

**The evolving right of counter-terrorism: An analysis of
SC resolution 2249 (2015) in view of some basic contributions
in International Law literature**

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1. *Introduction*

It seems safe to say that Security Council (SC) resolution 2249 of 20 November 2015 opens new ground in the fight against terrorism by the State Community. At the time of writing, only a few weeks have gone by since this resolution has been issued but it has immediately become clear that this document attracts enormous interest by the International Law academia.¹ It is to be expected that in the next time a flurry of articles on this subject will follow.²

The adoption of this resolution is seen as a good occasion to have a look at a series of recently published books³ that deal, in a larger sense, with the subject of ‘International Law and Terrorism’ and to compare

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¹ See, in particular, the contributions on the various (International) Law blogs such as EJIL Talk or *Opinio Juris*.

² This writer has also prepared a contribution on this subject entitled ‘The Security Council and the Fight Against Terrorism: Does SC Resolution 2249 (2015) Lead to a More Hobbesian or a More Kantian International Society?’, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2704467>. This review essay draws on the article posted on SSRN.

³ The following books are discussed here: L Moir, *Reappraising the Resort to Force* (Hart 2010); A Bianchi, Y Naqvi, *International Humanitarian Law and Terrorism* (Hart 2011); KN Trapp, *State Responsibility for International Terrorism* (OUP 2011); L van den Herik, N Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order* (CUP 2013).

the findings of these authors with the legal situation brought about by resolution 2249. In which sense did these publications anticipate the situation originating in the latest developments at UN level? To what extent does SC resolution 2249 further develop the legal situation in this field? Are we really confronted with a watershed or can analysis of resolution 2249 built on traditional international law doctrine? Up to which point is it possible to refer to the law of self-defence according to Article 51 of the UN Charter if measures against terrorist acts are at issue? These are some of the questions this article shall deal with. Thereby, this contribution will follow an unusual path. In view of the fact that the subject of the 'International Law of Counter-Terrorism' is a relatively recent one and further considering that SC resolution 2249 could be seen as a major step forward in the evolution of this subject the books mentioned above will be taken as a basis for a stock-taking as to this subject. At the same time an overview of the content and elements of an analysis of SC resolution 2249 shall be given.

2. *SC resolution 2249 of 20 November 2015– its main content*

The main operative provision of this resolution is contained in paragraph 5 of this document:

'5. *Calls upon* Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al-Qaida, and other terrorist groups, as designated by the United Nations Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council, pursuant to the statement of the International Syria Support Group (ISSG) of 14 November, and to eradicate the safe haven they have established over significant parts of Iraq and Syria;'



The SC calls upon the UN Member States (MS) to take all necessary means against ISIS and its immediate allies (in particular Al-Qaida) on the territory under their control in Syria and in Iraq. The words ‘to take all necessary means’ is considered, in UN parlance, as direct reference to Chapter VII of the Charter which provides in Article 42, for the adoption of forceful measures by the UN. As is well-known, according to Article 43 of the UN Charter, the activation of this system would have required the conclusion of specific agreements according to which Members should make available armed troops to the UN. MS were, however, not prepared to transfer military power directly to the UN and therefore a ‘delegation’ approach (called by some also as sort of ‘franchising the use of force’) was adopted according to which MS were ‘authorized’ to implement Chapter VII resolutions on the use of force.

Resolution 2249 is not very clear in this context as it neither mentions Chapter VII directly nor does it provide an ‘authorization’ for the use of force.

Nonetheless, reference to ‘all necessary means’ leaves little doubt as to the ultimate aim of this resolution and if doubts persist they should be dissipated by a look at the preambular provisions of this resolution where reference is made to a ‘global and unprecedented threat to international peace and security’ stemming from ISIS and its allies.

As to the lack of any reference to an ‘authorization’ it can be argued that ‘to call upon’ is at least as powerful as an ‘authorization’ and furthermore there are some precedents in UN law where exactly this formulation was used.⁴

However, perplexities still remain even if this hurdle has been overcome. In fact, while authorizations are usually conceded to specific states or groups of states, it is not clear what MS are exactly ‘called upon’ by this resolution. Reference to ‘MS that have the capacity to do so’ leaves many questions open. What type of ‘capacity’ is intended here? A material or a military capacity or also the absence legal hindrances of relevance? It is highly likely that this term has to be interpreted in a broad, all-encompassing sense, thereby, however, creating enormous space for exceptions and rendering the provision widely unclear.

⁴ For an overview on the main resolutions on counter-terrorism so far passed by the SC see the homepage by the SC Counter-Terrorism Committee, <www.un.org/en/sc/ctc/resources/res-sc.html>.

The result can be summarized the following way: Potentially all MS are called upon to ‘take all necessary measures’ – and this is a very strong urge. At the same time, however, those MS, which have not the capacity to do so, are exempted from this call. Therefore, it becomes clear, that this recourse to forceful measures is of a very specific nature.

It comes to mind that perhaps a different approach should be chosen. Should resolution 2249 rather be read in a self-defence perspective? Some authors suggested so.⁵

Again, however, resolution 2249 offers no straightforward basis for such an assumption. Resolution 2249 does not mention the concept of self-defence and even less Article 51 of the Charter. Only indirectly some references in this resolution could be put at the service of such a proposition. Thus, it has been suggested that reference in paragraph 1 of resolution 2249 to ‘the capability and intention [of ISIS] to carry and out further attacks’ should be read as an authoritative confirmation of the ‘immediacy’ element required to permit a response in terms of self-defence.⁶

We have to ask ourselves, however, whether such an affirmation by the SC is either sufficient or needed at all to activate such a right to self-defence. In fact, as will be further explained below, the criteria developed for the exercise of the right to self-defence in inter-state relations are not easily transferable to the struggle between states and non-state actors like terrorists. As has been shown elsewhere in greater detail⁷ until not long ago the fight against terrorism was seen primarily as a question of national law enforcement. It was only with terrorists gaining ever more destructive power and with the growing necessity to fight at least major terrorist groups not only by police forces but militarily, associated with the need to act outside the state’s realm of sovereignty that these measures became a major international issue. To rely in this situation on

⁵ See M Weller, ‘Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self-Defence Against Designated Terrorist Groups’ *EJIL: Talk!* (25 November 2015) <www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defence-against-designated-terrorist-groups/>.

⁶ So Weller (n 5). As is well known, the immediacy requirement results very clearly from the Webster-formula in the *Caroline* case. See Correspondence between Great Britain and the United States, respecting the Destruction of the *Caroline*, *British and Foreign State Papers*, Vol 26 (1837-1838) 1372-1377, Vol 29 (1840-1841) 1126-1142, Vol 30 (1841-1842) 193-202.

⁷ See P Hilpold (n 2).



criteria elaborated in the inter-state context seemed natural although, as will be shown, is not always appropriate.

After having set the scene, it is now the time to have a closer look at the existing literature on the relationship between international law and terrorism. To this end, some recent publications giving major contributions to this subject have been sorted out.

3. The use of force against terrorism – the role of the SC

This aspect has been extensively treated by Sir Michael Wood in his contribution entitled ‘The role of the Security Council in relation to the use of force against terrorists’ in the book edited by Larissa van den Herik and Nico Schrijver – an excellent collection of writings on the subject here to be dealt with.⁸ Already in the introductory part of this contribution Wood makes an important affirmation that is to be attributed particular value also in the ambit of the interpretation of resolution 2249: ‘Collective action is almost always better than individual action, legally, politically and in terms of effectiveness. Collective decisions (or even non-decisions) are often wiser than those taken individually’.⁹

This affirmation can be taken as a starting point for any attempt to interpret resolution 2249: Whatever its specific legal foundation should be, the fact that a consensus was reached within the SC for a common approach is of enormous value. As is well-known, the Syrian tragedy has reached such enormous proportions also because of the lack of an unanimous position between the superpowers. By resolution 2249 the previous dissent between East and West about the future of Syria has not really been overcome but notwithstanding all the remaining elements of disagreement the basic will to declare war on ISIS terror resulting from this resolution is to be considered an enormous step forward for the state community and a major setback for ISIS which counted on thriving further on a sort of a re-awakened East-West conflict.

⁸ M Wood, ‘The role of the Security Council in relation to the use of force against terrorists’ in van den Herik, Schrijver (n 3) 317-333.

⁹ *ibid* 317.

Wood in 2013 clearly points out that there is no reason why the SC while so far not having adopted measures involving the use of force against terrorist should not do so in the future.¹⁰ Having clarified that the SC, in principle, should be able to authorize the use of force against terrorist, it is, as anticipated above, however not fully clear whether this has happened by resolution 2249. One reason for this may be found in the fact that the ‘war on terror’ rhetoric was born in a self-defence perspective when the SC, shook up by the 9/11 attacks, adopted resolutions 1368 (2001) of 12 September 2001 and 1373 (2001) of 28 September 2001.

If further enlightenment is looked for as to the meaning of an ‘authorization’ by the SC to use force a good choice would be the monograph by Lindsay Moir on ‘Reappraising the Resort to Force’, published in 2010. Were it not for the time factor, some parts of this book seemed to have been written with resolution 2249 in mind:

‘Security Council resolutions are not always easy to interpret. In particular, and given that they almost always represent political compromise, they are often ambiguous and reflect the fact that, under the current voting system it is extremely difficult to attain the Council’s approval for military action.’¹¹

‘Ambiguity’ was exactly the qualification used by first commentators with respect to this resolution.¹² And Lindsay Moir continues as follows:

‘The number of activities authorised under Chapter VII from 1991 onwards ... increased markedly. In most of the relevant cases prior to 2001, the Council had authorized the use of force explicitly, if somewhat euphemistically by granting the states in question permission to resort to “all necessary means”. And yet, on occasion, the Security Council had still failed to express itself with sufficient clarity. For example, it periodically failed to assert whether a particular resolution had been adopted under Chapter VII. It will be recalled that Article

¹⁰ *ibid* 318.

¹¹ See L Moir (n 3) 36.

¹² See D Akande, M Milanovic, ‘The Constructive Ambiguity of the Security Council’s ISIS resolution’ *EJIL: Talk!* (21 November 2015) <www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution>.



39 requires the Council to determine whether there is a threat to, or a breach of, the peace, but not necessarily to state this explicitly in any relevant resolution. It may have become standard practice for it to do so, and to specifically indicate that it was acting under Chapter VII of the Charter, but in a number of cases it has failed to do so, thereby leaving the legal basis for any pursuant military action in doubt.¹³

Exactly such a situation is given with regard to resolution 2249. As already stated, no explicit reference to Chapter VII is made in this resolution and neither did the SC use the verb ‘to authorize’. Nonetheless, the SC called upon MS ‘to take all necessary measures’ (para 5) and in the preambular part it speaks of an ‘unprecedented threat to international peace and security’.

For an attempt to interpret this resolution guidance can be obtained by a statement made by the ICJ in the Namibia Advisory Opinion of 1971:

‘The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.’¹⁴

Bearing all elements of resolution 2249 and all circumstances regarding its adoption in mind and considering the broader doctrinal discussion about the bindingness of SC resolutions one could be inclined to assume that this resolution authorizes the use of force against ISIS.

Nonetheless, at the same time the ‘sui generis’ character of this resolution can neither be denied. Further clarifications are therefore needed and to this avail again the literature object of this review essay can be

¹³ See Moir (n 3) 38.

¹⁴ See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion of 21 June 1971) [1971] ICJ Rep 53. See also M Wood, ‘The Interpretation of Security Council resolutions’ 2 Max Planck YB UN L 1998 73, 89: ‘The terms of a resolution are to be interpreted “in their context”’.

very helpful. It shall now be examined whether resolution 2249 should primarily be looked at from the self-defence perspective.

4. *SC resolution 2249 and the right to self-defence*

At first sight it might appear odd to assume that resolution 2249 authorizes the exercise of a right to self-defence as such an authorization, as is well-known, is not necessary, nor could it be: Self-defence is by its nature a spontaneous and unilateral (in the sense of ‘not authorized by the SC’) act. To make the exercise of this right conditional upon a SC authorization would nullify this right in most cases in which it is needed: either because authorization by the SC does not come in time or not come at all. It can be argued that such a situation would also be highly detrimental for the general aim to rule out force in international relations because, with collective security measures politically often not at hand and an authorization to take recourse to self-defence not granted, the potential aggressor could speculate to emerge unscathed.

Nonetheless, as Michael Wood has correctly stated, ‘Security Council endorsement should be seen as politically desirable even in cases of self-defence (and need not affect the right of self-defence)’.¹⁵

As a consequence a somewhat longer inquiry into the role of self-defence in the fight against terrorism is required.

What does international law say about self-defence against terrorism? Originally not very much. An international legal order whose subjects were mainly states for a long time paid little attention to non-state actors like terrorists. Things changed only when the threat emanating from terrorist groups became equivalent to that of a medium-sized aggressor state. International lawyers had to look for applicable theories in related fields. They found them in the area of state responsibility for acts of force by armed groups, a situation the ICJ dealt with extensively in the Nicaragua case (1986). There are limits, however, to such an analogy as the context differs to a considerable extent. The Nicaragua case concerned the question of attribution (of acts of force to another state)¹⁶ while the new terrorist threat has generated a more basic ques-

¹⁵ See Wood (n 8) 338.

¹⁶ See on this aspect also Trapp (n 3) 38 ff.

tion: Is it allowed to exercise self-defence against terrorist groups even if no state complicity is involved or if state involvement is only marginal? In essence the question is whether international law allows self-defence against terrorists irrespective of the involvement of other states. Under this perspective terrorists become the main target of a military action. The positions of other states have to be considered only insofar as their sovereignty becomes impaired by such a military action.

On this subject, Steve Ratner has written a good contribution entitled 'Self-defence against terrorist: the meaning of armed attack'.¹⁷ He correctly points out that the text of Article 51 does not limit its attention to armed attacks carried out by States and he explains that in the past, when the role of non-state actors in terrorist activities was examined, the main interest referred to the question whether these activities were attributable to a state.¹⁸ In the meantime, the question whether such activities can constitute an armed attack regardless of the role of the State has become centrestage.¹⁹ He then continues with SC resolutions 1368 of 12 September 2001 and 1373 of 28 September 2001 which are stating exactly this. As is well-known, however, in the aftermath of the 9/11 attacks it was far from clear whether these resolutions really opened a new chapter in international law or were rather to be seen as emotionally loaded documents that spontaneously responded to an unprecedented calamity due to a terrorist attack of unknown and unprecedented proportions. It was, paradoxically, the ICJ that contributed to uncertainty and confusion in this field, as Ratner convincingly explains. The tendency by the ICJ to adopt a very limited perspective in this regard started already with the Nicaragua case where this court 'never considered the possibility that military action by ... the Salvadoran guerrillas ... or the contras was itself an armed attack, instead addressing whether those actions could either be imputed to, or were otherwise action of Nicaragua or the United States.'²⁰ When the General Assembly requested an advisory opinion in 2003 about the legality of the wall being built by Israel in the Occupied Palestinian Territory, Israel had grounds to believe it could rely on an argument of self-defence, particu-

¹⁷ S Ratner, 'Self-defence against Terrorist: The Meaning of Armed Attack' in van den Herik, Schrijver (n 3) 334-355.

¹⁸ *ibid* 335.

¹⁹ *ibid*.

²⁰ *ibid* 337.

larly given the strong statements contained in SC resolution 1368, according to which terrorism gives rise to a right to self-defence.²¹ The ICJ, however, missed the opportunity to give guidance on this delicate subject and instead rejected Israel's plea in a short but highly contorted passage, where it maintained that the right to self-defence mentioned in Article 51 of the Charter applied only in case of an attack by one State against another State.²² As the attacks referred to by Israel did not originate in another State but in the occupied territories Article 51 was found to be inapplicable. This statement left most commentators puzzled as Article 51 of the Charter does not contain any such limitation, and the ICJ did not explain why the State community should abide by a restrictive interpretation of self-defence, particularly given the events of 2001. Soon after, in *Armed Activities on the Territory of the Congo* (2005), the ICJ had the opportunity to clarify this subject. Again, the ICJ by-passed this highly contentious matter by stating on the one hand that the attacks by armed groups operating from the Democratic Republic of Congo ('DRC') and entering into Uganda could not be attributed to the DRC and therefore the Nicaragua-formula for self-defence against non-state actors did not apply. On the other hand, the Court did not feel the need to answer the question whether self-defence applies against 'large-scale attacks by irregular forces'.²³ If one is to take

²¹ See for this and the following sentences P Hilpold, 'The Applicability of Article 51 UN Charter to Asymmetric Wars' in H.J Heintze, P Thielbörger (eds), *From Cold War to Cyber War, The Evolution of the International Law of Peace and Armed Conflict over the Last 25 Years* (Springer 2016) 127-135.

²² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004) [2004] ICJ Rep 139. Also see Judge Higgins, Separate Opinion, *ibid* 207, as well as Judge Buergenthal, Declaration, *ibid* 240.

²³ See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment of 19 December 2005) [2005] ICJ Rep 223:

'...The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC....' (para 146).

'...For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the parties as to

an optimistic view it can be stated that at least the respective question was left open by the ICJ. Additionally, it is interesting to note that the ICJ's position was rejected in 2011 by the Secretary-General's Panel of Inquiry on the Israel attack on the Turkish flotilla near Gaza.²⁴

Commentators were widely critical in regard to this restrictive approach adopted by the ICJ. The impression was created that the ICJ had feared to open the Pandora's box if it qualified non-state actors as possible direct targets of acts of self-defence. It is clearly perceptible that the ICJ sees the prohibition of the use of force as such an important good that it tried hard to avoid the introduction of (further) exceptions to it, even though the need for such a re-qualification of Article 51 of the Charter had become ever more impelling. Of course, it was at the same time important to avoid direct confrontation with the ICJ. So, commentators suggested a restrictive reading of the pertinent ICJ pronouncements: They should be seen as informed by judicial economy and be interpreted in close connection with the specific factual situation.²⁵

Nonetheless, after 9/11 more clarity was needed. The task to shed more light on this legal situation was taken up by private think-tanks and academics in their personal capacity. Three highly sophisticated papers have been prepared and presented to this end:²⁶

- The Chatham House Principles of International Law on the Use of Force by States in Self-Defence of 2005;²⁷

- The Leiden Policy Recommendations on Counter-Terrorism and International Law of 2010;²⁸ and

whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.' (para 147).

²⁴ Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, July 2011, Annex I, paras 41, 93, cited according to Ratner (n 17) 337.

²⁵ See KN Trapp, 'Can Non-State Actors Mount an Armed Attack?' in M Weller (ed), *The Oxford Handbook on the Use of Force in International Law* (OUP 2015) 679, 686.

²⁶ See for the following Hilpold 'The Applicability of Article 51' (n 21).

²⁷ E Wilmschurst, 'The Chatham House Principles of International Law on the Use of Force by States in Self-Defence' 55 ICLQ (2006) 963-972.

²⁸ N Schrijver, L van des Herik, 'Leiden Policy Recommendations on Counter-terrorism and International Law' 57 Netherlands Intl L R (2010) 533-550.

– The Principles on ‘Self-Defense against an Imminent or Actual Armed Attack by non-State Actors’ presented by Daniel Bethlehem in 2012.²⁹

These documents have different origins but bear considerable resemblance in the way they have come to life. The Chatham House principles are the result of an intense dialogue between several eminent British academics and practitioners. The Leiden Policy Recommendations also ensued from a process of several steps and rounds of dialogue between academics and practitioners, based at the Grotius Centre of Leiden University and with the involvement of Dutch and international experts. The Bethlehem principles, finally, evidence most clearly the signature of one single expert, Daniel Bethlehem who, however, reports that his document is also the result of an intense dialogue with other experts.

The main conclusions that can be drawn from these documents seem to be the following:³⁰

– The role of the Security Council for the maintenance of international peace and security is emphasized and (unilateral) armed action in self-defence should be a measure of last resort.

– In clear contrast to the ICJ but in conformity with a broad majority in literature it is affirmed that Article 51 of the UN Charter applies also to attacks by non-state actors ‘even when not acting on behalf of a State’.³¹ In fact, as in the commentary to the Chatham house principle n 6 is explained ‘the right to use force in self-defence is an inherent right and is not dependent upon any prior breach of international law by the State in the territory of which defensive force is used.’³²

– In such case, however, the attacks must be of a large scale. As the Leiden Policy Recommendations explain, ‘[t]he heightened threshold stems from the critical role of the State(s) on whose territory terrorists

²⁹ See D Bethlehem, ‘Principles Relevant to the Scope of a State’s Right of Self-defence against an Imminent or Actual Armed Attack by Non-State Actors’ 106 *AJIL* (2012) 770-777.

³⁰ See Hilpold ‘The Applicability of Article 51’ (n 21) 134.

³¹ Leiden Policy Recommendations (n 28) 541, para 38; The Chatham House Principles (n 27) 969, principle 6.

³² The Chatham House Principles (n 27) 970.



operate and the primary responsibility of such State(s) for the prevention and suppression of such acts'.³³

– It suffices that a State is unwilling or unable to prevent attacks against another country. The Leiden Policy Recommendations remember that self-defence is 'an inherent right' and therefore it does not 'require that armed attacks by terrorists be attributable to the territorial State under the rules of States responsibility'.³⁴

Of course, a certain amount of caution is required when recourse is taken to these documents. In fact, they do not constitute binding legal documents and their authority relies on that of their authors and the stringency of the arguments adopted. On the other hand, exactly these elements suggest that considerable value is to be attributed to these statements.

On a whole, it can therefore be said that the last two decades have revealed wide-reaching uncertainty as to which forceful measures are permitted against terrorist groups in case of major threats emanating from such sources. In 2001 the SC has opened the gate for the application of Article 51 also in this context. The ICJ showed hesitancy to follow while commentators perceived the need to accept this change of paradigm.

5. Self-defence against states 'unwilling or unable' to fight terrorists

The attacks of Paris of 13 November 2015 have definitely evidenced that major steps have to be undertaken in order to counter effectively the terrorist threat. At the same time, both international institutions as single academics in their own capacity have warned that in any case a cautious approach is needed because highly sensitive achievements of UN law are here at stake. In particular, Andrea Bianchi has made clear that care should be taken not to re-introduce inadvertently the concept of armed reprisals when allowing acts of self-defence against terrorists.³⁵ In fact, as Bianchi points out, many actions taken against terrorists so

³³ Leiden Policy Recommendations (n 28) 541, para 39.

³⁴ *ibid* 542, para 42; Bethlehem (n 29) principle n 12.

³⁵ See A Bianchi 'The International Regulation of the Use of Force: The Politics of Interpretative Method' in van den Herik, Schrijver (n 3) 283-316, 308 ff.

far strongly resemble punitive actions as there is often a considerable hiatus between the terrorist act and the counter-measure taken. Furthermore, counter-measures often have not the direct aim to ward off an ongoing attack but to retort for a previous aggression. Bianchi is right if he points out the necessity to defend with utmost resolve the outlawing of armed reprisals. However, it can be argued that this achievement pertains to inter-state relations and the fight against terrorists is based on other circumstances and limits. The same holds true, more in particular, for the way, self-defence can be exercised against terrorists. While between states it is correct that exemptions from the prohibition of the use of force have to be interpreted restrictively in order to preserve the basic achievement brought about by the UN Charter, no such caution applies in confront to terrorists as they are not elements of the peace order. They merit no regard and no respect (with the exception of considerations of human rights or humanitarian law).

The situation changes only if states are involved. In this case, again all the restrictions apply that have been elaborated in the field of self-defence in inter-state relations. Of course, if extraterritorial measures against terrorists are adopted nearly always the state sovereignty of other states is affected. But there are graduations. If the state harbouring terrorists is not actively supporting terrorists but merely unable to oust these groups from the country the sovereignty of the respective state deserves the utmost respect. State practice has developed the 'unable or unwilling'-criterion in order to assess the legitimacy of acts of self-defence against states harbouring terrorists: States unwilling or unable to go after terrorists could become legitimate targets of acts of self-defence. As shown above, recent doctrinal papers and recommendations have strongly supported this approach. It could, however, be argued that 'unwilling states' and 'unable states' should not be considered as making part of one and the same category. A state merely unable to fight terrorists should deserve a far higher degree of protection. As Lindsay Moir stated in 2010, the right to self-defence against terrorist after 9/11 might have appeared to some to constitute 'instant custom' but this 'instant custom' might dissolve as quickly as it disappeared when it is claimed by other countries.³⁶

³⁶ See Moir (n 3) 155. See on the discussion about the 'unwilling or unable'-criterion also Bianchi, Naqvi (n 3) 17.

SC resolution 2249 has taken into consideration all these doubts but it has also taken a step ahead, even at the price of creating additional uncertainty.

6. *First conclusions as to SC resolution 2249*

By resolution 2249 the SC not only allows MS to act against the terrorist threat stemming from ISIS but MS are even ‘called upon’ to do so. It remains unclear, however, on which specific legal basis these measures should be grounded and what they should consist of. Resolution 2249 refers to an array of concepts and terms that could either be read in a perspective of ‘collective use of force’ according to Article 42 of the Charter or in view of the right to self-defence according to Article 51 of the Charter. And in both cases doubts remain. A solution to this conundrum could be found in an approach that uses Chapter VII as a whole for measures to be taken against ISIS (even though Chapter VII is not even mentioned in this resolution!). Collective action against ISIS is not only allowed but even required while at the same time resolution 2249 leaves it open which states should carry out these actions. One reading of this resolution suggests that all states are potentially affected by ISIS terrorist actions but at the same time, some states are particularly hit (as the attacks of Paris show) and it stands to reason that they should spearhead military measures in the way of some sort of self-defence. As shown above, in the context of the fight against terrorists, the right to self-defence follows specific rules and conditions that are under several perspectives not so restrictive as those applying in the inter-state context. Nonetheless, all principles and values coming here into play have to be weighed against each other and there are some basic rights that also self-defence against terrorism has to respect to the utmost extent. In this context, state sovereignty has to be mentioned. SC resolution 2249 does not subscribe to the ‘unwilling or unable’-criterion whose application to Syria and Iraq would most probably allow for armed intervention as the respective governments, at least at the time being, are obviously unable to fight ISIS effectively. Instead, resolution 2249 safeguards both countries’ sovereignty and allows the use of force only in the territories controlled by ISIS (and their allies) furthermore requesting ‘compliance with international law, in particular with the

United Nations Charter'. As a consequence, it can be argued that intervention is possible only upon invitation by the respective governments and in strict collaboration with them.

In this sense, doctrinal elaborations on the right to self-defence and the use of force against terrorists are widely confirmed by resolution 2249 and at the same time this resolution manages to reconcile a somewhat extended right to self-defence with basic achievements brought about by the UN Charter.³⁷

7. *What SC resolution 2249 does not say and is nonetheless very important in the fight against terrorism*

The fight against terrorism is a multi-faceted long-term endeavour and SC resolution 2249 addresses only some aspects of this struggle. The books here under review offer a far broader perspective and this further elements shall now be briefly considered.

In their introductory chapter to 'The Fragmented Response to Terrorism'³⁸ Larissa van den Herik and Nico Schrijver write about a possible 'shift in paradigm' in international terrorism law after 9/11: While Ian Brownlie still in 2008 had asserted that '[t]here is no "law of terrorism" and the problems must be characterized in accordance with the applicable sectors of public international law: jurisdiction, international criminal justice, State Responsibility, and so forth', now assertions have been spawned 'that counter-terrorism law is now a separate branch of international law'.³⁹

At the end the editors deny the existence of a 'special regime of international terrorism law' but it seems nonetheless warranted to argue that SC resolution 2249 provides further elements that are hinting exactly in the direction of such a special regime. We are now far beyond the traditional national 'law enforcement approach' typical for the era before 2001. As shown, now military measures are instruments of primary importance in the fight against terrorism and the law of self-defence has been adapted accordingly. Neither the problem of defini-

³⁷ See for more details Hilpold (n 2).

³⁸ van den Herik, Schrijver (n 3) 1-25, 21.

³⁹ *ibid.*

tion, long considered to be a main obstacle in the development of an autonomous ‘international law of counter-terrorism’⁴⁰ has revealed to be of secondary importance: The terrorist groups addressed by this resolution are explicitly mentioned and this could not be otherwise in view of the far-reaching measures directly or indirectly considered by this document.

There can be no doubt that resolution 2249 considers military measures centre-stage in the fight against ISIS. Nonetheless, also other instruments are touched upon, both directly and indirectly. First of all, this resolution in the preamble leaves no doubt as to the fact that ‘any acts of terrorism are criminal’. And when the preamble sets forth with a reference to ‘continued gross systematic and widespread attacks directed against civilians, abuses of human rights and violations of international humanitarian law, including those driven on religious or ethnic ground, its eradication of cultural heritage and trafficking of cultural property’ international criminal responsibility of those perpetrating these acts come to mind.⁴¹ For any future proceeding against those responsible for these acts this resolution constitutes an important pre-assessment of the crimes to be persecuted. Politically, this resolution can also be seen as an invitation to actually bring such a case before the ICC. The contributions by Anton du Plessis, Michael A. Newton, Kimberley Prost and several other authors in ‘Counter-Terrorism Strategies in a Fragmented International Legal Order’ (van den Herik and Schrijver eds, 2013) very convincingly argue that a military strategy will be important but not sufficient to counter effectively modern international terrorism. They rightly emphasize the need to complement such activities by national-level law enforcement and criminal justice responses and by enhanced international cooperation. Also Kimberley N. Trapp admits in her book on ‘State Responsibility for International Terrorism’ – which constitutes a fine analysis of all possible aspects of states responsibility associated with terrorists acts and the fight against them – that individual criminal responsibility is gaining ever more importance – even in the pursuit of justice as between injured and a

⁴⁰ On this discussion see extensively Bianchi, Naqvi (n 3) 269 ff.

⁴¹ This sentence seems to refer to art 8 of the Rome Statute (‘war crimes’) and art 7 (‘crimes against humanity’).

wrongdoing states.⁴² With regard to international criminal justice it is to be said that terrorism as such does not fall under the jurisdiction of the ICC but, as explained above, crimes such as those committed by ISIS may fall under the purview of Article 5 of the Rome Statute.⁴³ It is therefore possible that SC resolution 2249 marks the first step in a process that might lead to international criminal persecution of ISIS members by the ICC.⁴⁴

And a last point has to be addressed in the analysis of SC resolution 2249: The limits posed by international humanitarian law in the fight against terrorism. Also this element may have been lost by first commentaries to resolution 2249 but it is nonetheless present in this document.

Already in the preambular part we find the following caveat:

‘Member States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law’.

And in the substantive part, paragraph 5 when addressing the need ‘to take all necessary measures’, requires also compliance ‘with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law’. This subject is treated in very great detail both by the book edited by van den Herik and Schrijver (with contributions by Charles Garraway, Robert K Goldman, Helen Duffy, Jelena Pejic and Cordula Droege, David Kretzmer, Margaret Satterthwaite, Claudia Martin and Karima Ben-noune) as well as by the book written by Andrea Bianchi and Yasmin Naqvi (‘International Humanitarian Law and Terrorism’, 2011).

These two publications complement each other in an excellent sense: Those looking for a comprehensive analysis of this subject with broad doctrinal references will find in the book by Bianchi and Naqvi the ideal basis for their studies. Those interested in specific answers to specific questions will find in the relevant contributions in the book ed-

⁴² See Trapp (n 3) 263.

⁴³ In the future also the crime of aggression could become prosecutable if terrorists are sent by a State to commit such a crime. See Trapp (n 3) 261.

⁴⁴ As to the limits of ICC prosecutions for terrorist offences (limited ICC jurisdiction) see Trapp (n 3) 262 ff.



ited by van den Herik and Schrijver an excellent and easily accessible source of information. In their very substance both books represent a plea to pay uncompromising respect to international humanitarian law even in this extremely asymmetric struggle between states and terrorists. It may be added that this plea is particularly important in the fight against ISIS as the un-precedented cruelty displayed by these terrorists could induce some governments to abandon basic achievements in this field – thereby, however, not only undermining essential tenets of their constitutional orders but also furnishing further arguments to terrorists eager to combat our societies and the values on which they are premised.⁴⁵

8. *An overall analysis of the books considered – and of SC resolution 2249*

The four books taken as a basis for presenting the status quo ante resolution 2249 are both singularly unique and at the same time complementing each other in an ideal way. As shown, the monograph by Lindsay Moir and the contributions in the collective writing edited by Larissa van den Herik and Nico Schrijver anticipate much of what has now been confirmed by SC resolution 2249. This resolution goes, however, also beyond these doctrinal positions. While in the past pertinent academic literature prevalingly denied that a special regime of international terrorism law has been created (presenting however, at the same time, a flurry of material that would point exactly in this direction) SC resolution 2249 can be taken as a prove that the SC is now willing to continue the path initiated by resolutions 1368 and 1373 in 2001. At least with regard to the law of self-defence a special regime for the fight against terrorists is taking shape. Of course, the fight against terrorism poses new challenges in the field of humanitarian law. The book by Andrea Bianchi and Yasmin Naqvi offers – together with many contributions in the book edited by van den Herik and Schrijver – a thorough analysis of the problems arising from this asymmetric fight. The monograph by Kimberley N. Trapp provides a good overview as to the way

⁴⁵ See in this sense also A Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' 12 *Eur J Intl L* (2001) 993-1001.

the fight against terrorism was traditionally looked at from an international law viewpoint: As a phenomenon potentially generating state responsibility (in the case attribution was possible). In the meantime the primary focus has shifted toward individual responsibility as well as to the question whether terrorists can be fought even without attribution of any responsibility to another state but, of course, the aspect treated by Trapp remains important.

All in all we notice that this special regime of international terrorism law evolving since 2001 has definitely affirmed itself in international law – not as a set of norms completely detached from general international law but rather operating in close interplay with it,⁴⁶ while at the same time catering to specific needs not anticipated in 1945 when the UN was founded and not even foreseen a mere twenty years ago. All the regimes of which the international legal order is formed⁴⁷ have to be coordinated and to be kept in mutual balance.⁴⁸ This balance has to be continuously refocused in dependence of the challenges that come up anew. SC resolution 2249 gives fully credit to this basic considerations: The attacks of Paris of 13 November 2015 require resolve and a decisive response. And the State community is faithful to be able to come up to this task while upholding all the civilizational achievements that terrorist have tried to put into jeopardy.

⁴⁶ See M Zürn, B Faude, 'On Fragmentation, Differentiation, and Coordination' 13 *Global Environmental Politics* (2013) 119.

⁴⁷ See on this subject, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion Of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682 (13 April 2006).

⁴⁸ With regard to counter-terrorism and the respect of human rights see K Bennoune, 'Reconciling International Regimes' in van den Herik, Schrijver (n 3) 667-705, 668: '...the contemporary moment requires a holistic understanding of both security and human rights advocates. Such an approach requires reconciling the international legal regimes that govern peace and security on the one hand, and the protection of persons on the other.' See also W Karl, 'Terrorismus, Krieg, Menschenrechte – zwei beiläufige Gedanken zum europäischen Notstandsrecht' in G Biaggini et al (eds.), *Polis und Kosmopolis – Festschrift für Daniel Thürer* (Dike 2015) 359-373.

