use of force, and whether the events of 11 September give rise to the right of self-defence. Finally it considers what the practical limits of self-defence are in the present case, including role of the United Nations Security Council.

Chronology

11 September—Four commercial United States jetliners on domestic routes are hijacked. The hijackers issue no demands to authorities. Two of the jets are flown into the twin towers of the World Trade Centre in New York, one into the Pentagon in Washington DC and another crashes in rural Pennsylvania. Around 3 000 people are killed. No organisation claims responsibility for the hijackings. Representatives of the Taliban government of Afghanistan immediately condemn the attacks.² Later, Osama bin Laden also denies involvement.³

12 September—The United Nations General Assembly and Security Council pass resolutions condemning the events of 11 September as acts of terrorism.⁴ The resolutions call for the 'perpetrators, organizers and sponsors' to be '[brought] to justice' and states that those responsible for 'aiding, supporting or harbouring' such persons 'will be held accountable'.

14 September—the United States Congress authorises the use of military force against those involved in the attacks, including those who 'harboured' such persons or organisations 'so as to prevent any future acts of international terrorism'.⁵ Also on 14 September, the Australian Government announces the activation of the ANZUS treaty.⁶

17 September—Both Houses of the Australian Commonwealth Parliament pass a resolution which, amongst other things, states that Parliament 'fully endorses the commitment of the Australian Government to support within Australia's capabilities United States-led action against those responsible for these tragic attacks'.⁷

20 September—In an address to a Joint session of Congress,⁸ United States' President George Bush states that 'the evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as Al Qaeda...they are the same murderers indicted for bombing American embassies in Tanzania and Kenya, and responsible for bombing the USS Cole'. Osama bin Laden is named as the leader of Al Qaeda. President Bush demands that the Taliban must 'deliver to the United States authorities all the leaders of Al Qaeda who hide in your land...immediately and permanently close every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities'. Failure to immediately hand over the 'terrorists' would result in the Taliban 'sharing their fate'. According to President Bush, the 'war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.'

21 September—The Taliban refuse to comply with the United States demands unless evidence is produced.⁹ The United States rejects the Taliban's position, stating that bin Laden has already been indicted in the United States for the bombings of United States embassies in Kenya and Tanzania in 1998.

6 October—The Taliban offers to detain bin Laden and try him under Islamic law in Afghanistan if the United States makes a formal request and presents them with sufficient evidence. This proposal is rejected by the United States who insist on the fulfilment of their 20 September demands.¹⁰

7 October—Airstrikes by United States and British planes commence against Al Qaeda training camps and military installations of the Taliban regime in Afghanistan. According to President Bush, 'these carefully targeted actions are designed to disrupt the use of Afghanistan as a terrorist base of operations and to attack the military capability of the Taliban regime'.¹¹

7 October—The United States representative to the United Nations delivers a letter to the President of the United Nations Security Council citing the right of self-defence as justification for the airstrikes.¹² The latter states that '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'. It also states that 'we may find that our self-defence requires further actions with respect to other organizations and other States'.

12 October—The United States ceases strikes for one day, pending a response to a renewed demand to hand over Osama bin Laden and the Al Qaeda members. The demand is refused.

13 October—Ongoing airstrikes resume.

November/December—Taliban and Al Qaeda forces are progressively driven out from former strongholds by a combination of Afghani anti-Taliban forces and United States airstrikes. By the end of December, anti-Taliban forces effectively control Afghanistan. Neither the Taliban leader, Mohammed Omar, nor bin Laden are captured or confirmed as killed and their whereabouts are unknown.

14 November—the United Nations Security Council pass a resolution expressing 'strong support for the efforts of the Afghan people to establish a new and transitional administration leading to the formation of a new government'.¹³

22 December—A transitional Afghani administration is sworn in Kabul.

International Terrorism and International Law

The international community has never succeeded in developing an accepted comprehensive definition of terrorism. During the 1970s and 1980s, the United Nations attempts to define the term foundered mainly due to differences of opinion between various members about the use of violence in the context of conflicts over national liberation and self-determination.

Terrorism is defined by the Australian Defence Force as:

The use or threatened use of violence for political ends, or any use or threatened use of violence for the purpose of putting the public or any section of the public in fear.¹⁴

This is broadly consistent with most definitions in academic literature which generally require two elements:

1. actual or threatened violence against civilians or persons not actively taking part in hostilities, and
2. the implicit or explicit purpose of the act is to intimidate or compel a population, government or organisation into some course of action.

International law has traditionally dealt with the duties and rights of states in their relations with each other. This is reflected in the fact that most international law dealing with international terrorism¹⁵ concentrates on the duties of states to prevent and punish terrorism. Certainly terrorism in all its forms is considered a criminal act under international law, but historically terrorists have generally been punished under the domestic law of the country harmed by the specific act in question. This said, the mass-murders committed on 11 September by the hijackers probably constituted a crime against humanity under Article 7(a) of the Rome Statute of the International Criminal Court (ICC).¹⁶ However as the ICC only has jurisdiction over crimes committed *after* the Rome Statute comes into force—it is still seventeen ratifications short of the sixty required - the ICC has no immediate relevance to the current situation.¹⁷

The first major step in the modern era in outlawing terrorism under international law was made through the *Convention for the Prevention and Punishment of Terrorism*, developed by the League of Nations in the 1930s. However, the Convention never came into force. A number of conventions were developed during the 1960s and 1970s to address specific types of violent acts such as aircraft hijacking, kidnapping of diplomats and the taking of hostages. These generally obligated parties to the Convention to either prosecute offenders¹⁸ or extradite them to countries in which the act in question took place. The aircraft hijacking conventions in particular have a large number of parties to them, including Australia, Afghanistan and the United States.

In spite of its failure to define terrorism, in 1985 the United Nations General Assembly adopted a resolution:

unequivocally condemn[ing], as criminal, all acts, methods and practices of terrorism wherever and by whomever committed...[and calling]s upon all States to *fulfil their obligations under international law* to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts. [Italics added by author]¹⁹

Similar language can be found in any number of subsequent General Assembly and Security Council resolutions over the last fifteen years. Many of these resolutions also state that terrorism is contrary to the purposes and the principles of the United Nations and represent a 'threat to international peace and security'.

From the mid 1990s, there has been a concerted effort by the United Nations to develop a more comprehensive approach to combating terrorism and this has resulted in the 1997 *International Convention for the Suppression of Terrorist Bombings* (the Bombing Convention) and the 1997 *International Convention for the Suppression of the Financing of Terrorism* (the Financing Convention).

The Bombing Convention came into force in May 2001. Australia,²⁰ Afghanistan and the United States are not parties to this convention, although the United States has signed but not ratified it. Under this Convention, a person commits an offence if they unlawfully and intentionally use an explosive or lethal device against a public place, a government facility, infrastructure, or transport craft or system either with the intent to cause death or serious bodily injury or extensive destruction of such a place, facility or system resulting in major economic loss. However, acts that occur within the boundaries of a country and do not involve foreign nations do not come within the Convention, nor do acts by armed forces involved in armed conflict.²¹

The Bombing Convention aims to deny safe havens to persons wanted for terrorist bombings (including accomplices)²² by obligating each state party to prosecute such persons if it does not extradite them to another state that has issued an extradition request. A country cannot decline to extradite a person on the basis that a bombing within the meaning of the convention was a 'political offence'. Importantly, parties to the Bombing Convention are also obliged to take all practical measures to prevent preparation of terrorist acts where they take place within their territories.

The Financing Convention is not yet in force and again, Australia, Afghanistan and the United States, are not parties to this Convention, although Australia and the United States have signed but not ratified it.

The Financing Convention provides that an offence occurs where a person unlawfully provides or collects funds with the intention that the funds should be used or in the knowledge that they are to be used to carry out various acts. These acts include an offence under the other various 'terrorist conventions' or any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an act is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. Accomplices, defined in a similar way as in the Bombing Convention, are also deemed as committing an offence. Again, acts that occur within the boundaries of a country and do not involve foreign nationals do not come within the Convention, nor do acts by armed forces involved in armed conflict.

The Convention obligates states parties either to prosecute or to extradite persons accused of funding terrorist activities, and requires banks to enact measures to identify suspect transactions. It also forbids the use by a country of its bank law secrecy laws as an excuse for not providing assistance to other Parties in their investigations of possible offences.²³

Individual and State Legal Responsibility for 11 September

Since early October, the United States has maintained that it has firm evidence that Osama bin Laden and the Al Qaeda network were responsible for the attack. However, perhaps the fullest account of the evidence has been released by Britain.²⁴ In summary, this evidence includes the apparent ringleader of the hijackers as being a member of the largest constituent group within Al Qaeda, a senior Al Qaeda lieutenant planning the details of the attack, and intercepts of various telephone calls and money trails. Since then, the most potent evidence has been the (poor quality) video that features bin Laden discussing how the 11 September attacks were planned. Items such as flight-simulator programs and lists of United States flight schools have also been recovered in Afghanistan as anti-Taliban forces progressively captured various Taliban and Al Qaeda facilities during November and December.²⁵

The Australian Prime Minister described the evidence shown to him in October by the US Ambassador to Australia as 'collectively [amounting] to a very compelling case in support of the allegations concerning bin Laden and his terrorist organisation'.²⁶ Around the same time, Pakistan, one of the few countries to maintain regular diplomatic relations with the Taliban, has been reporting as acknowledging the strength of the evidence against Osama bin Laden.²⁷ Bin Laden has denied involvement in the 11 September attacks, as well as earlier attacks against United States nationals.²⁸ However, for the purposes of argument, it is assumed that the evidence mentioned above exists that indicates that at least certain elements of the senior Al Qaeda hierarchy, including bin Laden, may have been involved in the planning and facilitation of the 11 September attacks.

But what responsibility does the Taliban regime have? It seems clear that Al Qaeda have established training camps in Afghanistan with the acquiescence of the Taliban. The Taliban have failed to comply with Security Council resolutions demanding the closure of all camps where terrorists are trained²⁹ and the surrender of Osama bin Laden to stand trial for the bombings of United States embassies in Kenya and Tanzania in 1998.³⁰ Immediately after the 11 September attacks, the Taliban denied that they have permitted Osama bin Laden to use Afghan territory 'to launch any attack on any government around the world'.³¹ While the United States has not directly asserted that the Taliban leadership, or elements of it, knew of the attacks beforehand, can they nonetheless be held responsible under international law for the attacks?

In the case of *Nicaragua v United States of America*,³² the International Court of Justice found that the United States government provided weapons, finance and other logistical assistance to guerilla forces who carried out ongoing attacks against both Nicaraguan

armed forces and civilians in Nicaragua. The Court ruled that the actions of the United States did not constitute an attack by it on Nicaragua.³³ The Court found for the United States to have legal responsibility under international law for the attack, it must have effective control over the group or groups carrying out the attacks. However, the Court did not provide any real guidance on what constitute the lower limits of effective control.³⁴

More recently, the issue was considered by the Appeals Court of the International Criminal Tribunal for the former Yugoslavia in *The Prosecutor v Dusko Tadic*,³⁵ where the question was whether the armed forces of Serbian Bosnia were under the control of the former Yugoslavian Republic. The Court found that the 'effective control test' used in *Nicaragua* was 'at variance' with judicial state practice in relation to the activities of paramilitary groups. Unfortunately again the Tribunal does not provide any real detail on what the test should be. However, it did comment that:

on the basis of the International Law Commission's Draft on State Responsibility, [the Tribunal] found that international law on State responsibility is founded on a realistic concept of accountability which transcends legal formalities. A State is responsible for acts by individuals who make up an organised group under its overall control irrespective of whether or not it issued specific instructions.³⁶

This comment is likely based on Article 8 of draft articles on Responsibility of States for Internationally Wrongful Acts³⁷ which states:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that in carrying out the conduct.

It is worth noting that the 'State' does not necessarily mean the duly authorised activities of the government or its authorities. Under Article 7 of the draft articles, 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. It can be argued that at least bin Laden and some other senior Al Qaeda figures were a de-facto part of the Taliban government. Al Qaeda is generally accepted as providing the Taliban with significant financial and military support. Moreover, according to the report of the United Nations Secretary General, the Al Qaeda leadership exercised a markedly increased degree of influence over Taliban political, social and military policy during the course of 2001 by means of significant participation in the Taliban's decision-making processes.³⁸ This influence manifested itself in matters such as the Taliban's supreme leader stating his support for a global Jihad, as advocated by bin Laden.³⁹ It is also hard to argue the Taliban leadership were not clearly aware of the potential implications of hosting Al Qaeda. For example, the United Nations Secretary General has said:⁴⁰

my Personal Representative time and again exhorted the Taliban to hand over Bin Laden in compliance with [the Security Council resolutions], and repeatedly spelled out the consequences that were likely to ensue from their continued refusal to do so. He

specifically warned them that any incident similar to those attributed to Osama bin Laden in the past would have catastrophic consequences for the Taliban and for the Afghans.

This all suggests that, although the Taliban leadership may have been completely unaware of the planning of the 11 September attack, their failure to act in the face evidence of past Al Qaeda attacks and of binding Security Council resolutions means that there must bear significant responsibility under international law for 11 September. This conclusion is supported by discussion in academic writings as to whether the *Nicaragua* effective control test should be modified in cases like the attacks of 11 September. For example, it has been suggested that an attenuated (lowered) standard:

may be particularly appropriate when the non-state actor is known by all to be a highly dangerous and readily capable and willing of initiating attacks.⁴¹

It appears that Al Qaeda would readily fit into 'capable and willing' category, particularly if we assume Osama bin Laden is truly the leader or primary backer of the organisation.

The Legal Use of Force in International law

The Charter of the United Nations is one of the world's most important treaties. Ratification of the Charter is a prerequisite to membership of the United Nations. The Charter sets out the obligations of members and, amongst other matters, establishes the Security Council.

Article 2(4) of the Charter states:

All 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 other manner inconsistent with the purposes of the United Nations.

Essentially, this eliminates the concept of a 'just war'. The use of force, or the threat of it, by a state is no longer a legitimate means of dealing with a dispute with another state.

However, Article 2(4) does not prevent a country from defending itself in response to acts of aggression. Article 51 states:

Nothing in the present Charter shall impair the *inherent right of individual or collective self-defence if an armed attack* occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Alternatively, force may be used by a state or coalition of states in order to 'maintain peace and security' if this is specifically authorised by the Security Council under Article 42 of the Charter. Article 42 was used, for example, to authorise the military response by the United States and its allies against Iraq to drive it out of Kuwait in the so-called 'gulf-war' of 1990–91. More recently, force has been used without express Article 42 authorisation in so-called 'humanitarian intervention', where NATO conducted sustained airstrikes against the Federal Republic of Yugoslavia during 1999 in reaction to the civil conflict in Kosovo and the widespread killing of Kosovo Albanians.⁴²

Is the Doctrine of Self-Defence Applicable?

The United States has said that its military action (use of force) in Afghanistan constitutes acts of self-defence rather than being reprisals or punishment. This is not the first time the US has taken military action in response to a terrorist act ostensibly for the reason of self-defence. In 1998, it launched missile strikes on Afghanistan and Sudan in response to the 1998 bombings of its embassies in Kenya and Tanzania.⁴³ In that case, about 100 tomahawk missiles were fired at seven alleged training camps in Afghanistan and an alleged biological weapons plant in Sudan. In these cases, American officials justified these attacks as required to prevent Al Qaeda from being able to launch further attacks as 'there was evidence that they were planning operations against specific (unnamed) US targets'.⁴⁴

There has been some academic debate as to whether the concept of 'armed attack' as contained in Article 51 must originate from a State (government) rather than a non-state group like Al Qaeda. Security Council resolution 1368 of 12 September is ambiguous on the issue. In its preamble, the resolution 'recogni[s]es the inherent right of individual or collective self-defence in accordance with the Charter', but in the operative part of the resolution describes the attacks as 'terrorist attacks' (not armed attacks) which 'represent a threat to international peace and security'. In summary, the resolution does not explicitly recognise that the right of self-defence applies in relation to any parties as a consequence of the 11 September attacks.

In the author's view, well-organised terrorist groups with the means to reach across international borders to inflict significant damage on a country on an ongoing basis (which Al Qaeda arguably have) must represent the sort of threat against which self-defence is legitimate if the doctrine is to have any practical contemporary value. There are no obvious examples of United Nations members claiming that the 1998 missile strikes against Al Qaeda camps could not be acts of self-defence because the alleged perpetrators of the embassy bombings were a non-state group. State practice would therefore seem to support the hypothesis that an Article 51 armed attack may be by a non-state group. In any case, the symbiotic relationship of Al Qaeda in Afghanistan and the Taliban means that at least the Al Qaeda leadership cannot be seen as purely as a 'non-state' entity and that the Taliban shares significant responsibility for Al Qaeda's actions in the 11 September attack.

Limits of the Right of Self-Defence

The right of self-defence is not an open-ended right. To be a valid act under international customary law, as set down by the classic formulation by the United States in the 1837 *Caroline* incident,⁴⁵ it is generally required to conform with three elements:

- was the response necessary?
- was the response proportionate?
- was the response immediate?

The last point, the question of immediacy, seems to be of lesser importance in contemporary practice. State practice suggests that a reasonably delayed response is acceptable where there is a need to gather evidence of the attackers identity and or collect the intelligence and military force in order to strike back in a targeted manner.

So, was a military response necessary? It seems clear that the diplomatic actions through the United Nations in the late 1990s such as the various Security Council resolutions⁴⁶ and development of the Bombing and Finance Conventions have been largely ineffective in combating the terrorist ability of Al Qaeda, although why this is so is beyond the scope of this paper. As already mentioned, following the 11 September attacks, the United States demanded that Osama bin Laden and members of the Al Qaeda network within Afghanistan be surrendered to the United States. They also demanded that all terrorist training camps be shut down and access given to United States personnel to verify this. It appears the United States refused to share the evidence regarding Al Qaeda's alleged guilt with the Taliban to the extent this was shared with its allies. The Taliban refused to comply with the United States demands, initially saying they were prepared to try him in Afghanistan under Islamic law if sufficient evidence of his guilt was provided, although later they said they were prepared to surrender him to a neutral country. These options were dismissed by the United States.⁴⁷

If the United States objective was to protect itself from the possibility of further Al Qaeda attacks in the immediate future, was their 'no negotiation' position the only way of likely achieving this? Ultimately this must be a subjective question. Earlier in this paper, it has been argued that the actions of the Taliban before 11 September mean that the regime shares significant responsibility for the attacks under international law, even if the circumstances do not neatly fall within the *Nicaragua* 'effective control' test. However, it was Al Qaeda rather than the Taliban that represented the *direct* threat to the United States. The Taliban's failure to at least take steps to detain bin Laden and any senior Al Qaeda leaders present in Afghanistan pending agreement on how to proceed could be said to render the United States military actions necessary to eliminate this direct threat, at least in the absence of any useful guidance on what are the limits of international law in this area. However, a more difficult question is whether the United States was justified under the self-defence doctrine in pursuing a policy aimed at assisting the Afghani anti-Taliban forces to completely oust the Taliban. However, this question became academic after Security Resolution 1378 of 14 November which

expressed support for the Afghan people to establish a transitional administration. Resolution 1378 effectively cut the feet out from under the Taliban in terms of them being the lawful government of Afghanistan.

Finally, was the military response proportional? There are two main aspects to this. Firstly, was the scope of the response proportional to the 11 September attack? Secondly, as the humanitarian laws of war apply, have noncombatants been properly protected?

The first issue is mainly bound up in the discussion above about necessity in that it is questionable whether the purpose of military campaign against the Taliban was proportional because the Taliban did not of themselves represent a direct threat to the United States. If the Taliban's acquiescence to the presence of Al Qaeda was a threat to international peace and security, it is properly the role of the Security Council to deal with this, including through the mandating of the use of force under Article 42 of the United Nations Charter. The possibility that the international politics of the Security Council may not have allowed the United States as broad-ranging a mandate to deal with the Taliban is it might wish for does not change the position in international law.

In relation to the second issue, there are no strict limits as to when non-combatant deaths through so-called collateral damage become excessive. International customary law forbids the use of weapons that are incapable of distinguishing between civilian and military targets.⁴⁸ A question may arise whether, in targeting any Al Qaeda training camps, all persons present can be classified as combatants. However, the author has no information on this.

Collective Self-Defence

As previously mentioned, Article 51 of the United Nations Charter recognises the right of both individual and collective self-defence. Australia's committal of military force to the campaign in Afghanistan is consistent with Australia's right to participate in the collective defence of the United States if requested to do so following an armed attack on that country. This right is unaffected by the existence or otherwise of any treaty obligations to provide military or other support, such as under the ANZUS Treaty.

The Role of the Security Council

Under Article 51, the right of self-defence ceases once the Security Council has taken measures necessary to maintain international peace and security. In theory, the question arises whether the measures taken would have to be demonstratively effective before the right of self-defence ceases. However, given the United States is a permanent member of the Security Council, it could veto any measures it deems contrary to its national interests. Thus it is unlikely a situation would arise where the Security Council was at odds with the United States on whether a right of self-defence continued to exist or whether that right

was being exercised within the limits set down under international law. Once the right of self-defence arises, the only legal obligation the United States has is to report to the Security Council on what measures it has taken in self-defence. It has no obligation to seek authorisation under Article 42 for the use of force so long as the force it is using is consistent with the right of self-defence as previously outlined.

Conclusion

The international law relating to self-defence is too ill-defined to provide any detailed guidance on the legality of the totality of the United States' military operations against the Taliban regime in Afghanistan. The various uncertainties highlighted by this paper suggests there is real need for the International Law Commission to codify exactly what are the principles applying to the doctrine of self-defence. This need is underscored by the fact that the main check on the exercise of the right of self-defence, the United Nations Security Council, is unlikely to function if one of its permanent members considers that the continuation of military action is in its national interest. However, this issue is bound up in the question of whether the Security Council permanent members should continue to have veto powers, and is therefore beyond the scope of this paper.

Endnotes

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1. To paraphrase Mark Drumbl, it can be argued that the response—or lack of—of the United Nations can be said to reflect the *opinio juris* of states, one of the two key elements of determine what is customary international law. See Mark Drumbl 'Judging Terrorist Crime, Taliban guilt, self-defence and Western innocence' <http://jurist.law.pitt.edu/terrorismdrumbl.htm>.
 2. 'Taliban diplomat condemns attacks' *CNN website*, posted 11 September, <http://www.cnn.com/2001/WORLD/asiapcf/central/09/11/afghan.taliban/index.html>.
 3. 'Bin Laden says he wasn't behind attacks' *CNN website*, posted 16 September, <http://www.cnn.com/2001/US/09/16/inv.binladen.denial/>.
 4. The text of the General Assembly resolution can be viewed at <http://www.un.org/documents/ga/res/56/a56r001.pdf> and that of the Security Council at <http://www.un.org/Docs/scres/2001/res1368e.pdf>.
 5. The text of the joint resolution is at <http://www.house.gov/mthompson/hjr64summary.htm>.
 6. 'Application of the ANZUS Treaty to the Terrorist attacks on the United States', *Media Release*, The Hon John Howard 14 September 2001 http://www.pm.gov.au/news/media_releases/2001/media_release1241.htm.
 7. House of Representatives, *Debates*, 17 September 2001, p 30739.
 8. See <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

9. 'Taliban leaders refuse to hand over bin Laden', *Canberra Times*, 22 September 2001.
10. 'US rejects Taliban offer to try bin Laden', *CNN website*, posted 7 October, <http://www.cnn.com/2001/US/10/07/ret.us.taliban/index.html>.
11. See <http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html>.
12. The text of the letter as at <http://www.un.int/usa/s-2001-946.htm>.
13. Resolution 1378 (2001) 14 November 2001.
14. *Australian Defence Force Publication 101*, 1994.
15. That is, where the acts take place outside the terrorist's country of residence or are directed at foreign nationals or their property.
16. Note that there was some debate about whether to include 'terrorism' as a crime under the Rome Statute, but again there was a lack of agreement over its definition, so it was not included in the Statute's final form. The text of the Rome Statute is at <http://www.un.org/law/icc/statute/romefra.htm>.
17. The International Law Commission's 1996 *Draft Code of Crimes against Peace and Security of Mankind* has a similar definition of crimes against humanity as the Rome Statute. Note that the Draft Code has not yet been considered by the United Nation's General Assembly for possible adoption as a convention and thus has no legal force. The text of the Draft Code is at <http://www.un.org/law/ilc/texts/dcodefra.htm>.
18. This includes accomplices, although accomplices are generally not defined under these early conventions.
19. Resolution 40 of 1985.
20. The Government has stated it intends to become a Party: 'Australia's national security', *Press Release*, The Hon. Daryl Williams, 18 September 2001, http://www.ag.gov.au/aghome/agnews/2001newsag/1047_01.htm.
21. Acts of armed forces involved in armed conflict are governed by international humanitarian law, which is mainly found in the four 1949 Geneva Conventions and associated 1977 Protocols.
22. Article 2(3)(c) of the Convention indicates that accomplices includes a person who 'in any...way [intentionally] contributes to the commission of the [offence] with the aim of furthering the general criminal activity or purpose of the group'.
23. Switzerland has signed, but not ratified the Financing Convention.
24. 'Responsibility for the Terrorist atrocities in the United States 11 September 11, an updated account' British Foreign and Commonwealth Office, November 14 <http://www.fco.gov.uk/news/dynpage.asp?Page=10846&Theme=34&Template=999>
25. See for example, 'In 2 abandoned Kabul houses, some hints of Al Qaeda presence' *New York Times* 17 November 2001
26. 'PM commits troops to US terror war', *Canberra Times*, 5 October 2001.
27. *AM* 5 October 2001.

28. 'Taliban breaks resistance', *Australian Financial Review*, 19 September 2001.
29. Resolution 1333 of 2000.
30. Resolution 1267 of 1999. Note that the Security Council has not authorised the use of force to gain compliance with either Resolution 1267 or 1333.
31. 'Officials: new information points to bin Laden'. *CNN website*, posted 12 September 2001, <http://www.cnn.com/2001/US/09/11/investigation.terrorism/index.html>.
32. *Nicaragua v United States of America* 1 ICJ reports 1986 (27 June 1986).
33. The actions of the armed bands did constitute an armed attack, but the attacks were by the bands themselves, not the United States.
34. This failure attracted some criticism by academic writers: see for example T.D.Gill, 'The law of armed attack in the Nicaragua case', *Hague Yearbook of International Law* 1988, at pp 50-52.
35. The judgment of the Appeals Chamber is at <http://www.un.org/icty/Supplement/supp6-e/tadic.htm>.
36. At paragraph 3(a) of the judgment.
37. The draft articles are effectively a draft treaty that may be considered by the United Nations General Assembly at a later date.
38. *ibid*, at paragraphs 87-88.
39. *ibid*.
40. 'The situation in Afghanistan and its implications for international peace and security' Report for the Secretary General to the General Assembly and Security Council 6 December 2001 at paragraph 90.
41. Drumbl, *op. cit*.
42. For more on the rather vexed question of the use of force for the purposes of humanitarian intervention see 'Humanitarian intervention: getting past the reefs', *World Policy Journal*, Summer 2001, pp 21-32.
43. These bombings killed over 250 people, 12 of whom were American nationals.
44. In *Nicaragua v United States of America*, the ICJ made a passing reference to the concept of 'imminent threat of armed attack' but made no judgment as to whether self-defence could be legally invoked in such a situation ICJ Reports, *op. cit*, paragraph 194 The balance of academic opinion suggests that 'anticipatory' self-defence is prohibited, but 'interceptive' self-defence is permissible. Interceptive self-defence occurs where the aggressor has committed itself to an attack in an 'ostensibly irrevocable way. See Dinstein, *War Agression and Self-Defence*, 1988, p 180. The question of the legality of self-defence after an attack has occurred but based on the rational of possible further attacks would be governed the questions of necessity etc addressed later in this paper.
45. In 1837, an armed rebellion occurred in the (then) British colony of Canada. A ship, moored in United States waters, was suspected by the British of being used by certain individuals to

supply arms to Canadian rebels. British forces boarded the ship and destroyed it, killing two people in doing so. Britain justified the attack as an exercise of self-defence. The United States Secretary of State asserted that a country claiming such a right must 'show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation...[the act of self-defence must also involve] nothing unreasonable or excessive'.

46. At least some of these resolutions were made under Chapter VII of the United Nations Charter. Chapter VII deals with peace and security issues and is the part of the Charter that contains Article 42 which allows for force to be used against situations that represent threats to 'international peace and security'. Security Council resolution 1267 of 1999 specifically named the Taliban's failure to stop providing sanctuary and training to 'international terrorists' as a such a threat, but decided on that occasion only to impose non-forceful measures under Article 41 such as financial and airflight embargoes.
47. 'Read my lips: no negotiations', *The Australian*, 16 October 2001.
48. International Court of Justice (ICJ), *Advisory opinion on the Legality of the threat or use of nuclear weapons*, ICJ reports 1996 at paragraph 78.