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Terrorist Attacks: Collective Defence and Solidarity“

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To my favorite family

Claudia, Jesus and Alejandro

To my favorite partner in life

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ABBREVIATIONS

UN Charter	United Nations Charter
ACT	Accountability, Coherence and Transparency Group
Allies	Each and all members of NATO
Black Friday attacks	13 November 2015 attacks occurred in Paris, France
Brussels Treaty	Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, signed on 17 March 1948, as amended by the Paris Agreements on 23 October 1954
CFSP	Common Foreign and Security Policy
Constitutional Treaty	Treaty Establishing a Constitution for Europe, signed on 16 December 2004, not yet entered into force
Council	Council of the European Union
CSDP	Common Security and Defence Policy
Defence Clause	Article 5 of NATO Treaty
DRC	Democratic Republic of the Congo
Geneva Conventions	1949 Geneva Conventions on the Laws of Wars, together with their 1977 Additional Protocols
ICJ	International Court of Justice
Implementation Decision	Council Decision on the Arrangements for the Implementation by the Union of the Solidarity Clause, dated 24 June 2014
International Community	For purposes of this Master Thesis will refer jointly to the states, the ICJ and the Security Council
Iran	Islamic Republic of Iran
ISI	Islamic State in Iraq
ISIS	Islamic State in Iraq and Syria
Maastricht TEU	Treaty on European Union, Treaty of Maastricht, signed on 7 February 1992, entered into force on 1 November 1993
Member States	Each and all members of the European Union
Mutual Defence Clause	Article 42.7 of the TEU

NAC	North Atlantic Council
NATO	North Atlantic Treaty Organization
NATO Treaty	North Atlantic Treaty, signed on 4 April 1949, entered into force on 24 August 1949
P5	Five Permanent Members of the Security Council
Solidarity Clause	Article 222 of the TFEU
TEU	Treaty on European Union, as amended by the Treaty of Lisbon in 13 December 2007, entered into force on 1 December 2009
TFEU	Treaty on the Functioning of the European Union, signed on 13 December 2007, entered into force on 1 December 2009
Treaty of Lisbon	Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed on 13 December 2007
UN	United Nations
United States	United States of America
WEU	Western European Union
9/11 attacks	11 September 2001 attacks occurred in New York, Pennsylvania and Virginia, United States

*"It isn't enough to talk about peace. One must believe in it.
And it isn't enough to believe in it. One must work at it."*

(Eleanor Roosevelt)

INTRODUCTION

Nowadays, terrorism is considered one of the main challenges to global security. Terrorism has grown steadily over the last decade, a trend that shows no sign of slowing down. In the last years, deaths caused by terrorism have increased, resulting in almost 18,000 people being killed in terrorist attacks.¹ Of those deaths, 82 per cent occurred in countries facing constant violent conflicts: Iraq, Afghanistan, Pakistan, Nigeria and Syria.²

The threat of terrorism has also affected many peaceful countries. Indeed, at the end of 2015, the terrorists struck a peaceful country. This time the affected state was France. If no clear path of action exists for states to defend themselves against terrorist attacks, this problem will continue to grow, as it would become increasingly difficult to effectively fight against this threat.

According to Article 2.4 of the United Nations Charter ("UN Charter"), states are prohibited from resorting to the threat or use of force.³ However, this prohibition is not absolute. Article 51 of the UN Charter recognises the "inherent right of individual or collective self-defence"⁴ as an exception to the rule. This article provides the conditions under which a state may react to defend itself in cases where it has suffered an armed attack, as well as to assist the defence of another state.

Regarding the scope of the words "armed attack" one of the main unresolved issues is the determination of whether or not acts performed by independent non-state actors, specifically terrorist organisations, could trigger the exercise of the right of individual or collective self-defence.⁵ The International Court of Justice ("ICJ") remains reluctant to broaden the interpretation to cover terrorist attacks.⁶ One of the reason for this reluctance is the fact that it has been impossible to reach an agreement on the notion of "terrorism" due to its multiple shapes and

¹ Global Peace Index 2015, INSTITUTE FOR ECONOMICS AND PEACE, available at http://static.visionofhumanity.org/sites/default/files/Global%20Peace%20Index%20Report%202015_0.pdf, last visited on 9 February 2016, at p. 3.

² *Ibid.*

³ Charter of the United Nations, signed 26 June 1945, entered into force 24 October 1945, 1 UNTS XV, at Article 2.4.

⁴ *Ibid.*, at Article 51.

⁵ Dinstein Yoram, *War, Aggression and Self-Defence* (Cambridge University Press, 2001), at p.192.

⁶ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States) ("Nicaragua Case"), Judgement, ICJ Reports 1986, at paras. 109, 115 and 201. See also *Oil Platforms (Islamic Republic of Iran v. United States of America)* ("Case Concerning Oil Platforms"), Judgement, ICJ Reports 2003, at para. 78.

forms. Hence, broadening the scope of an “armed attack” without clear rules on the notion of terrorism, could lead to undesirable consequences concerning the principle of non-intervention.

Despite the restrictive approach taken by the ICJ, following the “9/11 attacks” against the United States, the general practice of states has shown an acceptance of the possibility of unilaterally triggering the right of self-defence against terrorist attacks.⁷ Moreover, the Security Council has indicated that “any act of international terrorism, constitutes a threat to international peace and security” and recognised the “inherent right of individual or collective self-defence” as a response to these attacks, without making any reference to an armed attack by a specific state.⁸

Besides the complexities on the notion of “armed attack”, the concept of collective self-defence *per se* also remains problematic in theory and practice.⁹ Collective self-defence has been traditionally understood as a tool for states to defend themselves and other states from imminent attacks or to repeal an on-going attack. Terrorist attacks tend to arise out of the blue and normally states can only react once the attack has passed. Hence, the state’s reaction aims to prevent further attacks, since terrorist attacks often involve a series of events. The exercise of collective self-defence against terrorist attacks therefore appears to be related to the doctrine of preventive and pre-emptive self-defence, which remains controversial. This controversy poses an additional challenge to the possibility of exercising the right of collective self-defence against terrorist attacks.

Furthermore, some academics regard collective self-defence as a pooling of a number of rights of individual self-defence, within the context of a particular treaty or institution.¹⁰ However, the practice of states suggests that collective self-defence is something more than the mere accumulation of rights of individual self-defence, as it forms the “basis of comprehensive regional security systems.”¹¹

Indeed, states have associated in military regional organizations, such as the North Atlantic Treaty Organization (“NATO”), the South-East Asia Treaty Organization, as well as the Warsaw Treaty Organization, specifically for purposes of exercising the right of collective self-

⁷ Eisemann Pierre M., *Attaques du 11 septembre et exercice d'un droit naturel de légitime défense (The attacks of September 11 and the exercise of a natural right of self-defence)*, Corten Oliver et al. (eds.), *Le droit international face au terrorisme* (2002), at p. 239.

⁸ United Nations Security Council Resolution 1373, 28 September 2001, S/RES/1373 (2001)

⁹ *Encyclopaedia of Public International Law, Use of Force War and Neutrality Peace Treaties (A-M)*, Bernhardt Rudolf (ed.) (North Holland Publishing Company, 1982), at pp. 116-117.

¹⁰ Bowett D. W., *Self-defence in International Law* (The Lawbook Exchange Ltd. 2009), at p. 245. See also Brownlie Ian, *International Law and the Use of Force by States* (Clarendon Press 1963), at pp. 328-329.

¹¹ Malcom N. Shaw, *International Law* (Cambridge University Press 2014), at p. 831.

defence. These organisations have been established in great part because of the fact that agreements under Article 43 of the UN Charter¹² have never been concluded. Moreover, direct enforcement by the Security Council is unavailable since it does not have the necessary military means to guarantee an effective exercise of the right of collective self-defence nor a collective security system under its independent auspices.

The political interests surrounding these organisations have sometimes conflicted with the Security Council's interests. Pursuant to this conflict, in some cases, the lawfulness of the actions performed by these organisations has been questioned. One case was Operation Allied Force. This operation was a military air campaign launched by NATO against the Serbian forces on 24 March 1999, without the authorization of the Security Council.¹³ Hence, this operation constituted a violation under the UN Charter even though the political interests of NATO were justified as a legitimate humanitarian intervention.

In addition to these military organisations, the Treaty on European Union ("TEU") also contemplates provisions for the exercise of collective self-defence. However, despite its existence, states have never or very rarely invoked these collective self-defence mechanisms. The main reason for justifying the scarce usage could be attributed to NATO's successful deterrence effect. This success is not only due to the usage of Article 5 collective self-defence mechanism but also to multiple successful missions since its creation, as well as other measures including a number of standing forces on active duty.

A solidarity mechanism, designed specifically to face terrorist attacks, has been included under Article 222 of the Treaty on the Functioning of the European Union ("TFEU"). However, this solidarity mechanism also remains unused, probably due to its complex legal procedure of implementation. This poor usage has made it difficult to evaluate its effectiveness in a particular situation.

Pursuant to the response of France to the recent 13 November 2015 terrorist attacks, commonly referred to as the "Black Friday attacks", the world is facing a situation where a mechanism for the exercise of collective self-defence, not under the auspices of a military regional

¹² UN Charter, *Supra* note 3, Article 43 provides the following: All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a *special agreement or agreements*, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security (emphasis added).

¹³ Neuhold Hanspeter, *Human Rights and the Use of Force*, in: Stephan Breitenmoser/Bernhard Ehrenzeller/Marco Sassòli/Walter Stoffel/Beatrice Wagner Pfeifer (eds.), *Liber amicorum Luzius Wildhaber* (Zürich/St. Gallen/Baden-Baden 2007) pp. 479-498, at p.484

organisation, has been invoked. France decided, for the first time, to invoke Article 42.7 of the TEU.

Therefore, the legal implications of the French decision should be analysed and compared to other possible scenarios under the different, available mechanisms. To achieve this purpose also some of the most important unresolved issues regarding the lawfulness of the exercise of the right collective self-defence, as traditionally understood, against contemporaneous threats, such as terrorist attacks will be addressed.

In Chapter I, a brief factual background of the Syrian conflict will be provided to establish a clear landscape on the political particularities of the case, the types of acts committed and the attacker.

In Chapter II, an analysis on the concept of collective self-defence will be performed to identify the characteristic surrounding this concept, in particular its differences with the concept of a collective security system.

In Chapter III, the divergent opinions regarding the notion of "armed attack" in Article 51 of the UN Charter, will be analysed to identify the arguments that support and reject the possibility of including attacks performed by independent terrorist organisations within the scope of this notion.

In Chapter IV, an analysis on the available collective self-defence and solidarity mechanisms for France, at the time of the Black Friday attacks, will be made to determine their legal implications, as well as to identify some of the main differences or similarities between them.

In Chapter V, after having examined the characteristic of each collective self-defence and solidarity mechanisms, an analysis regarding the possible legal and political reasons on which France might have based its decision will be performed.

Finally, in Chapter VI, the role of the Security Council in the Black Friday attacks will be analysed along with the legitimacy crisis it is currently facing and the impact of this crisis on its performance regarding the Syrian conflict.

CHAPTER I: FACTUAL BACKGROUND OF THE CONFLICT

Law and politics are strongly interrelated. For the purposes of analysing the legal implications of France's decision to invoke Article 42.7 of the TEU it is important to discuss: first, the attacks that trigger the invocation of this article (**A**); second, the factual issues surrounding ISIS (as defined below) and the Syrian conflict, as well as the underlying political interests of the key players involved (**B**); third, the complexities surrounding the definition of terrorism (**C**); and finally, the response of France following the occurrence of the attacks (**D**).

A. The Black Friday Attacks: France as the Affected State

This section is important to identify the features and context of the factual trigger for France's invocation of Article 42.7 of the TEU.

On 13 November 2015, terrorism struck again. This time the affected state was France. The Black Friday attacks consisted of seven coordinated strikes, which occurred in Paris. The first attacks were launched simultaneously, with two explosions near to the *Stade de France* in Saint-Denis. Further attacks comprised another suicide bombing and a series of mass shootings at four different locations, the most deadly taking place at the Bataclan concert venue. Three of the attackers were killed after police arrived on the scene; two by activating their suicide vests and the third was shot dead by the police. The attacks ended with the death of 130 people and 352 wounded.¹⁴

The following morning, the Islamic State in Iraq and Syria, also known as Islamic State of Iraq and al-Sham or Islamic State of Iraq and the Levant ("ISIS"), claimed responsibility for the strikes in retaliation against France for its airstrikes against ISIS in Syria and Iraq. One week after the attacks, the French police identified at least 15 men responsible for the murders, seven of whom died in suicide bombing, a further seven were being detained and one man was on the run.¹⁵

¹⁴ Mullen Jethro, Melvin Don and Armstrong Paul, *Terror in Paris: What we know so far*, CNN WEBSITE, 16 November 2015, available at <http://edition.cnn.com/2015/11/13/europe/paris-attacks-at-a-glance/>, last visited on 10 February 2016.

¹⁵ Steafel Eleanor, Mulholland Rory, *et al*, Paris terror attack: Everything we know on Saturday afternoon, THE TELEGRAPH, 21 November 2015, available at <http://www.telegraph.co.uk/news/worldnews/europe/france/11995246/Paris-shooting-What-we-know-so-far.html>, last visited on 27 February 2016.

On 18 March 2016, the Belgian authorities caught the missing man in Brussels. As a consequence, four days later Brussels suffered two terrorist attacks; one at its Zaventem airport and another at Maalbeek metro station, with ISIS claiming responsibility again.¹⁶

Conclusion

The Black Friday attacks were characterised by France, the international community and the media as terrorist attacks. This characterisation was based on the type of attacker and the similarities of the attacks with the 9/11 attacks. As it will be addressed below, the group which claimed responsibility for the attacks, ISIS, has been identified by the Security Council as a paradigmatic example of a terrorist organisation and a threat to international peace and security. Hence, even though no single definition of "terrorism" has been agreed upon by the international community, as we will be further discussed in Subsection C of this Chapter, it can be submitted that there is a general understanding regarding which groups fall within the scope of this notion. One of these groups is ISIS.

B. Identifying the Attacker: ISIS and the Syrian Conflict

This section is important to describe the attacker and the relevant features that could identify it as a terrorist organisation, different from a state, which under the traditional notion of self-defence used to be the attacker.

ISIS is an organised, Islamist military and non-military force in control of part of the territory of Syria and Iraq.¹⁷ The historical roots of ISIS can be traced back to the collapse of the Iraqi state, the United States' occupation and the establishment of Al-Qaeda in Iraq. All these causes led to the rise of extremist movements in Iraq. One of these movements was the Sahwa¹⁸, which began around 2006 and was a central component of the United States' strategy in Iraq. This strategy aimed to cultivate Iraqi Sunni¹⁹ tribal leaders to combat Al-Qaeda fighters in Iraq. However, Al-Qaeda's counterattack forced the collapse of the Sahwa. The weakening of the Sahwa provided the opportunity for the strengthening of Al-Qaeda in Iraq, since the latter

¹⁶ Graham David A, *How Belgium Tried and Failed to Stop Jihadist Attacks*, THE ATLANTIC, 22 March 2016, available at <http://www.theatlantic.com/international/archive/2016/03/belgium-attacks-isis/474945/>, last visited on 23 March 2016.

¹⁷ Laub Zachary, *The Islamic State*, CFR BACKGROUNDEERS, available at <http://www.cfr.org/iraq/islamic-state/p14811>, last visited on 21 February 2016 ("Laub Zachary").

¹⁸ Arabic word for "awakening".

¹⁹ Islam is divided in three major religious denominations: Sunni, Khawarij and Shi'ah. Sunnis constitute more than 85% of the total Muslim population.

formed alliances with other insurgent groups. One of these alliances gave rise to the creation of the Islamic State in Iraq (“ISI”).²⁰

The ISI served as a support for several organisations that continued the fight against the United States until its withdrawal. After the United States’ army forces withdrew from Iraq, ISI became stronger. Subsequently, the movement established a branch in Syria. When disagreements broke out between ISI and its Syrian branch, the latter separated from Al-Qaeda and finally, this separation caused the establishment of ISIS as an independent movement operating in Iraq and Syria.

History reveals that Syria has always been a conflict-ridden country. There are many reasons for this; for instance, Syria’s geographical location, the availability of natural resources, as well as its multicultural population. Before and during its independence, the political stability of the country had always been at stake.²¹ In 1970, Syria came under the authoritarian rule of President Hafiz al-Assad. After his death, his son Bashar al-Assad became president. Despite some early steps towards political reform, President al-Assad ultimately continued his father’s authoritarian style of government, using Syria’s powerful military and security services to suppress political dissent.²²

In March 2011, the regime of President Bashar al-Assad faced a strong challenge to its authority. There was no single reason for this challenge, rather there were a multiplicity of concerns. The social, economic, and political factors, along with a culture of fear in the country contributed to the uprising.²³ Although, the triggering point could be attributed to the shooting and killing by Syrian security forces of protesters who were claiming the arrest of a “middle-school-aged boys who painted graffiti with the slogan of the protests ‘[t]he people want the downfall of the regime’ on their school wall.”²⁴ Further protests spread throughout other cities of the country against the repressive measures of President Bashar al-Assad’s regime, including increased internet censorship, expanded use of travel bans, and the arrest of political prisoners.²⁵

²⁰ Abboud Samer N., *Syria* (Polity Press 2016) (“Abboud Samer”), at pp. 106-107.

²¹ *Ibid*, at p. 4.

²² Abboud Samer, *Supra* note 20, at pp. 34-25.

²³ Kahf Mohja, *Then and Now: The Syrian Revolution*, 1 A SPECIAL REPORT FROM FRIENDS FOR A NONVIOLENT WORLD 1, 28 February 2013.

²⁴ Abboud, *Supra* note 20, at p. 56.

²⁵ *Ibid*, at pp. 48-50. See also Flock Elizabeth, *Syria Revolution: A Revolt Brews Against Bashar al- Assad’s Regime*, The Washington Post, 15 March 2011, available at https://www.washingtonpost.com/blogs/blog-post/post/syria-revolution-revolt-against-bashar-al--assads-regime/2011/03/15/ABrwNEX_blog.html, last visited on 29 May 2016.

These protests were “the first large-scale demonstrations”²⁶ since pro-democracy uprisings began against the regime of President Bashar al-Assad.

Syria’s 2011 uprising helped ISIS’ expansion, “some analysts have even described a tacit non-aggression pact between Islamic State militants and Bashar al-Assad regime, each focused on fighting the anti-government opposition forces for territorial control.”²⁷ The government of President al-Assad has been supported by Russia. Russia has blocked Security Council’s resolutions targeting President al-Assad and has continued to supply weapons to the Syrian military despite international criticism.²⁸ Conversely, Turkey, Jordan, Saudi Arabia, Qatar and most importantly the United States have been supporting the main opposition party, the National Coalition, providing “limited military assistance to ‘moderate’ rebels.”²⁹ Both groups of states have contributed to the military conflict one way or another by supplying weapons and military equipment to people within the Syrian territory. It is also very likely that some of this military equipment ended up under the control of ISIS militants.

In June 2014, ISIS seized the city of Mosul and its leader Abu Bakr al-Baghdadi proclaimed himself caliph of the caliphate.³⁰ The origin of the concept of caliphate could be traced back to the death of the Prophet Mohammed in 632 A.D. The prophet did not leave an heir and the search for his successor became a central focus of Islam. The search for a caliph divided the Muslims into two groups. On the one hand, some Muslims supported the idea that his son-in-law, Ali, should become the caliph. A supporter of Ali was described as a Shiaat Ali, and these supporters later became known as Shias. On the other hand, a different group of believers thought that the caliph should be chosen among those who followed the prophet’s teachings and examples. This group of believers formed Islam’s Sunni tradition.³¹

From the Sunni tradition, those teachings and examples formed the basis of the Sharia, or Islamic law, which guides all aspects of Muslims life. The academic Steven A. Cook has pointed out that the existence of a variety of interpretations of the Sharia has resulted into distinct schools of Islamic thought.³² In particular, the caliphate of ISIS is based on an extremist

²⁶ *In Syria, Crackdown After Protests*, THE NEW YORK TIMES, 28 March 2011, available at http://www.ny-times.com/2011/03/19/world/middleeast/19syria.html?_r=1, last visited on 28 November 2015. A version of the article appears in print on March 19, 2011, on page A10 of the New York edition.

²⁷ Laub Zachary, *Supra* note 17.

²⁸ *Syria crisis: Where key countries stand*, BBC NEWS, 30 October 2015, available at <http://www.bbc.com/news/world-middle-east-23849587>, last visited on 24 February 2016.

²⁹ *Ibid.*

³⁰ Abboud Samer, *Supra* note 20, at p. 107.

³¹ Vick Karl, *What is a Caliphate?*, THE TIME, 1 July 2014, available at <http://time.com/2942239/what-is-the-caliphate/>, last visited on 29 May 2016.

³² Johnson Toni and Sergie Aly Mohammed, *Islam: Governing under Sharia*, CFR BACKGROUNDS, 25 July 2014, available at <http://www.cfr.org/religion/islam-governing-under-sharia/p8034>, last visited on 29 May 2016.

form of the Sharia, which holds that democracy is a purely Western concept imposed on Muslim countries and rejects the “very idea of a nation-state”³³. Unlike other rebel movements in Syria, “ISIS does not profess or have pretensions toward political integration into a post-conflict Syrian order”³⁴. ISIS functions as a separate entity governed by the Sharia with the purpose of achieving a single Islamic economic system and currency, as well as an independent army capable of defending itself. Indeed, ISIS’ objective is the establishment of “an alternative political authority in the form of the Caliphate, out of lands extracted from Syria and Iraq.”³⁵

Over time, ISIS has gained control over significant economic resources and territory of Syria and Iraq. By using tactics that instil terror among the civilian population, and conversely providing them with basic services, it has fostered loyalties among local communities in the areas it controls. ISIS operates under a harsh administrative system that comprises the Sharia, Al-Hisbah morality police, a general police force, courts and entities managing recruitment, tribal relations and education.³⁶

ISIS could hardly be considered to be a state according to the established principles of international law. Pursuant to Article 1 of the Montevideo Convention on the Rights and Duties of States (“Montevideo Convention”), the common criteria concerning the definition of statehood are the following: (i) permanent population, (ii) defined territory, (iii) government, and (iv) capacity to enter into relations with other states.³⁷ Additionally to these factual criteria, legitimacy has also been considered to be a strong legal criterion of statehood.³⁸

There are two main theories which arise when dealing with statehood under international law: the declaratory and the constitutive. According to the declaratory theory, the existence of a state is independent of its recognition before other states; recognition is merely declaratory. According to the constitutive theory, only recognition can make an entity a state and thereby a subject of international law.³⁹

³³ Abboud Samer, *Supra* note 20, at p.186.

³⁴ *Ibid*, at pp. 171-172.

³⁵ Abboud Samer, *Supra* note 20, at pp. 171-172.

³⁶ *Ibid*, at pp. 107-108.

³⁷ *The Montevideo Convention on Rights and Duties of States*, 26 December 1933, 165 LNTS 19 (1933), at Article 1.

³⁸ Yuval Shany, Amichai Cohen, and Tal Mimran, *ISIS: Is the Islamic State Really a State?*, ISRAEL DEMOCRACY INSTITUTE, 15 September 2014, available at <http://en.idi.org.il/analysis/articles/isis-is-the-islamic-state-really-a-state/>, last visited on 4 August 2016.

³⁹ The Glasgow University Law Society, *Advantages and disadvantages of the declaratory and the constitutive 'theories' of recognition from the point of view of an aspirant statal entity*, THE GULS LAW REVIEW, 4 June 2016, available at <http://www.gulawreview.org/entries/international-law/comparative-advantages-disadvantages-declaratory-constitutive-theories-recognition>, last visited on 4 August 2016.

Certainly under the constitutive theory, ISIS could not be considered to be a state since it does not have the recognition of other states. This statement is confirmed by the Security Council's Resolution 2249 (2015) which calls to eradicate ISIS.⁴⁰ Under the constitutive theory, it could also be argued that ISIS is not conceived as a legitimate entity and because of this, it does not have the capacity to enter into relations with other states. Thus, it does not comply with the criteria required under international law to become a state. Nevertheless, this analysis may be regarded as immaterial since, even if ISIS could be considered a state under the constitutive theory, it does not intend to become a state in accordance with the current international legal system. This conclusion has direct repercussions on the lawfulness on the French decision to invoke Article 42.7 of the TEU since the international community has not agreed upon the possibility of invoking collective self-defence mechanisms against attacks that cannot be attributed to a state.

Conclusion

ISIS has claimed responsibility for a series of attacks, which have caused the death of a large number of innocent people. ISIS does not abide to the international legal system and therefore it is a contemporary threat to the international peace and security which should be combatted one way or another. Although the use of collective self-defence mechanisms against terrorist organisations still faces multiple debates a consensus among the international community should be relentlessly sought. States should be legally able to effectively defend themselves and other states against attacks performed by terrorist organisations.

As we mentioned, the discussion regarding statehood is pertinent when analysing if the use of collective self-defence mechanisms is lawful against ISIS. As it will be analysed in detail in Chapter III, two possible answers could be drawn depending on the interpretation given to the words "armed attack".

On one side, according to the restrictive approach taken by the ICJ regarding the interpretation of the words "armed attack", only acts attributable to a state can fall within the scope of these words and thus within the scope of collective self-defence. Hence, under this approach if ISIS does not comply with the requirements of statehood according to international law, the mechanisms of collective self-defence are not available to combat ISIS and therefore it could be argued that the invocation of Article 42.7 of the TEU was unlawful.

⁴⁰ United Nations Security Council Resolution 2249, 20 November 2015, S/RES/2249 (2015).

On the other side, according to an evolutionary and flexible interpretation supported by state practice and the Security Council regarding the interpretation of the words “armed attack”, even though ISIS does not comply with the requirements of statehood under international law, still the mechanisms of collective self-defence are available to combat terrorist organizations, such as ISIS, and therefore the invocation of Article 42.7 of the TEU was legal.

Nonetheless following the latter interpretation, the uncertainties regarding the notion of terrorism also remain and pose an additional challenge to sustain the lawfulness of the invocation of Article 42.7 of the TEU. As it will be addressed in Section C below, in the case of ISIS, this challenge would be easier to overcome since it could be argued that, despite the disagreements on the notion of terrorism, there is a common understanding that ISIS and its actions are in the clear side of the debate.

C. The Notion of Terrorism: Multiplicity and Incompatibility of Definitions

As it was mentioned above, the Black Friday attacks have been identified as acts of terrorism. As it will be discussed in Chapter III, there is an on-going debate on whether collective self-defence should also be available to combat terrorist organisations. However, before considering this debate this section is important to discuss the conflicts regarding the definition of terrorism under international law.

What elements should be present to label an attack as a terrorist attack? This is not an easy question to answer since there is not a single definition of terrorism. Beginning with the ordinary meaning of the notion, dictionaries consider different elements. The Cambridge Dictionary provides a very broad definition. It describes “terrorism” as any “threat or violent action for political reasons”.⁴¹ The Oxford Dictionary added more elements to the definition. It provides that terrorism is “the unlawful use of violence and intimidation, especially against civilians, in the pursuit of political aims”.⁴²

The factual reason for this multiplicity of definitions is that terrorism comes in all shapes and forms. Several forms of violence, which are labelled terrorism have nothing in common aside from that label. Moreover, these forms of violence have varied considerably with time. Hence, it can be argued that terrorism is a fast evolving concept. For instance, the notion of terrorism during the Cold War and the contemporary notion are different. During the Cold War,

⁴¹ Cambridge Dictionary, *Definition of Terrorism*, available at <http://dictionary.cambridge.org/dictionary/english/terrorism>, last visited 1 June 2016.

⁴² Oxford Dictionary, *Definition of Terrorism*, available at <http://www.oxforddictionaries.com/definition/english/terrorism>, last visited 1 June 2016.

terrorism was mainly understood as “a tool of indirect strategy used by states lacking in military power or in diplomatic influence.”⁴³

Nowadays, terrorism is generally identified with non-state actors, which pursue different objectives and use different means to perform their attacks. This diversity prevents the notion of terrorism from being reduced to a simple and clear definition. For instance, in time of a civil armed conflict, there is a disagreement over whether acts performed by freedom fighters in wars of national liberation should constitute an exception to the definition.⁴⁴ In time of armed conflict, terrorist attacks may also amount to crimes against humanity (if part of a widespread or systematic attack on the civilian population), which fall under the scope of a different legal framework from self-defence⁴⁵.

The Convention on Offences and Certain Other Acts Committed on Board Aircraft, adopted in 1963⁴⁶, is considered to be the first international treaty against contemporary terrorism.⁴⁷ This convention was followed by a series of counter-terrorism regional treaties. These treaties identify particular offences as terrorist acts, including crimes against civil aviation⁴⁸, crimes involving the use, possession or threatened use of bombs or nuclear materials⁴⁹, and crimes concerning the financing of terrorism⁵⁰, among others.

Some treaties criminalise certain acts regardless of the intent with which they were committed. For instance, the Council of Europe Convention on the Suppression of Terrorism does not regard terrorist acts as offences inspired by political motives.⁵¹ Other treaties criminalise certain

⁴³ Begorre-Bret Cyrille, *The Definition of Terrorism and the Challenge of Relativism*, Vol. 27:5 CARDOZO LAW REVIEW 2006, 1987, at p. 1990.

⁴⁴ Cassese Antonio, *The Multifaceted Criminal Notion of Terrorism in International Law*, Vol. 4 (5) J INT CRIMINAL JUSTICE 2006, 933-958, at p. 1.

⁴⁵ Di Filippo Marcello, *Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes*, Vol: 19 EJIL 2008, 533-570, at p. 566. Regarding the applicable legal framework see, International Criminal Court, *Rome Statute of the International Criminal Court*, entered into force on 01 July 2002, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90, Article 7(2)(a).

⁴⁶ United Nations, International Civil Aviation Organization, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, 974 UNTS 177.

⁴⁷ O'Donnell Daniel, *International Treaties Against Terrorism and the Use of Terrorism During Armed Conflict and by Armed Forces*, Vol. 88:864 INTERNATIONAL REVIEW OF THE RED CROSS 2006, 853, at p. 854.

⁴⁸ United Nations, International Civil Aviation Organization, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 September 1971, 974 UNTS 177. See also, United Nations, Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, UNTS 1973.

⁴⁹ United Nations General Assembly, Convention on the Physical Protection of Nuclear Material, 26 October 1979, No. 24631. See also, United Nations General Assembly, International Convention for the Suppression of Terrorist Bombings, 15 December 1997, No. 37517.

⁵⁰ United Nations General Assembly, International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, No. 38349.

⁵¹ Council of Europe, European Convention on the Suppression of Terrorism, 27 January 1977, ETS No. 90, at Article 1.

acts only if they were committed with a specific intent.⁵² The International Convention for the Suppression of the Financing of Terrorism criminalises the donation or collection of funds to support “[a]ny other act intended to cause death or serious bodily injury [...] when the *purpose* of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act”.⁵³ Furthermore, the majority of these treaties criminalise acts that cause death or injury to persons, while a few others only require damage of property.⁵⁴ Regarding the damage of property, most treaties refer to public property, although recent proposals on a definition of terrorist acts also refer to private property.⁵⁵

Therefore, despite these existing regional treaties it has not been possible to reach a consensus on a single definition of terrorism.⁵⁶ For this purpose, the General Assembly established an Ad-Hoc Committee to support the efforts of the Sixth Committee to draft a comprehensive convention on international terrorism, which ideally should include an agreed definition. However, to date no agreement on the definition has been reached.

The working definition of terrorism under consideration by the Ad-Hoc Committee is the following:

1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:

(a) Death or serious bodily injury to any person; or

(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or

(c) Damage to property, places, facilities, or systems referred to in paragraph 1(b) of the present article resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

⁵² United Nations General Assembly, International Convention against the Taking of Hostages, 17 November 1979, No. 21931, at Article 1(1).

⁵³ United Nations General Assembly, International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, No. 38349, at Article 2(1)(b) (emphasis added).

⁵⁴ United Nations General Assembly, Convention on the Physical Protection of Nuclear Material, 26 October 1979, No. 24631, at Article 5(2).

⁵⁵ Report of the coordinator on the results of the informal consultations on a draft comprehensive convention on international terrorism held from 25 to 29 July 2005, A/59/894, Appendix II.

⁵⁶ Saul Ben, *Attempts to Define “Terrorism” in International Law*, 52 NETHERLANDS INT’L L REV 2005, 57. See also, Walter Christian, *Defining Terrorism in National and International Law*, in C. Walter *et al.* (eds), *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS FREEDOM?* (2004), at p. 23.

2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of the present article. [...] ⁵⁷

During the negotiations for the draft, one of the main factors which gave rise to disagreement was that some states consider that every act of violence by irregular forces against a state constitutes a terrorist act, while other states consider that any act of violence against civilians is a terrorist act, even if this act could be attributed to a given state.⁵⁸ Another open issue is that some states consider that a clear distinction between terrorism and the right of self-determination has to be made. They argued that peoples under foreign occupation have a right of resistance, which the definition of terrorism should not override. This clear distinction is difficult to reach since the concept of self-determination is itself controversial.

Some of the drafters also emphasised that the convention should not interfere with the rules of armed conflict by criminalising conducts, which would otherwise not be prohibited under international humanitarian law.⁵⁹ It is important to point out that all these disagreements and open issues seem to be the result of political factors rather than due to the factual complexities of the notion.

Conclusion

Today, the security threat posed by terrorism makes it essential to achieve a comprehensive convention on terrorism that includes a clear definition. Besides the factual complexities of the notion, the political interests of some states still present a difficult obstacle to overcome, which will continue to undermine the legal standing of states against terrorism. It could also be argued that this obstacle is one of the reasons why the ICJ remains reluctant to broaden the scope of the words "armed attack", as it will be detailed in Chapter III below.

However, in the particular case of the Black Friday attacks it could be argued that, according to the draft definition of terrorism under consideration by the Ad-Hoc Committee, these attacks felt within the scope of more than one of the proposed situations. The attacks were committed by persons who unlawfully and intentionally caused death and serious bodily injury to a large number of persons, as well as serious damage to public and private property with the purpose

⁵⁷ Report of the coordinator on the results of the informal consultations on a draft comprehensive convention on international terrorism held from 25 to 29 July 2005, A/59/894, Appendix II.

⁵⁸ Begorre-Bret Cyrille, *The Definition of Terrorism and the Challenge of Relativism*, Vol. 27:5 CARDOZO LAW REVIEW 2006, 1987, at p. 1989.

⁵⁹ General Assembly of the United Nations, Legal - Sixth Committee, *Measures to Eliminate International Terrorism*, 27 July 2007, A/C.6/62/L.14.

of intimidating the population and compelling France to stop the on-going operations against ISIS in Syria and Iraq⁶⁰.

Furthermore, as it will be analysed below, the response of France and the Security Council also confirm that the Black Friday attacks felt within the generally understanding of terrorist attacks, since their features could be assimilated with those of the 9/11 attacks (*e.g.* type of attacker, means and effects), which in turn were also accepted by the international community as terrorist attacks.

D. France’s Response to the Black Friday Attacks: Exercise of its Right of Collective Self-Defence

This section is important to describe the response of France following the Black Friday attacks, which gives raise to the analysis on whether the traditional notion of collective self-defence is applicable to contemporaneous terrorist attacks. *Arguendo* that the evolutionary interpretation of this notion covers terrorist attacks an analysis on the different available mechanism will be performed to elucidate which were the possible reasons for France’s decision to invoke Article 42.7 of the TEU.

On 19 September 2014, France commenced a military campaign against ISIS called “Opération Chammal”.⁶¹ This operation is limited to launching airstrikes on the command centres and training camps of ISIS in Syria.⁶² Until now, there are no plans for ground troops to be involved in the operation.⁶³

In response to the Black Friday attacks, the French Air Force launched an airstrike campaign, comprising ten planes that dropped 20 bombs over training camps and ammunition facilities of ISIS in the city of Raqqa, which is its *de facto* capital.⁶⁴ This airstrike campaign was part of Opération Chammal.

Following the bombing, in a press conference, the French Prime Minister Manuel Valls said that France was acting in self-defence, “which Article 51 of the United Nations Charter permits

⁶⁰ See subsection D of this Chapter II.

⁶¹ The name of the operation is derived from the north-western wind blowing over Iraq and the Persian Gulf States. *Opération Chammal Explained*, EVERYTHING EXPLAINED WEBSITE, available at http://everythingexplained.to-day/Op%C3%A9ration_Chammal/, last visited on 6 March 2016.

⁶² *The Paris Black Friday 13/11/2015 Attacks - What do we know? What should we do?*, INTERNATIONAL INSTITUTE FOR COUNTER-TERRORISM, 15 November 2015, available at <http://www.ict.org.il/Article/1512/The-Paris-Black-Friday-Attacks>, last visited on 26 January 2016.

⁶³ *Opération Chammal Explained*, EVERYTHING EXPLAINED WEBSITE, available at http://everythingexplained.to-day/Op%C3%A9ration_Chammal/, last visited on 6 March 2016.

⁶⁴ Cenciotti David, *France strikes back with Rafale and Mirage 2000 jets*, THE AVIATIONIST, 15 November 2015, available at <http://theaviationist.com/tag/operation-chammal/>, last visited on 6 March 2016.

[them] to do.”⁶⁵ On 16 November 2015, during a joint session of both houses of parliament, President François Hollande remarked that “France [was] at war”.

The French President used the word “war” to refer to the conflict with ISIS. The use of the word “war” has relevant legal implications, which should not be taken lightly. The 1949 Geneva Conventions on the Laws of Wars, together with their 1977 Additional Protocols (the “Geneva Conventions”) contain the legal basis on the law of war.⁶⁶ According to this legal framework, war “may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”.⁶⁷ Thus, if ISIS does not constitute a state according to none of the international law theories, then the term “war” was not correctly used.

As noted by Professor Vaughan Lowe, in war:

Combatants in States’ armed forces may kill and destroy property within the laws of war without fear of facing trial for murder or criminal damage. That is the privilege that the law of war confers, and one reason why it is so important that in the debate of the so-called wars against terror [...] a clear eye is kept on the fact that they are not true wars but simply large-scale campaigns against very serious criminal conduct.⁶⁸

On one side, it could be argued that the French President deliberately decided to use this word to provide support to the lawfulness of its decision to invoke Article 42.7 of the TEU, since the term war is related to the notion of an armed attack. As it will be discussed in Chapter III below, the scope of the notion of an armed attack is currently facing a challenge in order to broaden its interpretation in light of contemporary threats. Therefore, probably he decided to make this declaration to support this broader interpretation.

On the other side, the provisions and principles contained in the Geneva Conventions are not being applied by France and certainly not by ISIS in this conflict. Hence, it appears to be an incongruence regarding the use of the word “war” in the declaration made by President Hollande.

⁶⁵ Breeden Aurelien, *France Says Its Airstrikes Hit an ISIS Camp in Syria*, THE NEW YORK TIMES, 27 September 2015, available at http://www.nytimes.com/2015/09/28/world/europe/france-says-it-has-struck-at-isis-in-syria.html?_r=0, last visited on 26 January 2016.

⁶⁶ Lowe Vaughan, *International Law* (Clarendon Law Series, Oxford University Press 2011), at p. 282. See also David Turns, *The Law of Armed Conflict (International Humanitarian Law)*, in Evans Malcom, *INTERNATIONAL LAW* (Oxford University Press 2010), at p. 824.

⁶⁷ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, signed on 12 August 1949, 75 UNTS 287, at Art. 2.

⁶⁸ Lowe Vaughan, *International Law* (Clarendon Law Series, Oxford University Press 2011), at pp. 282 and 283.

Following the declaration of war provided by the French President, he mentioned that the jihadist group was “not only an enemy of France, but an enemy of Europe”⁶⁹ and as a consequence, he announced that France would invoke Article 42.7 of the TEU and he stressed that this article “provides that when a State is attacked, all Member States must bring their solidarity to address the aggression.”⁷⁰

Conclusion

The right of collective self-defence under Article 42.7 of the TEU had never been invoked. Therefore, France became the first state to invoke Article 42.7 of the TEU. Due to this innovation, rather than invoking Article 5 of NATO Treaty, the reasons behind France's decision have been questioned.

The French Defence Minister, Jean-Yves Le Drian, was questioned in regards to the decision. He characterised the decision “first and foremost as ‘a political act’ that the French hope to see translated into ‘collaboration’ for French interventions in Syria and Iraq, either by relief to or support of France in other operations.”⁷¹ The characterisation of the decision as a “political act” invites question as to what extend the legal implications of the provision were analysed and taken into consideration.

In order to assess the legal implication of France's decision to invoke Article 42.7 of the TEU an analysis of this provision should be made, followed by an analysis of the other available mechanisms. However, before delving into this analysis it is important to consider the characteristics of the right of collective self-defence and its main differences with the collective security system, as the concepts are confused at times. Therefore, Chapter II will provide the necessary elements to be able to distinguish the right of collective self-defence from a collective security system.

⁶⁹ Valero Jorge, *France 'at war' inaugurates EU's mutual defence clause*, EURACTIV.COM, 17 November 2015, available at <http://www.euractiv.com/sections/global-europe/france-war-inaugurates-eus-mutual-defence-clause-319531>, last visited on 9 February 2016.

⁷⁰ *Ibid.*

⁷¹ Cirlig Carmen-Cristina, *The EU's mutual assistance clause: First ever activation of Article 42(7) TEU*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, November 2015, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572799/EPRS_BRI\(2015\)572799_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572799/EPRS_BRI(2015)572799_EN.pdf), last visited on 10 February 2016 (“Cirlig Carmen-Cristina”).

CHAPTER II: COLLECTIVE SELF-DEFENCE

As stated above one of the possible legal defences that states could have against terrorist attacks are collective self-defence mechanisms. However, this chapter is important to determine if these types of mechanism are suitable for this purpose. Therefore, the general notion of collective self-defence and its legal implications under international law should be analysed.

The notion of collective self-defence remains problematic in theory and practice. Since the UN Charter does not provide a definition of this notion, its characteristics have been mainly developed through case law, state practice and Security Council's resolutions. Therefore, it is important to analyse the main features surrounding the traditional notion of collective self-defence to be able to identify, which cases fall within its scope **(A)**. Following the former analysis, a distinction between the notions of collective self-defence and collective security system will be provided, since these two exceptions to the prohibition on the use of force are, at times, confused **(B)**.

A. The Notion of Collective Self-Defence: Traditional Theoretical Foundations

This section is relevant to identify the traditional features that, through time, have been attributed to the notion of collective self-defence.

The notion of collective self-defence is not defined in the UN Charter. The notion is incorporated in Article 51 of the UN Charter, thus its characteristics have been identified with those of the right of individual self-defence, which in turn have been developed mainly through customary law and case law.⁷² The inherent right of individual self-defence is common to all systems of law and implies a justified reaction to an aggression.⁷³ Article 51 of the UN Charter presupposes that a state that has been victim of an armed attack could not be expected to remain passive until the Security Council acts. Thus, the state may use force in self-defence as an interim measure until the Security Council takes measures to restore peace and security.

Traditionally, the scope of action of the right of self-defence was to repel the attacker from the state's territory. In other words, if the enemy has invaded or attack a state's territory self-defence may include using force only to expel or repeal it. However, nowadays this scope of action is questionable, as terrorist attacks generally do not imply a permanent presence in the

⁷² Eyffinger Arthur, Stephen Alan, Muller Sam (eds), *Self-Defence as a Fundamental Principle* (Hague Academic Press 2009), at p. 10. See also Van den Hole Leo, *Anticipatory Self-Defence under International Law*, Vol 19.1 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 2003, 70, at p. 78.

⁷³ Bowett D. W., *Supra* note 10, at p. 3

affected state’s territory and the acts of this state are not limited to repeal a given attack but rather the acts are broadened to prevent future attacks. Therefore, any use of force by the affected state will not be strictly in self-defence against the occurred armed attack, but against the threat of possible future attacks.⁷⁴ The exercise of the right of collective self-defence also falls within this situation. As a consequence of this change in the traditional scope of action, it can be submitted that the exercise of the right of individual and collective self-defence against terrorist attacks is closely linked to the concept of anticipatory self-defence, including both pre-emptive and preventive.

Pre-emptive self-defence is the taking of action against the attacker when there is incontrovertible evidence that the latter is about to initiate an attack. Preventive self-defence is the taking of action against the attacker when it is believed that an attack, while not imminent, is inevitable, and delay in attacking would involve greater risk.⁷⁵

The doctrine of pre-emptive self-defence was developed during the President George Bush’s administration. Furthermore the House of Commons Foreign Affairs Committee in its report *Foreign Policy Aspects of the War against Terrorism* also supported this doctrine by recognising that:

[...] the notion of ‘imminence’ should be reconsidered in light of new threats to international peace and security—regardless of whether the doctrine of pre-emptive self-defence is a distinctively new legal development. We recommend that the Government work to establish a clear international consensus on the circumstances in which military action may be taken by states on a pre-emptive basis.⁷⁶

One year later, in a subsequent report the committee limited its former approach by remarking that:

[...] the concept of ‘imminence’ in anticipatory self-defence may require reassessment in the light of the [weapons of mass destruction] threat but that the Government should be very cautious to limit the application of the doctrine of anticipatory self-defence so as to prevent abuse by states pursuing their national interest.⁷⁷

Although, no conclusive opinion exists regarding the lawfulness of pre-emptive or preventive self-defence, following the 9/11 attacks the *opinio juris* among states regarding anticipatory

⁷⁴ Kretzmer David, *The Inherent Right to Self Defence and Proportionality in Jus Ad Bellum*, 24 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 1, 30 April 2013, at p. 250.

⁷⁵ Barnes Joe, and Stoll Richard J., *Preemptive and Preventive War: A Preliminary Taxonomy*, THE JAMES A. BAKER III INSTITUTE FOR PUBLIC POLICY, March 2007.

⁷⁶ House of Commons, Foreign Affairs Committee, *Foreign Policy Aspects of the War against Terrorism*, 2002–03, H.C. 196, at paras. T and 161.

⁷⁷ House of Commons, Foreign Affairs Committee, *Foreign Policy Aspects of the War against Terrorism*, 2003–04, H.C., 441-I, at para. 429.

self-defence has widened. The implication is that, taking account of the absence of a concrete precedent in State practice which convincingly demonstrates the international community's support for some form of anticipatory self-defence, it is impossible to identify *de lege lata* a general right of pre-emptive and a fortiori preventive self-defence. However, the breach narrows the higher the degree of imminence in the attack is.⁷⁸ Otherwise, if the state remains inactive and the imminent attack takes place, it could have terrible consequences for the state or afford the attacker a significant advantage.

The necessary conditions that are required to allow a state to exercise its right of self-defence against imminent attacks were laid down in the *Caroline* case.⁷⁹ This case arose from a dispute regarding an incident pursuant to which a British commando seized and destroyed a vessel, located at a port in the United States. The main reason for the destruction was that this vessel had been supporting Canadian rebels with fighters and weapons, during the 1837 Canadian rebellion against the oligarchic government of the British colony of Upper Canada. Referring to this case, the United States Secretary of State, Daniel Webster, indicated that the right to self-defence includes the right to use force against an imminent attack if a state is faced with the threat of an armed attack that presents a "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation."⁸⁰

According to Hans Kelsen the concept of collective "self"-defence results from a contradictory concept as a state can only exercise self-defence to protect itself, not to protect someone else. Furthermore, some academics have argued that the right of collective self-defence is "merely a combination of individual rights of self-defence".⁸¹ Thus, states may exercise collectively the right of self-defence only if each of them is entitled to exercise it individually in a particular situation. However, neither Kelsen's theoretical contradiction nor the view of the right of collective self-defence as a combination of individual rights has been shared by the practice of states.

Conversely, the concept has been generally understood as a centralised or decentralised defence by one or more states in order to assist the defence of an affected state.⁸² In order to

⁷⁸ Jon Heller, *Why Preventive Self-Defense Violates the UN Charter*, OPINION JURIS, 17 August 2016.

⁷⁹ *Caroline Case* (1837) 2 MOORE DIGEST OF INTERNATIONAL LAW, ii (1906), at p. 412.

⁸⁰ Note of US Secretary of State Daniel Webster, 24 April 1841, in *Caroline Case*, 29 BRITISH AND FOREIGN STATE PAPERS (1841) 1137–1138.

⁸¹ Malanczuk Peter, *Akehurst's Modern Introduction to International Law* (Routledge 1997), at p. 317.

⁸² Kelsen Hans, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (The London Institute of Law Affairs, 2008) ("Kelsen") at p. 915.

exercise the right of collective self-defence, military regional organisations and other non-military international organisations, such as the European Union have incorporated specific provisions to this effect in their constituent instruments.

It is important to point out that a debate exists regarding as to whether “collective self-defence is a valuable safeguard for small States” or rather “a dangerous doctrine justifying intervention by distant and powerful States in remote conflicts.”⁸³ However, no general answer could be given to this debate, as it would have to be analysed in a case-by-case scenario.

Conclusion

The characteristics of the right of collective self-defence have been strictly related to those of the right of individual self-defence. These characteristics have been developed through customary law and case law therefore their content could be subject to evolve. Despite some academics having questioned the nature and scope of the right of collective self-defence, it has been generally accepted by state practice and remains the legal foundation of military regional organisations, such as NATO.

While the debate on the lawfulness of preventive and pre-emptive self-defence falls outside the scope of this paper, it is important to reconsider that, in the same way an evolutionary interpretation of the words “armed attack” is necessary to face contemporaneous threats (as discussed in Chapter III below), also the scope of action of self-defence should adapt, including its temporal limitation.

Under the traditional temporal limitation of self-defence as a merely repelling or immediate reaction mechanism, responses against terrorist attacks could not easily qualify as self-defence, as they come after the event and when the harm has already been inflicted, thus they could not be characterized as a means of protection.⁸⁴ Nonetheless, nowadays the mere immediate response to a terrorist attack might result illusory and ineffective, taken into consideration the *modus operandi* of terrorist organisations, such as ISIS. States are no longer dealing with inter-state attacks rather they are dealing with organisations which are constantly committing strikes and planning its next move. In the case of the Black Friday attacks, France could not be expected to remain inactive once the attacks have passed and more attacks were expected to occur, which indeed happened.

⁸³ Gray Christine, *The Use of Force and the International Legal Order* (Oxford University Press 2006) (“Gray Christine”), at p. 604.

⁸⁴ Tams Christian J., *The Use of Force against Terrorists*, Vol. 20 No. 2 EJIL 2009, 359 – 397, at pp. 370-371.

This accumulation of attacks requires a re-thinking of new strategies that effectively comply with the protective objective of self-defence without compromising the proportionality and necessity requirements. The immediacy requirement should be balanced with an effective protection of the civilians and interests of the state at stake. Proportionality and necessity should remain as justified limitations, otherwise self-defence could be transformed in an open-ended mechanism, which could lead to undesirable abuses.

B. Right of Collective Self-Defence vs. Collective Security System

This section is relevant to identify the main differences between the exercise of the right of collective self-defence from a system of collective security. Although both concepts are relevant to the case at study it is necessary to distinguish them in order to avoid confusions. This paper’s scope will be limited to the analysis regarding the exercise of collective self-defence in the case of the Black Friday attacks.

On the one hand, collective self-defence is contemplated in Article 51 of the UN Charter. This right can be exercised only “[...] if an *armed attack* occurs against a Member of the United Nations [...]”.⁸⁵ This article “makes an ‘armed attack’ the condition for the exercise of the right of self-defence.”⁸⁶

In the *Nicaragua case*, the ICJ provided a high threshold to consider a given act as an armed attack under Article 51 of the UN Charter. In this case, the ICJ differentiated between an aggression of “the most grave form of the use of force”, which amounts to an armed attack and “other less grave forms”.⁸⁷ For instance, according to the ICJ, mere frontier incidents do not have the necessary gravity to be considered as armed attacks.⁸⁸ This difference implies the existence of a *de minimis* threshold and therefore not every illegal use of force warrants states to resort to its rights of self-defence.⁸⁹ Furthermore, the ICJ recognised that small-scale attacks could amount to justify the triggering of the right of self-defence, if cumulatively these attacks reached the severity threshold.

⁸⁵ UN Charter, *Supra* note 3, at Article 51 (emphasis added).

⁸⁶ Zemanek Karl, *Armed Attack*, OXFORD PUBLIC INTERNATIONAL LAW WEBSITE (Max Planck Encyclopaedia of Public International Law 2013) available at <http://opil.oupilaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241>, last visited on 23 January 2016.

⁸⁷ *Nicaragua Case*, *Supra* note 6, at para. 191.

⁸⁸ *Ibid*, at para.195. See also the Eritrea-Ethiopia Claims Commission which has held that “[l]ocalized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter”. Eritrea-Ethiopia Claims Commission, *Jus ad Bellum (Partial Award)*, 2005, at para.11, available at <http://www.pca-cpa.org/upload/files/FINAL%20ET%20JAB.pdf>, last visited 12 June 2016.

⁸⁹ Öyküİrmakkesen, *The Notion of Armed Attack under the UN Charter and the Notion of International Armed Conflict – Interrelated or Distinct?*, GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, LLM paper, August 2014, at p. 6.

In addition to the requirement that an armed attack must have occurred, the other conditions for the exercise of collective self-defence are the following: first that the use of force is deemed necessary; second, that the force is proportionate to that used in the attack or the threat posed; and third, that it is immediate.⁹⁰ These conditions are not explicitly mentioned in the UN Charter, but they are considered part of customary law.⁹¹ If all conditions are met, there is no requirement that the Security Council make any prior pronouncement, much less authorise the use of force. Additionally, the right of collective self-defence is only applicable against an external enemies of the system.

The exercise of this right is of a provisional character. The existence of the right of self-defence arises following the occurrence of an attack and terminates once the Security Council starts the “machinery of collective security”.⁹² However, this termination may be questionable when the intervention by the Security Council is not sufficient to restore peace and security. According to Article 51 the Security Council’s measures should be “necessary” to maintain peace and security. Thus, it can be submitted that the mere authorisation on the use of force by the Security Council does not terminate the exercise of the right self-defence, unless this authorisation leads to an effective recovery of international peace and security. For the determination on the measures’ effectiveness, the Security Council has a discretionary power. Hence, when the Security Council expressly declares that the respective measures are or are ought to be effective, this declaration could only be set aside by a manifest lack of effectiveness.⁹³

On the other hand, the collective security system is regulated under Chapter VII of the UN Charter. This system “provides for joint action by the other member states against a member that violates the principle of the system.”⁹⁴ It involves the use of force to maintain or restore international peace and security. The only precondition required for the triggering of the system is a determination by the Security Council that there has been a threat to the peace, a breach of the peace, or an act of aggression under Article 39 of the UN Charter.⁹⁵ Following this determination, the Security Council can choose between resorting to measures not involving the use of armed force under Article 41 of the UN Charter, or to “action by air, sea, or land forces as may be necessary to maintain or restore international peace and security” under Article 42 of

⁹⁰ Gray Christine, *Supra* note 83, at p. 599.

⁹¹ *Ibid.*

⁹² Kelsen, *Supra* note 82, at p. 922.

⁹³ Krisch Nico, *Self-Defence and Collective Security*, 151 MAX-PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW 2001, at. p. 409.

⁹⁴ Neuhold Hanspeter, *The International Community and “Rogue States”* in: Andreas Fischer-Lescano/Hans-Peter Gasser/Thilo Marauhn/Natalino Ronzitti (eds.), *Frieden in FREIHEIT: FESTSCHRIFT FÜR MICHAEL BOTHE ZUM 70. GEBURTSTAG* (Baden-Baden 2008), at p. 217. (“Neuhold 2”)

⁹⁵ Orakhelashvili Alexander, *Collective Security* (Oxford University Press 2011) at pp. 4 and 22.

the UN Charter. Non-procedural decisions of the Security Council require a majority of nine of its 15 members. However, each of the five permanent members ("P5") of the Security Council has the power to block the decision by its negative vote.⁹⁶

Due to the Security Council's lack of military resources, Article 42 remains as dead letter since it cannot take armed action itself. Pursuant to Article 43 of the UN Charter, the Security Council might remedy its lack of military resources by concluding special agreements with the respective states to make available all necessary resources. However, until now no agreements under Article 43 of the UN Charter have ever been concluded. Consequently, in practice the Security Council is limited to authorise a state to use force in order to maintain or restore international peace and security.

According, to the UN Charter wording it can be submitted that the right of collective self-defence is subordinated to the collective security measures taken by the Security Council.

Conclusion

Pursuant to the UN Charter, the right of collective security and collective self-defence have different objectives. While self-defence is designed to protect the security of any affected state(s) from an external aggressor, collective security aims at preserving international peace in a much broader sense.

In the case at study, the collective security system plays also an important role since the Security Council could exercise its mandate under Chapter VII of the UN Charter to restore international peace and security, particularly in Syria. In fact, it could be argued that pursuant to its resolution 2244 (2015)⁹⁷ it already activated the system. However, it is important to note that different from the Security Council Resolution 1373 (2001)⁹⁸ issued after the 9/11 attacks, this resolution did not mention specifically that the Security Council was acting under Chapter VII of the UN Charter, nor that the exercise of collective self-defence was terminated. Hence, this resolution did not expressly establish whether the Security Council authorised the use of force acting under the collective security system or if it merely recognized legality of the use of force by states acting under collective self-defence.

⁹⁶ Neuhold 2, *Supra* note 94, at p. 217.

⁹⁷ United Nations Security Council Resolution 2249 (2015), *Supra* note 40.

⁹⁸ United Nations Security Council Resolution 1373, *Supra* note 8.

C. Summary

Following the Black Friday attacks, France decided to exercise its right of collective self-defence as provided in Article 51 of the UN Charter, through the invocation of Article 42.7 of the TEU. France justified its decision to invoke Article 42.7 of the TEU on the factual trigger of the Black Friday attacks which occurred in the territory of France and were performed by an external aggressor, ISIS. However, this invocation faces multiple challenges since it departs from the traditional concept of collective self-defence in several aspects.

First, the exercise was made after the attacks were committed. The time of this reaction is controversial since the international community has not unanimously accepted the use of pre-emptive and preventive self-defence and therefore is far from being considered unequivocally legal its exercise. Nevertheless, the preventive and pre-emptive reactions are part of the new challenges that the exercise of collective self-defence against terrorist organisations faces.

Second, *arguendo* that the exercise of collective self-defence is lawful after the attacks have been committed in order to prevent further attacks, as it will be explained in Chapter III below, another challenge is to determine whether the scope of the words “armed attack” covers terrorist attacks.

Finally, *arguendo* that the scope of the words “armed attack” covers terrorist attacks, as it was detailed in Chapter I, the lack of a single agreed definition of “terrorism” implies an additional obstacle, even though it is less controversial concerning the particular case of ISIS.

Now that we have briefly elucidated: i) the elements involving the traditional exercise of the right of collective self-defence; ii) its differences with the UN collective security system; and iii) the challenges to apply the traditional elements of collective self-defence to new threats, it will be topic of the next chapter to analyse in detail the debates regarding the scope of the words “armed attack”, which constitutes the activating condition for the exercise of this right.

CHAPTER III: THE DIFFERENT INTERPRETATIONS OF THE WORDS "ARMED ATTACK"

This chapter is important to elucidate one of the main unresolved issues concerning the applicability of collective self-defence against terrorist attacks. This debate is important before delving into the analysis on the available collective self-defence mechanisms, for analysing if the invocation of any of these mechanisms was controversial in the first place.

The devastating consequences of both World Wars made the achievement of an effective prohibition on the use of force a matter of the highest priority. The UN Charter achieved this prohibition through its Article 2.4. However, as was indicated before, the prohibition is not absolute. Article 51 of the UN Charter recognises the "inherent right of individual or collective self-defence"⁹⁹ as exceptions to the general rule. As indicated in Chapter II above, this article "makes an 'armed attack' the condition for the exercise of the right of self-defence."¹⁰⁰ However, the rise of contemporaneous threats has recently caused an intensive debate concerning the scope of these words.

At the time the UN Charter was drafted, conflicts involving the use of force were mainly between states. Hence, the wording used by the drafters in the provisions involving the prohibition on the use of force and the exceptions focused mainly on inter-state conflicts. Notwithstanding, since the conclusion of the UN Charter, the characteristics of international conflicts have changed in many respects.

The evolutionary interpretation of the words "armed attack" in Article 51 of the UN Charter has been thoroughly discussed in order to adapt its scope to the contemporary world. Not only the issue regarding the use of pre-emptive and preventive self-defence remains unresolved but also whether or not acts of independent non-state actors, in particular terrorist organisations, could be considered an "armed attack" for the purpose of triggering the exercise of the right of self-defence.¹⁰¹

The practice of states, the ICJ, as well as the Security Council has shown different approaches to this latter debate. On the one hand, the ICJ has supported a restrictive evolutionary interpretation according to which an attack performed by an independent terrorist organisation does not justify the exercise of the rights to individual or collective self-defence (A). On the

⁹⁹ UN Charter, *Supra* note 3, at Article 51.

¹⁰⁰ Zemanek Karl, *Armed Attack*, Oxford Public International Law Website, Max Planck Encyclopedia of Public International Law, October 2013, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241>, last visited on 23 January 2016.

¹⁰¹ Dinstein Yoram, *Supra* note 5, at p.192.

other hand, the practice of states supports a broader approach, whereby the rights to individual or collective self-defence can be exercised in response to independent terrorist attacks, in certain cases **(B)**. Finally, the possibility that the Security Council acts as a moderator in relation to this disagreement will be analysed **(C)**.

A. The Restrictive Approach: No Right of Self-Defence against Independent Terrorist Attacks

This section is important to elucidate the restrictive approach that the ICJ has maintain concerning the possibility that collective self-defence could be used by states against terrorist attacks and the possible reasons for this approach.

Since 1986, the ICJ has supported the opinion that the evolutionary interpretation of the term “armed attack” allows the attacker to be identified, not only with regular, but also with irregular forces. However, under this restrictive approach only acts attributable to a state could be considered to fall within the scope of the term. This approach was developed by the ICJ in the *Nicaragua Case (a)*, followed by a series of cases in which it was endorsed **(b)**.

a. The Starting Line: *Nicaragua Case*

The *Nicaragua Case* was the first case, which significantly dealt with the concept of an “armed attack.”¹⁰² The case involved military and paramilitary activities conducted by the United States with respect to Nicaragua from 1981 to 1984. For political reasons, the United States decided to support certain groups (called “*contras*”) to fight against the Nicaraguan Government. The support provided by the United States included the financing, organising, training, supplying and equipping of the *contra* forces, as well as other attacks performed directly by the United States’ military forces. Nicaragua commenced proceedings against the United States before the ICJ on the basis that the United States had violated its obligations under international law.

In the *Nicaragua Case*, the ICJ set forth a definition of the term “armed attack” which was based on the definition of “aggression” provided by the General Assembly in UNGA Resolution 3314 (XXIX) on the Definition of Aggression.¹⁰³ The ICJ stated that an “armed attack” could be considered as an:

- (1) action by regular armed forces across an international border; and

¹⁰² *Nicaragua Case*, *Supra* note 6.

¹⁰³ United Nations General Assembly Resolution 3314 (XXIX) on the Definition of Aggression, Article 3(g).

(2) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its (the State's) substantial involvement therein.¹⁰⁴

Pursuant to this definition, the ICJ broadened the range of acts that may be considered to constitute an "armed attack" by including the words "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries".¹⁰⁵ However, these attacks are only "imputable to the 'sending' State if the latter has 'effective' control" of the entity that physically carries out the attack.¹⁰⁶ The ICJ indicated that "under Article 51 of the UN Charter [...] self-defence is only available against a use of force that amounts to an armed attack"¹⁰⁷ according to the definition provided. Hence, the restrictive approach of the ICJ provides that an attack performed by an independent terrorist organisation, which cannot be attributable to a specific state, is not covered by the scope of Article 51 of the UN Charter.

b. Cases Endorsing the *Nicaragua Case* Approach

The ICJ has maintained the position it expressed in the *Nicaragua Case*, that only acts attributable to a state can constitute an "armed attack," and has restated this position in several other cases as well as one advisory opinion briefly described below.

In 2003, the ICJ issued its judgment in the *Case Concerning Oil Platforms* between the Islamic Republic of Iran ("Iran") and the United States¹⁰⁸. The dispute in this case arose out of the attack on and destruction of three offshore oil production complexes owned and operated for commercial purposes by the National Iranian Oil Company by several warships of the United States Navy. The United States contended that its attacks on the oil platforms were justified as acts of self-defence, in response to what it regarded as an armed attack by Iran.¹⁰⁹ The ICJ ruled that the United States had the burden to prove that the attacks were attributable to Iran. The United States was not able to provide sufficient evidence to attribute the acts to Iran. Thus, the ICJ concluded that it couldn't claim self-defence as their actions were taken against "armed force not qualifying, under international law on the question."¹¹⁰

¹⁰⁴ *Nicaragua Case*, *Supra* note 6, at para. 195

¹⁰⁵ *Ibid.*

¹⁰⁶ *Nicaragua Case*, *Supra* note 6, at paras. 109 and 115.

¹⁰⁷ *Ibid.*, at para. 211.

¹⁰⁸ *Case Concerning Oil Platforms*, *Supra* note 6, at p. 16.

¹⁰⁹ *Ibid.*, at para. 25.

¹¹⁰ *Case Concerning Oil Platforms*, *Supra* note 6, at para. 78.

In 2004, the ICJ issued an advisory opinion entitled “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.”¹¹¹ The ICJ had been asked to determine what legal consequences arose from the construction by Israel of a wall, which ran through East Jerusalem and the West Bank territory of Palestine. At the time the wall was constructed, Israel was occupying the Palestinian territory. Israel argued that the construction of the wall was an exercise of its right of self-defence against terrorist attacks.¹¹² The ICJ emphasised the “existence of an inherent right of self-defence in the case of armed attack by *one State against another State*.”¹¹³ As a consequence, the ICJ denied Israel’s arguments, as it did not prove that the attacks against it were imputable to a foreign state.

It is important to point out that in this case, three judges issued a dissenting opinion, whereby they recognised that the approach of the majority was “formalistic” in light of the Security Council’s resolution adopted after the 9/11 attack.¹¹⁴ According to Judge Kooijmans, these resolutions had the effect of including terrorist attacks as a new element within the scope of Article 51 of the UN Charter, without the need for the attacks to be attributed to a specific state.¹¹⁵

In 2005, the ICJ issued its judgment in the *Armed Activities Case* between the Democratic Republic of the Congo (“DRC”) and Uganda.¹¹⁶ This case primarily concerned the determination as to whether the armed activities of Uganda in the DRC violated the prohibition on the use of force or whether those activities could be justified as actions of self-defence. The ICJ rejected Uganda’s argument based on self-defence, as they concluded that there was “no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC.”¹¹⁷ Even though the ICJ recognised the deplorable character of the attacks, it endorsed the restrictive approach of the Nicaragua Case indicating that the attacks “still remained *non-attributable* to the DRC.”¹¹⁸

¹¹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (“Palestine Wall Advisory Opinion”), Advisory Opinion, ICJ Reports 2004, at p. 136.

¹¹² *Ibid*, at para. 138.

¹¹³ *Palestine Wall Advisory Opinion*, *Supra* note 111, at para. 139 (emphasis added).

¹¹⁴ *Palestine Wall Advisory Opinion*, Separate Opinion of Judge Kooijmans, ICJ Reports 2004, p. 136, at para. 35. *Palestine Wall Advisory Opinion*, Separate Opinion of Judge Higgins, ICJ Reports 2004, p. 136, at paras. 33-35. *Palestine Wall Advisory Opinion*, Separate Opinion of Judge Buergenthal, ICJ Reports 2004, p. 136, at para. 5.

¹¹⁵ In particular, Judge Kooijmans indicated that “The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence.” *Palestine Wall Advisory Opinion*, Separate Opinion of Judge Kooijmans, ICJ Reports 2004, p. 136, at para. 35.

¹¹⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (“Armed Activities”), Judgment, ICJ Reports 2005, p. 168.

¹¹⁷ *Ibid*, at para. 146.

¹¹⁸ *Armed Activities*, *Supra* note 116, at para. 146 (emphasis added).

The restrictive approach taken by the ICJ thus far is understandable given the risk of opening a Pandora's Box by expanding the scope of the words "armed attack" to independent non-state actors without clear parameters.

As a general rule, the use of force by a state in the territory of another state against non-state actors in respect of acts that are not attributable to the state would require the consent of the state, as this falls within the scope of law enforcement.¹¹⁹ If the consent is not provided, the use of force could be considered, subject to certain exceptions, an attack on the host state which in turn could give rise to an international conflict between states.

The admission of terrorist attacks as a trigger to the exercise of the rights of individual or collective self-defence has the potential to result in an infinite numbers of unjustified attacks on the territory of sovereign states. Furthermore, since there is no a single agreed definition on what elements should be considered to characterise an act as terrorist, as discussed in Chapter I above. Without a single agreed definition, the affected state will have a very broad discretionary power to determine if an offence committed in its territory give rise to the exercise of its right of self-defence. However, this situation could lead to abuses by some states and eventually could cause an unjustified violation to the principle of non-intervention.

Conclusion

Given that the characteristics and situations surrounding terrorist attacks have been very varied, it has been difficult for the ICJ to establish clear parameters regarding when it is permitted for a state or a group of states to exercise their rights of individual or collective self-defence. As it will be addressed in the following Subsection C, the Security Council could have an important role concerning the delimitation of these parameters to prevent that states commit abuses.

In the 9/11 attacks and in the Black Friday attacks, the Security Council had the opportunity to establish some clear parameters on this matter. However as it will be analysed below, the resolutions issued by the Security Council in these cases were drafted in general terms and contained some inconsistencies between them, which makes difficult to extract a clear and unequivocal conclusion. Nonetheless, one of the things one could concluded from these resolutions is that the attacks against the civil population performed by organisations similar to Al-Qaeda

¹¹⁹ Dire Tladi, *The Nonconsenting Innocent State: The Problem with Bethlehem's Principle*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 2013, 570, at p. 572.

and ISIS, represent a breach to the international peace and security which should be combatted by states.

B. The Broader Approach: Unilateral Exercise of the Right of Self-Defence against Independent Terrorist Attacks.

This section is important to demonstrate that state practice and the Security Council have taken a broader approach than the ICJ in the debate at stake. This broader approach invites to consider if the traditional notion of collective self-defence requires to be interpreted in an evolutionary manner in order to protect states from contemporaneous threats.

Contrary to the ICJ's approach, the practice of states has demonstrated a willingness to recognise that the rights of individual or collective self-defence can be exercised in cases of terrorist attacks, without the need to attribute these attacks to a certain state. This practice can be analysed in two periods. The first period relates to cases where the state concerned decided to exercise its right of individual self-defence against a terrorist attack and the Security Council rejected the lawfulness of their actions **(a)**. The second period follows the 9/11 attacks and the Black Friday attack, where the Security Council supported the exercise of the rights of individual and collective self-defence by the state concerned **(b)**.

a. Unsupported Cases of the Exercise of Self-Defence against Terrorist Attacks

Israel has remained one of the most fervent supporters of a broader exercise of the right of individual self-defence. First in 2003, Israel bombed Palestinian camps in the north of Damascus in response to a suicide bombing attack.¹²⁰ Three years later, Israel responded with bombings following rocket attacks against it by the Lebanon-based Hezbollah and ultimately invaded Lebanon.¹²¹ Also, Turkey has repeatedly invoked a right to use force against Kurdish *Partiya Karkerên Kurdistanê* bases in the north of Iraq.¹²² Russia has upheld the exercise of its right of individual self-defence to respond to Islamic terrorists. Thus, following a series of attacks in Russia committed by Chechen rebels, Russia conducted air strikes against Chechen bases in the Pankisi Gorge in Georgia.¹²³

¹²⁰ Myre Greg, *Israel Attacks What It Calls a Terrorist Camp in Syria*, THE NEW YORK TIMES, 6 October 2013, available at <http://www.nytimes.com/2003/10/06/international/middleeast/06MIDE.html>, last visited on 27 January 2016.

¹²¹ Monbiot George, *Israel responded to an unprovoked attack by Hizbullah, right? Wrong*, THE GUARDIAN, 8 August 2006, available at <http://www.theguardian.com/commentisfree/2006/aug/08/israel.syria>, last visited on 27 January 2016.

¹²² Ruys Tom, *Quo Vadit Jus ad Bellum?: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq*, 9 MELBOURNE JOURNAL OF INTERNATIONAL LAW 2008.

¹²³ Hunter Shireen T., *Islam in Russia: The Politics of Identity and Security* (The Center for Strategic and International Studies, 2004), at p. 353.

The above-mentioned cases are a few examples, which illustrate that, in practice, states have not been reluctant to invoke the right of individual self-defence in response to terrorist attacks. These cases were not supported by the Security Council and have been widely criticised. However, the main cause of rejection by the Security Council was not based on the fact that the attacker was a terrorist organisation, but rather that the state concerned did not comply with the additional requirements for the exercise of self-defence: necessity and proportionality.

This conclusion demonstrates that the requirements of necessity and proportionality remain as core limits to the exercise of collective self-defence that should never be underscored.

b. Approved Cases of the Exercise of Self-Defence against Terrorist Attacks

Following the 9/11 attacks, there was general understanding among the international community that the United States could rely on its right of individual self-defence in response to these attacks. Consequently, the United States launched "Operation Enduring Freedom" against the Al Qaeda members in Afghanistan, initially without seeking authorisation from the Security Council.¹²⁴ Additionally, the United States decided to invoke Article 5 of NATO Treaty for the exercise of its right of collective self-defence.

Subsequently, the Security Council issued Resolutions 1368 (2001)¹²⁵ and 1373 (2001).¹²⁶ Pursuant to these resolutions, the Security Council recognised the inherent right of individual or collective self-defence without making any reference to an armed attack by a particular state.¹²⁷ As pointed out by Judge Kooijmans, "[t]his new element [independent terrorist attacks] is not excluded by the terms of Article 51 of the UN Charter, since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State."¹²⁸

As was discussed in Chapter I above, following the Black Friday attacks, France launched an aircraft bombing attack over Raqqa, including a command centre and a training camp. The French Prime Minister Manuel Valls categorised these actions as France's exercise of its right of self-defence, "which Article 51 of the United Nations Charter permits [France] to do."¹²⁹

¹²⁴ Neuhold Hanspeter, *Mars versus Mercury? The Legal Dimension* (Transatlantic Legal Issues-European Views, Diplomatic Academy of Vienna, 2005), at p. 91.

¹²⁵ United Nations Security Council Resolution 1368, 12 September 2001, S/RES/1368 (2001)

¹²⁶ United Nations Security Council Resolution 1373, *Supra* note 8.

¹²⁷ *Ibid.* ("Reaffirming the inherent right of individual or collective self-defence as recognised by the Charter of the United Nations as reiterated in resolution 1368 (2001)") (emphasis added).

¹²⁸ *Palestine Wall Advisory Opinion*, Separate Opinion of Judge Kooijmans, *Supra* note 111, p. 136, at para. 35.

¹²⁹ Breeden Aurelien, *France Says Its Airstrikes Hit an ISIS Camp in Syria*, THE NEW YORK TIMES, 27 September 2015, available at http://www.nytimes.com/2015/09/28/world/europe/france-says-it-has-struck-at-isis-in-syria.html?_r=0, last visited on 26 January 2016.

Additionally, France invoked Article 42.7 of the TEU for the exercise of its right of collective self-defence.

As it will be further discussed in Chapter VI, a few days after France's response, the Security Council issued Resolution 2244 (2015)¹³⁰ whereby, unlike in the case of Resolution 1373 (2001), it did not make any express reference to the rights of individual or collective self-defence. However, it called "*upon* Member States that have the capacity to do so to take all necessary measures, in compliance with international law [...] to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by [ISIS]."¹³¹

Conclusion

It can be submitted that in the case of the Black Friday attacks, the Security Council and the state practice have considered them as armed attacks covered by the scope of Article 51 of the UN Charter, without the need to attribute the relevant acts to a specific state. This broader approach invites to consider whether in practice the traditional notion of collective self-defence is no longer useful to defend states from contemporaneous threats. However, this broader approach still requires to reach an agreement on the limits and parameters which should be taken into consideration in order to avoid abuses and possible conflicts with other rules of international law.

C. The Role of the Security Council: Moderator in the Disagreement

This section is important to sustain that the Security Council has a major role if an agreed evolutionary interpretation of the words "armed attack" wants to be reached.

Despite the position the Security Council has taken, because of the rulings of the ICJ, controversy still exists. Thus, there is no unanimous position regarding the possibility of exercising the rights of individual or collective self-defence in response to terrorist attacks. Perhaps in the future, a consensus will be achieved. In the meantime, the early intervention of the Security Council in a particular case might function as a tool to moderate the opposing positions and avoid or justify possible doubts of lawfulness.¹³² Therefore, the Security Council's determina-

¹³⁰ United Nations Security Council Resolution 2249 (2015), *Supra* note 40.

¹³¹ *Ibid.* (emphasis added)

¹³² Stahn Carsten, *Terrorist Acts as 'Armed Attack': The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism*, Vol. 27:2 THE FLETCHER FORUM OF WORLD AFFAIRS 2003, at p. 38 ("Stahn Carsten").

tions with respect to Article 51 of the UN Charter could establish a framework for the delimitation of which cases and under which circumstances it is permissible for states to exercise their rights of individual or collective self-defence.

Moreover, the Security Council could help to contribute to a more flexible interpretation of the relevant provisions of the UN Charter by allowing a controlled extension of the concept of self-defence to new types of attacks, not only terrorist attacks, "which do not fall within the traditional parameters of "armed attack", but inflict comparable harm to the defending state."¹³³ For instance cyber-attacks, as well as attacks performed with new technologies of weapons.

The Security Council could serve as a moderator to determine whether or not in a specific situation the affected state exercised its right of individual or collective self-defence in a lawful manner. Although, in case a controversy arises between the host state of the terrorist group and the affected state, the ICJ would have the final word, if the host state decides to lodge a claim.

In order for the Security Council to act as a moderator, it would have to perform an evaluation taking into consideration the condition of the host state and its attitude towards the respective attacker. As a general rule a state may not take armed action in self-defence against a non-state actor in the territory or within the jurisdiction of a third without the consent of that state. However, it could be argued that this requirement is inoperative in particular scenarios. First, if a state actively supports or colludes with the relevant non-state actor or is otherwise unwilling to effectively restrain the armed activities of the latter. Second, if the host state lacks control over the area from which the non-state actor operates or is considered a failed state, which could be the case of Syria. Finally, where, even if the host state exercises governance authority and actively tries to suppress the violence, it has proven to be ineffective.¹³⁴ In carrying out its evaluation, time will be of the essence; hence, the Security Council should bear in mind the possible consequences its inaction could have.

Despite the above-mentioned benefits, the involvement of the Security Council has also its downsides. As we analysed in Chapter II above, the approval of the Security Council is not necessary for the lawful exercise of the rights of individual or collective self-defence. Therefore, requiring the approval of the Security Council would undermine the nature of these rights.

¹³³ *Ibid.*

¹³⁴ Hakimi Monica, *Defensive Force against Non-State Actors: The State of Play*, UNIVERSITY OF MICHIGAN LAW SCHOOL SCHOLARSHIP REPOSITORY (2015), available at <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=2379&context=articles>, last visited on 29 January 2016.

Furthermore, the Security Council's decision-making process might not take place as quickly as required. Additionally, its objectivity could be compromised by the veto privilege of the P5 members, on the one hand, and the political character of the Security Council as an organ, on the other.¹³⁵ A paralysis of the Security Council could invite other regional organisations such as NATO to take action, which could be considered legitimate, although not necessarily lawful.

Conclusion

The Security Council is a key player for the successful consolidation of the broader approach of the words "armed attack". However, as it will be analysed in Chapter VI below, the status of this institution is currently facing a legitimacy crisis which could affect its performance and slow down the consolidation process.

D. Summary

It is a fact that terrorist attacks are becoming a constant and increasingly more powerful threat. Any affected state should be able to defend itself even when it involves extra-territorial action, even more so in cases where the host state is unwilling or unable to cooperate or eliminate the situation. The challenge is to formulate principles and parameters, capable of attracting a broader agreement, that apply, or ought to apply, to the use of force in self-defence against armed attacks by non-state actors.

The reality of the threats, the consequences of inaction, and the challenges of both strategic appreciation and operational decision making in the face of such threats frequently trump a doctrinal debate that has yet to produce a clear set of principles that effectively address the specific operational circumstances faced by states.¹³⁶ The Security Council could play an important role in reaching a unanimous consensus among the international community. Furthermore, this consensus could be more probably reached if for instance, the legal implications of the available collective self-defence mechanisms were thoroughly understood.

In the case of the Black Friday attacks, it could be argued that the Security Council acted relatively consistent with its decision concerning the 9/11 attacks. Although as it will be analysed in more detail in Chapter VI below, the resolutions issued in both cases have certain

¹³⁵ Stahn Carsten, *Supra* note 132, at p. 41.

¹³⁶ Bethlehem Daniel, *Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, Vol. 106:000 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 2012, p. 1, at p. 4.

differences. These differences affect the certainty and consistency of its act and thus the effectiveness of its role as a moderator.

In its Resolution 2244 (2015), the Security Council could have mention that collective self-defence under Article 42.7 of the TEU was allowed against ISIS because of the fact that Syria lacks control over the territory occupied by ISIS and/or is a failed state¹³⁷ and therefore it is unable to combat ISIS by itself. Furthermore, it could have made a pronouncement regarding the possibility of exercising the right of self-defence in a pre-emptive and/or preventive manner, in cases that involve an accumulation of attacks.

¹³⁷ Ki-moon Ban, *Crisis in Syria: Civil War, Global Threat*, UNITED NATIONS SECRETARY-GENERAL BAN KI-MOON, 25 June 2014, available at <https://www.un.org/sg/en/content/sg/articles/2014-06-25/crisis-syria-civil-war-global-threat>, last visited 4 August 2016.

CHAPTER IV: AVAILABLE MECHANISMS OF COLLECTIVE SELF-DEFENCE

Now that the traditional characteristics of the right of collective self-defence and the challenges to adapt this notion to contemporaneous threats have been set out, this chapter will focus on the analysis on the different available mechanisms for France’s exercise of this right can be performed. This analysis will be made *arguendo* that the right of collective self-defence covers terrorist attacks, such as the Black Friday attacks.

First, an analysis on Article 42.7 of the TEU will be provided, as it was France’s decision (A). Second, an analysis on Article 5 of NATO Treaty will be provided, as NATO has been the supreme collective defence organisation (B). Finally, an analysis on Article 222 of TFEU will be provided, as this provision was specifically designed for cases where terrorist attacks are involved (C).

A. Treaty of the European Union: The Mutual Defence Clause.

This section is important to understand the background and legal implications of the collective self-defence mechanism under Article 42.7 of the TEU.

France decided to invoke Article 42.7 of the TEU. Until now no explanation has been provided regarding the legal grounds of that decision. Even if it was only a political strategy it is important to analyse the legal background and content of the provision to determine its implications.

a. Origin and Context of the Provision

The study of the background a provision is relevant to understand its *raison d’être* and the context in which it was conceived.

The formulation of Article 42.7 of the TEU is consider to be inspired by Article V of the 1948 Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence (“Brussels Treaty”).¹³⁸ The United Kingdom, the Netherlands, Belgium, France and Luxembourg were the countries, which originally signed the Brussels Treaty. The Treaty of Brussels was modified in October 1954 to create the Western European Union (“WEU”).¹³⁹ The WEU

¹³⁸ *Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence as amended by the Protocol Modifying and Completing the Brussels Treaty*, signed on 23 October 1954, Texts of the Treaty and the Protocols. Brussels: Western European Union, [s.d.] p. 40 (“Brussels Treaty”)

¹³⁹ European Union External Action, *About CSDP - The Western European Union*, available at http://eeas.europa.eu/csdp/about-csdp/weu/index_en.htm, last visited on 4 March 2016.

was a defensive alliance eventually composed of ten members: Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.

The primary objectives of the organisation were the following: (i) create a firm basis for European economic recovery in Western Europe; (ii) offer mutual assistance to member countries in resisting any policy of external aggression; and (iii) promote unity and encourage positive integration in Europe.¹⁴⁰ Additionally, the WEU throughout its existence worked in close cooperation with NATO.¹⁴¹

The Brussels Treaty contained a collective self-defence provision in Article V, which stated the following:

If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power.¹⁴²

Article V utilised the words “armed attack” identically to those in Article 51 of the UN Charter, but limited the location of the attack to any part within Europe. Furthermore, this article made express mention of “military” aid. Thus, it was perceived as a military agreement between the Contracting Parties, similar to other regional military organisations, such as NATO.¹⁴³

Despite the existence of Article V, the WEU never played an important role in a military mission since its implementation was *de facto* left to NATO, to which all WEU members belonged. The main reason for this *de facto* delegation was mainly because of the superiority of the United States military resources.

The Maastricht TEU is an international treaty adopted in 7 February 1992 and entered into force on 1 November 1993, also known as the Maastricht Treaty since it was signed in Maastricht, Netherlands (“Maastricht TEU”). The treaty reinforced the idea of a European union, through the incorporation of the three pillars: the European Communities, Common Foreign and Security Policy (“CFSP”), and police and judicial cooperation in criminal matters.

Originally, the Maastricht TEU did not contemplate its own collective self-defence mechanism rather it referred to the WEU and NATO for such purposes. However, Article J.4 of the

¹⁴⁰ *Ibid.*

¹⁴¹ The Editors of Encyclopædia Britannica, *Western European Union*, ENCYCLOPÆDIA BRITANNICA, available at <http://www.britannica.com/topic/Western-European-Union>, last visited on 3 March 2016.

¹⁴² Brussels Treaty, *Supra* note 138, at Article V.

¹⁴³ *The Origin and Development of the Western European Union*, INNOVATING EUROPEAN STUDIES, January 2014, available at <http://www.cvce.eu/en/recherche/unit-content/-/unit/72d9869d-ff72-493e-a0e3-bedb3e671faa/578edfb4-179a-486e-a75a-a1347ee1167c>, last visited on 10 February 2016.

Maastricht TEU envisaged the European Union's common defence policy and common defence.¹⁴⁴

Upon request of the European Union, the WEU was responsible for the elaboration and implementation of the decisions and actions involving common defence issues. Furthermore, it conditioned the European Union's common defence policy to the prerogatives of NATO's policy. This dependency could imply that the European Union's common defence decisions could be influenced by a regional military organisation, which in great part represented the United States interests.

In late 2000, WEU's political and military functions were transferred to the European Union. In turn, the European Defence Agency was established in 2004 built on the foundations laid down by the military organisation within the WEU.

Finally in 2007, Article 42.7 was incorporated through the Treaty of Lisbon, in similar terms to those of Article V of the Brussels Treaty. This clause was included in the TEU at the initial request of Greece.¹⁴⁵ The intention was to have a collective self-defence mechanism within the European Union's framework. Greece initiated this request due to its consideration of Turkey, who is member of NATO and not a European Union's member, as a potential enemy.

Following the entry into force of the Treaty of Lisbon in 2009 all functions of the WEU had effectively been incorporated into the European Union and as a consequence the WEU was terminated on 30 June 2011.

Article 42.7 of the TEU is also known as the "Mutual Defence Clause" and its main objective is that the members of the European Union must help other European Union members in the event of a violent incursion into another Member State's territory.

b. Legal Content of the Provision

The analysis of the text of the provision is relevant to determine its scope of application and to decide whether a particular situation falls within such a scope.

Article 42.7 of the TEU provides the following:

If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article

¹⁴⁴ European Union, *Treaty on European Union*, signed in Maastricht on 7 February 1992 ("Maastricht TEU"), OJEC 29.07.1992, No. C 191. [s.l.] ISSN 0378-6986, Article 4.J.

¹⁴⁵ Alecu de Flers Nicole, *EU Foreign Policy and the Europeanization of Neutral States: Comparing Irish and Austrian Foreign Policy* (Routledge 2012), at Chapter 6.

51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.¹⁴⁶

i. Factual Trigger: The Occurrence of an Armed Aggression

The factual trigger of Article 42.7 of the TEU is the occurrence of an armed aggression. Contrary to Article V of the Brussels Treaty, Article 42.7 of the TEU substituted the words "armed attack" by the words "armed aggression". This substitution is in line with the expanded definition of armed attack provided since 1986 by the ICJ in the Nicaragua Case¹⁴⁷ based on the General Assembly's definition of "aggression".¹⁴⁸ Pursuant to this definition, the ICJ recognised that not only acts performed by regular forces but also by armed bands, groups, irregulars or mercenaries could constitute an armed aggression or armed attack under Article 51 of the UN Charter.

ii. Geographical Scope: Territory of a Member State

The geographical scope of this article is an armed aggression occurring in the territory of a Member State rather than in the European territory. The reason for this difference was the potential accession of new members to the European Union, such as Turkey, whose territory extends beyond Europe.¹⁴⁹

The notion of "territory" is not always clear since it is not limited to geographical boundaries, it can also encompass ships, aircrafts, islands and so on. The territory of each state is defined within its domestic law. However, this definition could sometimes result disputable by international law or by other states. Several international conflicts have been originated pursuant to territory disputes, such as the case of the Falkland Islands or the Netherlands Antilles. Territory "should not be understood as the static backdrop or container of political actions. Nor is it the passive object of political struggle. It is something shaped by, and a shaper of, continual processes of transformation, regulation and governance."¹⁵⁰ Hence, in a given case it is important

¹⁴⁶ European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, signed on 13 December 2007, 2007/C 306/01, Article 42.7.

¹⁴⁷ *Nicaragua Case*, *Supra* note 6, at para. 195.

¹⁴⁸ United Nations General Assembly Resolution 3314 (XXIX) on the Definition of Aggression, *Supra* note 103, Article 3(g).

¹⁴⁹ *The Treaty on European Union (TEU): A Commentary*, Blanke Hermann-Josef and Mangianeli Stelio (eds.) (Springer 2013) ("Blanke Hermann-Josef and Mangianeli Stelio"), at p. 1226.

¹⁵⁰ Elden, S. "How should we do the history of territory?" *Territory, Politics, Governance*, (Routledge 2013), at p. 13.

to be sure which parts constitute the territory of the affected state at the time of the aggression’s occurrence.

iii. *Legal Commitment: Obligation to Provide Any Means in their Power*

Article 42.7 of the TEU strengthened the mandatory language used in Article V of the Brussels Treaty substituting the words “will afford” with the words “shall have [...] an obligation”. However, there is no practical difference since both wordings amount to a legally binding obligation. If a Member State makes a request for assistance, the other Member States have a legal obligation to assist it by “any means in their power”, which could include, among others, military or economic aid.

It is important to point out that the TEU was concluded in multilingual authentic legal texts. Treaties that have been concluded in more than one language could give rise to problems of interpretation if there are differences between the text versions.

For instance, the Spanish version of Article 42.7 of the TEU is not an exact translation of the English text. In the Spanish text the provision was phrased without the word “obligation”, it states the following “*los demás Estados miembros le deberán ayuda y asistencia*”. The Spanish version is also similar to the French text which provides “*les autres États membres lui doivent aide et assistance*”. Both Spanish and French texts state that the other Member States “owe” assistance to the affected State, which is less categorical than “shall” provide assistance to the affected State. Conversely, the English text maintained the strong categorical wording, “shall have [...] an obligation” that was used in the drafting of the Constitutional Treaty¹⁵¹. However, the Constitutional Treaty was rejected by France and never entered into force based, among other reasons, on this strong categorical wording. This inconsistency therefore could raise some doubts regarding the type of legal obligation of the Member States.

Moreover, the article emphasises that the obligation to provide aid is of the “other Member States” meaning that the defence arrangements should be agreed only between national governments in the European Union. Thus, no involvement of supranational institutions such as the European Commission or the European Parliament is required.

iv. *The Irish Clause: Neutrality and NATO’s Supremacy*

Article 42.7 of the TEU maintained the wording of the so-called Irish Clause, which indicates that the terms of the provision “shall not prejudice the specific character of the security

¹⁵¹ European Union, *Treaty Establishing a Constitution for Europe*, 16 December 2004, OFFICIAL JOURNAL OF THE EUROPEAN UNION, C310, 16 December 2004, not yet entered into force.

and defence policy of certain Member States". According to this Irish Clause, already included in the Maastricht Treaty, the security and defence policy of certain Member States is not prejudiced. Consequently, the neutral Member States do not have to subscribe obligations contrary to their status. If they invoke this exemption, they would benefit from a non-reciprocal guarantee arrangement in their favour.¹⁵²

Neutral states may provide other aid measures without violating the obligations resulting from their status as long as these measures are in accordance with their individual constitutional requirements. Thus, the wording Article 42.7 of the TEU is not limited to military aid.

The last paragraph of Article 42.7 of the TEU was inserted to ensure that the Member States' commitments with NATO would not be undermined. Therefore, it recognises the supremacy of NATO in the field of collective-self defence.¹⁵³

Conclusion

Following the Black Friday attacks, France decided to invoke Article 42.7 of the TEU. According to the restrictive approach of the ICJ concerning the notion of "armed aggression", it could be argued that the invocation of Article 42.7 of the TEU was mistaken. However, according to a broader approach, it could be submitted that French invocation complied with the legal requirements provided in Article 42.7 of the TEU. The factual trigger was the series of attacks occurred in an unquestionable part of the territory of France, which is a Member State. The result of the invocation was a legal obligation of all Member States to provide aid by all means in their power. All Member States expressed their intentions to comply with this legal obligation, although the type and amount of aid provided by each Member State was discussed through closed bilateral negotiations with France. The particular results of these negotiations are unknown.

As it will be further discussed below, pursuant to the declarations made by the European Union High Representative, Federica Mogherini, and the French Defence Minister, Jean-Yves Le Drian, it could be expected that the aid provided by the Member States will be used not only

¹⁵² Traynor Ian, *France invokes EU's article 42.7, but what does it mean?*, THE GUARDIAN, 17 November 2015, available at <http://www.theguardian.com/world/2015/nov/17/france-invokes-eu-article-427-what-does-it-mean>, last visited on 11 February 2016.

¹⁵³ Quille Gerrard, *The Lisbon Treaty and its implications for CFSP/CSDP*, DIRECTORATE GENERAL FOR EXTERNAL POLICIES OF THE UNION, DG EXPO/B/PolDep/Note/2009_169, 01 September 2009, available at, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/afet/dv/201/201009/20100928lisbontreaty_cfsp-csdp_en.pdf, last visited on 11 February 2016.

to prevent ISIS from committing further attacks against France, but also to support other on-going peace-keeping operations led by France in Africa.

Lastly, the invocation of Article 42.7 of the TEU did not contravene with any French obligation concerning NATO, since at the time of its invocation, it was not publicly known any operation carried out by NATO that could be undermined by the reaction of the Members States under Article 42.7 against Syria.

B. Article 5 of the North Atlantic Treaty Organization: The Defence Clause

According to last paragraph of Article 42.7 of the TEU¹⁵⁴, it could be expected that a NATO and/or EU Member State who faced an armed aggression might first invoke Article 5 of NATO Treaty.¹⁵⁵ However, as it has been indicated in the case of France this did not happen. Despite France not deciding to invoke Article 42.7 of the TEU, this section is important to analyse the traditional military collective self-defence mechanism under Article 5 of NATO Treaty.

a. Origin and Context of the Provision

NATO, also called the “Atlantic Alliance”, the “Atlantic Alliance” or the “Western Alliance”, was established in 1949 by means of the North Atlantic Treaty and currently is comprised by 28 members (“Allies”). NATO is an intergovernmental military organisation established for purposes of exercising the right of collective self-defence and for supporting the UN collective security system.¹⁵⁶ According to this organisation, “the principle of collective defence is at the very heart of NATO Treaty.”¹⁵⁷

NATO has been considered the world’s most important military alliance.¹⁵⁸ NATO’s military resources could be estimated to include more than three million troops, 25,000 aircraft and

¹⁵⁴ Last paragraph of Article 42.7 of the TEU establishes the following:

[...]

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States, which are members of it, remains the foundation of their collective defence and the forum for its implementation.

¹⁵⁵ North Atlantic Treaty, signed 4 April 1949, entered into force 24 August 1949, 4 UNTS 243; 43 AJILs 159., at Article 5 (“NATO Treaty”).

¹⁵⁶ *Collective Defence Article 5*, NORTH ATLANTIC TREATY ORGANISATION OFFICIAL WEBSITE, 16 December 2015, available at http://www.nato.int/cps/en/natohq/topics_110496.htm?, last visited on 26 February 2016 (“NATO Website 1”).

¹⁵⁷ *Ibid.*

¹⁵⁸ *How NATO's Article 5 works*, THE ECONOMIST, 9 March 2015, available at <http://www.economist.com/blogs/economist-explains/2015/03/economist-explains-6>, last visited on 25 February 2016.

800 oceangoing warships.¹⁵⁹ Economically, NATO is also an intimidating force, representing more than 50 per cent of global Gross Domestic Product.¹⁶⁰

On 12 September 2001, for the first time in NATO's history, the Allies invoked Article 5 of NATO Treaty, also known as "the Defence Clause". On 2 October 2001, the North Atlantic Council ("NAC") determined that the 9/11 attacks were regarded as actions covered by Article 5. Accordingly, the NAC agreed on a package of measures to support the United States and launched its first anti-terror operation "Eagle Assist".¹⁶¹ The foregoing reflects that states support the opinion that the scope of Article 51 of the UN Charter and, as a consequence, the scope of Article 5 of NATO Treaty could cover terrorist attacks.

The principle of collective self-defence has also been recently discussed in the context of Russia's military aggression against Ukraine. In this regards, on 4-5 September 2014, NATO held a summit in Newport, Wales, whereby NATO condemned Russia's destabilisation of eastern Ukraine in violation of international law. In the Joint Statement of the NATO-Ukraine Commission, Russia was demanded to "reverse its self-declared 'annexation' of Crimea."¹⁶² NATO offered its support to Ukraine, although no formal invocation of Article 5 was made.

Furthermore, NATO has other types of collective defence measures not related to specific cases under Article 5. These measures include a large number of standing forces on active duty, which are ready to act when called upon. These forces perform different tasks ranging from exercises to operational missions, in peacetime and in periods of crisis and conflict.¹⁶³ NATO also conducts several air policing missions, which are collective peacetime missions to identify all violations of its airspace, which run on a 24/7 basis, 365 days per year.¹⁶⁴

b. Legal Content of the Provision

Article 5 of NATO Treaty provides the following:

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 individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking

¹⁵⁹ Stavridis James, *NATO's Turn to Attack*, FOREIGN POLICY, 14 November 2015, available at <http://foreignpolicy.com/2015/11/14/natos-turn-to-attack-paris-terrorist-isis/>, last visited on 26 February 2016.

¹⁶⁰ *Ibid.*

¹⁶¹ NATO Website 1, *Supra* note 156.

¹⁶² Joint Statement of the NATO-Ukraine Commission, UK GOVERNMENT PUBLICATIONS, 4 September 2014, available at <https://www.gov.uk/government/publications/nato-summit-2014-joint-statement-of-the-nato-ukraine-commission/joint-statement-of-the-nato-ukraine-commission>, last visited on 24 March 2016.

¹⁶³ NATO Website 1, *Supra* note 156.

¹⁶⁴ *Ibid.*

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.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.¹⁶⁵

i. Factual Trigger: The Occurrence of an Armed Attack

In the first line of paragraph 1, a different wording from Article 42.7 of the TEU can be identified. The drafters of Article 5 utilised the same words “armed attack” established in Article 51 of the UN Charter. This difference is understandable, as at the time when Article 5 of NATO Treaty was drafted, no expanded interpretation of the words “armed attack” based on the General Assembly’s definition of “aggression” had yet been provided by the ICJ as the problem of non-state actors hardly existed.

For the implementation of the provision, according to Article 4 of NATO Treaty, consultations should take place to determine if the “territorial integrity, political independence or security of any”¹⁶⁶ Allie is threatened. However, in cases where immediate action is needed consultations could take place afterwards. In practice, these consultations are performed by the NAC. NATO also has a specific defence committee, which is in charge of issuing recommendations “for the implementation of Articles 3 and 5.”¹⁶⁷

ii. Geographical Scope: Territory of the North Atlantic Area

The geographical scope of the provision is limited to attacks that occurred within the “North Atlantic area”. Article 6.1 of NATO Treaty identifies the locations that comprise this area:

For the purpose of Article 5, an armed attack on one or more of the Parties is deemed to include an armed attack:

- On the territory of any of the Parties in Europe or North America, on the Algerian Departments of France, on the territory of or on the Islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer;

¹⁶⁵ NATO Treaty, *Supra* note 155, at Article 5.

¹⁶⁶ *Ibid*, at Article 4.

¹⁶⁷ NATO Treaty, *Supra* note 155, at Article 9.

- On the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer.¹⁶⁸

iii. *Legal Commitment: Discretionary Power*

The Defence Clause stipulates that, if invoked, each of the Allies would assist the attacked Ally with “such action as it deems necessary”. This wording grants each party a discretionary power to decide the scope of the assistance provided. This wording departed from the stringent language included in its contemporary provision, Article V of the Brussels Treaty, which provides that in case of an armed attack the “High Contracting Parties will [...] afford the Party so attacked *all* the military and other aid and assistance in their power.”¹⁶⁹

The flexible wording of Article 5 of NATO Treaty was the product of a discussion between the United States and the European countries. On the one hand, according to the United States Constitution, congressional approval is required to declare war and the approval of the US Senate would have been necessary to conclude the NATO Treaty.¹⁷⁰ Thus, the United States preferred a broad language not expressly referring to the obligation of armed assistance in the event of an attack to avoid internal political difficulties. On the other hand, the European countries claimed that leaving out the option of a military response would have voided the provision's effect.¹⁷¹ Hence, the resulting wording intended to meet both demands: the European guarantee and United States political acceptance.

However, the United States Senator Forrest Donnell claimed that, despite this intent, the discretionary language of the provision was in fact illusory, as in case of an attack it would be unrealistic to expect that the United States will assist with something different than armed support.¹⁷²

Conclusion

Following the analysis on Article 5 of NATO Treaty, no practical differences can be appreciated compared against Article 42.7 of the TEU. Article 5 of NATO Treaty, could have also

¹⁶⁸ *Ibid.*, at Article 6.1.

¹⁶⁹ Brussels Treaty, *Supra* note 138, at Article V (emphasis added).

¹⁷⁰ United States of America, *United States of America: Constitution*, signed on 17 September 1787, at Article I, Section 8, Clause 11.

¹⁷¹ Sloan Stanley R., *Negotiating Article 5*, NORTH ATLANTIC TREATY ORGANISATION OFFICIAL WEBSITE, 16 December 2015, available at http://www.nato.int/docu/Review/2006/Invokation-Article-5/Negotiating_Article_5/EN/index.htm, last visited on 26 March 2016.

¹⁷² *Ibid.*

been legally invoked by France in response to the Black Friday attacks. A minor difference is that under Article 5 of NATO Treaty, the NAC would have to, sooner or later, evaluate if the attacks felt within the scope of Article 5. However, it is very likely that it would have decided to confirm that the invocation of the provision was correct, since the case was very similar to the 9//11 attacks. Consequently, as it will be analysed in Chapter V below, the reasons for the French decision to invoke Article 42.7 of the TEU are to be sought in the political sphere.

C. Treaty on the Functioning of the European Union: The Solidarity Clause

Even though France decided to invoke Article 42.7 of the TEU, this section is important to analyse the solidarity provision contemplated in Article 222 of the TFEU, as it was specifically designed for cases where terrorist attacks are involved.

a. Origin and Context of the Provision

The origin and context of this provision is relevant since it is particularly designed to deal with contemporaneous threats. Therefore, this provision avoids some of the unresolved issues regarding the traditional notion of collective self-defence.

In 2009, the Treaty of Lisbon also amended the Treaty establishing the European Community and renamed it TFEU. Article 222 of the TFEU is known as the “Solidarity Clause”, its origins can be traced back to the draft negotiations of the Constitutional Treaty. During these negotiations, delegates from France, Germany, Finland and Sweden were uncomfortable with the idea of including a traditional collective self-defence mechanism within the European Union’s legal framework. They considered that the notion of armed attack as established in Article 51 of the UN Charter was inconsistent with the contemporaneous security environment. These delegates recommended a more generic security clause that emphasises more on the democratic institutions and societal values rather than solely on the territory of the Member States for the purpose of taking into consideration new security threats like terrorism, diseases, and infrastructure breakdowns.¹⁷³ However, the Constitutional Treaty never entered into force.

Following the terrorist attacks occurred in Madrid, pursuant to the Declaration on Combating Terrorism set out in the European Council Conclusions of 25 and 26 March 2004, the European Council remarked that “[t]he threat of terrorism affects us all” and cautioned that “[a] terrorist

¹⁷³ Rhinard Mark & Myrdal Sara, *What Collective Security Agreements Does the EU Have?*, THE SWEDISH INSTITUTE OF INTERNATIONAL AFFAIRS, 17 November 2015, available at <http://www.ui.se/eng/blog/blog/2015/11/17/what-collective-security-agreements-does-the-eu-have.aspx>, last visited 23 June 2016 (“Rhinard Mark & Myrdal Sara”).

act against one country concerns the international community as a whole".¹⁷⁴ As a consequence of this declaration, Article 222 was included in the TFEU to provide the European Union's organs with an active role in the combat and suppression of terrorism.

Contrary to the pure intergovernmental character of the collective self-defence mechanisms, the stronger involvement of the European Union's organs moves the Solidarity Clause closer to a more supranational mechanism. The differences between the notions "supranational" and "intergovernmental" have been modified from time to time and depend on the specifications of each treaty. To illustrate the differences within the framework of the European Union we will relate the notion "supranational" with the institutional operating mode of the "community method" established by the Maastricht TEU. The main characteristics of this method are the following: i) the European Commission has an exclusive right of submitting initiatives; ii) the decision-making process in the Council is generally by qualified majority; iii) the legislation power is exercised jointly by the European Parliament and the Council; and iv) for purposes of uniformity, the interpretation of the European Union's law is left to the European Court of Justice.¹⁷⁵

This method "has been traditionally opposed to the 'intergovernmental method' according to which the Member States usually decide by unanimity, the European Parliament being merely informed or consulted, and where the Commission shares its right of initiative".¹⁷⁶ The Treaty of Lisbon introduced amendments that blurred these distinctions and interrelated both methods in most cases. However, some functions of the European Union could still be identified closer to one or the other method. In case of the Solidarity Clause, the joint action of the European Union with the Member States indicates that it is no longer a pure intergovernmental mechanism.

Moreover, a Solidarity Clause is not a defence mechanism against the attack of another state rather it is a responsive mechanism to face critical situations not necessary attributable to any state. However, both mechanisms are, in the end, fashioned to restore the security and peace of the affected state.

The driving idea behind Article 222 of the TFEU is to allow the European Union and its Member States to act jointly and to provide mutual assistance in cases of natural and/or man-

¹⁷⁴ Brussels European Council 25 and 26 March 2004, Declaration on Combating Terrorism, 25 March 2004, at p. 1.

¹⁷⁵ Schout Adriaan & Wolff Sarah, *How EU Institutions Form Positions* (Netherlands Institute of International Relations, Fifth Pan-European Conference on EU Politics Porto, Portugal –23-26 June 2010), at p. 8.

¹⁷⁶ *Ibid.*

made disasters, as well as terrorist attacks that occurred in the territory of a Member State. This provision covers those cases, which could be considered to be outside the scope of Article 42.7 of the TEU and Article 51 of the UN Charter because of the ICJ’s restrictive interpretation of the words “armed attack” or “armed aggression”. Article 222 of the TFEU specifically covers cases of independent terrorist attacks, as well as natural and man-made disasters.

Article 222 of the TFEU has never been invoked. The Chairman of the Friends of the Presidency Group on the European Union Integrated Political Crisis Response arrangements and the Solidarity Clause Implementation under the Latvian Presidency, Uldis Mikuts, recognised that Article 222 “is sometimes unclear and a number of issues needed clarification including from a legal perspective”.¹⁷⁷ As a consequence, on 24 June 2014 the Council of the European Union (the “Council”) adopted a decision containing the arrangements for the practical implementation of this clause (the “Implementation Decision”). The Implementation Decision outlines solely the European Union’s role and the options for closer cooperation among all relevant actors.

b. Legal Content of the Provision

Article 222 of the TFEU provides the following:

1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

(a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;

[...]

2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

3. The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council shall act in accordance

¹⁷⁷ Bonacquisti Giulia, *The solidarity clause: one of the most unacknowledged innovations of the Lisbon Treaty. The European Parliament debates its implementation but also its ambiguities*, L’ ESPACE DE LIBERTÉ, SÉCURITÉ ET JUSTICE, available at <http://europe-liberte-securite-justice.org/2015/07/27/the-solidarity-clause-one-of-the-most-unacknowledged-innovations-of-the-lisbon-treaty-the-european-parliament-debates-its-implementation-but-also-its-ambiguities/>, last visited on 12 February 2016.

with Article 15b(1) of the Treaty on European Union where this decision has defence implications. The European Parliament shall be informed.

For the purposes of this paragraph and without prejudice to Article 207, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy and by the Committee referred to in Article 61 D; the two committees shall, if necessary, submit joint opinions.

4. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action.¹⁷⁸

i. Joint Action: More than a Mere Intergovernmental Mechanism

Paragraph 1 of Article 222 of the TFEU establishes the obligation of the European Union and the Member States to “act jointly”. As it was mentioned above, this formulation demonstrates that the Solidarity Clause is more than a merely intergovernmental obligation since it involves the joint participation of the organs of the European Union and the Member States.

Each party has different obligations, even though they have to coordinate their efforts. On the one hand, the European Union shall “mobilise all instruments at its disposal” which implies that for an effective implementation, a high threshold of synchronisation is needed.

On the other hand, the Member States have the obligation to provide assistance to the affected state. An explanatory consideration of what must be provided is contained in the Declaration Number 37 added to the Solidarity Clause, whereby it is established that the Member States will be allowed to “choose the most appropriate means to comply with its own solidarity obligations”¹⁷⁹ towards the affected state. The scope of the assistance provided is left to the discretion of each Member State.

ii. Scope of Protection: Terrorist Attacks

The subsections in paragraph 1 reflect the general scope of the provision. The first subsection focuses on terrorism, specifying the kinds of actions that are expected from the Member States. Those actions covered preventive, protective and reacting phases. These phases demonstrate a

¹⁷⁸ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, signed on 13 December 2007, 2008/C 115/01, at Article 222.

¹⁷⁹ *Ibid*, Declaration (No. 37) on Article 222, at p. 337. The declaration indicates the following:

Without prejudice to the measures adopted by the Union to comply with its solidarity obligation towards a Member State which is the object of a terrorist attack or the victim of natural or man-made disaster, none of the provisions of Article 222 is intended to affect the right of another Member State to *choose the most appropriate means to comply with its own solidarity obligation* towards that Member State (emphasis added).

broad scope than a traditional collective self-defence mechanism, which, on the contrary, initiates with the occurrence of an armed attack and terminates with the intervention of the Security Council. Furthermore, this scope also avoids the debate on whether preventive and/or preventive self-defence is permitted since it expressly allows actions to prevent further attacks.

The TFEU does not provide a definition of terrorist attacks; however, the Implementation Decision refers to the definition of terrorist offences contained in the Council Framework Decision dated 13 June 2002 on combating terrorism.¹⁸⁰ Article 1 of this Council Framework Decision, contains a list of terrorist offences, including without limiting: (i) attacks upon a person’s life which may cause death; (ii) attacks upon the physical integrity of a person; (iii) kidnapping or hostage taking; (iv) causing extensive destruction to a government or public facility, a transport system, an infrastructure facility; (v) seizure of aircraft, ships or other means of public or goods transport; and (vi) threatening to commit any of these acts. Furthermore, these acts shall be committed with the aim of:

- seriously intimidating a population, or
- unduly compelling a Government or international organisation to perform or abstain from performing any act, or
- seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.¹⁸¹

The Black Friday attacks felt within one or more of the offences listed above and were also made for the aims mentioned in Article 1 of the Council Framework Decision.

iii. Geographical Scope: Territory of the Member States

Regarding the geographical scope, in principle it is limited to the territory of the Member States, including land area, internal waters, territorial sea and airspace as well as infrastructure situated in the exclusive economic zone or the continental shelf.¹⁸² However, it must be noted that with regard to the protection of “democratic institutions and the civilian population from any terrorist attack” in Article 222 (1) (a), subsection two, no territorial limitation is contemplated.

¹⁸⁰ European Union, *Council Framework Decision on Combating Terrorism*, 13 June 2002, 2002/475/JHA, at Article 1.

¹⁸¹ *Ibid.*

¹⁸² Council of the European Union, *Council Decision on the arrangements for the implementation by the Union of the solidarity clause of 24 June 2014*, 2014/415/EU, at Article 2.

It could be argued that the Black Friday attacks fell outside the scope of Article 222 (1) (a), subsections one and three, since France intended to act in the Syrian territory, which is not part of the European Union. However, due to the fact that Article 222 (1) (a), subsection two, does not contemplate any territorial limitation, it could be submitted that if France had opted to invoke Article 222 it could have alleged that its actions in the Syrian territory fell within the scope of Article 222 (1) (a), subsection two.

iv. Implementation Arrangement: a Complex Procedure

Paragraph 3 deals with the “arrangements for the implementation” of the provision. Those arrangements “shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and High Representative”. Those arrangements should not have any “defence implications”, “in the event that a crisis requires CFSP or CSDP action, a decision should be taken by the Council in accordance with the relevant provisions of the Treaties.”¹⁸³ This last consideration, could imply that in a case of collective self-defence, Article 222 of the TFEU should be invoked at the same time as Article 42.7 of the TEU; therefore, these two provisions are not exclusive.¹⁸⁴

From the reading of paragraph 3, it can be submitted that the implementation stage requires several actions involving different actors, which could lead to interpretation and practical complications. Thus, an eleven-article Implementation Decision was issued aimed at clarifying some procedural aspects in order to facilitate the implementation stage. The Implementation Decision outlines solely the European Union’s role and the options for closer cooperation of all relevant actors.

However, the Implementation Decision rather than clarifying the procedural stages to encourage Member States to invoke the provision, added multiple requirements, which might result in it being even more confusing for the Member States. Regarding the conditions for the invocation of the provision, it indicates that “in the event of a disaster or terrorist attack, the affected Member State may invoke the solidarity clause if, *after having exploited the possibilities offered by existing means and tools at national and Union level*, it considers that the crisis clearly overwhelms the response capabilities available to it.”¹⁸⁵

¹⁸³ *Ibid*, at Whereas 13.

¹⁸⁴ Implementation Decision, *Supra* note 182, according to Whereas 14 this decision “is without prejudice to Article 42(7) of the Treaty on European Union.”

¹⁸⁵ *Ibid*, at Article 4.1 (emphasis added).

The former provision, requires the concerning Member State to complete an initial stage by exploiting the means it has at a domestic and at the European Union's level to solve the crisis before invoking Article 222 of the TFEU. However, it does not elaborate on the scope of the initial stage, for example how long should it last? Which are the elements to be considered for its compliance? Who will determine if it was completed or not? In the case of it being a self-judging provision, then the problem will lay on the sign of weakness that the affected state will transmit when admitting that it cannot deal with the terrorist challenge alone.

v. *Monitoring System*

The final paragraph of the provision mandates the European Council to "regularly assess threats facing the Union" in order to allow the European Union and its Member States "to take effective action". In order to regularly assess the threats, the European Council may request the European Commission, the High Representative and European Union agencies, where relevant, to produce reports on specified threats.¹⁸⁶ As regards the terrorism's threat, the strategic framework for the European Union's action is the European Union Counter Terrorism Strategy¹⁸⁷; and thus, it shall be associated with the preparation of these reports where relevant.

Conclusion

The Solidarity Clause adds a "new layer of obligation to European security arrangements"¹⁸⁸, besides the Mutual Defence Clause. Some of these arrangements are based on the heart of Member States' security policies, and will remain paramount. Because of today's complex, cross-border, and non-state threats, there is reason to believe in a gradually increasing use of the Solidarity Clause. The latter statement due to the fact that this solidarity mechanism avoids some of the debates concerning the exercise of collective self-defence against terrorist attacks. On the one hand, it avoids the debate regarding the scope of the words "armed attack", since it is particularly designed for terrorist attacks. On the other hand, it avoids the debate on the possibility of exercising self-defence in a pre-emptive and/or preventive manner, since it expressly covers preventive actions.

¹⁸⁶ Implementation Decision, *Supra* note 182, at Article 8.

¹⁸⁷ *Ibid*, at Whereas 7.

¹⁸⁸ Myrdal Sara and Rhinard Mark, *Supra* note 173, at p. 19.

However, this increase on the use of the provision could be prevented if the procedures and rules of implementation remain complex and unclear. Based on the former statement, it is justifiable to raise the question as to whether Article 222 of the TFEU functions as an effective tool or if it is a dead letter.

D. Summary

As a response to the Black Friday attacks, France decided to invoke Article 42.7 of the TEU. According to the legal analysis of Article 42.7 of the TEU it can be submitted that its invocation complied with the requirements indicated therein. The series of terrorist attacks, according to the broader opinion of the states practice and the Security Council, constituted the factual trigger of an armed aggression. These attacks felt within the geographical scope of the provision as they occurred in Paris, which is part of the French territory.

Regarding the aid provided, in a Press Conference the European Union High Representative, Federica Mogherini, indicated that the European Union "[...] through the voices of all the defence ministers of all the EU member states unanimously expressed its strongest full support and readiness to provide all the aid and assistance required and needed".¹⁸⁹ Different from the Solidarity Clause, the aid, under the Mutual Defence Clause was to be provided on a bilateral basis rather than through a Common Security and Defence Policy ("CSDP") operation. Furthermore, Mogherini stated that, following the attacks, several states announced to offer material assistance, as well as to enhance support in other operations to free up additional French capacity.¹⁹⁰

In addition to this statement, the French Defence Minister, Jean-Yves Le Drian, when questioned about the French decision to invoke Article 42.7 of the TEU, declared that France expected to see the aid provided translated into "capability collaboration for French interventions in Syria and Iraq, either by relief to or support of France in other operations".¹⁹¹

According to the former statements, it can be expected that France could redirect some of the aid provided by other Member States to other of its current operations in Central Africa Republic, Mali and in the Middle East. This redirection could constitute a departure of the main nature of Article 42.7 as a mechanism limited to the exercise of the right of collective self-defence.

¹⁸⁹ Barigazzi Jacopo, *EU Agrees to French Request for Military Help*, POLITICO, 17 November 2015, available at <http://www.politico.eu/article/eu-agrees-to-french-request-for-military-help/>, last visited 24 June 2016.

¹⁹⁰ *Ibid.*

¹⁹¹ Cîrlig Carmen-Cristina, *Supra* note 71.

As it will be discussed in the next Chapter, if France had opted for the invocation of Article 5 of NATO Treaty rather than Article 42.7 of the TEU to combat ISIS, it would have been supported by the world's most important military alliance, but mainly driven by the United States. Therefore, it can be submitted that the military strategy for the exercise of collective self-defence would have been transferred from France's hands to the United States.

Even though Article 222 of the TFEU was specifically designed to combat terrorist attacks the fact that its invocation implies complex implementation stages and different actors could have caused dissuade France to invoke the provision at this time. Since Article 222 of the TFEU and Article 42.7 of the TEU are not exclusive, nothing in the future impedes that this solidarity mechanism will not be invoked if the attacks continue. However, its invocation would always require recognition by the affected state on its inability to combat the attacker by its own means. The former recognition could be perceived as a sign of weakness that in the political sphere is not desirable, moreover coming from a powerful state such as France.

CHAPTER V:

ANALYSIS ON FRANCE'S DECISION

This chapter is important to understand France's decision to invoke a collective self-defence mechanism under Article 42.7 of the TEU. This decision also demonstrates that state practice continues to maintain and evolutionary interpretation of the words "armed attack" and a general understanding of ISIS as a paradigmatic example of a terrorist organisation.

Now that the legal implications of each provision have been analysed, certain legal **(A)** and political **(B)** reasons can be deduct to try to explain France's decision to invoke Article 42.7 of the TEU before having recourse to Article 5 of NATO Treaty and without any consideration to Article 222 of the TFEU.

A. Possible Legal Reasons

France did not provide any particular legal reason for its decision to invoke Article 42.7 of the TEU, instead of Article 5 of NATO Treaty and/or Article 222 of the TFEU. However, from the analysis of each mechanism, provided in Chapter IV above, some reasons could be elucidated.

Following the analysis of Article 42.7 of the TEU against Article 5 of NATO Treaty, the first impression is that no practical differences can be appreciated; both provisions were drafted in similar terms. As it was mentioned, Article 42.7 of the TEU recognises the supremacy of NATO as a military organisation, and therefore, its terms do not intend to contradict Article 5 of NATO Treaty.

Despite its similarities it is also important to point out the differences between both provisions. The only legal condition for the invocation of Article 42.7 of the TEU is the factual occurrence of an armed aggression. Thus, it functions as an effective and quick response to cases of urgency. Contrary to Article 5 of NATO Treaty, consultations to confirm that the invocation was correct are not needed at any stage of the procedure. However, in cases of urgency Article 5 of NATO Treaty could also be invoked prior consultations, hence in reality there is no practical difference.

The invocation of Article 5 of NATO Treaty would probably have resulted in a more effective tool to combat ISIS. NATO retains a greater collective defence strategy and capability as well as the opportunity to rely on the United States' military means.

Regarding the comparison of Article 42.7 of the TEU with Article 222 of the TFEU, France probably did not invoke the latter since it is restricted to the territory of the European Union. France intended to exercise its right of collective self-defence against ISIS. This terrorist organisation is mainly located in countries outside the European Union's territory, such as Iraq and Syria. Therefore, France could have considered that Article 222 of the TFEU was not suitable in this case. Although, France could have argued that its actions were covered under Article 222 (1) (a), subsection two, which does not contain a territorial limitation.

Moreover, choosing Article 222 of the TFEU would have required that, sooner or later, France stated that all existing means at its domestic and at a European Union level were not sufficient to face the threat. France probably was not willing, at that time, to perform the necessary evaluation to provide such a statement or admit its inability to deal with the terrorist challenge alone.

Despite these arguments, it is important to take into consideration that Article 222 of the TFEU is a solidarity mechanism specifically designed against terrorist attacks and which covers a broader scope of action. It could be argued that it constitutes a *lex specialis* to counter new threats by non-state actors, which require preventive response by military, police and other means, as well as the involvement of the European Union organs.

However acknowledging that in practice, states and the Security Council have admitted the possibility that terrorist attacks might also be considered as an armed aggression, the overlap between Article 42.7 of the TEU and Article 222 of the TFEU does not imply that one provision necessarily serves as *lex specialis*. The parallel introduction of both provisions could imply that Member States have a discretionary power to choose whether to fight a particular threat with one mechanism or the other, or even with both. Since Article 222 of the TFEU has a broader scope of action it serves as an umbrella for military activities under Article 42.7 of the TEU and also other activities outside the CSDP framework¹⁹².

The invocation of Article 42.7 of the TEU does not exclude the possibility of invoking Article 222 of the TFEU in regard to the same attack. France probably determined that the damage caused by the terrorist attacks could be managed with current domestic means. Therefore, the involvement of the European Union's organs was not necessary at this point. However, it could not be excluded the possibility that France invokes Article 222 of the TFEU in case that the attacks continue.

¹⁹² Blanke Hermann-Josef and Mangianeli Stelio, *Supra* note 149, at pp. 1225-1226.

Conclusion

Pursuant to the comparison of the implications of each available mechanism it can be presumed that the main reasons on which France based its decision are probably not in the legal sphere of the provisions.

B. Possible Political Reasons

In support to the above-mentioned statement, some commentators have sustained that France's decision was not mainly related to the substance of the provisions of the TEU, but rather related to political reasons. Therefore, this section is important to analyse which political reasons could exist behind France's decision.

As Article 42.7 of the TEU is solely intergovernmental it does not create any role for European Union's institutions. Hence, the activation of this article does not require political coordination at the European Union level. Political coordination at a European Union level implies that France was willing to sacrifice full control of its decisions. The involvement of the European Union's bodies requires multiple discussions and decision-making processes, which could always be influenced by different or even contradictory political interests. Thus, probably France preferred to maintain the mechanism at an intergovernmental/bilateral framework, which allows it to play a greater role.

Therefore, the political symbolism of invoking Article 42.7 of the TEU could mean France's aim for a common foreign policy towards the Middle East, including an integrated police and intelligence effort. Eventually, the foregoing might open an opportunity for France to use its current position to unify and deepen a coalition against ISIS, which currently suffers from a paucity of common purpose and lack of a central command structure.¹⁹³

Moreover, France could have invoked Article 42.7 of the TEU as a lever to use during the bilateral consultations with other Members States of the European Union to achieve a different purpose. According to a statement made by Federica Mogherini, Member States could contribute by providing support or staff to French on-going peacekeeping operations in Sahel, Mali, Central African Republic and in the Middle East, thereby allowing Paris to free up capacity to use internally.¹⁹⁴ Hence, the invocation of Article 42.7 of the TEU could have been a political

¹⁹³ Iyengar Rishi, *President Bashar Assad is gradually regaining his grip on the country*, TIME, 20 January 2016, available at <http://time.com/4188108/russia-syria-airstrikes-isis-assad/>, last visited on 26 February 2016.

¹⁹⁴ Cîrlig Carmen-Cristina, *Supra* note 71.

strategy to redirect the aid provided in a highly public tragedy to other operations which have received less attention from other Member States and the public opinion.

However, the most important reason for explaining France's decision could be related to the fact that invoking Article 5 of NATO Treaty would imply that the strategy for the exercise of the right of collective self-defence would be strongly dominated by the United States' policies. In that case, France would have lost control over the strategy as well as the opportunity to bargain with other Member States the direction of the aid provided. This is a strong reason to explain why France opted to invoke Article 42.7 of the TEU, despite the practical advantages of invoking Article 5 of NATO Treaty.

Conclusion

The analysis regarding the political reasons reveals that in practice the invocation of collective self-defence mechanisms remains highly politicised. As it was discussed, the decision to choose one mechanism over another could be strongly linked to the dominant states or institutions involved in the decision making process of each collective self-defence and/or solidarity organisation. Furthermore, these mechanisms sometimes could be used by states as bargaining tools to serve purposes other than merely defending themselves from an imminent armed attack or one that has already occurred.

CHAPTER VI: THE INVOLVEMENT OF THE SECURITY COUNCIL IN THE CONFLICT

This chapter is relevant to our analysis since the role of the Security Council is essential when dealing with the use of force to maintain or restore international peace and security. ISIS is undeniably a threat to international peace and security. The involvement of the Security Council is one of the features that distinguish the exercise of collective self-defence from a system of collective security under the UN Charter. However, in light of the multiple challenges that the adaptation of the scope of the traditional notion of collective self-defence to cover terrorist attacks implicate, the Security Council is a key player to achieve this adaptation without possible abuses and violations to principles of international law.

As it was addressed in Chapter II above, one of the features of the exercise of the right of collective self-defence is its temporary nature. The involvement of the Security Council to restore international peace ideally terminates this exercise. However, due to its decision-making process, this involvement does not always occur when it should happen, nor is sufficient to restore international peace. Currently, the Security Council is facing a crisis of legitimacy **(A)**, however, an analysis on its involvement in the Syrian conflict will shed some light on the level of accuracy of this alleged crisis **(B)**.

A. The Security Council's Crisis of Legitimacy

This section is important to analyse the current situation of the Security Council in order to determine its real effectiveness as a moderator.

The Security Council is the main body established by the UN Charter, competent to take all necessary actions to maintain or restore international peace.¹⁹⁵ For this purpose, it occupies an exceptional position regarding the legality on the use of force. Due to its lack of military means and special agreements concluded under Article 43 of the UN Charter, the Security Council has been unable to control the military action by itself. Its competence has been limited to issuing resolutions authorising the Member States to take those necessary actions to comply with a specific mandate to maintain or restore international peace. This competence "gives the permanent members of the Security Council, without whose consent no such authorization[s] can be

¹⁹⁵ UN Charter, *Supra* note 3, at Article 24 and Chapter VII.

reached, an overwhelming influence on scope and duration of such mandate".¹⁹⁶ Thus, the Security Council has the power to determine when and under which circumstances Members States are authorised to use force. For this reasons, as it was sustained in Chapter III above, the Security Council plays an important role when determining if the states' exercise of collective self-defence against terrorist attacks could be justified under certain circumstances.

Since its establishment, the Security Council has been confronted with different legitimacy crises. According to Professor Christian Reus-Smit, an institution experiences a crisis of legitimacy "when the level of social recognition that its identity, interests, practices, norms, or procedures are rightful declines to the point where [the institution] must either adapt ... or face disempowerment"¹⁹⁷.

During the Cold War, the Security Council was unable to fully comply with its tasks under the UN Charter due to the antagonism between the P5 members. The United States and the Soviet Union repeatedly violated the UN Charter's prohibition on the use of force, and still both always justified their actions and exercised its veto power to avoid any consequence.¹⁹⁸ After the Cold War, the Security Council became more active since its decisions were no longer blocked. However, different challenges to its legitimacy arose based on its inability to represent the interests of all members of the UN.

Paralysis emerged once again during the Kosovo conflict, as well as during the 2003 war in Iraq. In both crises, states used force in the absence of an explicit Security Council's authorisation. This time the paralysis of the Security Council was caused mainly because of the disagreement on the criteria to be applied when determining the limits within which states may have recourse to the use of force.

The Syrian conflict has not been the exception. For instance, Russia vetoed four decisions between 2011 and 2014 preventing action on the Syrian conflict, which has claimed over 250,000 lives and displaced 11.7 million people. It was until the Black Friday attacks when the Security Council issued a resolution authorising Member States to take all necessary actions to

¹⁹⁶ Wolfrum Rüdiger, *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?* (Max Planck Forum in Berlin 2003), at p. 12.

¹⁹⁷ Reus-Smith Christian, *International Crises of Legitimacy*, Vol. 44 PALGRAVE MACMILLAN JOURNAL INTERNATIONAL POLITICS 2007, 157, at p.157.

¹⁹⁸ Wheeler Nicholas J. and Morris Justin, *The Security Council's Crisis of Legitimacy and the Use of Force*, Vol: 44 INTERNATIONAL POLITICS 2007, 221.

combat ISIS. In addition to Syria, the divided Security Council has been unable to grant effective responses to crises in Gaza, in Darfur, and in Ukraine.¹⁹⁹

In brief, the Security Council has passed through different legitimacy crises. Strong and opposing political interests have always been involved in its decision-making process, affecting a successful compliance of its tasks under the UN Charter. The current challenges relate mainly to the lack of: adequate representation **(a)**, responsiveness against contemporary threats **(b)**, and transparency in its decision-making process **(c)**.

a. The Composition of the P5: Lack of Adequate Representation

The composition of the P5 has been strongly challenged. During the 48th and 49th Plenary Sessions of the General Assembly held in November 2010, the Assembly President in office, Joseph Deiss, indicated that a "reform of the Security Council was essential to reaffirming the United Nations central role in global governance".²⁰⁰ Almost 50 delegations stood by the opinion that the current Security Council, with its P5 members and ten rotating members retained an out-dated global balance of power.

Countries like Germany and Japan are no longer considered as latent threats to international peace, rather they have become peaceful nations and important contributors of the UN budget.²⁰¹ Thus, these and many other major players, such as the African and Latin American countries, want to become part of the P5.

Despite several attempts to reform the Security Council's composition, to date nothing has changed. A change is very difficult to achieve since states remained deeply divided on the form the new Security Council should take, particularly how large it should be and which countries should be included if it were expanded.²⁰² More unlikely will be to obtain the consent of the P5 members "whose ratification is needed for any amendment or revision of the UN Charter"²⁰³.

¹⁹⁹ Security Council Report Staff, *The Veto*, Vol: 3 SECURITY COUNCIL RESEARCH REPORT 2015, 1, at p. 6. ("Security Council Report Staff")

²⁰⁰ General Assembly, *Solution to Reform of Security Council 'Is in Your Hands'*, General Assembly President Says as Member States Begin Annual Debate on Long-Standing Issue, 48th and 49th Plenary Session Coverage, 10 November 2010, GA/11022 ("General Assembly GA/11022")

²⁰¹ Neuhold Hanspeter, *The United Nations as a Security Organization: The "Balkan Laboratory"*, (Franz-von-Liszt-Inst. für Internationales Recht und Rechtsvergleichung, 2007), at p. 40. ("Neuhold Hanspeter 4")

²⁰² General Assembly GA/11022, *Supra* note 200.

²⁰³ Neuhold Hanspeter 4, *Supra* note 201, at p. 40.

b. The Decision-Making Process: Lack of Responsiveness against Contemporary Threats

According to Article 27.3 of the UN Charter, for non-procedural decisions to be taken by the Security Council a majority of nine out of all 15 members is necessary.²⁰⁴ However, each of the P5 members has the right to veto any decision taken by the majority. Abstention is not regarded as a veto. The veto and the threat of a veto play considerable parts in the growing disappointment with how the Security Council is managed. Indeed, there is a general perception among states that the veto power has been at times abused, by some of the P5 members, to the detriment of international peace and security and solely in benefit of their national interests, or foreign policy. This rigid decision-making process might hinder the ability of the UN to adapt to the rapid changing nature of power in the international system and the development of new threats.

The latest Security Council's deadlocks have involved cases where the most egregious violations of human rights and international humanitarian law have been present. Indeed, this was the case of the Security Council's lack of responsiveness in the Rwanda and Srebrenica genocides.

As an attempt to overcome this problem, in September 2000, the government of Canada launched the International Commission on Intervention and State Sovereignty to discuss possible improvements to the Security Council's responsiveness to protect populations in cases of large-scale loss of lives or ethnic cleansing. One year later, these discussions concluded with a report that contemplated the concept of "Responsibility to Protect". Pursuant to this report, it was argued that the P5 members "should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct passage of resolutions authorising military intervention for human protection purposes for which there is otherwise majority support."²⁰⁵

Due to its temporary nature, in cases of collective self-defence, the Security Council's prompt intervention is essential. Most contemporary threats are no longer inter-state conflicts, rather acts performed by independent non-state actors. As it was discussed in Chapter III, there is a disagreement between the ICJ and state practice regarding the possibility of exercising the right of collective self-defence against these independent non-state actors. The Security Council could play an important role acting as a moderator on this disagreement. Through its resolutions the Security Council could establish the limits to determine under which circumstances states can exercise its rights of individual and collective self-defence against independent non-state

²⁰⁴ UN Charter, *Supra* note 3, at Article 27.3.

²⁰⁵ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Report, December 2001, at p. 75.

actors. This intervention could help to avoid unlawful interventions by the affected state(s) in the territory of the host state. However, the problems discussed above, inherent to its decision-making process, could also be detrimental for a successful intervention and the establishment of clear parameters.

c. Accountability of the Security Council: Lack of Transparency

The lack of transparency in the decision-making process and its outcomes has negatively affected the perception of accountability of the Security Council. Given the authority of the Security Council and the impact of its decisions, it is important for all UN members to expect to be informed as well as, to the extent possible, involved in its decision-making process. As a response to this increasing demand, the Accountability, Coherence and Transparency Group (“ACT”) was established in May 2013, to work on proposals for the improvement of transparency in the Security Council’s internal functioning and its relations to the other UN members.

Although this improvement will be a long on-going process, some improvements have already been achieved. For instance, open sessions, as opposed to close consultations, have become much more frequent. Indeed, during 2015 the yearly percentage of open sessions of the Security Council increased to 61 per cent from 55 per cent in 2014.²⁰⁶

In July 2015, the ACT circulated a code of conduct that calls on all UN members, but especially on the P5 members, to commit not to vote against draft resolutions that seek to end or prevent the commission of genocide, crimes against humanity or war crimes.²⁰⁷ This code of conduct is in line with the Elders’ Proposal²⁰⁸ provided in February 2015. However, the Elders’ Proposal considers an additional element to the commitment envisaged by ACT’s code of conduct. According to the Elders’ Proposal, the P5 members cannot veto a resolution that seeks to end or prevent the commission of genocide, crimes against humanity or war crimes, “without explaining, clearly and in public, what alternative course of action they propose, as a credible and efficient way to protect the populations in question.”²⁰⁹ Publishing reasoned decisions taken by the P5 members could be important to understand the justifications behind a veto exercise, as well as to address the legitimacy of its decisions, and enhance its accountability.

²⁰⁶ The Accountability, Coherence and Transparency Group, *Better Working Methods for today’s UN Security Council*, Fact Sheet, June 2015, available at <http://centerforunreform.org/sites/default/files/FACT%20SHEET%20ACT%20June%202015.pdf>, last visited 22 June 2016.

²⁰⁷ Security Council Report Staff, *Supra* note 199, at p. 5.

²⁰⁸ The Elders is an independent group of global leaders working to promote peace and human rights, founded by Nelson Mandela and currently chaired by Kofi Annan. See Elders Official Website, *Who are the Elders?* available at <http://theelders.org/about>, last visited on 22 June 2016.

²⁰⁹ Security Council Report Staff, *Supra* note 199, at p. 5.

Conclusion

The Security Council has passed through different legitimacy crises. Strong and opposing political interests have always been involved in its decision-making process, affecting a successful compliance of its tasks under the UN Charter. The current challenges relate mainly to the lack of: adequate representation, responsiveness against contemporary threats, and transparency in its decision-making process. These challenges should be overcome in order to achieve a successful performance of the Security Council as a moderator in relation to the evolutionary interpretation of the words "armed attack".

B. Security Council Resolutions 2170(2014) and 2249(2015)

This section is relevant to analyse the performance of the Security Council with respect to the case of the Black Friday attacks.

As it was discussed in the above section, the political divisions and divided interests within the Security Council have been an obstacle to properly address the mass atrocity crimes in Syria performed by both ISIS and the Syrian authorities.

Before the Black Friday attacks, several tempered resolutions were issued regarding the Syrian conflict. However, none of these resolutions stated a clear authorisation to the Member States to take all necessary actions to restore peace and security.

Russia and China on four separate occasions employed their vetoes to block military actions in response to the Syrian conflict. Each veto strengthened the impunity of ISIS and the Syrian Authorities and encouraged the expansion of war crimes and crimes against humanity.

The Security Council issued Resolution 2170 (2014) recognising the threat to the peace and security posed by ISIS and condemned all its on-going and multiple criminal terrorist acts, without authorising the use of force by states to prevent the occurrence of further terrorist acts **(a)**. It was only following the Black Friday attacks when the Security Council issued Resolution 2249 (2015) which implicitly authorised Member States to use force to prevent further terrorist acts **(b)**.

a. Resolution 2170 (2014)

On 15 August 2014, the Security Council issued Resolution 2170 (2014)²¹⁰. This resolution upholds that "terrorism in all forms and manifestations constitutes one of the most serious

²¹⁰ United Nations Security Council Resolution 2170(2014), 15 August 2014, S/RES/2170 (2014).

threats to international peace and security and that any act of terrorism is criminal and unjustifiable regardless of its motivations, whenever and by whosoever committed”. This broad definition of terrorism, different from some international treaties, avoids relating a terrorist act with a political or religious motivation and also did not distinguish between acts committed by state or non-state actors. However, as it was discussed in Chapter I above, this broad definition does not clarify what constitutes a terrorist attack, and what differentiates a terrorist attack from other acts of violence. This ambiguity is understandable since, as discussed in Chapter I above, a disagreement among the UN Member States regarding the definition of terrorism still remains.

Particularly, this resolution refers to the actions of ISIS in Syria and Iraq. It recognises that ISIS control over part of Syria and Iraq territories has conducted to a devastating humanitarian impact on the civilian populations which has led to the displacement of millions of people, and fomented sectarian tensions. It imposed targeted sanctions against certain individuals and entities associated with ISIS and Al Qaida and urged the UN Member States to cooperate in efforts to find and bring to justice those individuals and entities. However, the possibility for bringing them before the International Criminal Court was not addressed in the resolution.

What was lacking as an issue in the resolution was the use of military force against ISIS. This was the case even though several states had at the time already exercised military force against ISIS, including some P5 members of the Security Council, like the United Kingdom, Russia, France and the United States. The Security Council thereby missed a chance to create a legal justification for such actions. It could be argued that the reason for this was the political disagreements between the P5 members regarding the strategy to combat the Syrian conflict and in particular ISIS²¹¹.

b. Resolution 2249 (2015)

Following the Black Friday attacks, on 20 November 2015, the Security Council pursuant to its Resolution 2249 (2015) unequivocally condemned “in the strongest terms the horrifying terrorist attacks perpetrated by ISI[S] [...] which took place on 26 June 2015 in Sousse, on 10 October 2015 in Ankara, on 31 October 2015 over Sinaï, on 12 November 2015 in Beirut and on 13 November 2015 in Paris”.²¹² Moreover, it finally called upon all members of the UN to

²¹¹ Amichai Cohen, Tal Mimran, Yuval Shany, *The (Legal) Battle against the Islamic State*, THE ISRAEL DEMOCRACY INSTITUTE, 9 November 2014, available at <http://en.idi.org.il/analysis/articles/the-legal-battle-against-the-islamic-state>, last visited on 2 May 2016.

²¹² United Nations Security Council Resolution 2249 (2015), *Supra* note 40.

“take *all necessary measures*, in compliance with international law [...] to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISI[S] [...]”.²¹³

What results interesting regarding this resolution is that the Security Council decided to avoid using the words “authorise the use of force” rather its members chose an elusive wording. These wording implicitly could be understood as an authorisation on the use of force, although the omission of an express authorisation shed some light regarding its internal disagreements as well as the current debate on the exercise of self-defence against independent non-state actors, discussed in Chapter III.

Different from the Security Council Resolution 1373 (2001)²¹⁴ issued after the 9/11 attacks, this resolution did not mention that the Security Council was acting under Chapter VII of the UN Charter. Another difference between both resolutions is that Resolution 1373 (2001) makes express reference to the inherent right of individual or collective self-defence against terrorist attacks²¹⁵ while the Security Council Resolution 2249 (2015) did not make any reference to these rights.

Conclusion

Although the effects of the above-mentioned resolutions were very similar, the differences between them are relevant since they affect the consistency of the Security Council’s position before the possibility of exercising the right of collective and/or individual self-defence against terrorist attacks. Indeed, these inconsistencies raise doubts on why did the Security Council decided not to make express reference to the right of self-defence nor to Chapter VII of the UN Charter as it did in the case of the 9/11 attacks? Should we consider the Black Friday attacks as a similar or a different case from the 9/11 attacks? All these questions increase the uncertainty on the debate regarding the exercise of self-defence against terrorist attacks, rather than providing clear guidelines to combat and prevent these new threats.

For these reasons, the performance of the Security Council as a moderator in the case of the Black Friday attacks is still facing deficiencies in great part due to its legitimacy crisis which should be overcome to reach a common position on the matters at stake.

²¹³ *Ibid.* (emphasis added)

²¹⁴ United Nations Security Council Resolution 1373, *Supra* note 8.

²¹⁵ *Ibid.*: “*Reaffirming* the inherent right of individual or collective self-defence as recognised by the Charter of the United Nations as reiterated in resolution 1368 (2001)”. See also United Nations Security Council Resolution 1368, *Supra* note 125.

CONCLUSIONS

The case of the Black Friday attacks evidenced that the combat against terrorist organisations remains one of the greatest challenges in today's world. ISIS has become a threat to international peace and security. The political conflict in Syria has contributed to its strength as the political interests of the key players obstructed the prompt intervention of the Security Council, until it was too late. It was not until an attack on the French population occurred that the public's attention was drawn to the conflict and the Security Council's resolutions could be unblocked. Indeed, it was until 20 November 2015, when Security Council pursuant to its Resolution 2249 (2015) implicitly authorise the use of force to combat ISIS and try to restore the lost peace and security.

Collective self-defence and solidarity mechanisms are legal tools that allow states to take the necessary actions to react and defend themselves in the case of an armed attack, without requiring the intervention of the Security Council. Today, the majority of armed conflicts are no longer inter-state conflicts, rather conflicts with terrorist or other non-state organisations. Therefore, an evolutionary interpretation of Article 51 of the UN Charter should accept the possibility that terrorist attacks are also covered by its scope. This evolutionary interpretation is still facing multiple unresolved challenges.

Following the 9/11 attacks, it may be submitted that at least the majority of the states and the Security Council have accepted this interpretation. Although, the risk that states may abuse the exercise of the rights of individual or collective self-defence to invade a sovereign state must also be borne in mind. This is one of the main reasons the ICJ remains reluctant to endorse this broader interpretation of Article 51 of the UN Charter. Hence, to promote a broader approach by the ICJ, an agreement on the definition of "terrorism" is important.

In order to reach an agreed interpretation on the scope of the words "armed attack" it is important that the Security Council acts as a moderator and provide clear guidelines on the cases where the exercise of the right of collective and/or individual self-defence is permitted and cases where the principle of non-intervention and enforcement by consent should prevail.

The exercise of collective self-defence is often confused with measures under the collective security system. However, it is important to acknowledge their differences and the distinct legal requirements to avoid any legal confusion when talking about one or the other. The practice of a legal mechanism is always better if the theoretical foundations are well understood. Thus, the

importance of looking forward to a better understanding of the concept of collective self-defence cannot be underestimated.

However, even understanding the general implications of the concept of collective self-defence and *arguendo* that their scope covers terrorist attacks, not all the available mechanisms can be exercised in the same manner. For instance, the territorial limits of the collective self-defence and solidarity mechanisms also vary depending on the specific provision. Furthermore, Article 222 of the TFEU requires different steps for its implementation as well as a broader scope of action, since it covers preventive, protective and reacting phases. Therefore, an analysis on each available mechanism should be performed to determine which is the most suitable option in a given case.

In the case concerned, France had the possibility of invoking Article 5 of NATO Treaty or Article 42.7 of the TEU, jointly with Article 222 of the TFEU. For the purposes of France's exercise of its right of collective self-defence, Article 5 of NATO Treaty and Article 42.7 of the TEU have very similar legal implications. On the contrary, the provisions have very different political implications, mainly since the invocation of Article 5 of NATO Treaty enabled the intervention of the United States.

The possibility of France invoking Article 222 of the TFEU remains viable in the case of future attacks. However, the political implications of this solidarity provision should also be taken into account, since it implies the involvement of certain European Union organs in decisions relating to French strategy.

In practice, the invocation of collective self-defence mechanisms remains highly politicised. Sometimes they could be used by states as bargaining tools to serve purposes other than merely defending themselves from an imminent armed attack or one that has already occurred.

In the case of the Black Friday attacks, the public statements provided by Federica Mogherini and Jean-Yves Le Drian invite to consider the possibility that one of the reasons why France decided to invoke Article 42.7 of the TEU was for purposes of redirecting the aid provided to other operations, which felt outside the scope of collective self-defence or solidarity mechanisms and, therefore, they have not received sufficient attention by other states.

It can be submitted that the exercise of collective self-defence involves multiple aspects of international law that are still facing several unresolved complexities. As the prohibition on the use of force is a *ius cogens* norm, the exercise of collective self-defence, as one of its exceptions, should be carefully analysed and applied.

The development of new threats to international security and peace should go hand by hand with the modernisation and evolution of the legal framework. The political interest of states should not be an obstacle to this evolution. Although, in practice; humanity is witnessing a dissociation concerning the development of new threats and the stagnation on the evolution of the legal framework in order to successfully combat and prevent these threats. This dissociation is mainly due to the unresolved issues surrounding the exercise of the right of collective self-defence against terrorist organisations and the political disagreements among the international community to reach an agreement upon them.

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International Treaties and Conventions

Brussels Treaty	<i>Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence as amended by the Protocol Modifying and Completing the Brussels Treaty</i> , signed on 23 October 1954, Texts of the Treaty and the Protocols. Brussels: Western European Union, [s.d.] p. 40
Constitutional Treaty	European Union, <i>Treaty Establishing a Constitution for Europe</i> , signed on 16 December 2004, Official Journal of the European Union, C310, 16 December 2004, not yet entered into force
Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation	International Civil Aviation Organization, <i>Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation</i> , signed on 23 September 1971, 974 UNTS 177
Convention for the Suppression of Unlawful Seizure of Aircraft	United Nations, <i>Convention for the Suppression of Unlawful Seizure of Aircraft</i> , signed on 16 December 1970, UNTS 1973
Convention on the Physical Protection of Nuclear Material	United Nations General Assembly, <i>Convention on the Physical Protection of Nuclear Material</i> , signed on 26 October 1979, No. 24631
Convention on the Physical Protection of Nuclear Material	United Nations General Assembly, <i>Convention on the Physical Protection of Nuclear Material</i> , signed on 26 October 1979, No. 24631
European Convention on the Suppression of Terrorism	Council of Europe, <i>European Convention on the Suppression of Terrorism</i> , signed on 27 January 1977, ETS No. 90
Fourth Geneva Convention	International Committee of the Red Cross (ICRC), <i>Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)</i> , signed on 12 August 1949, 75 UNTS 287
ICC Statute	International Criminal Court, <i>Rome Statute of the International Criminal Court</i> , signed on 17 July 1998, entered into force on 01 July 2002, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90, Article 7(2)(a).
International Convention against the Taking of Hostages	United Nations General Assembly, <i>International Convention against the Taking of Hostages</i> , signed on 17 November 1979, No. 21931
International Convention for the Suppression of Terrorist Bombings	United Nations General Assembly, <i>International Convention for the Suppression of Terrorist Bombings</i> , signed on 15 December 1997, No. 37517

International Convention for the Suppression of the Financing of Terrorism	United Nations General Assembly, <i>International Convention for the Suppression of the Financing of Terrorism</i> , signed on 9 December 1999, No. 38349
Maastricht Treaty	European Union, <i>Treaty on European Union</i> , signed in Maastricht on 7 February 1992, OJEC 29.07.1992, No C 191. [s.l.] ISSN 0378-6986
Montevideo Convention	<i>The Montevideo Convention on Rights and Duties of States</i> , 26 December 1933, 165 LNTS 19 (1933)
NATO Treaty	North Atlantic Treaty, signed 4 April 1949, entered into force 24 August 1949, 4 UNTS 243; 43 AJILs 159
TEU	European Union, <i>Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community</i> , signed on 13 December 2007, 2007/C 306/01
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ABSTRACT

The case of the Black Friday attacks evidenced that terrorism represents one of the main challenges to global security. States should have the possibility to combat this challenge and defend themselves. One possibility is the exercise of the rights of individual and/or collective self-defence. Indeed, collective self-defence mechanisms are legal tools that allow states to take the necessary actions to react and defend themselves in the case of an armed attack, without requiring the intervention of the Security Council. Following the Black Friday attacks, France relied on these mechanisms and decided to invoke Article 42.7 of the TEU, instead of Article 5 of NATO Treaty and/or Article 222 of the TFEU, without providing particular reasons for this decision. However, the exercise of collective self-defence against terrorist attacks on their territory involves multiple aspects of international law that are still facing several unresolved complexities.

The development of new threats to international security and peace should go hand by hand with the modernisation and evolution of the legal framework. The political interest of states should not override this legal framework. Although, in practice; humanity is witnessing a dissociation concerning the development of new threats and the stagnation on the evolution of the legal framework in order to successfully combat and prevent them. This dissociation is mainly due to strong political disagreements among the international community, particularly among the P5 members of the Security Council.

Der Fall der Black Friday attacks veranschaulicht, dass Terrorismus momentan eine der Hauptbedrohungen für die globale Sicherheit darstellt. Folglich sollten Staaten die Möglichkeit haben, dieser Gefahr entgegenzuwirken und sich zu verteidigen. Möglichkeiten dies zu tun, stehen zum einen in der Ausübung ihres individuellen Rechtes auf Selbstverteidigung und zum anderen in der Ausübung kollektiver Selbstverteidigung. Mechanismen kollektiver Selbstverteidigung sind rechtliche Maßnahmen, die es Staaten im Fall eines bewaffneten Angriffes auf ihr Hoheitsgebiet ohne Intervention des UN-Sicherheitsrates erlauben, die notwendigen Schritte zu ergreifen, um auf den Angriff zu reagieren und sich zu verteidigen. Nach den Black Friday attacks stützte sich Frankreich auf jenes Recht und beschloss ohne Angabe näherer Gründe, sich anstatt auf Art 5 des Nordatlantikvertrags bzw Art 222 AEUV auf Art 42 Abs 7 EUV zu berufen. Die Ausübung kollektiver Selbstverteidigung umfasst jedoch einige Aspekte des Völkerrechts, die immer noch kontroversiell sind und ungelöste Streitpunkte darstellen.

Die Entwicklung neuer Gefahren für die internationale Sicherheit und den Frieden sollte auch mit der Modernisierung und Fortentwicklung rechtlicher Rahmenbedingungen einhergehen, wobei das politische Interesse von Staaten dabei in den Hintergrund treten sollte. Heutzutage entstehen neue Gefahren jedoch weitaus schneller als sich die rechtlichen Rahmenbedingungen zur Bekämpfung und Verhinderung solcher Bedrohungen fortentwickeln können. Diese Dissonanz ist vorwiegend auf die großen politischen Unstimmigkeiten innerhalb der internationalen Staatengemeinschaft zurückzuführen, insbesondere jedoch auf jene der fünf permanenten Mitglieder des UN-Sicherheitsrates.