

The Post-9/11 Discourse Revisited – The Self-Image of the International Legal Scientific Discipline

Ulf Linderfalk*

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* Ulf Linderfalk is an Associate Professor of International Law at the Faculty of Law, Lund University, Sweden.

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Abstract

A few years ago, the legality of Operation Enduring Freedom (OEF) was a topic much discussed in the international legal literature. This article approaches the problem from a new angle. Rather than investigating the relevant issue of legal substance – whether or not OEF was ever consistent with international law – the article focuses attention on the general scholarly performance in dealing with this issue. Scrutinizing the literature published immediately following upon the events of 11 September 2001, the author suggests that overall, the scholarly debate on the legality of OEF did not live up to the standards normally applied in serious legal analysis, and that hence, the debate should be characterized as poor science. The article presents this criticism in further detail. With said criticism as a basis, in a concluding part of this article, the author takes the investigation one step further. As he suggests, when scholars engaged in the post-9/11 discourse, there was something about the whole situation that greatly constrained them. They were obviously hesitant to conclude that in circumstances like those of 9/11, there would still not be any right of self-defense to exercise. So much did they hesitate that they thought the opposite conclusion worth the prize of far-reaching infringements of the most basic of scientific quality standards. Why this hesitation, the article asks. What force or forces are compelling international legal scientists? As the author suggests, this question bears directly on the particular self-image of the legal scientific discipline and the role it envisages for itself in the international community. He concludes the article by initiating a discussion on this very delicate issue specifically, introducing for this purpose a description of the international legal scientist as archetype.

A. Part I

I. Introduction

Legal science is a concept generally honored among the legal profession. As we are used to thinking, legal science is the activity typically engaging professors of law, research fellows at legal departments, and doctoral candidates. It produces descriptions and assessments of a legal system, including the way that system is created and developed. Stated generically, it provides what legal scholars communicate and deliberate at legal conferences and through the agency of law journals and scientific

publishing companies. Two assumptions are implicit in this activity.¹ First, there is the idea that legal science is a good to be desired and pursued. As most people in the legal profession tend to believe, legal science is an activity that *should* be practiced. For some reason – not often openly declared – we are better off *with* legal science than without it. Secondly, there is the idea that legal scientific activities can be assessed in comparative terms such as *better* and *worse*. In the conceptual world of the legal profession, obviously, there is an ideal legal scholarship that can be used as a basis for criticism of legal scientific activities. The more legal scholars can approximate the ideal, the better it is; and vice versa.

All things considered, the mere existence of legal scientific activity would seem to raise the claim for quality control and review. Generally speaking, such reviews are warranted for several reasons. First, they are a means to safeguard the internal rationality of legal science. To be able to communicate and perform their task efficiently, legal scientists are dependent on the instrumentality of specific intellectual tools, such as legal terminology and legal concepts. Largely, these tools are created and developed through the activities of legal scholarship itself. Legal scientific activities should be reviewed to ensure that the intellectual tools remain functional.² Second, reviewing legal scientific activity is a means to promote and protect the authority of the legal scientific discipline. Every legal proposition raises the claim that it be considered correct.³ Therefore, if on further scrutiny, time after time, the outcome of legal scientific activities is revealed to be incorrect, the credibility of all legal science will be jeopardized. Legal scientific activities should be reviewed to ensure that this does not happen. Third, reviewing legal scientific activity serves as a means

¹ Support for this proposition can be found in speech act theory. Searle gave the example of a person, who says “The cat is on the mat”, see J. R. Searle, *Speech Acts* (1969), 11. In *Speech Acts* he argued that by merely uttering this proposition, a person inevitably commits herself to its truthfulness. This line of argument can be applied to legal scientific activity as well. If people engage in legal scientific activities, they commit themselves to the assumption that legal science is a good to be desired and pursued. Similarly, if legal scholars spend time comparing and assessing legal scientific activities, they commit themselves to the assumption that legal scientific activities can be assessed in comparative terms such as better or worse.

² Cf. U. Linderfalk, ‘State Responsibility and the Primary-Secondary Rules Terminology: The Role of Language for an Understanding of the International Legal System’, 78 *Nordic Journal of International Law* (2009) 1, 53.

³ See R. Alexy, *A Theory of Legal Argumentation – The Theory of Rational Discourse as Theory of Legal Justification* (1989), 214-217.

to protect the internal rationality of legal systems. Legal science has a unique task, for which no other legal actor takes responsibility. It systemizes and analyzes the relevant “legal activities”, that is, the activities of all those who participate in the creation and development of a legal system. If legal science does not perform this task well, the coherence of the legal system will be put at risk. Legal scientific activities should be reviewed to ensure that this does not happen. Fourth, reviewing legal scientific activities is a means to protect the legitimacy of law as a form of governance. When legal research is performed on a legal order, it raises an implicit claim that overall, the legal order is legitimate.⁴ Therefore, the continued confidence of the community in legal science inevitably entails its confidence also in the legal order. Legal scientific activities should be reviewed to ensure that this confidence remains intact.

This essay is intended as a contribution to the ideally ever-on-going quality control of international legal scholarship. The essay will conduct a review of a particular legal discourse on a particular legal question: the legality of Operation Enduring Freedom. I assume the reader is already fairly acquainted with the setting. On 11 September 2001, four commercial aircraft were hijacked to be used in a large-scale attack carried out in and against the United States of America. Two of the jets were deliberately flown into the World Trade Center of New York City, a third struck the Pentagon in Washington, D.C., and a fourth crashed into a field in Shanksville, Pennsylvania, apparently heading for another target in the Washington area. The attacks were immediately attributed to a group of loosely affiliated terrorist organizations, known as the Al-Qaeda network. On the evening of 11 September, the United States Government declared itself to be engaged in a “war against terrorism”,⁵ and five days later, the Government of the United Kingdom followed suit by issuing a similar statement.⁶ On 7 October 2001, the two governments ordered armed forces to initiate military actions in Afghanistan. Air strikes were launched against terrorist training camps, but also against military targets – such as air defense, communication centers, and air bases – throughout the country, followed by a military campaign on the ground. This military action was

⁴ See K. Tuori, *Critical Legal Positivism* (2002), 283-322.

⁵ Statement by the President of the United States in his Address to the Nation, 11 September 2001, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html> (last visited on 19 November 2010).

⁶ See *Keesing's Record of World Events*, 44336.

referred to as Operation Enduring Freedom.⁷ In an attempt to justify it the two governments invoked their inherent right of self-defense.⁸

In the international legal literature, the tragic events of 9/11 and the subsequent military operation in Afghanistan attracted considerable attention. Articles and monographs were produced in great quantity,⁹ the

⁷ As of November 2010, Operation Enduring Freedom still continues.

⁸ Letters of 7 October 2001, UN Doc S/2001/946 and UN Doc S/2001/947.

⁹ See Y. Arai-Takahashi, 'Shifting Boundaries of the Right of Self-Defence: Appraising the Impact of the September 11 Attacks on *Jus Ad Bellum*', 36 *The International Lawyer* (2002) 4, 1081; J. M. Beard, 'America's New War on Terror: The Case for Self-Defense Under International Law', 25 *Harvard Journal of Law and Public Policy* (2001-2002) 2, 559; M. C. Bonafede, 'Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism After the September 11 Attacks', 88 *Cornell Law Review* (2002-2003) 1, 155; O. Bring & D. I. Fisher, 'Post-September 11: A Right of Self-Defence Against International Terrorism?', in D. Amnéus & K. Svanberg-Torpman (eds), *Peace and Security* (2004), 177-191; D. Brown, 'Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses', 11 *Cardozo Journal of International and Comparative Law* (2003) 1, 1; M. Byers, 'Terrorism, the Use of Force and International Law After 11 September', 51 *International and Comparative Law Quarterly* (2002) 2, 401; A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', 12 *European Journal of International Law* (2001) 5, 993 [Cassese, 2001]; J. A. Cohan, 'The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law', 15 *Pace International Law Review* (2003) 2, 283; J. Delbrück, 'The Fight Against Global Terrorism: Self-Defense or Collective Security as International Police Action? Some Comments on the International Legal Implications of the 'War Against Terrorism'', 44 *German Yearbook of International Law* (2001), 9; Y. Dinstein, 'Humanitarian Law on the Conflict In Afghanistan, Remarks by Yoram Dinstein', 96 *Proceedings of the American Society of International Law* (2002), 23; H. Duffy, *The 'War on Terror' and the Framework of International Law* (2005); P. M. Dupuy, 'The Law After the Destruction of the Towers', *European Journal of International Law, Discussion Forum, The Attack on the World Trade Center: Legal Responses*, once but not any more available at the web page of the European Journal: <http://www.ejil.org>, in file with the author of this essay; T. M. Franck, 'Terrorism and the Right of Self-Defense', 95 *American Journal of International Law* (2001) 4, 839; G. Gaja, 'In What Sense Was There an 'Armed Attack'', *European Journal of International Law, Discussion Forum, The Attack on the World Trade Center: Legal Responses*, once but not any more available at the web page of the European Journal: <http://www.ejil.org>, in file with the author of this essay; M. J. Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter', 25 *Harvard Journal of Law and Public Policy* (2002) 2, 539; C. Gray, *International Law and the Use of Force*, 2nd ed. (2004), 159-194; C. Greenwood, 'International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', 4 *San Diego International Law Journal* (2003), 7; E. Gross, 'Thwarting Terrorist Acts by

Attacking the Perpetrators or their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens', 15 *Temple International and Comparative Law Journal* (2001) 2, 195; E. Katselli & S. Shah, 'September 11 and the UK Response', 52 *International and Comparative Law Quarterly* (2003) 1, 245; F. L. Kirgis, 'Terrorist Attacks on the World Trade Center and the Pentagon' (September 2001) available at <http://www.asil.org/insigh77.cfm> (last visited 19 November 2010); B. Langille, 'It's 'Instant Custom': How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001', 26 *Boston College International and Comparative Law Review* (2003) 1, 145; L. Martinez, 'September 11th, Iraq and the Doctrine of Anticipatory Self-Defense', 72 *UMKC Law Review* (2003) 1, 123; K. M. Meessen, 'Unilateral Recourse to Military Force Against Terrorist Attacks', 28 *Yale Journal of International Law* (2003) 2, 341; S. D. Murphy, 'Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter', 43 *Harvard International Law Journal* (2002) 1 [Murphy, 2002a], 41; E. P. J. Myjer & N. D. White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?', 7 *Journal of Conflict and Security Law* (2002) 1, 5; R. Müllerson, 'Jus Ad Bellum and International Terrorism', 32 *Israel Yearbook of International Law* (2002), 1; M. E. O'Connell, 'Lawful Self-Defense to Terrorism', 63 *University of Pittsburgh Law Review* (2002) 4, 889 [O'Connell, 2002]; M. E. O'Connell, 'American Exceptionalism and the International Law of Self-Defense', 31 *Denver Journal of International Law and Policy* (2002-2003) 1, 43 [O'Connell, 2002-2003]; E. Papastavridis, 'Security Council Resolutions 1368/2001 and 1373/2001: Collective Security or the Right of Self-Defence', 55 *Revue Hellénique de Droit International* (2002), 501; J. J. Paust, 'Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond', 35 *Cornell International Law Journal* (2001-2002) 3, 533 [Paust, 2001-2002]; A. Pellet, 'No, This is not War!', *European Journal of International Law, Discussion Forum, The Attack on the World Trade Center: Legal Responses*, once but not any more available at the web page of the European Journal: <http://www.ejil.org>, in file with the author of this essay; N. G. Printer, 'The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen', 8 *UCLA Journal of International Law and Foreign Affairs* (2003) 2, 331; N. Quéniévet, 'The Legality of the Use of Force by the United States and the United Kingdom Against Afghanistan', 6 *Austrian Review of International and European Law* (2001), 205; J. Quigley, 'The Afghanistan War and Self-Defense', 37 *Valparaiso University Law Review* (2003) 2, 541; S. R. Ratner, 'Jus Ad Bellum and Jus In Bello After September 11', 96 *American Journal of International Law* (2002) 4, 905; P. Rowe, 'Responses to Terror: The New 'War'', 3 *Melbourne Journal of International Law* (2002) 2, 301; M. N. Schmitt, 'Counter-Terrorism and the Use of Force in International Law', 32 *Israel Yearbook on Human Rights* (2002), 53; N. Schrijver, 'Responding to International Terrorism: Moving the Frontiers of International Law for 'Enduring Freedom'', 48 *Netherlands International Law Review* (2001) 3, 271; C. Stahn, 'Terrorist Acts As 'Armed Attack': The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism', 27 *The Fletcher Forum of World Affairs* (2003) 2, 35 [Stahn, 2003]; C. Stahn, 'Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say', *European Journal of International Law, Discussion Forum, The Attack on the World Trade Center: Legal Responses*, once but not any more available at the

main part dating from September 2001 to the late fall of 2003. Although a wide range of legal issues were brought to analysis and commented upon, the center of all discussion remained the meaning and application of the two rights of self-defense – those laid down in Article 51 of the UN Charter and contained in customary international law, respectively; each requires the existence of an armed attack.¹⁰ For two reasons, the categorization of Operation Enduring Freedom as induced by an armed attack raised the interest of international legal scholars. First, the assault on New York and Washington, D.C., had not been performed by any state organ but by a group of private individuals – the Al-Qaeda terrorist network. Second, although the Al-Qaeda network had been harbored by Afghanistan for many years, according to the general international law of state responsibility, that in itself would not make the 9/11 attack attributable to this state.

Personally, I have studied the post-9/11 international legal discourse with great interest. As expected – considering the great number of scholars that engaged in the debate, and the complexity of the many legal issues involved – commentators disagreed on a wide range of issues. Given this context, it is surprising that something like a general doctrine might transpire; but this is exactly what happened. It was the opinion expressed or implied by the great majority of text-writers that at some point between 11 September and 7 October 2001, when Operation Enduring Freedom was officially launched,¹¹ the international law of self-defense changed.¹² When

web page of the European Journal: <http://www.ejil.org>, in file with the author of this essay, henceforth referred to as Security Council Resolutions 1368 and 1373; C. Stahn, 'International Law at a Crossroads? The Impact of September 11', 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), 183 [Stahn, 2002]; G. Travalio & J. Altenburg, 'Terrorism, State Responsibility, and the Use of Military Force', 4 *Chicago Journal of International Law* (2003) 1, 97; G. K. Walker, 'The Lawfulness of Operation Enduring Freedom's Self-Defense Responses', 37 *Valparaiso University Law Review* (2003) 2, 489; R. Wolfrum, 'The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?', 7 *Max Planck Yearbook of United Nations Law* (2003), 1.

¹⁰ See e.g. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment, ICJ Reports 1986, 14, 103, para. 195.

¹¹ Note that in the Afghanistan Combat Zone Executive Order of 12 December 2001, 19 September was designated as the date of commencement of combat activities. See <http://georgewbush-whitehouse.archives.gov/news/releases/2001/12/> (last visited 19 November 2010).

¹² See e.g. Arai-Takahashi, *supra* note 9, 1087, 1096 and 1101; Beard, *supra* note 9, *passim*, but see especially 589-590; Bonafede, *supra* note 9, 206, *et passim*; Bring &

a forcible measure is employed by a group of private individuals, whose conduct – judged by the general international law of state responsibility – cannot be attributed to any state, considered from the point-of-view of the international law of self-defense existing on the morning of 11 September 2001, that measure would never be classified as an armed attack. Considered from the point-of-view of the international law of self-defense existing on 7 October 2001, it sometimes would. To facilitate reference, henceforth, I will refer to this doctrine as the *proposition of change*.

Strictly speaking, the proposition of change comes in two versions, depending on the exact rule commentators thought had evolved. According to the argument of some legal scholars, in the relevant period from 11 September to 7 October 2001, *alongside the general international law of state responsibility*, states developed a new criterion of attribution: when a group of private individuals has been harbored by a state for an extensive period of time, the conduct of that group will be attributable to said state.¹³ This criterion bore specifically on the understanding of the concept of an armed attack.¹⁴ Henceforth, according to the international law of self-defense existing on 7 October 2001, a forcible measure would sometimes

Fischer, *supra* note 9, 185-191; Brown, *supra* note 9, 24-29; Byers, *supra* note 9, 409-410; Cassese, 2001, *supra* note 9, 996-997; Cohan, *supra* note 9, 320-328; Delbrück, *supra* note 9, 15-16, implicitly; Glennon, *supra* note 9, 549-553; Greenwood, *supra* note 9, 17; Langille, *supra* note 9, 146.; Martinez, *supra* note 9, 160-161, implicitly; Meessen, *supra* note 9, 345, *et passim*; Murphy, 2002a, *supra* note 9, 45-51; Müllerson, *supra* note 9, 43 and 47; O'Connell, 2002-2003, *supra* note 9, 45-47; Printer, *supra* note 9, 344-352; Quéniwet, *supra* note 9, 221-225; Ratner, *supra* note 9, 914; Rowe, *supra* note 9, 304 and 307-308; Schmitt, *supra* note 9, 77 and 104; Schrijver, *supra* note 9, 285; Stahn, 2002, *supra* note 9, 189 and 211-214; Stahn, 2003, *supra* note 9, 38 and 39, speaking about "Article 51(½)"; Travalio & Altenburg, *supra* note 9, 101-111 and 116-117; Walker, *supra* note 9, 532, fn. 182; Wolfrum, *supra* note 9, 2, 27-28, 35-39 and 75. For a contrary opinion, see Franck, *supra* note 9, 840-841; Gaja, *supra* note 9; Paust, 2001-2002, *supra* note 9, *passim*; Pellet, *supra* note 9. According to Franck, a terrorist attack like that of 9/11 would have been classified as an "armed attack" already by the international law of 11 September a.m. According to Paust, Gaja, and Pellet, at no point – neither before 11 September, nor after – did a terrorist attack like that of 9/11 classify as an "armed attack".

¹³ See e.g. Byers, *supra* note 9, 409-410; Cohan, *supra* note 9, 320-328; O'Connell, 2002-2003, *supra* note 9, 45-47; Rowe, *supra* note 9, 304 and 307-308; Stahn, 2002, *supra* note 9, 189 and 211-214; Schrijver, *supra* note 9, 285; Travalio & Altenburg, *supra* note 9, 101-111 and 116-117.

¹⁴ Hence, as *lex specialis*, it would have to be applied prior to the criteria provided in the general international law of state responsibility. Cf. *Articles on Responsibility of States for Internationally Wrongful Acts* (GA Res. 56/83, 28 January 2002, Annex), Art. 55.

classify as an armed attack, although, as far as general international law goes, it would not be attributable to any state. Other commentators viewed things differently. According to them, from 11 September to 7 October 2001, the question of attribution had been done away with entirely. Henceforth, according to the international law of self-defense, a forcible measure would classify as an armed attack, irrespective of whether it was performed by a state or a non-state agent.¹⁵ Whether commentators endorsed the one version of the proposition of change or the other, henceforth they will be referred to as *proponents of change*.

For several reasons, I insist, the post-9/11 debate is an exceptionally interesting object of scientific study. First of all, it raises some very interesting questions with respect to the integrity of the international legal scholarship. Certainly, from 11 September to 7 October 2001 there may have been a change in the way people conceptually conceive of attacks perpetrated by international terrorists. However, this is not in itself tantamount to a change of the relevant international law. A change of international law is effected using the particular norm-creating processes recognized by international law. Considering the oft-cited inertness of those processes, the proposition of change comes out as rather drastic. If, generally, a change of international law is difficult to accomplish, then it seems a rather remote idea that a universally or near-universally applicable rule, such as the right of self-defense, could be changed over a period of just four weeks. How did text-writers argue to defend this conclusion? To what extent did their arguments conform to the standards normally demanded of a well-functioning legal science? For a proper understanding of the international legal scholarship, these are critical questions. It is the purpose set for this essay to provide them with an answer.

Subsequent section II of Part I will set the proposition of change into the context of the wider legal discourse. It remains a fact, that in order to correctly understand and assess international legal scholars when arguing that from 11 September to 7 October 2001 the international law of self-defense changed, some background knowledge is required. We need to have an idea of the arguments that scholars thought were supporting their

¹⁵ See e.g. Arai-Takahashi, *supra* note 9, 1087, 1096 and 1101; Bonafede, *supra* note 9, 206, *et passim*; Bring & Fischer, *supra* note 9, 185-191; Brown, *supra* note 9, 24-29; Delbrück, *supra* note 9, 15-16; Langille, *supra* note 9, 153; Meessen, *supra* note 9, 345, *et passim*; Müllerson, *supra* note 9, 43 and 47; Ratner, *supra* note 9, 914; Schrijver, *supra* note 9, 285; Stahn, 2003, *supra* note 9, 38 and 39; Travalio & Altenburg, *supra* note 9, 101-111 and 116-117; Walker, *supra* note 9, 532, fn. 182.

assumption about the contents of that law on the morning of 11 September. It is the purpose of section II of Part I to impart such an idea. Part II of the essay will establish and critically investigate the series of argumentative behavior patterns that emerge by a closer reading of the post-9/11 international legal literature. As the investigation will show, discussants gravely and repeatedly violated a number of the most basic of scientific quality standards. To put it bluntly, overall, the discourse on the legality of Operation Enduring Freedom was poor legal science. This conclusion provokes another host of very interesting questions. Quite clearly, commentators were hesitant to conclude that Operation Enduring Freedom was not consistent with international law, or – more generally – that in circumstances like those accompanying the events of 9/11, there would still not be any right of self-defense for states to exercise. So much did they hesitate that they thought the opposite conclusion worth the prize of far-reaching infringements of the most basic of scientific quality standards. Why this hesitation, one might ask. What force or forces are compelling international legal scientists? As it seems, the answer to this question bears directly on the particular self-image of the legal scientific discipline and the role it envisages for itself in the international community – and that is the second reason for why I find the post-9/11 discourse so interesting. In the concluding part III of this essay, I will allow myself to share a few thoughts on this delicate issue. Based on generalized personal experience, I will venture a description of the international legal scientist as archetype. The description involves a distinction between six different kinds. They are denoted as the External Observer, the Legal Idealist, The Legal Activist, the Moral Messenger, the Preserver of the Legal Self, and the Guardian of the Legal System, respectively. As I will argue, the six types all serve as possible explanations of the poor scientific quality characterizing the post-9/11 international legal discourse. Considered from the perspective of the international legal scholarship in general, they may explain some of the relationships that obviously exist between the self-image of the legal scientific discipline and what tends to be the outcome of international legal scientific activities. Hopefully they may also provide a basis for a more penetrating general discussion on the role of the legal scientific discipline in the international community.

II. The Law of 11 September a.m.

As earlier indicated, the proposition of change entails an assumption about the contents of the international law of self-defense existing on the

morning of 11 September 2001: When a forcible measure is employed by a group of private individuals, whose conduct – judged by the general international law of state responsibility – cannot be attributed to any state, that measure can never be classified as an armed attack.¹⁶ To support this assumption, apart from earlier scholarly opinions,¹⁷ the proponents of change put their trust in the following authorities:

*The 1986 judgment of the International Court of Justice in the Nicaragua Case.*¹⁸ According to the argument invoked by the US Government in defense of its support for the *contras*, the Government of

¹⁶ See *supra* section I.

¹⁷ See e.g. M. Brennan ‘Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law’, 9 *Louisiana Law Review* (1998-1999), 1195, 1207, 1209; A. Cassese, ‘The International Community’s ‘Legal’ Response to Terrorism’, 38 *International and Comparative Law Quarterly* (1989), 589 [Cassese, 1989], 596-597; Y. Daudet, ‘International Action Against State Terrorism’, in R. Higgins & M. Flory (eds), *Terrorism and International Law* (1997), 201, 203-205; S. R. Knauft, ‘Propertosed Guidelines for Measuring the Propriety of Armed State Responses to Terrorist Attacks’, 19 *Hastings International and Comparative Law Review* (1995-96), 763, 773; J. Lobel, ‘Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan’, 24 *Yale Journal of International Law* (1999), 537, 541; M. F. Lohr, ‘Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism’, 34 *Naval Law Review* (1985), 1, 7-10, implicitly, *et passim*; J. Paust, ‘Responding Lawfully to International Terrorism: The Use of Force Abroad’, 8 *Whittier Law Review* (1986-87), 711 [Paust, 1986-1987], 720-721, 723, but note that according to Paust, if a state uses “clinical” force for the purpose of quashing terrorists residing within the territory of some other state, that force should not be considered directed against the territorial integrity or political independence of that state; O. Schachter, *International Law in Theory and Practice* (1991) [Schachter, 1991], 164-167; O. Schachter, ‘The Lawful Use of Force by a State Against Terrorists in another Country’, 19 *Israel Yearbook of Human Rights* (1989) 209 [Schachter, 1989], 216-219; G. M. Travalio, ‘Terrorism, International Law, and the Use of Military Force’, 18 *Wisconsin International Law Journal* (2000), 145, 152, 156; Contra, Y. Dinstein, *War, Aggression and Self-Defence*, 3rd ed. (2001), 213-22; R. Wedgwood, ‘Responding to Terrorism: The Strikes Against bin Laden’, 24 *Yale Journal of International Law* (1999), 559, 564, arguing that “[t]here is nothing in the U.N. Charter or state practice that restricts the identity of aggressors against whom states may respond – for privates as well as governments may be the sources of aggressive conduct”.

¹⁸ For commentaries citing this authority, see e.g. Brown, *supra* note 9, 24; Cassese, 2001, *supra* note 9, 996-997; Cohan, *supra* note 9, 317; Glennon, *supra* note 9, 543-544; Meessen, *supra* note 9, 345; Schmitt, *supra* note 9, 69-70 and 92-200; Murphy, 2002a, *supra* note 9, 44-45 and 51; Ratner, *supra* note 9, 908; Schrijver, *supra* note 9, 285-286; Stahn, 2002, *supra* note 9, 213 and 218-235; Travalio & Altenburg, *supra* note 9, 102-104.

Nicaragua had supplied the armed opposition in El Salvador with weapons. By doing so – this was the argument – Nicaragua had subjected El Salvador to an armed attack. The Court found that, irrespective of whether or not the supply of arms to the Salvadorian guerrillas could be treated as imputable to the government of Nicaragua, it was “unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State”.¹⁹ This statement invites an argument *a fortiori*. If the supply of arms by a government of a state to a group of non-state agents does not make the activities of that group attributable to the state in question, then neither should the mere harboring of such a group.

*The work done by the International Law Commission on the topic of state responsibility.*²⁰ In 1980, the ILC provisionally adopted a set of 35 *Draft Articles on State Responsibility*. According to Draft Article 34, “[t]he wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations”²¹. In the ILC Commentary to this Article, the concept of an armed attack is consistently referred to in inter-state terms. According to the words of paragraph 3, for instance, “for action of the State involving recourse to the use of armed force to be characterized as action taken in self-defence, the first and essential condition is that it must have been preceded by a specific kind of internationally wrongful act, entailing wrongful recourse to the use of armed force, by the subject against which the action is taken”²². The ILC Commentary adopted in 1996 confirms completely what was already stated in 1980.²³ As for the Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts finally adopted in 2001, it is a revised and abbreviated version of the earlier Commentaries. Interestingly it, too, is permeated by the assumption that armed attacks are performed by states and states only. Hence, according to text explaining the wording of Article 21, “[t]he essential effect of Article 21 is to preclude the

¹⁹ See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 10, 103, para. 195, para. 119 and paras 229-230.

²⁰ For commentaries citing this authority, see e.g. Brennan, *supra* note 17, 1207; Schachter, 1989, *supra* note 17, 217-218; Schachter, 1991, *supra* note 17, 164-165.

²¹ Yearbook of the International Law Commission [ILC Yearbook] (1980), Vol. II, Part 2, 33.

²² ILC Yearbook (1980), Vol. II, Part 2, 53. For other examples, see *id.*, 52, para. 1, and 53-54, para. 5.

²³ ILC Yearbook (1996), Vol. 1, 258-267.

wrongfulness of conduct of a State acting in self-defence *vis-à-vis* an attacking State”²⁴.

*International reactions to the bombing by Israeli military aircraft of the PLO headquarters in Tunis, 1985.*²⁵ In late September 1985, three Israeli citizens were assassinated by a group of terrorists in the port of Larnaca, Cyprus. Israel imputed the PLO, making the Larnaca killings the latest in a series of PLO terrorist attacks carried out against Israel and Israeli targets. On 1 October 1985, Israeli military aircraft penetrated Tunisian airspace and dropped several bombs at the PLO headquarters, some 20 km south of the Tunisian capital. In a meeting of the UN Security Council, the Israeli representative defended the action of his country invoking “its legitimate right of self-defence”. Interestingly, he used language very similar to that resorted to by President Bush in his several speeches post-9/11:

“For the past year, the PLO headquarter in Tunisia has initiated, planned, organized and launched hundreds of terrorist attacks against Israel, against Israeli targets outside Israel and against Jews everywhere in the world [...]. Tunisia knew, and it was strong enough to stop them. It knowingly harboured the PLO and allowed it complete freedom of action in planning, training, organizing and launching murderous attacks from its soil [...]. Under no circumstances can Israel accept the notion that bases and headquarters of terrorist killers should enjoy immunity anywhere, any time. It was against them that our action was directed, not against their host country. Nevertheless, the host country does bear considerable responsibility.”²⁶

All members of the Council, with the exception of the United States, condemned Israel.²⁷ Statements suggest that not only did members consider the Israeli bomb raid disproportionate to the original wrong, but they also rejected the argument that Tunisia, by harboring the PLO, should be considered responsible for the acts of terror performed in its name.²⁸

²⁴ ILC Yearbook (2001), Vol. 2, 75, para. 5.

²⁵ For commentaries citing this authority, see e.g. Byers, *supra* note 9, 407; Murphy, 2002a, *supra* note 9, 46-47.

²⁶ UN Doc S/PV.2611, 2 October 1985, paras 60 and 65-66.

²⁷ UN Doc S/PV.2611, 2 October 1985 and 2615, 4 October 1985.

²⁸ See e.g. statements made by Mr. Bierring (Denmark), UN Doc S/PV.2611, 2 October 1985, 2, para. 17; Mr. Halefoğlu (Turkey), *id.*, 4, para. 44; Mr. Woolcott (Australia), *id.*, 5, para. 52; Mr. Kusumaatmadja (Indonesia), UN Doc S/PV.2615, 4 October 1985, 6, para. 60. See also SC Res. 573, 4 October 1985, para. 1, condemning

*The Strategic Concept of the Alliance, adopted by NATO in 1999.*²⁹

On 24 April 1999, the heads of state and government participating in a meeting of the North Atlantic Council in Washington DC approved a new Strategic Concept of the Alliance. According to paragraph 24 of this document

“[a]ny armed attack on the territory of the Allies, from whatever direction, would be covered by Articles 5 and 6 of the Washington Treaty. However, Alliance security must also take account of the global context. Alliance security interests can be affected by other risks of wider nature, including *acts of terrorism* [...]. Arrangements exist within the Alliance for consultation among the Allies under Article 4 of the Washington Treaty and, where appropriate, co-ordination of their efforts including their responses to risks of this kind.”³⁰

By the description of terrorism, not as a matter covered by Article 5 of the Washington Treaty (North Atlantic Treaty), but as *another risk of a wider nature*, clearly, what the Alliance implies is that acts of terrorism are not to be seen as armed attacks in the sense of Article 51 of the UN Charter.³¹

“vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct”.

²⁹ For commentaries citing this authority, see e.g. Arai-Takahashi, *supra* note 9, 1087.

³⁰ NATO, ‘The Alliance’s Strategic Concept’ (24 April 1999), Press Release, NAC-S(99)65, available at http://www.nato.int/cps/en/natolive/official_texts_27433.htm?mode=pressrelease (last visited on 19 November 2010), para. 24. Emphasis added.

³¹ Article 5 of the Washington Treaty reads as follows: “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.” (*North Atlantic Treaty*, 4 April 1949, Art. 5, 34 U.N.T.S. 243, available at http://www.nato.int/cps/en/natolive/official_texts_17120.htm (last visited on 19 November 2010).

*The international reactions to the missile attack carried out by the USA on Sudan and Afghanistan in 1998.*³² On 7 August 1998, bombs exploded outside the two American Embassies in Nairobi and Dar-es-Salaam, respectively, completely destroying all buildings and killing some 200 people. As in the case of the terrorist assault of 11 September 2001, the United States Government identified Osama bin Laden and the Al-Qaeda network as the perpetrators. On August 20, US warships fired some 75 to 100 cruise missiles at alleged terrorist training camps in Afghanistan, and at a Sudanese chemical plant suspected of involvement in the production of chemical weapons. In a letter sent to the UN Security Council on that same day, the United States government announced that it had been exercising “its right of self-defence in response to a series of armed attacks against United States embassies and United States nationals”³³. Reactions from the international community were mixed. As stated by Professor Sean Murphy, some states and inter-governmental organizations condemned the attack,³⁴ while others were more understanding.³⁵ Few statements were vested in express legal terms. The one important exception is the Final Document that the Non-Aligned Movement (NAM) adopted when, on 2-3 September 1998, it met at Durban, South Africa, to discuss (among other things) the military actions taken one year earlier by the US against one of its members (the Sudan). Paragraph 179 of the Document reads as follows:

“The Heads of State or Government [...] expressed their deep concern over the air attack carried out by the United States Government against the El-Shifa Pharmaceutical Plant in the Sudan on 20 August 1998, and considered this as a serious violation of *the principles of international law* and the United Nations Charter and contrary to the principles of peaceful settlement of disputes as well as a serious threat to the sovereignty and territorial integrity of the Sudan and the regional stability and international peace and security. They further

³² For commentaries citing this authority, see e.g. Beard, *supra* note 9, 562-565; Bring & Fischer, *supra* note 9, 181-185; Byers, *supra* note 9, 407 and 409-410; Murphy, 2002a, *supra* note 9, 49-50; Schmitt, *supra* note 9, 106-109.

³³ UN Doc S/1998/780, para. 1.

³⁴ See S. D. Murphy, ‘Contemporary Practice of the United States Relating to International Law’, 93 *American Journal of International Law* (1999) 1, 161 [Murphy, 1999], 164-165, citing statements by the Sudan, Afghanistan, Iran, Iraq, Libya, Pakistan, Russia, the Yemen, and the League of Arab States.

³⁵ Murphy, 1999, *supra* note 34, 165, citing statements by Australia, France, Germany, Japan, Spain and the UK.

considered this attack as a unilateral and unwarranted act. The Heads of State and Government condemned *this act of aggression*.³⁶

Although the exact legal basis used for the condemnation is not clearly stated, there is room for the argument that NAM considered the assault on the two American Embassies not to form an armed attack in the sense of the international law of self-defense.

*The commonly accepted definition of aggression.*³⁷ According to the English language version of Article 51 of the UN Charter, the exercise of a right of self-defense requires the occurrence of an “armed attack”. Interestingly, the equivalent term used for the equally authentic French version is “agression armée”.³⁸ This would seem to provide an argument relevant for the interpretation of Article 51, considering what must be seen as the ordinary usage of this term in the parlance of international lawyers. From the time of the 1945 London Agreement,³⁹ up until 11 September 2001, international law has always defined *aggression* in clear and unambiguous inter-state terms. Prominent examples of this legal usage include the 1974 *Definition of Aggression*,⁴⁰ and the 1996 *Draft Code of Crimes Against the Peace and Security of Mankind*.⁴¹ It can be objected to

³⁶ Final Document of the 12th Meeting of the Non-Aligned Movement, held at Durban, South Africa, on 2 to 3 September 1998, para. 179, available at <http://www.nam.gov.za/xiisummit/chap1.htm> (last visited 19 November 2010).

³⁷ For commentaries citing this authority, see e.g. Arai-Takahashi, *supra* note 9, 1087; Delbrück, *supra* note 9, 15; Meessen, *supra* note 9, 345; Ratner, *supra* note 9, 907; Schmitt, *supra* note 9, 90-100 and 109; Stahn, 2002, *supra* note 9, 213.

³⁸ The full provision reads as follows: “Aucune disposition de la présente Charte ne porte atteinte au droit naturel de légitime défense, individuelle ou collective, dans le cas où un Membre des Nations Unies est l’objet d’une agression armée”.

³⁹ *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 UNTS 279.

⁴⁰ See GA Res. 3314, 14 December 1974, Annex, Art. 1: “L’agression est l’emploi de la force armée par un Etat contre la souveraineté, l’intégrité territoriale ou l’indépendance politique d’un autre Etat, ou de toute autre manière incompatible avec la Charte des Nations Unies, ainsi qu’il ressort de la présente Définition.” (“Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”)

⁴¹ In French, Article 16 of the Draft Code reads as follows: “Tout individu qui, en qualité de dirigeant ou d’organisateur, prend une part active dans – ou ordonne – la planification, la préparation, de déclenchement ou la conduite d’une agression commise par un État, est responsable de crime d’agression.” (“An individual who, as leader or organizer, actively participates in or orders the planning, preparation,

this line of reasoning that in the process of drafting the 1974 Definition of Aggression, Western states warned about the risk that an act of aggression be confused with an armed attack, which according to them was a distinct concept.⁴² The fact remains, however, that in its decision of the Nicaragua Case – when facing a situation where the concept of an armed attack had to be expounded – the International Court of Justice resorted to this definition exactly.⁴³

B. Part II

As indicated earlier, in defending their assumption that at some point between 11 September and 7 October 2001, the international law of self-defense changed, proponents of change argued along two different tracks. Some spent great effort on convincing us that there had been a revision of the right of self-defense contained in customary international law. They tailored their arguments to establish the existence of a new *opinio juris*. Others described the developments in terms of an evolution of the Charter-based right of self-defense. They argued that on 7 October 2001, the relevant legal context was different than the one that they assumed had obtained on the morning of 11 September a.m., and hence, we would now be justified for interpreting Article 51 differently. In the organization of my further review of the post-9/11 legal discourse, I will follow the logic of this reasoning. Hence, in section III, I will begin my assessment with the arguments that according to the proponents of change supported a new interpretation of Article 51 of the UN Charter. In sections IV and V, I will then continue with the arguments that allegedly established the creation of a new rule of customary international law.

initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.”) See also the Commentary adopted by the ILC to this Article: “[T]he violation by a State of the rule of international law prohibiting aggression gives rise to the criminal responsibility of the individuals who played a decisive role in planning, preparing, initiating or waging aggression. The words ‘aggression committed by a State’ clearly indicate that such a violation of the law by a State is a sine qua non condition for the possible attribution to an individual of responsibility for a crime of aggression.” (Articles of the Draft Code of Crimes Against the Peace and Security of Mankind, with Commentary, ILC Yearbook, 1996, Vol. II, Part 2, 43, para. 4.)

⁴² Cf. A. Randelzhofer, ‘Article 51’, in B. Simma (ed.), *The Charter of the United Nations. A Commentary*, Volume 1, 2nd ed. (2002), 788, 795.

⁴³ See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 10, 103, para. 195.

I. The New Interpretation of Article 51 of the Charter

1. The Relevant Legal Context Defined

Like any other treaty governed by international law, the legally correct understanding of the UN Charter is determined by reference to the rules of interpretation expressed in the 1969 *Vienna Convention on the Law of Treaties* (VCLT).⁴⁴ According to Articles 31-33 of this Convention, the interpretation of a treaty is a process that draws on certain means of interpretation, commonly referred to as primary and supplementary means of interpretation.⁴⁵ The primary means of interpretation are those that can be employed according to Article 31: conventional language (“the ordinary meaning”), the context, and the object and purpose of the treaty. The supplementary means of interpretation are those that can be employed according to Article 32, including among others “the preparatory work of the treaty and the circumstances of its conclusion”. Stated differently, the primary and supplementary means of interpretation form the legally relevant context, upon which we are expected to draw for the understanding of a treaty. When a proposition is put forth about the legally correct meaning of a treaty provision, the proposition shall be based on the relationship or relationships assumed to exist between a primary or supplementary means of interpretation and the written utterance interpreted.⁴⁶ Applied to the case at hand, it would seem that for the purpose of establishing the correct interpretation of UN Charter Article 51, the legally relevant context is identical with the contents of the primary and supplementary means of interpretation. If someone suggests that between 11 September and 7 October 2001, the legally relevant context was altered, so that on 7 October we would be justified for conferring a meaning on Article 51 that we would not have been able to defend by legal argument four weeks earlier, then this

⁴⁴ 23 May 1969, 1155 U.N.T.S. 331. Today, it is the generally held opinion, confirmed repeatedly by the ICJ, that Arts 31-33 of the Vienna Convention not only give expression to the rules of interpretation that apply according to the Convention, between its parties. They are also reflective of the rules that apply according to customary international law, between states in general. (For further references, see U. Linderfalk, *On the Interpretation of Treaties – The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), 7.)

⁴⁵ Although the Vienna Convention itself does not speak about primary means of interpretation, this terminology seems to be commonly accepted. For references, see Linderfalk, *supra* note 44, 19-20, fn. 60.

⁴⁶ See Linderfalk, *supra* note 44, 47-52.

assumes that during said period, the contents of the primary and supplementary means of interpretation changed to that very effect. I will structure my further analysis based on this observation.

Roughly speaking, it can be said that in defending their assumption of a new interpretation of Article 51, the proponents of change used arguments of three kinds. They used arguments based on the everyday meaning of the English expression “armed attack”; they used arguments based on the object and purpose of the Charter; and they used arguments based on subsequent practice. I will now proceed to investigate each of these arguments. I will construe the arguments in terms of the Vienna Convention, and I will give the reasons for why I think they should be considered evidence of a legal science not working properly.

2. The Everyday Meaning of the English “Armed Attack”

In the post-9/11 international legal discourse, several commentators built arguments on the everyday meaning of the English term “armed attack”.⁴⁷ They noted that in the sense of everyday English language, “armed attack” means simply an attack performed with arms or weapons. Such an attack, they argued, may be performed by any group of persons, regardless of whether they act as private agents or as agents of a state. For two reasons, this argument should be criticized.

First of all, it can be objected that there is really nothing new about the situation. Obviously, the everyday meaning of the English “armed attack” did not develop in the period from 11 September to 7 October 2001. It existed well before the attack on New York City and Washington, D.C. Hence, the everyday meaning of the English “armed attack” cannot be used to support the proposition of change. As already stated, in order for the proposition of change to be considered justified, it would have to be shown that, in some respect, on 7 October 2001, the contents of the primary and supplementary means of interpretation was different than four weeks earlier.

⁴⁷ See e.g. Arai-Takahashi, *supra* note 9, 1084 and 1093; Franck, *supra* note 9, 840; Gaja, *supra* note 9; Paust, 2001-2002, *supra* note 9, 534; Schrijver, *supra* note 9, 285; Schmitt, *supra* note 9, 76; Stahn, 2002, *supra* note 9, 213; Stahn, 2003, *supra* note 9, 35-36; Walker, *supra* note 9, 530.

Second, although the everyday meaning of a treaty might be seen as a natural start of any treaty interpretation process,⁴⁸ it is a mistake to regard this as the end of all discussion. According to the modern international law of treaty interpretation expressed in the 1969 Vienna Convention, the ordinary meaning of a treaty expression is not determined by reference to everyday language alone. The determining factor is conventional language, which includes apart from everyday language any possible technical language using the interpreted expression.⁴⁹ In the case confronted here, this observation is of great importance, since it would seem that in the sense of the language of international law, “armed attack” means a forcible measure attributable to a state.⁵⁰ Even assuming that an established legal meaning of the English term “armed attack” does not exist, we still have the corresponding French language to consider. As may be recalled, whereas the English language version of Article 51 requires the occurrence of an “armed attack”, the equivalent term used for the equally authentic French version is “agression armée”.⁵¹ “Agression”, in the parlance of international lawyers, means a forcible measure performed by a state, as defined by the general international law of state responsibility.⁵²

In a situation like the one just described, where the everyday and legal-technical meaning of a treaty expression produce different interpretation results, no legal hierarchies exist that will automatically allow preference to be given to either one of the two conflicting meanings.⁵³ As we will then have to conclude, the ordinary meaning of the expression is ambiguous. In other words, in deciding whether “agression armée” should be interpreted in the broader sense of an attack performed by any group of persons, or in the more limited sense of an attack attributable to a state, we will have to depend on other means of interpretation than conventional language. This notwithstanding, a remarkable number of text-writers confined themselves to an analysis of the everyday meaning of the English

⁴⁸ Cf. U. Linderfalk, ‘Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not? Interpreting the Rules of Interpretation’, 54 *Netherlands International Law Review* (2007) 1, 133.

⁴⁹ See Linderfalk, *supra* note 44, 61-73, and the further references cited there.

⁵⁰ See *supra*, section II.

⁵¹ See *supra*, section II.

⁵² See *supra*, section II.

⁵³ See e.g. Linderfalk, *supra* note 44, 62-73; M. E. Villiger, *Customary International Law and Treaties* (1985), 321-322; M. K. Yasseen, ‘L’interprétation des traits d’après la Convention de Vienne sur le droit des traités’, *Recueil des Cours*, Volume 151 (1976), 58.

expression “armed attack”, implicitly claiming this meaning as decisive for the entire interpretation exercise. As I would suggest, such reasoning shows scant understanding of the modern law of treaty interpretation, and therefore, it establishes good reason for criticism. In a scholarly discussion on the interpretation of a treaty provision like Article 51 of the UN Charter, discussants are expected to have a fairly robust knowledge of the system of rules laid down in the 1969 Vienna Convention. Alternatively, assuming I am wrong and that despite all appearances proponents of change *were not unfamiliar* with the broad definition given to the concept of an ordinary meaning, by their strong emphasis on the everyday English language they revealed bias. According to the criteria of general scientific ethics, scientific analysis assumes the investigation of an issue from all possible sides. Failing to conform to this standard, a text-writer will always expose herself to the criticism of having concluded all discussions before even beginning her analysis.

3. The Object and Purpose

Judging by the way some proponents of change approached the issue, the reason why Article 51 of the UN Charter would suddenly have to be understood differently lies mainly in the object and purpose conferred on this provision. In the international legal literature of 2001 to 2003, I have noted the following suggestion to be quite commonly represented: ‘A state must always have the possibility of averting a threat to its existence (or – put somewhat differently – to its territorial integrity or political independence); hence, we can assume that the expression “armed attack” in Article 51 of the UN Charter refers to any large-scale attack directed at a state, whether performed by a state or not.’⁵⁴ Expressed in such general terms, the idea that a state should be able to avert a threat to its existence is indeed a persuasive one. Still, there is nothing really new about it. In the organization of the UN Charter, Article 51 is a part of Chapter VII. It has always been said about the provisions of that Chapter that they form a delicate balance between two interests: that of establishing a system of collective security, and that of states being able effectively to protect their

⁵⁴ See e.g. Bonafede, *supra* note 9, 185-186; Bring & Fischer, *supra* note 9, 182; Gross, *supra* note 9, 214; Meessen, *supra* note 9, 353; Printer, *supra* note 9, 348-349 and 351-352; Quéniwet, *supra* note 9, 222; Stahn, 2002, *supra* note 9, 213; Walker, *supra* note 9, 531, implicitly; Wolfrum, *supra* note 9, 36.

existence.⁵⁵ Viewed in this light, the argument cited above is hardly relevant to the suggestion that on 7 October 2001, the objects and purposes conferred on Article 51 of the UN Charter were different than those that had been conferred four weeks earlier.

Of course, the argument could be stated in more elaborate terms. It could be argued that the events of 11 September brought about a change of attitude among the members of the UN, in the sense that the relative weight of the objects and purposes conferred on Article 51 is no longer the same. After the assault on Washington, D.C., and New York – this is how the argument goes – states were generally prepared to make greater sacrifices in the pursuit of national security than they were before. Hence, even if we consider the objects and purposes of 7 October to be perfectly identical with those of 11 September, their relationship would be different, and therefore, any interpreter using the teleological approach would be left with a different outcome.⁵⁶

There is a flaw in this argument. It builds on a misunderstanding of the contents of VCLT Articles 31 and 32. Although Article 31 para. 1 speaks of “the object and purpose” of a treaty in the singular, international law accepts that a treaty can be interpreted using several of its objects and purposes.⁵⁷ Of course, depending on the specific object and purpose drawn upon, the interpretation of a treaty in the light of its object and purpose might lead to different results. When it does, the interpreter will simply have to consider the meaning of the interpreted treaty ambiguous, upon which he will have to proceed to the context or to the supplementary means of interpretation. If we consider the two objects and purposes conferred on Article 51 – that of establishing a system of collective security, and that of states being able to effectively protect their existence – it is quite clear that in the case of an attack performed by a non-state agent, the use of the one object and purpose leads to a different interpretation result than the other, regardless of whether the interpretation is done at a point in time previous to 11 September 2001, or in the four weeks that ensued. It is possible that those of us observing the developments experienced a shift in the main emphasis placed by UN members on the two objects and purposes. But that would not have involved a significant change of the relevant legal context. Both before and after 11 September, any person who interprets Article 51 in the light of its objects and purposes will fail to achieve a clear result.

⁵⁵ See e.g. Myjer & White, *supra* note 9, 11-12.

⁵⁶ Cf. Martinez, *supra* note 9, 179-181; Cohan, *supra* note 9, 316.

⁵⁷ See Linderfalk, *supra* note 44, 211-217.

4. Subsequent Practice

In search of more convincing arguments, some authors invoked the existence of a new subsequent practice. In the period of 11 September to 7 October 2001 – this is how the argument goes – developments amounted to the formation of a practice, which established a new agreement among the member states of the UN with regard to the meaning of Article 51.⁵⁸ As I will insist, this argument must also be regarded as futile.

First of all, it can be questioned whether there is any practice at all. Arguably, in order for us to conclude that a practice exists in the application of Article 51 with regard to the interpretation investigated here, the following three conditions need to be satisfied:⁵⁹

- The application of Article 51 must be general.
- The application must be constant – it must have occurred on repeated occasions.
- The application must be fairly uniform.

It is debatable whether this is a fair description of the state of affairs that prevailed during the period of 11 September to 7 October 2001. Much depends on whether we limit ourselves to the way Article 51 was applied in that sole period, or whether we broaden our perspective to include previous acts of states. The problem can be approached in two different ways. According to the one approach, the relevant practice developed entirely in the period of 11 September to 7 October 2001. According to the other, practice developed over a longer period, but the acts performed from 11 September to 7 October provided the conclusive element that we needed to be able to speak about a true practice. Since this is a discussion that largely coincides with the subsequent investigation of a possible change of the right of self-defense contained in customary international law, I will save it for section IV.

At present, I will limit my observations to a second aspect of the problem. When we speak about a subsequent practice as material for the interpretation of a treaty, we must keep a constant eye on the relevant provisions of the Vienna Convention. Article 31 para. 3 lit. b of that

⁵⁸ See e.g. Arai-Takahashi, *supra* note 9, 1093 and 1095; Beard, *supra* note 9, 568-57; Bring and Fischer, *supra* note 9, 186-188; Paust, 2001-2002, *supra* note 9, 535; Stahn, 2002, *supra* note 9, 213-214; Walker, *supra* note 9, 531-532.

⁵⁹ Compare the criteria established by the ICJ in the case of customary law. See e.g. I. Brownlie, *Principles of Public International Law*, 7th ed. (2008), 7-8.

Convention reads as follows: “[For the purpose of the interpretation of a treaty, there] shall be taken into account, together with the context: [...] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. Obviously, in order for the state acts of 11 September to 7 October 2001 to be relevant for the interpretation of Article 51 of the UN Charter, not only must we show that on 7 October 2001, a practice existed in the sense of a general, constant and uniform application of Article 51. We must also show the practice to be one “which establishes the agreement of the parties”. The practice must be good reason for the assumption that on 7 October 2001, *all member states of the UN* were prepared to understand Article 51 in the way the proponents of change suggested.⁶⁰ Stated in inverse terms, Article 31 para. 3 lit. b does not apply to the state acts of 11 September to 7 October 2001 if it can be shown that one or more states explicitly disassociated themselves from this interpretation.

Considering such stringent conditions, it appears we have good cause to ponder the following statement made by Mr. Rodríguez Parilla of Cuba at a plenary meeting of the UN General Assembly on 1 October 2001:

“Terrorist acts are usually carried out by extremist groups or even individuals. Faced with such an event, however serious it might be, a powerful State must not invoke the right to self-defence in order unilaterally to unleash a war that might have unpredictable effects on a global scale and result in the death of an incalculable number of innocent people. Instead, the right of all to the common defence of all must be exercised [...]. It is Cuba’s opinion that any use of force against terrorism will require the explicit and prior authorization of the Security Council, as established in the Charter. Cuba also believes that neither of the two resolutions adopted by the Council in the wake of the attacks of September 11 could be invoked to launch unilateral military actions or other acts of force.”⁶¹

Obviously, Cuba *did not* share the opinion that according to Article 51 of the UN Charter, a right of self-defense may be exercised upon a large-

⁶⁰ See W. Karl, *Vertrag und spätere Praxis im Völkerrecht* (1983), 188-194; Linderfalk, *supra* note 44, 167; H. Thirlway, ‘The Law and Procedure of the International Court of Justice: 1960-1989, Part III’, 62 *British Yearbook of International Law*, (1991), 1, 52.

⁶¹ United Nations General Assembly, UN Doc A/56/PV.13, 1 October 2001, 15 and 17.

scale attack, regardless of whether according to the general international law of state responsibility the attack can be attributed to a state or not. This itself is reason enough to revoke the argument that from 11 September to 7 October 2001, a new practice developed in the sense of VCLT Article 31 para. 3 lit. b.

In conclusion, we might say that regardless of whether the proponents of change tried to defend their position by reference to the object and purpose conferred on Article 51, or by reference to a new subsequent practice, their arguments could be easily discarded. The question can be asked whether these arguments were intended at all as contributions to a scientific discourse. Especially the suggestion that a new subsequent practice had developed looks very much a long shot. The conclusion that immediately presents itself is that, in fact – contrary to all appearances – text-writers were not pursuing the task of disengaged scientific investigation, attentive to the persuasive force of good reason. Rather, they were engaged in advocacy. But, of course, this is pure speculation. After all, perhaps the behavior of text-writers should be attributed simply to a scant knowledge of the modern law of treaty interpretation. In any case, there are good reasons for criticism. As already stated in sub-section III 2, in a scholarly discussion on the interpretation of a treaty provision like Article 51 of the UN Charter, discussants are expected to have a fairly robust knowledge of the system of rules regulating the discussed field of activity.

5. Why the Treaty Interpretation Debate was Irrelevant

To the very skeptical attitude I expressed in the previous sub-section III 4, I would like to add a point of clarification. Generally speaking, I do not exclude the possibility that VCLT Articles 31-33 may sometimes be invoked to justify a new understanding of a treaty when primary and supplementary means of interpretation are altered – what is sometimes referred to as *dynamic interpretation*.⁶² Certainly, dynamic interpretation is a possibility, and from a perspective of principle, nothing prevents a means of interpretation from changing over such short periods as four weeks. The point of my argument is that the possibilities for changes are limited. This is especially so when we deal with treaties having so many parties as the UN Charter.

⁶² See e.g. U. Linderfalk, 'Doing the Right Thing for the Right Reason – Why Dynamic or Static Approaches Should be Taken to the Interpretation of Treaties', 10 *International Community Law Review* (2008) 2, 109.

As I would argue, given the contents of VCLT Articles 31-33 and the circumstances of the specific case, a proponent of change would have to argue her position on the basis of any one of the following four propositions:

- (1) On 7 October 2001, the ordinary meaning of the expression “armed attack” (French: “agression armée”) was not the same as that given to the expression on 11 September a.m.
- (2) On 7 October 2001, the objects and purposes conferred on Article 51 by the members of the UN were not the same as those conferred on the morning of 11 September.
- (3) In the period of 11 September to 7 October 2001, developments amounted to the formation of a new practice, which established the agreement of the member states of the UN with regard to the meaning of Article 51.
- (4) In the period of 11 September to 7 October 2001, developments amounted to the creation of a new relevant rule of international law applicable in the relations between the member states of the UN.

As noted in sub-sections III 2 to III 4, propositions (1), (2), and (3) are untenable. For those proponents of change, who because of the developments post-9/11 made the claim that a new interpretation of Article 51 was merited, proposition (4) seems the only avenue of defense.

Now, with these observations fresh in our minds, let us return to the review of the treaty interpretation debate. I will conclude section III with a critique that addresses the debate in its entirety. Obviously, proposition (4) assumes the contents of VCLT Article 31 para. 3 lit. b. The provision reads as follows: “[For the purpose of the interpretation of a treaty, there] shall be taken into account, together with the context: (b) any relevant rules of international law applicable in the relations between the parties”. In the terminology of the Vienna Convention, “parties” means *all parties* to a treaty.⁶³ Hence, in order for a rule of international law to be applicable in

⁶³ See Linderfalk, *supra* note 44, 178. For further discussions of this issue, see U. Linderfalk, ‘Who are ‘the Parties’? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the ‘Principle of Systemic Integration’ Revisited’, 55 *Netherlands International Law Review* (2008) 3, 343. For a different opinion, see G. Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties’, 35 *Journal of World Trade* (2001) 6, 1081.

the relations between the member states of the UN, it must be binding for each and every one of those states. No international agreement of this magnitude was concluded in the relevant period. As it appears, the validity of proposition (4) depends on whether it can be established that in the time span, the developments affected the contents of customary international law.

With this observation, focus shifts immediately from the debate on the Charter-based international law to the law of international custom. As explained earlier, considering how states behaved and expressed themselves in the period of 11 September to 7 October 2001, the action of states may have affected the contents of international law in two ways. First, it may have affected the right of self-defense expressed in Article 51 of the UN Charter. Secondly, it may have affected the right of self-defense contained in customary international law. In the present section of this essay, we have focused on the debate surrounding the allegedly changed UN Charter. The debate on an allegedly changed customary international law is meant to be the focus of our attention in the following sections IV to IV. As it now seems, the identities of the two debates are blurred to some extent: the former debate cannot be separated from the latter. In the final analysis, the difficult question to be answered in the treaty interpretation debate is not so much whether a large-scale attack performed by a group of non-state agents should be considered to come within the scope of application of Article 51. The really crucial issue is whether such attacks should be considered to come within the scope of application of the right of self-defense contained in customary international law. The treaty interpretation debate seems like a blind track: it does not lead anywhere.

Still, the fact remains that in light of the developments in the period of 11 September to 7 October 2001 text-writers spent great time discussing issues relating to the interpretation of Article 51 of the UN Charter. If I am to make a general assessment of this discussion, it would be my conclusion that it diverted attention from the truly relevant legal questions. This is serious criticism. In an international community based on a rule of law, it should be considered a task for legal scientists to assist judicial and political decision-makers in determining the scope of their discretion. Legal scientific analysis should bring focus to the legal questions that are relevant for judicial and political decision-making, rather than the opposite. Considering this standard, as I conceive of the issue, we should simply dismiss as poor science the entire interpretation debate.

II. The New Rule of Customary International Law

1. The Relevant Legal Context

For centuries, the international law literature has struggled to explain the existence of customary international law. Considering the discourse as a whole – and risking the criticism of oversimplification – we may say that there are two competing theories. According to a traditional understanding of the concept, a rule of customary international law is derived from the existence of a state practice and an *opinio juris*.⁶⁴ When a person suggests that, given the existence of some certain conditions {C₁, C₂, C₃}, a right of self-defense can be exercised by a state under customary international law, then two things must be shown by that person in order to establish the proposition as valid. First, the person must prove the existence of a general, constant, and uniform usage.⁶⁵ She would have to show that over a certain period of time, faced with the conditions {C₁, C₂, C₃}, states have repeatedly and consistently resorted to force. Secondly, the person must prove the existence of the relevant attitude. Based on the utterances and behavior of states, she would have to show that in instances where the conditions {C₁, C₂, C₃} prevail, states generally consider the use of force warranted according to a rule of customary international law.

According to a second theoretical approach, most prominently advocated by Professor Bin Cheng, a rule of customary international law is derived from the mere existence of an *opinio juris*.⁶⁶ When a person suggests that, given the existence of some certain conditions {C₁, C₂, C₃}, a right of self-defense can be exercised by a state under customary international law, then she must show only one thing: that in instances where the conditions {C₁, C₂, C₃} prevail, states generally consider the use of force warranted according to a rule of customary international law. She would not have to establish that in instances where the conditions {C₁, C₂, C₃} prevail, states generally resort to force. For the same reasons, she would

⁶⁴ See e.g. Brownlie, *supra* note 59, 7-8.

⁶⁵ See e.g. *Colombian-Peruvian Asylum Case (Colombia v. Peru)*, ICJ Reports 1950, 266, 276-277; *Case Concerning Right of Passage Over Indian Territory (Portugal v. India)*, Merits, Judgment, ICJ Reports 1960, 6, 40.

⁶⁶ See B. Cheng, 'United Nations Resolutions on Outer Space: 'Instant' International Customary Law?', 5 *Indian Journal of International Law* (1968) 1, 23, later developed in B. Cheng, 'Custom: The Future of General State Practice In a Divided World', in R. St. J. Macdonald & D. M. Johnston (eds), *The Structure and Process of International Law* (1983), 513-554.

not have to be overly concerned about the requirements that practice be general, constant, and uniform. Certainly, if it is established that over a certain period of time, faced with the conditions {C₁, C₂, C₃}, states have repeatedly and consistently resorted to force, then that would be good reason for the assumption that the relevant *opinio juris* exists. But it does not form a necessary condition. As long as the relevant *opinio juris* can be shown to exist, this should be considered sufficient. This is why the idea advocated by Professor Bin Cheng and others is often referred to as *the theory of instant customary law*.⁶⁷

On closer analysis, it would seem that a traditional theory of customary international law cannot explain the creation of a new right of self-defense in the period of 11 September to 7 October 2001. Clearly, the acts and omissions of states dating from this period alone did not amount to a practice in the proper sense. In order for a general, constant, and uniform usage to develop, some time is required,⁶⁸ and four weeks is simply not enough time. Admittedly, the proposition of change can be interpreted differently. It can be argued that the necessary practice developed over a longer period, but that the acts and omissions dating from 11 September to 7 October 2001 provided the conclusive element we needed to be able to speak about a practice in the sense of a general, constant, and uniform usage. Assessing the proposition of change, a crucial question would then be whether it can be shown that on the morning of 11 September 2001, a new rule of customary international law was already emerging. In the recent past, whenever states were confronted with a situation in all relevant respects similar to that of 11 September, did they act in favor of an extension of the hitherto existing rule of self-defense? As revealed by the earlier section II of this essay, the answer to this question would have to be in the negative.

All things considered, the proposition of change would seem to rely entirely on the theory of instant customary law.⁶⁹ Faced with the suggestion that on 7 October, customary international law allowed for a right of self-defense to be exercised upon a large-scale attack performed by a non-state agent, despite the fact that – judged by the criteria provided in the general international law of state responsibility – this attack cannot be attributed to any state, what we have to ask for is evidence of a new *opinio juris*

⁶⁷ See e.g. Arai-Takahashi, *supra* note 9, 1094.

⁶⁸ See e.g. *Colombian-Peruvian Asylum Case*, *supra* note 65, 276-277.

⁶⁹ Few commentators recognized this explicitly. See, however, Arai-Takahashi, *supra* note 9, 1093-1094; Cassese, 2001, *supra* note 9, 997; Langille, *supra* note 9, *passim*.

generalis to this effect. I will structure my further analysis based on this observation.

Generally speaking, it can be said that in defending their assumption of a new *opinio juris generalis*, the proponents of change cited evidence of three kinds. They cited statements made by states and international organizations pertaining directly to the contents of international law; they cited statements constituting pledges of support made to the US Government; and they cited the inaction of states pursuant to the events of 11 September. I will now proceed to investigate each such group of evidence.

2. Statements Pertaining Directly to International Law

This is the evidence that proponents of change typically cited: UN Security Council resolutions 1368 and 1373.⁷⁰ Both resolutions – adopted on 12 and 28 September, respectively – make express reference to a right of self-defense.⁷¹ In preambular paragraph 3 of resolution 1368, the Security Council “[recognizes] the inherent right of individual or collective self-defence in accordance with the Charter”. In preambular paragraph 4 of resolution 1373, the Council “[reaffirms] the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)”.

⁷⁰ For commentaries citing this evidence, see e.g. Arai-Takahashi, *supra* note 9, 1081-1082; Beard, *supra* note 9, 565-566 and 568; Bring & Fischer, *supra* note 9, 187; Brown, *supra* note 9, 29; Byers, *supra* note 9, 409; Greenwood, *supra* note 9, 17; Langille, *supra* note 9, 153-154; Myjer & White, *supra* note 9, 6; Murphy, 2002a, *supra* note 9, 48; O’Connell, 2002-2003, *supra* note 9, 49; Ratner, *supra* note 9, 909; Schmitt, *supra* note 9, 60-61 and 77; Schrijver, *supra* note 9, 282; Stahn, 2002, *supra* note 9, 214.

⁷¹ Judged by the way some commentators put it, it seems they were of the opinion that by these references the whole issue would be finally settled: no doubt, customary international law allows for a right of self-defense to be exercised upon a large-scale attack performed by a group of non-state agents. Personally, I think we should be sceptical about this argument. The Security Council is not empowered under the UN Charter to decide on the contents of the right of self-defense laid down in Article 51. Even less is it empowered to decide on the contents of the right of self-defense contained in customary international law. For a contrary opinion, see Arai-Takahashi, *supra* note 9, 1081-1082; Gross, *supra* note 9, 213; O’Connell, 2002, *supra* note 9, 892-893; Papastavridis, *supra* note 9, 507; Stahn, 2003, *supra* note 9, 39.

*Debates held from 1 to 5 October, 2001 during the 56th session of the UN General Assembly.*⁷² In discussions on Agenda Item 166 (“Measures to eliminate international terrorism”), several delegates commented on the meaning and contents of the right of self-defense held by states under international law. Mr. Kolby of Norway announced that since “[i]nternational law confirms the right to self-defence [...] Norway is fully committed to contributing to the broad alliance that is now forming.”⁷³ Mr. Šimonović of Croatia reiterated that according to indications given in the Charter of the UN, “terrorism is a threat to international peace and security and that every country has the solemn right to defend itself, its citizens and their peace and security. Therefore, such a right on the part the United States should not be questioned.”⁷⁴ Mr. Valdes of Chile remarked that in the view of his government, Security Council resolution 1373, “together with Article 51 of the Charter, provides the necessary legitimacy and the support of international law to actions directed at punishing those responsible for this act of terrorism.”⁷⁵ In the same vein, Mr. Cowen of Ireland rhetorically asked: “Who can reasonably argue that the United States does not have the right to defend itself, in a targeted and proportionate manner, by bringing to justice those who planned, perpetrated and assisted in these outrages and who continue to threaten international peace and security?”⁷⁶ Still with regard to the debate on Agenda Item 166, Mr. Hussein of Ethiopia reminded the Assembly “that if and when terrorists do attack a country, as happened on 11 September, that country has the legitimate right to defend itself.”⁷⁷ According to Mr. Heinbecker of Canada, “[t]he right of Canada, and of the United States and of all other United Nations Members, to self-defence is clear under international law, enshrined in the Charter of the United Nations and recognized again most recently in Security Council resolutions 1368 (2001) and 1373 (2001).”⁷⁸ Finally, Mr. Andino Salazar of El Salvador reiterated the support of his Government “for the right of the United States, as an aggressed State, to adopt measures of legitimate individual and

⁷² For commentaries citing this evidence, see e.g. Arai-Takahashi, *supra* note 9, 1093; Bring & Fischer, *supra* note 9, 187; Byers, *supra* note 9, 409-410, note 46.

⁷³ United Nations General Assembly, UN Doc. A/56/PV.12, 1 October 2001, 14.

⁷⁴ United Nations General Assembly, *supra* note 73, 24.

⁷⁵ United Nations General Assembly, *supra* note 61, 21.

⁷⁶ United Nations General Assembly, UN Doc. A/56/PV.14, 2 October 2001, 6-7.

⁷⁷ United Nations General Assembly, UN Doc A/56/PV.17, 3 October 2001, 13.

⁷⁸ United Nations General Assembly, UN Doc A/56/PV.18, 4 October 2001, 22.

collective self-defence to ensure the security of its citizens, property and institutions.”⁷⁹

*Action taken by the NATO.*⁸⁰ On 12 September, the North Atlantic Council issued a press release with the following contents: “On September 12th, the North Atlantic Council met again in response to the appalling attacks perpetrated yesterday against the United States. The Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty”. According to Article 5 of the Washington Treaty,

“[t]he Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.”

In a statement of 2 October, NATO Secretary General, Lord Robertson, confirmed that evidence pointed conclusively “to an Al-Qaida role in the September 11 attack”, and that hence, the attack should be regarded an action covered by Article 5 of the Washington Treaty.⁸¹

*Action taken by the Organization of American States (OAS).*⁸² On 21 September, the OAS Consultation of Ministers of Foreign Affairs adopted a resolution resolving

⁷⁹ United Nations General Assembly, UN Doc A/56/PV.19, 4 October 2001, 18.

⁸⁰ For commentaries citing this evidence, see e.g. Beard, *supra* note 9, 568; Bring & Fischer, *supra* note 9, 181 and 186; Brown, *supra* note 9, 28; Byers, *supra* note 9, 409; Cassese, 2001, *supra* note 9, 996; Greenwood, *supra* note 9, 17; Ratner, *supra* note 9, 909; Schrijver, *supra* note 9, 282; Stahn, 2002, *supra* note 9, 214; Schmitt, *supra* note 9, 61; Stahn, 2003, *supra* note 9, 42.

⁸¹ NATO Secretary General, Lord Robertson, ‘Statement’ (October 2, 2001) available at http://www.nato.int/cps/en/natolive/opinions_19011.htm (last visited on 19 November 2010).

⁸² For commentaries citing this evidence, see e.g. Brown, *supra* note 9, 28; Byers, *supra* note 9, 409; Greenwood, *supra* note 9, 18; Murphy, 2002a, *supra* note 9, 48; Ratner, *supra* note 9, 909; Stahn, 2002, *supra* note 9, 214.

“[t]hat these terrorist attacks against the United States of America are attacks against all American States and that in accordance with the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and the principle of continental solidarity, all States Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state, and to maintain the peace and security of the continent.”⁸³

According to Article 3 para. 1 of the Rio Treaty,⁸⁴

“[t]he High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an armed attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations.”

*Action taken under the Australia, New Zealand, United States Security Treaty (ANZUS Treaty or ANZUS).*⁸⁵ On 15 September, the Government of Australia publicly invoked the so-called ANZUS Treaty. The ANZUS is a Security Treaty concluded in 1951 between Australia, New Zealand, and the United States of America.⁸⁶ According to Article IV para. 2 of this agreement, any armed attack in the Pacific Area on any of the parties “and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations”. The relevant provision on which the Australian Government based its action is that contained in Article V:

“For the purpose of Article IV, an armed attack on any of the Parties is deemed to include an armed attack on the metropolitan territory of any of the Parties.”

⁸³ ‘Terrorist Threat to the Americas’, OEA/Ser.F/II.24, RC.24/RES.1/01, available at <http://www.oas.org/OASpage/crisis/RC.24e.htm> (last visited on 19 November 2010).

⁸⁴ *Inter-American Treaty of Reciprocal Assistance*, 2 September 1947, 21 U.N.T.S. 93.

⁸⁵ For commentaries citing this evidence, see e.g. Beard, *supra* note 9, 569; Brown, *supra* note 9, 29; Schmitt, *supra* note 9, 62; Walker, *supra* note 9, 499.

⁸⁶ *Australia, New Zealand, United States Security Treaty*, 1 September 1951, 131 U.N.T.S. 83 [ANZUS].

In order to correctly assess the value of all these statements, a word of caution is required. We must be mindful of the fact that in no case have states and organizations made clear reference to customary international law. In some cases, statements refer to the right of self-defense “recognized in Article 51 of the UN Charter”. In others, they refer to the right of self-defense “laid down in the UN Charter”, or – using terms of a generic character – they simply refer to the right of self-defense, without paying very much attention to whether this is the right of self-defense laid down in Article 51, or the right contained in customary international law. Obviously, the value of these statements as indicators of an *opinio juris* is contingent on the assumption that according to the belief of the utterers, the two rights of self-defense are in every relevant respect identical. Of course, this lowers the evidential value of these statements considerably, compared to the hypothetical situation that they clearly referred to the right of self-defense contained in customary international law. In the post-9/11 international legal discourse, no one author posed this as a problem. This forms the first point of my critique. Proponents of change did not openly confess to the relative weakness of their argument, which is contrary to what we expect from a legal science working properly.

There is also a second point of critique. Considering the international legal literature at large, the assumption that the two rights of self-defense are identical is not free from objection; on the contrary: generally, legal doctrine has described the two rights as partly different.⁸⁷ The right contained in customary international law has been seen to allow the use of force in situations where the right laid down in Article 51 does not. For example, it is a fact that while many commentators accept that according to Article 51, force may not be used by a state for anticipatory purposes, they still claim the existence of a right of anticipatory or pre-emptive self-defense in customary international law.⁸⁸ The question quite naturally follows: if the

⁸⁷ See e.g. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 10, 93-94, paras 174-176.

⁸⁸ See e.g. A. C. Arendt & R. J. Beck, *International Law and the Use of Force* (2003), 71-79; D. W. Bowett, *Self Defence in International Law* (1958), 192; J. Brunnée & S. J. Toope, ‘Slouching Towards New ‘Just’ Wars: International Law and the Use of Force After September 11th’, 51 *Netherlands International Law Review* (2004) 3, 363, 373; Delbrück, *supra* note 9, 14; Gross, *supra* note 9, 211 and 213; Martinez, *supra* note 9, 157-158; Printer, *supra* note 9, 351-352; Wolfrum, *supra* note 9, 28-29; . See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v.*

two rights of self-defense reflect differently upon the case of force used for anticipatory purposes, then why should they so obviously speak a common language in the case of a large-scale attack performed by a non-state agent? Among the great number of text-writers who took the position of a proponent of change, no one posed this as a problem. I find this striking reticence good cause for criticism. If legal scholars generally reject the idea that the two rights of self-defense are identical, but at the same time are prepared to accept this idea on a case-by-case basis, and they fail to see this as a problem, then it might seem they have given up on the idea of logical consistency.

3. Pledges of Support

Among the various statements used by the proponents of change as evidence of an *opinio juris*, many display the character of an assurance.⁸⁹ In the period of 11 September to 7 October 2001, a great number of states showed their sympathy with the specific case of the United States Government by pledging to support its projected military campaign. Some such pledges of support were very specific. Examples include offers to assist with intelligence matters;⁹⁰ offers to grant clearance for the overflight and landing of US military aircraft;⁹¹ offers for the provision of medical services and transportation;⁹² as well as offers for the provision of military equipment;⁹³ and in some cases even military troops.⁹⁴ Other assurances remained rather vague, as illustrated by the following list:

- On 23 September, the Gulf Cooperation Council issued a joint statement expressing “the willingness of its members to participate in any joint action that has clearly defined

United States of America), Dissenting Opinion of Judge Schwebel, ICJ Reports 1986, 259, 347-348, para. 173.

⁸⁹ For commentaries citing such statements, see e.g. Beard, *supra* note 9, 569-573; Bring & Fischer, *supra* note 9, 186; Brown, *supra* note 9, 29; Langille, *supra* note 9, 155; Murphy, 2002a, *supra* note 9, 49; Myjer & White, *supra* note 9, 8; Schmitt, *supra* note 9, 62-63; Stahn, 2003, *supra* note 9, 35; Walker, *supra* note 9, 500-505.

⁹⁰ See e.g. Walker, *supra* note 9, 502, citing a statement by the People’s Republic of China.

⁹¹ See e.g. Murphy, 2002a, *supra* note 9, 49, citing statements by Georgia, Oman, Pakistan, Qatar, Saudi Arabia, Turkey, and Uzbekistan.

⁹² See e.g. Brown, *supra* note 9, p. 29, citing a statement by Japan.

⁹³ See e.g. Walker, *supra* note 9, p. 502, citing a statement by Russia.

⁹⁴ See e.g. Beard, *supra* note 9, 569, fn. 37, citing a statement by the Philippines.

objectives”, and “to enter into an alliance that enjoys the support of the international community to fight international terrorism and to punish its perpetrators”.⁹⁵

- On 1 October, the UN Secretary General circulated a letter from the Permanent Representative of Saudi Arabia to the United Nations. According to this letter – citing a telephone call to the President of the United States – Crown Prince and Deputy Prime Minister Abdullah ibn Abdul Aziz had conveyed to the President of the United States and its people “the full readiness of the Kingdom of Saudi Arabia to cooperate with the United States Government in all matters that might assist in the identification and pursuit of the perpetrators of this criminal episode”⁹⁶.
- According to Professor George K. Walker of the Wake Forest University School of Law, citing the International Herald Tribune of 19 September, India – presumably on the 18th of that same month – had announced its “fullest co-operation” with US-led forces.⁹⁷

In order to assess the value of all these assurances, I find it appropriate to divide them into two groups, depending on their characterization as either vague or specific. As to the first group – illustrated by the statements of the Gulf Cooperation Council, Saudi Arabia, and India – I would hesitate to ascribe to them any value at all. In my mind, they are simply not specific enough. Naturally, if a state S offers to support US military action, this can be an expression of a belief on the part of state S as to whether or not a right of self-defense can be exercised by the United States. But it cannot be interpreted in this way until we know more specifically both the contents and extent of the support and the purpose for which it is given. To illustrate the problem, we may compare an offer made by state S to assist the US military campaign in Afghanistan with military troops with an offer simply to cooperate in the application of existing international agreements for the

⁹⁵ As quoted by S. D. Murphy, ‘Contemporary Practice of the United States Relating to International Law’, 96 *American Journal of International Law* (2002) 1, 237 [Murphy, 2002b], 245, quoting H. Schneider, ‘Persian Gulf Arab States Support Anti-Terror Efforts’, *The Washington Post*, 24 September 2001. The member states of the Gulf Cooperation Council are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates.

⁹⁶ See e.g. Walker, *supra* note 9, 504. The document number of the letter is UN Doc. A/56/423.

⁹⁷ See Walker, *supra* note 9, 503 and fn. 67, citing *The International Herald Tribune*.

prosecution of international terrorists. The implications are quite different. In the former case, the offer made by state S may possibly be seen as an indication of an *opinio juris individualis* to the effect that in the prevailing circumstances, a right of self-defense can be exercised by the United States. In the latter case, the offer may be equally well interpreted as an indication of the exactly opposite opinion.

As to the second group of assurances, they are certainly worthy of more serious consideration. Still, considered as indicators of an *opinio juris generalis* they are far from self-explanatory. Most importantly, it is not clear on what basis offers were made. Admittedly, any offer of this kind would have to be understood in the light of the broader context, including among other things international law in general. Of particular interest are the two principles of territorial integrity and non-intervention. According to the principle of territorial integrity, a state may not knowingly allow its territory to be used for activities that are detrimental to the rights of other states.⁹⁸ According to the principle of non-intervention, a state A may not offer its intelligence services to a state B for the planning and realization of a large-scale military operation in and against a third state C, if the purpose of the operation is the violent overthrow of the existing government of that state.⁹⁹ Considering this context, it might be assumed about a state, which offers its intelligence services to the US government, or offers to grant clearance for the overflight and landing of US military aircraft on its territory, that it acts on the basis of a very specific belief: that of the projected US military operation being in accordance with law. However – and this is my point – the assumption may not be as compelling as it first appears. To put things in perspective, we may broaden the context even further to include international politics. Could it not have been the case that states pledging to support the US military operation in Afghanistan simply chose to temporarily disregard the legal implications of their behavior? Allowing airspace and intelligence to be used by US military forces might have been seen as just or politically advisable – irrespective of whether or not it was legal – in which case, of course, the only plausible assumption is that through this behavior a state did not express its *opinio juris*. Given how

⁹⁸ *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment, ICJ Reports 1949, 4, 22.

⁹⁹ See e.g. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 10, 124, para. 241.

foreign relations are sometimes conducted by powerful states,¹⁰⁰ this assumption is certainly worthy of serious consideration.

Now, although the significance of said statements can be seriously doubted, the fact remains that quite a few scholars advanced them as indicators of an *opinio juris generalis*. What is more, this was done unreservedly – without the slightest discussion with respect to the weight that these statements should be afforded. One would expect at least some degree of critical response. Since such responses were apparently absent, I think a critical remark might be called for. It is a distinguishing trait of scientific analysis that it is performed with a critical mind. A good scientist is aware of the strength borne by her argument, and she discusses it openly. In the case of those authors who cited vague statements such as those of the Gulf Cooperation Council, Saudi Arabia, and India, I am prepared to take the argument a step further. I will insist that, for reasons already explained, authors gave the impression of being biased.

4. The Non-Action of States

To further substantiate their proposition of change, several commentators drew heavily, not on the express statements and reactions of states in the period of 11 September to 7 October, but on their *failure to react*.¹⁰¹ As claimed by these commentators, the inaction of states gave implicit evidence of an *opinio juris generalis* to the effect that according to customary international law, a right of self-defense can be exercised upon a large-scale attack performed by a non-state agent, despite the fact that – judged by the criteria provided in the general international law of state responsibility – this attack cannot be attributed to any state. No doubt, very few states explicitly objected to the claim expressed by the US Government and others that under the prevailing circumstances, a military operation on Afghan soil would be allowed by international law. Considering that we are

¹⁰⁰ According to Professor George K. Walker of the Wake Forest University School of Law, only a few days after India and Pakistan had pledged their fullest cooperation with the US Government, President Bush revoked sanctions imposed on the two countries in 1998, subsequent to the nuclear tests then performed. The US Government also agreed to reschedule a debt of USD 379 million owed by Pakistan to the USA. (Walker, *supra* note 9, 503.)

¹⁰¹ Commentators invoking the non-action of states include Arai-Takahashi, *supra* note 9, 1082 and 1095; Bring & Fischer, *supra* note 9, 190; Cassese, 2001, *supra* note 9, 996-997; Greenwood, *supra* note 9, 230; O'Connell, 2002-2003, *supra* note 9, 46; Ratner, *supra* note 9, 910; Schmitt, *supra* note 9, 77.

concerned here with a rule of general applicability, by many considered to be one of the most important upheld by international law, we have to admit that on the whole states remained surprisingly inactive. In principle, inaction of this kind may have legal consequences. According to repeated pronouncements by the International Court of Justice, the inaction of states may be evidence of their *opinio juris*.¹⁰² However – and this should be emphasized – the Court never talked of inaction in general. The inaction referred to was always a qualified one. Hence, in order for the inaction of a state S to be considered evidence of an *opinio juris individualis* to the effect that according to customary international law, some certain behavior B is allowed, circumstances need to give good reason for the assumption that state S would have taken positive action if it believed behavior B was not prohibited.¹⁰³

It is against this background that we must assess the apparent inaction of states in the wake of the September 11 attacks. If states were of the opinion that according to customary international law, a right of self-defense may *not* be exercised by a state under such circumstances as those accompanying the events of 9/11, I would say that they had little reason to openly give voice to such a conviction. Quite the contrary: they had good reason to keep quiet. Few states – apart from those reputed for harboring international terrorists themselves – had very much of a self-interest to protect. Of course, if a government believed that according to customary international law, a right of self-defense could not be exercised, and other governments had started to champion the exact opposite view, we might expect the former government to object *in the interest of law and order*. However, every government knows the risk that such a message will be misread or misrepresented. The statement about what is contrary to *the law* will often be received as expressing an opinion about what is contrary to *moral standards*. We have to remember the enormous social and political pressure to which governments all over the world were exposed. In the heated political climate that prevailed, a statement to the effect that the United States had no right to take up arms to defend itself would have been regarded as an insult to the American nation and its people. The objector would have risked retaliatory measures, including not only the cessation of diplomatic relations, but also economic sanctions, such as the discontinuance of economic aid, the suspension of projected investments, or

¹⁰² See e.g. *Fisheries Case (United Kingdom v. Norway)*, Judgment ICJ Reports 1951, 116, 138-139.

¹⁰³ *Id.*

the introduction of heavy fiscal duties on imported goods. Maybe some people would even have seen the objector as an accomplice of the terrorists. Consider the remark made by President Bush in his Address to the Nation, on 20 September:

“We will starve terrorists of funding, turn them one against another, drive them from place to place until there is no refuge or no rest. [...] Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.”¹⁰⁴

All things considered, I would insist that if most states did not explicitly object to the assertion that the USA and the UK were allowed to use force pursuant to a right of self-defense, this inaction should be taken very lightly. It cannot be considered a very weighty evidence of any existing *opinio juris generalis*. This notwithstanding, the inaction of states was invoked by a great number of scholars as forming an important argument to this effect – with no reservations attached. Because of this, in my opinion, scholars should be criticized. Obviously, they failed to perform the necessary critical analysis. This is not good science.

III. The New Rule of Customary International Law (cont'd)

In my review of the post-9/11 international legal debate, assessing the allegation that between 11 September and 7 October 2001, a new rule of customary international law was created, up to this point, I have concentrated on the evidence that the proponents of change themselves used to support this allegation. My criticism of the debate has concerned partly the way evidence was presented; partly it has concerned the inferences that the evidence was claimed to allow. In this section, I will continue my review from a new angle. I will argue that as much as the proponents of change should be criticized for what they brought to bear on the discussion, just as much should they be reproached for what they omitted. Once again, my criticism can be said to fall into three different categories: proponents of change paid little regard to negative statements; they did not cite their sources properly; and they failed to reflect upon the fact that according to

¹⁰⁴ U.S. President G. W. Bush, ‘Address to a Joint Session of Congress and the American People’ (20 September 2001) available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> (last visited 19 November 2010).

most international lawyers, the principle of non-use of force is *jus cogens*. I will structure this section accordingly.

1. Discussants Paid Little Regard to Negative Statements

The way many scholars described developments between 11 September and 7 October 2001, one gets the impression that at least among the approximately 200 states of the world, the legality of the projected British-American military campaign in Afghanistan was never really in doubt.¹⁰⁵ The following passages may serve as an illustration of the very neat picture rendered in the literature:

“No voices were raised claiming that either the customary right of self-defense or Article 51 was limited to the context of State action. On the contrary, there were very visible illustrations [...] of the fact that most States viewed 9/11 as an armed attack meriting actions in self-defense; in no case, [sic!] was there any suggestion that the right was dependent on identifying a State as the attacker.”¹⁰⁶

“Whatever criticism this [i.e. the characterization of the threat of future attacks from Al-Qaida as an armed attack] may have evoked from commentators, it appears to have met with no hostility from states, even from those normally opposed to U.S. positions.”¹⁰⁷

“No state argued that such attacks [i.e. attacks performed by non-state agents] should not give rise to self-defense.”¹⁰⁸

“This widespread, worldwide practice, to which few if any states persistently objected, further vindicated the legality of U.K.-U.S. Enduring Freedom operations.”¹⁰⁹

¹⁰⁵ Apart from the scholars cited in *supra* notes 104-108, see Cassese, 2001, *supra* note 9, 996-997; Cohan, *supra* note 9, 326; Duffy, *supra* note 9, 187; Langille, *supra* note 9, 154-156; Murphy, 2002a, *supra*, note 9, 48; O’Connell, 2002, *supra* note 9, 893; Ratner, *supra* note 9, 909; Stahn, 2003, *supra* note 9, 35-36; Stahn, 2002, *supra* note 9, 187.

¹⁰⁶ Schmitt, *supra* note 9, 77.

¹⁰⁷ Greenwood, *supra* note 9, 23. A footnote is omitted.

¹⁰⁸ O’Connell, 2002-2003, *supra* note 9, 46.

¹⁰⁹ Walker, *supra* note 9, 532. A footnote is omitted.

“State practice has clearly established that an attack of the scale and effect of September 11th is an armed attack against a state, giving rise to the inherent right of self-defense.”¹¹⁰

As I insist, descriptions such as these misrepresented reality. Contrary to what they suggest, a number of states expressed criticism of the projected British-American military campaign. Some respectfully called upon the two governments involved to exercise restraint. Examples of this can be drawn from debates held in the UN General Assembly, from 1 to 5 October, during its 56th session. Discussing Agenda Item 166 (“Measures to eliminate international terrorism”), Mr. Rodríguez Parrilla of Cuba expounded the view of his country that

“[t]errorist acts are usually carried out by extremist groups or even individuals. Faced with such an event, however serious it might be, a powerful State must not invoke the right to self-defence in order unilaterally to unleash a war that might have unpredictable effects on a global scale and result in the death of an incalculable number of innocent people. Instead, the right of all to the common defence of all must be exercised. [...] It is Cuba’s opinion that any use of force against terrorism will require the explicit and prior authorization of the Security Council, as established in the Charter. Cuba also believes that neither of the two resolutions adopted by the Council in the wake of the attacks of September 11 could be invoked to launch unilateral military actions or other acts of force.”¹¹¹

Mr. Hasmy of Malaysia quoted the Prime Minister of his country, Dr. Mahathir Mohamad:

“While he understood the reasons for the ongoing planning to hunt down terrorist groups and stop terrorism, he was against the use of force that resulted in the victimization of innocent civilians. He felt that retaliatory actions through the use of force would not solve the problem, as they might only provoke counter-retaliation and were therefore fraught with risks to international peace and security.”¹¹²

¹¹⁰ Brown, *supra* note 9, 29.

¹¹¹ United Nations General Assembly, *supra* notes 61, 15 and 17.

¹¹² United Nations General Assembly, *supra* note 76, 10.

Mr. Widodo of Indonesia maintained that

“[i]t is in this context that the United Nations, as the only multilateral organization with universal membership, is uniquely placed to advance global efforts and to take necessary and effective measures to combat this alarming increase in terrorist activity. It is the only appropriate forum to accord legitimacy to undertaking the resolute action needed to eradicate this phenomenon.”¹¹³

According to Mr. Ling of Belarus,

“[t]he possibility of any military intervention to combat international terrorism on the territories of other States today can and must be considered from the point of view of threats to international peace and security, exclusively by the Security Council, which has been given authority for this under the Charter.”¹¹⁴

According to his colleague of Turkmenistan, Mrs. Ateava,

“[t]he United Nations is the only forum for establishing a global coalition, as only in this way can we lend global legitimacy to the long-term struggle against terrorism.”¹¹⁵

To conclude the series of examples, we may consider also the letter sent by the Permanent Representative of Iraq to the United Nations, circulated by the Secretary General on 19 September. In this letter, President Saddam Hussein of Iraq emphatically condemned “Western Governments”, and the Government of the United States in particular, using broad and emotional language of the following kind:

“Some Western States are preparing to participate in a United States military action, and the indications are that it will be against an Islamic country. Who, in this case, are the fanatics? Is not the solidarity and the blanket approval in advance by some Western leaders of military *aggression* against an Islamic State the height of

¹¹³ United Nations General Assembly, UN Doc. A/56/PV.16, 3 October 2001, 16.

¹¹⁴ United Nations General Assembly, *supra* note 73, 21.

¹¹⁵ United Nations General Assembly, UN Doc. A/56/PV.21, 5 October 2001, 17.

the fanaticism of the new crusade? It reminds Arabs and Muslims of the crusade waged by the West and NATO against Iraq.”¹¹⁶

Assessing these negative statements with the same critical eyes as those used for an assessment of the positive statements cited in sub-sections IV 2 and IV 3, we have to admit that only the statements of Iraq and Cuba clearly indicate an *opinio juris* on the part of those states.¹¹⁷ Without any doubt, Iraq and Cuba were unfavorable to the proposition that under such circumstances as those accompanying the events of 9/11, according to customary international law, a right of self-defense may be exercised by the United States and the UK. The positions held by Malaysia, Indonesia, Belarus and Turkmenistan are ambiguous. Their statements can be interpreted to express the opinion that the projected military operation in Afghanistan would not be consistent with the right of self-defense contained in customary international law. But they can also be interpreted to express the opinion that even if the operation certainly would be consistent with the right of self-defense contained in customary law, for various reasons it would still be advisable to abstain from exercising that right. This notwithstanding, I would argue that, taken at large, these negative statements partly neutralize the effect of the alleged positive ones. They weaken the proposition that according to a generally held opinion among states on the morning of 7 October 2001, customary international law allowed for a right of self-defense to be exercised upon a large-scale attack performed by a non-state agent, although – judged by the criteria provided in the general international law of state responsibility – this attack cannot be

¹¹⁶ Annex I to the letter dated 18 September 2001 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General – Open letter from Saddam Hussein to the American peoples and the Western peoples and their Governments, UN Doc. S/2001/888, 19 September 2001, 5. (Emphasis added.) Compare the statement made by the Iraqi delegate (Mr. Aldouri), at the 56th session of the UN General Assembly, during discussions on Agenda Item 166 (“Measures to eliminate international terrorism”), United Nations General Assembly, *supra* note 79, 13-16.

¹¹⁷ In the earlier sub-section IV 2, some positive statements were considered ambiguous since they did not say clearly whether they concerned the right of self-defense laid down in Article 51 of the UN Charter, or the right of self-defense contained in customary international law. The negative statements referred to in the present sub-section V 1 are equally ambiguous, but in this case ambiguity is not a problem. If, according to what a state utters, no right of self-defense can be invoked upon a large-scale attack performed by a group of non-state agents, then obviously this means that according to that state, neither one of the two rights applies.

attributed to any state. Hence, in an assessment of those scholars who acted as if these negative statements simply did not exist, I would definitely plead for a reproach. Scientific analysis should be comprehensive: it assumes the investigation of an issue from all possible sides. Failing to conform to this standard, a text-writer will always expose himself to the criticism of being biased.

2. Discussants Failed to Cite their Sources Properly

In academic writing courses, a large amount of time is typically spent on discussing the issue of citation. The use of endnotes or footnotes is one among the many characteristics that make academic writing so peculiar, distinguishing the authoring of scholarly papers, theses, and research articles from writing in general. It is explained by the idea of science as an ever-continuing exchange of ideas. In a scientific exchange, the last word on a topic will never be uttered. Every idea or suggestion submitted is amenable to appraisal, re-appraisal, and renewed appraisal *ad infinitum*. In order for a reader to be able to verify and appraise the propositions submitted by a writer to a scientific discourse, it is required that the writer states her sources of information – those sources on which the proposition is allegedly based. If the reader cannot revisit the sources, appraisal will be impossible, and the founding idea of all science will be lost entirely.

For similar reasons, academic writing should be attentive to the use of secondary sources. To grasp the information contents conveyed by an utterance, we often have to interpret this utterance. Consequently, the more people that intervene in the communication of an utterance from its original source to the person using it, the greater the risk that the source will be misrepresented. Good reasons suggest that secondary sources should be avoided. However, as every academic knows, for various reasons, this principle must sometimes be set aside. In such cases, it is of utmost importance that readers are at least kept informed of the fact that a secondary source was exploited. If readers are not informed, how can they ever be expected to make a correct assessment of the proposition or propositions put forth? Naturally, the same applies to those cases where a writer builds upon a secondary source of information that cannot possibly be retrieved or accessed for inspection.

These are basic principles of scientific ethics that ought to be well known to scientists working in all disciplines. Nevertheless, in the post-9/11 international legal discourse they were repeatedly infringed upon, especially by text-writers reporting on the various state acts allegedly performed in the

period of 11 September to 7 October. In some cases, commentators claimed the existence of statements without citing any source of information whatsoever. As already stated, this is contrary to the idea of science as an ever-continuing appraisal of ideas. When an author submits a proposition to a discourse, but does not care to state his sources of support, the only remaining reason to adopt the proposition is the personal authority or credibility of the author. In this particular case, this is hardly sufficient. In other cases, text-writers cited sources of a secondary nature, including daily newspapers, articles by other commentators of international law, who themselves were unable to specify their sources of information, and telephone calls allegedly overheard by colleagues. Generally speaking, in a scientific discourse, secondary sources should always be treated with suspicion. Naturally, in the particular case addressed – given the overwhelming sentiments and political rhetoric that infected legal debate in the period immediately following upon the events of 9/11 – we should be more than normally skeptical. I have criticized scholars earlier in this article for underachieving; now I must go for something stronger. This is unacceptable!

3. The Missing *Jus Cogens* Argument

Contrary to what was indicated in sections IV and V, let us assume that based on the utterances and behavior of states between 11 September and 7 October 2001, the alleged *opinio juris generalis* can indeed be shown to exist. Let us assume that according to a generally held opinion among states on the morning of 7 October, under circumstances of the kind accompanying the events of 9/11, customary international law allowed for a right of self-defense to be exercised by the United States and the UK. Even if we accept this assumption, it does not really solve the matter. Obviously, anyone who chooses to advocate the creation of a new right of self-defense according to the assumption above still has one difficulty to confront. The complication is that she assumes the creation of not just any norm of customary international law, but a norm of a very particular kind. She assumes the creation of *jus cogens*.

This suggestion that the right of self-defense should be regarded as a norm of *jus cogens* might not appear as natural to everyone. The thing is that if we choose to characterize as *jus cogens* the principle on the non-use of force (as enshrined in Article 2 para. 4 of the UN Charter) – indeed, this

is the description habitually offered¹¹⁸ – we simply have no other alternative. The right of self-defense forms an exception to the principle on the non-use of force. Thus, the relevant *jus cogens* norm cannot possibly be identical with the principle on the non-use of force as such. If it were, this would imply that whenever a state exercises a right of self-defense, it would in fact be unlawfully derogating from a norm of *jus cogens*.¹¹⁹ Obviously, the following description of the relevant *jus cogens* norm simply does not hold: ‘If, in the conduct of its international relations, a state resorts to force directed against the territorial integrity and political independence of another state, or force otherwise inconsistent with the purposes of the United Nations, then this shall be considered a violation of the international *jus cogens*.’ A correct description would have to account for the fact that the principle on the non-use of force does have exceptions, such as the right of self-defense. To borrow a term from legal theory, the principle on the non-use of force is *supervenient* on the right of self-defense.¹²⁰ Hence, compared to the description above, a better way of representing the relevant *jus cogens* norm would be by the following norm sentence:

‘If, in the conduct of its international relations, a state resorts to force directed against the territorial integrity and political independence of another state, or force otherwise inconsistent with the purposes of the United Nations, and this action is not prompted by an armed attack, or, given that it is indeed prompted by such an attack, fail to meet the twofold criterion of necessity and proportionality, then this shall be considered a violation of the international *jus cogens*.’¹²¹

¹¹⁸ See e.g. the opinions expressed by the US and Nicaragua Governments, and by the International Law Commission, as reiterated by the ICJ in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 10, 100-101, para. 190.

¹¹⁹ Cf. VCLT Art. 53: A *jus cogens* norm “is a norm [...] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

¹²⁰ See e.g. R. M. Hare, *Essays in Ethical Theory* (1993), 66-81.

¹²¹ I am not saying that this is the correct way of representing the relevant *jus cogens* norm. As I have argued extensively elsewhere, it might be that this norm would have to be put in even more comprehensive terms. See U. Linderfalk, ‘The Effect of *Jus Cogens* Norms: Whoever Opened the Pandora’s Box, Did You Ever Think About the Consequences?’, 18 *European Journal of International Law* (2007) 5, 853.

In order for a norm of customary international law to fit the description of *jus cogens*, it must be regarded as peremptory by the international community of states as a whole. This is evident from the definition provided in Article 53 of the 1969 Vienna Convention on the Law of Treaties: A *jus cogens* norm “is a norm *accepted and recognized by the international community of States as a whole* as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹²² Stated somewhat differently, a norm of *jus cogens* presupposes the existence of two kinds of *opinio juris*. Let us say we wish to argue the position that the principle on the non-use of force is a norm of *jus cogens*. Then, first of all, we would have to show it to be a widely held opinion among states throughout the world that, according to a rule of customary international law, a state shall refrain in its international relations from the use of force directed against the territorial integrity or political independence of any other state, or in any other manner inconsistent with the purposes of the United Nations. Secondly, we would have to show it to be a widely held opinion among states that the principle on the non-use of force has a *jus cogens* character.

This requirement for a double *opinio juris* is of great relevance for the post-9/11 international legal discourse. If scholars advocated the proposition that from 11 September to 7 October 2001, the right of self-defense contained in customary international law was put through a process of revision, then obviously it would not be enough for them to show that in said period, states changed their opinion with regard to the contents of the right of self-defense. They would also have to show that states changed their opinion with regard to the contents of peremptory international law. Considering the circumstances, this second requirement can hardly be met. Even if we accept the assumption that an ordinary norm of customary international law can be brought into existence or modified in a period of four weeks, it is indeed absurd to imagine that in such a short period, a similar development could ever be effected with regard to a norm of *jus cogens*. It is entirely inimical to the idea of *jus cogens* as an uncommonly permanent set of norms. Not one text-writer commenting upon the developments post-9/11 brought this issue up for discussion. That is why I refer to it as the missing *jus cogens* argument.

¹²² Emphasis added.

In my understanding, the conclusion for sections IV and V of this essay would have to be very much the same as that for sub-section III 5. If we accept that the principle on the non-use of force forms part of the international *jus cogens*, the proposition of change is doomed from the very beginning. If a host of international legal scholars suggested that according to the *opinio juris* of states on 7 October 2001, under circumstances of the kind accompanying the events of 9/11 customary international law allowed for a right of self-defense to be exercised, spending time on carefully analyzing the invoked evidence to that effect was a meaningless exercise. What is more, it diverted attention from the legally relevant questions. Those questions obviously lied elsewhere. These are harsh words indeed; but in my opinion, if a *jus cogens* character is conferred on the principle on the non-use of force, we will simply have to dismiss as poor legal science the entire legal debate considered in this essay.

C. Part III

I. The Self-Image of the International Legal Scientific Discipline

I began this essay by sharing my opinion about the post-9/11 international legal discourse. I declared that I have studied with exceptional interest what international legal scholars wrote about the international law of self-defense relative to the initiation of Operation Enduring Freedom in Afghanistan. I have done so for several reasons. First of all, the post-9/11 international legal literature raises some very interesting questions with respect to the integrity of the legal scientific discipline. As I explained in the introduction of this essay, a great majority of text-writers expressed the opinion that at some point between the attack of 11 September 2001 and the initiation of Operation Enduring Freedom on 7 October that same year, the international law of self-defense substantially changed. Considering how radical this proposition must appear to most international lawyers, a legitimate question is to what extent good arguments were actually used to defend it. By submitting the post-9/11 international legal literature to a critical legal review, I have tried to provide this question with an answer. As argued in Part II of this essay, according to the quality standards normally used for criticism of legal scientific activities, legal science should engage in independent critical legal analysis. Legal science should bring focus to the operationally relevant legal questions – it should ask questions that help determining the scope of discretion conferred on political and judicial

decision-makers, rather than the opposite. Furthermore, legal science should fulfill the criteria of general scientific ethics. As the review clearly showed, in the post-9/11 international legal discourse, legal science failed on all counts.

Arguably, this conclusion forms a reason for a number of further actions. To begin with, obviously, it justifies the categorization of the post-9/11 discourse as poor legal science. It is good cause to express disapproval of the way proponents of change acted, and it urges people to be more skeptical about what they read in the international legal literature – whether they choose to distrust only the specific literature on international terrorism and the right of self-defense, or go as far as to be greatly skeptical about the entire international legal scholarship. Personally, I will approach the issue from a different angle. As I conceive of the results of Part II, more than anything else, they give us reason to submit to scrutiny and further discussion the self-image of the international legal scientific discipline. I will finish this essay by initiating something of that kind.

1. The International Legal Scientist as Archetype

If we wish to understand the international legal scholarship as it presented itself in the post-9/11 international legal discourse, I assume we have to know something about the forces influencing that scholarship. When scholars wrote about the international law of self-defense relative to the initiation of Operation Enduring Freedom in Afghanistan, clearly, there was something about the whole situation that greatly constrained them. Something urged scholars to avoid the conclusion that the initiation of Operation Enduring Freedom was contrary to international law, or – if we state this in general terms – that in circumstances like those accompanying the events of 9/11, there would still not be any right of self-defense to exercise. Given the importance of the legal issue discussed, it would be interesting to know more about this urge or influencing force – what it is, and how it works.

Some people would probably say that international legal scholars acted for ulterior motives, such as, for instance: a personally felt hatred or sorrow; solidarity with families directly affected by the terrorist assault of 9/11; a loyalty to one's country, government, or employer; or a will to secure future promotions and research funds. Although factors such as these certainly must have played a part – I would be a fool if I did not admit it – in my opinion, this explanation is oversimplistic. My reading of the post-9/11 debate tells me – and my earlier experience of the international legal

literature confirms this – we have to approach the problem at a deeper level. As I would like to suggest, the main motivating reason lies rather in the self-image of the international legal scientific discipline and the role it envisages for itself in the international community. Of course, approaching the issue on the level of the individual, we cannot speak about the “one role” assumed by the international legal scholar. Different scholars conceive of their role differently. They may share the conviction that something like a legal framework exists, but they certainly have different ideas of what this framework is and how they, as scholars, should approach it. However, since these different ideas and approaches would seem to lend themselves to general classification, I believe we can still talk about the *genus* of the international legal scholar. Consequently, I will now venture a description of the international legal scientist as archetype.¹²³ In fact, according to the description, there are several archetypes. I will denote them as the External Observer, the Legal Idealist, The Legal Activist, the Moral Messenger, the Preserver of the Legal Self, and the Guardian of the Legal System, respectively. If earlier I have referred to the post-9/11 international legal discourse as an interesting object of study, it is mainly because in this discourse, these archetypes are more than usually apparent.

For *the External Observer* the distinction between descriptive and normative legal statements is crucial. According to her, since international law exists in much the same way as natural phenomena, legal scientists can describe legal norms unaffected by whatever moral or political opinions they may personally hold. The External Observer admits that in legal discourses, people may utter statements defending legal norms on moral or political grounds. Also, people may utter criticism of the law and share opinions about the new legal norms they think ought to be created. This is an activity that the External Observer herself refuses to engage in, however. The role she has assumed is to be a provider of descriptive legal statements, and descriptive legal statements only. What tends to make her work complicated is the fact that, like most human beings, the External Observer is a moral and socially responsive creature. Therefore, when she reaches a conclusion (C) with regard to the contents of international law, sometimes she will experience great internal conflict. This conflict is owed either to the fact that the External Observer finds the conclusion C morally or politically

¹²³ For a similar approach, see e.g. J. Kammerhofer, ‘Law-Making by Scholarship? The Dark Side of 21st Century International Legal ‘Methodology’’, working paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1631510 (last visited 11 December 2010).

offensive and feels an inner need to express this openly. In the alternative, the External Observer may feel that she is under great social pressure: she knows that people generally will not understand that she is taking a neutral stance, but will think that she considers the conclusion C morally or politically defensible; and since she believes that most people will not share this assessment, this bothers her. The External Observer faces a dilemma. The easy way out of this dilemma is to make sure that the legal description and the morally or socially more attractive conclusion -C coincide. Arguably, the greater the External Observer perceives the moral or social values at stake to be, the more attractive this solution will seem to her. Considering the strong moral sentiments expressed in the public debate post-9/11, my suggestion is that the External Observer serves as a possible explanation for the poor scientific quality characterizing the post-9/11 international legal discourse.

The self-assumed role of *the Legal Idealist* is to pronounce on the way states, international organizations, and other international legal subjects *should* act, given the existing positive international law. For the Legal Idealist, international law is a means for the regulation of the behavior and interaction of its various subjects. Regulation is not seen as an end in itself, however, and this is where the Legal Idealist parts with the External Observer. In the view of the Legal Idealist, justice is an essential quality of law, and therefore, it is a constant requirement that regulation be just. By very definition, a rule that belongs to the system of international law is morally sound, and if it is not, it simply does not belong to that system. Stated in slightly different terms, for the Legal Idealist, international law is a representation of the set of moral values that justice stands for in the conceptual world she assumes. Consequently, if the Legal Idealist reaches a certain conclusion (C) with regard to the contents of international law, and she finds this conclusion morally offensive, then she will not regard C as correct, but will search for alternative conclusions. In the public debate post-9/11, many people regarded as inconceivable the idea that in circumstances like those then prevailing, the United States would have no right to defend itself. “National security” and “the self-preservation of states” were said to demand such a right. Strong moral language of this kind would seem to reinforce the conception of the Legal Idealist as a valid explanation of the post-9/11 international legal discourse.

For *the Legal Activist*, law is a means for the realization of some particular political agenda. If the Legal Activist reaches a certain conclusion (C) with regard to the contents of international law, and she finds that this conclusion is contrary to the political agenda she assumes, then the legal

Activist will argue for a legal change. The same goes for the situation where the Legal Activist finds that international law does not provide a clear answer to a given question, but believes that it should. The Legal Activist shares with the External Observer the task of analyzing and describing international law, but unlike her “colleague”, the Legal Activist has assumed also the further role of taking normative action. The distinguishing mark of the Legal Activist is the way this is done. The Legal Activist acts on the belief that as long as she acknowledges that something like a legal framework exists, she has the right to bring arguments to further her political agenda, even though this is done in a fully partial fashion. A clear risk comes with this approach. When the Legal Activist makes a statement on what she thinks the law *should be* people will easily understand this as a statement on *what the law is*; for several reasons. The Legal Activist might be vague about whether, in her opinion, international law provides a clear answer to the particular question investigated or not. Or, she might be vague about what in her account is a description of *the law that is*, and what is her opinion of *the law that should be*. (A conspiratorial mind would perhaps say that it remains in the interest of the Legal Activist to be vague about these things exactly.) Given the political importance often attached to the international law on the use of force, the conception of the Legal Activist would seem to serve as a valid explanation of the post-9/11 international legal discourse.

Although it might be said about *the Moral Messenger* that in a way she, too, approaches international law from a normative angle, we must be careful not to confuse her with other archetypes. Unlike the Legal Idealist and the Legal Activist, the Moral Messenger does not work on the basis of any general normative concept. What influences her is not so much the deeply felt conviction that beyond positive international law, a fact or a state of affairs can be generally desired on moral or political grounds. The Moral Messenger acts on the basis of more temporary motives. She acts under the influence of a pathos – the perceived pathos of the particular legal provision (P) she happens to be studying at the moment. By appealing to the emotions of the legal scientist – for instance, by warning of immanent threats or consequences, by appealing to pathetic circumstances, or invoking supposedly shared values – some agent – be it the law-makers, an NGO, a lobby group, or a collegiums of other legal scientist – has convinced the scientist that the provision P stands as a representative of some important moral value or values. Having adopted this view, for the legal scientist it will morally obviously make a great difference whether she comes to the conclusion that P allows a certain line of action or not. To say that a certain

line of action is not allowed by P will be tantamount to saying that this line of action is morally offensive. Add to this the unique position that the international law on the use of force occupies in international politics and to some extent also in international legal science. The international law on the use of force is often referred to as forming something of “an international constitution”. People speak of it as part of an “international *ordre public*” and as *jus cogens*. Consider also the language of Article 51 of the UN Charter, where the right of self-defense is described as having an “inherent” character. Pathetic language of this kind reinforces the suggestion that the Moral Messenger might be one explanation for the poor scientific quality characterizing the post-9/11 international legal discourse.

The *Preserver of the Legal Self* and the *Guardian of the Legal System* have very much in common, and therefore, to some extent, they can be dealt with jointly. When the Preserver of the Legal Self or the Guardian of the Legal System inquires into the contents of international law, she works under the influence of the perceived morality of the international community at large. She may or she may not have an opinion about the moral virtues of a particular conclusion (C), but this is immaterial. What influences the behavior of the Preserver of the Legal Self and the Guardian of the Legal System is not the set of moral principles that the particular scientist herself happens to hold. The source of influence, rather, is the scientist’s assumption that C will be received by the international community as morally offensive. For some reason she does not want her conclusion to be received this way. Therefore, if the Preserver of the Legal Self or the Guardian of the Legal System reaches a certain conclusion C with regard to the contents of international law, and she makes the prediction that the international community will find this conclusion morally offensive, she will reject C and search for alternative conclusions. In other words, the predicted reaction of the international community causes the scientist to give a different description of international law than she would have given if she would have acted independently of this community. Why is this? The Preserver of the Legal Self and the Guardian of the Legal System would answer this question differently. The Preserver of the Legal Self would answer that she considers it her duty to protect the authority of international legal science. She is afraid that if the international community perceives of her conclusions as morally offensive, it will increasingly look upon international legal science as irrelevant and ignore it. The Guardian of the Legal System, on the other hand, would answer that it is incumbent upon her to protect the legitimacy of the international legal system. If, generally, people tend to think of the international law on the use of force as

something of a core of an international legal system working properly, the morally dubious conclusion C will inevitably raise doubts as to whether international law is at all an appropriate form of governance. For the Guardian of the Legal System, as for the Preserver of the Legal Self, it is of course relevant that in dealing with the spectacular events of 9/11, international legal science was given an attention in the public debate far beyond normal. This is why I suggest that the Preserver of the Legal Self and the Guardian of the Legal System serves as valid explanations of the post-9/11 international legal discourse.

2. The Way Ahead

Naturally, my description of the international legal scientist as archetype must be taken for what it is. First of all, since the description is based not so much on sociological research proper as on generalized personal experience, it remains rather speculative. Furthermore, let it be clear that I do not claim to be providing a description of the personalities of individual legal scientists. Normally, individual legal scientists do not lend themselves to easy-found categorizations such as those suggested in this essay. This is mainly because legal scientists act consistent with different archetypes at different occasions, and because, seemingly, in particular legal discourses a legal scientist can act consistent with several archetypes at the same time. Finally, my description of the international legal scientist as archetype is not intended to be exhaustive. Obviously, the genus of the international legal scientist can be described on the basis of different criteria, and depending on the criteria used the ensuing description will inevitably be different. Nevertheless, even assuming that we were all to agree on the particular criterion used in this essay – the forces influencing international legal scientists – I do not exclude the possibility that on further analysis, additions would have to be made to the description that sub-section VI 1 provided.

Despite these reservations, it is my understanding that the current description of the international legal scientist as archetype has great explanatory value; for several reasons:

- It explains some of the relationships that obviously exist between, on the one hand, the way we look upon ourselves as international legal scientists, and, on the other hand, what tends to be the outcome of our scientific activities. Understanding these relationships, international legal scientists will be more

keen observers of, and participants in, the international legal discourse. International legal scientific activities will emerge as more transparent. Thus, the description provided in sub-section VI 1 will contribute to a more rational international legal discourse. Perhaps, for this same reason, it will also help re-establish the ethos of international legal science.

- As I would suggest, a good legal scientist continuously reflects upon her professional personality. Who am I? What am I doing? What exactly motivates my action? The description of sub-section VI 1 will not only encourage these questions, but it will also to some extent assist in answering them.

Possibly, my description of the international legal scientist as archetype will form a basis for a more penetrating general discussion on the role of the legal scientific discipline in the international community. What exactly is the international community expecting from international legal science? What role or roles should international legal science be taking in situations like that of 9/11? To what extent – particularly in 9/11-like situations – should the international legal scientist feel that she bears responsibility for the perceived moral deficiencies of international law? To what extent should the legal scientist be considered responsible for the authority of the entire international legal scientific discipline and for the legitimacy of the international legal system? If we agree that the international legal scientific discipline is constructed by its action in acute situations in particular, as international legal scholars we should consider these questions exceptionally important.