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## Counter-Terrorism and the Use of Force in International Law

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The terrorist attacks of September 11th undoubtedly ushered in a new era in international security affairs. Although terrorism has been a tragically prominent feature of the global condition for most of the past half century, these operations were quantitatively and qualitatively different than those of the past. They involved extensive and sophisticated long-term planning by a group that cuts across lines of nationality and which operates from within many countries.<sup>2</sup> The scale of the destruction in both human and physical terms was shocking; the fact that the attacks and their aftermath were broadcast live only served to further exacerbate their psychological impact.

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2. For an excellent discussion of how the attacks were a turning point in the evolution of international terrorism, see Paul J. Smith, *Transnational Terrorism and the al Qaeda Model: Confronting New Realities*, PARAMETERS, Summer 2002, at 33. See also, Michael Howard, *What's in a Name? How to Fight Terrorism*, FOR. AFF'S, January/February 2002, at 8, which argues that declaring a "war" on terrorism was a "terrible and irrevocable error." *Id.* at 8.

That all 19 terrorists directly involved executed them with great precision despite the certainty of their own deaths may well portend a terrifying face of 21st century terrorism—a genre of terrorism likely to prove extraordinarily difficult to counter by traditional means.

Combating this aggravated form of terrorism will require new cooperative security strategies. Certainly, the Global War on Terrorism articulated by the United States represents one such strategy.<sup>3</sup> As time passes and opportunities and threats become clearer, the worldwide war on terrorism will evolve responsively. Other governments and intergovernmental organizations are already developing parallel and complimentary strategies.

Lest the lawlessness inherent in terrorism spread to its victims, counter-terrorism strategy must be formulated with great sensitivity to the international law governing the use of force. Some have suggested that this body of law, including that facet regarding the right to self-defense, is not up to the task<sup>4</sup>

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3. The extent to which the GWOT represents a fundamental shift in US strategies for dealing with threats is apparent in President Bush's discussion of preemptive strategies. See Remarks by the President at 2002 Graduation Exercise of the United States Military Academy, June 1, 2002, available at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html> (Jun. 18, 2002). Released on September 17, 2002, the US National Security Strategy incorporates such strategies. See U.S. National Security Strategy, at 4, available at <http://www.whitehouse.gov/nsc/nss.html> (Nov. 4, 2002).

4. See Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL. 539 (2002). Professor Glennon argues that:

The international system has come to subsist in a parallel universe of two systems, one *de jure*, and the other *de facto*. The *de jure* system consists of illusory rules that would govern the use of force among states in a platonic world of forms, a world that does not exist. The *de facto* system consists of actual state practice in a real world, a world in which states weigh costs against benefits in regular disregard of the rules solemnly proclaimed in the all-but-ignored *de jure* system. The decaying *de jure* catechism is overly schematized and scholastic, disconnected from state behavior, and unrealistic in its aspirations for state conduct.

*Id.* at 540.

Others counter that effective responses to terrorism and state “supporters” thereof are proving entirely consistent with existing prescriptive norms.<sup>5</sup> This article explores those norms, specifically the relevant *jus ad bellum*,<sup>6</sup> in the context of the response to the 9/11 attacks. Under what circumstances can a victim state react forcibly to an act of terrorism? Against whom? When? And with what degree of severity? It concludes that a natural evolution in the community understanding of limitations on the use of force has occurred over the past decades, such that claims of international law’s present insufficiency are overblown. However, assertions that the law as traditionally understood supports a full range of forceful responses to terrorism equally overstate reality. As is usually the case, the truth lies between the extremes.

### *The Relevant Facts*

In order to effectively appraise the international law governing the use of force in counter-terrorism today, and to acquire a sense for its normative vector, it is necessary to first paint the factual backdrop. Law tends to be reactive and responsive to the factual context in which it operates. Obviously, this is the case for customary international law, which relies, *inter alia*, on state practice for its emergence. The same is true, however, for convention-based law. Despite declarations that international agreements, such as the UN Charter, should be interpreted in accordance with the ordinary meaning of their text, it is undeniable that community understanding of law shifts over time to remain

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5. See, e.g., Jack M. Beard, *America’s New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J. L. & PUB. POL. 559 (2002).

[T]he case for America’s forcible response to the September 11 attacks as being fully consistent with the inherent right of self-defense under customary international law and Article 51 of the U.N. Charter is very strong. The unanimous condemnation of the attacks by the U.N. General Assembly, the affirmation of the right of self-defense by the Security Council, the growing consensus in the international community to hold states accountable for terrorist actions, and the repeated condemnation by the Security Council of the Taliban Regime’s support of terrorists in particular, clearly help establish an appropriate framework under international law for the exercise of self-defense by the United States.

*Id.* at 589–90.

6. That component of international law that governs when it is that a state may resort to force in pursuit of its national interests, such as defending itself from armed attack.

coherent and relevant to both current circumstances and the global community's normative expectations.<sup>7</sup>

Sadly, the facts of 9/11 are all too familiar. On 11 September 2001, terrorists seized control of four passenger aircraft in the United States. Two were flown into the Twin Towers of the World Trade Center in New York City, a third was driven into the Pentagon in Washington D.C. and the fourth crashed in Pennsylvania following an unsuccessful attempt by passengers to regain control from the hijackers. Roughly 3000 people of over 80 nationalities perished.

Investigation quickly led authorities to focus their attention on Osama bin Laden and his al Qaeda terrorist organization.<sup>8</sup> Al Qaeda operates from more than 60 countries through a compartmentalized network using operatives of numerous nationalities. By October, the British government felt sufficiently confident in intelligence reports at its disposal to release certain facts and conclusions regarding the group. These were subsequently confirmed by the United States. Specifically, 10 Downing Street announced that al Qaeda had planned and conducted the attacks, that it continued to have the resources to mount further operations, that US and UK citizens were potential targets and that "Usama Bin Laden and Al-Qa'ida were able to commit these atrocities

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7. Pursuant to Article 31 of the Vienna Convention on the Law of Treaties:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose . . . ;
2. There shall be taken into account together with the context: . . .
  - b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. . . .

Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969). This point was reiterated by the International Court of Justice in *Competence of the General Assembly for the Admission of a State to the United Nations*. There, the Court noted "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur." 1950 I.C.J. 4, 8.

8. For background on bin Laden, see PETER L. BERGEN, *HOLY WAR, INC.: INSIDE THE SECRET WORLD OF OSAMA BIN LADEN* (2001); Michael Dobbs, *Bin Laden: Architect of New Global Terrorism*, WASH. POST, Sep. 16, 2001, at A8.

because of their close alliance with the Taleban regime, which allowed them to operate with impunity in pursuing their terrorist activity.”<sup>9</sup>

Of particular relevance to the use of force issue is the fact that al Qaeda was hardly venturing into terrorism for the first time on September 11th. The organization had allegedly been involved in the 1993 World Trade Center bombing, the 1998 bombings of the US embassies in Kenya and Tanzania (attacks for which Osama bin Laden has been indicted<sup>10</sup>), and the attack on the USS *Cole* in 2000; the group had also claimed responsibility for the 1993 attack on US special forces in Somalia, as well as three separate 1992 bombings intended to kill US military personnel in Yemen. Moreover, the US Department of State alleges the existence of al Qaeda ties to plots (not executed) to kill the Pope, attack tourists visiting Jordan during the millennium celebration, bomb US and Israeli embassies in various Asian capitals, blow up a dozen passenger aircraft while in flight and assassinate President Clinton.<sup>11</sup>

That al Qaeda represents a continuing threat is apparent not only from its track record, but also from statements periodically issued by Osama bin Laden himself. The British government’s October Press Release cited a number of his most virulent:

The people of Islam have suffered from aggression, iniquity and injustice imposed by the Zionist-Crusader alliance and their collaborators . . . . It is the duty now on every tribe in the Arabian peninsula to fight jihad and cleanse the land from these Crusader occupiers. Their wealth is booty to those who kill them. (1996)

[T]errorising the American occupiers [of Islamic Holy Places] is a religious and logical obligation. (1996)

We—with God’s help—call on every Muslim who believes in God and wishes to be rewarded to comply with God’s order to kill Americans and plunder their money whenever and wherever they find it. We also call on Muslims . . . to

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9. United Kingdom Press Release, 10 Downing Street Newsroom, *Responsibility for the Terrorist Atrocities in the United States*, Oct. 4, 2001, at paras. 21–22, available at <http://www.number-10.gov.uk/news.asp?NewsId=2686> (Jun. 18, 2002). As to US confirmation of the facts, see David E. Sanger, *White House Approved Data Blair Released*, N.Y. TIMES, Oct. 6, 2001, at B6.

10. Indictment, *United States v. Usama bin Laden et al.*, S(2) 98 Cr. 1023 (LBS) (S.D.N.Y. Nov. 4, 1998).

11. Department of State, *Patterns of Global Terrorism*, app. B: Background Information on Terrorist Groups, al-Qa’ida, April 30, 2001, available at <http://www.state.gov/s/ct/rls/pgtrpt/2000/2450.htm> (Jun. 18, 2002).

launch the raid on Satan's US troops and the devil's supporters allying with them, and to displace those who are behind them. (1998)

[A]cquiring [chemical or nuclear] . . . weapons for the defence of Muslims [is] a religious duty. (1998)

Thus, in al Qaeda we have a determined terrorist organization that has committed multiple acts of terrorism over the course of a decade—acts which resulted in the deaths of thousands and caused property and financial damage measured in the billions of dollars—and views its continuing campaign in terms of *jihad*.

The US reaction was swift. Within a week, President Bush formally proclaimed a national emergency<sup>12</sup> and called up members of the reserve component of the armed forces.<sup>13</sup> He also established the Office of Homeland Security and the Homeland Security Council in order to facilitate a coordinated response to the terrorist threat.<sup>14</sup> For its part, Congress passed a joint resolution that authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”<sup>15</sup> Essentially, the United States was placed on a war footing. Indeed, the President characterized the attacks as “an act of war against our country.”<sup>16</sup> Thus, the US government quickly moved beyond a criminal law enforcement paradigm in determining how to respond to the attacks.

Almost immediately, the spotlight focused on Taliban connections to al Qaeda, which was “headquartered” in Afghanistan. Although the United

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12. Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sep. 18, 2001).

13. Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sep. 18, 2001). A number of other steps were taken. For instance, President Bush gave the Treasury Department greater power to undermine financial support for terrorism through freezing assets and imposing financial sanctions on those who refused to cooperate in the effort. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

14. Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 10, 2001).

15. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

16. President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347 (Sep. 20, 2001).

States did not formally recognize the Taliban as the legitimate government of the country, the Taliban controlled the greatest amount of territory, including that where al Qaeda was based.<sup>17</sup> Working through the Pakistani government, which maintained diplomatic relations with the Taliban, the United States issued a series of demands. These were set forth publicly in late September during a Presidential address to a joint session of Congress. Specifically, the United States insisted that the Taliban:

Deliver to United States authorities all the leaders of Al-Qa'ida who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats, and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.<sup>18</sup>

President Bush made it quite clear that there would be no negotiation and that he expected immediate compliance. Moreover, he unambiguously laid out the consequences of non-compliance: "They will hand over the terrorists, or they will share in their fate."<sup>19</sup>

Despite the "no-negotiations" stance, the Taliban expressed a desire to resolve the matter. These entreaties were rebuffed and on October 6 the President issued a final public warning to cooperate.<sup>20</sup> The following day the United States and United Kingdom launched the first phase of Operation ENDURING FREEDOM, consisting of airstrikes against both al Qaeda and Taliban targets. The scope and nature of the campaign quickly expanded to encompass ground and maritime operations.

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17. For background on the Taliban, see AHMED RASHID, *TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA* (2001); PETER MARSDEN, *THE TALIBAN: WAR, RELIGION AND THE NEW ORDER IN AFGHANISTAN* (1998).

18. Address Before a Joint Session of the Congress, *supra* note 16.

19. *Id.*

20. President George W. Bush, Radio Address, 37 WEEKLY COMP. PRES. DOC. 1429, 1430 (Oct. 6, 2001).

As required by Article 51 of the United Nations Charter, the United States promptly notified the Security Council that it was acting in individual and collective self-defense.<sup>21</sup> In the report, the United States asserted that it had “clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks” and that there was an “ongoing threat” made possible “by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by [al Qaeda] as a base of operations.” The purpose of the military operations was to “prevent and deter further attacks on the United States.” Ominously, the United States warned, “We may find our self-defense requires further actions with respect to other organizations and other States.”<sup>22</sup> In an address to the nation, the President echoed the threat contained in the Article 51 notification: “Every nation has a choice to make. In this conflict, there is no neutral ground. If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers, themselves. And they will take that lonely path at their own peril.”<sup>23</sup>

Because it had participated in the strikes, the United Kingdom also transmitted the requisite report to the Security Council. It announced that the attacks were conducted in self-defense against “Usama Bin Laden’s Al-Qaeda terrorist organization and the Taliban regime that is supporting it.” The avowed purpose was “to avert the continuing threat of attacks from the same source.”<sup>24</sup> Thus, although limiting the scope of its operations to al Qaeda and

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21. U.N. CHARTER, art. 51. Article 51 provides that:

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

22. Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (Oct. 7, 2001), U.N. Doc. S/2001/946, available at <http://www.un.int./usa/s-2001-946.htm> (Jun. 18, 2002) [hereinafter US Letter].

23. President George W. Bush, Address to the Nation Announcing Strikes Against Al Qaeda Training Camps and Taliban Military Installations, 37 WEEKLY COMP. PRES. DOC. 1432, (Oct. 7, 2001).

24. Letter from the Charge d’Affaires of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (Oct. 7, 2001) available at [http://www.ukun.org/xq/asp/SarticleType.17/Article\\_ID.328/qx/articles\\_show.htm](http://www.ukun.org/xq/asp/SarticleType.17/Article_ID.328/qx/articles_show.htm) (Jun. 18, 2002).



the Taliban, like the United States it suggested that action was necessary to prevent further attacks.

The international reaction to the affair was almost universally one of outrage over the terrorist acts and support for the United States. On September 12th, the Security Council passed Resolution 1368 condemning the attacks as “horri-fying,” labeling them a threat to international peace and security, and reaffirming the “inherent right of self-defence as recognized by the Charter of the United Nations.”<sup>25</sup> Resolution 1373, passed on September 28th, likewise cited the right to self-defense and laid out steps to combat terrorism, such as suppressing the financing of terrorism, denying safe haven to terrorists and their accomplices, and cooperating in law enforcement efforts.<sup>26</sup> Interestingly, the General Assembly did not refer to self-defense in its own resolution on the attacks.<sup>27</sup>

Following commencement of the military campaign, the Security Council passed a number of relevant resolutions. For instance, on November 14th it issued Resolution 1378, which expressed support for “international efforts to root out terrorism, in keeping with the Charter of the United Nations”; reaffirmed Resolutions 1368 and 1373 (which had cited the right to self-defense); condemned the Taliban for “allowing Afghanistan to be used as a base for the export of terrorism by the Al Qa’ida network and other terrorist groups and for providing safe haven to Osama Bin Laden, Al-Qa’ida and others associated with them”; and expressed support for the “efforts of the Afghan people to replace the Taliban.”<sup>28</sup> On December 20th it passed Resolution 1386, which (as with Resolution 1373) expressed support for rooting out terrorism in accordance with the Charter, reaffirmed Resolutions 1368 and 1373, and

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25. S. C. Res. 1368, pmb., U.N. SCOR, 56th Sess., U.N. Doc. S/1378/(2001). It is interesting that the Security Council did not reference self-defense in response to the 1998 attacks on the East African embassies even though the United States formally invoked Article 51. According to Article 39 of the UN Charter, the Security Council has cognizance over “any threat to the peace, breach of the peace, or act of aggression” and decides upon measures necessary to “maintain or restore international peace and security.” U.N. CHARTER, art. 39. Therefore, labeling the acts as a threat to international peace and security is normatively significant in that it empowers the Council to act.

26. S. C. Res. 1373, pmb. U.N. SCOR, 56th Sess., U.N. Doc. S/1373/(2001).

27. G.A. Res. 56/1, U.N. GAOR, 56th Sess., Agenda Item 8 (Sep. 18, 2001).

28. S. C. Res. 1378, U.N. SCOR, 56th Sess., U.N. Doc. S/1378/(2001).

authorized the establishment of the International Security Assistance Force [ISAF].<sup>29</sup> Reaffirmation of the international counter-terrorist effort, of previous resolutions, of its prior condemnation of the Taliban and al Qaeda and of the fact that terrorism constitutes a threat to international peace and security occurred yet again on January 20th, 2002 with Resolution 1390.<sup>30</sup> In it, the Security Council employed its Chapter VII authority to impose sanctions on the Taliban and al Qaeda, including a freezing of assets, a prohibition of travel and an arms embargo.

In none of the resolutions did the Security Council explicitly authorize the United States, any coalition of forces, or a regional organization to use force pursuant to Article 42 of the Charter, as the Council is entitled to do in the face of a “threat to the peace, breach of peace or act of aggression.”<sup>31</sup> However, it is important to note that the Security Council twice referred to the inherent right to individual and collective self-defense prior to coalition combat operations against the Taliban and al Qaeda, that no effort was made to condemn the forceful response once launched, and that the Council repeatedly reaffirmed the right to self-defense and expressed support for the international effort to “root out terrorism” as those operations were ongoing.

Beyond the United Nations, the most powerful military alliance in the world articulated its position in even more unequivocal terms. The day after the terrorist attacks, NATO’s North Atlantic Council, consisting of Permanent Representatives of all 19 NATO member states, announced that if the attacks originated from outside the United States, they would be “regarded as

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29. S. C. Res. 1386 U.N. SCOR, 56th Sess., U.N. Doc. S/1386/(2001). Pursuant to the Agreement on Provisional Arrangements in Afghanistan pending the Re-establishment of Permanent Government Institutions (Bonn Agreement of Dec. 5, 2001), ISAF is to assist in maintenance of security in the vicinity of Kabul. ISAF executed a military technical agreement (MTA) with the Interim Administration in Afghanistan on 4 January 2002. For the text of the Bonn Agreement, see <http://www.uno.de/frieden/afghanistan/talks/agreement.htm> (Jun. 18, 2002). The MTA text is at <http://www.operations.mod.uk/isafmta.pdf> (Jun. 18, 2002).

30. S. C. Res. 1390, U.N. SCOR, 57th Sess., U.N. Doc. S/1390/(2002). The operation itself is described by the British Ministry of Defence at <http://www.operations.mod.uk/fingal/> (Jun. 18, 2002).

31. U.N. CHARTER, art. 42. The text reads:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

an action covered by Article 5 of the Washington Treaty.”<sup>32</sup> Article 5, based on Article 51 of the UN Charter, provides for collective self-defense if any of the member states suffers an “armed attack.”<sup>33</sup> Within three weeks, and following briefings in which US officials provided “clear and compelling” evidence that the attacks were not the work of domestic terrorists, the North Atlantic Council made precisely that finding and invoked Article 5.<sup>34</sup> There was no mention of whom the defense, which began five days later, could be directed against. This was a normatively significant omission given that one of the entities the United States and United Kingdom struck on October 7th was a non-state actor, whereas the other was a government supportive of that group, but which did not control it.

Similarly, the Organization of American States invoked the collective self-defense provisions of the Rio Treaty<sup>35</sup> following its finding that “these terrorist attacks against the United States are attacks against all American States.”<sup>36</sup> Australia did likewise, citing Article IV of the ANZUS Treaty in offering to

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32. North Atlantic Treaty Organization (NATO), Press Release No. 124, statement by the North Atlantic Council (Sep. 12, 2001) *available at* <http://www.nato.int/docu/pr/2001/p01-124e.htm>, (Jun. 18, 2002).

33. 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 forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

North Atlantic Treaty, Aug. 24, 1959, art. 5, T.I.A.S. 1964, 34 U.N.T.S. 243.

34. Secretary General Lord Robertson, statement at NATO Headquarters (Oct. 2, 2001) *available at* <http://www.nato.int/docu/speech/2001/s011002a.htm>, (Jun. 18, 2002).

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

Inter-American Treaty of Reciprocal Assistance, Sep. 2, 1947, art. 3.1, 62 Stat. 1681, 21 U.N.T.S. 77.

36. Terrorist Threat to the Americas, Resolution 1, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs Acting as Organ of Consultation In Application of the Inter-American Treaty of Reciprocal Assistance, OEA/Ser.F/II.24, RC.24/RES.1/01 (Sep. 21, 2001).

deploy military forces.<sup>37</sup> Russia, China and India agreed to share intelligence with the United States, while Japan and South Korea offered logistics support. The United Arab Emirates and Saudi Arabia broke off diplomatic relations with the Taliban, and Pakistan agreed to cooperate fully with the United States. Twenty-seven nations granted overflight and landing rights and 46 multilateral declarations of support were obtained.<sup>38</sup>

Once the campaign against al Qaeda and the Taliban began, offers or expressions of support flowed in from many sources. The United Kingdom, as noted, participated directly in the initial strikes, whereas many other states, such as Georgia, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Tajikistan, Turkey and Uzbekistan, provided airspace and facilities. China, Egypt, Russia and the European Union publicly backed the US/UK operations. The Organization for the Islamic Conference simply urged the United States to limit the campaign to Afghanistan,<sup>39</sup> while the Asia-Pacific Economic Cooperation Forum condemned terrorism of all kinds. Neither organization criticized the operations. Australia, Canada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey, and the United Kingdom offered ground troops.<sup>40</sup> By May 2002, the forces of several nations, in particular sizable British, Australian, Canadian and American contingents, were engaged in dangerous “mop-up” actions.<sup>41</sup>

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37. Prime Minister John Howard, Government Invokes ANZUS Treaty—Press Conference (Sep. 14, 2001), available at <http://australianpolitics.com.au/foreign/anzus/01-09-14anzus-invoked.shtml>, (Jun. 18, 2002). See also White House, Fact Sheet: Operation ENDURING FREEDOM Overview (Oct. 1, 2001) available at <http://www.state.gov/sc/rls/fs/2001/5194.htm> (Jun. 18, 2002). Article VI of the ANZUS Treaty provides: “Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.” Security Treaty (Australia, New Zealand, United States), Sep. 1, 1951, art. IV, 3 U.S.T. 3420, 3422, 131 U.N.T.S. 83, 84.

38. Fact Sheet, *supra* note 37.

39. See Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L. J. 41, 49 (2002); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT’L. LAW 237, 248 (2002).

40. Murphy, *Contemporary Practice* 2002, *supra* note 39, at 248. The European Council “confirm[ed] its staunchest support for the military operations . . . which are legitimate under the terms of the United Nations Charter and of Resolution 1368.” Declaration by the Heads of State of Government of the European Union and the President of the Commission: Follow-up to the September 11 Attacks and the Fight Against Terrorism, Oct. 19, 2002, SN 4296/2/01 Rev. 2.

41. Perhaps best illustrative of the coalition nature of the campaign were operations that month from Manas airport, near Bishket, Kyrgyz Republic. Although typically a sleepy airfield, it was hosting US and French fighter-bombers; Australian and French tankers; transport aircraft from Spain, the Netherlands, Denmark and Norway; and a South Korean medical team. *Americans in a Strange Land*, THE ECONOMIST, May 4, 2002, at 41.

Since the counter-terrorism operations began, controversy has surfaced regarding a number of legal issues. Most notable among these has been the detention, treatment and proposed prosecution of the detainees held at US Naval Base Guantanamo Bay. Also a point of contention, albeit more muted, is the extent of collateral damage and incidental injury from the strikes conducted against al Qaeda and Taliban targets. And looming on the horizon is a very divisive issue, i.e., carrying the fight beyond the borders of Afghanistan. Yet, except in legal circles, and particularly the sub-circle of academia, there has been minimum controversy about the lawfulness of the operations conducted within Afghanistan under the *jus ad bellum*. On the contrary, and as illustrated in the events described above, support for the US and coalition military response has been strong. The extent to which this support is grounded in either the *lex lata* or *lex ferenda* is the subject of the remainder of this article.

### *The Normative Framework for the Use of Force*

The UN Charter expresses the basic prohibition on the use of force in international law. It provides, in Article 2(4), that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>42</sup> Within the four corners of the Charter, there are but two exceptions to this prohibition. The first, set forth in Article 39, empowers the Security Council to determine the existence of a threat to the peace, breach of peace or act of aggression and decide what measures are necessary to maintain or restore international peace and security. By Article 42, the Council may turn to military force to resolve these situations in what are generally labeled “enforcement operations.”<sup>43</sup> States would provide troops under a UN flag, as a coalition of the willing or individually. Regional

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42. U.N. CHARTER, art. 2(4). On this article, see Albrecht Randelzhofer, *Article 2*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 72 (Bruno Simma ed., 1995).

43. U.N. CHARTER, art. 42.

organizations are also authorized to engage in “enforcement” activities, but only with the approval of the Security Council.<sup>44</sup>

The second exception is found in Article 51. It provides

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

Thus, states victimized by an armed attack may not only defend themselves, but also receive assistance from others in mounting that defense. They need not await a Council authorization to act, but are required to report actions taken to the Security Council, which may itself determine that it needs to respond in some fashion.

Some commentators assert that additional exceptions to the prohibition on the use of force lie outside the Charter. Most frequently cited is a right to humanitarian intervention, a topic rendered timely by NATO’s 1999 intervention in the Federal Republic of Yugoslavia on behalf of the Kosovar Albanians.<sup>45</sup> However, no such purported exception, or at least none that has

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44. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

U.N. CHARTER, art. 53.1.

45. On this issue, see Adam Roberts, *The So-Called ‘Right’ of Humanitarian Intervention*, 3 Y.B. INT’L HUM. L. 3 (2000).

garnered any significant support, would apply in the case of counter-terrorist operations.<sup>46</sup>

Despite the seeming expansiveness of the Charter prohibition, there has been, as will be discussed, growing support for, or at least a diminishing degree of criticism of, forceful counter-terrorist operations. Tellingly, they are almost always justified in terms of the right to self-defense, rather than as an exception to the general prohibition on the use of force. Perhaps more normatively significant is the fact that acceptance by other states of their legitimacy, when expressed, is also usually framed in self-defense terms. Thus, while it is apparent that such activities are increasingly acceptable politically, it is more appropriate to consider that acceptance as bearing on the evolution of the norms regarding self-defense, than as exemplars of an emergent exception to a prohibition generally characterized as comprehensive in nature.

Returning to the Charter, a more apropos inquiry is whether counter-terrorist operations can fall within the Chapter VII enforcement framework. That international terrorism may constitute a threat to international peace and security, as understood in the Charter use of force context, is unquestionable. For instance, in 1992 the Security Council, reacting to attacks against Pan Am Flight 103 (the *Lockerbie* case) in 1988 and UTA Flight 722 the following year, affirmed “the right of all states . . . to protect their nationals from acts of international terrorism that constitute threats to international peace and security” and expressed concern over Libya’s failure to fully cooperate in establishing responsibility for the acts.<sup>47</sup> The same year, and in response to Libya’s failure to render the requisite cooperation, the Council re-emphasized that “suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of

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46. It has been suggested that the Article 2(4) prohibition does not apply in any event to limited strikes against terrorists based in another country. Such operations, so the reasoning goes, do not “violate the territorial integrity or political independence” of the state in which they occur since they are not directed against that state’s personnel or property, are not intended to affect its political independence in any way, and are limited temporally to the period necessary to eradicate the terrorist threat. Gregory M. Travalio, *Terrorism, International Law, And The Use Of Military Force*, 18 WIS. INT’L L. J. 145, 166–67 (2000), citing, inter alia, Jordan J. Paust, *Responding Lawfully to International Terrorism*, 8 WHITTIER L. REV. 711, 716–7 (1986); JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW 131 (1990); LOUIS HENKIN, HOW NATIONS BEHAVE 141–45 (1979); Jean Kirkpatrick and Allan Gerson, *The Reagan Doctrine, Human Rights and International Law*, in RIGHT V. MIGHT 25–33 (Council on Foreign Relations 1989). This article rejects the approach, favoring, as discussed infra, one that acknowledges an infringement on sovereignty, but balances it against other state rights.

47. S. C. Res. 731, U.N. SCOR, 47th Sess., U.N. Doc. S/731/(1992).

international peace and security.” It further reaffirmed that “in accordance with the principle in Article 2, paragraph 4, of the Charter . . . every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force.” Finally, the Council styled the failure of Libya to cooperate a threat to international peace and security.<sup>48</sup>

Similarly, following the 1998 US Embassy bombings in Nairobi and Dar-es-Salaam, the Security Council condemned “such acts which have a damaging effect on international relations and jeopardize the security of States.” As it did in 1992, the Council also reiterated the duty to refrain from “organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.”<sup>49</sup> The following year, the Council approved Resolution 1269 (1999), which, without being tied to any particular incident, “[u]nequivocally condemn[ed] all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, *in particular those which could threaten international peace and security.*”

Indeed, the Security Council characterized the pre-September 11th situation in Afghanistan as one implicating international peace and security. In October 1999, it “strongly condemn[ed] the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and planning of terrorist acts, and reaffirm[ed] its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security.”<sup>50</sup> It did precisely the same in December 2000. In July 2001, the Council made its position completely unambiguous by determining that “the situation in Afghanistan constitutes a threat to international peace and security in the region.”<sup>51</sup> By September 2001, therefore, it was abundantly clear that international terrorism, as well as allowing one’s territory to be used as a base of terrorist activities, could rise to the level of a “threat to the peace.” This being so, the Council is entitled, pursuant to

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48. S. C. Res. 748, U.N. SCOR, 47th Sess., U.N. Doc. S/748/(1992).

49. S. C. Res. 1189, U.N. SCOR, 53d Sess., U.N. Doc. S/1189/(1998). *See also* S. C. Res. 1044, U.N. SCOR, 51st Sess., U.N. Doc. S/1044/(1996) regarding assassination attempts against the President of Egypt, which styled “the suppression of acts of international terrorism . . . an essential element for maintenance of international peace and security.”

50. S. C. Res. 1267, U.N. SCOR, 54th Sess., U.N. Doc. S/1267/(1999).

51. S. C. Res. 1363, U.N. SCOR, 56th Sess., U.N. Doc. S/1363/(2001).



Article 39, to decide on the appropriate measures to take to “maintain or restore international peace and security,” and such measures include the use of force.

In the aftermath of the attacks, the Security Council labeled them threats to the peace. On September 12, 2001, it “[s]trongly condemn[ed] in the strongest terms the horrifying terrorist attacks which took place on September 11, 2001 in New York, Washington D.C. and Pennsylvania and, regard[ed] such acts, like any act of international terrorism, as a threat to international peace and security.”<sup>52</sup> On September 28, it did so again in nearly identical language.<sup>53</sup> Meeting at the ministerial level on November 12, 2001, the Council issued Resolution 1377, in which it declared “that acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century.”<sup>54</sup> In subsequent resolutions on the situation in Afghanistan, it adopted the practice of reaffirming all previous resolutions, thereby continuing to characterize the September 11 attacks, as well as any other act of international terrorism, as a threat to international peace and security. Such a finding is the *sine qua non* of an authorization for a forceful response pursuant to Chapter VII (with the exception of self-defense).

Thus, it is unquestionable that the Security Council could have elected to mount enforcement operations—either under the UN banner or by granting a mandate to member states or an intergovernmental organization—in an effort to restore and maintain international peace and security.<sup>55</sup> Since the demise of the Cold War, the Council has not hesitated to exercise its enforcement authority, sometimes in quite creative fashion. Chapter VII enforcement operations have been conducted in response to such diverse situations as the Iraqi invasion of Kuwait, the failed-state disorder in Somalia, fighting resulting from the breakup of Yugoslavia and internal violence in Indonesia. It has even, in the case of Operation DENY FLIGHT, authorized a regional security organization, NATO, to maintain a no-fly zone. And when that same organization mounted Operation ALLIED FORCE to stop human rights abuses against the Kosovar Albanians by forces of the Federal Republic of Yugoslavia, ad

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52. S. C. Res. 1368, U.N. SCOR, 56th Sess., U.N. Doc. S/1368/(2001).

53. S. C. Res. 1373, U.N. SCOR, 56th Sess., U.N. Doc. S/1373/(2001).

54. S. C. Res. 1377, U.N. SCOR, 56th Sess., U.N. Doc. S/1377/(2001). In the resolution, it adopted the Declaration on the Global Effort to Counter Terrorism.

55. For an article arguing that there is “a continuing process of attempting to widen customary rights while eroding the effective powers of international organizations,” of which Operation ENDURING FREEDOM is an excellent example, see Eric P.J. Myjer and Nigel D. White, *The Twin Towers Attack: An Unlimited Right to Self-Defence?*, 7 J. CONF. & SEC. L 5 (2002).

bellum-based criticism of the bombing centered on the fact that the NATO members had *not* turned to the Council for authorization to conduct their humanitarian intervention, rather than on the operation itself. Perhaps best illustrative of the flexibility with which the Council has interpreted its Chapter VII authority is creation of international tribunals to try those charged with human rights and humanitarian law violations during both international and non-international armed conflicts.<sup>56</sup>

In fact, the Security Council has used its Chapter VII authority to respond to terrorism in the past by imposing sanctions on both Libya and Sudan for allowing terrorist organizations to operate from their territory.<sup>57</sup> Yet the Security Council was never asked to issue a mandate in response to the 9/11 attacks and in no resolution did it do so. Although some commentators have searched for an implied use of force authorization in the post-attack Security Council resolutions,<sup>58</sup> such efforts are unnecessary. There was no reason for the Council to issue one. The sole basis for conducting Coalition operations was self-defense, which does not require advance Council authorization. All the Charter requires is notice whenever such activities are undertaken. By the terms of Article 51, an operation in self-defense does not deprive the Council of its “right” to respond to the situation, but, by the same token, that fact does not deprive states of their inherent right to exercise individual or collective self-defense, a form of armed self-help.<sup>59</sup>

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56. See, e.g., Statute of the International Tribunal for the Former Yugoslavia, *available at* <http://www.un.org/icty/index.html> (Jun. 18, 2002) [established by S. C. Res. 827, U.N. SCOR, 47th Sess., U.N. Doc. S/827/(1993)]; Statute of the International Tribunal for Rwanda, *available at* <http://www.ict.r.org/> (Jun. 18, 2002) [established by S. C. Res. 955, U.N. SCOR, 50th Sess., U.N. Doc. S/955/(1994)]; Statute of the Special Court for Sierra Leone, *available at* <http://www.sierra-leone.org/specialcourtstatute.html> (Jun. 18, 2002) [established by S. C. Res. 1315, U.N. SCOR, 55th Sess., U.N. Doc. S/1315/(2000)]. Note that the authority of the Council to establish such tribunals was unsuccessfully challenged in an interlocutory appeal before the Appeals Chamber of the International Criminal Court for Yugoslavia. *Prosecutor v. Tadic*, Case IT-94-1-T, Decision on Jurisdiction (Aug. 10, 1995). See George H. Aldrich, *Comment: Jurisdiction Of The International Criminal Tribunal For The Former Yugoslavia*, 90 AM. J. INT’L L. 64 (1996).

57. S. C. Res. 748 U.N. SCOR, 47th Sess., U.N. Doc. S/748/(1992) (Libya); S. C. Res. 1054, U.N. SCOR, 51st Sess., U.N. Doc. S/1054/(1996) (Sudan).

58. See, e.g., Carsten Stahn, *Addendum: Security Council Resolutions 1377 (2001) and 1378 (2001)*, ASIL Insights, Dec., 2001, <http://www.asil.org/insights/insigh77.htm> (Jun. 18, 2002).

59. Report of the International Law Commission, 32d Sess., II(2) Y. B. INT’L L. COMM. 1, 54 (1980).

### *Self-Defense*

As noted, Security Council Resolutions 1368 and 1373 cited the inherent right to self-defense in the specific context of international terrorism. Further, both the United States and the United Kingdom notified the Security Council that they were conducting operations against the Taliban and al Qaeda pursuant to their right of individual and collective self-defense. They received verbal and actual support from an array of states and intergovernmental organizations, and there was no significant criticism of either the general premise that states may respond to international terrorism in self-defense or of its invocation in this particular case. However, the operations that have been mounted against the Taliban and al Qaeda raise a number of issues regarding the precise (or not so precise) parameters of the right to self-defense and the nature of its evolution. Before turning to them though, it is useful to survey several of those surrounding self-defense generally.<sup>60</sup>

One involves ascertaining whether an action constitutes an “armed attack,” for under Article 51 the right to defend oneself surfaces only in the face of such an attack. Not all uses of force rise to this level. For instance, it is arguable that certain operations that do not involve physical force, such as a computer network attack, might be a “use of force” [and thereby contrary to Article 2(4)], but not an “armed attack.”<sup>61</sup> Similarly, the International Court

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60. One important issue is whether or not Article 51 represents the entire body of the law of self-defense. In the Nicaragua case, the International Court of Justice held that the customary international law right of self-defense “continues to exist alongside treaty law,” specifically Article 51 of the Charter. To begin with, the article itself refers to the “inherent right” of individual and collective self-defense. More to the point in this inquiry is the fact that Article 51 leaves unanswered certain aspects of its exercise. As the Court pointed out, for instance, although Article 51 sets a threshold of “armed attack” for vesting of the right, there is no definition of that term. The Charter also fails to articulate the well-accepted requirements that acts of self-defense be proportional and necessary. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, I.C.J. Reports 1986, para. 176 [hereinafter *Nicaragua*]. See also *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, I.C.J. Reports 1996, para. 41 [hereinafter *Nuclear Weapons*]. Customary international law can prove useful in filling voids in the understanding of self-defense. This fact renders the current campaign normatively significant in that pervasive state practice over time, when the product of a sense of legal obligation, matures into received customary international law. The Afghanistan operations therefore represent important data points in the development of the right of self-defense.

61. See Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 896 (1999).

of Justice, applying customary international law, held in the *Nicaragua* case that:

the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its *scale and effects*, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of “armed attack” includes only acts by armed bands where such acts occur on a *significant scale* but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.<sup>62</sup>

It is therefore the “scale and effects” of the act that are determinative in assessing whether an armed attack is taking place such that a right to respond in self-defense vests. By the Court’s standard, acts of a “significant scale” suffice. That said, the Court’s reference to a *mere frontier incident*, as well as the acceptance of actions by *other than* a state’s armed forces, imply that the requisite significance of the scale and effects is rather low. Border incidents are characterized by a minimal level of violence, tend to be transitory and sporadic in nature, and generally do not represent a policy decision by a state to engage an opponent meaningfully. They are usually either “unintended” or merely communicative in nature. By negative implication, it would not take much force to exceed this threshold.

It is possible, then, that a state employing violence will have “used force,”<sup>63</sup> and in doing so committed an international wrong, or even engaged in activity constituting a threat to the peace, breach of the peace or act of aggression (thereby allowing the Security Council to take cognizance of the matter under Chapter VII), but not have conducted an armed attack as that term is

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62. *Nicaragua*, *supra* note 59, para. 195 (emphasis added).

63. Note that Article 2(4) prohibition on the use of force applies only to states.

understood normatively in the context of self-defense.<sup>64</sup> Analogously, actions by non-state actors (the applicability of self-defense in such situations is discussed *infra*) might be criminal in nature and/or represent threats to the peace, breaches of the peace or acts of aggression, but not be of a scale sufficient to implicate the international law right of self-defense. Despite the gaps, however, it would appear that the level of violence necessary to rise to the level of an armed attack is markedly low.

Once an armed attack has been launched, the victim state may respond with force in self-defense. However, customary international law imposes certain requirements on self-defense. In the 19th century *Caroline* case, Secretary of State Daniel Webster set out the standard that has since achieved nearly universal acceptance. According to Secretary Webster, there must be a “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation” and the defensive acts must not be “unreasonable or excessive.”<sup>65</sup> This standard has matured into the requirements that self-defense be necessary and proportionate. The International Court of Justice confirmed their existence in both the *Nicaragua* case<sup>66</sup> and the *Nuclear Weapons* advisory opinion.<sup>67</sup> In the latter case, the Court noted “this dual

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64. In ascertaining whether an armed attack has occurred, resort is sometimes made to the term “aggression,” which was defined in General Assembly’s Definition of Aggression Resolution. However, aggression is not wholly synonymous with armed attack. As Randelzhofer has noted,

The travaux préparatoires of the Definition illustrate that a definition of ‘armed attack’ was not intended. In the special committee that worked out the Definition, the United States, supported by other Western states, strongly opposed tendencies to include the ‘armed attack’. [Cf the statements made by the US representative (U.N. Doc. A/AC.134/S. C. 113, S. C. 105, p. 17 and S. C. 108, p. 43), the representative of Japan (U.N. Doc. A/AC.134/S. C. 112), and the UK (U.N. Doc. A/AC. 134/S. C. 113)]. Like the Soviet Union [see stmt by the Soviet Representative (U.N. Doc. A/AC.134/S. C. 105, p. 16)], they also expressed the view that the notions of ‘act of aggression’ and ‘armed attack’ are not identical [see the statement by the US representative (U.N. Doc. A/AC.134/S. C. 105, p. 17)].

Albrecht Randelzhofer, *Article 51*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 661, 668 (Bruno Simma ed., 1995).

65. Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), 29 *BRITISH AND FOREIGN STATE PAPERS* 1129, 1138 (1840–1).

66. *Nicaragua*, *supra* note 60, para. 176.

67. *Nuclear Weapons*, *supra* note 60, para. 41. See also *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* 905 (1987). Ian Brownlie labels proportionality “the essence of self-defence.” IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 279 n. 2 (1963).

condition applies equally to Article 51 of the Charter,” thereby verifying the applicability of the requirements in both customary and conventional law.<sup>68</sup>

The principle of necessity requires that the resort to force occur only when no other reasonable options remain to frustrate continuation of the armed attack. Obviously, directly reacting with force to an armed attack that is underway would seldom be deemed unnecessary. More normatively complex is the situation where an armed attack has taken place, but for some reason has paused. Perhaps it has achieved its intended objectives. Or cooler heads may have prevailed in the attacking state’s government. Maybe the government that ordered the attack has been ousted and a successor government opposed to the conflict is now in power. Whatever the case, necessity mandates other than forceful responses whenever feasible.

Transposing the standard to terrorism, the question is generally whether law enforcement operations are likely to be sufficient to forestall continuation of the armed attack. Such operations may be undertaken by the victim state, the state where the terrorists are based, or, for that matter, any other state. Similarly, if a state in which the terrorists are located conducts military operations with a high probability of success, there would be no necessity basis for self-defense by the victim state.

The proportionality principle simply requires that the response in self-defense be no more than necessary to defeat the armed attack and remove the threat of reasonably foreseeable future attacks. Yet, it is sometimes wrongly suggested that the size, nature and consequences of the response must be proportional to the size, nature and consequences of the armed attack. As to the size of the attack, it would be absurd to suggest that there must be an equivalency of force between the armed attack and self-defense. On the contrary, the attacker typically seizes the initiative, thereby acquiring an advantage. To successfully defend against an opponent enjoying such an advantage may take much greater force than that used to mount the attack.

Requiring equivalency of nature is equally inappropriate. The International Court of Justice suggested as much by implication in its *Nuclear Weapons* opinion. When assessing the proportionality of the use of nuclear weapons, the Court opined that “(t)he proportionality principle may . . . not in itself exclude

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68. *Nuclear Weapons*, *supra* note 60, para. 41.

the use of nuclear weapons in self-defense in all circumstances.”<sup>69</sup> While representing a non-decision on the issue at hand, the Court had admitted the possibility that use of a nuclear weapon might be legitimate in the face of a non-nuclear attack. Scaled down from the nuclear level, such a criterion remains equally malapropos. By way of illustration, in responding to a maritime attack the most productive tactic may be to disrupt land-based maritime command and control assets. Likewise, in an effort to cause an attacker to desist by altering his cost-benefit calculations, it may be more effective to concentrate on targets of particular value to him rather than those directly involved in the attack.<sup>70</sup> In fact, doing so may well result in a lesser level of violence than would be necessary to definitively defeat the attacking units themselves. Surely international law does not mandate tit-for-tat exchanges.

At first glance, a standard of proportionality vis-à-vis the harm caused (or possible) to the victim might seem more reasonable. In other words, the state engaging in self-defense should not be entitled to cause more harm than it has suffered. But such a standard ignores the fact that international law grants states the right to self-defense in order that they not be rendered helpless in the face of an attack. To suggest that a state cannot use the destructive force necessary to cause an attacker to discontinue (or to prevent future attacks) because the resulting destruction outweighs that the victim state originally suffered is to effectively deprive the victim of the right to self-defense.

Finally, there have been suggestions that self-defense operations are disproportionate if they cause more collateral damage and incidental injury than the civilian casualties and damage to civilian objects originally suffered by the victim state. Such assertions have been made in the context of the current

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69. *Id.*, para. 42. There are, as noted in the discussion of self-defense, competing views of proportionality. India argued that the principle meant a nuclear weapon could not be used except in response to a nuclear attack. But even in such a case, so India argued, the use of nuclear weapons would be *malum in se*. Thus, any nuclear reprisal would be unlawful. Written statement of the Government of India, June 20, 1995 (Legality of the Threat or Use of Nuclear Weapons), at 2–3. Other approaches include proportional to the harm caused, vice technique employed to cause the harm, and proportional to the force needed to cause the other side to desist. Compare the approach of the Netherlands and United States, both of which argued that the legality would be situational, with that of India. Observations of the Government of the Kingdom of the Netherlands, June 16, 1995 (Legality of the Threat or Use of Nuclear Weapons), at 12; Written statement of the Government of the United States of America, June 20, 1995 (Legality of the Threat or Use of Nuclear Weapons), at 30.

70. In a slightly different context, this approach lies at the heart of compellence strategies. On the issue of affecting an enemy’s decision-making, see Jeanne M. Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A. F. L. REV. 143 (2001).

counter-terrorist operations, in which the number of civilian casualties allegedly exceeds the number of fatalities resulting from the 9/11 attacks.<sup>71</sup> Claims of this nature confuse the self-defense proportionality requirement of the *jus ad bellum* with the *jus in bello* proportionality principle that forbids attacks “expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>72</sup> But even by the *in bello* standard, the correct phenomena to compare are incidental injuries/collateral damage and military advantage. The issue is whether or not the military advantage accruing from an attack justifies the civilian casualties and damage to civilian objects; there is no balancing of the civilian suffering on the opposing sides of the conflict.

Restated in the context of terrorism, the proportionality standard allows only that degree of force necessary to fend off a terrorist attack and protect oneself from a future continuation thereof. But the force necessary to achieve this purpose may far exceed that employed in the attack. Terrorists often operate in loose networks from dispersed locations, receiving logistic support in ways intended to mask their nature. Further, they may be fanatical devotees willing to die for their cause; this makes it extremely difficult to meaningfully affect their cost-benefit calculations. Taking them on is a daunting task that typically requires extremely aggressive measures.

Beyond necessity and proportionality, the *Caroline* standard has also often been deemed to impose an imminency requirement, i.e., that the attack be ongoing, or at least so imminent that the victim state has to react almost reflexively to counter it. This requirement has generated enormous debate about precisely when it is that an attack becomes imminent enough to merit

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71. Estimates of civilian casualties vary widely. Compare, e.g., Marc W. Herold, *A Dossier on Civilian Victims of United States' Aerial Bombing of Afghanistan: A Comprehensive Accounting*, Dec. 10, 2001, available at [http://www.cursor.org/stories/civilian\\_deaths.htm](http://www.cursor.org/stories/civilian_deaths.htm) (Jun. 18, 2002) (approximately 4000 by Jan. 1, 2002) with Carl Connetta, *Operation Enduring Freedom: Why a Higher Rate of Civilian Bombing Casualties*, Jan. 18, 2002, available at <http://www.comw.org/pda/0201oef.html#ref7> (Jun. 18, 2002) (1000–13000 over the same period). A Human Rights Watch Report is forthcoming on the subject (unreleased as of Jun. 19, 2002).

72. Protocol Additional (I) to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, arts. 51.5(a) & 57.2(a)(iii) & (b), Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977), reprinted in ADAM ROBERTS & RICHARD GUELFF, *DOCUMENTS ON THE LAWS OF WAR* 419 (3d ed. 2000). On proportionality, see William J. Fenrick, *The Rule of Proportionality and Protocol Additional I in Conventional Warfare*, 98 MIL. L. REV. 91 (1982); Judith G. Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993).



“pre-emptive” action in self-defense. This is the issue of the appropriateness of “anticipatory self-defense.”<sup>73</sup>

Certain commentators who read *Caroline* narrowly suggest a high standard of imminence.<sup>74</sup> Such a reading logically flows from Webster’s “instant, overwhelming, leaving no choice of means, and no moment for deliberation” verbiage. However, the nature of combat has evolved dramatically since the time of the *Caroline* correspondence. In the 21st century, the means of warfare are such that defeat can occur almost instantaneously. Indeed, the linear blitzkrieg strategies of the Second World War appear slow and unwieldy by today’s standards, in which the battlespace is four-dimensional and effects are generated in fractions of a second.

In such an environment, the most apropos approach is to concentrate on the underlying intent of the right to self-defense. Its primary purpose is to afford states a self-help mechanism by which they may repel attackers; it recognizes that the international community may not respond quickly enough, if at all, to an armed attack against a state. Yet, the limitations of necessity, proportionality and imminency play to the community’s countervailing aversion to the use of violence by states. Thus, there is a balancing between the state’s right to exist unharmed and the international community’s need to minimize the use of force, which is presumptively destabilizing.

The most responsive balance between these two interests lies in permitting a use of defensive force in advance of an attack if “the potential victim must immediately act to defend itself in a meaningful way and if the potential aggressor has irrevocably committed itself to attack.”<sup>75</sup> This standard combines an exhaustion of remedies component with a requirement for a reasonable expectation of future attacks—an expectation that is more than merely speculative.

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73. Yoram Dinstein has rejected the terminology “anticipatory” in favor of “interceptive” on the basis that the former term suggests that preventive actions in the face of a “foreseeable” armed attack are legitimate. For Professor Dinstein, the question is whether or not the “other side has committed itself to an armed attack in an ostensibly irrevocable way.” As he explains, “[t]he crucial question is who embarks upon an irreversible course of action, thereby crossing the Rubicon. This, rather than the actual opening of fire, is what casts the die and forms what may be categorized as an incipient armed attack. It would be absurd to require that the defending state should sustain and absorb a devastating (perhaps a fatal) blow, only to prove an immaculate conception of self-defence.” YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 172 (3rd ed. 2001).

74. See, e.g., Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634–35 (1984).

75. Schmitt, *supra* note 61, at 932.

However, what if an attack is “complete” at the time of the proposed response in self-defense? To some extent, this question bears on the necessity requirement; the termination of the initial action may allow for other than forceful resolution of the situation, thereby rendering a use of force in self-defense unnecessary. But the query also touches upon the imminency requirement. Must defense against a future attack be measured by the same standard of imminency as defense against an initial one?

The answer is “yes,” but the mere fact that an entity has attacked once makes it easier to conclude that it will do so again. After all, the “potential” attacker’s mens rea has now been tangibly demonstrated. Much more to the point, it may also be reasonable to conclude that the first attack was part of an overall campaign that in itself constitutes a single extended armed attack. By this understanding, an after-the-fact reaction to an initial attack constitutes a response to an on-going armed attack in which there is but a tactical pause. The approach reflects the reality of combat, in which pauses are the norm, not the exception. They may be necessary for logistical purposes, as a result of weather, due to enemy responses, pending acquisition of further intelligence, to leverage surprise, etc. The question is whether the attack that has occurred is part and parcel of a related series of acts that will continue to unfold.

Treating a series of actions as a unitary whole makes particular sense in the context of terrorism. Terrorist campaigns generally consist of a series of actions that occur periodically over extended periods of time. Moreover, given their nature, they are very difficult to defend against while underway—the potential target is usually only revealed by the attack itself, all of society represents a potential target thus rendering effective on-the-spot defense problematic, the actual violence may occur after the terrorists have left the scene (as in a bombing), the terrorists may be willing to die in the attack, and the identity and location of the terrorists may not be uncovered until after the completion of a particular action. In fact, in the majority of cases it is only after the attack that the victim state can mount its response. Therefore, unless one is willing to deny victim states a consequential right of self-defense against terrorists, it is reasonable to interpret self-defense as permitting the use of force against terrorists who intend, and have the capability to, conduct further attacks against the victim. By this interpretation, it is not the imminency of an isolated action that is relevant, but rather the relationship between a series of attacks. Once the first of the related attacks has been launched, the question becomes whether the victim state has sufficient reliable evidence to conclude that further attacks are likely, not whether those further attacks are themselves imminent.

*Self-Defense Against al Qaeda*

“Armed attacks” by terrorists. That the attacks of 9/11 were of sufficient “scale and effects” to amount to an armed attack is tragically self-evident. However, the self-defense operations launched against the al Qaeda terrorist network in Afghanistan raise a number of other interesting issues. The first is whether an “armed attack” can be carried out by a terrorist group or, stated conversely, whether self-defense can be conducted against one.

Some commentators have suggested that until 9/11, the understanding of self-defense against an armed attack was essentially limited to aggression by states.<sup>76</sup> But Article 51 makes no mention of the nature of the entity that must mount the attack that in turn permits a forceful response in self-defense. This omission is particularly meaningful in light of the fact that Article 2(4)’s prohibition on the use of force specifically applies only to actions by Members of the United Nations, all of which are states. That one key provision on the use of force [2(4)] includes a reference to states, whereas another (51) does not, implies that the latter was not meant to be so limited. This distinction makes sense in the Charter context. The Charter was meant to govern state behavior, but in doing so it both limits what states may do and empowers them. Thus, in 2(4) it restricts a state’s resort to force, but in 51 authorizes it to use force in the face of armed attack. It would make no sense to limit the authorization to attacks by states because at the time the Charter was drafted, that was the greater threat.

Article 39 is similarly devoid of reference to state action when charging the Security Council with responsibility for deciding on the measures to take in the face of a threat to the peace, breach of the peace or act of aggression. In the various resolutions regarding the events of 9/11 (and those resulting from it), the Council characterized the situation as a threat to international peace and security. Moreover, it specifically noted that as a general matter terrorism constituted such a threat. While Article 39 does not directly address self-defense and armed attacks, both it and Article 51 fall within Chapter VII, which is entitled “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.” Considering these related points vis-à-vis

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76. See, e.g., Antonio Cassese, *Terrorism is also Disrupting Some Crucial Legal Categories of International Law*, European Journal of International Law Discussion Forum, available at [http://www.ejil.org/forum\\_WTC/ny-cassese.html](http://www.ejil.org/forum_WTC/ny-cassese.html) (Jun. 18, 2002). See also Giorgio Gaja, *In What Sense Was There an “Armed Attack”?*, European Journal of International Law Discussion Forum, available at [http://www.ejil.org/forum\\_WTC/ny-gaja.html](http://www.ejil.org/forum_WTC/ny-gaja.html) (Jun. 18, 2002).

Articles 39 and 51, it is reasonable to conclude that the entire chapter deals with actions that threaten international peace and security, *whatever the source*.

Moreover, recall that Security Council Resolutions 1368 and 1373, which both cited the inherent right of self-defense, were issued before the counter-terrorist campaign began and at a time when suspicion was focused on an international terrorist group as the culprit. In particular, recall that Resolution 1368 passed the very day after the attack, when no one was discussing the possibility that a state may have been behind the actions. This indicates that the Council's understanding of self-defense includes defending against armed attacks by non-state actors.

State practice in the aftermath of 9/11 further supports the applicability of self-defense to acts by non-state actors. No voices were raised claiming that either the customary right of self-defense or Article 51 was limited to the context of state actions. On the contrary, there were very visible illustrations, such as NATO's invocation of Article V for the first time in its existence, of the fact that most states viewed 9/11 as an armed attack meriting actions in self-defense; in no case was there any suggestion that the right was dependent on identifying a state as the attacker. Lest there be any question on this point, once the self-defense actions commenced against both a state *and* a non-state actor on October 7th, the dearth of controversy over using self-defense against non-state actors persisted.<sup>77</sup> In fact, post-October 7th Security Council resolutions went so far as to urge member states to "root out terrorism, in keeping with the Charter of the United Nations."<sup>78</sup>

*Necessity and the impact of law enforcement alternatives.* It is interesting to note that support for using force was widely evident despite the fact that a logical alternative to self-defense existed—criminal law enforcement.<sup>79</sup> After all, the September 11th terrorist acts constituted a variety of criminal offences under the laws of a number of jurisdictions. Because it allows for universal

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77. Ireland's Ambassador to the United Nations, who was acting as President of the Security Council, noted the unanimous support of the Council following the briefing on the United States' and United Kingdom's operations in self-defense. Christopher S. Wren, *U.S. Advises U.N. Council More Strikes Could Come*, N.Y. TIMES, Oct. 9, 2001, at B5.

78. S. C. Res. 1378, U.N. SCOR, 57th Sess., U.N. Doc. S/1378/(2002); S. C. Res. 1386, U.N. SCOR, 56th Sess., U.N. Doc. S/1386/(2001); S. C. Res. 1390, U.N. SCOR, 57th Sess., U.N. Doc. S/1390/(2002). Specific reference was made to Osama bin Laden and the al Qaeda network in the January resolution.

79. For a pre 9/11 discussion of the alternatives, and the appropriateness of each, see Walter Gary Sharp, *The Use of Armed Force Against Terrorism: American Hegemony or Impotence?*, 1 CHI. J. INT'L L. 37 (2000).

jurisdiction, of particular significance is the offense of crimes against humanity.<sup>80</sup> Further, relevant international law instruments that bear on the incident (or analogous terrorist incidents) include, inter alia, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, and the International Convention for the Suppression of Terrorist Bombings.<sup>81</sup> Although these treaties do not directly criminalize the actions, they often require criminalization at the domestic level and/or set forth mutual law enforcement cooperation and extradition procedures.<sup>82</sup> Under US federal law, the acts violated certain sections of the Antiterrorism Act of 1990<sup>83</sup> and the US statutes implementing the Montreal Convention.<sup>84</sup> Of course, specific elements of the attacks violated the criminal law of the US states (and the District of Columbia) where they occurred, such as the prohibitions on murder and the various forms of accomplice participation.

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80. A crime against humanity involves the commission of certain acts, including murder and “other inhumane acts . . . causing great suffering, or serious injury to body or to mental or physical health” when committed as part of a widespread or systematic attack directed against any civilian population.” Rome Statute for the International Criminal Court, art. 7.1, *reprinted in* 37 I.L.M. 999 (1998), M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL COURT: A DOCUMENTARY HISTORY 39 (1999), *available at* <http://www.un.org/law/icc/statute/rome1948.htm> (Jun. 18, 2002). Widespread consensus exists that the attacks of 9/11 constituted crimes against humanity. For an analysis of its applicability to the 9/11 attacks, see Cassese, *supra* note 76.

81. Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, art. 1, 22 U.S.T. 1641, 10 I.L.M. 133 (1971); Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Montreal Convention on the Suppression of Unlawful Acts Against The Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. § 565, T.I.A.S. No. 7570; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, art. 1, 22 U.S.T. 1641, 860 U.N.T.S. 105, 107. On the applicability, or difficulties thereof, of the treaties to the 9/11 attacks, see Arnold N. Pronto, *Comment*, ASIL INSIGHTS, Sep. 2001, *available at* <http://www.asil.org/insights/insigh77.htm> (Jun. 18, 2002).

82. Professor M. Cherif Bassiouni has convincingly argued that the international law governing this topic is not comprehensive. “[G]overnments have avoided developing an international legal regime to prevent, control, and suppress terrorism, preferring instead the hodgepodge of thirteen treaties that currently address its particular manifestations.” M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT’L L. J. 83 (2002).

83. Antiterrorism Act of 1990, 18 U.S.C. §§ 2331 et seq. (2000).

84. 18 U.S.C. § 32 (2000). See Jordan J. Paust, *Addendum: Prosecution of Mr. bin Laden et al. for Violations of International Law and Civil Lawsuits by Various Victims*, ASIL INSIGHTS, Sep. 21, 2001, *available at* <http://www.asil.org/insights/insigh77.htm> (Jun. 18, 2002). Professor Paust also discusses the possibility of civil suits against the perpetrators.

It is apparent, therefore, that the international community does not view the applicability of a criminal law enforcement regime as precluding a response in self-defense to an armed attack by terrorists. That said, the prospect of law enforcement bears on the issue of whether particular acts of self-defense are necessary. Recall that necessity requires an absence of reasonable alternatives to the defensive use of force. In this context, then, the state may only act against the terrorists if classic law enforcement reasonably appears unlikely to net those expected to conduct further attacks *before* they do so. One must be careful here. There is no requirement for an expectation that law enforcement will fail; rather, the requirement is that success not be expected to prove timely enough to head off a continuation of the terrorist campaign. Of course, if no further attacks are anticipated, the necessity principle would preclude resort to armed force at all, since self-defense contains no retributive element.

In this case, the necessity of resort to force was obvious despite the nearly global law enforcement effort to identify and apprehend members of the al Qaeda network and prevent further attacks. Recall that al Qaeda had been implicated in numerous prior acts of terrorism, most notably the 1998 East African embassy bombings, and was at the time of the 9/11 attacks already the target of a massive international law enforcement effort. Nevertheless, law enforcement failed to prevent the tragic events of September 11th. That is hardly surprising. Al Qaeda is a shadowy, loose-knit terrorist organization in which cells operate with substantial autonomy from scores of countries. The complexity of coordinating law enforcement efforts in the face of widely divergent capabilities, domestic laws and national attitudes was daunting. Further, al Qaeda was headquartered in Afghanistan, then ruled by a government seemingly oblivious to international pressure to deny al Qaeda its main base of operations. Simply put, there was no guarantee that even a law enforcement effort that was proving successful against much of the organization could effectively eradicate the threat of another major attack. At the same time, aggressively attacking the senior leadership and denying it a base of operations promised great returns in alleviating the threat, far greater than would likely be realized by law enforcement in a comparable period. And it must be remembered that the clock was ticking. As the United States and its coalition partners planned their response, warnings of imminent attacks flowed through intelligence channels with great frequency.

*Proportionality.* The second core requirement of self-defense, that of proportionality, also limits when a state may resort to self-defense in responding to a terrorist act. Whereas necessity asks whether the use of force is appropriate, proportionality asks how much may be applied.

Like necessity, proportionality is affected by the prospect of law enforcement activities. Even if armed force is necessary, the extent of that force may be diminished by on-going or future law enforcement activities. In counter-terrorist operations, law enforcement and military force can act synergistically, thereby reducing the level of force that needs to be applied (and affecting its nature). For instance, law enforcement disruption of a number of terrorist cells within an organization may lessen the extent (number, location, etc.) of military strikes that need to be conducted. That is exactly what happened in the aftermath of 9/11. Thousands of potential terrorists were arrested or detained worldwide, thereby dramatically reducing the need to resort to force in countering future terrorism.

Were the strikes against al Qaeda proportionate, particularly in light of the extensive parallel law enforcement campaign? Clearly, they were. Al Qaeda forces in Afghanistan numbered in the thousands and were widely dispersed. Moreover, to be disproportionate, the use of force would have had to be excessive in relation to the degree of force actually needed to prevent *continuation* of al Qaeda's terrorist campaign. As of June 2002, al Qaeda forces remain in the field, periodically engaging coalition forces, albeit in small unit fashion. Further, intelligence sources have reported that mid-level al Qaeda operatives have pulled the organization back together again and are forging alliances with other terrorist groups. The organization reportedly "is as capable of planning and carrying out potent attacks on U.S. targets as the more centralized network once led by Osama bin Laden."<sup>85</sup> So, despite the success of international law enforcement and military efforts, al Qaeda remains a very viable threat, continuing to operate from bases in any number of countries. The group may have been gravely wounded, but it would be highly premature to contend the wounds are fatal.

That said, the increasing effectiveness of international counter-terrorist law enforcement efforts and the fact that the fight may now need to be taken outside the borders of Afghanistan do raise questions regarding the proportionality of future military efforts. Using an extreme example for the sake of illustration, one might question the proportionality of a large scale military operation mounted into an uncooperative state which refuses to hand over a small number of low-level operatives. The action might be necessary in the sense that diplomacy and law enforcement offered slim prospects of taking

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85. David Johnson et al., *Qaeda Lieutenants Form Terror Alliance*, INT'L HERALD TRIBUNE, June 17, 2002, at 1.

them out of the terrorist network, but the extent of the use of force would appear to be more than reasonably required to accomplish the objective.

*Imminency.* As noted above, it would make little sense to evaluate each terrorist attack individually in every case. Doing so would deny the reality that most conflict, even conventional conflict between states, is a series of engagements, with contact repeatedly made and broken. This being so, in many situations it may be reasonable to conclude that an attack was merely the opening shot in an overall campaign that in itself constitutes a single on-going armed attack.

That is exactly the case with regard to the 9/11 attacks. Al Qaeda had been involved in terrorism against US assets for a decade, terrorism that resulted in extensive property damage, loss of life and injury. Although there was often a hiatus between attacks, they did occur with some regularity. In light of this record, it is absurd to suggest al Qaeda would terminate the campaign after achieving its most significant victory; logic would impel just the opposite conclusion. Additionally, not only did al Qaeda's own statements style continued attacks as a religious duty, one of the organization's central objectives, withdrawal of US and coalition forces from Islamic territory, remained unfulfilled. Since 9/11, multiple al Qaeda related plots have been uncovered or foiled, most recently that involving use of a "dirty (radiological) bomb" against a US population center.<sup>86</sup> Thus, it is not necessary to speculate on whether further attacks were likely and imminent on October 7th; they clearly were (and remain so).

*Cross-border counter-terrorist operations.* While it is appropriate to extend self-defense to acts committed by non-state actors, and though the availability of criminal law enforcement responses does not preclude doing so, since non-state actors possess no territory as a matter of international law (they may in fact), can the victim state enter another state's territory in order to conduct self-defense operations? The answer requires balancing the rights and duties of the respective states involved. The state in which the terrorists are located has a right of territorial integrity. This well-established customary international law right creates corresponding duties in other states. For instance, Article 2(4) of the UN Charter prohibits the threat or use of force against the "territorial integrity . . . of any State."<sup>87</sup> Commentators generally agree that

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86. On the continuing operations of the organization, see David Johnston et al., *Qaeda's New Links Increase Threats From Far-Flung Sites*, N.Y. TIMES, June 16, 2002, at 1.

87. U.N. CHARTER, 2(4).



the prohibition extends to any non-consensual penetration of a state's territory, not simply those intended to seize parts of that territory.<sup>88</sup> Non-compliance may amount to an act of aggression.<sup>89</sup>

However, the state victimized by terrorism has a right to self-defense. No one would dispute that a state forfeits a degree of its right to territorial integrity when it commits acts that vest the right to self-defense in another state, at least to the extent necessary for self-defense to be meaningful. Thus, an armed attack by state A may justify the crossing of state B's military forces into state A to put an end to the attack.

Lest the right to self-defense be rendered empty in the face of terrorism, in certain circumstances the principle of territorial integrity must yield to that of self-defense against terrorists. Putting aside the issue of when the acts of terrorists may be ascribed to a state, thereby justifying self-defense directly against that state, the balancing of self-defense and territorial integrity depends on the extent to which the state in which the terrorists are located has complied with its own responsibilities vis-à-vis the terrorists.

As John Bassett Moore noted in the *Lotus* case, "it is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people. . . ."<sup>90</sup> This principle has been reflected in numerous pronouncements on terrorism. For instance, the 1970 Declaration on Friendly Relations urges each state to "refrain from . . . acquiescing in organized activities within its territory directed toward

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88. Randelzhofer, Article 2(4), *supra* note 42, at 117. See also Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations:

Every State has a duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., annex, U.N. Doc. A/Res/2625 (1970), reprinted in 65 AM. J. INT'L L. 243 (1971) and in KEY RESOLUTIONS OF THE UNITED NATIONS GENERAL ASSEMBLY, 1946-1996 (Dietrich Rauschnig, Katja Wiesbrock & Martin Lailach eds., 1997), at 3 [hereinafter Declaration on Friendly Relations]. The resolution was adopted by acclamation.

89. Aggression is the use of "armed force by a State against the . . . territorial integrity . . . of another State." Definition of Aggression, annex, art. 1, G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975), 13 INT'L LEG. MAT'L 710 (1974). Additionally, pursuant to Article 3, aggression includes "[t]he invasion or attack by the armed forces of a State of the territory of another State. . . ."

90. S.S. *Lotus* (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 4, 88 (Moore, J., dissenting).

the commission of [terrorist acts in another state],”<sup>91</sup> a proscription echoed in the 1994 Declaration on Measures to Eliminate Terrorism.<sup>92</sup> In the context of the instant case, recall the 1999, 2000 and 2001 Security Council resolutions condemning the Taliban’s willingness to allow territory they controlled to be used by al Qaeda.

Should a state be unable or unwilling to comply with this obligation, the victim state is then permitted to enter the territory of the state where the terrorists are located for the limited purpose of conducting self-defense operations against them. This is only logical, since the unwillingness or inability of state A to comply with the requirements of international law cannot possibly be deemed to deprive state B of its authority to defend itself against an armed attack, the seminal right of the state-centric international normative architecture. Of course, all requirements of self-defense must be met. There must be an on-going armed attack (or armed campaign), no reasonable alternative to the penetration of state A’s territory for the purpose of using force against the terrorists can exist, and the force used has to be limited to that necessary to accomplish the defensive objectives. Once those objectives are attained, state B must immediately withdraw because at that point there is no right of self-defense to justify its “violation” of state A’s territorial integrity. Further if, during the self-defense operations, state A takes actions that comply with its obligation to deny use of its territory to terrorists, state B’s right of self-defense will diminish accordingly. Finally, state A may not interfere with the self-defense operations, as state B is simply exercising a right under international law. Since state B’s use of force is lawful, any other state’s use of force against it would constitute an “armed attack.”<sup>93</sup>

In fact, there have been numerous instances of states exercising this self-help right of self-defense. In the aftermath of the coalition operations against

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91. Declaration on Friendly Relations, *supra* note 88.

92. Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60, U.N. GAOR 6th Comm., 49th Sess., 84th plen. mtg., U.N. Doc. A/49/743 (1994); Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, G.A. Res. 51/210, U.N. GAOR 6th Comm., 51st Sess., 88th plen. mtg., U.N. Doc. A/51/631 (1996).

93. Professor Robert Turner perceptively offered an analysis along these lines in the aftermath of the September 11th attacks. Robert F. Turner, *International Law And The Use Of Force In Response To The World Trade Center And Pentagon Attacks*, JURIST, available at <http://jurist.law.pitt.edu/forum/forumnew34.htm> (Jun. 18, 2002). On the subject of self-help, see also Guy B. Roberts, *Self-Help in Combating state-Sponsored Terrorism: Self Defense and Peacetime Reprisals*, 19 CASE W. RES. J. INT’L L. 243 (1987); Franz W. Paasche, *The Use of Force in Combating Terrorism*, 25 COLUM. J. TRANSNATL L. 377 (1987); Oscar Schachter, *The Extra-Territorial Use of Force against Terrorist Bases*, 11 HOUS. J. INT’L L. 309 (1989).

al Qaeda, the most often cited has been US General John Pershing's unsuccessful 1916 foray into Mexico after Pancho Villa and his bandits killed 18 Americans in New Mexico. At the time, Mexico was in the midst of a revolution and, thus, incapable of effectively controlling Villa. Note that the Mexican government asked the US forces to withdraw three months after they entered Mexican territory, a demand refused on the basis of Mexico's inability to police Villa. Similarly, during the Vietnam conflict, the United States conducted aerial and ground attacks against enemy forces that had sought refuge in Cambodia. Although criticized widely, such criticism was arguably more the product of general anti-war fervor, than concern over the legality of the operations.<sup>94</sup> In another example, Israel conducted airstrikes against PLO facilities in Tunisia during 1985 on the grounds that the PLO was using Tunisia as a base of operations for terrorist attacks on Israel—with the acquiescence of the Tunisian government.<sup>95</sup> The Security Council, with the United States abstaining, condemned the bombings as an “act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct” in a 14–0 vote.<sup>96</sup> Whether concern centered on the alleged violation of international law or on the fact that the operation posed a “threat to the peace and security in the Mediterranean region”<sup>97</sup> (and on general hostility to Israel) remains an open question.

Political unacceptability instead of normative concern also drove most international criticism of South Africa's operations against African National Congress groups based in Angola during the 1970s.<sup>98</sup> Similarly, the international community was unsupportive as Turkey mounted regular incursions into Northern Iraq against Kurdish terrorists throughout the 1990s. As in the South African case, opposition arguably was driven by factors other than the legal acceptability of crossing into Iraq. At the time there was de minimus concern over violation of Iraq's territorial integrity, as Iraqi forces and

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94. On the Cambodian incursions, see Timothy Guiden, *Defending America's Cambodian Incursion*, 11 ARIZ. J. INT'L & COMP. L. 215 (1994); John Fried, *United States Military Intervention in Cambodia in the Light of International Law*, reprinted in 3 THE VIETNAM WAR AND INTERNATIONAL LAW 100 (Richard Falk, ed. 1972); *International Law and Military Operations Against Insurgents in Neutral Territories*, 68 COLUM. L. REV. 1127 (1968).

95. See statement of [then] Israeli Ambassador to the UN, Benjamin Netanyahu, U.N. Doc. S/PV.2615, at 86–7 (Oct. 4, 1985).

96. S. C. Res. 573, U.N. SCOR, 40th Sess., U.N. Doc S/573/(1985).

97. *Id.*

98. See W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 53 (1999); G.A. Res. 45/150, U.N. GAOR, 3d Comm., 45th Sess., 69th plen. mtg., U.N. Doc. A/Res/45/150 (1990).

government officials were already excluded from the area due to their suppression of the Kurds. Rather, criticism most likely derived from irritation over interference with the relief and no-fly operations in northern Iraq<sup>99</sup> and concern over a track record of human rights abuses against the Kurds during Turkish military operations conducted in Southeastern Turkey.<sup>100</sup>

Most recently, the United States launched raids on terrorist facilities in Afghanistan and Sudan following the 1998 bombings of the US embassies in Nairobi and Dar-es-Salaam.<sup>101</sup> Although the cruise missile strike against the al Shifa pharmaceutical plant in Sudan (it was allegedly involved in chemical weapons production) was criticized, most censure surrounded the alleged invalidity of the claim of a connection between the plant and international terrorism, not the violation of Sudanese territory;<sup>102</sup> the attacks against al Qaeda training bases in Afghanistan evoked little condemnation. Nor did the 1999 pursuit of Hutu guerrillas in the Democratic Republic of Congo by Ugandan forces following a massacre of foreign tourists,<sup>103</sup> although the internationalization of the conflict did draw international concern and resulted in the dispatch of a peacekeeping force by the Security Council.<sup>104</sup>

Of greatest normative relevance on the issue of cross-border counter-terrorist operations is the famous *Caroline* incident cited above in regard to the core requirements of self-defense.<sup>105</sup> Recall the facts. In 1837 a rebellion was underway in Canada against the British. Some of the rebels were based in the United States. The British attempted to negotiate with the American side, in particular the Governor of New York, to no avail. At that point they

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99. First Operation PROVIDE COMFORT, later NORTHERN WATCH. The author was staff judge advocate of the operations during this period.

100. See, e.g., Department of State, 1999 Country Reports on Human Rights Practices: Turkey, available at [http://www.state.gov/www/global/human\\_rights/1999\\_hrp\\_report/turkey.html](http://www.state.gov/www/global/human_rights/1999_hrp_report/turkey.html) (Jun. 18, 2002).

101. Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559 (1999); Leah M. Campbell, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067 (2000).

102. On the confusion surrounding whether the facility was involved in terrorist activities, see Vernon Loeb, *U.S. Wasn't Sure Plant Had Nerve Gas Role; Before Sudan Strike, CIA Urged More Tests*, WASH. POST, Aug. 21, 1999, at A1.

103. Reisman, *supra* note 98, at 54.

104. In S. C. Res. 1291, U.N. SCOR, 55th Sess., U.N. Doc. S/1291/(2000), the Council authorized the United Nations Organization Mission in the Democratic Republic of the Congo. For details and background, see [http://www.un.org/Depts/dpko/monuc/monuc\\_body.htm](http://www.un.org/Depts/dpko/monuc/monuc_body.htm) (Jun. 18, 2002).

105. On the *Caroline* incident in the context of the issue at hand, see Reisman, *supra* note 98, at 42–47. On the facts, see R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

mounted a small raid (80 men) into the United States where they seized the *Caroline*, a vessel used by the rebels and their supporters. The ship was set ablaze and sent over Niagara Falls.

The incident generated a fascinating correspondence over the next several years between the British Foreign Office and the United States Department of State. The issue in dispute, though, was not whether the British could legitimately cross into the United States for the limited purpose of attacking the rebels. Instead, controversy focused on the *circumstances* permitting them to do so and how. As Lord Ashburton, the Foreign Minister, wrote to his US counterpart, Daniel Webster:

I might safely put it to any candid man, acquainted with the existing state of things, to say whether the military commander in Canada had the remotest reason, on the 29th day of December, to expect to be relieved from this state of suffering by the protective intervention of any American authority. How long could a Government, having the paramount duty of protecting its own people, be reasonably expected to wait for what they had then no reason to expect?<sup>106</sup>

Ashburton's premise that crossing the border was proper in the absence of effective action by the authorities where the rebels were based went unchallenged, with Webster simply asserting that the action had been excessive in the particular circumstances of the case.<sup>107</sup>

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106. Letter from Lord Ashburton to Daniel Webster (July 28, 1842), 30 BRITISH AND FOREIGN STATE PAPERS 195.

107. A necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of The United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the *Caroline* was impracticable, or would have been unavailing; it must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this, the Government of The United States cannot believe to have existed.

Jennings, *supra* note 105, at 89 (quoting Daniel Webster).

Therefore, quite aside from the trinity of self-defense criteria, *Caroline* supports the principle that a state suffering attack from non-state actors in another may, after seeking assistance from that state (assuming the requested state is capable of doing so), enter its territory for the limited purpose of preventing further attacks, although its actions must be necessary and proportional. State practice seems guardedly consistent. Objections to such limited cases as have occurred are usually attributable to political, vice normative, motivations. Of course, in fairness, the same could be said regarding the relative absence of criticism when penetrating the territory of ostracized states, such as Afghanistan, in operations against organizations which enjoy no consequential support from members of the international community, such as al Qaeda. The better interpretation, however, is that, as a general matter, state practice, beginning with the *Caroline* case, supports the approach posited.

Do US and coalition operations in Afghanistan comport with this standard? Recall the Security Council's pre and post 9/11 demands that the Taliban cease allowing territory they controlled to be used as a terrorist base and that they cooperate in bringing Osama bin Laden and al Qaeda to justice. Recall also the US demands that the Taliban unconditionally surrender bin Laden and other al Qaeda leaders and grant the United States sufficient access to terrorist bases to ensure their inoperability. In reply, the Taliban regime first stated it wished to see the evidence linking bin Laden to the 9/11 attacks.<sup>108</sup> As the likelihood of US strikes drew closer, the Taliban indicated that they had Osama bin Laden and might be willing to negotiate, possibly about turning him over to a third country. The United States again stated that only an unconditional surrender of bin Laden and other al Qaeda leaders would suffice.<sup>109</sup> After the coalition attacks commenced, the Taliban renewed the offer. However, the US administration maintained its no-negotiation stance.<sup>110</sup>

Were the US demands, particularly in that they were unconditional, sufficient? It might be argued that no demand at all was necessary, for on multiple occasions the Security Council had insisted that the Taliban comply with the

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108. Murphy, *Contemporary Practice* 2002, *supra* note 39, at 244. The situation caused divisions within the Taliban and Afghan religious leadership. Clearly, unanimity did not exist as to how to respond to the US demands. John F. Burns, *Afghans Coaxing bin Laden, But U.S. Rejects Clerics' Bid*, N.Y. TIMES, Sep. 21, 2001, at A1.

109. Murphy, *Contemporary Practice* 2002, *supra* note 39, at 244.

110. Elisabeth Bumiller, *President Rejects Offer By Taliban For Negotiations*, N.Y. TIMES, Oct. 15, 2001, at A1.

measures sought by the United States. Consider, for instance, the following unambiguous language in Security Council Resolution 1333 (2000):

[The Security Council] *Demands* . . . that the Taliban comply without further delay with the demand of the Security Council in paragraph 2 of resolution 1267 (1999) that requires the Taliban to turn over Usama bin Laden to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice;

*Demands further* that the Taliban should act swiftly to close up all camps where terrorists are trained within the territory under its control, and calls for the confirmation of such closures by the United Nations, inter alia, through information made available to the United Nations by Member States in accordance with paragraph 19 below and through such other means as are necessary to assure compliance with this resolution. . . .<sup>111</sup>

Extended non-compliance with the Security Council demands arguably provided a good faith basis for determining that further exhortations would prove fruitless. However, the Council's insistence was made in the context of cooperative law enforcement (albeit in the face of a threat to international peace and security) rather than self-defense. Therefore, the most defensible position is that while non-compliance strengthened the political case for action by the Security Council under Chapter VII, a separate demand was required for action by a state pursuant to the right to self-defense.

As noted, the United States made one. Unconditionality was certainly reasonable in the circumstances. The United States had just suffered a horrendous terrorist attack, with every reason to believe more were imminent. The Taliban request for evidence of al Qaeda's complicity might have made sense but for the previous Security Council resolutions, which clearly rendered the request superfluous. Moreover, the United States government, which had been conducting talks with the Taliban since 1996 over the presence of al Qaeda in Afghanistan, had previously provided evidence of al Qaeda responsibility for the 1998 bombings of the two US embassies in East Africa—at the request of Taliban officials.<sup>112</sup> The provision of that evidence, and the continuing talks, had no discernible affect on the Taliban's continued harboring of the terrorist organization.

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111. S. C. Res. 1333, U.N. SCOR, 55th Sess., U.N. Doc. S/1333/(2000).

112. UK Press Release, *supra* note 9, at paras. 14–15.

Additionally, unless the Taliban regime controlled al Qaeda absolutely, which it did not, post 9/11 negotiations would merely have extended the window of vulnerability for the United States. If the right to self-defense was to be meaningful in these circumstances, the United States needed to act as quickly as possible. This meant that either the Taliban should have complied with the demands promptly or acknowledged they lacked the capability to do so and stood aside as the United States entered Afghanistan to engage al Qaeda.

In other words, the adequacy of a request to the state in which terrorists are located, as well as the sufficiency of the response thereto, must be assessed contextually. Have there been prior requests? For what? What is the nature of relations between the requesting and requested state? Between the terrorist group and the state in which it is located? What capability does the requested state have to counter or control the terrorists? What is its track record in doing so? What are the nature and the imminency of the threat by the terrorists against the requesting state? Under the circumstances, the US decision to attack al Qaeda on October 7th, despite Taliban quibbling over the US request to turn over members of the organization, was reasonable and legally defensible.

There are two other circumstances in which it is unquestionable that one state can enter the territory of another to conduct defensive counter-terrorist operations. The first is upon invitation, though any such operation would have to comply with the relevant provisions of human rights and humanitarian law, as well as any conditions imposed by the host state.<sup>113</sup> Obviously, that did not occur in the case of Afghanistan. More problematic is the situation in which the terrorist group acts on behalf of the state such that its attacks can be deemed those of the state itself. As in traditional armed attacks by a state actor, the sole question regarding the penetration of the attacker's territory is whether cross-border operations are necessary, proportional and in response to an armed attack. To the extent the state could be attacked in self-defense, so too can the terrorist group that actually executed the armed attack. The issue of Taliban support for al Qaeda is considered in the following section.

Summarized, the campaign against al Qaeda in Afghanistan is a legitimate exercise of the right to individual and collective self-defense. The right extends to armed attacks from whatever source, the 9/11 attacks met the threshold requirement of being "armed," crossing into Afghanistan was appropriate

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113. On the conduct of forces in another country, see *THE HANDBOOK OF THE LAW OF VISITING FORCES* (Dieter Fleck ed., 2001).



once the Taliban failed to police the territory they controlled, the attacks were necessary and proportionate, and they occurred in the face of an imminent, credible continuation of an al Qaeda campaign that had been underway for a period measured in years.

### *Operations Against the Taliban*

In his address to a Joint Session of Congress on 20 September, President Bush uttered his ominous warning that “[e]ither you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.”<sup>114</sup> When the attacks began, the United States cited the Taliban’s decision to “allow the parts of Afghanistan that it controls to be used by [al Qaeda] as a base of operation,” a policy which the Taliban refused to alter despite repeated entreaties to do so, as justification for their actions.<sup>115</sup> It should be noted that in June 2001 the United States had already warned the Taliban regime that it would be held responsible for any terrorist acts committed by terrorists that it was sheltering.<sup>116</sup>

The United Kingdom has released the most extensive information to date regarding the relationship between al Qaeda and the Taliban.<sup>117</sup> Al Qaeda provided troops, weapons and financing to the Taliban for its conflict with the Northern Alliance. The organization was also reportedly involved in the planning and execution of Taliban operations, assisted in training Taliban forces, and had representatives assigned to the Taliban command and control structure. Additionally, al Qaeda was a source of “infrastructure assistance and humanitarian aid.”<sup>118</sup> In return, the Taliban granted al Qaeda safe haven and a base for its terrorist training camps; essentially, al Qaeda enjoyed free rein to do as it pleased in Taliban controlled territory. Further, the two groups cooperated closely in the drug trade, with the Taliban providing security for al Qaeda’s drug stockpiles.<sup>119</sup> Was this relationship such that conducting

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114. President George W. Bush, Address Before a Joint Session of the Congress, *supra* note 16, at 1349.

115. US Letter, *supra* note 22.

116. UK Press Release, *supra* note 9, para. 16.

117. *See id.* generally. *See also* the update to the UK press release. United Kingdom Press Release, 10 Downing Street Newsroom, *Responsibility for the Terrorist Atrocities in the United States*, Nov. 14, 2001, available at <http://www.pm.gov.uk/news.asp?NewsId=3025> (Jun. 18, 2002).

118. UK Press Release, *supra* note 9, para. 12.

119. *Id.*, para. 13.

military operations against the Taliban on October 7th was a legitimate exercise of the use of force by the United States and United Kingdom?

*State Responsibility.* Unfortunately, there has been much confusion surrounding the relationship between Taliban obligations and the attacks mounted against them on October 7th. In the discussion of self-defense against al Qaeda, it was noted that the Taliban had a duty to keep their territory from being used as a base of terrorist operations. Failure to comply with that duty in part justified penetrating Afghan territory when attacking al Qaeda, albeit only to conduct operations against al Qaeda. If the Taliban were incapable of stopping al Qaeda, then they would incur no responsibility for their failure to address the situation.

On the other hand, if capable, but unwilling, the Taliban would be responsible for their failure under the international law of state responsibility.<sup>120</sup> The duty to desist from assisting terrorists in any way is manifest. In 1996 the General Assembly articulated this duty in the Declaration on the Strengthening of International Security. Specifically, it stated that:

States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain from organizing, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts.<sup>121</sup>

In doing so, it echoed earlier exhortations in the 1970 Friendly Relations Declaration<sup>122</sup> and its 1965 progenitor, Resolution 2131 (1965).<sup>123</sup> Similar

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120. On the issue of state responsibility, see Gregory Townsend, *State Responsibility for Acts of De Facto Agents*, 14 ARIZ. J. INT'L & COMP. L. 635 (1997); Ian Brownlie, *International Law and the Activities of Bands*, 7 INT'L & COMP. L. QTRLY 712 (1958).

121. Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60, U.N. GAOR, 6th Comm., 49th Sess., 84th plen. mtg., U.N. Doc. A/49/743 (1994); Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, G.A. Res. 51/210, U.N. GAOR, 6th Comm., 51st Sess., 88th plen. mtg., U.N. Doc. A/51/631 (1996).

122. "Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force." Declaration on Friendly Relations, *supra* note 88, prin. 1.

123. "No state shall organize, assist, foment, finance, incite, or tolerate subversive, terrorist or armed activities directed toward the violent overthrow of another regime. . . ." G.A. Resolution 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 107, U.N. Doc. A/6221 (1965).

prohibitions can be found in Article 2(4) of the International Law Commission's 1954 Draft Code of Offenses against the Peace and Security of Mankind.<sup>124</sup>

Case law supports these declarations. Most notably, in the *Corfu Channel* case the International Court of Justice held that "every State has an obligation to not knowingly allow its territory to be used in a manner contrary to the rights of other States."<sup>125</sup> *Corfu Channel* involved an incident in which two British destroyers struck mines in Albanian waters while transiting the Corfu Strait in 1946. Though the evidence was insufficient to demonstrate that the Albanians laid the mines, the Court nevertheless held that they had the obligation to notify shipping of the danger posed by the mines. Albania's failure to do so represented an internationally wrongful act entailing the international responsibility of Albania. Other case law and arbitral decisions are in accord.<sup>126</sup>

Applying the *Corfu Channel* principle to the case of terrorism, states that permit their territory to be used as a base of operations for terrorist acts against other countries have committed an international wrong. There is no question that Taliban acquiescence in allowing Afghan territory to be used by al Qaeda,

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124. The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another state, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.

Draft Code of Offenses Against the Peace and Security of Mankind, art. 2(4), available at <http://www.un.org/law/ilc/texts/offfra.htm> (Jun. 18, 2002).

125. *Corfu Channel Case (Merits)*, 1949 I.C.J. Rep. 4, 22.

126. See discussion in JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 77–85 (2002). Article 2 of the International Law Commission's Articles on State Responsibility (adopted by the Commission in 2001) provides that "There is an internationally wrongful act of a State when conduct consisting of an act or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State." International Law Commission, *Articles on State Responsibility*, reprinted in *id.* at 61. These elements have been articulated in a number of tribunals. Among those referenced specifically by Professor Crawford are: *Phosphates in Morocco*, Preliminary Objections, 1938, P.C.I.J., Series A/B, No. 74, p. 10; *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, p. 3; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, I.C.J. Reports 1986, p. 14, 117–118, para. 226; *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, 54, para. 78.

assuming arguendo that their conduct is attributable to the “State” of Afghanistan,<sup>127</sup> created responsibility under international law for that wrongful act. Does this responsibility justify the October 7th attacks by the United States and the United Kingdom?

Despite occasionally loose discussion of the subject in the aftermath of 9/11, the existence of state responsibility for an international wrong does not justify the use of force in self-help to remedy the wrong. Traditional reparations for an international wrong come in the form of restitution, compensation or satisfaction.<sup>128</sup> It is also permissible to take countermeasures in response to an internationally wrongful act.<sup>129</sup> Countermeasures are “measures which would otherwise be contrary to the international obligations of the injured State vis-à-vis the responsible State if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation.”<sup>130</sup> Various requirements, such as the existence of an on-going wrong,<sup>131</sup> proportionality of the countermeasure to the injury suffered,<sup>132</sup> and a call on the state committing the wrong to comply with its obligations<sup>133</sup> apply to the taking of countermeasures.

But it is generally agreed that countermeasures employing armed force are prohibited.<sup>134</sup> Article 50 of the Articles on State Responsibility specifically provides that “Countermeasures shall not affect . . . the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.”<sup>135</sup> This provision tracks the holding in *Corfu Channel*. There the

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127. The Commentary to the ILC Articles on State Responsibility describes a “state” as “a real organized entity, a legal person to act under international law.” Crawford, *supra* note 126, at 82 (para. 5 of commentary to art. 2).

128. Articles on State Responsibility, *supra* note 126, arts. 34–37. Restitution is reestablishing “the situation which existed before the wrongful act was committed” (art. 35); compensation is covering any financially assessable damage not made good by restitution (art. 36); satisfaction is “an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality” that responds to shortfalls in restitution and compensation when making good the injury caused (art. 37).

129. *Id.*, art. 49.1.

130. Crawford, *supra* note 126, at 281.

131. Articles on State Responsibility, *supra* note 126, art. 52.3(a).

132. *Id.*, art. 51.

133. *Id.*, art. 52.1.

134. Certain countermeasures employing force are permissible. An example would be sending agents into a state to apprehend a terrorist who that state wrongfully refused to extradite. Mary Ellen O’Connell, *Lawful Responses to Terrorism*, JURIST, available at <http://jurist.law.pitt.edu/forum/forumnew30.htm> (Jun. 18, 2002).

135. Articles on State Responsibility, *supra* note 126, art. 50.1(a).

International Court of Justice held that Albania's failure to comply with its responsibility did not justify the British minesweeping of the Strait, an act that therefore constituted a violation of Albanian sovereignty. Thus, breach of the obligation not to allow Afghanistan to be used as a base for terrorist activities did not, alone, justify use of force against the Taliban.

An identical analysis would apply in assessing whether the actions of al Qaeda in conducting the 9/11 (and other) attacks can be attributed to the Taliban under the law of state responsibility. The International Law Commission's Articles on State Responsibility set forth the standards for imputing an armed group's acts to a state for the purpose of assessing state responsibility. Two are relevant here.

Article 8 provides that the "conduct of a person or group shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."<sup>136</sup> This was the issue in the *Nicaragua* case, where Nicaragua argued that the United States was responsible under international law for violations of humanitarian law committed by the Contras, the anti-Sandinista rebel group it supported. After finding that the United States had provided "subsidies and other support", the Court held that:

United States participation, even if preponderant or decisive in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, . . . for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent state over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. . . . For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>137</sup>

Aside from the Contras, certain individuals, not of US nationality, were paid by the United States and directly instructed and supervised by US

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136. *Id.*, art. 8.

137. Nicaragua, *supra* note 60, para. 115.

military and intelligence personnel. For instance, they carried out such operations as mining Nicaraguan ports. The Court easily found their actions imputable to the United States, either because they were paid and instructed by the US, and were therefore agents thereof, or because US personnel had “participated in the planning, direction, support and execution” of particular operations.<sup>138</sup>

The evidence released to date regarding Taliban ties to al Qaeda does not suggest that al Qaeda was under the direction or control of the Taliban in conducting the 9/11 attacks or any other acts of international terrorism. In fact, some have suggested precisely the opposite—that it was the Taliban that was dependent on al Qaeda, both financially and militarily. While that may be a more accurate characterization, such dependency bears little direct connection to al Qaeda’s international terrorist campaign.

Article 11 sets forth a second possibly relevant standard. It provides that “[c]onduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct as its own.”<sup>139</sup> This principle lay at the core of the International Court of Justice’s *Diplomatic and Consular Staff* case.<sup>140</sup> There the Court held that the Iranian government violated its responsibility to prevent the 1979 seizure by militant students of the US Embassy in Tehran and subsequently failed to meet its obligation to act promptly in ending the seizure.<sup>141</sup> Following the takeover, the Iranian government, including its leader, the Ayatollah Khomeini, expressed approval of the student actions. Indeed, in a decree issued within two weeks of the seizure, Khomeini declared that “the hostages would remain as they were until the U.S. had handed over the former Shah for trial” and that “the noble Iranian nation will not give permission for the release . . . until the American Government acts according to the wish of the nation.”<sup>142</sup> For the International Court of Justice, “[t]he approval given . . . by the Ayatollah Khomeini and other organs of the Iranian state, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.”<sup>143</sup>

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138. *Id.*, para. 86.

139. Articles of State Responsibility, *supra* note 126, art. 11.

140. United States Diplomatic and Consular Staff in Tehran (Iran v. USA), 1980 I.C.J. 3.

141. According to the court, Iranian authorities were “fully aware of their obligations to protect the premises of the U.S. Embassy and its diplomatic and consular staff from any attack [,] . . . had the means at their disposal to perform their obligations [but,] . . . completely failed to comply.” *Id.*, para. 68.

142. *Id.*, para. 73.

143. *Id.*, para. 74.

Therefore, while the Iranian government breached its own obligations when the Embassy was taken, it became responsible for the seizure itself (or at least the continuing occupation thereof) when it supported the student actions and took steps to continue the occupation.

Are the Taliban responsible for the 9/11 attacks under the principle of attribution of state responsibility? The level of Taliban support falls far below that of the Iranian government in the Embassy case. It did not express open and public support for the attacks, nor did it ever assume control of the terrorist campaign in the way that the Iranian government took control over release of the US hostages. Further, although its military did conduct combat operations against US and coalition forces in concert with al Qaeda, that was only after October 7th, following air attacks on its own facilities and personnel.

By either of these two standards of state responsibility, it is difficult to attribute al Qaeda's terrorist attacks to the Taliban. That said, any such assessment is fact-dependant; unfortunately, many of the relevant facts tying the Taliban to al Qaeda and vice versa remain either unreleased or as yet undiscovered. However, what must be remembered in discussions over the state responsibility of the Taliban is that the existence of responsibility in the general sense is a question quite distinct from that of whether an armed attack has been committed by that state, so as to justify self-defense by the state attacked. This is a very fine point. The principles of state responsibility determine when a state may be held responsible for an act and thus subject to reparations or countermeasures. But as noted, forcible countermeasures are not an acceptable remedy for violations of state responsibility. That is so whether the issue is harboring a terrorist group or being responsible for an act committed by one.

Nevertheless, certain acts that generate state responsibility may at the same time justify a violent response. Although forcible countermeasures are impermissible to make whole the victim or cause the wrongdoer to desist in breaching an international obligation, the application of force against the

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144. This reality explains why the prohibition on forcible countermeasures is reasonable; the ban is compensated for in those cases where one might most want to engage in them—when victimized by an armed attack—by the existence of the right to self-defense. Conversely, the various limits on self-defense are compensated for by the fact that once the need for self-defense vanishes, the state that committed the wrongful attack remains liable for the consequences under the law of state responsibility. The classic example is the Iraqi invasion of Kuwait in 1990. In S. C. Res. 681, U.N. SCOR, 46th Sess., U.N. Doc. S/681/(1991), the Security Council found that “Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.” It subsequently established the United Nations Compensation Commission to handle claims in S. C. Res. 692, 46th Sess., U.N. Doc. S/692/(1991).

wrongdoer may be justified as an act of self-defense in the face of an imminent or on-going armed attack.<sup>144</sup> Restated in the context of the present case, the proper query in assessing the lawfulness of attacking the Taliban on October 7th is *not* whether the Taliban are in any way responsible under principles of state responsibility for the acts of 9/11. Rather, it is whether or not the Taliban can be determined to have committed the armed attack under the law of self-defense.

*Self-Defense.* No evidence has been released to suggest that Taliban forces played a direct role in the attacks of 9/11 or any other al Qaeda operation. Was the Taliban relationship with al Qaeda nevertheless such that the terrorist acts constructively amounted to a Taliban *armed attack*?

The precise degree of association between a non-state organization and state sponsor necessary for attribution of an armed attack to the state is a matter of some controversy.<sup>145</sup> However, on September 11th, the most widely accepted legal standard on the issue was that set forth in the *Nicaragua* case. That case was discussed earlier vis-à-vis the nature of an armed attack, as well as state responsibility. However, the International Court of Justice also addressed the issue of imputing an armed attack to a state.

In the case, the United States argued that Nicaragua had conducted an armed attack against El Salvador through support to guerillas attempting to overthrow the El Salvadoran government. This being so, US activities directed against Nicaragua were, so the argument went, legitimate exercises of the right of collective self-defense with El Salvador. The Court rejected the assertion, setting a high standard for attributing the actions of a non-state actor to a state in the context of an armed attack.

There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “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 substantial involvement therein”. This description,

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145. For instance, Oscar Schachter has argued “When a government provides weapons, technical advice, transportation, aid and encouragement to terrorists on a substantial scale, it is not unreasonable to conclude that an armed attack is imputable to the government.” Oscar Schachter, *The Lawful Use of Force by a State Against Terrorists in Another Country*, reprinted in HENRY H. HAN, *TERRORISM AND POLITICAL VIOLENCE* 250 (1993). See also Alberto Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 PROC. AM. SOC. INT’L L. 297 (1987).



contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314(XXIX), may be taken to reflect customary international law.<sup>146</sup>

By this standard, the state to which the acts are to be attributed must be “substantially involved” in an operation that is so grave it would amount to an armed attack if carried out by regular members of its armed forces. Recall from the earlier discussion of the holding that armed attacks are measured in terms of their scale and effects, and that the Court specifically held that the provision of “weapons or logistical or other support” was insufficient. Further, to constitute an armed attack by the state, that state must have “sent” the group into action or it must be acting on the state’s behalf. These criteria resemble the requirement under state responsibility that the group in question act on the instructions of, or under the direction or control of, the state to which responsibility is to be imputed. In this sense, the principles of state responsibility can assist in determining whether specific conduct is an armed attack.

It should be noted that the Court was not unanimous in its findings. Most notably, Judge Stephen Schwebel of the United States dissented, arguing that there had been an armed attack:

The delictual acts of the Nicaraguan government have not been confined to provision of very large quantities of arms, munitions and supplies (an act which of itself might be viewed as not tantamount to an armed attack); Nicaragua (and Cuba) have joined with the Salvadoran rebels in the organization, planning and training for their acts of insurgency; and Nicaragua has provided the Salvadoran insurgents with command-and-control facilities, bases, communications and sanctuary, which have enabled the leadership of the Salvadoran insurgency to operate from Nicaraguan territory. Under both customary and conventional international law, that scale of Nicaraguan subversive activity not only constitutes unlawful intervention in the affairs of El Salvador; it is cumulatively tantamount to an armed attack upon El Salvador.<sup>147</sup>

What seems to run through both the Court’s and Judge Schwebel’s position is that the state must at least exercise significant, perhaps determinative, influence over the group’s decision-making, as well as play a meaningful role in the specific operations at hand, before an armed attack will be imputed to it. The facts asserted by Judge Schwebel suggest that Nicaragua not only provided the means to conduct operations against El Salvador, but it did so in a

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146. Nicaragua, *supra* note 60, at 195.

147. *Id.*, (Schwebel dissent) at 258–259, para. 6.

manner that would allow operations it helped plan to be mounted. Further, by organizing and planning the actions, Nicaragua occupied a central position in the decision-making hierarchy. By contrast, the Court focused almost exclusively, as it did regarding the issue of state responsibility, on the extent of control the state has over the specific actions of the group.

There seems to be little evidence that the Taliban “sent” al Qaeda against any particular targets or even that they provided the materiel and logistic support that the *Nicaragua* Court found insufficient to amount to an armed attack. In essence, the key contribution made by the Taliban was granting al Qaeda a relatively secure base of operations. By the classic *Nicaragua* test, or even the lower standard advocated by Judge Schwebel, it would be difficult to argue that the Taliban, through complicity with al Qaeda, launched an armed attack against the United States or any other country. Harboring terrorists is simply insufficient for attribution of an armed attack to the harboring state. Rather, the situation appears to have been a marriage of convenience—convenient for al Qaeda’s conduct of external terrorist acts and convenient for the Taliban’s control over territory within Afghanistan and their battles with internal enemies.

One further judgment of relevance is that rendered by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadic*. There the issue was whether acts of Bosnian Serb forces could be attributed to Yugoslavia. The Chamber held that the degree of control necessary for attribution would vary according to the factual circumstances of the case. Refusing to apply the *Nicaragua* approach in its entirety, the Chamber adopted a standard of “overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations” for acts by an “organized and hierarchically structured group.”<sup>148</sup> It felt the dual requirements of effective control of the group and the exercise of control over a specific operation were excessive, except in the cases of individuals acting alone or disorganized groups.

By way of caveat, it must be noted that *Tadic* involved neither state responsibility nor the criteria for attribution of an armed attack. Rather, the issue was whether the Bosnian Serb actions could be attributed to Yugoslavia such that there was an international armed conflict. The existence of such a conflict was a prerequisite for applicability of various aspects of humanitarian law to

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148. International Criminal Tribunal for Yugoslavia, Case IT-94-1, *Prosecutor v. Tadic*, 38 I.L.M. 1518 (1999), at paras. 120 & 145.

the defendants before the tribunal. Because there was no jurisprudence on the issue, the Chamber turned to the law of state responsibility by way of analogy.

Again, and though the opinion is only relevant by analogy to the issue at hand, it would appear that Taliban relations with al Qaeda did not rise to this level. Thus, al Qaeda actions do not appear imputable to the Taliban as a matter of state responsibility, as an armed attack or in the context of having caused an international armed conflict (although no doubt exists that its harboring of the terrorists was an internationally wrongful act). It must be emphasized, however, that this assessment is entirely fact-dependant, and that there is a relative paucity of reliable open-source information on the subject.

To summarize, al Qaeda conducted an armed attack against the United States on September 11th. That attack activated the right of self-defense, one that continues as long as the terrorist campaign against the United States can reasonably be characterized as ongoing. Once attacked, the United States properly demanded that the Taliban turn over al Qaeda leaders and allow the United States to verify that no further operations were ongoing from the country. When the Taliban failed to comply, the United States and its partners acquired the right to enter Afghanistan for the limited purpose of putting an end to al Qaeda operations. Had it done so, and had the Taliban interfered, the interference would have amounted to a separate attack of its own. However, from the evidence available, it does not appear that the Taliban were sufficiently entwined with al Qaeda terrorist operations for the 9/11 attacks to be imputed to it, thereby justifying the immediate use of force against the Taliban. Were the attacks against the Taliban therefore illegal? That is a very uncertain matter.

### *The Evolving Standard of Self-Defense*

There is little doubt that the response to the tragic events of September 11th has tested accepted understandings of the international law regarding the use of force. Many would dispute certain of the legal conclusions set forth above—that a terrorist group can mount an “armed attack”; that a series of terrorist attacks can be treated as a single on-going attack; or that the United States and the United Kingdom were justified in forcibly crossing into Afghan territory on October 7th. Indeed, this article has concluded that use of force directly against the Taliban is difficult to fit within traditional understandings of attribution of an armed attack.

Such unease has led some to pronounce the traditional normative system dead in fact, if not in law. For instance, Michael Glennon has opined that:

the rules concerning the use of force are no longer regarded as obligatory by states. Between 1945 and 1999, two-thirds of the members of the United Nations—126 states out of 189—fought 291 interstate conflicts in which over 22 million people were killed. This series of conflicts was capped by the Kosovo campaign in which nineteen NATO democracies representing 780 million people flagrantly violated the Charter. The international system has come to subsist in a parallel universe of two systems, one *de jure*, the other *de facto*. The *de jure* system consists of illusory rules that would govern the use of force among states in a platonic world of forms, a world that does not exist. The *de facto* system consists of actual state practice in a real world, a world in which states weigh costs against benefits in regular disregard of the rules solemnly proclaimed in the all-but-ignored *de jure* system. The decaying *de jure* catechism is overly schematized and scholastic, disconnected from state behavior, and unrealistic in its aspirations for state conduct.

The upshot is that the Charter's use-of-force regime has all but collapsed. . . . I suggest that Article 51, as authoritatively interpreted by the International Court of Justice, cannot guide responsible U.S. policy-makers in the U.S. war against terrorism in Afghanistan or elsewhere.<sup>149</sup>

Professor Glennon's thoughtful analysis exaggerates the *de jure-de facto* divide. In fact, what has been happening over the past half-century is a regular evolution in the global community's understanding of the use of force regime. This evolution has been, as it always is and always must be, responsive to the changing circumstances in which international law operates. Practice does not contradict law so much as it informs law as to the global community's normative expectations. It is a phenomenon that is particularly important in international law because of the absence of highly developed constitutive entities and processes.

Consider the changing context in which use of force norms have operated. In the immediate aftermath of the Second World War an understandable preference for collective remedies to threats to international peace and security, remedies that would be executed through inclusive international institutions, emerged—hence the United Nations and its restrictive use of force regime. With the outbreak of the Cold War, and its resulting bipolarity, that system fell into desuetude as the veto power of the permanent five members

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149. Glennon, *supra* note 4, at 540–41.

[P-5] rendered the Security Council impotent. States were therefore compelled to engage in various forms of coercive self-help to perform tasks that would otherwise have been the preferred prerogative of the Council.<sup>150</sup>

The demise of the Cold War removed two contextually determined constraining influences on the use of force. First, the Security Council was reinvigorated because the zero-sum paradigm of the Cold War no longer held; for the first time in nearly 50 years, the P-5 could share common cause (or at least not find themselves inevitably in opposition). This meant that the Council could assume its intended role in the maintenance of international peace and security. The Council promptly did so, authorizing one major international effort to counter aggression, the 1990–91 Gulf War, and multiple peace enforcement operations.

Second, the Cold War had imposed an implicit limitation on unilateral uses of force—that they not threaten the fragile peace between East and West. Thus, for example, whereas intervention was deemed inappropriate as a general matter during the Cold War (it risked sparking a broader conflict), intervention within a zone of influence appeared more palatable (or as “the other fellow’s business”). With this second constraint removed, states today are more willing to accept unilateral uses of force, as there is less chance of spillover effects (as reflected by Operation ALLIED FORCE).

What happened is that the operational code regarding the use of force shifted with the emergence of new geo-political circumstances. Circumstances determine the viability of normative strategies for advancing shared

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150. For instance, Michael Reisman has identified nine basic categories of unilateral uses of force that enjoyed a significant degree of community support: “self-defense, which has been construed quite broadly; self-determination and decolonization; humanitarian intervention; intervention by the military instrument within spheres of influence and critical defense zones; treaty-sanctioned interventions within the territory of another state; use of the military instrument for the gathering of evidence in international proceedings; use of the military instrument to enforce international judgments; and counter measures, such as reprisals and retorsions.” W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT’L L. 279, 281 (1985). See also W. Michael Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, PROC. AM. SOC. INT’L L. LAW 74, 79–84 (1984–85); W. Michael Reisman, *War Powers: The Operational Code of Competence*, 83 AM. J. INT’L L. 777 (1989).

community values.<sup>151</sup> It is not that new law emerges or that old law fades away, as much as it is that the understanding of the precise parameters of the law evolves as it responds to fresh challenges or leverages new opportunities. That international law is understood in light of the circumstances in which it finds itself is a strength, not a weakness.

This is certainly true regarding responses to terrorism. During much of the Cold War, the pressing problem of violence outside the classic state-on-state paradigm was guerilla warfare by insurgents against a government. Both sides had their clients, whether states or rebel groups, and in many cases the conflicts were proxy in nature. The geopolitical and normative appeal of proxy wars was that they tended to facilitate avoidance of a direct superpower clash. Thus, as demonstrated in *Nicaragua*, a very high threshold was set for attributing rebel acts to their state sponsors or for characterizing assistance to a rebel group as an “armed attack” legitimizing a victim state’s forceful response. This was a very practical approach. The bipolar superpowers were surely going to engage in such activity regardless of the normative limits thereon, so a legal scheme that avoided justifying a forceful response by the other side contributed to the shared community value of minimizing higher order violence. The result was creation of a legal fiction that states that were clearly party to a conflict, were not.

To some extent, this paradigm was illustrated by community reactions to counter-terrorist operations. Consider Operation EL DORADO CANYON, the 1986 air strikes against terrorist and Libyan government facilities by US forces in response to the bombing of the La Belle discothèque in Berlin. The Libyan leader, Muammar el Qadhafi, had previously praised terrorist actions.

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151. Such as physical survival and security for individuals and the tangible or intangible objects on which they rely, human dignity, social progress and quality of life, and “the right of peoples to shape their own political community.” These aims derive from those expressed in the Preamble to the UN Charter:

To save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.

U.N. CHARTER, pmb. The final aim was articulated in W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 26, 45 (Lori Damrosch & David J. Scheffer eds., 1991).

Moreover, in advance of the attacks the United States intercepted communications to the Libyan People's Bureau in West Berlin containing an order to attack Americans. Additional intercepts immediately preceding and following the La Belle bombing provided further evidence of Libyan complicity.<sup>152</sup>

Despite Libya's support of terrorism, international reaction to the US operation, which was justified on the basis of self-defense, was overwhelmingly negative.<sup>153</sup> Many of the United States' closest allies were critical, with the exceptions of the United Kingdom and Israel. The General Assembly passed a resolution condemning the action, while Secretary-General Javier Perez de Cuellar issued a statement "deploring" the "military action by one member state against another."<sup>154</sup> Viewed in the then-existing international security context, this was an unsurprising reaction. If state sponsorship of terrorism (a particularly ill-defined term given the bipolarity of the period) rose to the level of an armed attack justifying a forceful response in self-defense, then, given both sides' propensity to support opponents of their foe, the risk of a superpower affray grew.

However, the geopolitical context has changed dramatically in the last decade. Today there is but one superpower. Additionally, any antagonism that exists between it and other significant world players, such as Russia and China, is unlikely to erupt into open conflict. On the contrary, in many cases the former antagonists are cooperating against common threats, a trend illustrated by the recent creation of the NATO-Russia Council.<sup>155</sup>

Yet, as the likelihood of inter-state conflict receded, the relative importance of the terrorist threat grew correspondingly. For the major players on the world scene, it was no longer attack by another state that dominated strategic risk assessment, but rather the spread of instability, particularly through the mechanism of non-international armed conflict, and the related menace

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152. Marian Nash Leich, *U.S. Practice* 80 AM. J. INT'L. L. 612, 633 (1986); Gregory Intocchia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE WES. RES. J. INT'L L. 177 (1987); Jeffrey A. McCredie, *The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal?*, 19 CASE WES. RES. J. INT'L L. 215 (1987); David Turndorf, *The U.S. Raid on Libya: A Forceful Response to Terrorism*, 14 BROOK. J. INT'L L. 187 (1988).

153. See Reisman, *International Legal Responses*, *supra* note 98, 33–34, for a detailed description of the international reaction. See also Stuart G. Baker, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT'L & COMP. L. 99 (1994).

154. *Israelis Praise It While Arabs Vow to Avenge It*, CHICAGO TRIBUNE, Apr. 16, 1986, at A9.

155. The NATO-Russia Council, approved in May 2002, is specifically tasked with countering terrorism. See Declaration by Heads of State and Government of NATO Member states and the Russian Federation, May 28, 2002, available at <http://www.nato.int/docu/basicctxt/b020528e.htm> (Jun. 18, 2002).

of terrorism, either domestic or international. Not surprising, normative understandings shifted accordingly.

That shift was dramatically illustrated by the deafening silence, described at the outset of this article, over the issue of the lawfulness of the US and UK attacks of October 7th. Of course, some academic voices pointed to the normative faultlines in the operations, but academe was by no means united on the subject. Media criticism was rare, as was that by important non-governmental organizations. Most significantly, there was almost no state censure of the actions; on the contrary, states scrambled to join the cause.

This reaction was a logical continuation of a trend evident in two earlier post-Cold War responses to terrorism. In 1993, a plot to assassinate former President George Bush during a visit to Kuwait was foiled. Investigation suggested Iraqi government involvement. In response, the United States launched cruise missiles against Iraqi intelligence facilities. President Clinton justified the action in the following terms:

This Thursday, Attorney General Reno and Director of Central Intelligence Woolsey gave me their findings. Based on their investigation there is compelling evidence that there was, in fact, a plot to assassinate former President Bush and that this plot, which included the use of a powerful bomb made in Iraq, was directed and pursued by the Iraqi intelligence service.

These actions were directed against the Iraqi Government, which was responsible for the assassination plot. Saddam Hussein has demonstrated repeatedly that he will resort to terrorism or aggression if left unchecked. Our intent was to target Iraq's capacity to support violence against the United States and other nations and to deter Saddam Hussein from supporting such outlaw behavior in the future. Therefore, we directed our action against the facility associated with Iraq's support of terrorism, while making every effort to minimize the loss of innocent life.<sup>156</sup>

Of course, Iraq is a unique case given that an international armed conflict with the United States had occurred in 1991 (and arguably continues today). Nevertheless, the international community generally supported the strikes, or

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156. President William Clinton, Address to the Nation on the Strike on Iraqi Intelligence Headquarters, 29 WEEKLY COMP. PRES. DOC. 1180-81 (Jun. 26, 1993). For an excellent analysis on the state of international law regarding counter-terrorism in the wake of the US strikes, see Robert J. Beck and Anthony Clark Arend, "Don't Tread On Us": *International Law and Forcible State Responses To Terrorism*, 12 WIS. INT'L L. J. 153 (1994). See also Robert F. Teplitz, *Taking Assassination Seriously: Did the United States Violate International Law in Responding to the Iraqi Plot to Kill George Bush*, 28 CORNELL INT'L L. J. 569 (1995).



at least muted its criticism thereof. Of the P-5, only China expressed concern. By contrast, support was voiced by, inter alia, the United Kingdom, Israel, Russia, Germany, Italy, Japan and South Korea, as well as the three Islamic states then sitting on the Security Council, Pakistan, Djibouti and Morocco. Egypt, Jordan and Iran criticized the attack, but on the basis of the civilian casualties caused.<sup>157</sup>

What is normatively remarkable is that the attack was somewhat questionable as a traditional exercise of self-defense, the legal basis asserted by the United States. It was in response to a plot that had already been foiled; indeed, some of those directly responsible for executing it were behind bars. Additionally, there was no assertion that this was but one phase in a continuing campaign by the Iraqis against the United States. Interestingly, the Security Council appeared more interested in the facts of the case, which it reportedly found sufficient to establish Iraqi involvement, than in the legal sufficiency of the US actions.<sup>158</sup>

A more viable argument legally would have been that an international armed conflict was still in existence between the United States and Iraq, punctuated only by a cease-fire agreement, the terms of which had been breached by Iraqi complicity in the plot. Curiously, that argument never surfaced. Instead, Article 51 was the sole legal justification asserted, an assertion that was relatively uncontested. It is also important to note that, aside from the strict legal stylization, the strikes were characterized as deterrent in purpose, a warning to Iraq to desist from any further involvement in acts of terrorism. This purpose has pervaded virtually every justification for striking back at terrorists over the past two decades.

The relative lack of criticism is all the more striking when contrasted with that generated by the 1986 attacks against Libya. Some 50 Americans were injured and two died in the La Belle Disco attacks. Further, prior to the attacks Qadhafi had threatened that the Libyans were “capable of exporting terrorism to the heart of America,” a threat repeated on multiple occasions.<sup>159</sup> There was no reason at the time to believe the Libyans would desist in their support of terrorism against the United States; indeed, such support continued after

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157. Baker, *supra* note 152, at 99–101.

158. On the extent to which the Council was satisfied with the US evidence, see *U.S. Photo Evidence Convinces the U.N.*, TORONTO STAR, June 28, 1993, at A13.

159. *Text of the State Department Report in Libya Under Qaddafi*, N.Y. TIMES, Jan. 9, 1986, at A6.

the strikes, most notably with the bombing of Pan Am 103 over Lockerbie.<sup>160</sup> Thus, the severity of the terrorist attack and the likelihood more were forthcoming make the Libya case more egregious than the plot against George Bush. Nevertheless, international reaction differed dramatically.

Further evidence of the trend came in 1998 in response to the bombings of the US embassies in Nairobi and Dar es Salaam. Almost 300 people, including 12 Americans, perished in the attacks, which were tied to Osama bin Laden and al Qaeda. In response, the United States launched cruise missile attacks against terrorist training camps in Afghanistan and a pharmaceutical plant suspected of involvement in chemical weapons production in Sudan. On the day they were conducted, President Clinton announced his rationale for ordering the attacks:

First, because we have convincing evidence these groups played the key role in the Embassy bombings in Kenya and Tanzania; second, because these groups have executed terrorist attacks against Americans in the past; third, because we have compelling information that they were planning additional terrorist attacks against our citizens and others with the inevitable collateral casualties we saw so tragically in Africa; and fourth, because they are seeking to acquire chemical weapons and other dangerous weapons.<sup>161</sup>

Formal legal justification for the actions came in the required notification of the Security Council that actions in self-defense had been taken.

These attacks were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the bin Laden organization. That organization has issued a series of blatant warnings that “strikes will continue from everywhere” against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use

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160. The accused bombers were tried in *Her Majesty's Advocate v. Abdelbaset ali Mohamed al Megrahi and Al Amin Khalifa Fhimah*, Scot. High Court of Justiciary at Camp Zeist, Case No. 1475/99. Megrahi was found guilty and sentenced to life imprisonment in January 2001; the Court accepted the allegation that he was a member of Libya's Jamahariya Security Organization. In March 2002, Megrahi's appeal was denied. *Abdelbaset Ali Mohmed Al Megrahi v. Her Majesty's Advocate*, Appeal Court, High Court of Justiciary, Appeal No: C104/01. Negotiations over Libyan compensation for the victims' families have been ongoing for some time. See, e.g., Rob Crilly, *Libya Denies Offer of (Pounds) 1.8bn Deal for Lockerbie Families*, THE HERALD (Glasgow), May 30, 2002, at 2.

161. President William Clinton, Remarks on Departure for Washington, D.C., from Martha's Vineyard, Massachusetts, 34 WEEKLY COMP. PRES. DOC. 1642 (Aug. 20, 1998).

armed force to prevent these attacks from continuing. In doing so, the United States has acted pursuant to the right of self defence confirmed by Article 51 of the Charter of the United Nations. The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality.<sup>162</sup>

International reaction to the two strikes was telling. Although Iran, Iraq, Libya, Pakistan,<sup>163</sup> Russia and Yemen condemned them, Australia, France, Germany, Japan, Spain and the United Kingdom were supportive.<sup>164</sup> In other words, support or condemnation tended to track political alignment with the United States. More normatively significant is the difference in the reaction to the two strikes. The League of Arab States' Secretariat condemned the strikes against the Sudanese pharmaceutical factory, but not those against the terrorist bases in Afghanistan.<sup>165</sup> Similarly, Sudan, the Group of African States, the Group of Islamic States and the League of Arab States individually asked the Security Council to consider the attacks against the pharmaceutical plant and send a fact-finding mission to Sudan, but did not do likewise vis-à-vis the strikes into Afghanistan.<sup>166</sup>

The best explanation for the difference is revealed in the brouhaha that followed the strikes on the Sudanese factory. Almost immediately questions began to surface in the press regarding the accuracy of US claims that the plant

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162. Letter from the Permanent Representative of the United States of America to the President of the Security Council (Aug. 20, 1998), U.N. Doc. S/1998/780 (1998), available at <http://www.undp.org/missions/usa/s1998780.pdf> (Jun. 18, 2002).

163. Pakistan protested the violation of its airspace. Letter from the Permanent Representative of Pakistan to the President of the Security Council, Aug. 24, 1998, U.N. Doc. S/1998/794 (1998).

164. The international reaction is well-described in Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 164–5 (1999).

165. Letter from the Charge d'Affaires of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council, Aug. 21, 1998, U.N. Doc. S/1998/789 (1998).

166. Letter from the Permanent Representative of the Sudan to the United Nations Addressed to the President of the Security Council, Aug. 21, 1998, U.N. Doc. S/1998/786, annex (1998); Letter from the Permanent Representative of Namibia to the United Nations Addressed to the President of the Security Council, Aug. 25, 1998, U.N. Doc. S/1998/802 (1998) (Group of African states request); Letter from the Charge d'Affaires A.I. of the Permanent Mission of Qatar to the United Nations Addressed to the President of the Security Council, Aug. 21, 1998, U.N. Doc. S/1998/790 (1998) (Group of Islamic states request); Letter from the Charge d'Affaires of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council, Aug., 21, 1998, U.N./ Doc. S/1998/791 (1998) (League of Arab States request).

was tied to chemical weapon production. In the end, the United States never made a convincing case that the plant was engaged in the activities alleged.<sup>167</sup> Moreover, even if the assertions had been accurate, the causal relationship between the plant and the attacks against the embassies was indirect at best. By contrast, little doubt existed that terrorists were operating from bases in Afghanistan with the seeming acquiescence of the Taliban or that the organization targeted was tied to the bombings.

The reaction of the politically relevant actors such as states, non-governmental organizations, and the media in this case reflects a general sense that it was not the fact that the United States struck back which caused concern as much as it was that the United States “got it wrong” in the Sudanese case. In other words, if a state is going to take the dramatic step of conducting military operations against terrorists, it needs to have sufficient evidence of the connection between the target and the act that was committed, as well as a reasonable belief that future acts are on the horizon.

What is the relationship between these incidents and the law of self-defense as it applies to international terrorism? As Professor Reisman has perceptively noted, “law is not to be found exclusively in formal rules but in the shared expectations of politically relevant actors about what is substantively and procedurally right.”<sup>168</sup> Though such New Haven School pronouncements often evoke controversy, there can be little doubt that the received law—customary, conventional and case law—is informed by state practice and the practice of other politically relevant actors on the international scene. Their normative expectations as to how law should foster shared community values are determinative of international law’s vector. In the context of counter-terrorist operations conducted in self-defense, a number of conclusions as to possible criteria bearing on the international community’s assessment of lawfulness can be suggested from both the legal analysis offered earlier and the short discussion of the evolving international reaction to counter-terrorist operations.

*Armed attack.* A community consensus now appears to exist that armed attacks may be conducted by terrorist organizations. At the same time, such attacks constitute violations of international and domestic criminal law. Thus,

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167. Tim Weiner & Steven Lee Myers, *After the Attacks: The Overview, Flaws in the U.S. Account Raise Questions on Strike in Sudan*, N.Y. TIMES, at A2 (Aug. 19, 1998).

168. W. Michael Reisman, *The Raid on Baghdad: Some Reflections on its Lawfulness and Implications*, 5 EUR. J. INT’L L. 120, 121 (1994). He further notes “a prerequisite for appraisal of the lawfulness of an incident . . . is an identification of the yardstick of lawfulness actually being used by the relevant actors.” *Id.*

the target state may respond to them with armed force in self-defense and/or engage in law enforcement activities. To amount to an armed attack, the “scale and effects” must be “significant,” although in a series of related attacks significance is a cumulative calculation. This is a somewhat ambiguous standard, but factors such as the nature and capabilities of the organization conducting the attack, the extent of human injury and physical damage caused (or likely to have been caused if the attack is foiled or otherwise unsuccessful), the relation of the attack to previous attacks and the method and means used to conduct it bear on the appraisal.

*Necessity.* For compliance with the necessity requirement of self-defense, there must be a sound basis for believing that further attacks will be mounted and that the use of armed force is needed to counter them. This requires the absence of a reliable means other than force to counter the prospective attacks. The relative success of any law enforcement efforts (or likelihood thereof) will affect the extent to which resort to armed force is necessary. Similarly, if self-defense operations involve crossing into another state’s territory, that state must be unable or unwilling to prevent the terrorists from continuing to threaten the victim state.

As an aside, the option of seeking Security Council action under Chapter VII has no relation to the necessity assessment. Although it is sometimes asserted that states should turn to the Council for assistance if the opportunity presents itself, Article 51 contains no such legal obligation.

*Proportionality.* Self-defense operations against terrorists and states involved in terrorism are limited to the nature, targets, level of violence and location required to defeat an on-going attack or, if that attack has ended, prevent any further reasonably foreseeable attacks. That said, those who act in self-defense should be sensitive to the other face of proportionality, its *ius in bello* face.

*Imminency.* Self-defense may only be conducted against an attack that is imminent or ongoing. An attack is imminent when the potential victim must immediately act to defend itself and the potential aggressor has irrevocably committed itself to attack. In the context of terrorism, this point may occur well before the planned attack due to the difficulty of locating and tracking terrorists. Imminency is not measured by the objective time differential between the act of self-defense and the attack it is meant to prevent, but instead by the extent to which the self-defense occurred during the last window of opportunity.

More significant are responses to on-going attacks. The acceptability of viewing separate acts of terrorism conducted by the same organization (or

closely related organizations acting in concert) as a single on-going attack appears clear in the aftermath of the response to 9/11. Thus, whereas Operation EL DORADO CANYON was widely characterized as punitive in nature, the US counter-terrorist strikes in 1993, 1998 and 2001 were generally seen as appropriately preventive. In other words, the understanding of armed attack has evolved from one looking at particular operations in isolation, and asking whether each is imminent or ongoing in and of itself, to one where terrorists are viewed as conducting campaigns. Once it is established that an ongoing campaign is underway, acts of self-defense are acceptable throughout its course, so long as the purpose is actually to defeat the campaign. In this sense, deterrent self-defense has become, or is at least in the process of becoming, accepted. As noted, almost all justifications, official and otherwise, of counter-terrorist strikes cite the purpose of preventing and deterring future terrorism.

*Purpose.* The sole acceptable purpose for self-defense operations is to defeat an on-going attack or prevent one that is imminent. The motivation cannot be retribution, general deterrence (detering terrorism generally vice deterring specific acts and actors), punishment or any other motive. Of course, although each of these may be the logical consequence of a defensive action or, perhaps, a secondary goal, they are impermissible as the primary purpose of the actions.

*Conducting self-defense in another state.* It is permissible to cross into the territory of another state to conduct defensive counter-terrorist operations when that state has granted consent to do so or when it is unable or unwilling to effectively prevent terrorist activities on its soil. In the latter two cases, a request from the victim state to take the steps that are necessary must precede nonconsensual entry into the country. Operations may only be conducted against the terrorists and their assets; however, if the host state forcibly interferes with them, then that state may have committed an armed attack against the force carrying out the counter-terrorist actions.

*Conducting self-defense against a state sponsor.* The formal rules regarding the extent of support to a terrorist organization necessary to attribute an armed attack to a state appear to differ from the normative expectations of the global community. Those rules require a high degree of control over a specific operation, such that the terrorist organization is sent by or on behalf of a state to conduct the attack. Mere harboring does not suffice.

However, normative expectations are clearly in the process of rapid evolution. Seemingly authoritative articulations of the standard, such as that by the International Court of Justice in *Nicaragua*, are increasingly out of step with the times. Although no definitive conclusions can be drawn yet regarding the

extent and nature of the relationship between the state and terrorist group deemed sufficient to impute an armed attack, several factors seem to have informed the community's general support (or at least lack of criticism) for the strikes against the Taliban. Of particular importance is the fact that the Security Council had made repeated demands that the Taliban put an end to the use of its territory by terrorists, all to no avail. The existence of these warnings by an authoritative international body rendered the Taliban the masters of their own fate. Refusal to cooperate even after the unthinkable happened on September 11th, despite demands and an opportunity to do so, only served to exacerbate their culpability.

Moreover, the terrorists being harbored were of a particularly nasty sort. They had conducted multiple operations in the past that resulted in hundreds of casualties, and had now mounted an attack in which the death toll was measured in the thousands. Their attack also had global impact; financial reverberations were felt throughout the world economy, citizens of over 80 countries were killed, and a pervasive sense of fear infected millions. Clearly, the scale and effects of al Qaeda's attacks bore directly on the community's assessment of Taliban actions (or the lack thereof).

Additionally, the relationship between al Qaeda and the Taliban was extremely close, actually symbiotic in many ways. Although no evidence has been released of direct complicity in the 9/11 attacks, it is difficult to imagine a more cooperative host for al Qaeda than the Taliban, cooperation that was the inevitable result of the Taliban's own dependence on al Qaeda.

Finally, the Taliban were viewed as illegitimate in many ways. Only three countries—Saudi Arabia, the United Arab Emirates and Pakistan—recognized them as the proper government of Afghanistan, by no stretch of the term could they be described as democratic and their human rights record was horrendous.<sup>169</sup> To describe the Taliban as internationally ostracized would be an understatement. Thus, conducting assaults against them seemed to do less violence to countervailing international law principles such as territorial integrity than would similar actions against other governments and states.

Drawing these strands together, relevant factors in assessing the lawfulness of a response against a state sponsor include the severability (or lack thereof) between it and the terrorist group; the frequency, source and timing of warnings to desist from cooperation with the group; the scale and nature of the

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169. See, e.g., Department of State, Human Rights Country Report: Afghanistan, Mar. 4, 2002, available at <http://www.state.gov/g/drl/rls/hrrpt/2001/sa/8222.htm> (Jun. 18, 2002). See also the various reports by Human Rights Watch, available at <http://hrw.org/reports/world/afghanistan-pubs.php> (Jun. 18, 2002).

cooperation; the extent to which the state is perceived as generally law abiding and legitimate or not; the inclusivity of the threat in terms of states threatened; and the severity of the acts committed by the terrorist group with which the state has chosen to associate itself. Further, it appears that self-defense vis-à-vis state involvement (like that against the terrorists themselves) is heading in deterrent directions. Although each determination will be fact-specific, it is clear that the bar is being measurably lowered.

*Evidence.* As illustrated in the case of the 1998 strikes against the Sudanese pharmaceutical plant, the international community expects states carrying out counter-terrorist strikes to act only on the basis of reliable information. The United States learned its lesson well; in the recent attacks, the United States provided briefings on al Qaeda and Taliban activities to the Security Council, North Atlantic Council and other intergovernmental organizations, as well as numerous states bilaterally.

The incidents considered above highlight the core facts that need to be demonstrated: that the target of the self-defense operations conducted the attack, either directly or constructively, and that the self-defense complies with the requirements of necessity, proportionality and imminency. A much more difficult question is that of how heavy the burden of proof should be.

Because the issue at hand involves the most significant act of international intercourse, the use of armed force, a high standard of proof is obviously required. A preponderance of the evidence standard (i.e., evidence that the fact in issue is more likely than not) is clearly insufficient to justify acts of such import. On the other hand, a beyond a reasonable doubt standard would prove impractical in all but the rarest of cases. The shadowy world of international terrorism simply does not lend itself to immediate access to credible information. By this standard, states would almost never have sufficient evidence to mount a timely and decisive response to a terrorist act.

Mary Ellen O'Connell has suggested a "clear and convincing" standard.<sup>170</sup> Although acknowledging that no accepted standard exists, she draws on domestic law evidentiary standards and an assortment of decisions by international courts, including the *Nicaragua* case,<sup>171</sup> as well as the work of other

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170. Mary Ellen O'Connell, *Evidence of Terror*, 7 J. CONF. & SEC. L. 19, 22–28 (2002).

171. Professor O'Connell notes that the Court referred to the need for "sufficient proof" [at 437, para. 101], which she argues equates by implication to convincing proof. *Id.* at 24.



scholars.<sup>172</sup> Her suggested standard is consistent with the US notification of self-defense to the Security Council, in which the United States adopted a “clear and compelling” evidentiary standard;<sup>173</sup> this was also the verbiage used to describe the evidence presented to the North Atlantic Council.<sup>174</sup> Application of such a standard, or an analogous one, meets the dual requirements of practicality and rigor—practicality in the sense that an evidentiary burden should not render a state paralyzed as it seeks the requisite quality of evidence, but rigor in that the burden should be heavy enough to preclude states from reacting precipitously to terrorist attacks. Ultimately, an adequacy assessment will rest on the international community’s determination of whether a reasonable international actor would have acted in self-defense on the basis of the evidence in question. All such assessments are inherently subjective and contextual.

Once a state possesses the requisite evidence must it disclose it? Professor Jonathan Charney argues that it must.

To limit the use of force in international relations, which is the primary goal of the United Nations Charter, there must be checks on its use in self-defense. Disclosure to the international community of the basis for such action would help to serve this purpose. The alleged credibility of conclusory statements by a state’s leadership should not be a sufficient basis for actions in self-defense since it would encourage abuse. When attacks on a state are so grave as to justify actions in self-defense, the supporting evidence would normally be readily available. Disclosure of that evidence should be required even if the state would wish to claim that classified information would be disclosed. The use of force in self-defense is limited to situations where the state is truly required to defend itself from serious attack. In such situations, the state must carry the burden of presenting evidence to support its actions, normally before these irreversible and irreparable measures are taken.<sup>175</sup>

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172. *Id.* at 25, citing Christopher Greenwood, *International Law and the United States’ Air Operation Against Libya*, 89 W. VA. L. REV. 933, 935 (1987) [“sufficiently convincing”]; Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT’L L. 537, 538 (1999) [clear and stringent evidentiary standard]; LOUIS HENKIN, *HOW NATIONS BEHAVE* (2d ed. 1979) [the attack must be “clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication”].

173. US Letter, *supra* note 22.

174. Robertson statement, *supra* note 34.

175. Jonathan I. Charney, *Editorial Comments: The Use of Force Against Terrorism and International Law* 95 AM. J. INT’L L. 835, 836 (2001).

This is a noble proposal, but unfortunately an impractical one. In the vast majority of cases, the information necessary to establish the material facts will be extraordinarily sensitive. Releasing it may endanger the lives of human sources, jeopardize on-going intelligence operations of use in targeting the terrorists or foiling future attacks, surrender the element of surprise, and reveal critical information regarding the extent to which the battlefield, and the enemy's command and control, is transparent to the state engaged in self-defense operations. An absolute disclosure standard is not one the international community will ever adopt in the case of self-defense against terrorism.

A more reasonable standard would require disclosure to the extent practicable in the circumstances. Professor Charney's concern about abuse of the right to self-defense is well founded; however, that concern must be balanced against the need to be able to conduct self-defense, and otherwise safeguard oneself from terrorists, effectively. Moreover, the situation is not always a strict disclosure/no disclosure conundrum. For instance, it may serve both purposes to disclose the necessary information in closed session, as was done when the United States briefed its NATO allies. The subsequent support of states that have received such briefings serves as a safeguard against abuse, albeit a less than perfect one. Additionally, it may be possible to disclose information after the fact, as was done by the United States in 1997 regarding Operation EL DORADO CANYON.<sup>176</sup> Doing so will allow states to build a track record of credibility in their claims, a particularly valuable safe-guard in those cases where immediate disclosure is impossible.

### *Conclusion*

It has been asked whether the attacks of September 11th ushered in a dramatically new era in international law. This article has suggested that in most respects the law on the use of force has proven adequate vis-à-vis international terrorism. Where it has not, the emerging normative expectations represent less a new era than the logical and constant evolution of the existing legal system in the face of changing global realities. That evolution has resulted in some degree of softening in the community understanding of when self-defense is appropriate.

Such a softening is appropriate in the face of the new threat environment. Terrorism today represents a particularly pernicious prospect. Unfortunately,

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176. See Bill Gertz, *U.S. Intercepts from Libya Play Role in Berlin Bomb Trial*, WASH. TIMES, Nov. 19, 1997, at A13. The United States provided intercepted communications gathered by the National Security Agency.

the attacks that occurred in September 2001 may represent only the tip of the iceberg. Thousands of individuals trained under bin Laden are at large worldwide.<sup>177</sup> More ominously, the threat of terrorism using weapons of mass destruction looms ever larger. The normative system developed for state-on-state conflict, in which the risk of super power confrontation was always present, is predictably shifting to remain responsive to community values in the face of the changing threat.

Consider the apparent relaxation in the requirements for attribution of an armed attack. Although it may make striking at a state in self-defense more acceptable, thereby heightening the likelihood of state-on-state conflict, it may have just the opposite effect by serving as an effective deterrent to state sponsorship without risking the higher order conflict that was the danger during the Cold War. Similarly, characterizing terrorist attacks as part of a campaign rather than a series of individual actions actually gives the state acting in self-defense an opportunity to seek resolution of the situation without being compelled to immediately resort to force lest the imminency pass. This permits greater community involvement in the decision-process and greater opportunity to gather and assess evidence.

The final normative verdict on the US and coalition attacks against al Qaeda and the Taliban is uncertain. The attacks against al Qaeda appear novel, but consistent with the community expectations existing on September 10th. By contrast, the attacks against the Taliban represent a less than crystalline glimpse of the direction in which the international law regarding responses to terrorism may be heading. But given the existing security landscape, the vector appears positive.

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177. According to the Egyptian Minister of Interior, "as many as 80,000 people may have been trained in Afghanistan under bin Laden." 1 THE TERRORIST THREAT (no. 2), Apr. 2002, at 2.