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The Contemporary Perception Of The Right To Self-Defense In The Fight Against Terrorism: An Antagonistic Right?

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***Abstract*—Since its inclusion in the Charter of the United Nations in Article 51, the right of self-defence has been used in a tumultuous manner. The prohibition of the use of force codified in article 2 paragraph 4 of the Charter of the United Nations seems today to be somewhat threatened. The reason is that following the terrorist attacks of September 11, 2001, state practice seems to be migrating towards the systematic use of force against terrorist groups by invoking the right to self-defense. Drafted at a time when the use of force in international relations was part of the attributes of the State, the right codified in Article 51 of the United Nations Charter is only valid in a military operation between States. The increasingly prominent place of non-state actors on the international scene is likely to make this right "vulnerable". In the context of the fight against terrorism, the implementation of Article 51 of the Charter has always been a source of controversy. Beyond the problem of legality, there is a problem of use of this right in the hands of States. Some take advantage of it to respond with force against terrorist groups on questionable legal grounds. However, this right sometimes has a positive value in view of the essential elements it protects while the role of the Security Council remains anchored in the context of the fight against terrorism.**

Keywords—Preventive self-defense- Use of force- Terrorist groups- Security Council- Terrorist threat.

INTRODUCTION

The history of the world is marked by situations of war [1] more or less atrocious. But since September 11, 2001, international society has witnessed a shift in the rules relating to the use of force. Indeed, the greatest world power had just experienced the worst attacks in its history. Struck in the heart of its civilization, the United States was confronted with an asymmetric conflict. The attacks of the terrorist organization Al-Qaeda in 2001 marked a paradigm shift in international armed conflicts. International law was thus called into question. For this reason, Brigitte STERN declared that in the face of the attacks in the United States, international law is a "disempowered law"[2]. Ulcerated by the appalling terrorist attacks of September 11, 2001, the American president declared that the United States was in a "war against terrorism"[3]. In this sense, it invoked the right to self-defense to justify its military action in the framework of Operation Enduring Freedom in Afghanistan. By reacting in this way, the United States trampled underfoot a rule prohibited by general international law, namely the prohibition of the use of force in international relations. Of course, the fight against international terrorism is complex because of the asymmetric nature of the threat. By giving a green light to one of the victors of the Second World War, the Security Council opened the Pandora's box. Indeed, the Security Council had supported the United States

[1] In its march, the world experienced the First World War of 1914-1918. Still called the "Great War", this military conflict initially involved the European powers and then spread to several continents. After the First World War, they world knew then the Second World War between 1939-1945. It was an armed conflict with a planetary scope and opposed the allied powers and those of the axis.

[2] See STERN (B.), « Le contexte juridique de « l'après » 11 septembre 2001 », *in* BANNELIER (K.), CHRISTAKIS (T.), CORTEN (O.), DELCOURT (B.) (eds.), *Le droit international face au terrorisme*, Paris, Pedone, CEDIN, n° 17, 2002, p. 13 et s.

[3] Address to the Nation, September 12, 2006, available online at www.lemonde.fr, "Our nation has been tested, and the road ahead is difficult. Winning this war against terrorism requires a united national effort.

by recognizing its right to self-defense following the attacks of September 11, 2001. As a result, later on, other States used Council resolutions to intervene militarily in other States on the grounds of exercising their right to self-defense[4]. The economy of Article 51 of the United Nations Charter enshrines the right to self-defense following armed aggression by one state against another. The wave of challenges that followed led to the questioning of the legality of the United States' operation in Afghanistan in the context of the fight against international terrorism. Even if the latter has not yet received a universally accepted definition, the one retained in the framework of this article will be the following: international terrorism is generally identified as an illicit act of serious violence committed by an individual or a group of individuals, acting individually or collectively with the approval, encouragement, tolerance or support of a State, against persons or property, in pursuit of an ideological objective, and likely to endanger international peace and security [5].

However, as we have said, international terrorism represents one of the most serious threats of our century. In this context, the anchoring of this phenomenon in the field of the right of self-defense aims first of all at repelling an attack which could probably lead to the obliteration of the State. Article 51 states that "*Nothing in the present Charter shall impair the right of individual or collective self-defense 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*"[6] . Despite the unconventional approach of terrorist groups, international law remains the appropriate legal framework to deal with this danger that affects the entire international society. For this reason, some have thought that "*Until now, even if international law had gaps and insufficiencies, it was designated as the most adequate framework to fight against transnational forms of terrorism*"[7]. *Moreover, the formula of Marcelo KOHEN according to which "the weapon of civilization is the right »*[8] is a reminder of the extent to which the law is an indisputable bulwark for States to safeguard their existence. It is hard to imagine a State that is attacked by a terrorist organization refraining from reacting on the grounds that the latter does not represent a State in the sense of international public law. Thus, the relevant question to be asked is: **how is the right of self-defense perceived in the fight against terrorism?** Beyond the legality of the implementation of the right of self-defense by States, the idea of perception here refers to the use that States make of the right of self-defense. The answer to this question will allow us to consider, on the one hand, the right of self-defense in the fight against terrorism as an instrumental right, thus involving a subjective approach to Article 51 of the World Organization's founding treaty (I) and, on the other hand, the right of self-defense as a conservative right, thus involving a positive approach to Article 51 of the United Nations Charter (II).

I- The right of self-defense in the fight against terrorism as an instrumentalized right: A subjective approach

In their fight against international terrorism, states usually resort to the use of force by invoking the right of self-defense. However, this reference to Article 51 of the UN Charter is sometimes perceived as a manipulation of this provision by user states. An instrumentalized right is a right that is used for the benefit of the State while going beyond what is provided for in this right or for other purposes. States sometimes fail to distinguish the difference between law, politics and morality. This made Gowlland-Debbas say that *"Kelsen's insistence on the strict autonomy of the law ... constitutes an attempt to save the law from destruction through its*

[4] See the minutes of the meetings of the General Assembly of the United Nations UN Doc A/56/PV. 44 and following. See also MARTIN (J-C), Les règles internationales relatives à la lutte contre le terrorisme, Brussels, Bruylant, 2006, p. 297 and following.

[5] SALMON (J.), *Dictionnaire de droit international public*, Bruxelles, Bruylant, 2001,

[6] See Article 51 of the UN Charter.

[7] TIGROUDJA (H.), « Quel droit applicable à la 'guerre au terrorisme' ? », *AFDI*, 2002, p. 82.

[8] Declaration of Marcelo KOHEN dans le journal *Le temps*, le 17 septembre 2001.

instrumentalization for political purposes"[9]. The instrumentalization would thus come from the fact that States sometimes use the right of self-defense to settle scores of all kinds and sometimes put emotion into it. Since the attacks of September 11, 2001 against the United States has caused a shock wave in the collective consciousness of States. This part of the paper will therefore analyze the instrumentalization of the right to self-defense in the fight against terrorism as a subjective approach to the implementation of Article 51 of the United Nations Charter, based on the basis of the mitigated self-defense remedy (A). On the other hand, the questionable interpretation of Article 51 of the UN Charter (B).

A-The basis of the mitigated self-defense remedy

We will not consider here pre-emptive self-defense which gives the right to use force against an aggression in progress. Even if there are still some controversies on the question, it must be recognized that preemptive self-defense has met with a favourable echo from the majority of jurists [10] and the World Organization [11]. The foundations of a mitigated self-defense remedy in will focus on the Caroline case (1) and its scope (2).

1- The Caroline Case

The Caroline case constitutes the precedent from which the preventive theses of legitimate defense draw their legitimacy. In his letter of July 27, 1842, Daniel WEBSTER noted that *"Under these circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's government to show, upon what state of facts, and what rules of national law, the destruction of the « Caroline » is to be defended. It will be for that government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation"* [12]. Through this correspondence, the American representative thus adopted a restrictive position on self-defense copied from the domestic rules. According to him, an offensive on foreign territory could only be justified in a case of extreme urgency. To support this argument, reference is generally made to the judgment of the International Military Tribunal of Nuremberg. This was created following the London Agreement of 1945 and its main role was to punish the major war criminals of the Second World War, in particular the Germans responsible for the aggression against Norway in 1940 [13]. Indeed, Germany had attacked Norway in April 1940 under the pretext of preventing the Allied landing, specifying that this offensive was of a preventive nature. The court rejected Germany's claim for two reasons.

On the one hand, the tribunal of the victors of the Second World War considers that the argument put forward by Berlin is fallacious because the objective of the aggression against Norway was to acquire bases for attack in order to promote the invasion of England and France. On the other hand, while rejecting the motive of self-defense invoked by the defense, the court recalled *"(...) that a preventive action in foreign territory is justified only in the case of an urgent and pressing necessity of defense, which does not allow either the choice of means or deliberation (...)"*[14]. It should be noted that this statement is based on the Caroline case. For the

[9] See Gowland-Debbas, « The limits of unilateral enforcement of community objectives in the framawork of United Nations Peace maintenance », *EJIL*, 2000, pp. 361-38, in CORTEN (O.), "The controversies over the customary prohibition on the use of force: A methodological debate", *EJIL*, 2006, p. 815.

[10] See BETHLEHEM (D.), "Self-defence against an imminent or actual armed attack by non-state actors, AJIL, 2012; See BAKIRCIOGU (O.), Self-defence in international and criminal law: the doctrine of imminence, London, Routledge, 2011.

[11] 2005 World Summit of the High Level Panel.

[12] See ILC Report, A/56/10, 2001, p. 210. For more details see DELIVANIS (J,), La légitime défense en droit international, Paris, LGDJ, 1971, p. 18. See also CHRISTAKIS (T.), "Existe-t-il un droit de légitime défense en cas de simple "menace" ? Une reponse au groupe de personnalités de haut niveau", in SFDI, Les métamorphoses de la sécurité collective : Droit, pratique et enjeux stratégiques, Paris, Pedone, Journées franco-tunisiennes, 2005, p. 203.

[13] See KAMTO (M.), *L'agression en droit international,* Paris, Pedone, 2010, pp. 25-26.

[14] Judgment of October 1, 1946, in Trial of the Major War Criminals before the Military Tribunal, Nuremberg, 1947, p. 217.

Military Tribunal, the criteria of necessity of defense and imminent threat were not met, especially since the Caroline did not constitute a threat to Germany and had been characterized throughout the conflict by its impartiality. It is for this reason that Olivier CORTEN thinks that there is confusion between the state of necessity and self-defense; two notions that do not justify Germany's aggression against Norway when he declares *"The notion of self-defense (...) was understood in a particularly broad sense, both in diplomatic practice and among specialists in international law (...). War was justified as soon as the attacking State could rely on legitimate grounds, expressions which illustrate the confusion that still prevailed between law in the strict sense and subjective considerations of justice, which were left to the appreciation of States"*[15].

In response, the British representative said: *"Agreeing therefore on the general principal and possible exception to which it is liable, the only question between us is whether this occurrence came within the limits fairly to be assigned to such exception, whether, to use your words, there was « that necessity of self-defense, instant, overwhelming, leaving no choice of means » which preceded the destruction the 'Caroline', while moored to the shore of the United States"*[16].This letter testifies to a desire on the part of those in charge of the English crown to justify the attack on the ship by the existence of a natural right of self-defense. From the above, it should be noted that the merit that can be drawn from the Caroline case is that it laid the groundwork for the future exception to the use of force contained in Article 2 paragraph 4 of the United Nations Charter. The instrumentalization of the right of self-defense in the context of the fight against international terrorism is based on the idea of the existence of a customary rule prior to the United Nations Charter. However, this theory has not been accepted by the majority of the international community. In this sense, CHRISTAKIS thinks that: *"The 'Caroline case' continues today to fuel the insurrection against the positive law of self-defense". He continues: "Several contemporary authors, especially Anglo-Saxon, present this case as the 'locus classicus' in self-defense"*[17]. This desire to use the right of self-defense for the benefit of certain States corroborates the idea of an instrumentalization of this mechanism contained in Article 51 of the United Nations Charter. The relevance of such reasoning does not find a favorable echo in international law for several reasons.

The intellectual construction of preventive self-defense based on the use of force in the event of a threat is incompatible with Article 51 of the United Nations Charter. First of all, the Carolina case comes at a time when the use of force in international relations was permissive. The right to wage war was authorized and constituted one of the attributes of state sovereignty in the nineteenth century. Therefore, the transposition of this notion to a time when the universal treaty came into force is inoperative[18]. Moreover, *"At that time, the use of force was not prohibited and the notion of self-defense did not have the meaning that it has today, namely the only possibility admitted by law to use force unilaterally"*[19]. In other words, considering the

[15] CORTEN (O.), *Le retour des guerres préventives : le droit international menacé*, Bruxelles, Editions LABOR, 2003, p. 14.

[16] This correspondence is available on the website http://www.yale.edu

[17] *Ibid.* Among these authors, he mainly quotes JENNINGS (R.), WATTS (A.), *Oppenheim's International Law*, Longman, Peace, 9th ed., Vol. 1, 1992, p. 420 ; BOWETT (D. W.), *Self-defense in international law*, Manchester, Manchester University Press, 1998, pp. 187-192 ; McDOUGAL (M.), FELICIANO (F.), *Law and Minimum w*

[17] CHRSITAKIS (T.), « Vers une reconnaissance de la notion de « guerre préventive » ? », *in* BANNELIER (K.), CHRISTAKIS (T.), CORTEN (O.), et KLEIN (P.) (eds.), *L'intervention en Irak et le droit international*, Paris, Pedone, CEDIN, 2004, p. 18.

[17] CHRISTAKIS (T.), « Existe-t-il un droit de légitime défense en *orld public orde*r, Yale, Yale University Press, 1961, pp. 232 et s.

[18] CHRSITAKIS (T.), « Vers une reconnaissance de la notion de « guerre préventive » ? », *in* BANNELIER (K.), CHRISTAKIS (T.), CORTEN (O.), et KLEIN (P.) (eds.), *L'intervention en Irak et le droit international*, Paris, Pedone, CEDIN, 2004, p. 18.

[19] CHRISTAKIS (T.), « Existe-t-il un droit de légitime défense en cas de simple 'menace' ? », *op. cit.* p. 203.

Caroline case as a customary basis for the right of self-defense is questionable. As Antonio CASSESSE points out, he believes that *"Cases of armed action on foreign territory or on the high seas with the aim of preventing harmful actions by private individuals (e.g. the case of the Caroline, the Mary Lowel, the Virginius etc. In fact, the unlawful act that was to be prevented did not come from States but from individuals, and it must be added that the States from which these individuals came were in no way responsible"*[20]. What about the interpretation of Article 51 of the UN Charter?

2- The questionable interpretation of Article 51 of the United Nations Charter in the fight against terrorism

The use of force in self-defense is sometimes given an expansive interpretation of Article 51. The "Unwilling or Unable" theory remains remarkably one of the most controversial arguments in the use of force against terrorist groups. Generally speaking, it states the right of a state that is the victim of an armed attack by a non-state group based on the territory of another state to use extraterritorial self-defense against the latter if it is unwilling or unable to take measures to contain the threat of aggression on its territory[21]. This theory is closely linked to sovereignty and the consent of the state to intervene on its territory. Overall, this doctrine advocates the use of force against a state that is unable to fulfill its counter-terrorism obligations and refuses to give its consent for an intervention on its territory. This is dangerous because, as we will see later, sovereignty is an essential attribute of the State. Some jurists such as DEEKS[22] or WILLIAMS[23] are strong proponents of this thesis. The tension created by the "Unwilling or Unable" doctrine is justifiable in that it is linked to section 51 of the Charter[24]. The rise of terrorism has heightened the debate on the unwilling/unable state theory. Several states in practice have followed the controversial doctrine of the unwilling or unable state favorably. These include the United States and Israel. For them, the threat to international peace and security comes not only from powerful states, but also from state entities unable to meet their international obligations in the fight against terrorism. This has led some to say that *"If the attention of the international community was initially focused on Afghanistan, considered as the rear base of Al-Qaeda, very soon many failed states in Africa, Eastern Europe, Latin America and the Middle East will also be considered as potential sources of international instability"*[25].

In international practice, several precedents have been set to illustrate the use of the right to self-defense. Thus, following the 1991 Gulf War, Turkey carried out an operation on Iraqi territory. To justify its offensive, the government of Ankara argued that its strikes were aimed at the troops of the Kurdistan Workers' Party (PKK). Moreover, it invoked their right to self-defense because of the Iraqi government's inability to control its territory. In a letter to the Security Council, Turkey justified its attack in the following terms: *"Given that Iraq is not able to exercise its authority over the northern part of the country (...), Turkey cannot ask the Iraqi government to fulfil its obligation under international law to prevent its territory from being used as a base for terrorist acts against Turkey. Under these circumstances, the fact that Turkey is resorting to legitimate measures, which are indispensable for its security, cannot be considered as a violation of*

[20] CASSESSE (A.), « L'article 51 », in COT (P.), PELLET (A.) et FORTEAU (M.) (eds.), La Charte des Nations Unies, commentaire article par article, Paris, Economica, 3e ed., vol. 1, 2005, p. 772.

[21] See WILLIAMS GARETH (D.), "Piercing the Shield of Sovereignty: An assessment of the legal status of the "Unwilling or Unable" test, Unversity of New South Wales Law Journal 36.2, 2013, p. 625.

[22] See DEEKS (A.), Unwilling or Unable, Towards a normative framework, Virginia Journal of International law, vol. 52, 2012; WILLIAMS GARETH (D.), "Piercing the Shield of Sovereignty: An assessment of the legal status of the "Unwilling or Unable", *op.cit.* pp. 619-649.

[23] *Ibid.*

[24] See SKANTZ (M. H.), The Unwilling or Unable doctrine: The right to use extraterritorial self-defense against non-state actors, Thesis in international law, University of Stockholm, 2017, p. 34.

[25] See MONZALA (W.), *Réflexions sur le concept d'Etats défaillants en droit international*, Mémoire en droit international public, Université de Strasbourg, 2012, p. 23.

Iraq's sovereignty"[26]. In the same vein, Russia used the argument of self-defense to punish Chechen terrorists nestled on Georgian territory[27]. Starting from the fact that the state in which a terrorist group is located cannot or is incapable of fulfilling its international obligations relating to the fight against terrorism, a question remains unanswered. That of knowing whether the state that is the victim of terrorist acts can intervene on the territory of the so-called "defaulting" state to combat terrorist entities. Some authors believe that an armed intervention may be legitimate provided that it does not infringe on the sovereignty of the state in which the terrorist group has taken refuge[28]. In any case, a use of force based on the theory of the unwilling or unable state cannot correspond to Article 51 of the UN Charter as *lex lata*. What about the extension of Article 51 of the UN Charter?

B-The extension of Article 51 of the United Nations Charter based on the use of force on mere threat

The extension of Article 51 of the United Nations Charter based on the use of force on mere threat implies a definition of the latter (1) and its scope (2).

1- Definition of the "threat of aggression"

Historically, the term "threat" was introduced during the preparatory work for the drafting of the United Nations Charter, more precisely in the Dumbarton Oaks proposals. At the end of the work, neither the Charter nor the resolutions of the General Assembly gave it a definition. Moreover, the issue of threat was raised during the elaboration of the code of crimes against international peace and security. For some States, the threat, when considered imminent, constitutes aggression. In this case, the threat should give rise to the right to exercise self-defense contained in article 51 of the United Nations founding treaty. In support of their argument, the states that advocated the inclusion of the threat in the code of crimes against the peace and security of humanity[29], the need to protect the vital interests of the state and the risk of suffering enormous damage. Indeed, during the work of the committees on the definition of aggression, the Dutch representative insisted on the need to hold atomic weapons and specified that *"to wait passively to defend oneself from receiving hydrogen bombs would be a real suicide for a country (...). It is no longer possible to exclude from the definition of armed aggression certain cases of immediate threat"*[30].

Aware of the devastating effects of war, the members of the international society already limited the use of war in the Covenant of the League of Nations. Thus, Article 11 paragraph 1 of the Covenant states that *"it is expressly declared that any war or threat of war, whether or not affecting any Member of the League, is of concern to the League as a whole, and that the League shall take measures for the effective preservation of the peace of the Nations. In such cases the Secretary-General shall immediately convene the Council at the request of any member of the Society»*[31]. The threat here falls within the framework of collective security under the aegis of the Security Council. Similarly, in 1924, the Geneva Protocol established a special procedure for cases of threatened aggression, giving the Security Council the power to conduct investigations in the country suspected of being involved in preparations for war[32]. It is therefore a matter for the Council, in the event of a threat of aggression, to warn international society of the scourge of war. However, Article 51 of the United Nations Charter prescribes the exercise of the right of self-defense against the army of a State. It can therefore be said that the threat of aggression cannot constitute armed aggression as such.

[26] Letter from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council on 24 July 1995, S/1995/605.

[27] Letter from the Russian Representative to the United Nations addressed to the President of the Security Council, S/2002/1012.

[28] See CLASSEN (C.D.), "Failed States" and the prohibition of the use of force ", *in* SFDI, *Les nouvelles menaces contre la paix et la sécurité internationales*, Paris, Pedone, Journées franco-allemandes, 2004, pp. 136-138.

[29] *Ann*. CDI, 1949, pp. 109 et s.

[30] *Ibid.*

[31] Cf. Article 11 paragraphe 1 du Pacte de la Société des Nations.

[32] See ZOUREK (J.), « Enfin une définition de l'agression », *AFDI*, 1974 p. 11.

In its Non-Aggression Pact, the African Union (AU) gives pride of place to the threat of aggression in several of its provisions. Thus, article 1 g) defines this notion as *"any hostile act or declaration by a State, group of States, organization of States or non-State actors which, without a declaration of war, could result in an act of aggression (...)»* [33] . This definition is extremely broad in principle. Indeed, the use of terms referring to non-state actors contributes to the broadening of this concept. In international law, armed aggression can only be committed by a state in accordance with UN General Assembly resolution 3314. As KAMTO points out, *"This particularly loose conception of the concept (threat of aggression) is perplexing, to say the least, especially since the Covenant does not indicate the consequences of a threat of aggression. Nowhere in the Covenant is there any mention of the term 'self-defense', either in response to aggression or to a threat of aggression"* [34] . Furthermore, the threat of aggression and aggression under international law cannot mean the same thing and therefore would not be *"capable of justifying the exercise of self-defense within the meaning of Article 51 of the United Nations Charter"*[35].

For the doctrine, the "threat" deserved a definition in international law. Thus, for Jean SALMON *"The threat in the sense of article 2 paragraph 4, of the Charter implies an element of coercion with a view to inducing a State to conduct itself or to perform acts different from those it could freely perform"*[36]. For this author, the result is that the threat involves an element of coercion by one State against another State. The Anglo-Saxon doctrine is not to be outdone in this drive to define the notion of "threat" in international law. BROWNLIE adopts a restrictive conception of "threat". For him, *"A treat of force consists in an express or implied promise by a government of a ressort to force conditional on non-acceptance of a certain demands of that government"*[37]. On the other hand, SADURSKA takes a more open definition of the threat. According to her, *"A threat is an act that is designed to create a psychological condition in the target of apprehension, anxiety and eventually fear, which will enrobe the target's resistant to change or will pressure it toward preserving the status quo"* [38] . By way of illustration, the "threat" may consist of propaganda for aggressive war [39] or in a concentration of troops on the borders [40] or by installing military bases on the territory of a third State [41] . In any event, the threat of force is prohibited under international law[42]. Indeed, for SADURSKA the "threat" can result from an abstention of a permanent member of the Security Council during the vote on a resolution. Thus, the United States abstained from voting on the resolution condemning Israel for its military offensive against the headquarters of the Palestine Liberation Organization, meaning, according to the author, that it would resort to the same type of armed measures in the event of

[33] See Article 1 g) of the Non-Aggression Pact of the African Union.
[34] KAMTO (M.), *L'agression en droit international*, *op. cit.* p. 64.
[35] See CORTEN (O.), *Droit contre la guerre : L'interdiction du recours à la force en droit international contemporain*, Paris, Pedone, 2008 p. 229.
[36] See SALMON (J.), *Dictionnaire de droit international public*, Bruxelles, Bruylant, 2001, p. 694.
[37] See BROWNLIE (I.), *International law and the use of force by States*, Oxford, Oxford University Press, 1963, p. 364. For this autor "A threat of force consists of an express or implicit promise by a government to use force on condition that certain demands of that government are not accepted". See also DUBUISSON (F.) and LAGERWALL (A.), "What does the prohibition on the threat of force still mean?", in BANNELIER (K.), CHRISTAKIS (T.), CORTEN (O.), and KLEIN (P.) (eds.), L'intervention en Irak et le droit international, op. cit. p. 364.
[38] See SADURSKA (R.), « Threats of force », *AJIL*, 1988, p. 241. *"A threat is an act designed to create a psychological condition of apprehension, anxiety, and possibly fear, which may prevent the target from changing or pressure them to preserve the status quo".*
[39] See ASRAT (B.), *Prohibition of force under the UN Charter. A study of article 2 (4),* Uppsala, Iustus Forlag, 1991, p. 139.
[40] See JIMENEZ De ARECHAGA (E.), « International law in the past third of a century", *RCADI*, vol. 159, 1978, p. 88.
[41] See CASTEL (J-G.), *International law*, Toronto, Butterworths, 3rd ed., 1976, p. 1220.
[42] About the situation between Moscow and Kiev, a journalist wrote April 2014 that "Russian diplomacy considered the threats of the pro-Western authorities in Kiev to launch an assault pro-Russian demonstrators who took new buildings in eastern Ukraine, were inadmissible.

terrorist attacks[43]. Therefore, the scope of self-defense on simple terrorist threat becomes relevant.

2- The scope of the use of force in self-defense against a simple terrorist threat

Recourse to preventive self-defense has often been invoked by certain States on the basis of a simple threat. In state practice, recourse to preventive action based on a simple threat has been more or less rare. For some authors, *"If in fact the action does constitute a case of preventive intervention, States will always associate the argument of preventive self-defense with the existence of a previous armed aggression, even if this means using particularly convoluted intellectual constructions"* [44] . This means that the argument based on preventive self-defense in the case of a mere threat is based on an extensive interpretation of the right enshrined in Article 51 of the United Nations Charter. Such a broadening of the right of self-defense leads inevitably to a unilateral use of force on the mere threat of aggression. This idea is rejected by the community of States, as Christine GRAY points out, who believes that *"In practice (States) prefer to take a wide view of armed attack rather openly claim anticipatory self-defense. It is only where no conceivable case can be made for this that they resort to anticipatory self-defense. This reluctance expressly to invoke anticipatory self-defense is in itself a clear indication of the doubtful status of this justification for the use of force"*[45]. Thus, for the states that support the theory of preventive self-defense based on a simple threat, the unilateral use of force is a means of prevention in order to protect themselves from a future attack. However, this interpretation of Article 51 of the United Nations Constitutional Treaty is contrary to current international law.

The American military offensive in Iraq, known as "Iraqi Freedom", is undoubtedly one of the most recent and most illustrative examples of the unilateral use of force as a preventive measure based on a simple threat. Launched on March 19, 2003, this operation has been criticized by most states. In a speech to the United Nations General Assembly, President George W. Bush justified the American preventive action on the basis of Iraq's possession of weapons of mass destruction and its very close ties to terrorist organizations such as Al-Qaeda [46] . According to the Bush administration, the offensive was aimed at disarming Iraq in order to prevent future armed attacks comparable to the attacks of September 11, 2001[47]. However, the inspectors of the World Organization were in Iraq before the American military offensive and had noted that this country, which was already suffering the effects of the sanctions imposed by the government in Washington, could not hold the weapons of mass destruction [48] . It is obvious that this military operation in Iraq poses legal problems in international law. The Bush administration's justification does not hold up under Article 51 of the United Nations Charter, which requires the existence of prior armed aggression before any use of force in self-defense. The United States could be considered as an aggressor of Iraq, which could in turn invoke the right of self-defense against the world's leading power.

In terms of the principle of the prohibition of recourse in international relations, the government in Washington had violated this norm of *jus cogens*, which is well established in international law. In trying to justify its operation in Iraq, the United States showed malice by deliberately failing to rely exclusively on preventive self-defense. This is what made CONDERELLI say that this attitude *"can easily be interpreted as indicating that the American side was fully aware of the fact that the argument of preventive self-defense (...) would have been very difficult to support in a credible and convincing way: it would therefore neither have gathered a sufficiently broad consensus, nor*

[43] See SADURSKA (R.), « Treats of force », *op. cit.* p. 86.
[44] *Ibid*.,
[45] See GRAY (C.), *International law and the use of force*, *op. cit*. p. 112.
[46] A/57/PV.2, 12 septembre 2002, pp. 7-9.
[47] See YOO (J.), « International law and the war in Iraq », *AJIL*, 2003, pp. 563-576. For this author, there was a need to disarm Iraq before it could attack the United States with weapons of mass destruction.
[48] See in this sense O'CONNELL (M.E.), « La doctrine américaine et l'intervention en Iraq », *op. cit.* p. 15.

would it have allowed to gather allies"[49]. It is therefore clear that the use of force under the right of preventive self-defense in the case of a simple threat is rejected by the majority of states. During the American offensive that led to the destruction of the Al-Shifa pharmaceutical factory in Khartoum, Sudan, in August 1998, the world's leading power based its military operation on the right of preventive self-defense. In a letter to the Security Council, the Washington administration referred to the clandestine production of chemical weapons for the terrorist organization Al-Qaeda. Thus, for the United States, this military operation was presented as necessary to *« deter and prevent the repetition of unlawful terrorist attacks on the United States and other countries »*[50]. From the above, this attack on the Sudanese pharmaceutical factory, the United States reacted in preventive self-defense due to a simple threat of terrorist aggression and not as a result of a previous aggression from Khartoum. By adopting this behavior the first international military power positions itself as an aggressor of Sudan, which can validly invoke its right to self-defense under Article 51 of the Charter of the World Organization. This attack has been strongly criticized by the community of states. In the end, this is a broad reading of the right enshrined in Article 51 of the UN Charter, which is undoubtedly a subjective approach to this provision. In any case, the right of self-defence is not only an instrument in the hands of the States that use it as they please, it also has a positive value.

II- The right of self-defense in the fight against terrorism as a conservative right: A positive approach

In his letter of May 19, 1932 to Mr. HOUGHTON, the United States Ambassador in London, during the preparation of the Pact of Paris, Sir CHAMBERLAIN stated: *"There are certain parts of the world whose well-being and integrity are of special and vital interest to our peace and security. His Majesty's Government has always endeavored in the past to make it clear that no intervention in these regions can be tolerated on its part; their protection against all attacks constitutes for the British Empire a measure of self-defense"*[51]. Thus, as the primary subject of international law, the State occupies a place of choice in the international dynamic. Thus, it is difficult to imagine the disappearance of the State as a result of a large-scale terrorist attack. When the essential elements of the State's existence are threatened, it is entitled to protect itself. In addition to the state, a broader vision can be considered here, namely the maintenance of international peace and security. It is therefore a question of analysing, on the one hand, the protection of the essential elements of the State (A) and, on the other hand, analysing the right of self-defense as a right to maintain international peace and security (B).

A- Protection of the essential elements of the State

Article 1 of the Montevideo Convention on the Rights and Duties of States, concluded in 1933, elaborates the constituent elements of the State. According to this article, a State must have a permanent population, a defined territory, a government and the capacity to enter into relations with other States[52]. Only territorial integrity (1) and sovereignty (2) are of interest to us here.

1- Safeguarding the territorial integrity of the State

Among the material components of the State, the territory is relevant. Without territory, there would be no State. This means that territory in international law occupies a place of choice both in practice and in doctrine. Historically, questions of territory arose from the European conquest of

[49] See CONDORELLI (L.) « Les attentats du 11 septembre et leurs suites : où va le droit international ? », *RGDIP*, 2001, p. 832.

[50] Letter from the Permanent Representative of the United States to the United Nations addressed to the President of the Security Council, S/1998/760, August 20, 1998.

[51] Voir Pacte général de réconciliation à la guerre, *in* GIRAUD (E.), « La théorie de la légitime défense », *RCADI*, 1934, p. 740.

[52] According to article 1 of the Montevideo Convention on the Rights and Duties of the State of 1933, which states: "*The State, as a person of international law, must fulfill the following conditions: 1) permanent population, 2) determined territory, 3) government, 4) capacity to enter into relations with other States"*.

the American continent[53]. In addition to the Treaty of Wesphalia of 1648, which gives considerable importance to territorial power[54], international law from the 18th century onwards considered that *"any land on the globe is either the territory of European States or of States placed on the same footing, or land still freely occupied, i.e. potential State territory or colony"*[55]. This means that the State, as the sole holder of territorial space, cannot see this component of its existence disappear because it is an essential element of its expression on the international scene. As MARTIN rightly pointed out when he said: *"It would seem that the violation of the territorial sovereignty of a State... would qualify as a serious infringement of an essential interest; there is no doubt that territorial integrity is an essential interest for a State"*[56].

The consequences of the Second World War led the founding fathers of the United Nations to give each State territorial jurisdiction. For the initiators of a conception of international law based on the non-use of force in international relations, it was a question of attributing to each State entity a portion of the maintenance of international peace and security. Thus, emphasis was also placed on the competence *ratione loci* of the State[57]. This conception of international law, which holds that the state is the guarantor of international security by exercising full territorial jurisdiction, was enshrined in the founding treaty of the United Nations. It is in this sense that article 2 paragraph 4 obliges the members of the world organization not to resort to force against the territorial integrity of other states. Since the League of Nations, the protection of territorial integrity has been the object of particular attention. Thus, Article 10 of the founding treaty of the League of Nations already safeguarded territorial integrity against an external attack from one or more states[58]. At that time, recourse to war was accepted to settle inter-state conflicts. The term "aggression" contained in article 10 was indicative of the desire of the initiators of the League of Nations Pact to put an end to the use of war. For this reason, some authors have stated that *"the League of Nations guarantees territorial integrity"* [59]. Among the legal instruments that protect the territorial integrity of the State is the United Nations General Assembly Resolution 2625 or Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States[60]. It is clear that territorial integrity is a central element in the existence of the State and that its violation leads to sanctions. Furthermore, the United Nations General Assembly resolution 3314 reiterates the need to safeguard the territorial integrity of States in one of its recitals regarding the definition of aggression[61]. This prohibition had already been made by the founding treaty of the United Nations earlier in 1945. Certainly, the protection of territorial integrity through the various international legal instruments took into account exclusively inter-state relations. Today, it is accepted that individuals can seriously undermine the territorial integrity of states. Terrorist groups constitute a real danger to the territorial integrity of States. Several jihadist organizations control certain portions of the territories of States, thus violating

[53] See BRETT (A.), « Francisco de Victoria and Francisco Suarez », *Oxford Handbook of the History of International Law*, 2012, pp. 1086-1092.

[54] On the question see VEROSTA (S.), « History of the law of Nations: 1648 to 1815 », *Encyclopédia of Public International Law*, New York, vol. 7, 1984, pp. 160-176.

[55] See SCHMITT (C.), *Le nomos de la terre dans le droit des gens du jus publicum europaeum*, Paris, PUF, 2001, p. 171.

[56] See MARTIN (J-C), *Les règles internationales relatives à la lutte contre le terrorisme, op. cit.* p. 313.

[57] See GRAFF (T.F.), « Territoire et droit international », *Civitas Europa*, N° 35, 2015, p. 42.

[58] See KORMANICKI (T.), *La question de l'intégrité territoriale dans le Pacte de la Société des Nations*, Paris, PUF, 1923, p. 162. See also CHAUMONT (C.) et FISHER (G.), « Explication juridique d'une définition de l'agression », *AFDI*, vol. 2, 1956, p. 528.

[59] See STRUYCKEN (A. A.), *La Société des Nations et l'intégrité territoriale*, Madrid, Biblioteca Visseriana, 1923, pp. 104 et seq., KORMANICKI (T.), *La question de l'intégrité territoriale dans le Pacte de la Société des Nations, op. cit.* p. 12.

[60] See United Nations General Assembly Resolution 2625 or Declaration on Principles of International Law concerning Friendly or Cooperative Relations among States.

[61] See Article 3g of the United Nations General Assembly Resolution 3314 of 1974.

their territorial integrity[62]. This means that terrorist groups have a territorial foothold in certain territories around the world. On the strength of this, some authors have described Daech as a "nascent state"[63]. It should be noted that the objective of terrorist groups such as Daech or the Islamic State is to establish a true caliphate in the territories they control, i.e. areas where Islamic law would reign. Moreover, it is difficult to deny that on certain points Daech meets the conditions for the formation of a state under international law, namely a territory, a population and a political organization. But all this does not make it a state in the sense of contemporary international law[64].

The use of force in self-defence in the fight against international terrorism could be meaningful in the light of the violation of the territorial integrity of states and in accordance with the legal instruments of the United Nations prohibiting the use of force in international relations. The crumbling of a state's territory by force therefore constitutes aggression within the meaning of UN General Assembly Resolution 3314 and gives rise to the right to exercise Article 51 of the Charter. The debate on the statehood or not of terrorist organizations seems to be reductive with regard to their capacity to carry out unimaginable armed attacks that could lead to the annihilation of state entities. It is true that contemporary international law, and more specifically the United Nations Charter, was designed to govern relations between States. However, terrorist groups today play a relevant role on the international scene and deserve special attention. The right to self-defense is therefore only a right to protect the territorial integrity of the State. But it is not a question of a state reacting in self-defence to also attack the territorial integrity of another state. This is how Resolution 2625 of the United Nations General Assembly recalled it when it asks not to interpret it as *"authorizing or encouraging any action whatsoever which would dismember or threaten, in whole or in part, the territorial integrity or political unity of any sovereign and independent State conducting itself in accordance with the principle of equal rights and self-determination of peoples"*[65]. What about the preservation of the State sovereignty?

2- Preservation of State sovereignty

International law as conceived by the founding fathers is based on the sovereignty of States. Moreover, one of the fundamental principles of the UN is that of the sovereign equality of States[66]. This means that all UN member states are equal before international law and are subject only to it[67]. This is done with the aim of eliminating any discrimination in the role played by States on the international scene. This equality extends to the rights and duties of States. As a subjective right of the State, as BEAU points out when he writes: "There is nothing to invalidate the opinion that there is no State without sovereignty"[68], In international law, sovereignty has always been equated with independence, thus allowing its holder to impose its power. The implementation of the sovereignty of the State requires a will that manifests itself by imposing itself on that of others. Some authors speak of *"the force superior to all other wills"*[69].

[62] This is the case of the "Islamic State" organization which occupies 40% of Iraqi territory and 33% of Syrian territory.

[63] See LAURENT (S.), *L'Etat islamique*, Paris, Seuil, 2014, p. 159.

[64] See the Montevideo Convention on rights and duties of States.

[65] See UN General Assembly Resolution 2625 on the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.

[66] See Article 1 of the United Nations Charter which states "The Organization is founded on the principle of the sovereign equality of all its members".

[67] On this question, see CHAUMONT (C.), "La recherche du contenu irréductible du concept de souveraineté internationale", in Mél. BASDEVANT, op. cit, p. 114.

[68] See BEAU (O.), *La puissance de l'Etat*, Paris, PUF, 1994, p. 14. See also on the question SUR (S.), « Sur quelques tribulations de l'Etat dans la société internationale », *RGDIP*, 1993, p. 885.

[69] For SALMON, sovereignty is the "legal capacity of the State, full and complete, which allows it, at least potentially, to exercise all the rights known to the legal order, and in particular the faculty to decide, to carry out an act, to lay down rules", it is also the "exercise for the State to decide by itself the limitations to its powers without foreign interference", SALMON (J.), *Dictionnaire de droit international public*, op. cit. For CARRE DE MALBERG "the word sovereignty does not designate a power, but a quality, a certain way of being, a certain degree of power. Sovereignty is the supreme character of a power: supreme in that the power admits no other, neither above it, nor in

Sovereignty is therefore an essential quality of the State. For Georges SCELLE, *"sovereignty is a fiction in international law which leads to a logical impossibility"* [70] . Indeed, sovereignty appears in international law as a political concept characterized by the designation of the legitimate holder of power. This attribute of the State has its source in the long Westphalian period, which continues to this day, and makes sovereignty an indissociable element of the State[71].

Behind sovereignty lies a legal mechanism for the protection of this fundamental right of the State. Indeed, resolution 3314 of the United Nations General Assembly contains this notion in one of its recitals relating to the definition of aggression. Thus, article 1 of this resolution is more or less assimilated to the use of force codified in article 2 paragraph 4 of the United Nations Charter in these terms: "Aggression is the use of force against sovereignty, (...) or in any other manner inconsistent with the Charter of the United Nations". As a result, any armed attack against sovereignty constitutes aggression and may give rise to the right to exercise self-defense. In the context of the fight against international terrorism, sovereignty is not an empty word. Any violation of the sovereignty of a State is considered to be an aggression in view of the nature of the perpetrators of the offending acts. For this reason, some authors believe that sovereignty is seriously threatened in the case of armed aggression by a State[72]. Moreover, the United Nations Court, in the case of military and paramilitary activities in Nicaragua, recalled that *"the principle of respect for the sovereignty of States in international law is closely linked to that of the prohibition of the use of force and of non-intervention"*[73]. In this case, the Court of The Hague considered that the mining of the territory of a State constitutes a violation of its sovereignty. It stated: *"The obligation of every State to respect the territorial sovereignty of others comes into play in the judgment to be given on the facts relating to the mining carried out near the coast of Nicaragua"*[74].

In the same vein, the United Nations General Assembly Resolution 2625 or Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, protects inter-state sovereignty. In its preamble, it reaffirms the fundamental importance of sovereign equality without which the purposes of the United Nations cannot be achieved[75]. It is clear that the World Organization of the United Nations has always wanted to protect the sovereignty of States. This constitutes an inalienable pillar of State entities. As Alain Pellet points out, for whom the foundation of international society depends on sovereignty[76]. In this sense, the resolution 2131 of the General Assembly of the United Nations of December 21, 1965 or Declaration on the inadmissibility of intervention in the internal affairs of States and on the protection of their independence and sovereignty also emphasizes the protection of sovereignty in inter-state relations. Thus, the right of self-defense is also perceived as a right to maintain international peace and security.

competition with it", CARRE DE MALBERG (R.), Contribution à la théorie générale de l'Etat, Paris, Sirey, 1933, pp. 1920-1922. See also SCHRIJVER (N.J.) " The changing nature of state sovereignty", BYBIL, 1999, vol. 70, pp. 69 and seq. On this question, see also ALLAND (D.) and RIALS (S.), *Dictionnaire de culture juridique*, op. cit. p. 1434.

[70] See SCELLE (G.), *Précis de droit des gens : principes et systématique*, Paris, Sirey, 1934, p. 13.

[71] See DEMICHEL (F.), " Le rôle de la souveraineté dans les relations internationales contemporaines ", in Mélanges BURDEAU, Le pouvoir, Paris, LGDIP, p. 1054. For the author, "Sovereignty has a long history, naturally linked to that of the State. It appeared, in fact, as a quality inherent in the very notion of the State, when the feudal world and its theocratically inspired unilateralism broke up to make way for clearly delimited territorial political units". See also BASDEVANT (J.), Les règles générales du droit de la paix,The Hague, RCADI, vol. 58, 2008, , pp. 577-587.

[72] See PELLA (V.), « La codification du droit pénal international », *RGDIP*, 1952, Tome XXIII, pp. 383-384.

[73]ICJ, *Case Concerning Military Activities in Nicaragua*, supra, para. 212, p. 111

[74] *Ibid.*

[75] See Resolution 2625 (XXV) of the United Nations General Assembly or Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. This text makes sovereign equality a fundamental principle in international law.

[76] . Statement made when chairing a round table, in CASSESSE (A.) and DELMAS-MARTY (M.), Crimes internationaux et juridictions internationales, Paris, PUF, 2002, p. 188.

B- The right to self-defense as a right to maintain international peace and security in the fight against terrorism

After the Second World War and when the founding treaty of the United Nations was drafted, the founding fathers decided to entrust world security to a political body. The international law laid down in the UN Charter condemns the use of war. Moreover, the new world order had as its objective the permanent quest for peace and security. In this perspective, the Security Council has a predominant place (1) as well as regional defense organizations (2).

1- The preponderant role of the Security Council: a principal organ

As a subsidiary right, the right of self-defence is limited by the intervention of the Security Council. Simply put, when a state acts in self-defence, once the Security Council intervenes under Chapter VII of the UN Charter to maintain international peace and security, the state's right to self-defence ceases in accordance with Article 51 of the UN Constitutional Treaty. The very limited body of the world organization is therefore the guarantor of collective security, which should not be confused with collective self-defense. One of the purposes of the United Nations is contained in Article 1 of the World Organization's Constitutional Treaty, which sets out the means by which the Security Council can put an end to situations that endanger international peace[77].

One of the requirements of Article 51 is that states must inform the Security Council of measures taken in self-defence. In the Case Concerning Military and Paramilitary Activities in Nicaragua, the Court criticized the United States for failing to act in self-defence by not informing the Security Council[78]. Indeed, failure to comply with this obligation does not invalidate the use of self-defence but weakens it. For the Court in The Hague, failure to comply with the obligation to report to the Security Council has no consequences for the right of the United States to use force in self-defence under Article 51 of the United Nations Charter. This is the position defended by some authors who believe that *"The proposition that a failure to comport with de subsequent duty (to report) undermines the legality of the preceding measures (of self-defence) does not fit the scheme of article 51"*[79]. Furthermore, in his separate opinion attached to the judgment in the case of military and paramilitary activities in Nicaragua, Judge SCHWEBEL stated *« The term in question is a procedural term; of itself it does not, and by the terms of article 51, cannot impair the substantive, inherent right of self-defence, individual or collective"*[80].

In another case, The Hague Court confirmed this requirement for reporting to the Security Council. Thus, in the Case Concerning Armed Activities in the Territory of the Congo, the Court criticized Uganda for not declaring its use of force as self-defence. It stated: "The Court will observe first of all that, in August and early September 1998, Uganda did not bring to the attention of the Security Council the events which, in its view, required it to exercise its right of self-defence"[81]. In any case, the collective security system is an intermediate system between the power of states to ensure their own security by their own means and an international police mechanism under the auspices of the Security Council. Moreover, under Article 39 of the UN Charter *"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression"*[82]. In practice, the Security Council has always been a body that legitimizes the use of force in self-defence. Faced with the scourge of international terrorism, the Security Council is more than ever confronted with a new type of use of force in international

[77] See Article 1er of UN Charter

[78] ICJ, Case Concerning Military and Paramilitary Activities in Nicaragua, supra, para. 235, at 121-122.

[79] See DINSTEIN (Y.), *War, aggression and self-defence*, op. cit. p. 190. Voir également GRAY (C.), *International law and the use of force*, *op. cit.* p. 91; SCHACHTER (O.), Authorized use of force by the United Nations and regional organizations, in DAMROSCH (L.F.) and SCHEFFER (D.J.) (eds.), *Law and force in the new international order*, London,Westview Press, 1991, p. 65.

[80] See Judge SCHWEBEL, separate dissenting opinion appended to the Judgment of 27 June 1986, Case concerning military and paramilitary activities in Nicaragua, supra, para. 227, p. 376.

[81] ICJ, Case Concerning Armed Activities in the Territory of the Congo, supra, para. 145.

[82] Cf. Article 39 of UN Charter.

relations. The system of collective security as instituted by the drafters of the United Nations Charter took into account the inter-state relations that prevailed until then. Since the attacks of September 11, 2001 in the United States, the collective security system tends to be weakened by the veto. It was after the Second World War that the UN officially took measures to maintain international peace and security. Yet, in terms of the resolutions mentioned, the Security Council remains ambiguous about the coercive measures taken to maintain peace and security in Afghanistan. In addition to calling the attacks in the United States a "threat to international peace and security," the Security Council calls on states to cooperate in the fight against international terrorism. In its resolution 1373, the political and military body of the United Nations refers to Chapter VII of the world organization's founding treaty while taking measures to combat international terrorism. Despite the financial restrictions taken by the Security Council, this was not likely to ensure the defense of the United States. This is one of the reasons why some authors have suggested that the 2001 resolutions did not end the US response. Rather, there was a simultaneous intervention by the United States and the Security Council[83]. In its role as the "world's policeman", the Security Council not only adopted resolution 1390 of 2002, creating the International Security Assistance Force for Afghanistan, but also resolution 1373 of 2001, under Chapter VII of the United Nations Charter. In this way, the collective security system took shape in place of the individual self-defence of the United States[84]. After the attacks of November 13, 2015 in Paris, the Security Council adopted, under the leadership of France, resolution 2249 of November 20, 2015. In it, the Security Council *"unequivocally condemns in the strongest terms the appalling attacks that were committed by ISIS, also known as Daech, on June 26, 2015 in Sousse, on October 10, 2015 in Ankara, on October 31, 2015 over Sinai, on November 12, 2015 in Beirut, and on November 13, 2015 in Paris, and all other attacks committed by ISIS"*[85]. With regard to this resolution, the observation that can be made is that it does not specifically concern the attacks of November 13 in Paris, although the French request refers to these attacks. That said, resolution 2249 condemns in a general way the terrorist acts committed by Daech, which is its particularity.

Moreover, it does not contain any reference to the right of self-defence but deals with the use of force against ISIS. To the question of whether resolution 2249 put an end to France's self-defense, it must be said that this was not the case in theory, but in practice, France continued to bomb Syria on the basis of individual and collective self-defense[86]. By virtue of its Charter powers to maintain international peace and security, the Security Council just condemns terrorist attacks without taking appropriate measures to preserve international peace and security, thus leaving room for the victim state to maneuver[87]. By not resorting to Chapter VII of the United Nations Charter in resolution 2249, the Security Council has placed itself within the framework of the cooperation of States in the fight against international terrorism, more specifically Daech. Consequently, the military actions taken by France and other European states in collective self-defence against Daech

[83] See on this question CONDORELLI (L.), « Les attentats du 11 septembre et leurs suite : où va le droit international ? », *RGDIP*, 2001, p. 841. L'auteur note qu' *« il y a simultanément prise de mesures par le Conseil de sécurité et reconnaissance persistance du droit de légitime défense, ce qui constitue une anomalie »*.

[84] It should be noted that despite these measures taken by the Security Council, the United States continued to conduct operations on the ground under Article 51 of the UN Charter.

[85] See Security Council resolution 2249 of November 20, 2015 on "Threats to international peace and security caused by terrorist acts."

[86] France's representative to the Security Council stated after the vote on resolution 2249 that "On the basis of this historic Security Council resolution, France will continue and expand its efforts to mobilize the entire international community to defeat our common enemy" (UN Doc S/PV. 7565).

[87] In paragraph 5 of resolution 2249, the Security Council calls on States to take *"all necessary measures in accordance with international law, in particular the Charter of the United Nations, international human rights law, refugee law and international humanitarian law (...) with a view to preventing and suppressing acts of terrorism committed in particular by the ISIL (...) and to eliminating the sanctuary which they have created in large parts of the territories of Iraq and Syria*".

positions in Syria and Iraq have no legal basis. On the other hand, Security Council Resolution 2249 is *"as France wished, not an international legal basis for military operations against the ISIL in Syria, but the basis of its efforts to mobilize the entire international community, a 'political appeal' in short to mobilize the States"*[88]. At the time of the adoption of this resolution, the representative of Russia said *"In our opinion, the resolution presented by France is a political appeal that does not change the legal framework of the fight against terrorism"*[89]. In other words, Security Council resolution 2249 does not appear to be a discharge for the use of force against the ISIL, nor does it authorize the use of self-defence. It is therefore innovative but also ambiguous. In any case, the Security Council, through this resolution, recommends that States take all necessary measures to fight terrorism in accordance with international law, while preserving the rules on self-defence. What about regional defence organizations?

2- Regional Defense Organizations: Subsidiary Body

The fight against international terrorism takes place at all levels, both universal and regional. Thus, regional defence organizations play a significant role in the framework of self-defence against international terrorism. Since the end of the Cold War, the use of force authorized by the United Nations or international organizations raises the problem of the applicability of the principle of the prohibition of the use of force by these international organizations[90]. The role of regional organizations has been more or less circumscribed in the United Nations Charter. These lower-level representatives of the collective security system can use force, but under certain conditions. Indeed, Chapter VIII, more precisely Article 53 paragraph 1 of the UN Charter, empowers the Security Council, if necessary, to use regional organizations "for the application of coercive measures under its authority. In addition, this provision specifies that "No coercive action shall be taken under regional arrangements or by regional organizations without the authorization of the Security Council" [91]. From the above, this article inaugurates, alongside article 51 of the United Nations Charter, a new exception to the sacrosanct principle of the prohibition of the use of force in international relations laid down in article 2 paragraph 4 of the World Organization's Constitutional Treaty[92]. This means that there is a subordinate relationship between the Security Council and the regional defence organizations. Thus, any use of force by a regional defence organization is subject to the authorization of the Security Council. It goes without saying that any action contrary to the United Nations Charter or carried out without the approval of the United Nations' restricted body is contrary to international law, despite the legal uncertainty surrounding the legality of certain regional defence organizations in the prevention or repression of acts of genocide.

In the fight against international terrorism, multilateralism is undoubtedly an effective mechanism for eradicating sanctuaries established by private groups[93]. Therefore, self-defense must be exercised collectively under Article 51 of the United Nations Charter. It is true that international terrorism today constitutes a formidable challenge for States. Because of its manifestations and consequences, international terrorism undermines the foundations of international society. In order for there to be self-defence, the state invoking it must first be the victim of an armed aggression. In this case, two hypotheses may govern the implementation of collective self-defence by a regional organization. Either the state is the victim of terrorist attacks

[88] See MARTIN (J-C.), « Les frappes de la France contre l'EIIL en Syrie, à la lumière de la résolution 2249 (2015) du Conseil de sécurité », *QIL*, 2016. p. 14.

[89] UN Doc S/PV.7565 (n 6) 5.

[90] See STEIN (T.), "Kosovo and the International Community. The attribution of possible internationally wrongful acts: responsibility of NATO or its members states?", *in* TOMUSCHAT (C.), *Kosovo and the International Community. A legal assessment*, La Haye, Kluwer international law, 2002, pp. 186 et s.

[91] See Article 53 of UN Charter.

[92] See VILLANI (U.), « Les rapports entre l'ONU et les organisations régionales dans le domaine du maintien de la paix », *RCADI*, 2001, vol. 290, p. 325.

[93] In 2006, the States adopted a "Global Counter-Terrorism Strategy for the United Nations", see Resolution A/RES/60/288 of the General Assembly.

committed by subversive groups based on the territory of another state[94], or the State is a victim of terrorist acts committed by private groups based on its own territory[95]. Faced with the unprecedented violence of terrorist groups, States have the right to respond in self-defense if these acts constitute armed aggression within the meaning of United Nations General Assembly resolution 3314 in order to ensure their security. In the event that they are unable to do so, this failure may justify the invocation of collective self-defence mechanisms provided for in regional instruments within regional organizations[96]. However, the implementation of collective self-defence must obey two fundamental conditions. On the one hand, the State victim of terrorist acts must declare itself attacked and on the other hand, the requirement of an express request from the State victim of aggression is necessary. This crucial obligation was recalled by the Hague Court in the case of military and paramilitary activities in Nicaragua. For the Court, *"there is no rule in customary international law that would allow another State to exercise the right of collective self-defence against the alleged aggressor by relying on its own assessment of the situation. In the event of the invocation of collective self-defence, it is to be expected that the State in whose favour this right is to be exercised will declare itself the victim of an armed aggression"*[97].

Since the end of the Soviet era[98], collective security systems based on regional defense agreements were based on an inter-state mechanism of armed conflicts. At that time, the implementation of the regional mechanism of the collective security system had two dimensions, namely *"on the one hand, as a regional collective security organization, acting ad intra to guarantee a form of regional public order; that is, within the meaning of Chapter VIII of the Charter against threats to peace of all kinds. This clarification is of primary importance insofar as terrorism has recently been considered one of the most serious threats to international peace and security. On the other hand, they may use armed force ad extra as a regional collective defense organization by virtue of the inherent right of self-defense provided for in Article 51 of the Charter. This last prerogative allows them to exercise their mission of 'international community policing*[99] *""*[100]. This approach seems to be crumbling today in view of not only the decrease in inter-state conflicts but also the rise of international terrorism characterized by an asymmetric use of force.

In international practice, regional defense organizations very often resort to the use of force in violation of the provisions of the United Nations Constitutional Treaty. This was the case with the armed intervention of ECOMOG[101] during the armed conflict in Liberia in August 1990. As an ECOWAS military force, ECOMOG's military action had no legal basis. Indeed, taking into account the internal nature of the conflict, the operation of this regional organization could not be based on collective legitimacy, nor on Chapter VIII of the Charter, and finally, the Security Council had not given its authorization for an action to maintain peace and security in the region. It was not until November 19, 1992, that the United Nations' restricted body adopted resolution 788; it referred to Chapter VIII of the

[94] This is the case of Cameroon, Niger, Chad and Kenya. As for Cameroon, since 2014 it has suffered terrorist attacks from the Islamic State for West Africa still called Boko Haram based on Nigerian territory.

[95] This is the case of Syria and Iraq, among others, which are suffering from the terrorist attacks of the Islamic State in Iraq and the Levant, still called Daech.

[96] See BIDIAS (J.P.), « Le recours à la légitime défense par les organisations régionales dans la lutte contre le terrorisme », *RQDI*. 2016, p. 35.

[97] ICJ, *Case Concerning Military and Paramilitary Activities in Nicaragua*, supra, para. 195.

[98] On December 21, 1991, eleven countries of the Soviet Union decided to put an end to the federal state in Alma-Ata. And on December 26, 1991, after the resignation of Mikhail Gorbachev, the fall of the USSR becomes effective.

[99] Voir BALMOND (L.), « La contribution des organisations régionales à la sécurité collective : entre chapitre VIII et néo régionalisme », *in* GUILHAUDIS (J-F.) (dir.), *La sécurité internationale entre rupture et continuité : mélanges en l'honneur du professeur Jean-Francois Guilhaudis*, Bruxelles, Bruylant, 2007, pp. 1-6.

[100] See BIDIAS (J-P.), « Le recours à la légitime défense par les organisations régionales dans la lutte contre le terrorisme », *op. cit*. pp. 35-36.

[101] In a literal way, *Economic Community of West African States Monitoring Group.* It is a military intervention group under the leadership of the Economic Community of West African States (ECOWAS).

United Nations Charter to legitimize the ECOMOG operation without, however, legalizing it. From then on, the question of the original legality of this organization arises. The doctrine is divided on this point. For VILLANI, the a posteriori authorization of the Security Council could not lead to a regularization of the use of force by the regional organization. For him, the approval should come at the beginning or during the course of the military operation, in short before it is completed[102]. However, according to Pierre KLEIN, the a posteriori authorization of a coercive action by ECOMOG, by the restricted organ of the United Nations *"must simply be analyzed as a renunciation of the responsibility of the regional organization for a recourse to force which would not, at the outset, meet the requirements of international law on the subject"*[103].

Similarly, NATO's military operation in the Federal Republic of Yugoslavia triggered strong criticism in international society. The representative of the Russian Federation to the UN strongly condemned the offensive as a *"violation of the UN Charter".* For his part, the Russian President, Boris Yeltsin, described this action as aggression, when he declared that *"Russia is deeply indignant about NATO's military action against sovereign Yugoslavia, which is nothing less than a flagrant act of aggression"*[104]. Many states felt that NATO had violated international law, in particular Articles 2 paragraph 4 and 53 of the United Nations Charter. Some states, such as Belarus[105] and India[106] explicitly disapproved of NATO's military operation, calling it aggression. China, for its part, considered this action to be a "flagrant violation of the United Nations Charter and accepted norms of international law"[107]. On the other hand, some state entities have instead given their support to the regional organization led by the United States of America[108]. It is worth mentioning that the attacked state declared itself to be the victim of armed aggression and naturally invoked its right to self-defense in accordance with Article 51 of the United Nations Charter. With regard to its statements before the Security Council, the former Yugoslavia considered NATO and its member states as aggressors[109]. Taken singularly, Article 5 of the North Atlantic Treaty refers explicitly to "the exercise of the right of individual or collective self-defence recognized in Article 51 of the Charter of the United Nations. However, international law is not only a matter of texts and terms, it is also a matter of practice and custom[110]. Thus, in the context of the military intervention in Baghdad, the legal basis that had been proposed in support of the transit authorization given by Belgium was the Treaty concluded with the United States on 16 and 19 July 1971. The Belgian authorities claim that they could not refuse the requests of the United States to use their national territory specifically to activate communication lines intended to pass material between Belgium and Germany. In reality, the 1971 Treaty cannot be separated from the North Atlantic Treaty because it is part of the NATO Convention, the purpose of which was to allow the United States to ensure the movement of its armed forces in order to prepare and carry out military actions decided in accordance with the North Atlantic Treaty[111].

The majority of the doctrine is unanimous in its view that Article 53(1) of the UN Charter has been violated. The World Court adopted the same reasoning in its orders of 2 June 1999 in the cases concerning the Legality of Use of

[102] See VILLANI (U.), *Les rapports entre l'ONU et les organisations régionales dans le domaine du maintien de la paix*, *op. cit*. pp. 379-381.
[103] See KLEIN (P.), « Les organisations régionales dans les conflits armés : la question de la responsabilité internationale », *in* BENCHIKH (M.) (eds..), *Les organisations internationales et les conflits armés*, Paris, l'Harmattan, 2001, p. 173.
[104] S/PV. 3988, 24 mars 1999, p. 2.
[105] *Ibid*., p. 15.
[106] *Ibid*., p. 16.
[107] *Ibid.*, p. 13.
[108] This is the case of Germany, Albania, Bahrain, France, Brazil, Bosnia-Herzegovina, Canada, the United States, the Netherlands, the United Kingdom and Slovenia.
[109] S/PV. 3988, of 24 March 1999, p. 14 ff., S/PV. 3989, of 26 March 1999, pp. 11 et seq. 4011, pp. 3-6.
[110] Cf. Military intervention against Baghdad carried out without the agreement of the United Nations. See in this sense, TERTRAIS (S.), "Légale, sur le strict plan du droit international", *Le Soir*, 2003, p. 19.
[111] See CORTEN (O.), « Le comportement de la Belgique pendant la crise irakienne : respect ou violation du droit international ? », *J.T*, 2003, pp. 478-479.

Force. It expressed concern about "the use of force in Yugoslavia. Furthermore, the Hague Court stated that "in the present circumstances, this use of force raises serious problems under international law. In its approach, the International Court of Justice condemns NATO's action[112]. On the point of the prohibition of the use of force, it is noted that a regional organization can be held responsible for the violation of article 2 paragraph 4. On the other hand, armed aggression cannot be held against an international organization, since it is only relevant in inter-State relations. The maintenance of peace in the context of the exercise of the right of collective self-defence could only have meaning if it contributes to the establishment of world public order.

Conclusion

In this article, the perception of the right to self-defence in the fight against international terrorism was highlighted. The article shows that the right codified in Article 51 of the United Nations Charter is a victim of the evolution of threats on the international scene. In the past, States were the only ones capable or authorized to commit acts of aggression of remarkable gravity, today the world cannot do without organized groups or terrorists. These groups sometimes commit acts of such gravity that they put some of the world's states to the test. Faced with this rise in international terrorism, States resort to self-defense on grounds contrary to the United Nations Charter, thus violating its purposes and principles enshrined therein. In the name of the fight against terrorism, the transgression of Article 51 of the United Nations Charter cannot be accepted. The principle of the non-use of force in international relations remains the pillar of international society. However, the right of self-defense in the fight against terrorism is sometimes seen positively as protecting the essential elements of the state. In this context, the Security Council remains the regulatory body for international conflicts. From the above, one observation can be made regarding the invocation of the right to self-defense in the fight against terrorism. Most of the States that justify their use of force against terrorist groups are powerful States. In the end, is the right of self-defense a right of force? This is the question that can be asked at the end of this study.

[112] ICJ, Cases Concerning the Legality of Use of Force, (Yugoslavia v. Belgium and Others), Request for the Indication of Provisional Measures, Orders of 2 June 1999, para. 17.

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