

WAR ON THE ENEMY: SELF-DEFENCE AND STATE-SPONSORED TERRORISM

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[In the international law system, internal mechanisms are the appropriate responses to terrorist acts through domestic criminal law. The weakness of domestic criminal law is however evident in the face of transnational terrorists groups whose scope spreads across many borders. The challenge is compounded when States actively or passively support terrorism. Though traditionally State responsibility has been the vehicle through which pressure is exerted on States sponsoring terrorism, the lethal capabilities of terrorists demonstrated by the September 11, 2001 attacks has fundamentally changed the landscape. The consequences of breaches arising out of a failure by a State to effectively curtail terrorist organisations based or operating out of its territory have expanded sharply, permitting not just financial reparations or other traditional benign countermeasures, but even the extensive use of deadly military force. With the linkage between the terrorist and the sponsoring state becoming crucial to providing States with the justification for a response against rogues States, this Article discusses the issue of State-sponsored terrorism and the use of military force in combating terrorism in the context of the *UN Charter* regime on the use of force by States.]

I. Introduction

The term ‘terrorism’ is of French origin and was first coined in connection with the Jacobin ‘Reign of Terror,’ a period of the bloody French Revolution in which the French State, asserted its authority by knitting a fabric of fear over the populace through summary executions of thousands.² It was however not until the 20th century, in 1934, following the assassination of French statesman Jean-Louis Barthou and King Alexander of Yugoslavia that terrorism entered the international agenda.³ This event induced the League of Nations to draft the first ever penal instrument making terrorism an international offence-the *Convention for the Prevention and Punishment of Terrorism*.⁴ The Convention defined terrorism as ‘criminal acts directed against a State and intended or calculated to create a State of terror in the minds of particular persons, or a

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² John F Murphy, Defining International Terrorism: A Way Out of the Quagmire’ (1989) 19 *Israel Year Book of Human Rights* 13, 14.

³ Joel Cavicchia, ‘The Prospects for an International Criminal Court in the 1990s’ (1992) *Dickinson Journal of International Law* 223, 225.

⁴ League of Nations, *Convention for the Prevention and Punishment of Terrorism*, ((1938) 19 League of Nations O J 23.

group of persons or the general public.’⁵ This Convention, which adopted a very broad definition of terrorism, never entered into force. Nevertheless, certain customary norms of international law relating to the use of armed force, most notably the duty of States ‘to prevent and suppress such subversive activity against foreign Governments as assumes the form of armed hostile expeditions or attempts to commit common crimes against life or property,’⁶ implicitly proscribed certain instances of terrorism.

After the World War II, the international community codified certain binding norms of international law in the United Nations Charter. The *UN Charter* has as its primary goal the prevention of war by working with the political system to govern conflicts between States by outlawing a wide range of uses of force and defining permissible and lawful uses of force.⁷ The Charter does not expressly mention terrorism. The drafters of the *UN Charter* ‘did not fully anticipate the existence, tenacity and technology of modern day terrorism’⁸ nor contemplate the existence of international terrorists with the result that the *UN Charter* simply does not directly address the subtler uses of force which terrorists began to actively pursue in the post-World War II period.

The absence of an explicit recognition of terrorism was later matched by the absence of a single definition of terrorism in either customary or conventional international law. To date efforts by the United Nations to draft a single broad definition of terrorism acceptable to all States, such as

⁵ Ibid.

⁶ Lassa Oppenheim, *International Law* (Hersch Lauterpacht ed, 8th ed 1955), Vol 1, 292-293.

⁷ See James P Rowles, ‘Military Responses to Terrorism: Substantive and Procedural Constraints in International Law’ (1987) 81 *American Society of International Law Proceedings* 287, 310.

⁸ Mark Baker, ‘Terrorism and the Inherent Right of Self-Defence (A Call to Amend Article 51 of the United Nations Charter)’ (1987) 10 *Houston Journal of International Law* 25.

that found in the *Convention for the Prevention and Punishment of Terrorism*, have failed.⁹ Conventional international law on terrorism is presently limited to a relatively small number of widely accepted conventions that proscribe particular types of terrorism, which likely reflect customary norms of international law.¹⁰ The most common types of terrorism covered by these conventions include crimes against the safety of civil aviation and maritime navigation, the taking of hostages, the use of nuclear and chemical weapons, and crimes against internationally protected persons.¹¹

During the early years of the UN the distinction between terrorists and revolutionaries¹² was subject to much disagreement and the volatile Cold War era loomed large over any effort to establish a firm international definition of terrorism as it relates to States that sponsor or support terrorists. It was during this early days of the UN and the regime on the use of force that it sought to craft that the UN was presented with its greatest opportunity to bring terrorism within the ambit of the *UN Charter* through the key 1957 UN General Assembly resolution defining ‘aggression’¹³ (as it relates to Article 2(4) and Article 51 of the *UN Charter*). Sidestepping the

⁹ Rosalyn Higgins, ‘The General International Law of Terrorism’ in Rosalyn Higgins & Maurice Flory eds, *Terrorism and International Law* (1997) 14.

¹⁰ See Louis Rene Beres, ‘On International Law and Nuclear Terrorism’ (1994) *Georgia Journal of International and Comparative Law* 1, 1-2.

¹¹ See Yonah Alexander, ‘Terrorism in the Twenty-First Century: Threats and Responses’ (1999) *DePaul Business Law Journal* 59, 92-94.

¹² For example when Nelson Mandela first visited the US, he was on the State Department’s list of international terrorists. Mandela is now a Nobel Peace Prize Laureate, pre-eminent international statesman and a living legend! In the Middle East another ‘international terrorist’ Yasir Arafat won the Nobel Peace Prize but still there are question marks as to whether he is an architect of peace or a purveyor of terrorism. As recently as February 2001 a Malaysian representative to the ad hoc committee of the General Assembly created to draft a comprehensive convention on terrorism speaking on behalf of the Organisation of the Islamic Conference, said that a definition of terrorism was desirable so that terrorism could be ‘differentiated from the legitimate struggles of people under foreign occupation for national liberation, as recognised by the relevant resolutions and declarations of the United Nations.’ Committee on Terrorism Takes Up Draft Comprehensive Anti-Terrorism Convention, Press Release, Ad Hoc Committee on Assembly Resolution 51/210, 5th Sess 19th mtg, UN L/2971 (2001).

¹³ Definition of Aggression, GA Res 3314, 29 UN GAOR, Supp No 31, at 142, UN Doc A/9631 (1957). The UN Definition of Aggression states in main part:
Article 1

volatile issue, the UN chose to ignore using the word terrorism choosing instead to classify the activities of States who send, organize, or support ‘armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against a State . . .’ as engaging in unlawful aggression in direct violation of the *UN Charter* and not as terrorism. During the 1970s and 1980s, the United Nations attempts to define the term foundered mainly due to differences of opinion between various members about the use of violence in the context of conflicts over national liberation and self-determination. In spite of its failure to define terrorism, in 1985 the United Nations General Assembly adopted a key resolution:

unequivocally condemn[ing], as criminal, all acts, methods and practices of terrorism wherever and by whomever committed...[and calling]s upon all States to *fulfil their obligations under international law* to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts.¹⁴ [Emphasis added]

Aggression is the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any manner inconsistent with the Charter of the United Nations.... Article 2

The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression....

Article 3

Any of the following acts, regardless of a declaration of war, shall... qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State... of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State...;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea, or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State... in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; or,
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State, of such gravity as to amount to the acts listed above, or its substantial involvement therein.

¹⁴ GA Res 40/61 9 December 1985, para 1 in conjunction with para 16. Full text of the resolution can be accessed at the following URL: <<http://www.un.org/documents/ga/res/40/a40r061.htm>>.

Similar language can be found in any number of subsequent General Assembly and Security Council resolutions over the last fifteen years.¹⁵ Many of these resolutions also State that terrorism is contrary to the purposes and the principles of the United Nations and represents a ‘threat to international peace and security’. Various definitions of terrorism refer to unlawful force as opposed to lawful force. However, the problem arises on the fundamental aspect of the definitions--the distinction between unlawful force and lawful force. ‘Recognizing the politics associated with reaching an acceptable global definition for terrorism, the United Nations (UN) has elected to avoid the term terrorism altogether, to use it in a general sense only, or to carefully carve out very specific acts in selected international treaties to characterise as terrorism.’¹⁶ Consequently, the international community has taken a piecemeal approach and addressed the problem of international terrorism by identifying particular criminal acts inherently terrorist in nature to be prevented and punished by domestic law. The result has been the adoption of a number of global treaties, regional conventions, and bilateral agreements, which are relevant to the suppression of international terrorism, and corresponding domestic laws, which implement those arrangements.¹⁷

Though terrorism is a term used frequently and has been extensively treated in legal literature for decades, there continues to be disagreement as to what might be an acceptable and universal

¹⁵ See, e.g., GA Res 31-102, UN GAOR, 31st Sess, Supp No 39 at 185-186, UN A/31/39 (1976); GA Res 34-145, UN GAOR, 34th Sess, Supp No 46, at 244-245, UN A/34/46 (1980); GA Res 38-130, UN GAOR, 38th Sess, Supp No 47, at 266-267, UN A/38/47 (1983); GA Res 44-29, UN GAOR, 44th Sess, Supp No 49, at 301-303, UN A/44/49 (1989); GA Res 46-51, UN GAOR, 46th Sess, Supp No 49 at 283-285, UN A/46/49 (1991); GA Res 51-210, UN GAOR, 51st Sess, Supp No 49 at 346-348, UN A/51/49 (1996); GA Res 53-108, UN GAOR, 53rd Sess, Supp No 49 at 364-365, UN A/53/49 (1998); GA Res 56-160, UN GAOR, 56th Sess, Supp No 49, at 358-359, UN A/56/49.

¹⁶ Jeffrey F Addicott, ‘Legal and Policy Implications For A New Era: The “War On Terror”’ (2002) 4 *Scholar: St. Mary’s Law Review on Minority Issues* 209, 213-214.

¹⁷ ‘The international conventions by and large address the form or target of the terrorist attack, rather than the terrorists themselves.’ Leah Campbell, ‘Defending Against Terrorism: A Legal Analysis of the decision to Strike Sudan and Afghanistan’ (2000) 74 *Tulane Law Review* 1067, 1071-1072.

definition of the word. Despite the uncertainties, generally acts of violence that are considered objectively and intrinsically unlawful and without adequate justification amount to acts of terrorism even though the terrorist group construe its activities within its political philosophy as a 'just cause' under international law. Some basic features that might contribute to an acceptable and working definition can be gleaned from the following definitions which encapsulate various aspects of terrorism.

- '[T]he unlawful use or threatened use of force or violence by a revolutionary organization against individuals or property with the intention of coercing or intimidating governments or societies, often for political or ideological purposes.'¹⁸
- 'the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.'¹⁹
- 'premeditated, politically motivated violence perpetrated against non-combatant targets by sub national groups or clandestine State agents.'²⁰
- 'violent criminal conduct apparently intended: (a) to intimidate or coerce a civilian population; (b) to influence the conduct of a government by intimidation or coercion; or (c) to affect the conduct of a government by assassination or kidnapping.'²¹

Synthesising the aforementioned elements, terrorism can broadly be defined as: The use or threatened use of violence for political ends, or any use or threatened use of violence for the purpose of putting the public or any section of the public in fear, such force being distinguished by its unlawfulness under domestic and/or international law. This is broadly consistent with most definitions in academic literature which generally require two elements: actual or threatened violence against civilians or persons not actively taking part in hostilities and the implicit or explicit purpose of the act being to intimidate or compel a population, government or organisation into some course of action. This broad definition is supported by a proposed convention drafted by the International Law Association which defines terrorism as:

¹⁸ US Department of Justice. Rushworth M Kidder, 'Unmasking Terrorism: The Fear of Fear Itself' in Bernard Schecterman & Martin Slann eds, *Violence and Terrorism* (3rd ed, 1993) 14.

¹⁹ US Federal Bureau of Investigation, *ibid.*

²⁰ US Department of State, *ibid.*

²¹ US Department of Justice, *ibid.*

An international terrorist offence is *any serious act of violence or threat* thereof by an individual whether acting alone or in association with other persons, organizations, places, transportation or communications systems or against members of the general public *for the purpose of intimidating* such persons, *causing injury to or the death* of such persons, disrupting the activities of such international organisations, of causing loss, detriment or damage to such places or property, or of interfering with such transportation and communications systems in order to undermine friendly relations among States or among the nationals of different States or *to extort concessions from States*.²² [Emphasis added]

In the words of Professor J F Addicott:

Despite the lack of a fixed universal agreement defining terrorism, the essential goal of terrorism is readily identifiable. As the root word implies, the goal of terrorism is to instil fear in a given civilian population by means of violence. In the oft-repeated Chinese proverb, the objective of the terrorist is to kill one and frighten 10,000. While specific acts of terrorism may appear to be mindless and irrational, terrorism is the antithesis of confused behaviour. Terrorism is a goal-directed, calculated, and premeditated use of force.²³

International discourse on terrorism is abundant and terrorism continues to be the subject of sustained debate. However, the September 11, 2001 attacks elevated the discourse to another level through generation of momentum for the international legal system to co-opt military response to counter terrorism within the *UN Charter* on the regime of lawful use of force. Many of the strict requirements of *Nicaragua Case*²⁴ which considered the issue of the State responsibility in light of international norms on the use of force are now under siege and have been opened to challenge. This points to an infusion of Article 51 with a new focus. This of itself is nothing new as discourse in this field has long grappled with the issue. This particular Article has as its aim an examination of the use of force to counter terrorism in light of the September 11 attacks. It is premised on the central theme that the right to self-defence is visibly enrolled in a process of change and evaluates this within the framework of the uncertainty and indeterminacy

²² Art I (J) of Draft Single Convention on the Legal Control of International Terrorism (International Law Association 1980) in International Law Association, Report of the Fifty-Ninth Conference Held at Belgrade, August 17th, 1980 to August 23rd, 1980, at 497-504 (1982). The traditional political offence exception commonly associated with extradition is not applicable in this definition of terrorist offence. See *ibid* at 502-3, commentary to art II.

²³ Addicott, above n 2 at 216.

²⁴ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)* 1986 ICJ 14 p 109 27 June).

of the role of the doctrine of State Responsibility in providing the necessary linkage to the use of military force against States that sponsor terrorism.

In Part II, the Article will seek to set the parameters for State-sponsored terrorism through an evaluation of the tenets of State responsibility and *UN Charter* enshrined norms on the use of force. This is important since the potential for abuse of the option of military force is significantly reduced if States observe the evidentiary thresholds that relate to careful evaluation of evidence as to who is responsible for the attack. The recognition that acts of private actors may give rise to an armed attack is anything but revolutionary. However, it is not entirely clear from the practice in the aftermath of September 11 whether the requirement of the attributability of a terrorist act to a specific State actor was, in fact, fully abandoned or whether the qualification of armed attack still requires a nexus of the terrorist act to another State entity. Tied to this is the prickly issue of situations in which the attack is launched from failed States or territories governed by *de facto* regimes.

In Part III, the Article analyses the *UN Charter* regime on the use of force specifically as it relates to State-sponsored terrorism. This is an issue that continues to be on uncertain ground since under customary international law, States *per se* are not perpetrators of terrorism because terrorism is a penal offence and States are not subjects of international criminal law.²⁵ Nonetheless, General Assembly resolutions that repeatedly condemn State undertaking and support of terrorism implicitly acknowledge that States are involved in terrorist activities.²⁶ Within this context, the

²⁵ Krzysztof Skubiszewski, 'Definition of Terrorism' (1989) 19 *Israel Year Book of Human Rights* 39, 45.

²⁶ See, e.g., GA Res 31-102, UN GAOR, 31st Sess, Supp No 39, at 185-186, UN Doc A/31/39 (1976); GA Res 34-145, UN GAOR, 34th Sess, Supp No 46, at 244-245, UN Doc A/34/46 (1980); GA Res 38-130, UN GAOR, 38th Sess, Supp No 47, at 266-267, UN Doc A/38/47 (1983); GA Res 44-29, UN GAOR, 44th Sess, Supp No 49, at 301-

Article discusses the relationship of armed attacks to terrorist attacks considering that it can be argued that terrorism is similar to conventional war insofar as they both have parallel goals and rationales, i.e., attacking the political, social or economic structures of a given State.²⁷ The difference though is terrorists engage in violence against people who are not at war and who do not understand themselves to be at war. Considering that the relative lethality of a given terrorist attack may vary in terms of the intensity and destructiveness of force deployed, ranging from the bombing of a small group to the large-scale slaughter of September 11, 2001, can terrorist attacks be co-opted into the understanding of ‘armed attack’ and thus a basis for the use of military force against the responsible entity?

Finally Part IV of the Article sums up the argument by considering the defensive response to state-sponsored terrorism and the dictates of customary and conventional legal requirements. Though the unspoken premise of the September 11 attacks is that terrorist groups shall not receive an ‘unwitting shield’ from the territorial integrity of a State, the normative corollary of this hypothesis which posits that the right to territorial integrity must, in some instances, yield to the exercise of another State’s right to protect itself and its citizens under the rubric of self-defence may set a dangerous precedent. The quantum leap in countering terrorism, from the reactive mode to recognition that proactive steps are needed ought to be carefully weighed in an international system that is still dominated by the dictates of national and geopolitical interests.

303, UN Doc A/44/49 (1989); GA Res 46-51, UN GAOR, 46th Sess, Supp No 49, at 283-285, UN Doc A/46/49 (1991); GA Res 51-210, UN GAOR, 51st Sess, Supp No 49, at 346-348, UN Doc A/51/49 (1996); GA Res 53-108, UN GAOR, 53rd Sess, Supp No 49, at 364-365, UN Doc A/53/49 (1998); GA Res 56-160, UN GAOR, 56th Sess, Supp No 49, at 358-359, UN Doc A/56/49 (2001) [hereinafter General Assembly Resolutions].

²⁷ See Richard Falk, *Revolutionaries and Functionaries: The Dual Face of Terrorism* (1988) 76, 90-93.

II. Anatomy of State-Sponsored Terrorism

Historically, rules on the lawful use of force have developed within a framework of State-to-State relationships. ‘Terrorism’s uniqueness lies in its use of armed force against targets that would be exceptional or aberrational in regular warfare, with results that have little relationship to traditional military necessity.’²⁸ ‘State involvement in terrorist activity is dictated by practical as well as ideological considerations. The strategic thinking involved incorporates the view that terrorism is a suitable substitute for traditional warfare when that warfare becomes too expensive or too risky. The construct of State support includes propaganda and political support, funding, intelligence, training, and supply of weapons at one end of the spectrum, and direct covert involvement at the other.’²⁹

However, just like terrorism, the notion of State-sponsored terrorism lacks a universal definition partly because it traditionally fell in the realm of State responsibility and victim States then sought to enrol the countermeasures that the use of force affords. The confusion over a precise definition of State-sponsored terrorism is in large part reflective of the basic disagreement over the elements of terrorism itself. There are, however certain basic elements attendant to State-sponsored terrorism: A politically subversive violent act or threat thereof; a State sponsor; an intended political outcome; and a target, whether civilian, military or material, whose death, injury or destruction can be expected to influence to some degree the desired political outcome.

In defining State-sponsored terrorism, Cline and Alexander sum up this category thus:

²⁸ Lieutenant Colonel James P Terry USMC, ‘Countering State-Sponsored Terrorism: A Law-Policy Analysis’ (1986) 36 *Naval Law Review* 159, 161.

²⁹ *Ibid.*

The deliberate employment of violence or the threat of use of violence by sovereign States (or sub-national groups encouraged or assisted by sovereign States) to attain strategic and political objectives by acts in violation of law intended to create overwhelming fear in a target population larger than the civilian or military victims attacked or threatened.³⁰

State sponsorship of terrorism involves both acts of commission and omission. This can range from a State being directly behind the terrorist attacks, to less direct State involvement such as providing training, financing, or support one way or another, to even less direct State involvement by ‘tolerating,’ while not specifically supporting or approving, a particular terrorist group. Using a State’s territory as a location from which to launch terrorist attacks is something that, if tolerated, suggests that the State involved has in effect aided and abetted the terrorist group through tacit support or approval.’

From as far back as 1977, commentators suggested that the attempt ‘to hold States responsible in damages for the acts of terrorists when such acts can be attributed to them represents a strategic use of traditional international law norms which . . . may produce short-run benefits and ...l contribute to long-run interests of the world community.’³¹ This position has been actively pursued by the International Law Commission (ILC)³² in its quest to codify customary international law relating to State responsibility. In its Draft Articles on Responsibility of States for Internationally Wrongful Acts.³³ Articles 8 and 11 codify the relevant rules pertaining to State responsibility for terrorist acts committed by private persons. Article 8 is the classic formulation of the *de facto* agency principle; it reads: ‘[t]he conduct of a person or group of persons shall be

³⁰ Senate Subcomm. on Security and Terrorism, Senate Comm. on the Judiciary, 99th Cong, 1st Sess, *Report on State-Sponsored Terrorism* (Comm. Print 1985) (authored by R Cline and Y Alexander) 40.

³¹ Richard B Lillich & John M Paxman, ‘State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities’ (1976) 26 *American University Law Review* 217, 221.

³² The ILC is a body established by the UN General Assembly to make recommendations for the codification of customary international law.

³³ See Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 53d Sess, Supp No 10, UN Doc A/56/10 (2001) 44-45.

considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.’³⁴ Historically, the ILC has firmly insisted that in order to meet this test ‘it has to be effectively proved’ [in each and every case] that the person or persons ‘had really been charged by the State organs to carry out that specific act.’³⁵

Article 11, in contrast, does not require proof of a State’s prior knowledge, and instruction or control of a terrorist act in order to attribute a private person’s conduct to the State. Under this rule, ‘conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of a State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.’³⁶ Elaborating on this rule, Scott M Malzahn notes that ‘[it] differs from the classic formulation of the de facto agency principle in that the private person is not acting on behalf of the State at the time of the act’s commission, rather State responsibility is based on the State identifying the conduct and either expressly or impliedly making the conduct its own at some later date.’³⁷ A position consonant with ILC elaboration.³⁸

In two different cases, the International Court of Justice (ICJ) applied and expanded on the tests found in Articles 8 and 11 to determine whether a State was responsible for criminal and terrorist activities committed by private persons. In the first case, entitled *United States Diplomatic and*

³⁴ Ibid at 45.

³⁵ Luigi Condorelli, ‘The Imputability to States of Acts of International Terrorism’ (1990) 19 *Israel Year Book of Human Rights* 233, 239.

³⁶ ILC Report, above n 32 at 45.

³⁷ Scott M Malzahn, ‘State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility (2002) 26 *Hastings International and Comparative Law Review* 83, 98.

³⁸ ILC Report, above n 32 at 122.

Consular Staff in Tehran, the ICJ held that Iran was responsible for the taking of US hostages by private militants because the Iranian Government sanctioned and perpetuated the hostage crisis.³⁹ Six years later in *Military and Paramilitary Activities in and against Nicaragua*, the ICJ ruled that the United States was not responsible for the rebel activities of Nicaraguan Contras because evidence that the Contras were controlled and dependent on the United States was insufficient to establish that the United States directed the Contras' each and every act.⁴⁰ The ICJ ruled that US support for the Contras infringed on Nicaragua's territorial sovereignty in contravention of international law,⁴¹ but concluded the evidence did not demonstrate the United States 'actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.'⁴² In order to attribute the actions of the contras to the United States, the ICJ required proof in each instance that operations launched by the contras 'reflected strategy and tactics solely devised by the United States.'⁴³

'Whereas the judgment in the *Tehran Case* was met with general approval and approbation, the Nicaragua decision was criticised for its "painstaking examination" of specific acts. The ICJ's act-by act approach to *de facto* agency, reflected in Article 8 of the ILC Draft Articles requires proof of State authorisation of each and every act carried out by private persons before the conduct is attributed to the State.'⁴⁴ In the *Nicaragua Case*, the ICJ adopted an all or nothing approach to State responsibility. In the absence of sufficient proof to demonstrate the Contras

³⁹ *United States and Consular Staff in Tehran (US v Iran)* 1980, ICJ 3, p 74 (24 May).

⁴⁰ *Nicaragua Case*, above n 23.

⁴¹ *Ibid* at 108.

⁴² *Ibid* at 109.

⁴³ *Ibid* at 109.

⁴⁴ Malzahn, above n 36 at 100-101. For a detailed exposition of this assertion, see Keith Highet, 'Evidence, The Court, and the Nicaragua Case' (1987) 81 *American Journal of International Law* 1, 40-41; see also Francis V Boyle, 'Appraisals of the ICJ's Decision: Nicaragua v United States (Merits)' (1987) *American Journal of International Law* 86.

were *de facto* agents of the US government, the United States escaped any responsibility for the contras' actions.⁴⁵ Despite the criticism of the case, one of its most important aspects was that the ICJ suggested that active support by a State constitutes a substantial degree of State control, which would be sufficient to legally charge a State for an 'armed attack' (as used in Article 51) committed by international terrorists within its borders.⁴⁶

While State responsibility for terrorist activities actively supported by the State logically follows from the State's complicity in the offence,⁴⁷ more problematic is a State's responsibility for acts of terrorism that it failed to prevent. A State is not expected to prevent every act of international terrorism that originates from within its territory. What is expected is that States exercise due diligence in the performance of their international obligations so as to take all reasonable measures under the circumstances to protect the rights and securities of other States. Professor Richard B Lillich, a leading publicist on international terrorism and State responsibility,⁴⁸ agrees that customary international law expects States to prevent their territory from being used by terrorists for the preparation or commission of acts of terrorism against aliens within its territory or against the territory of another State.⁴⁹

Concurring with Professor Lillich, the author asserts that under international law, States now are under a general duty to carry out prevention of terrorism by 'due diligence,' which means that all

⁴⁵ Mark Gibney et al, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 *Harvard Human Rights Journal* 267, 287.

⁴⁶ See Gregory M Travalio, 'Terrorism, International Law, and the Use of Military Force' (2000), 18 *Wisconsin International Law Journal* 144, 155.

⁴⁷ See Lillich & Paxman, above n 30 at 236-237.

⁴⁸ The writings of widely respected publicists, so long as they reflect the actual status of the law rather than personal recommendations, are a subsidiary source of international law. Statute of the International Court of Justice, June 26, 1945, art 38(1), 59 Stat 1055, TS No 993 at 1060.

⁴⁹ See Lassa Oppenheim, *International Law* (Robert Jennings & Arthur Watts eds, 9th ed 1996), Vol I, § 127a; Lillich & Paxman, above n 30 at 245, 261.

reasonable measures under the circumstances must be taken to prevent terrorist acts.⁵⁰ The toleration by a State of the use of its resources for terrorist activity against foreigners also serves as a basis for liability under State responsibility principles.⁵¹ Indeed, it is rarely asserted that State acquiescence in or toleration of acts of international terrorism is lawful; States are more inclined to deny that the State's action or inaction rises to the level of State support or that the alleged act of terror meets the legal definition of terrorism.

The ICJ jurisprudence discussed above and supported by writings of leading publicists leads the author to the position that Article 2(4) of the *UN Charter* implicitly prohibits State support of international terrorism by explicitly ordering all Member States 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.'⁵² This implied prohibition it is argued was made express in 1970 when the General Assembly approved the Declaration on Principles of International Law concerning Friendly Relations and Co-Operation Among States:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.⁵³

Unlike Article 2(4), which only requires that States refrain from the threat or use of force, the Declaration Concerning Friendly Relations requires positive action on the part of the State so as

⁵⁰ Lillich & Paxman, *ibid* at 245-46.

⁵¹ *Ibid* at 257, 274.

⁵² *UN Charter*, art 2, para 4.

⁵³ GA Res 2625, UN GAOR, 25th Sess, Supp No 28, at 123, UN Doc A/8028 (1970).

not to acquiesce in or tolerate terrorist activities originating from within its territory. The authoritativeness of the Declaration under international law is championed by Scott M Malzhan who notes that although passed only once, some commentators regard the Declaration Concerning Friendly Relations as an authoritative interpretation of the *UN Charter* because of the drafting committee's mandate to restate the fundamental principles of international law.⁵⁴ In any case, there is a long-standing General Assembly practice of passing resolutions that condemn both active and passive State support of terrorism⁵⁵ and in recent years, the Security Council stated that 'all States shall [r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts ...'⁵⁶

Despite wide universal acceptance of terrorism as an international crime, the contentious issue revolves around the issue of acceptable and permitted countermeasures. This is especially so since the UN has generally treated the general subject of terrorism as a General Assembly issue. Specifically, the matter mainly fell within the jurisdiction of the Sixth (Legal) Committee of the General Assembly. Through the Sixth Committee and other UN bodies, the UN has played a part in elaborating conventions addressing specific crimes committed by terrorists, although most of the Conventions omit the word 'terrorism.'⁵⁷ Though the goal of the General Assembly was to

⁵⁴ Malzahn, above n 36 at 88.

⁵⁵ See General Assembly Resolutions, above n 14.

⁵⁶ UN SCOR, 56th Sess, 4385th mtg at 2, UN Doc S/RES1373 (2001); see also UN SCOR, 56th Sess, 4413th mtg at 157-158, UN Doc S/RES1377 (2001); UN SCOR, 54th Sess, 4053rd mtg at 157-158, UN Doc S/RES1269 (1999).

⁵⁷ See Convention on the Physical Protection of Nuclear Material, 1979, 1456 UNTS 24631; see *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1 March 1991, UN S/22393; See, e.g., *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, 14 September 1963, 704 UNTS 219 *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 1973 UNTS 106; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 23 September 1971, 974 UNTS 178; *Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, 24 February 1988, reprinted in 27 ILM 627; See *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* 10 March 1988, S Treaty Doc No 101-1 reprinted in 27 ILM 672; *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, 10 March 1988, 1678 UNTS 304, reprinted in (1988) 27 ILM 685; See *Convention on the Prevention and Punishment of Crimes against*

create a basis for universal jurisdiction over, and condemnation and criminalisation of, the types of crimes that terrorists commit it did not extend this to terrorism per se perhaps keen to ward off the intrusion of the Security Council which might have invoked its role as guardian of international peace and security-something that it eventually did in the aftermath of the September 11 attacks.⁵⁸

Because there is no cohesive elaboration enumerating appropriate responses to terrorist acts in the international system,⁵⁹ individual States, have developed internal mechanisms for dealing with terrorists through criminal laws.⁶⁰ Frequently, these internal mechanisms are the result of treaty agreements.⁶¹ However the system remains weak owing to the reality that terrorists may evade capture in the same way other criminals do: by exploiting faulty extradition treaties and weaknesses in law enforcement.⁶² In addition to these realities the state-to-terrorist relationship can be protected at the discretion of the sponsor, thereby sheltering the perpetrator from immediate coercion and other legal claims offered by victim States. Since terrorism is ambiguous, it throws victim States off balance as they must grope for an appropriate means of response, or a determination if any response is appropriate.

Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, 1035e UNTS 167; See *International Convention Against the Taking of Hostages*, 17 December 1979, 1316 UNTS 206.

⁵⁸ As a first step, the Security Council adopted Resolution 1368. The Resolution unequivocally condemned the terrorist attacks of September 11, called on all states to 'work together urgently to bring to justice the perpetrators, organizers and sponsors' of the attacks, and called on the international community to 'redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions.' SC Res 1368, UN SCOR, 56th Sess, 4370th mtg, UN S/RES/1368 (2001).

⁵⁹ See Spencer J Crona & Neal A Richardson 'Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism' (1996) 21 *Oklahoma City University Law Review* 349, 355.

⁶⁰ *Ibid* at 350-354.

⁶¹ See *ibid* at 355 (citing as examples the 1979 *Convention on Taking of Hostages*, the 1988 *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, and others).

⁶² See Bradley Larschan, 'Legal Aspects to the Control of Transnational Terrorism; An Overview' (1986) 13 *Ohio Northern University Law Review* 117, 140-14.

Coupled with the uncertain nature of permissible countermeasures against international terrorism within the international system, the efficacy of domestic criminal laws is weakened in the face of transnational terrorists groups whose membership and conspiracy may spread across many borders.⁶³ The challenge to States and the international community is compounded when States actively or passively support terrorism thus enhancing the capabilities of terrorist organizations as well as their ability to avoid both domestic and international enforcement regimes paving way for impunity. Though traditionally State responsibility has been the vehicle through which pressure is exerted on States sponsoring terrorism, the lethal capabilities of terrorists demonstrated by the September 11, 2001 attacks has fundamentally changed the landscape.

The attacks against the United States changed the context of UN activities. As noted above, the UN generally treated the general subject of terrorism as a General Assembly issue. After September 11, 2001, the Security Council weighed in on the matter and quickly became the locus of action. ‘That the larger world could not agree on a definition of terrorism or condemnation of terrorism in all circumstances became irrelevant.’⁶⁴ Security Council Resolution 1368 unequivocally condemned the terrorist attacks of September 11, called on all states to ‘work together urgently to bring to justice the perpetrators, organizers and sponsors’ of the attacks, and reaffirmed the inherent right of self-defence in accordance with Article 51 of the *UN Charter*. ‘Given the circumstances, this affirmation was significant: it implied that the attacks triggered the right even if, at the time of adoption, the UN Security Council knew almost nothing about who or what had launched them.’⁶⁵

⁶³ Ibid at 134.

⁶⁴ Nicholas Rostow, ‘Before and After: The Changed UN Response to Terrorism Since September 11th’ (2001) 35 *Cornell International Law Journal* 475, 481.

⁶⁵ Ibid.

This shift in the law is evident when one considers that in 1985, the international response to military strikes made by Israel in 1985 against Tunisia was strongly condemnatory. So much so that the Security Council in Resolution 573 condemned the air attack on PLO headquarters as an ‘act of armed aggression . . . against Tunisian territory in flagrant violation of the Charter.’⁶⁶ This was despite Israel’s argument that Tunisia’s acts of harbouring, supplying, and assisting non-State actors should be sufficient to attribute the acts of those non-State actors to it. Israel had accused Tunisia of harbouring individuals who had committed terrorist acts in Israel.⁶⁷ The fact that Resolution 573 condemned Israel’s attack as contrary to the Charter implied that no justification based on self-defence was found. The claim of self-defence was subsequently also rejected by States as justification for the United States’ bombing of Tripoli (for a terrorist bomb in a Berlin nightclub) and the 1993 bombing of the Iraqi Secret Service (after an assassination attempt was made on former President George H W Bush in Kuwait).⁶⁸

In an important departure from Resolution 573, the Security Council’s resolutions on Afghanistan explicitly mention the right of individual and collective self-defence and do not contain any condemnation of the military strikes. In view of the dangers posed by terrorism, broadening State responsibility and imposing severe punishment for breaches seems understandable however the issue is whether once responsibility is triggered by establishing that

⁶⁶ SC Res 573, UN SCOR, 2615th mtg at 1, S/RES/573 (1985). See generally Marian Nash Leich, ‘Contemporary Practice of the United States Relating to International Law: Resort to War and Armed Force’ (1986) 80 *American Journal of International Law* 165 (discussing the UN Security Council’s condemnation of Israel’s air attack against the Palestine Liberation Organisation headquarters in Tunisia).

⁶⁷ Admittedly the situation defers in exact factual circumstance but does reflect the general stance of the international community prior to September 11. The Security Council was obviously faced with a situation that profoundly differs from the previous incidents there were limited casualties.’).

⁶⁸ Michael Byers, ‘Terrorism, the Use of Force and International Law After 11 September’ (2002) 51 *International and Comparative Law Quarterly* 401, 407.

the State in question knowingly tolerates the responsible parties, encourages them, or fails to do anything about them should this be followed up with the lethal use of force? While military action in Afghanistan in the aftermath of the September 11 attacks drew favourable response to the use of force with America's right of self-defence being mentioned in the same breath as terrorist attacks, the recent military action against Iraq in the aftermath of the 'Axis of Evil' speech provoked strong reaction with its strong overtones of unilateral military action by the United States against countries that support terror notwithstanding United States insistence that the act was a strategic imperative in its strategy of 'offensive defence'.

The question that arises especially after the post-September 11 endorsements is: to what extent may a State lawfully respond with armed force against the State that has sponsored the terrorists deemed responsible for the attack? Under international law, the response of a targeted State is predicated on principles of self-defence, and these are in turn based on what the international community regards as the 'inherent' right to ensure national security and the attendant duty to protect one's citizens from terrorist attacks.⁶⁹ The norms of self-defence revolves around survival, and a State's inherent right to protect and defend its sovereignty this in turn brings into play the *UN Charter* regime on the use of force vis-à-vis terrorism.

III. Terrorism Acts and the UN Charter Regime on Force

Until 1945, there was no customary prohibition on the unilateral resort to force if circumstances warranted it, and for signatories to particular instruments, if certain preliminary procedures had been exhausted, States reserved the right to resort to force. The *UN Charter* introduced to

⁶⁹ See generally UN Secretary General Affirms US Rights to Self-Defence (Oct. 2001) available at <http://usinfo.state.gov/topical/pol/terror/01100903.html>.

international politics a radically new notion: a general prohibition of the unilateral resort to force by States. The principle is encapsulated in its most authoritative form in Article 2(4) of the Charter. Pursuant to Article 2(4) of the *UN Charter*, all members shall refrain in their international relations from the threat or use of force. Today Article 2(4) constitutes the basis of any discourse on the legitimacy of the use of force by States. Its predominant significance has been emphasized by authors who labelled it ‘the corner stone of peace in the Charter’, ‘the heart of the United Nations’ Charter basic rule of contemporary public international law’. The use of force in general is prohibited, rather than only war. The prohibition is not confined to the actual use of force, but extends to the mere threat of force.

The scope and content of the prohibition of the use of force in contemporary international law cannot be determined by an interpretation of Article 2(4) alone. Rather than standing by itself, Article 2(4) is part and parcel of a complex security system. The provision must be read in its context with Articles 39, 51, and 53. Here the problem arises that those Articles contain a number of terms which, though related to one another, differ considerably in their meaning. The *UN Charter* uses the terms ‘attack’ or ‘aggression’ in Articles 1(1), 39, 51, and 53, albeit without defining them anywhere. Though the Security Council has the authority to make findings regarding threats to or breaches of international peace and security and authorise States to impose coercive sanctions or use armed force in response to any act of terrorism that violates Article 2(4),⁷⁰ neither legal writings nor State practices has so far clarified the threshold of these terms beyond doubt, nor have the attempts within the framework of the UN yet led to a satisfactory interpretation. Regardless of the uncertainties that accompany international law, and the frustrating impotence of the United Nations, the UN stands as the authoritative body that

⁷⁰ Bruno Simma, *The Charter of the United Nations: A Commentary* (1994) 407-18.

continues to define conventional and customary standards for the use of force in international law.⁷¹ Contemporary law concerning the use of force abroad holds that self-defence is the only justification recognised for the resort to force.⁷² Thus, despite the widespread condemnation of international terrorism, and the threat it presents to the international community, the use of military force across international boundaries to counter terrorism is not necessarily permissible under international law,⁷³ through terrorism may be equated with conventional war insofar as they both have parallel goals and rationales, i.e., attacking the political, social or economic structures of a given state.⁷⁴ As in war, terrorists believe the enemy threatens their very existence and they accept the possibility of their own death in pursuit of the cause. The crucial difference is that in war, innocent civilians may not be used as targets for military victory, while terrorists freely choose from civilian targets. The problem for the State-centric regime on the use of force is that terrorist groups do not claim to represent or constitute internationally recognised States. The drafters of the Charter were concerned with a completely different set of problems--use of armed force by a State against the sovereignty, territorial integrity or political integrity or political independence of another State. Further, the traditional theories of customary international law were developed in a completely different era, with no concern for the danger presented by a modern well-financed terrorist organisation in a world of chemical, biological, and nuclear weapons capable of horrific destruction, and yet portable by a single individual. A terrorist 'war' does not consist of a massive attack across an international border, nor does it consist of one isolated incident that occurs and is then past. It is a drawn out, patient, sporadic pattern of attacks.

⁷¹ Campbell above n 16 at 1074. See also See Peter Daniel DiPaola, 'A Noble Sacrifice? Jus ad Bellum and the International Community's Gamble in Chechnya' (1997) 4 *Indiana Journal of Global legal Studies* 435, 436. The International Court of Justice has recognised the Charter as jus cogens.

⁷² See Wallace F Warriner, 'The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986' (1988) 37 *Naval Law Review* 49, 56.

⁷³ Travalio, above n 45 at 149-150.

⁷⁴ See Falk, above n 26 at 76, 90-93.

In view of the fact that terrorist groups may have reach and sophistication that is global, there is little doubt that international terrorism presents a threat that traditional theories for the use of military force are inadequate to deal with, and that were not contemplated at the time of the United Nations Charter.⁷⁵ The first move to address force as a permissible countermeasure against terrorism within the purview of the international system arose from within the statal sphere. In the early 1980s, the US forcefully pronounced and expressly linked military responses to counter terrorism to international law. The move was clearly signalled amidst increased terrorist attacks against US interests and nationals. In the 1983, the Long Commission in commenting upon the devastating attack on the US Marine Headquarters in Beirut, concluded:

[S]tate sponsored terrorism is an important part of the spectrum of warfare and ... adequate response to this increasing threat requires an active national policy which seeks to deter attack or reduce its effectiveness. The Commission further concludes that this policy needs to be supported by political and diplomatic actions and by a wide range of timely military response capabilities.⁷⁶

A year later, the then US President, Ronald Reagan signed the National Security Decision Directive (NSDD) which assigned responsibility for developing strategies for countering terrorism and made clear that, while the US must use all the non-military weapons in its arsenal to the fullest, it must also be prepared to respond within the parameters set by the law of armed conflict. Robert C McFarlane, a former Assistant to the President for National Security Affairs, suggested at a Defence Strategy Forum on March 25, 1985, that the directive supported resistance by force to State-sponsored terrorism 'by all legal means.'⁷⁷ The Vice President's Task Force

⁷⁵ Warriner, above n 21 at 64

⁷⁶ *Report of DoD Commission on Beirut International Airport Terrorist Act of 23 October 1983* at 129 (20 December 1983), reprinted in (1983) *American Foreign Policy Document* 122 at 349, col. 2.

⁷⁷ R McFarlane, 'Terrorism and the Future of Free Society', Speech Delivered at the Defence Strategy Forum, National Strategic Information Centre, Washington, D.C. (15 March 1985).

refined this construct and explained that: ‘States that practice terrorism or actively support it will not do so without consequence. If there is evidence that a State is mounting or intends to conduct an act of terrorism against this country, the United States will take measures to protect its citizens, property and interests.’⁷⁸

Two years later, George Shultz, the US Secretary of State in what became known as the Shultz Doctrine asserted:

It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations, even for the purpose of rescuing hostages; or from using force against States that support, train, and harbour terrorists or guerrillas. International law requires no such result. A nation attacked by terrorists is permitted to use force to prevent or pre-empt future attacks, to seize terrorists, or to rescue its citizens when no other means is available. The law requires that such actions be necessary and proportionate. But this nation has consistently affirmed the right of States to use force in exercise of their right of individual or collective self-defence.⁷⁹

Despite the US’s forceful pronouncements backed by actual military responses to counter terrorism, from the international legal perspective, purported defensive responses to State-sponsored terrorism need to be valid under customary and conventional legal requirements. Managing the terrorist threat posed by State sponsors requires identification of the threat, clear establishment of linkage to a State -sponsor and in the event of use of military force, the dual legal requirements of self-defence: necessity and proportionality ought to be met. The problem is that often responses to terrorism are coloured (negatively) by the reality that States intertwine responses with national interest. This reality weakens the substantive legal bases in international law that support military action despite frequent justifications that action is supported in customary international law by the inherent right of self-defence and a ‘realistic’ interpretation of

⁷⁸ Vice President’s Task Force on Combating Terrorism, Public Report 2 (February 1986) [hereinafter cited as Public Report]. 7

⁷⁹ Statement of Secretary of State George Shultz (15 January 1986).

Article 51 of the United Nations Charter, which takes into account modern weapons capabilities of today.

Any move to endorse the right of States to attack terrorist organisations located in other States with military force must necessarily be consistent with the requirements of Article 2(4). ‘Unless the level of support or control by the host State is such that the terrorists are mere proxies for the armed forces of the State, force cannot be used against facilities of the host country as a means of convincing the host country to stop its support of the terrorists, nor can force be used against facilities of the host country that only indirectly or collaterally support the terrorists.’⁸⁰ To use force under these circumstances would amount to a breach of Article 2(4) which precludes the use of force against the political independence or territorial integrity of the host country. State sponsored terrorism, is another matter. If terrorism is State sponsored, other nations can direct their response to terrorist attacks at the State itself (in addition to the terrorist groups). If it can be established that State-sponsored terrorism exists, then the sponsoring State may be in violation of Article 2(4) of the *UN Charter*, which prohibits ‘Members’ of the United Nations from taking forcible action against the territorial integrity and political independence of other States. This Article has been interpreted to apply to non-Member States as well.⁸¹ That provision was applied by the UN Security Council in 1992 to impose economic sanctions on Libya for its connection with terrorist activities and for its refusal to extradite two Libyan nationals alleged to have

⁸⁰ Travalio, above n 45 at 171-172.

⁸¹ See Natalino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (1985) 13-14. See also Hermann Mosler, ‘The International Society as a Legal Community’ (1974) 140 *Recueil des Cours* 283.

participated in the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland.⁸² The

Resolution Stated:

[E]very State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed toward the commission of such acts, when such acts involve a threat or use of force.⁸³

In addition, the United Nations had this explication of State-sponsored terrorism affecting regions outside a State:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State. Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.⁸⁴

This has been interpreted to constrain States from the maintenance of terrorist training camps in the techniques of assassination, destruction and sabotage, the collection of funds, directly or indirectly, providing of direct financing for training camps and other programs, the purchase of arms, ammunition and explosives and preparation of foreign propaganda.⁸⁵ When the location of a terrorist or a terrorist base camp is known and the territorial State refuses to cooperate within the ‘extradite or prosecute’ framework laid down by international conventions,⁸⁶ domestic law enforcement is completely ineffective in defending a State and its interests abroad. In this situation where States openly engage in, or support acts of violence and attacks on another State,

⁸² See Paul Lewis, ‘Security Council Votes to Prohibit Arms Exports and Flights to Libya’ *New York Times* 1 April 1992, at A4.

⁸³ UN SCOR, Res 731, (1992), reprinted in ‘Resolution on Libya Embargo: Barring Takeoff and Landing “to Any Aircraft”,’ *New York Times*, 1 April 1992 at A12.

⁸⁴ GA Res 2625, UN GAOR, (1970).

⁸⁵ See R I R Abeyratne, ‘The effects of Unlawful Interference with Civil Aviation on World Peace and Social Order’ (1995) 22 *Transnational Law Journal* 449, 466.

⁸⁶ Refer to terrorist conventions above n 56.

an appropriate response of the victim State may be the use of armed force.⁸⁷ Although arguably effective and temporarily satisfying, the important concern is whether a policy of armed response is wise in view of its probable violation of international law. If a State concludes that an illegal use of force is too costly a response, the State is left with a limited array of alternatives for dealing with terrorist incidents. Countries are therefore in search of a permissible and effective response in order to thwart terrorism. That search has led to the use of Article 51 of the Charter, the claim of self-defence, as a way of legitimising the use of armed force. Article 51, the inherent right of self-defence in the face of an armed attack' permits a victimised nation to engage in 'unilateral or collective self-defence until and unless the Security Council has addressed the issue. Nothing in the *UN Charter* restricts the identity of aggressors against whom States may respond, since private agents as well as governments may be the sources of aggression.

Self Defence in the Context of Terrorism

Use of Article 51 to defend a State's decision to use armed force against terrorists and terrorist havens is not novel. The Israelis used it in defence of its raid on Entebbe⁸⁸ as did the United States in attempting to justify its bombing of Libya. Such claims did not win a favourable

⁸⁷ As J A Cohan notes, one might analyse the existence of State-sponsored terrorism along the lines of a four-part continuum ranging from active to passive support:

- a. The State actively sponsors, controls or directs the terrorist activities.
- b. The State encourages the activities by providing training, equipment, money and/or transportation.
- c. The State tolerates the terrorists operating as such within its borders by making no effort to arrest or oust them, although it does not actively support them. By not ejecting or arresting the terrorists, the State is 'enabling' them to carry on their activities.
- d. The State, due to political factors or inherent weakness of leaders, is simply unable to deal effectively with the terrorists; therefore there is inaction.

John Alan Cohan, 'Formulation of A State's Response To Terrorism and State-Sponsored Terrorism' (2002) 14 *Pace International Law Review* 77,90 -91.

⁸⁸ John F Murphy, 'State Self-Help and Problems of Public International Law' in John F Murphy, *Legal Aspects of International Terrorism* (1978) 556.

response from the international community.⁸⁹ ‘While the right of self-defence is referred to as being “inherent,” the *UN Charter* itself does not elaborate on what is meant by the use of the word “inherent.” It is clear that the word was intentionally used because the initial draft of Article 51 did not contain “inherent” but was changed to make the right of self-defence explicitly inherent.’⁹⁰ This has been interpreted by a number of international law scholars to mean that the right of self-defence is one which antedates and exists independently of the Charter.⁹¹ In contrast to international customary law, the Charter appears to have added a new requirement to the ‘inherent’ right --the occurrence of an ‘armed attack.’ It is unclear whether this new criteria was intended to narrow the existing right of self-defence. Even if the addition of the words ‘armed attack’ do narrow the inherent right of self-defence, it is equally unclear how and to what extent they limit that right. There appears to be no discussion of the phrase ‘armed attack’ in the records of the San Francisco Conference. One explanation might be that the drafters felt the words themselves were sufficiently clear. Given that the main concern of the Charter is the unilateral use of force, the prerequisites of an actual attack by armed forces would severely limit such action. Therefore, the Charter may be interpreted as limiting the use of force to only those situations involving the most serious and dangerous form of threat to international peace.

⁸⁹ *Los Angeles Daily Journal*, 16 April 1986, at 1 col 6. See also Boyle, ‘Preserving the Rule of Law in the War Against International Terrorism’ (1986) 8 *Whittier Law Review* 735, 736-38.

⁹⁰ Mark M Baker, ‘Terrorism and the Inherent Right of Self-Defence (A Call to Amend Article 51 of the United Nations Charter)’ (1987) 10 *Houston Journal of International Law* 25, 31.

⁹¹ Blum, ‘The Legality of State Response to Acts of Terrorism’ in *Terrorism: How The West Can Win* (1986) 137; Professor Derrek Bowett writes:

It is fallacious to assume that members have only those rights which the Charter accords them; on the contrary they have those rights which general international law accords them except and in so far as they have surrendered them under the Charter.

Derek Bowett, *Self-Defence in International Law* (1958) 184, 186.

Professor A L Goodhart states that the ‘members of the United Nations when exercising their inherent powers do so not by grant but by already existing rights.’ A L Goodhart, ‘The North Atlantic Treaty of 1949’ (1951, Vol II) 79 *Recueil Des Cours* 187, 192. It was also the view of one of the committees at San Francisco that inherent meant that the ‘use of arms in legitimate self-defence remains admitted and unimpaired.’ UNCIO, Docs, Vol VI at 459.

It is also significant that the drafters chose the word ‘attack’ over the term ‘aggression’ which is used repeatedly throughout the Charter. Under the Charter the term ‘aggression’ is undefined.⁹² Instead, it is up to the Security Council to determine on a case-by case basis whether a particular action constitutes unlawful aggression. The drafters at the San Francisco Conference chose this more flexible system because ‘the progress of modern warfare...renders very difficult the definition of all cases of aggression.’⁹³ We do not find, however, any evidence that such flexibility and subjectivity was to be accorded to the exercise of the right of self-defence. As Professor J E S Fawcett points out:

It could be said that there is some evidence that the drafters of the Charter used the precise and restrictive notion of ‘armed attack’ in preference to ‘aggression’ or ‘threat to the peace,’ precisely because they wished to avoid giving too much latitude within the Charter system to the recognised right of self-defence . . .⁹⁴

Though legality of the use of force under international law (*jus ad bellum*) is instructive in matters relating to State-sponsored terrorism the nature of terrorism renders this concept rather vague and blurred since terrorism does not fall easily into traditional principles of international law. Terrorists are not State actors bound by international law but rather they are similar to criminals in that they act outside of the scope of law.⁹⁵ This condition presents States with an intractable problem: how to respond legally to groups who are not adhering to legal strictures. This problem is made all the more difficult when States actively or passively support terrorism.

⁹² But see GA Res 3314, UN GAOR Supp (No 31) at 14204 (1974). This Definition of Aggression, as formulated by the General Assembly, gives guidance to the Security Council in dealing with this matter. Note, however, that the annex, and Articles 2, 4, and 6 of the Definition clearly indicate that the Security Council is not limited by the Definition and further, that the Definition is not intended as a modification or amendment of the Charter.

⁹³ *Documents of The UN Conference On International Organization* (1945, Vol 12) 505.

⁹⁴ J E S Fawcett, ‘Intervention in International Law, A Study of Some Recent Cases’ (1961, Vol II) 103 *Recueil Des Cours* 361.

⁹⁵ See Warriner, above n 71 at 76-77.

The involvement of States in supporting terrorism brings into play the international regime on the use of force based on the *UN Charter*, as well as the concept of State responsibility. The tendency has been to draw a distinction between terrorist acts and acts which lead to an invocation of the use of force under the *UN Charter*. 'If a terrorist attack occurs outside the borders of a group that is sponsored by a State, the question arises: to what extent may a State lawfully respond with armed force against the State that has sponsored the terrorists deemed responsible for the attack?'⁹⁶ Reacting to this, J A Cohan opines that:

Under international law, the response of a targeted State is predicated on principles of self-defence, and these are in turn based on what the international community regards as the 'inherent' right of national security and the attendant duty to protect one's citizens from terrorist attacks. The norms of self-defence revolve around survival, autonomy, and dignity, and are parallel to the common law of self-defence in Western jurisprudence. Clearly, we start with the principle that a State has the inherent right to protect and defend its sovereignty.⁹⁷

It is arguable that well-organised terrorist groups with the means to reach across international borders to inflict significant damage on a country on an ongoing basis (such as Al Qaeda) must represent the sort of threat against which self-defence is legitimate if the doctrine is to have any practical contemporary value. There are no obvious examples of United Nations members claiming that the 1998 missile strikes against Al Qaeda camps could not be acts of self-defence because the alleged perpetrators of the embassy bombings were a non-State group. State practice would therefore seem to support the hypothesis that an Article 51 armed attack may be by a non-State group. In any case, the symbiotic relationship of Al Qaeda in Afghanistan and the Taliban meant that at least the Al Qaeda leadership could not be seen purely as a 'non-State' entity and that the Taliban shared significant responsibility for Al Qaeda's actions in the 11 September attack. Depending on the factual circumstances, the definition of the terrorist acts of September

⁹⁶ Cohan, above n 86 at 100.

⁹⁷ *Ibid* at 100-101.

11 as ‘armed attack’ may not necessarily imply that the concept actually refers to acts that are attributable to a State. In the *Nicaragua Case*, the ICJ gave a restrictive view of attribution when it found that there was ‘no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.’⁹⁸

In the face of the ever-increasing threat of terrorism and the inability to root out terrorist groups, States such as the United States and Israel have resorted to retaliatory strikes against terrorist cells located in sovereign States. These States contend that terrorist threats represent a legitimate justification for the use of force abroad. Others argue that the use of such force presents an even greater threat to community order and well being. The idea of strategic deterrence to deter future terrorist attacks is not without controversy considering that the Charter and customary international law authorise the use of force only for self-defence. When the *UN Charter* was drafted in 1945, the right of self-defence was the only included exception to the prohibition of the use of force though customary international law had previously accepted reprisal, retaliation, and retribution as legitimate responses as well.⁹⁹

Reprisals and retaliatory strikes are illegal under contemporary international law because they are punitive, rather than legitimate, actions of self-defence.¹⁰⁰ It would be difficult to conform acts of reprisal with the overriding dictate in the Charter that all disputes must be settled by peaceful means. Further, under the *UN Charter* regarding self-defence, there are three main principles that go into examining the jus ad bellum dimensions of a State’s response if it has

⁹⁸ (*ICJ Reports 1986* at 62, para 101).

⁹⁹ Reprisal allows a state to commit an act that is otherwise illegal to counter the illegal act of another state. Retaliation is the infliction upon the delinquent state of the same injury that it has caused the victim. Retribution is a criminal law concept, implying vengeance, that is sometimes used loosely in the international law context as a synonym for retaliation.

¹⁰⁰ See Bowett, above n 90 at 13.

suffered a terrorist attack. These principles dealing with the timeliness of the response, and the requirements of necessity and proportionality are difficult to reconcile with retaliatory strikes. Indeed, the use of reprisals represents a regression to the just war theory, which was abandoned in the seventeenth century. The purpose of the United Nations is to limit the use of force in international matters and to provide a forum for the resolution of conflict in international matters so as to prevent the need for war. To permit reprisals would thwart the very goal to which States have committed themselves by membership in the UN.

In customary law, conventional law, and *opinio juris*, the practice of reprisals through the use of unilateral force has been denounced.¹⁰¹ A sharp distinction has also been drawn between the use of force in self-defence and its use in reprisals. The legal status of reprisals is stated very succinctly by Professor Ian Brownlie: ‘The provisions of the Charter relating to the peaceful settlement of disputes and non-resort to the use of force are universally regarded as prohibiting reprisals which involve the use of force.’¹⁰² Since 1953, the use of force by way of reprisals has been strongly condemned by the United Nations as an illegal use of force under the Charter.¹⁰³ The United Nations condemned Israel when it used force against Palestinians in Tunisia in retaliation for repeated terrorist attacks in 1985.¹⁰⁴ It had the same response to Britain when it attacked Yemen for similar reasons in 1964.¹⁰⁵ Though some in the international community would argue that reprisal action is inherent to maintaining security, most States condemn the practice.¹⁰⁶

¹⁰¹ Warriner, above n 71 at 155.

¹⁰² Ian Brownlie, *International Law and the Use of Force By States* (1963) 281.

¹⁰³ Bowett, above n 90 at 13-14 .

¹⁰⁴ Warriner, above n 71 at 63-64.

¹⁰⁵ *Ibid* at 64.

¹⁰⁶ Byard Q Clemmons & Gary D Brown, ‘Rethinking International Self-Defense: The United Nations’ Emerging Role’ (1998) 45 *Naval Law Review* 217, 225.

Cast against the backdrop of brief survey above on the use of force to counter terrorism, the legal response to the September 11, 2001, attacks was unusual. The international community broadly qualified the September 11 attacks as ‘armed attacks’ against the United States, justifying the exercise of self-defence with quasi-unanimous statements of support coupled with offers of assistance to the US to facilitate the military action that soon followed.¹⁰⁷ By reaffirming the ‘inherent right of individual and collective self-defence’ in the preambles of Security Council Resolutions 1368 (2001) and 1373 (2001),¹⁰⁸ the doctrine of self-defence clearly underlies the military strikes against the Taliban in 2001. The main question is how the events of September 11 affect the interpretation of the armed attack requirement under the Charter. It is this difficult question that the Article now turns to consider in the next section.

Armed Attacks and Terrorism Acts

The prohibition of the use of force embodied in Article 2(4) of the *UN Charter* not only proscribes war, but any use or threat of force in general. Apart from the, now obsolete, clauses concerning the former enemy States, the *UN Charter* contains only two exceptions to the prohibition of force, namely Security Council enforcement actions pursuant to Chapter VII, and the right to individual and collective self-defence laid down in Article 51. As the system of collective security¹⁰⁹ has been of little practical significance, international legal practice since 1945, contrary to the intentions of the authors of the Charter, continues to be determined by the

¹⁰⁷ See Jack M Beard, ‘Military Action Against Terrorists Under International Law: America’s New War On Terrorism: The Case For Self-Defence Under International Law,’ (2002) *Harvard Journal of Law & Public Policy* 25 (2002): 559, 571

¹⁰⁸ See paragraph 3 of the preamble of Resolution 1368 and paragraph 4 of the Preamble of Resolution 1373.

¹⁰⁹ See eg Allen Overland, ‘The United Nations Response To A Changing World: International Law Implications’ (1992) 86 *American Society of International Law Proceedings* 303; Carolyn L Willson, ‘Changing The Charter: The United Nations Prepares For The Twenty-First Century’ (1996) 90 *American Journal of International Law* 115.

unilateral use of force by States. Yet in this respect the Charter provides in Article 51 for an exclusive regulation, allowing individual States the threat or use of force only under the conditions stipulated there.¹¹⁰ The right of self-defence laid down in Article 51 of the *UN Charter*, being the only exception to the prohibition of force of practical significance, is therefore the pivotal point upon which disputes concerning the lawfulness of the use of force in, inter-state relations usually concentrate. Commenting on the practical implications of Article 51, Professor Ian Brownlie explains that:

[i]t is believed that the ordinary meaning of the phrase precludes action which is preventive in character. In this respect the French text is less equivocal than the English since its literal translation would read in a case where a United Nations Member is the object of an armed aggression. The Spanish text simply reads 'en caso de ataque armado'. There is no further clarification of the phrase to be gained from study of the *travaux préparatoires*. However, the discussions at San Francisco assumed that any permission for the unilateral use of force would be exceptional and would be secondary to the general prohibition in Article 2, paragraph 4. There was a presumption against self-help and even action in self-defence within Article 51 was made subject to control by the Security Council. In these circumstances the precision of Article 51 is explicable.¹¹¹

A major question is whether the right of self-defence under Article 51 is limited to cases of armed attack or whether there are other instances in which self-defence may be available under Article 51. A number of commentators argue that the right to use force in self-defence under Article 51 is not limited to cases of armed attack.¹¹² As Professor G M Travaglio observes,

[t]hese commentators generally argue that the intention of the drafters of the United Nations Charter was to incorporate into Article 51 all of the rights of self-defence that existed in customary international law at

¹¹⁰ Article 51 of the Charter provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in anyway 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.

¹¹¹ Brownlie, above n 101 at 275.

¹¹² See, e.g., Myres McDougal and Florentino P Feliciano, 'Conditions and the Expectation of Necessity' in *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961) 234-35.

the time of the Charter In addition, the International Court of Justice in the *Nicaragua Case*, indicated that the right of self-defence in Article 51 simply recognised a pre-existing right of customary international law.¹¹³

Because the customary right of self-defence, so the argument goes, includes instances in addition to an armed attack, military force may be legally available as an option against terrorists even if an armed attack has not occurred. This view holds that the presence of an armed attack is one of the bases for the exercise of the right of self-defence under Article 51, but not the exclusive basis.¹¹⁴ Professor Oscar Schachter sums up this position thus:

On one reading [of Article 51] this means that self-defence is limited to cases of armed attack. An alternative reading holds that since the Article is silent as to the right of self-defence under customary law (which goes beyond cases of armed attack) it should not be construed by implication to eliminate that right ... It is therefore not implausible to interpret Article 51 as leaving unimpaired the right of self-defence as it existed prior to the Charter.¹¹⁵

A significant number of writers argue that an armed attack is the exclusive circumstance in which the use of armed force is sanctioned under Article 51.¹¹⁶ In fact, Professor Yoram Dinstein has gone so far as to State that ‘the leading opinion among scholars’ is that the right of self-defence in Article 51 does not extend beyond armed attack.¹¹⁷ Furthermore, the International Court of Justice in *Nicaragua Case* clearly stated that the right of self-defence under Article 51 only accrues in the event of an armed attack.¹¹⁸ Also, it is a traditional requirement of self-defence that

¹¹³ Travalio, above n 45 at 145.

¹¹⁴ See Terry above n 27 at 170; Oscar Schachter, ‘International Law; the Right of States to Use Armed Force’ (1984) 82 *Michigan Law Review* 1620, 1633-34.

¹¹⁵ Schachter, *ibid* at 1633-34 .

¹¹⁶ See, e.g., Yoram Dinstein, *War, Aggression, and Self-Defence* (2nd ed, 1994) 183 (choice of words in Article 51 is deliberately restrictive; right of self-defence is limited to armed attack).

¹¹⁷ *Id.* at 186. See Michael Lohr, ‘Legal Analysis of US Military Responses to State-Sponsored International Terrorism’ (1985) 34 *Naval Law Review* 1, 18 (referring to Phillip Jessup, *A Modern Law of Nations* (1948) 166 and Lassa Oppenheim, *International Law* (H Lauterpact 7th ed) 156).

¹¹⁸ In para 195 of its opinion, the Court said that the exercise of the right of self-defence by a state under Article 51 ‘is subject to the state concerned having been the victim of an armed attack.’ 1986 ICJ at 103.

a triggering event justifying a military response have already occurred or at least be imminent.¹¹⁹

Summing up these arguments, Professor G M Travalios concludes that

... it is generally believed that the right of self-defence, even if it extends beyond the 'armed attack' of Article 51, does not permit the use of force to punish an aggressor after a threat has passed, nor does it permit the use of force to deter a less than imminent threat. The basis in international law for this limitation is the famous Caroline case.¹²⁰

Apart from reference to phrases in Article 2(4) to which it is sought to give a restricted meaning, it can be argued that Article 51 and paragraph 4 of Article 2 were not intended to, and do not restrict the right of Member States to use force in self-defence within the meaning of that concept to be found in the customary law.

Article 51, it is said, refers merely to 'armed attack' because it was inserted for the particular purpose of clarifying the position of defence treaties which are concerned only with external attack, and being in this way specific it leaves the broader customary right, which is always implicitly reserved, intact. Professor Derek Bowett's view supports the position that Article 2, paragraph 4, left the right of self-defence unimpaired and that the right implicitly excepted was not confined to reaction to 'armed attack' within Article 51 but permitted the protection of certain substantive rights:

Action undertaken for the purpose of, and limited to, the defence of a State's political independence, territorial integrity, the lives and property of its nationals (and even to protect its economic independence) cannot by definition involve a threat or use of force 'against the territorial integrity or political 'independence' of any other State.¹²¹

¹¹⁹ See Hilaire McCoubrey & Nigel D White, *International Law and Armed Conflict* (1992) 91-92.

¹²⁰ Travalios, above n 45 at 162.

¹²¹ Bowett, above n 90 at 188-9.

Richard Erickson, in his monograph on international terrorism and the use of military force, states that ‘the traditional view is that State toleration or encouragement is an insufficient State connection’ to constitute an armed attack under Article 51 of the *UN Charter*.¹²² This position is shared by a number of other commentators and can be readily supported by arguments distilled from provisions in the *UN Charter*.¹²³ If the right of self-defence extends beyond the ‘armed attack’ provision of Article 51, there are, at the very least, serious hurdles that must be overcome before self-defence, as traditionally understood, can be used to justify attacks against terrorists or terrorist facilities located in another State.

The recognition that acts of private actors may give rise to an armed attack is anything but revolutionary. The term ‘armed attack’ was traditionally applied to States, but nothing in the Charter indicates that ‘armed attacks’ can only emanate from States. The main question is whether a terrorist act must be in some form attributable to another State in order to qualify as an armed attack. It is not entirely clear from the practice in the aftermath of September 11 whether the requirement of the attributability of a terrorist act to a specific State actor was, in fact, fully abandoned. NATO, for instance, introduced an interesting new formula when determining whether the September 11 attacks amounted to ‘armed attacks.’ It did not expressly inquire whether the attacks were ‘attributable’ to the Taliban or Afghanistan, but instead asked whether ‘the attack against the United States on September 11 was directed from abroad’ and could ‘therefore be regarded as an action covered by Article 5 of the *Washington Treaty*.’¹²⁴

¹²² Richard Erickson, *Legitimate Use of Force Against State Sponsored Terrorism* (1989)134.

¹²³ See, e.g., Donald J Hanle, *Terrorism: The Newest Face of Warfare* (1989) 190-91; Louis Henkin, ‘The Use of Force: Law and US Policy’ reprinted in *Right V. Might* (Council on Foreign Relations 1989).

¹²⁴ See NATO, ‘Press Release No 124 , Statement of the North Atlantic Council,’ September 12, 2001, <<http://www.nato.int/docu/pr/2001/p01-124e.htm>> (accessed April 1, 2003).

It may be of greater consequence to admit openly that the requirement of attributability does not play a role in the definition of armed attack. A similar argument can be made with regard to armed attacks under Article 51. One may argue that the criterion of the attributability of an armed attack is only relevant in the context of the question towards whom the forcible response may be directed, but not in the context of the definition of an armed attack. Carsten Stahn postulates that ‘... the main criteria to determine whether a terrorist attack falls within the scope of application of Article 51 would not be attributability, but whether the attack presents an external link to the State victim of the attack.’

Reviewing the relationship between article 2 (4) and article 51 vis-à-vis other coercive uses of force, Professor Myres McDougal states:

Article 2(4) refers to both the threat and use of force and commits the Members to refrain from ‘threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations;’ the customary right of defence, as limited by the requirements of necessity and proportionality, can scarcely be regarded as inconsistent with the purpose of the United Nations, and a decent respect for balance and effectiveness would suggest that a conception of impermissible coercion, which includes threats of force, should be countered with an equally comprehensive and adequate conception of permissible or defensive coercion ...¹²⁵

In an exposition of the significance of Professor McDougal’s statement, Lieutenant Colonel James P Perry notes that:

...in Professor McDougal’s interpretation is the recognition of the right to counter the imminent threat of unlawful coercion as well as an actual attack. This comprehensive conception of permissible or defensive coercion, honouring appropriate response to threats of an imminent nature, is merely reflective of the customary international law. It is precisely this anticipatory element of lawful self-defence that is critical to an effective policy to counter State-sponsored terrorism.¹²⁶

Secretary of State Shultz emphasized this point when he said: ‘The *UN Charter* is not a suicide pact. The law is a weapon on our side and it is up to us to use it to its maximum extent ... There should be no confusion about the status of nations that sponsor terrorism against Americans and

¹²⁵ M McDougal, ‘The Soviet-Cuban Quarantine and Self-Defence’ (1963) 57 *American journal of International Law*. 597, 600.

¹²⁶ Terry, above n 26 at 171.

American property.’¹²⁷ The premise of this contention is that self-defence is an inherent right whose contours have been shaped by custom and subject to customary interpretation. Thus although the drafters of Article 51 may not have anticipated its use in protecting States from the effects of terrorist violence, international law recognises the need for flexible application if the constitutive nature of the *UN Charter* is to have any meaning

Even though the language of Article 51 may be thought to lend itself to an expansive interpretation, so that in today’s world, with today’s military capabilities, the manner in which a State protects itself from suffering a further terrorist attack must be flexible, this would allow any State, once a terrorist ‘attack occurs’ or is about to occur, to use force against those responsible for the attack in order to prevent the attack or to deter further attacks unless reasonable ground exists to believe that no further attack will be undertaken.’¹²⁸ Though self-defence by the drafters of the *UN Charter* was addressed in the context of large-scale attacks by the regular armed forces of one State against (the territory of) another, not the mere harbouring of a terrorist group, it can be argued that given the radically different contemporary realities compared to 1949, Article 51 needs to be interpreted more broadly. Considering that the preferred modus operandi of terrorist organisations is drawn out, patient, sporadic pattern of attacks, it is very difficult to know when or where the next incident will occur. This state of affairs was simply not contemplated at the time the *UN Charter* was drafted. As observed by Professor G M Travaglio:

... reasonable arguments can be made that the definition of ‘armed attack’ should be interpreted to include the purposeful harbouring of international terrorists. The potential destructive capacity of weapons of mass destruction, the modest means required to deliver them, and the substantial financial resources of some

¹²⁷ G Shultz, ‘Low Intensity Warfare: The Challenge of Ambiguity’ (January 1986). US Department of State Current Policy No 783 at 3.

¹²⁸ Abraham D Sofaer, ‘Terrorism, the Law and the National Defence’ (1989) 126 *Military Law Review* 89, 95.

terrorist organizations, combine to make the threat posed by some terrorist organizations much greater than that posed by the militaries of many States.¹²⁹

The UN was founded on the unfulfilled promise that the UN Security Council would protect international peace and security in return States would forgo self-help in favour of collective-help. The reality is that the *UN Charter* system is not strongly coherent or controlling. It is arguable that in the face of the reality of the alleged weaknesses of the UN system in guaranteeing peace and security, the right of self-defence under Article 51 ought be read to include all of the rights of self-defence that existed in customary international law at the time it was drafted.¹³⁰ And the customary right of self-defence has included instances in which military force might be legally appropriate as self-defence, even when no armed attack has occurred.¹³¹ The fact however is that unseating regimes that adopt terror as a tool of statecraft is not supported by existing current legal doctrines governing the use of force nor does the international system adequately account for the threat posed by such States.

Before 11th September 2001, Article 51 of the Charter of the United Nations on individual or collective self-defence was generally interpreted in a restrictive fashion. Most States (with the exception of the United States and Israel) did not recognise a right of self-defence against terrorist networks hiding in territories of other States; nor did a majority of States recognise the legitimacy of military action intended to prevent future attacks. Self-defence was seen as an action of immediate response to an ongoing armed attack. Preventive or anticipatory self-defence was more or less ruled out. However, the terrorist attacks on September 11, 2001 marked a turning point in the international regime on the use of force. The world community came to

¹²⁹ Travalio, above n 45 at 155.

¹³⁰ Ibid at 156.

¹³¹ Ibid at 160.

understand terrorism as an act of war—a new manifestation of the changing nature of armed conflict. As such, it poses not only new challenges for the historically fixed international rules relating to armed conflict but it also demands the development of new legal regimes which can effectively address the threat of global terrorism. This is necessary in view of the international community largely assenting to the invocation of self-defence and thus in essence characterising the attacks as armed attacks. This characterization evoked a legal basis for the use of force initiated by the United States and United Kingdom against Afghanistan on October 7, 2001.

When stating the conditions for individual and collective self-defence, Article 51 of the *UN Charter* does not specify that an ‘armed attack’ has to originate from a State. However, this condition may be taken as implicit. The provision deals with international relations and envisage an exception to the general prohibition of the use of force against States. Moreover, armed attack is a subcategory of aggression, as explicitly said in the French text of Article 51 of the Charter, and also aggression clearly has to come from a State (see Article I of the definition of aggression annexed to GA resolution 3314(XXIX)). There has been some academic debate as to whether the concept of ‘armed attack’ as contained in Article 51 must originate from a State (government) rather than a non-State actor like Al Qaeda.

Security Council resolution 1368 of September 12, 2001 is ambiguous on the issue. In its preamble, the resolution ‘recogni[s]es the inherent right of individual or collective self-defence in accordance with the Charter’, but in the operative part of the resolution describes the attacks as ‘terrorist attacks’ (not armed attacks) which ‘represent a threat to international peace and security’. In summary, the resolution does not explicitly recognise that the right of self-defence applies in relation to any parties as a consequence of the 11 September attacks.

When a State harbouring¹³² terrorists provides active support for the terrorist group, as distinguished from mere tolerance and encouragement, there is a raging debate among international lawyers over whether, and under what circumstances, such support can constitute an ‘armed attack’ under Article 51 of the *UN Charter* against the target State. On this point there is considerable authority for the proposition that under some circumstances active support to terrorist groups can constitute an ‘armed attack’ against another State. For example, Professor Oscar Schachter has stated:

[W]hen a government provides weapons, technical advice, transportation, aid and encouragement to terrorists on a substantial scale, it is not unreasonable to conclude that an armed attack is imputable to the government.¹³³

The *Nicaragua Case*¹³⁴ decided by the International Court of Justice in 1986, is the closest case on this issue. In this case, the Court rejected the claim of the United States that the support of Nicaragua to the rebels in El Salvador justified the use of force by the United States against Nicaragua in self-defence under Article 51. The Court said clearly that the provision of weapons or logistical support by one State to the opposition in another State is not an armed attack under Article 51.¹³⁵ Consequently, this opinion suggests, although does not decide, that even the active support by a State to terrorist groups would not be an armed attack under Article 51. The *Nicaragua Case*, however, is far from directly on point and leaves many questions unanswered.

¹³² Harbouring entails providing sanctuary and training to international terrorists as well as conditions that support their ability to engage in terrorist activities. See eg SC Res 1193, 391st mtg at 1, UN S/RES/1193 (1998). SC Res 1214, 4053d mtg at 1, UN SCOR, 4051st mtg at 1, UN S/RES/1214 (1998)

¹³³ Oscar Schachter, ‘The Lawful Use of Force by a State Against Terrorists in Another Country’ reprinted in Henry H Han, *Terrorism and Political Violence* (1993) 250. See Alberto Coll, ‘The Legal and Moral Adequacy of Military Responses to Terrorism’ (1987) 81 *Proceedings of the American Society on International Law* 297, 298.

¹³⁴ 1986 ICJ 14

¹³⁵ *Ibid* at 119, para 30.

For example, what if the support includes not only weapons and logistical support, but includes the provision of training and a secure base of operations? Does it change matters if the terrorists might have access to weapons of mass destruction? Might support to terrorists acting trans-nationally be sufficient to be an armed attack against a target State even though support to an armed opposition located within the target country would not? None of these questions is addressed by the *Nicaragua Case*. Professor Rosalyn Higgins indicates that if the support reaches a sufficient scale, it can constitute an armed attack for purposes of Article 51.¹³⁶ Other commentators as well support the idea that the level of support to terrorist groups can rise to a level sufficient to become an armed attack under Article 51.¹³⁷

The distinction between armed attacks and terrorist acts has become blurred in the aftermath of the acts that took place on September 11, 2001 possibly because of the enormous consequences. By 'recognizing the inherent right of individual or collective self-defence in accordance with the Charter' a preambular paragraph of SC resolution 1368 appeared to imply that the terrorist acts in New York, Washington and Pennsylvania represented an 'armed attack' within the meaning of Article 51 of the *UN Charter*. A similar preambular paragraph was also included in Resolution 1373. The point that an armed attack occurred was more explicit in the statement made by the North Atlantic Council on September 12th. This said that, 'if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which States that an armed attack against one or more of the

¹³⁶ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) 250.

¹³⁷ See, e.g., John F Murphy, *State Support of International Terrorism* 120 (1989); Sage R Knauft, 'Proposed Guidelines for Measuring the Propriety of Armed State Responses to terrorist Attacks' (1996) 19 *Hastings International and Comparative Law Review* 763, 765. See also Jeffrie A McCredie, 'The April 14, 1986 Bombing of Libya: Act of Self Defence or Reprisal' (1987) 19 *Case Western Reserve Journal of International Law* 215, 219 (effects of terrorism on victim state must be directly linked to state support to justify the use of military force).

Allies in Europe or North America shall be considered an attack against them all'.¹³⁸ Neither the Security Council resolutions nor the NATO statement attempted to establish a link between the terrorist acts and a particular State. However, these texts do not provide a clear indication whether they intend to refer to a wide concept of armed attack which would comprise also acts which are not attributable to a State. The issue whether the acts in question could be regarded as State acts depends on factual elements which are still controversial.

The terrorist attacks against the World Trade Centre and the Pentagon seemed to create a political will to adapt the concept of self-defence to a new threat-the threat of large-scale terrorist attacks against nations as such. For traditional self-defence scenarios, the restrictive interpretation of Article 51 would still be valid, but in defence of 'open societies' against the new threat there was a widespread feeling among political decision-makers that preventive military action should no longer be ruled out. Through a process of State practice between 12th September and 10th October-which included UN Security Council Resolutions, NATO Declarations, supportive statements by the European Union, and a declaration by the Organization of Islamic States-the traditional rule of self-defence was extended. Particularly important was the meeting of the UN Security Council on 8th October. The Council had met to receive information on and discuss the US-UK bombings of targets in Afghanistan which had started on the preceding day. In a statement by the President of the Council, it was underlined that the military action had been reported to the Council as measures of self-defence (in accordance with the requirement of Article 51 that actions in self-defence should be so reported). 'The members of the Council were appreciative of the presentation made by the United States and the United Kingdom.' No member

¹³⁸ Press Release (2001) 124.

of the Council, the most important body of the international community, objected to the new interpretation of Article 51.

IV. Conclusion

As a matter of public international law, terrorism presents several problems: the identification of terrorists is often difficult; the inconsistent international legal system fails to deter terrorist operations; and the complicated cross-border nature of terrorist networks makes it difficult to effectively diminish the threat. In the face of these problems, States that are targeted by terrorists have essentially two options in responding against terrorists. If the terrorists are located within the target State's borders, they may be captured and prosecuted under domestic criminal laws. However, as is frequently the case, if terrorists are located outside the target State, military strikes against them may be undertaken but this frequently involves incursions into neutral sovereign States. Though it is clear that effective deterrence demands that terrorists do not have safe havens and that terrorists must fear that they ultimately will pay a price for their criminal mayhem, there is no indication that the world community is prepared to accept the use of force against sovereign territories in pursuit of modern terrorists since fundamental principles of the international system will be breached.

The significance of September 11 is the seeming official recognition by States that acts of terrorism carried out by independent private actors fit (somewhat uneasily) within the parameters of Article 51. But the events of September 11 have another more profound impact on the law of self-defence--they affect the system itself. "They will most likely strengthen the role of Article 51

as a new Grundnorm governing the unilateral use of force by States against armed violence.’¹³⁹

The consequence is a wider concept of armed attack based on an eased nexus requirement concerning the act of terrorism to State actors. This relaxation will, in the long run, lead to an increasing invocation of Article 51 and to an extension of the scope of Article 51.¹⁴⁰ ‘The other implication is a growing focus on the use of force in response to violence on Article 51. The lowered threshold for attributing terrorist acts to non-State actors will push States to rely on Article 51 to justify military means, rather than invoke a right to self-defence under customary law or the existence of a State of necessity.’¹⁴¹

In principle, the growing centralisation of the system around Article 51 is a desirable development. An expansion of Article 51 is preferable to the creation of unwritten exceptions under the Charter because it does not further erode the prohibition of the use of force under Article 2(4), but simply opens a broader spectrum of justifications for what continues to be unlawful conduct under Article 2(4). A broadening of the ‘law of justification’ is much less detrimental to the regulatory framework of the Charter than a limitation of its prohibitory character. In addition, Article 51 presents the decisive advantage of containing inherent limits to self-defence, leaving less room for abuse than an (unlimited) exception to Article 2(4). In the enthusiastic words of Carsten Stahn:

On a more general level, the broadening of the notion of armed attack to include acts of terrorism by non-State actors such as al-Qaeda may...be viewed as a recognition of the adaptability of the system from within. It avoids the perpetuation of the Kosovo dilemma, namely, the emergence of categories of uses of force that may be said to be ‘illegal but justifiable’ while further isolating the ‘Glennonists’ of international law, who call into question the viability of the Charter rules on the use of force. Moreover, many of the dangers of a broad definition of the notion of ‘armed attack’ may be attenuated by a reasonable application of the principles of necessity and proportionality, which are the cornerstones of the permissibility of the use of force in self-defence.¹⁴²

Conceptually, there is little dispute concerning the right to exercise the doctrine of self-defence.

The difficulty lies in the determination of those conditions which justify the use of military

¹³⁹ Carsten Stahn, ‘Terrorist Acts as “Armed Attack”: The Right to Self-Defence, Article 51 (1/2) of the UN Charter, and International Terrorism’ (2003) 27 *Fletcher Forum of World Affairs* 35, 37.

¹⁴⁰ *Ibid* at 35.

¹⁴¹ *Ibid*.

¹⁴² *Ibid*.

power. This requires an assessment of whether there is actual necessity, whether there is demonstrable justification, and whether the military instrument can be used in a manner proportionate to the threat. It is suggested that self-defence claims must be appraised in the total context in which they occur. One aspect of this contextual appraisal of necessity, especially as it relates to responding after-the-fact to terrorist violence, concerns the issue of whether force can be considered necessary if peaceful measures are available to lessen the threat. Once a terrorist attack has occurred, the military response should meet the legal criteria of necessity and proportionate use of force. After all, no State is obliged to ignore an attack as irrelevant, and the imminent threat to the lives of its nationals as well as its role as guarantor of national security for the well being of its citizenry.

Whatever the particular circumstances, policy makers and lawyers must keep in mind that there are significant potential dangers in expanding the category of 'armed attack' in Article 51 beyond its obvious meaning of a direct attack by the military of one State against the territory, property, or population of another. It does seem to stretch the common understanding of the term to suggest that a State has committed an 'armed attack' against another by tolerating persons on its soil who are, in one view, nothing more than criminals. Too loose a definition of 'armed attack' invites future abuse and undermines the predictability of international law regarding the use of force. Moreover, while the right of self-defence, even against armed attack, is subject to limitations of proportionality and necessity, it is generally accepted that self-defence against an armed attack includes both a right to repel the attack and in limited cases to take the war to the aggressor State to prevent a recurrence.

While the terrorist threat posed by biological, chemical or nuclear attacks is chilling, pre-emptive use of military action opens a Pandora's box.¹⁴³ Intervention to prevent the sinister marriage of international terrorism and weapons of mass destruction presents serious legitimacy questions. It is not necessarily in the interest of the international community to make the category of 'armed attack' under Article 51 so broad and potentially open-ended that nations harbouring groups committing violent acts in other States will be considered to have made armed attacks on the target State. Further, the scope of a nation's permissible military response is almost certainly greater in the event of an 'armed attack' by another State than in other situations in which a more limited military response might be justified, and a broad definition of 'armed attack,' to include those situations in which a State merely harbours terrorists, would too readily justify the robust use of military force. While the language of Article 51 might be given an expansive interpretation, so that in today's world, with increased terrorist capabilities, the manner in which a State protects itself from suffering a further attack might be made flexible, allowing States to act militarily, once a terrorist 'attack occurs' or is about to occur, the use of force against those responsible for attacks in order to prevent the attack or to deter further attacks without sufficient, recognised benchmarks will set dangerous precedent.

¹⁴³ The US intervention in Iraq constituted a paradigm-altering event. Even though the United States resorted to tired political games of legal rationalisation. The legality of its behaviour premised on the 'Bush Doctrine' remains in serious doubt.