

# Chapter 2

## Responding to Transnational Terrorism Under the *Jus ad Bellum*: A Normative Framework

**Abstract** This chapter explores the *jus ad bellum*—that aspect of international law governing the resort to force by States—applicable to counterterrorist operations. It begins by considering the possibility of a mandate to conduct such operations under Chapter VII of the UN Charter, concluding that such an authorization from the Security Council would be lawful. The chapter then examines self-defense pursuant to Article 51 of the Charter (and customary international law) as a possible basis for cross-border counterterrorist operations. It argues that despite suggestions to the contrary by the International Court of Justice, self-defense is a legitimate ground for actions against non-State actors such as terrorist groups, even when such groups are located in another State’s territory. However, strict conditions apply as to when and how they may be conducted.

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First published in Michael N. Schmitt & Jelena Pejic, eds., *International Law and Armed Conflict: Exploring the Faultlines* (Leiden, Martinus Nijhoff, 2007); reprinted in 56 *Naval Law Review* (2008) 1.

## 2.1 Introduction

On April 5, 1986, terrorists bombed Berlin's La Belle discotheque, a bar frequented by US military personnel. One American soldier and one Turkish woman were killed and nearly 200 other patrons injured. Prior to the attack, US intelligence intercepted communications to the Libyan People's Bureau in the city ordering an attack on Americans. Other intercepts, collected both before and after the bombing, further substantiated Libyan involvement.

Ten days later, the United States responded with Operation El Dorado Canyon, a strike involving some 200 aircraft targeting terrorist and Libyan government facilities in Tripoli and Benghazi, including a residence of Libyan leader Muammar el-Qaddafi. The international reaction was overwhelmingly critical. The United Nations General Assembly "condemned" the attack as "a violation of the Charter of the United Nations and of international law,"<sup>1</sup> while Secretary General Javier Perez de Cuellar publicly "deplored" the "military action by one member state against another."<sup>2</sup> The reaction of individual States, with the notable exceptions of the United Kingdom (from which some of the aircraft launched) and Israel, was likewise unsupportive.<sup>3</sup> Indeed, aircraft based in the United Kingdom had to transit the Strait of Gibraltar because the United States could not secure overflight rights from countries, including NATO ally France, along the most direct route to the target area.<sup>4</sup>

Fifteen years later, on 11 September 2001, members of al Qaeda, a shadowy terrorist network operating from some 60 countries, seized control of four aircraft, flying two into the World Trade Center in New York City, and a third into the Pentagon. The fourth crashed in Pennsylvania following a valiant attempt by passengers to regain control of the aircraft. In all, nearly 3,000 people died, the citizens of over 100 nations. The financial impact of the attack has been estimated in the hundreds of billions of dollars.<sup>5</sup>

The United States and its coalition partners responded on October 7 by attacking both al Qaeda and Taliban targets in Afghanistan. Not only did the

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<sup>1</sup> G.A. Res. 41/38, ¶ 1, U.N. Doc. A/RES/41/38 (November 20, 1986).

<sup>2</sup> Sciolino 1986, at A17.

<sup>3</sup> For instance, Shimon Peres, the Israeli Prime Minister, stated "the American action benefited the whole free world, which was becoming more and more a victim of irresponsible terrorism. It is good that a major power like the United States took steps to cut off the arm of the terrorists, at least one of them." Broder 1986, at A9. On the reaction to the strike, see Reisman 1999, for a description of the international reaction. See also Baker 1994.

<sup>4</sup> Military aircraft are permitted transit passage through international straits, i.e., a strait in territorial waters used for international navigation (including overlapping territorial waters of multiple States) linking two parts of the high seas (or exclusive economic zones). See The Commander's Handbook on the Law of Naval Operations (NWP 1-14 M; MCWP 5-12.1; COMDTPUB P5800.7 A) (2007), at para 2.5.3.

<sup>5</sup> The Comptroller of New York City estimated the cost to the city alone at \$95 billion. Wray 2002. Financial losses and the cost to the US government dwarf that figure.

international community refrain from condemning Operation Enduring Freedom (OEF), but many States provided verbal and material support. The United Nations and other intergovernmental organizations treated the 9/11 terrorist strikes as meriting military action in self-defense, even as the United States ousted the Taliban regime, which no credible source cited as behind the attacks.<sup>6</sup> There is little question but that the international normative understandings regarding the application of the *jus ad bellum*, that component of international law which governs when States may resort to force, had changed dramatically. Large-scale transnational terrorism compelled the international community to discover a normative architecture governing the legal bases for counterterrorism that had theretofore been rather obscure. Specifically, although traditionally viewed as a matter for law enforcement, States and intergovernmental organizations now style terrorism as justifying, with certain conditions, the use of military force pursuant to the *jus ad bellum*. It is not so much that the law has changed as it is that existing law is being applied in a nascent context. In law, as in all other aspects of international security, what one sees depends on where one stands.

## 2.2 The *Jus ad Bellum* Schema

Set out in the United Nations Charter, the *jus ad bellum* schema is linear. Pursuant to Article 2(4), States Party to the Charter agree to “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>7</sup> There are two universally accepted exceptions to the prohibition.

### 2.2.1 Security Council Mandate

The first occurs when the Security Council determines pursuant to Article 39 that a breach of the peace, act of aggression, or threat to the peace exists.<sup>8</sup> Having made such a determination, and having attempted to resolve the situation through non-forceful measures as required by Article 41 (or determining that they would prove

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<sup>6</sup> For a discussion of these events and their legal implications, see Schmitt 2002.

<sup>7</sup> UN Charter, Article 2, para 4.

<sup>8</sup> UN Charter, Article 39. “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

fruitless),<sup>9</sup> the Council may authorize the use of force to maintain or restore international peace and security pursuant to Article 42.<sup>10</sup> Such actions are known variously as Chapter VII, peace enforcement, or collective security operations.

In the eyes of the Security Council, international terrorism qualifies as a threat to international peace and security. It made exactly that finding the very day after the attacks of September 11. In Resolution 1368, the Council “[u]nequivocally condemn[ed] in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security.”<sup>11</sup> Note the scope of the Council’s characterization of any act of international terrorism as a threat to international peace and security. It did so again on 28 September in Resolution 1373, which encouraged international cooperation in the fight against terrorism, specifically through implementation of international conventions.<sup>12</sup>

On 12 November, the Council adopted Resolution 1377, to which a Ministerial-level declaration on terrorism was attached. The declaration branded international terrorism “one of the most serious threats to international peace and security in the twenty-first century,” declared it “a challenge to all States and to all of humanity,” reaffirmed the Council’s “unequivocal condemnation of 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,” and called on “all States to intensify their efforts to eliminate the scourge

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<sup>9</sup> UN Charter, Article 41. “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

<sup>10</sup> UN Charter, Article 42. “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.”

<sup>11</sup> S.C. Res. 1368, ¶ 1, UN Doc. S/RES/1368 (September 12, 2001).

<sup>12</sup> S.C. Res. 1373, UN Doc. S/RES 1373 (September 28, 2001). The resolution “reaffirmed” Resolution 1373, as well as S.C. Resolution 1269 (October 19, 1999), which had “[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.” See also S.C. Res. 1455, UN Doc. S/RES/1455 (January 17, 2003); S.C. Res. 1566, UN Doc. S/RES/1566 (October 8, 2004); S.C. Res. 1526, UN Doc. S/RES/1526 (January 30, 2004); S.C. Res. 1535, UN Doc. S/RES/1535 (March 26, 2004); and S.C. Res. 1617, UN Doc. S/RES/1617 (July 29, 2005).

of international terrorism.”<sup>13</sup> Since then, the Security Council has characterized terrorist attacks as threats to international peace and security with great regularity: Bali (2002),<sup>14</sup> Moscow (2002),<sup>15</sup> Kenya (2002),<sup>16</sup> Bogota (2003),<sup>17</sup> Istanbul (2003),<sup>18</sup> Madrid (2004),<sup>19</sup> London (2005),<sup>20</sup> and Iraq (2005).<sup>21</sup>

It is, therefore, irrefutable that international terrorism constitutes a qualifying condition precedent to Article 42 action. On repeated occasions, the Council, exercising its Chapter VII powers, has encouraged, and sometimes required, States to cooperate in combating international terrorism. Most notably, in Resolution 1373, it obliged them to, *inter alia*, prevent the financing of terrorism; criminalize the collection of funds for terrorist purposes; freeze the financial assets of anyone who participates in, or facilitates, terrorism; and take any steps necessary to prevent terrorist acts, including passing early-warning information to other States. Drawing on the recent Taliban experience, the Resolution additionally instructed States to “[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists”; “[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; [p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens”; and “[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.”<sup>22</sup>

Although the Security Council has never expressly mandated the use of force in response to terrorism, it has taken measures short of that remedy. For instance, the Council directed non-forceful sanctions against both Libya and Sudan during the 1990s for their support of terrorism.<sup>23</sup> And in 1999, it imposed sanctions on the

<sup>13</sup> S.C. Res. 1377, Annex, UN Doc. S/RES/1377 (November 12, 2001). In 2003, the Council, meeting at the Foreign Minister Level, adopted a similar declaration. S.C. Res. 1456, UN Doc. S/RES/1456 (January 20, 2003). At the 2005 Security Council Summit, Resolution 1624, UN Doc. S/RES/1624 (September 14, 2005) was adopted, again calling on Member States to intensify their domestic and international efforts to combat terrorism.

<sup>14</sup> S.C. Res. 1438, UN Doc. S/RES/1438 (October 14, 2002).

<sup>15</sup> S.C. Res. 1440, UN Doc. S/RES/1440 (October 24, 2002).

<sup>16</sup> S.C. Res. 1450, UN Doc. S/RES/1450 (December 13, 2002).

<sup>17</sup> S.C. Res. 1465, UN Doc. S/RES/1465 (February 13, 2003).

<sup>18</sup> S.C. Res. 1516, UN Doc. S/RES/1516 (November 20, 2003).

<sup>19</sup> S.C. Res. 1530, UN Doc. S/RES/1530 (March 11, 2004).

<sup>20</sup> S.C. Res. 1611, UN Doc. S/RES/1611 (July 7, 2005).

<sup>21</sup> S.C. Res. 1618, UN Doc. S/RES/1618 (August 4, 2005).

<sup>22</sup> S.C. Res. 1373, ¶ 2(e), UN Doc. S/RES/1373 (September 28, 2001).

<sup>23</sup> S.C. Res. 748, UN Doc. S/RES/748 (March 31, 1992) (Libya); S.C. Res. 1054, UN Doc. S/RES/1054 (April 29, 1996) (Sudan).

Taliban because, among other reasons, the regime was providing safe haven to Usama bin Laden and allowing him and his associates “to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations.”<sup>24</sup> The sanctions included a ban on flights to and from Afghanistan and an international freeze on Taliban assets. Further sanctions were imposed in 2000 and a sanctions-monitoring mechanism was established in 2001.<sup>25</sup>

Few would contest the power of the Security Council to take the further step of authorizing force to counter terrorism, should it so deem necessary. It is important to understand that the Council enjoys unconditional authority to determine both when a situation constitutes a threat, breach, or act of aggression and whether to mandate the use of force in response. Once the Council grants a mandate, it is irreversible except by decision of the Council itself or upon occurrence of a termination condition, such as a cessation date, set forth in the Resolution in question.<sup>26</sup> No review mechanism exists to effectively challenge the Council’s decision.

This being so, it would be entirely within the Security Council’s prerogative to determine that any terrorist-related action amounted to a threat to international peace and security necessitating a forceful response. As an example, from 1998 to 2001, the Council frequently censured the Taliban regime over terrorism-related issues.<sup>27</sup> At any time during that period, the Council could have authorized the use of force against the Taliban, either to coerce the regime into compliance with its wishes or to remove it from power. It elected to not take such a dramatic step, even after the attacks of September 11. The key point is that the Council enjoyed the discretion to do so and, in the future, it may opt to exercise said power in the face of transnational terrorism posing catastrophic risks to the global community.

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<sup>24</sup> S.C. Res. 1267, pmb, UN Doc. S/RES/1267 (October 15, 1999).

<sup>25</sup> S.C. Res. 1333, UN Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1363, UN Doc. S/RES/1333 (July 30, 2001).

<sup>26</sup> An example of expiration involved the UN Preventive Deployment Force (UNPREDEP) in the Former Yugoslav Republic of Macedonia. Its mandate, initially set out in S.C. Res. 983, UN Doc. S/RES/983 (March 31, 1995), expired on February 28, 1999. China vetoed the resolution seeking extension, a move widely regarded as retaliation for Macedonia’s establishment of diplomatic relations with Taiwan.

A resolution may also fall into desuetude when circumstances have so changed that the underlying logic and purpose of the resolution no longer resonate. However, absent that condition or a new resolution repudiating the original resolution “a presumption of continuity is plausible.” See Roberts 2003, at 31, 43.

<sup>27</sup> S.C. Res. 1193, UN Doc. S/RES/1193 (August 28, 1998); S.C. Res. 1214, UN Doc. S/RES/1214 (December 8, 1998); S.C. Res. 1267, UN Doc. S/RES/1267 (October 15, 1999); S.C. Res. 1333, UN Doc. S/RES/1333 (December 19, 2000); S.C. Res. 1363, UN Doc. S/RES/1363 (July 30, 2001).

### 2.2.2 Self-Defense

When the United States, United Kingdom, and other States attacked Afghanistan in 2001, they averred self-defense as the operation's legal basis. Self-defense constitutes the second express exception to the Charter prohibition on the use of force. A form of self-help in international law, it is a customary international law norm codified in Article 51 of the United Nations Charter.

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.

Note that self-defense may be exercised individually or collectively. Since not every State participating in OEF had been attacked on September 11, the Coalition operations launched on October 7 amounted to both collective defence and individual self-defence.

Operation Enduring Freedom was not the first instance of the United States claiming self-defense as a right in forcefully countering terrorism, although in previous decades it typically addressed transnational terrorism through the prism of law enforcement.<sup>28</sup> The international reaction to such assertions of self-defense has evolved steadily, an evolution that reflects a clear shift in the normative expectations regarding exercise of the right.

Recall Operation El Dorado Canyon in 1986, mentioned at the outset of this chapter. Following the attack, President Reagan announced that the United States had acted defensively: "Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight—a mission fully consistent with Article 51 of the UN Charter."<sup>29</sup> As noted, the international community generally balked at this justification.

The United States again claimed the right to react to terrorism in self-defense when it uncovered an assassination plot against former President George Bush in 1993.

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<sup>28</sup> In 1989, President George H.W. Bush elected not to respond militarily when terrorists blew up Pan American flight 103 over Lockerbie, Scotland. Two hundred and seventy people died in the attack. Instead, the United States mobilized international pressure that led to prosecution by a Scottish court sitting in the Netherlands. Extradition and criminal prosecution of those involved in the World Trade Center bombing, particularly Sheik Omar Abdel Rahman, was the chosen course of action.

<sup>29</sup> Reagan President 1986, at 1–2. See also, White House Statement 1986, at 1. A suggestion that the motive was retaliation created some confusion: "Several weeks ago in New Orleans, I warned Colonel Qadhafi we would hold his regime accountable for any new terrorist attacks launched against American citizens. More recently, I made it clear we would respond as soon as we determined conclusively who was responsible ..."

In reporting to the Security Council that US forces had replied by launching cruise missiles against Iraqi intelligence facilities, Madeline Albright, US Ambassador to the United Nations, stated “I am not asking the Council for any action ... but in our judgment every member here today would regard an assassination attempt against its former head of state as an attack against itself and would react.”<sup>30</sup> International reaction was certainly more muted than it had been in response to El Dorado Canyon, a fact no doubt influenced by Iraq’s status as an international pariah in the aftermath of events that had precipitated the First Gulf War, as well as that nation’s non-compliance with the terms of the cease-fire.

In 1998, the United States again claimed a right to use defensive force following the bombings of US embassies in Nairobi and Dar-es-Salaam. Albright, now Secretary of State, announced that “[I]f we had not taken this action, we would not have been exercising our right of self-defense ...”<sup>31</sup> A number of States, including Iran, Iraq, Libya, Pakistan, and Russia, condemned the response, which consisted of cruise missile strikes against terrorist camps in Afghanistan and a pharmaceutical plant in Sudan allegedly tied to terrorism.<sup>32</sup> However, a stream of criticism distinguishing between the two targets foreshadowed a shift in international normative expectations regarding forceful State responses to transnational terrorism. The League of Arab States, for example, criticised the strike into Sudan while offering no comment on that against targets in Afghanistan.<sup>33</sup> At the United Nations, Sudan, the Group of African States, the Arab League, and the Group of Islamic States asked the Security Council to investigate the Sudan attack, but remained silent over the companion operations against Afghanistan-based targets.<sup>34</sup> Perhaps most tellingly, in nearly every case, censure focused not on the fact that a forceful response to a terrorist attack had been mounted, but rather on a belief that the Sudan attack was based on faulty intelligence. In other words, there was implied acceptance of a State’s right to react forcefully to terrorism pursuant to the law of self-defense, so long as the action is based on reliable information.

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<sup>30</sup> Meisler 1993, at A1.

<sup>31</sup> Lacey 2000, citing Interview by Dan Rather, CBS News, with Madeleine K. Albright, US Secretary of State, (August 21, 1998).

<sup>32</sup> Murphy 1999.

<sup>33</sup> Letter from the Chargé d’Affaires A.I. of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/789 (August 21, 1998).

<sup>34</sup> Letter from the Permanent Representative of the Sudan to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/786 (August 21, 1998); Letter from the Permanent Representative of Namibia to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/802 (August 25, 1998) (conveying Group of African States request); Letter from the Chargé d’Affaires of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/791 (August 21, 1998) (conveying League of Arab States request); Letter from the Chargé d’Affaires A.I. of the Permanent Mission of Qatar to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/790 (August 21, 1998) (conveying Group of Islamic States request).

The acceptability of resorting to military force in response to transnational terrorism crystallized in the aftermath of 9/11. Prior to that event, many in the international legal community would still have urged that the international law of self-defense referred only to “armed attacks” by States or armed groups acting on behalf of a State. Violent acts by non-State actors remained the province of law enforcement. However, within a day of the attacks, and at a time when no one was suggesting a State was behind them, the Security Council adopted Resolution 1368, in which it recognized the inherent right of individual or collective self-defense.<sup>35</sup> This action suggested that the Council now understood the law of self-defense as extending to terrorism, at least of the kind mounted on September 11. Lest the resolution be styled merely an emotive reaction to the events of the previous day, on September 28 the Council again affirmed the right of self-defense in Resolution 1373.<sup>36</sup> Other international organizations took exactly the same approach. For instance, both NATO and the Organization of American States activated the collective defense provisions of their respective treaties.<sup>37</sup> So too did Australia vis-à-vis the ANZUS Pact.<sup>38</sup> Bilateral support for the prospective US exercise of its self-defense rights was equally widespread, as 27 nations granted overflight and landing rights to US military aircraft and 46 issued declarations of support. Quite simply, it was universally accepted that a military response in self-defense would be appropriate and lawful.

On October 7, US and Coalition forces launched that response. US Ambassador to the United Nations John Negroponte contemporaneously notified the Security Council, as required by Article 51, that the United States was exercising its right to self-defense.

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defense following the armed attacks that were carried out against the United States on 11 September 2001.

... Since 11 September, my Government has obtained 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. There is still much we do not know. Our inquiry is in its early stages. We may find that our self-defense requires further actions with respect to other organizations and other States.

<sup>35</sup> S.C. Res. 1368, U.N. Doc. S/RES/1368 (September 12, 2001).

<sup>36</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (September 28, 2001).

<sup>37</sup> North Atlantic Treaty, Article 5, April 4, 1959, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; Press Release, NATO, Statement by the North Atlantic Council (September 12, 2001); Inter-American Treaty of Reciprocal Assistance, Article 3.1, September 2, 1947, 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 93; Terrorist Threat to the Americas, Res. 1, Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas, OAS Doc. RC.24/RES.1/01 (September 21, 2001).

<sup>38</sup> Security Treaty, US-Aust.-N.Z., Article IV, September 1, 1951, 3 UST. 3420, 3423, 131 U.N.T.S. 83, 86; Pearson 2001, at 9.

The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.

In response to these attacks, and in accordance with the inherent right of individual and collective self-defense, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan ...<sup>39</sup>

Despite the fact that the attacks fell on not only Al Qaeda, but also the *de facto* government of Afghanistan, the Taliban, criticism was nowhere to be heard. On the contrary, support for the operations was effusive. The United Kingdom participated from the beginning, and Australia, Canada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey, and the United Kingdom offered ground troops.<sup>40</sup> Georgia, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Tajikistan, Turkey, and Uzbekistan opened airspace and provided facilities to support operations.<sup>41</sup>

Further, the claim of the right to act in self-defense engendered de minimis controversy. China and Russia endorsed the operations, as did Arab states such as Egypt.<sup>42</sup> International organizations were likewise sympathetic to the position. The European Union “confirmed its staunchest support for the military operations ... which are legitimate under the terms of the United Nations Charter and of Resolution 1368 of the United Nations Security Council.”<sup>43</sup> The United Nations Security Council continued to adopt resolution after resolution reaffirming the right to self-defense, thereby implicitly accepting the Coalition operations as legitimate and lawful.<sup>44</sup> Even the Organization of the Islamic Conference seemed to approve, simply urging the United States not to expand operations beyond Afghan territory.<sup>45</sup>

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<sup>39</sup> Letter from The Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN. Doc. S/2001/946 (Oct. 7, 2001), 40 I.L.M. 1281 (2001).

<sup>40</sup> Murphy 2002.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Declaration by the Heads of State or Government of the European Union and the President of the Commission: Follow-up to the September 11 Attacks and the Fight against Terrorism, at 1, SN 4296/2/01 Rev. 2 (October 19, 2001).

<sup>44</sup> E.g., S.C. Res. 1378, UN Doc. S/RES/1378 (November 14, 2001); S.C. Res. 1386, UN Doc. S/RES/1386 (December 20, 2001); S.C. Res. 1390, UN Doc. S/RES/1390 (January 28, 2002).

<sup>45</sup> Williams 2001, at A21.

Of course, that the United States had acted militarily in self-defense did not preclude it and its partners around the world from taking other measures. For instance, the Security Council imposed financial sanctions on Afghanistan in Resolution 1373, Saudi Arabia and the United Arab Emirates broke off diplomatic relations with the already isolated regime, and the largest international cooperative law enforcement effort in history was (and continues to be) mounted to identify, locate, arrest, and prosecute terrorists. However, with 9/11, international law became unequivocal vis-à-vis the propriety of using armed force to counter transnational terrorism. The military has been added as yet another arrow in the quiver of international counter-terrorism strategy.<sup>46</sup>

### 2.2.2.1 Self-Defense Against Non-State Actors

Despite a paucity of scholarly or policy attention to self-defense against armed attacks by non-State actors acting autonomously from a State, extension of the right to such situations is supportable as a matter of law, not mere political expediency. In particular, note that Article 51 makes no mention of the nature of the entity that commits the offending armed attack, whereas the Article 2(4) prohibition on the use of force specifically refers to “Member states” acting in their “international relations” (i.e., against other States). This suggests there is no limitation on the use of defensive force against entities other than States, a position supported by the fact that neither Article 39 nor 41, which appear in the same chapter as 51, refer to States. Indeed, the Security Council has never restricted enforcement actions to those directed against States. For instance, it has created international tribunals to prosecute individuals charged with crimes against humanity, war crimes, and genocide.<sup>47</sup> It would be incongruous to suggest that Article 51 should be interpreted differently.

Curiously, the International Court of Justice appears to have done just that in its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.<sup>48</sup> There, the majority opined that Article 51 was irrelevant because Israel did not avow that the terrorist attacks the wall was intended to thwart were imputable to a foreign State.<sup>49</sup> In doing so, the Court seemed to strictly apply, without directly referencing, its holding in Military and

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<sup>46</sup> Of course, the military is used in many nations for counter-terrorist purposes. What is new is the treatment of counter-terrorism as a classic military operation rather than “assistance to law enforcement.”

<sup>47</sup> International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

<sup>48</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (International Court of Justice, July 9, 2004), 43 Int’l Legal Materials 1009 (2004).

<sup>49</sup> *Id.* at para 139, 43 I.L.M. at 1050.

Paramilitary Activities in and Against Nicaragua. In Nicaragua, the Court found that actions of irregulars could constitute an armed attack if they were “sen[t] by or on behalf” of a State and if the “scale and effects” of the action “would have been classified as an armed attack ... had it been carried out by regular armed forces.”<sup>50</sup>

Judges Higgins, Kooijmans, and Buergenthal rejected the majority position, correctly pointing to: (1) the absence of mention of a State as the originator of an armed attack in Article 51 and (2) the clear intent of the Security Council to treat terrorist attacks as armed attacks (expressed, e.g., in Resolutions 1368 and 1373).<sup>51</sup> Moreover, the question in the two ICJ cases differed materially. In Nicaragua, the issue was when did a State’s support of guerrillas justify imputing their acts to the State, such that the victim could respond in self-defense (individually or collectively) directly against the supporter. The Court did not address the issue at hand in the Wall case, i.e., whether the actions of a non-State actor justified the use of force directly against that actor in self-defense.

In this regard, the one point of agreement in the Wall opinion was that acts against which the State is responding in self-defense have to be mounted from outside the State (unless they can be imputed to another State) before triggering the right to self-defense. The majority used this as a second basis for rejecting Israel’s claim to self-defense. It distinguished the situation “contemplated by Security Council resolutions 1368 (2001) and 1373 (2001),” arguing that “Israel exercises control in the Occupied Palestinian Territory” and “the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory.”<sup>52</sup> Judges Buergenthal and Higgins both (correctly) contested the Court’s extension of the principle to occupied territories. In their view, attacks originating therein meet the external attack criterion.<sup>53</sup> The caveat of occupied territory aside though, terrorism occurring wholly within the State does not implicate the right of self-defense. Rather, it falls within the purview of domestic criminal law and, in certain circumstances, the law of non-international armed conflict.

### 2.2.2.2 The Nature of an “Armed Attack”

It is now clear that terrorists may launch armed attacks as that phrase is understood in the Article 51 context. However, this leaves open the question of what constitutes an “armed attack.”

<sup>50</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. Rep. 14 (June 27), at para 195.

<sup>51</sup> Construction of a Wall, *supra* note 48, Sep. Op. Judge Higgins, para 33; Sep. Op. Judge Kooijmans, para 35; Decl. Judge Buergenthal, para 6.

<sup>52</sup> *Id.*, Advisory Opinion at para 139.

<sup>53</sup> *Id.*, Sep. Op. Judge Higgins, para 34; Decl. Judge Buergenthal, para 6.

Article 2(4) prohibits certain “uses of force”, whereas the Article 51 condition precedent is an “armed attack.” The distinction is constitutively logical. The Charter was meant to create an organization and set norms that would “save succeeding generations from the scourge of war.”<sup>54</sup> Thus, the drafters set a low threshold for prohibited uses of force by States, while establishing a higher one before a State could use defensive force, absent United Nations acquiescence. In light of the different standards, uses of force that do not rise to the armed attack level must a priori exist. Although Article 2(4) applies only to States, the difference is relevant to this inquiry because there would perforce be “uses of force” by terrorists that would not activate the right to self-defense, thereby limiting the victim State’s response to one of classic law enforcement measures.

In 1974, the General Assembly embraced the notion of a gap, albeit in the context of a use of force not amounting to an act of aggression. Article 2 of the Resolution on Aggression stated that the Security Council could “conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.”<sup>55</sup> In Article 3(g), it included as an example of aggression “[t]he 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 the acts listed above, or its substantial involvement therein.” By this standard, there are self evidently uses of armed force that do not rise to the level of aggression because they are insufficiently grave.

In Nicaragua, the International Court of Justice specifically addressed the gap when it distinguished between “the most grave forms of the use of force (those constituting an armed attack)” and other “less grave forms.”<sup>56</sup> In 2003, the Court, in *Case Concerning Oil Platforms*, referred approvingly to the “most grave forms” approach.<sup>57</sup>

The Nicaragua Court found that arming guerrillas and providing them logistic support might be a use of force, but did not constitute an armed attack.<sup>58</sup> As noted, it also stated that armed attacks were actions of particular “scale and effects,” distinguishing them from “mere frontier incidents[s]”,<sup>59</sup> a distinction Professor Dinstein famously dismisses.

[U]nless the scale and effects are trifling, below the *de minimis* threshold, they do not contribute to a determination whether an armed attack has unfolded. There is certainly no cause to remove small-scale armed attacks from the spectrum of armed attacks.<sup>60</sup>

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<sup>54</sup> UN Charter, pmbi.

<sup>55</sup> G.A. Res. 3314, Annex, Article 2, UN Doc. A/RES/3314 (XXIX) (Dec. 14, 1974), annexed Definition of Aggression.

<sup>56</sup> Nicaragua, *supra* note 50, para 191.

<sup>57</sup> Oil Platforms (Iran v. V.S.), Merits, 2003 I.C.J. 161, para 51 (November 6).

<sup>58</sup> Nicaragua, *supra* note 50, para 195.

<sup>59</sup> *Id.*

<sup>60</sup> Dinstein 2005.

In the context of State-on-State hostilities, there is much to recommend Professor Dinstein's rejection of the Court's suggestion that violence must rise above a certain level.<sup>61</sup> Yet, the Court's scale and effects criterion makes sense in the case of non-State actors. For States, the only options in the face of attack are self-defense (including the collective variant) and Security Council enforcement action. Since the Council has a less than august record in coming to the rescue of States under attack, the notion of limiting a State's recourse to defensive force is disquieting. By contrast, a rather robust law enforcement regime exists to deal with minor attacks by terrorists and other non-State actors. This being so, the Court's "scale and effects" requirement is far less worrisome in the case of terrorism.

The right to act in self-defense against terrorists is not unfettered. All defensive uses of force, including those directed against non-State actors, must meet three criteria—necessity, proportionality, and immediacy—that derive from the nineteenth century "Caroline Case" and the ensuing exchange of diplomatic notes between the United States and United Kingdom. There, Secretary of State Daniel Webster opined that defensive actions must reflect a "necessity of self-defense, instant, overwhelming, leaving no moment for deliberation."<sup>62</sup> The I.C.J. has recognized the applicability of the first two criteria on multiple occasions. In Nicaragua, the Court confirmed their status as customary international law.<sup>63</sup> It extended them to Article 51 self-defense in the advisory opinion, *Legality of the Threat or Use of Nuclear Weapons*.<sup>64</sup> Lest there be any doubt, the Court confirmed the requirements in its *Oil Platforms* judgment.<sup>65</sup>

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<sup>61</sup> One wonders if the criticism would have been tempered had the Court included a State intent requirement. At the risk of oversimplifying, an armed attack is an intentional military attack or other intentional act resulting in, or designed to result in, immediate violent consequences (such as a computer network attack causing physical damage). For a discussion of this point, see Schmitt 1999. Viewed in this way, the distinction between training guerrillas and sending them out to do one's bidding makes sense. It also explains the Court's rather curious, and certainly confusing, reference to frontier "incidents." Frontier incidents are usually brief encounters between forces facing each other across a border. They seldom represent a conscious strategic decision to initiate international armed conflict. Rather, they tend to be unplanned or, at most, communicative in nature. In the latter case, the intent is often to avoid conflict by signalling the seriousness of the dispute at hand. Of course, the fact that an incident does not amount to an armed attack in the Article 51 sense does not deprive those facing the violence of their right to defend themselves in individual self-defense.

<sup>62</sup> 30 Brit. Foreign St. Papers 193 (1843), reprinted in Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int'l L. p. 82, 89 (1938).

<sup>63</sup> Nicaragua, *supra* note 50, para 194.

<sup>64</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, (July 8), at para 41.

<sup>65</sup> *Oil Platforms*, *supra* note 57, paras 43, 73–74, 76.

### 2.2.2.3 The Necessity Criterion

The first of the principles, necessity, requires there to be no viable option other than force to deter or defeat the armed attack. This is a critical criterion in the context of terrorism. If law-enforcement measures (or other measures short of self-defense) will assuredly foil a terrorist attack on their own, forceful measures in self-defense may not be taken. The issue is not whether law enforcement officials are likely to bring the terrorists to justice, but instead whether, with a reasonable degree of certainty, law enforcement actions alone will protect the target(s) of the terrorism. For instance, if members of a terrorist cell can confidently be arrested, that action must be taken in lieu of a military attack designed to kill its members. Factors such as risk of the terrorists eluding capture and the degree of danger involved in the capture are certainly relevant.

Not only must there be confidence of success, law enforcement must alone be capable of deterring or defeating the threat (or ongoing attack) before actions in self-defense are ruled out. The attacks of September 11 triggered the most intensive international law enforcement operations in history, largely targeted at al Qaeda or its affiliates. Yet, al Qaeda remained active, launching numerous spectacular attacks in the wake of 9/11. This being so, it is plain that military operations launched in self-defense against the organization and its operatives met the necessity criterion.

### 2.2.2.4 The Proportionality Criterion

The proportionality criterion addresses the issue of how much force is permissible in self-defense. It is widely misunderstood. Proportionality does not require any equivalency between the attacker's actions and defender's response. Such a requirement would eviscerate the right of self-defense, particularly in the terrorist context. For instance, terrorists may conduct a series of isolated bombings, yet the only way to preclude follow-on attacks, since surprise is their *modus operandi*, would be major air strikes against their base camps. Surely, it would be absurd to suggest that the greater use of force by the victim State is unlawful.

Instead, proportionality limits defensive force to that required to repel the attack. This may be less or more than used in the armed attack that actuated the right to self-defense; in essence, the determination is an operational one. The availability of other options, especially law enforcement, would in part determine the permissible quantum and nature of the force employed. To the extent that law enforcement is likely to prevent follow-on attacks, the acceptability of large-scale military operations drops accordingly.

### 2.2.2.5 The Immediacy Criterion

The third criterion, immediacy, imposes a temporal limitation on self-defense, both in advance of an attack and following one. The first issue is when does the

right to act in self-defense mature? Professor Dinstein has conspicuously criticized notions of a right to anticipatory self-defense, i.e., defensive actions in anticipation of an attack. Instead, he asseverates that such actions may be “interceptive” at most. Professor Dinstein explains that “an interceptive strike counters an armed attack which is in progress, even if it is still incipient: the blow is ‘imminent’ and practically ‘unavoidable’.”<sup>66</sup>

Professor Dinstein’s view of “in progress” is markedly broad:

The crux of the issue, therefore, is not who fired the first shot but who embarked upon an apparently irreversible course of action, thereby crossing the legal Rubicon. The casting of the die, rather than the actual opening of fire, is what starts the 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 the immaculate conception of self-defense.<sup>67</sup>

It is so broad, that it embraces many actions that other scholars might well label “anticipatory.”

Ascertaining when the “die has been cast” in instances of terrorism will prove far more challenging than in the cases of attacks launched by States. With attacks by States, there are often transparent activities of indications and warnings value: heightened political tensions, call-up of reserve forces, movement of forces towards the border, stand-down of air units, warships putting to sea, etc. Although it may be impossible to know the precise moment the blow will fall, the opponent will usually have a rough sense of when the attacker might cross the Rubicon. This is especially true in an era of global mass media, instant communications, and commercially available satellite imagery.

Terrorism affords no such transparency. On the contrary, a defining characteristic of terrorist attacks is the absence of warning. As the target State usually enjoys a dramatic advantage in force capabilities, surprise is typically the only option available to counter the terrorist group’s asymmetrical disadvantage. Ominously, given growing terrorist access to weapons of mass destruction, miscalculation as to when a terrorist group is entering the Rubicon’s waters may prove catastrophic.

This was a point expressly made in the US National Security Strategy of 2002. In that document, President Bush argued that the confluence of transnational terrorism and weapons of mass destruction necessitated a rethinking of the concept of anticipatory self-defense:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional

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<sup>66</sup> Dinstein 2005, at 191.

<sup>67</sup> *Id.*

means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning...

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>68</sup>

As a practical matter, the President was, of course, correct. In the unique circumstances of twenty-first century terrorism, target States will seldom know where and when an attack is to occur until it is too late. Yet, it would be foolhardy to wait until the launch of a particular terrorist strike before acting in self-defense.

How, then, should the legality of interceptive (anticipatory) counterterrorist actions be measured? International law must always be interpreted in light of the context to which it is being applied and with sensitivity to the underlying purpose of the norm in question. In particular, as a form of self-help, self-defense has to be construed in a way that renders it meaningful; self-help must help.

In the context of terrorism, it is essential to bear the very *raison d'être* of terrorist groups—conducting violent attacks on States and/or societies—in mind when assessing the propriety of anticipatory action. Even though the timing and location of an attack may be uncertain, there is near certainty that an attack will be conducted since that is the group's very purpose. This fact distinguishes armed attacks conducted by States from those mounted by terrorists. States perform useful functions in the international system; indeed, the global architecture relies on States. That being so, a rebuttable presumption that States will act in accordance with international norms, especially those governing the use of force, attaches; hence the normative concerns about acting precipitously in self-defense.

Such presumptions cannot logically attach to terrorist groups. On the contrary, an irrebuttable presumption that the organization will act outside the law should be at play. This reality shapes the interpretation of what it means to say a terrorist group has crossed the Rubicon. Under such circumstances, it is reasonable to characterize the convergence of two factors as the "launch" of a terrorist attack justifying interceptive (anticipatory) action: (1) formation of a group with an avowed purpose of carrying out attacks, and (2) acquisition (or material steps towards the acquisition) of the means to carry out such an attack. A combination of will and capability must coincide.

Lest there be concern this standard sets the threshold for action in self-defense too low, recall that immediacy is but one of the three criteria applicable in defensive actions. In particular, necessity, with its requirement that law enforcement not suffice to prevent terrorist acts, serves as a brake on precipitous actions by the State. Combining these requirements, interceptive (anticipatory)

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<sup>68</sup> The White House, *The National Security Strategy of The United States of America* (September 2002), at 15 [hereinafter *The White House, National Security Strategy of 2002*].

self-defense against terrorists is appropriate and lawful when a terrorist group harbors both the intent and means to carry out attacks, there is no effective alternative for preventing them, and the State must act now or risk missing the opportunity to thwart the attacks. It is action during the last viable window of opportunity a State has to defend itself. In the shadowy and secretive world of transnational terrorism, that window can close long before a terrorist strike takes place. Stated bluntly, when the opportunity presents itself, it may be necessary, and lawful, to kill a terrorist that you cannot capture, even though you do not know precisely when and where he or she will strike.

The other side of the coin is the question of when terrorists may be struck after they act. This is an important query, for in most terrorist acts, the attackers escape. When they do not, as in the case of suicide bombings, the organization of which they are members lives on.

Professor Dinstein has sagely contended that although “[w]ar may not be undertaken in self-defense long after an isolated armed attack,” “a war of self-defense does not have to commence within a few minutes, or even a few days, from the original attack ... [E]ven when the interval between an armed attack and a recourse to war of self-defense is longer than usual, the war may still be legitimate if the delay is warranted by the circumstances.”<sup>69</sup> In other words, he reasonably suggests a test of reasonableness in light of the circumstances prevailing at the time.

But this is a State-centric analysis. It presumes that at a certain point, self-defense is inappropriate because States should defer to non-forceful means of settling their disputes. Such a presumption does not apply to cases of transnational terrorism; the terrorist group would disband if it did not intend to continue the violence. Unlike States, and by definition, the mere existence of the group means the dispute between it and the State(s) will remain violent. The one exception is a terrorist group that morphs into a political organization, as some have suggested (rather optimistically) Hamas is doing.

This being so, it does not make sense to treat multiple terrorist strikes by the same terrorist organization (or network such as al Qaeda) as isolated acts to which the law of self-defense applies separately. Rather, it is more appropriate to characterize them as a continuous attack, much as individual and distinct tactical engagements coalesce into a military campaign. Just as there are tactical pauses in military campaigns, so related terrorist attacks are often separated by periods during which the terrorist regroup and plan their next attack. For instance, experts trace attacks by al Qaeda against US assets back at least to the early 1990s.<sup>70</sup> Sadly, they will likely stretch some distance into the future.

Considered in this way, the immediacy criterion applies only to the first in an anticipated series of attacks. The remainder comprise a continuing terrorist campaign entitling the State to an extended period of self-defense. The criteria

<sup>69</sup> Dinstein 2005, at 242–243.

<sup>70</sup> Schmitt 2002, at 56.

of necessity and proportionality continue to apply, for measures such as law enforcement may remain viable and useful. In this sense, a defensive “war” against a terrorist group differs from an all-out “war” of self-defense in response to, e.g., a major invasion by the military forces of a neighbouring State. In the latter case, the application of the criteria of necessity and proportionality differs, for necessity is self-evident once the attacker crosses the border and concerns about proportionality recede as the State’s survival is placed at risk.<sup>71</sup>

### 2.2.2.6 The Situs of Counter-Terrorist Operations

More sensitive than the issue of when counterterrorist operations may be mounted, is that of where they may occur. Obviously, a State may conduct them on its own territory or the territory of another State that has consented. Thus, for instance, the 2002 strike against al Qaeda operatives in Yemen with the consent and cooperation of Yemeni intelligence was lawful, at least as to its venue.<sup>72</sup> Counter-terrorist operations may also occur on the high seas, for it is accepted customary international law that States may engage in military action beyond the territorial waters of neutral States, so long as they act with due regard to the rights of others.<sup>73</sup>

But when can such operations be mounted without the consent of the State on which they take place? The dilemma is that the question involves two conflicting international law rights, self-defense on the part of the victim State and the right of territorial integrity enjoyed by the State in which the terrorists are located. Territorial integrity is a core principle of international law, one expressly codified in Article 2(4)’s prohibition on the use of force. The sanctity of borders precludes any non-consensual penetration of another sovereign’s territory.<sup>74</sup> On the other hand, self-defense is also a core right in international law codified in the Charter. It is deemed so central to the State-based paradigm that States are allowed to use force to effectuate it.

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<sup>71</sup> The International Court of Justice hinted at this point in its Nuclear Weapons Advisory Opinion: “[T]he Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.” Nuclear Weapons, *supra* note 64, para 97.

<sup>72</sup> See text accompanying footnotes 93–94, *infra*.

<sup>73</sup> NWP 1–14 M, *supra* note 4, para 2.6.3.

<sup>74</sup> 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), Annex, ¶ 1, UN Doc. A/8082 (October 24, 1970). The resolution was adopted by acclamation. There are several possible exceptions, such as rescue of nationals abroad and humanitarian intervention.

In assessing these two relevant aspects of international law, it is useful to recall that when international law rights collide, one need not prevail over the other. Rather, an accommodation should be sought between them that best maximizes and balances their respective underlying purposes.

Assume for the sake of analysis that the State where the terrorists are located is not so complicit in the terrorism that it may be treated as having conducted the armed attacks itself, an issue that will be dealt with later. Rather, it either lacks the means to put an end to the terrorist activities on its soil or does not have the will to do so. In the latter case, the “host” State may sympathize with the group’s aims, benefit from its presence,<sup>75</sup> or fear retaliation if it moves against the organization. Whatever the case, if the “host” State’s territory is unqualifiedly inviolable, the victim State might be deprived of any effective defense. This is particularly so with terrorism. Due to the secretive planning, surprise launch, and at times suicidal execution that characterize it, pre-emptive action may be the only viable defense.

Professor Dinstein labels such actions “extra-territorial law enforcement.” He explains it thusly:

Extra-territorial law enforcement is a form of self-defense, and it can be undertaken by Utopia against terrorists and armed bands inside Arcadian territory only in response to an armed attack unleashed by them from that territory. Utopia is entitled to enforce international law extra-territorially if and when Arcadia is unable or unwilling to prevent repetition of that armed attack.<sup>76</sup>

As he correctly notes, the assertion of such a right is far from exceptional. Quite to the contrary, the Caroline incident, the touchstone of the law of self-defense,<sup>77</sup> involved extra-territorial self-defense. Forces under British command crossed into New York from Canada when British official protestations that rebels were being supported from US territory during the Mackenzie Rebellion of 1837 fell on deaf American ears. As noted by Lord Ashburton, who was negotiating with US Secretary of State Daniel Webster regarding the affair:

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>78</sup>

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<sup>75</sup> As in the case of al Qaeda, which supported the Taliban in its conflict with the Northern Alliance.

<sup>76</sup> Dinstein 2005, at 247.

<sup>77</sup> For instance, the International Military Tribunal at Nuremberg cited the standard when rejecting the argument that Germany invaded Norway in self-defense in 1940. International Military Tribunal at Nuremberg, Judgment, 1 I.M.T. pp. 171, 207 (1946).

<sup>78</sup> Jennings 1938 (quoting Lord Ashburton to Mr. Webster, July 28, 1842, Parliamentary Papers (1843), Vol. LXI; British & Foreign State Papers, vol. 30, at 195).

A contemporary example of “taking the battle to the enemy” in foreign territory without the consent of the territorial sovereign was, of course, Operation Enduring Freedom. For the sake of analysis, put aside the issue the Taliban’s involvement in the attacks against the United States and whether it justified military action directly against the Taliban. That issue will be addressed in due time. Instead, and somewhat artificially, consider only the penetration of Afghan territory to attack al Qaeda.

The Security Council had, on repeated occasions prior to 9/11, demanded that the Taliban police its own territory. In Resolution 1267 of October 1999, for instance, it insisted that the Taliban “cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice.” Included was a specific demand that the Taliban turn over Usama bin Laden.<sup>79</sup> It reiterated its demands in December 2000.<sup>80</sup>

Once attention focused on al Qaeda as the culprit in the September 11 attacks, the United States insisted on Taliban cooperation in eradicating the al Qaeda presence in Afghanistan. Some demands were conveyed through Pakistan, which had maintained relations with the Taliban and thereby served as a useful intermediary. Others were made publicly, such as that expressed by President Bush during an address to a joint session of Congress: “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>81</sup> Following a final ultimatum on October 6,<sup>82</sup> the President ordered US forces into action the next day.

The overture to OEF illustrates a further facet of the requisite balancing between self-defense and territorial integrity. As in the Caroline case, the aggrieved party, now the United States, conveyed demands that the territorial State take action to put an end to the threat emanating from its territory. The US-led coalition, like the British over 160 years earlier, only attacked once it had afforded the “host” State, Afghanistan, ample opportunity to rectify the intolerable situation. This approach represents a fair accommodation of that State’s right to territorial integrity. A State taking defensive action cannot be deprived of its right to

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<sup>79</sup> S.C. Res. 1267, ¶ 2, UN Doc. S/RES/1267 (October 15, 1999). The previous year it had also demanded that the “Taliban stop providing sanctuary and training for international terrorists and their organizations, and that all Afghan factions cooperate with efforts to bring indicted terrorists to justice.” S.C. Res. 1214, ¶ 13, UN Doc. S/RES/I 2 14 (December 8, 1998). See also S.C. Res. 1193, UN Doc. S/RES/1193 (August 28, 1998).

<sup>80</sup> S.C. Res. 1333, UN Doc. S/RES/1333 (December 19, 2000).

<sup>81</sup> Address Before a Joint Session of the Congress on the United States, Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Docs. 1347, 1348 (September 20, 2001).

<sup>82</sup> President’s Radio Address, 37 Weekly Comp. Pres. Docs. 1429 (October 6, 2001).

defend itself, but at the same time must allow the host State a reasonable opportunity to remedy matters before suffering a non-consensual violation of its territory.

Lest it seem overly aggressive to allow a victim State to violate another's borders, recall that States have an obligation to police their territory, ensuring it is not used to the detriment of others. In the classic 1927 Permanent Court of Justice case, *S.S. Lotus*, John Basset Moore, writing in dissent (on other grounds), noted that "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>83</sup> citing for support the 1887 US Supreme Court case *United States v. Arjona*.<sup>84</sup>

In 1949, in its first case, *Corfu Channel*, the International Court of Justice addressed the issue head on.<sup>85</sup> The facts are pertinent. In May 1946, Albanian shore batteries fired on two British cruisers transiting the Corfu Strait, in Albanian waters. The UK. claimed the ships were entitled to pass through the strait in innocent passage, a contention contested by the Albanians. The British sent word that in the future they would return fire if fired upon. That October, four British warships transited the Corfu Strait. Although previously swept, two struck mines, resulting in the loss of 45 lives. When London transmitted a Diplomatic Note stating it intended to sweep the channel, Tirana replied that doing so would violate Albania's sovereignty. In November, the British Navy swept the channel, cutting 22 mines, all of German make.

The Court faced two questions: (1) Is Albania responsible for the explosions, such that it has a duty of compensation, and (2) Did the UK. violate international law through its naval actions in October and November? As to the first, the Court concluded that since the mines could not have been laid without Albania's knowledge, it bore responsibility based on "certain general and well recognized principles," including "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of others."<sup>86</sup> With regard to the second, the October passage need not detain us. However, the November action was styled by the British as, in part, self-help. The Court rejected the argument, noting, "respect for territorial sovereignty is an essential foundation of international relations," but qualified this finding with the caveat that Albania's "failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes" were "extenuating circumstances."<sup>87</sup>

The Court's opinion is relevant in two regards. First, it makes clear that State A has a duty to prevent its territory from being used in a manner that negatively affects an international law right of State B. Applied to terrorism, State A must not

<sup>83</sup> *S.S. Lotus* (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 4, 88 (Moore, J., dissenting).

<sup>84</sup> 120 US 479 (1887).

<sup>85</sup> *Corfu Channel* (UK. v. Alb.), 1949 I.C.J. 4.

<sup>86</sup> *Id.* at 22.

<sup>87</sup> *Id.* at 55.

allow its territory to serve as a terrorist base of operations or sanctuary, or be used in any other manner that would facilitate terrorism against State B. Second, although highlighting the centrality of territorial sovereignty, the Court's reference to extenuating circumstances demonstrates that the right is conditional. Although less than obvious in the written opinion, in *Corfu Channel* the Court balanced competing rights by determining that the right of innocent passage must yield to the right of territorial sovereignty, at least to the extent that force may not be used to secure the former.

The International Court of Justice again turned to the issue of responsibility in *United States Diplomatic and Consular Staff in Tehran*.<sup>88</sup> The facts are notorious and well known. In November 1979, Iranian radicals seized the US Embassy in Tehran and the Consulates in Tabriz and Shiraz, taking hostage American diplomats and other US citizens. Although the United States requested assistance from the Iranian government, none was forthcoming. On the contrary, the Iranian government soon expressed support for the seizure. The United States mounted a failed rescue attempt in April 1980. After 444 days in captivity, the Iranians released the hostages on the day President Ronald Reagan was sworn in as President.

The Court held that Iran's failure to protect the diplomatic premises and subsequently take action to free the hostages violated not only the 1961 and 1963 Vienna Conventions on Diplomatic Relations and Consular Relations respectively, but also "obligations under general international law."<sup>89</sup> As to the failed rescue attempt, it expressed concern that the United States had acted despite the existence of a provisional order directing no action be taken by either side that might aggravate tensions. However, it noted that the US action had no bearing on Iran's responsibility for failure to protect the diplomatic facilities and staff. Thus, again we see the Court emphasizing that States shoulder a legal obligation to safeguard the interests of other States against acts committed from their soil, at least when they have the means to do so.

Aside from the ICJ opinions, a number of other sources support the obligation to police one's own territory. Article 2(4) of the International Law Commission's 1954 Draft Code of Offences against the Peace and Security of Mankind, for instance, provides that "[t]he 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," is an offense against "the peace and security of

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<sup>88</sup> *United States Diplomatic and Consular Staff in Tehran* (US v. Iran), 1980 I.C.J. 3 (May 24).

<sup>89</sup> *Id.*, para 62. Vienna Convention on Consular Relations, April 23, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

mankind.”<sup>90</sup> Note the depiction of mere “toleration” as a crime in international law.

The same proscription appears in the 1970 General Assembly Resolution, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. It provides that “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 para involve a threat or use of force.”<sup>91</sup> In 1994, the Assembly addressed the subject of terrorism directly in its Declaration on Measures to Eliminate Terrorism. By the terms of the resolution, States may not “acquiesce” in “activities within their territories directed towards the commission of [terrorist] acts.” More to the point, they have affirmative “obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism and are urged to take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism.”<sup>92</sup> The resolution goes on to delineate specific measures to achieve these aims. Although “soft law,” these instruments plainly evince a broad consensus that States bear a duty to act against terrorists located on their territory.

Recall that the Security Council also spoke to the issue, for example, when it directed the Taliban to take action against al Qaeda and other terrorist groups operating from Afghanistan. In a more general sense, Resolution 1373, drafted in the immediate aftermath of 9/11, amounted to a watershed in terms of imposing requirements on States to combat terrorism. In particular, States are now prohibited from providing “any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists” and obligated to, *inter alia*, “[t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; [d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; and [p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.”<sup>93</sup>

Thus, an assessment of the lawfulness of penetrating borders to conduct anti-terrorism operations involves more than a “simple” balancing of two conflicting international law rights. It also entails breach (whether intentional or due to an

<sup>90</sup> Draft Code of Offences Against the Peace and Security of Mankind, (1954) 2 Y.B. Int'l L. Comm'n 150, UN Doc. A/CN.4/SER.A/1954/Add.1.

<sup>91</sup> Declaration of Friendly Relations, *supra* note 74.

<sup>92</sup> G.A. Res. 49/60 UN Doc. A/RES/49/60 (December 9, 1994), annexed Declaration, paras 4–5.

<sup>93</sup> S.C. Res. 1373, UN Doc. S/RES/1373 (September 28, 2001).

inability to comply) of a duty owed other States by the State on whose territory the terrorism-related activities are occurring. Analysis will soon turn to the issue of when the actions of the “host” State merit treating that State as if it had itself conducted an “armed attack.” But the inaction of that State in policing its territory is relevant to determining when its borders may be crossed to conduct counter-terrorist operations.

### 2.2.2.7 Limits on Cross-Border Operations

The understandable hesitancy to sanction violation of another State’s territorial integrity must be tempered by the fact that doing so in self-defense is only permissible once that State has failed in its duty to police that territory, either volitionally or unavoidably. Given the serious affront to territorial integrity, the “right” to cross the border must be interpreted very narrowly. The victim State must make a demand on the “host” State to satisfactorily cure the situation (i.e., comply with the duty described above), and the latter must be afforded sufficient opportunity to do so, at least to an extent consistent with the realities the victim State’s effective defense. It may not strike any targets of the “host” government, nor anything else unconnected with the terrorist activity. Indeed, if it does so, it will have committed an armed attack against the host State, which would in turn allow that State to lawfully use force against the intruders in self-defense. Of course, since the State conducting the operation is, to the extent it remains within the limitations, exercising a legitimate international law right, the host State may not interfere with said operations. If it does, that State commits an armed attack, thereby permitting the counterterrorist operation to expand to government personnel and facilities constituting military objectives under international humanitarian law (since an international armed conflict now exists in light of the interstate hostilities).

The intrusion must be limited in time, space, and purpose. As soon as the menace has effectively been quashed, the counterterrorist units must withdraw. Further, the operation must be limited geographically to the minimum territorial infringement consistent with mission success. Both requirements derive from the principle of proportionality in the law of self-defense. Finally, the operation must be intended solely to accomplish a counter-terrorist purpose. It cannot, for instance, be a subterfuge designed to assist one side in a civil war, intimidate the “host” State, etc. Of course, if such a result is the concomitant consequence of the action, so be it; but it cannot be the underlying purpose.

The United States is conducting operations along these lines. At times, it does so with the cooperation, or at least blessing, of the State on whose territory they are mounted. For instance, and as briefly mentioned earlier, in 2002 a CIA-operated Predator unmanned aerial vehicle launched a Hellfire missile to destroy a vehicle in which Qaed Senyan al-Harhi, a senior al-Qaeda member, was riding. Al-Harhi had been involved in the bombing of the USS Cole in 2000 and, given his role

in the organization, was a key player in current and future operations.<sup>94</sup> Yemeni intelligence cooperated in the strike.<sup>95</sup> Given Yemeni consent and the clear need to act defensively, the operation met the criteria outlined above. Al-Harthi was complicit in previous terrorist attacks and surely intended to continue operations against the United States; in that sense, he was engaged in an ongoing campaign, thereby rendering the US strike legitimate under the immediacy criterion. It was necessary in that lesser alternatives such as law enforcement were not viable at the time and there was no certainty that later law enforcement actions would have put him behind bars before he could attack again. Finally, it was proportionate, for no lesser use of force would have sufficed to kill or neutralize al-Harthi, nor was any practically possible in the circumstances.

More recently, the United States conducted air strikes in Pakistan targeting Ayman al-Zawahiri, al Qaeda's second in command. The unsuccessful January 2006 operations, which killed 18 civilians, sparked nationwide protests. Pakistan's President, Pervez Musharraf, condemned the operation, stating, "It is an issue of our sovereignty and of our people's sensitivities ... We're against such attacks." He also denied that Pakistan had provided the intelligence necessary to conduct them.<sup>96</sup>

Such claims must be taken with a grain of salt. Musharraf is conducting a delicate balancing act between support for US counterterrorism efforts and avoidance of domestic unrest and isolation in the Muslim world. Of course, although Pakistan's intelligence agencies and military have been cooperating closely with their US counterparts in the war on terror, "plausible deniability" is often an integral component of such involvement. Indeed, recall that President Bush visited Pakistan in March 2006, in part to demonstrate appreciation for Musharrafs support. This would have been a strange visit to have made if the United States had in fact brazenly violated Pakistani territory.

However, taking President Musharraf's public stance at face value, the attack would nevertheless have arguably fallen within the normative framework set forth. Al Zawahiri is a highly elusive linchpin in the continuing al Qaeda campaign against the United States. Opportunities to "take him out" rarely present themselves and, given the remoteness of the Banjur region, the prospects of a mounting a successful operation to capture him were slim to non-existent. Had the United States taken the time to coordinate its operations with Pakistan (assuming for the sake of analysis that it did not), it would have risked missing the opportunity to act, which, apparently, it did in any event. Pakistan's security forces lacked the assets to mount a timely attack with high confidence. As Musharraf himself noted when commenting on the affair: "We cannot compare our capabilities with the US"

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<sup>94</sup> Profile: Ali Qaed Senyan al-Harthi, BBC News World Report, November 5, 2002, available at [http://news.bbc.co.uk/2/hi/middle\\_east/2404443.stm](http://news.bbc.co.uk/2/hi/middle_east/2404443.stm).

<sup>95</sup> Dworkin 2002.

<sup>96</sup> Bennhold 2006, at 7.

Finally, the use of a CIA-controlled Predator to conduct the attack was certainly the least invasive option available.<sup>97</sup>

That the operation was unsuccessful is of only slight relevance. In assessing the lawfulness of military operations, the crux of the issue is the reasonableness of having acted in the circumstances based on information reasonably believed reliable at the time. There has been no convincing evidence that the United States' belief that it had al Zawahiri in the cross-hairs was precipitous or ill-reasoned. Of course, there is the matter of the resulting 18 civilian deaths. Civilian deaths are always tragic, but the international humanitarian law principle of proportionality acknowledges that they can be unavoidable. In the conduct of hostilities context, proportionality requires that collateral damage to civilian objects and incidental injury to civilians caused during military operations not to be excessive in relation to the concrete and direct military advantage anticipated to result from the attack.<sup>98</sup> Al Zawahiri constituted a target of enormous value in the war on terrorism, and although civilian deaths are tragic, State practice has countenanced levels of incidental injury in excess of this in operations directed against lesser objectives. Proportionality in this context must not be confused with the *jus ad bellum* principle (discussed above) that is one criterion for self-defense.

Critics will assert, fairly, that the framework suggested for cross-border counterterrorist operations is subjective and, therefore, ripe for abuse. While they are correct, the alternative, elevating territorial integrity to a position of unconditioned supremacy over the right to self-defense, is inconsistent with the realities of a twenty-first century beset by transnational terrorism in which the prospect of the use of weapons of mass destruction (WMD) by terrorists grows steadily. Lest it be rendered obsolete, law must be interpreted in light of the context in which it is to be applied, and with fidelity to its core purpose, in this case global order. The normative framework outlined above does just that without undue violence to the received understanding of the law of self-defense.

### 2.2.2.8 Operations Against State-Sponsors

A more difficult endeavour is determining when a victim State may treat the actions of terrorist group as an armed attack not only by the group, but also by a State that has in some way provided it support. Until recently, the generally cited, albeit not universally accepted, standard was that enunciated in the Nicaragua case.<sup>99</sup> There, the Court opined 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

<sup>97</sup> Gall and Jehl 2006, at 3.

<sup>98</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, at Articles 51.5(b) and 57.2(a)(iii).

<sup>99</sup> See, e.g. the dissenting opinion of Judge Schwebel in the Nicaragua case, esp. para 154 ff.

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.'<sup>100</sup> It drew on the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX) for the quoted text,<sup>101</sup> arguing that the definitional extract reflected customary internal law. However, according to the Court, the activities of the guerrilla force, to qualify as an armed attack, should be of a "scale and effects" equivalent to those that would qualify as an armed attack if conducted by regular forces, citing "acts by armed bands where such attacks occur on a significant scale," but explicitly excluding a "mere frontier incident."<sup>102</sup> The Court went on to determine that providing "weapons or logistical or other support" did not suffice. Such activities might amount to a threat or use of force, or wrongful intervention in the external or internal affairs of the target State, but not armed attacks.

This latter point is key. Whether an armed attack has occurred is a different matter than that of a State's responsibility (under international law) for the commission of acts to which it is in some way connected. States undoubtedly shoulder a degree of international responsibility for support to terrorists or other armed groups.<sup>103</sup> Recall the soft law texts cited above, as well as the General Assembly's 1996 Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, which reiterated the obligation of States to refrain from "financing, encouraging, providing training for or otherwise supporting terrorist activities."<sup>104</sup>

The issue at hand, however, is the point at which a State stands in the shoes of the terrorist group it backs. By the Nicaragua yardstick, the supporting State must send the terrorists, effectively control them, or be substantially involved in the

<sup>100</sup> Nicaragua, *supra* note 50, at para 195.

<sup>101</sup> G.A. Res. 3314 (XXIX), *supra* note 55.

<sup>102</sup> Nicaragua, *supra* note 50, para 195.

<sup>103</sup> According to Article 8 of the International Law Commission's Articles of State Responsibility,

conduct of a person or group shall be considered an act of State under international law if the person or group of persons is in fact acting on the instruction of, or under the direction or control of, that State in carrying out the conduct.

International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001), with Commentary, at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf). The Commentary to the article explains:

More complex issues arise in determining whether conduct was carried out under the direction or control of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

*Id.* at 104.

<sup>104</sup> G.A. Res. 51/20 (December 17, 1996).

execution of their attack before being deemed to have committed an armed attack itself.<sup>105</sup> The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia rejected the effective control test in its 1999 Tadic decision. Considering whether an international armed conflict existed in Bosnia-Herzegovina by virtue of the Federal Republic of Yugoslavia's control over Bosnian Serb forces, the Chamber adopted a more relaxed standard: "overall control going beyond mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations for acts of an "organized and hierarchically structured group."<sup>106</sup> Although the precise issue was not armed attack, the Appeals Chamber was commenting on the International Court of Justice's standard in that regard.

In the case of the 9/11 attacks, Taliban support of al Qaeda rose to neither the Nicaragua level, nor that of Tadic. Whilst true that the Taliban tolerated the presence of al Qaeda, and arguably offered sanctuary, they exercised no meaningful control over the organization. Nor has any evidence been produced that the Taliban were accomplices in the 9/11 attacks. Indeed, they did not even provide financing, training, or materiel to al Qaeda, standards which both the ICJ and ICTY rejected as meeting the armed attack threshold. Quite the contrary, the Taliban was in the dependency relationship to some extent, for al Qaeda supported them in their fight with the Northern Alliance, both in terms of financing and fielding the 055 Brigade.

Nevertheless, as discussed, the international community fully supported the strikes on the Taliban. Indeed, over a month after Operation Enduring Freedom began, the Security Council condemned the Taliban "for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist groups and for providing safe haven to Usama Bin Laden, Al-Qaida and others associated with them" and expressed its support for "the efforts of the Afghan people to replace the Taliban regime."<sup>107</sup> This is significant, for the Coalition's participation turned the tide in the civil war between the Taliban and Northern Alliance. Thus, to the extent that the Council supported regime change, it implicitly also supported Coalition military operations against the Taliban.

What does this mean for the *jus ad bellum*? The general principle that States can technically commit an armed attack through association with non-State actions (that would constitute an armed attack if committed by a State's armed forces) remains intact. What appears to have changed is the level of support that suffices. It would seem that in the era of transnational terrorism, very little State support is necessary to amount to an armed attack; at least in this one case, merely

<sup>105</sup> On an analogous basis, the International Court of Justice in Nicaragua rejected assertions of US responsibility for the Contras' actions in violation of international humanitarian law. The Court stated that such activities "would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts ... For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations." Nicaragua, *supra* note 50, at para 115.

<sup>106</sup> Prosecutor v. Tadic, Case IT-94-1, ¶ 145, 120 (1999).

<sup>107</sup> S.C. Res. 1378, pmbl, UN Doc. S/RES/1378 (November 14, 2001).

harbouring a terrorist group was enough. This is a far cry from Nicaragua's "sending by or on behalf" or Tadic's "overall control."

Has the law changed? In a sense, no. Instead, normative interpretation appears to have shifted in the face of changed circumstances. Such shifts are entirely appropriate, for international law exists to serve global needs for security and other common goods. We should not be surprised when the normative expectations of the international community evolve in the face of new threats. This is particularly so in the absence of *lex scripta* directly on point, as is the case with regard to attributing actions of non-State actors to States.

The international community has naturally reacted very aggressively to both transnational terrorists intent on mass casualty attacks and those States that facilitate their activities. As any threat to the community evolves, so too must the operational code governing responses thereto designed to preserve common interests and values. The demise of Cold War bipolarity renders such aggressiveness less disruptive to global order. During the Cold War, many violent non-State actors enjoyed some degree of backing from one of the opposing camps. Reacting forcefully to client States that supported terrorism risked superpower conflict. Thus, the international community, through State practice and judicial pronouncement, set the legality threshold for such responses very high.

That paradigm has been turned on its head. Today, failure to take strong action against either terrorists (perhaps armed with weapons of mass destruction) or their sponsors risks catastrophe. Moreover, it is in the battle against transnational terrorism that we see perhaps the greatest degree of meaningful cooperation between powerful States, thereby limiting the risk that forceful reactions will escalate into major interstate armed conflict.

The extent to which the "armed attack" bar has been lowered remains to be seen. Was the Taliban case unique? After all, the Taliban were international pariahs, condemned widely for horrendous human rights abuses and isolated in the international community. The almost audible sigh of relief upon their ouster from power was not only the product of angst over their willingness to allow al Qaeda to operate freely within Afghanistan, but also of near universal contempt resulting from their domestic behavior towards the long-suffering Afghan people. It is irrefutable that both community order and global values were advanced by their defeat. This reality begs the question of whether States meant to relax normative understandings on the use of force against States tied to terrorism or they were simply celebrating a legitimate, albeit unlawful, regime change.

### The Case of Iraq

The case of Iraq sheds a bit of light on the issue of when State sponsors may be deemed to have themselves committed an armed attack. It does so through negative inference because although discussions of Iraqi support of terrorism prominently occupied pre-attack discourse, self-defense was notably absent in the legal justification proffered for operation Iraqi Freedom (OIF).

In Resolution 1441 of November 2002, the Security Council stated that it “deplored” the fact that Iraq had not complied with its obligations regarding terrorism.<sup>108</sup> Those obligations had been set forth in Resolution 687 of April 1991, which captured the terms of the 1990–91 Gulf War cease fire.<sup>109</sup> In 687, the Council condemned threats made by Iraq during the conflict to “make use of terrorism against targets outside Iraq” and required Iraq to formally inform the Council that “it will not commit or support any act of international terrorism or allow any organization directed towards the commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods, and practices of terrorism.”<sup>110</sup>

The extent and nature of Iraq’s ties to terrorism prior to OIF have proven murky at best. However, a glimpse of what the United States believed regarding Iraqi involvement came in February 2003 when Secretary of State Colin Powell briefed the Security Council in the unsuccessful effort to secure a use of force resolution.<sup>111</sup> The broadest accusation was that “Iraq ... harbours a deadly terrorist network headed by Abu Musab al-Zarqawi, an associate and collaborator of Osama bin Laden and his Al Qaeda lieutenants.” Powell asserted that al-Zarqawi had moved a training camp from Afghanistan to northeastern Iraq when the Taliban fell. Although the area was under the control of the Ansar al-Islam movement, not the Iraqi government, Saddam Hussein reportedly had an agent in the organization that was providing safe haven to some of Zarqawi’s lieutenants and other members of al Qaeda. Further, al Qaeda affiliates based in Baghdad were reportedly directing operations throughout the country. Powell stated that the United States had transmitted information on Zarqawi’s whereabouts to the Iraqis through a friendly intelligence service, but that Iraq did nothing to capture him. Finally, Powell asserted a detainee had admitted during interrogation that Iraq had provided training in chemical and biological weapons to two Al Qaeda operatives, an admission since discredited.

An intensive search throughout Iraq during the occupation turned up very little additional evidence of Iraqi support to terrorism. However, as a matter of law, the question is whether the level of support that the United States and its Coalition partners believed Iraq was providing at the time they launched OIF rose to the “armed attack” level. The United States was apparently uncertain it could credibly make such a case, for, having failed to convince the Security Council to mandate military action on the basis of Iraqi ties to terrorism and weapons of mass destruction, it refrained from formally asserting any claim of self-defense when it did attack. Instead, the United States and United Kingdom proffered a highly

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<sup>108</sup> S.C. Res. 1441, UN Doc. S/RES/1441 (November 8, 2002).

<sup>109</sup> S.C. Res. 687, UN Doc. S/RES/687 (April 3, 1991).

<sup>110</sup> *Id.*

<sup>111</sup> Address by Secretary of State Colin Powell to the Security Council, UN Doc. S/PV.4701 (5 February 2003), at 14–17.

legalistic justification—material breach of the 1991 cease-fire terms.<sup>112</sup> Indeed, in their formal letters to the Security Council setting forth the legal basis for military action, neither country mentioned terrorism, not even in the context of a breach of the cease-fire obligations vis-à-vis terrorism.<sup>113</sup> That the partners chose a highly technical (albeit correct) justification certain to generate international political and legal controversy rather than self-defense—the always preferred justification for action without Security Council mandate—demonstrates they understood a claim of self-defense against State support to terrorism would likely prove unconvincing.

While the community reaction to OEF suggests a modified operational code for when support to terrorists may be treated as an “armed attack,” the reticence of the United States and United Kingdom to use the principle to justify OIF reveals its limits. The Afghanistan case suggests that knowingly and willingly allowing territory to serve as a base of terrorist operations may now represent a degree of complicity sufficient to amount to an “armed attack.” Iraq, on the other hand, seems to illustrate that the scale and scope of terrorist operations occurring on the territory in question must be significant; convincing evidence of the activities, as well as of the willingness of the host State to allow them to take place, must exist; and the host State must be warned to put an end to terrorist operations on its soil and provided ample opportunity to do so before a forceful response in self-defense is permitted.

### 2.3 The Case of Pre-Emptive Self-Defense

The issues discussed above have coalesced into formal strategy pronouncements by the United States and other nations. Most significant in this regard is the pre-emption doctrine, enunciated by the US National Security Strategy 2002 (2002 NSS) in the extract cited earlier.<sup>114</sup> The 2002 NSS also reflected the US conviction that it was at war with terrorists and would, as it had a year earlier, deal harshly with States complicit in terrorist activity:

The war against terrorists of global reach is a global enterprise of uncertain duration. America will help nations that need our assistance in combating terror. And America will hold to account nations that are compromised by terror, including those who harbor terrorists—because the allies of terror are the enemies of civilization. The United States

<sup>112</sup> For a discussion of this point, see Schmitt 2004.

<sup>113</sup> Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351 (March 21, 2003); Letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/350 (March 21, 2003).

<sup>114</sup> The White House, National Security Strategy of 2002, *supra* note 68, at 15 (see text accompanying footnote 68 *supra*); see also The White House, Strategy for Combating Terrorism (February 2003), at 2.

and countries cooperating with us must not allow the terrorists to develop new home bases. Together, we will seek to deny them sanctuary at every turn.<sup>115</sup>

Yet despite the ominous timing of its issuance as events in Iraq cascaded towards war, and although it purported to be a new adaptation of the law of self-defense in the face of rogue states and terrorists, ultimately the United States chose not to assert pre-emption as the legal basis for OIF.

In March 2006, the United States issued a new National Security Strategy (2006 NSS), one retaining all of the key elements of its predecessor. One interesting point is that the discussion of pre-emption occurs primarily in the section on weapons of mass destruction, whereas in the 2002 version it was prominent vis-à-vis both terrorism and WMD. In relevant part, the new strategy provides:

Our strong preference and common practice is to address proliferation concerns through international diplomacy, in concert with key allies and regional partners. If necessary, however, under long-standing principles of self defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack. When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize. This is the principle and logic of preemption ... We will always proceed deliberately, weighing the consequences of our actions. The reasons for our actions will be clear, the force measured, and the cause just.<sup>116</sup>

Whether this placement represents a subtle change in approach or merely reflects the current strategic context, one in which the war on terrorism is well underway and Iran's nuclear ambitions have moved to the forefront of global attention, is unclear. The document itself asserts that "The place of preemption in our national security strategy remains the same."<sup>117</sup>

The new NSS comes out even more strongly than the 2002 version against State support for terrorism, making "deny terrorist groups the support and sanctuary of rogue states" one of its four short term objectives.

The United States and its allies in the War on Terror make no distinction between those who commit acts of terror and those who support and harbor them, because they are equally guilty of murder. Any government that chooses to be an ally of terror, such as Syria or Iran, has chosen to be an enemy of freedom, justice, and peace. The world must hold those regimes to account.<sup>118</sup>

Although the 2002 NSS evoked a fire storm of controversy, nothing regarding terrorism strategy in either it or its successor runs counter to any of the legal norms analyzed above. As the former Legal Adviser to the Department of State correctly noted in 2003,

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<sup>115</sup> The White House, National Security Strategy of 2002, *supra* note 68 at 3–4.

<sup>116</sup> The White House, The National Security Strategy of the United States (March 2006), at 23 [hereinafter The White House, National Security Strategy of 2006].

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 12.

In the end, each use of force must find legitimacy in the facts and circumstances that the state believes have made it necessary. Each should be judged not on abstract concepts, but on the particular events that gave rise to it. While nations must not use preemption as a pretext for aggression, to be for or against preemption in the abstract is a mistake. The use of force preemptively is sometimes lawful and sometimes not.<sup>119</sup>

So long as the State is acting in the likely last window of opportunity to defend itself effectively against a future terrorist attack in circumstances where alternatives such as law enforcement are not certain to suffice, the preemptive operation is available as a matter of law. If the State acts prior to the maturation of these conditions, it is acting preventively, not preemptively.<sup>120</sup> The distinction is crucial, for the preventive use of force is unlawful. For instance, if State A attacks WMD storage facilities in State B because it has hard intelligence that B is about to transfer WMD to a terrorist group which has previously carried out attacks against A, the action is preemptive in nature. However, if it strikes in the absence of actionable intelligence, but simply out of concern that B may effect a transfer to terrorists one day, it has acted preventively. Preventive action is based solely on a potential opponent's capability to carry out an attack (or imminent acquisition of such capability). Preemption requires both capability and intent.<sup>121</sup>

In December 2004, a High Level Panel appointed by the UN Secretary-General issued *A More Secure World: Our Shared Responsibility*. In part, the report addressed self-defense and its relationship to actions under Chapter VII of the UN Charter. Although the panel avoided use of the controversial term "preemption," it embraced the notion, while rejecting that of preventive attack.

(...) [A] threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability.

Can a State, without going to the Security Council, claim in these circumstances the right to act, in anticipatory self-defense, not just preemptively (against an imminent or proximate threat) but preventively (against a non-imminent or non-proximate one)? (...)

The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment—and to visit again the military option.<sup>122</sup>

In other words, the panel adopted the approach advanced in this chapter.

<sup>119</sup> Taft IV and Buchwald 2003.

<sup>120</sup> The confusion and controversy resulting from release of the 2002 NSS was in part caused by use of the word "prevent" in the title of both the terrorism and WMD chapters.

<sup>121</sup> Of course, the preemptive action must comply with the other requirements of self-defense.

<sup>122</sup> *A More Secure World: Our Shared Responsibility*, Report of the High Level Panel on Threats, Challenges, and Change, UN Doc. A/59/565, at 54–55 (December 12, 2004).

There is one aspect of the US preemptive doctrine, though, that has proven contentious—the commitment to act “even if uncertainty remains as to the time and place of the enemy’s attack.” The 2002 statement in this regard was retained in the 2006 NSS.<sup>123</sup> If the statement implies that the United States might act without knowing whether a potential enemy will strike, then a proposed action would be preventive and, therefore, unlawful. On the other hand, if, as the plain text denotes, the United States knows the attack is coming, but does not know precisely when and where, then the action would be judged by the criteria outlined earlier, particularly those of acting in the last window of opportunity and the absence of viable alternatives.

It cannot be otherwise in an era of weapons of mass destruction that can be unleashed by groups who often pay no heed to their own survival. Authorities seldom know where and when a terrorist strike will occur. After all, discovery of a prospective attack usually foils it. Consequently, the terrorist *modus operandi* involves doing everything possible to foster uncertainty as to time and place. To impose a burden of certainty on a potential victim State would be ludicrous. The only bearing that knowledge as to time and place has on the lawfulness of an action in self-defense is in assessing whether alternatives to the use of military force are available and whether the proposed defensive action may be the last opportunity to thwart whatever attack is coming.

The uncertainty reference could also be interpreted as comment on the quality of the evidence upon which action is based, in other words, as an assertion that the United States will act on less than fully reliable information given the stakes involved with terrorism and WMD. This is an incorrect characterization, for the uncertainty refers to time and place of the attack, not to whether an attack will occur. However, in an abundance of analytical caution, let us assume the latter is the case. Since uncertainty often shrouds international security matters, how good must the evidence be before a State may act in self-defense?

Recall criticism of the 1998 strike into Sudan. Also recall the extent to which failure to discover the “smoking gun” linking Iraq to WMD or terrorism resulted in widespread criticism of the decision to go to war and left the Bush administration scrambling for other grounds on which to denounce the Iraqi regime, such as its appalling human rights record. Both incidents evidence an operational code that requires counterterrorist operations to be based on dependable evidence.

Unfortunately, international law contains no express evidentiary standard governing the quality of the information upon which States may resort to force in self-defense. However, a useful standard is that articulated by the United States in its notification to the Security Council that it was acting in self-defense when attacking Al Qaeda and the Taliban. In the letter of notification, Ambassador John Negroponte stated that “my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban

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<sup>123</sup> The White House, National Security Strategy of 2006, *supra* note 116, at 23.

regime in Afghanistan, had a central role in the attacks.”<sup>124</sup> NATO Secretary General Lord Robertson used precisely the same term when announcing that the attack against the United States fell within the terms of Article V of the North Atlantic Treaty.<sup>125</sup> In light of the near universal characterization of OEF as lawful, it appears that the international community accepts “clear and compelling” as an appropriate evidentiary standard in self-defense cases.

Clear and compelling is a term borrowed in part from American jurisprudence, although, when assessing evidence, “clear and convincing” is more typically employed. Clear and convincing evidence is a level more probative of the issue at hand than “preponderance of the evidence,” which simply means that the evidence makes the matter more likely than not. It is, on the other hand, less probative than the “beyond a reasonable doubt” standard typically required for a guilty finding in a criminal case. Used in the context of justifying a use of force, clear and convincing evidence of a forthcoming armed attack is evidence that would convince a reasonable State to act defensively in same or similar circumstances. Reasonable States do not act precipitously, nor do they remain idle as indications that an attack is forthcoming become deafening.

Since the United States proffered the phrase in a self-defense context, it is reasonable to impose such a standard upon it. Thus, if the 2006 NSS’ use of the term “uncertainty” is interpreted as alluding to the quality of evidence, that uncertainty may not rise to a level that would cause the basis for the action to be less than clear and compelling.

## 2.4 Conclusion

In a sense, the 2006 National Security Strategy represents the maturation of counterterrorism strategy and law. The horrendous events of 9/11 shocked the international community into reconsidering the normative framework governing terrorism. Resultantly, the premise that terrorism was more than mere criminality, that it rises to the level of armed attack, has garnered wide acceptance. This acceptance is reflected in the fact that the most powerful country in the world has chosen to make counterterrorism the centerpiece of its national security strategy.

Operation Enduring Freedom also fundamentally altered notions of the sanctions to which States that support terrorism are subject. An operational code that generally rejected the use of force against States for involvement falling below some degree of control shifted in the course of less than a month to one permitting the forcible ouster of a regime that had done little more than allow a terrorist group

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<sup>124</sup> Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/2001/946 (October 7, 2001).

<sup>125</sup> Statement by NATO Secretary General Lord Robertson, NATO Headquarters (October 2, 2001), available at <http://www.nato.int/docu/speech/2001/s011002a.htm>.

to freely use its territory. This shift is reflected brightly in the 2006 NSS' refusal to distinguish between terrorists and the States that support or harbor them.

The operational code has evolved in other ways responsive to the new context. For instance, imminency can no longer be seen in purely temporal terms; in the twenty-first century the issue is opportunity, not time. And territorial sovereignty has necessarily yielded a bit to the practical needs of self-defense. As the difficulty of combating a territory-less enemy became apparent, States which cannot or will not police their own territory must surrender a degree of their border's legal impenetrability. Again, although not completely new, these issues were highlighted by the attacks of 9/11, with transformations in the operational code revealing themselves as the United States and its global partners responded to this and subsequent acts of transnational terrorism. They are all reflected in the NSS.

But the Operation Iraqi Freedom interlude demonstrated that we were witnessing an evolution of the normative framework, not its dismantling. The United States and its allies, despite the fact that the Security Council itself had condemned Iraq for failing to comply with its obligations regarding terrorism, was incapable of making the case that the situation merited action in self-defense (or a Council use of force mandate). In the end, it resorted to a legal justification that, albeit appropriate as a matter of law, continues to mystify many. Moreover, the failure to produce the "smoking gun" and the negative impact it (wrongly) had on perceptions of the legality of the operation, demonstrate that even in cases of terrorism, States will be held to high standards. Bearing this in mind, the current normative vector of the law of counterterrorism appears sound.

## Abbreviations

NSS	National Security Strategy
OEF	Operation Enduring Freedom
OIF	Operation Iraqi Freedom
WMD	Weapons of mass destruction

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<http://www.springer.com/978-90-6704-739-5>

Essays on Law and War at the Fault Lines

Schmitt, M.N.

2012, XII, 640 p., Hardcover

ISBN: 978-90-6704-739-5

A product of T.M.C. Asser Press