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CAN SELF-DEFENSE SERVE AS AN APPROPRIATE TOOL AGAINST INTERNATIONAL TERRORISM?

Jan Kittrich

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CAN SELF-DEFENSE SERVE AS AN APPROPRIATE TOOL AGAINST INTERNATIONAL TERRORISM?

*Jan Kittrich**

I. INTRODUCTION

The phenomenon of terrorism represents one of the gravest challenges to international order, peace, and security. The unpredictable nature of terrorist attacks threatens the public safety of each member of the international community. At the same time, member states' responses to terrorism appear to threaten the homogeneity of modern international law and disrupt the uniform system of legal rules. In some aspects, it also seems to divide the community of international scholars. Simply put, terrorism deviates from the rule of law and so might the responsive action that it necessitates. This is the potential danger that terrorism intentionally aims to escalate.¹

Modern terrorism poses serious and unprecedented challenges to public international law. In particular, it is very difficult to find and identify terrorist groups or infrastructure; international law does not always serve as an efficient deterrent for terrorists, as it is inconsistent and not easily enforceable; the effectiveness of international law is very often limited by the cross-border nature of terrorist networks; terrorists are often located outside the target states and thus the defensive measures mean challenging third, "neutral" states' sovereignty.

But in this sense, it must be admitted that sovereignty cannot be separated from the responsibilities that are linked intrinsically to sovereignty. One of the most essential responsibilities is to prevent its own sovereign territory from being used by non-state entities instigating terrorist or armed attacks against other states.² Case law of the International Court of Justice (ICJ) supports the existence of the aforementioned

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1. See ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 155 (1993).

2. This obligation is explicitly stipulated in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (U.N. General Assembly Resolution No. 2625), which reads as follows:

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 toward the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

G.A. Res. 2625 (XXV), at 125, U.N. Doc. A/8082 (Oct. 24, 1970). This duty has been reiterated in subsequent international documents such as United Nations General Assembly Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism (Dec. 17, 1996), which specifies that "states guided by the purposes and principles of the Charter of the United Nations . . . must refrain from organizing, instigating, assisting or participating in terrorist acts in territories of another states, or from acquiescing in or encouraging activities within its their territories directed towards the commission of such acts." G.A. Res. 49/60, ¶ II 5(a), U.N. Doc. A/Res./4960 (Dec. 9, 1994).

duty. In its *Corfu Channel* opinion of 1949, the court stated that every state is under an obligation “not to allow knowingly its territory to be used for acts in a manner contrary to the rights of other states.”³ Allowing its territory to be used by terrorist groups committing attacks against another state will, beyond any doubt, breach the obligation stated above. Thus, the *Corfu Channel* concept could be applied to terrorist activities.

States that allow this situation risk bearing the negative consequences of neglecting their communal duty. Sovereignty should not serve as protection from a state’s responsibility when that state knowingly offers its territory for launching terrorist attacks.

Very specific situations arise when the local state (whose territory is used by terrorists) is unwilling or unable to put an end to activities of terrorist or armed groups. Could the local state, under international law, become a target of forcible measures by the threatened or attacked state? Could a terrorist attack emanating from its territory be attributed to the local state due to the fact it has neglected its aforementioned duty? These are very serious questions that deserve detailed analysis.

As international law should not be a “suicide pact,”⁴ it should allow states to defend their legitimate interests and avert danger by force if there is no other alternative. No one can expect that the inability or unwillingness of a state to meet its international legal obligations could impair the essential interest of the threatened state and deprive it of the right to respond by forcible measures. These exceptional measures should be of very limited purpose and scope. One should not forget that the celebrated *Caroline* opinion of 1837 involved the use of force against armed bands; it was a clear example of forcible incursion into the territory of another state for a limited purpose.⁵ It could be inferred from the case that the two states agreed, that in certain limited circumstances, a state might use forcible measures against a non-state entity in cases of “strong overpowering necessity” to prevent the illegal activities of armed bands.⁶

3. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).

4. Louis René Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT’L & COMP. L. 1, 31 (1994).

5. In the *Caroline* case, British soldiers undertook an incursion into the territory of the United States and seized the *Caroline* steamer used by the rebels against British rule. The Avalon Project at Yale Law School, *Webster Ashburn Treaty—The Caroline Case* (1997), <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm> [hereinafter *The Caroline Case*]. The boat was ultimately damaged and sent over Niagara Falls. *Id.* The British government stated in subsequent diplomatic correspondence that the United States did not effectively stop the operation of the rebel groups and left their action unchallenged. *Id.* Foreign Secretary Ashburton explicitly remarked:

But however strong this duty may be, it is admitted by all writers, by all Jurists, by the occasional practice of all nations, not excepting your own, that a strong overpowering necessity may arise, when this great principle may and must be suspended. It must be so for the shortest possible period, during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity . . . How long could a Government, having the paramount duty of protecting its own people, be reasonably expected to wait for what they had then no reason to expect?

Id.

6. *Id.*

When facing the threat of international terrorism, the right of self-defense might seem an appropriate tool against terrorist attacks. In order to make the protection of the rights of member states and the law enforcement process more efficient, the right of self-defense is of great importance and represents the only justifiable resort to unilateral force.⁷ The question may be posed: Should self-defense be regarded as a lawful tool when suppressing attacks conducted by highly-organized terrorist groups? Answering this question is difficult as many aspects of the right of self-defense must be assessed and evaluated (e.g., if the right of self-defense is broad enough to include armed strikes against terrorists on the territory of another state; or if the customary conditions of self-defense may be redefined when facing terrorist threats). All these aspects shall be analyzed below.

Because the right of self-defense is linked intrinsically to the concept of state sovereignty, it is left to the discretion of that state to determine whether it will take any defensive measures. Therefore, the state becomes the sole judge of the cause that gives rise to its claimed self-defense. It must be noted at the beginning that action taken in self-defense should not be aimed at punishing the offender or preventing future violation. Self-defense should never be retributive in nature. In broader terms, the purpose of defensive force is the protection and conservation of values that appear essential to the defending state. As Professor Schwarzenberger put it, the purpose of self-defense is to repel “any present invasion of the rights of the defender.”⁸ Undoubtedly, acts of international terrorism disrupt the values that are essential for the state; therefore, using military force in self-defense may seem justified.

There is another issue of utmost importance that must be highlighted: whether, under the law of state responsibility, an armed attack conducted by a terrorist group can be attributed to the local state. This issue is very serious as such a state could become a target of forcible measures of the attacked state. Article 8 of the International Law Commission’s Articles on State Responsibility (the Articles) provides: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”⁹

II. PRINCIPLES OF ATTRIBUTION AND DEGREES OF COMPLICITY

There are several possible scenarios involving complicity between the local state and the terrorist group for which we need to assess the legal consequences. The major aspect is the degree of complicity of the host state, which will ultimately decide what

7. This was confirmed in the *Judgment of the Military Tribunal for Far East* (Tokyo), where it was declared “any law, international or municipal, which prohibits recourse to force, is necessarily limited by the right of self-defense.” TOKYO JUDGMENT, INT’L MIL. TRIB. FOR FAR E. 47 (1977). Additionally, it is apparent that all major legal systems recognize the excuse of self-defense. See Matt S. Nydell, *Tensions between International Law and Strategic Security: Implications of Israel’s Preemptive Raid on Iraq’s Nuclear Reactor*, 24 VA. J. INT’L L. 459, 465 (1984).

8. Georg Schwarzenberger, *The Fundamental Principles of International Law*, 87 ACAD. DROIT INT’L RECUEIL COURS 195, 335 (1955).

9. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, ¶ 8, U.N. Doc. A/RES/56/83 (Jan. 28. 2002). See also Daniel Bodansky & John R. Crook, *Symposium: The ILC’s State Responsibility Articles*, 96 AM. J. INT’L L. 773, 783 n.67 (2002).

legal options exist for the attacked or threatened state. Some remarks will also be made on the relevance of the law of state responsibility, in particular, on the issue of whether such acts can be attributed to the state. There is an overarching principle that needs to be highlighted at the beginning. It is submitted that Article 51 permits a state to react to an armed attack committed by non-state entity.¹⁰ As the defensive measure will inevitably affect another sovereign state, another issue must be assessed. Scholars are divided as to whether state involvement is necessary in these cases in order to activate the right of self-defense. Some scholars uphold the restrictive view: demanding the existence of a certain involvement or specific link (based on rules on state responsibility) between the perpetrators of the armed attack and the host state. However, other scholars argue that due to the increased threat of transnational terrorism, this high threshold should be relaxed. Consequently, the principle of “substantial involvement,” which has often been regarded as a condition *sine qua non*, should be lowered. There are several prominent scholars who take a rather extreme view, claiming that an armed attack conducted by non-state actors automatically triggers the right of self-defense irrespective of any state involvement.¹¹

A. De Jure Organs of a State

Firstly, acts of de jure organs of a state that act in the state’s name or on its behalf are fully attributable to such a state.¹² There is no question that an armed attack committed by these organs would be directly attributable to the state itself. In fact, it would be the state itself launching the armed attack. Such a scenario can be described as the so-called “state terrorism” or “state-sponsored terrorism.” Article 4(2) of the Articles requires that private actors would have to be accorded a “status in accordance with the internal law of the state.”¹³ It is submitted that in contemporary interstate relations, this scenario is the least probable.

B. De Facto Organs of a State

The local state is also responsible for the acts of the so-called de facto organs of its own. These are usually acts of individuals—mostly physical persons—who do not normally possess any state authority; however, in some specific situations, they might be acting under direction or in the interest of the state concerned. They might be ancillaries of the state or volunteer personnel for specific purposes. When discussing de facto organs the specific factual relationship between them and the state concerned is crucial. The nature or genuineness of the factual relationship ultimately will be a decisive factor in assessing whether acts of the organs can be attributed to the state.

10. Article 51 provides: “Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.” G.A. Res. 56/83, ¶ 51, U.N. Doc. A/RES/56/83 (Jan. 28. 2002).

11. See, e.g., Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 98 AM. J. INT’L L., 839, 840 (2001); see also Christopher Greenwood, *International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO J. INT’L L. 7, 17 (2003).

12. De jure organs of a state might be understood as legislative, judicial, executive, or administrative bodies or state agencies, irrespective of their internal hierarchy. The state will thus be responsible for the acts of its local, municipal, and federal organs.

13. G.A. Res. 56/83, ¶ 4(2), U.N. Doc. A/RES/56/83 (Jan. 28. 2002).

A state will likely be held responsible in cases where the de facto organs contravene the directions of the state. Also, the factual relationship will likely be established in cases where the local states tolerate acts of individuals that cause damage or other injuries to neighboring third states of without any intention to stop such activities though having sufficient resources and capacity to do so.

As the ICJ ruled in *Nicaragua*, relying on Article 3(g) of the Definition of Aggression, an armed attack may also encompass “sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts against another state of such gravity as to amount to an actual armed attack conducted by regular forces”¹⁴ The ICJ set up a relatively high standard for state involvement because the mere assistance or provision of weapons or support of terrorists shall not elevate to the level of an armed attack.¹⁵ The court confirmed that a non-state attack may, under certain conditions, trigger the right of self-defense, provided it is of sufficient gravity and the state concerned is significantly involved.¹⁶ This being said, the court narrowed the scope of self-defense to only such armed attacks as can be attributed to a particular state.¹⁷ However, an important principle must be highlighted: the mere support of terrorist groups—be it weapons or logistical—may not be regarded as an armed attack “as long as the private group has not yet committed acts of military force against another state.”¹⁸ As already mentioned, the court’s decision raised a lot of criticism in relation to such narrow construction of the term “armed attack.” It remained unclear what degree of control a state must exercise over terrorists in order to be held responsible for the terrorists’ actions. One might argue that a similar approach may be applied to cases of terrorist attacks, as they may be equivalent to armed attacks. The *Nicaragua* decision suggests that a state must exercise very significant or substantial influence over the terrorists before the armed attack may be imputed to the state. As the court concluded, “effective control” of a state over the groups or other non-state entities must exist.¹⁹ This conclusion indicates that certain terrorist groups, not being state organs but receiving support and direction from the state, may become de facto agents of such state. It must be admitted that it may not be easy for the victim state to provide sufficient evidence to prove the test of “effective control.”

In 1999, the Appeal Chamber of the International Criminal Tribunal for the Former Republic of Yugoslavia (ICTY) decided *Prosecutor v. Tadić*,²⁰ wherein the court adopted a more liberal view regarding terrorists acting as de facto organs of a state. The ICTY held that the necessary degree of control or involvement would

14. Military and Paramilitary Activities (*Nicar. v. U.S.*), 1986 I.C.J. 14, 103 (June 27) [hereinafter *Nicaragua*] (quoting G.A. Res. 3314 (XXIX), at 143, U.N. Doc. A/2319 (Dec. 14, 1974)). At the same time, the court ruled that “financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets” was insufficient to for the purposes of attributing an armed attack. *Id.* at 64.

15. *Id.* at 104.

16. *Id.*

17. *Id.*

18. ALBRECHT RANDELZHOFFER, *On Article 51, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, 788, 801 (Bruno Simma ed., Oxford 2002).

19. *Nicaragua*, 1986 I.C.J. at 65. The court ruled that “it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.” *Id.*

20. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Jul. 15, 1999).

depend on the factual circumstances of each case and declined to see “why in each and every circumstance international law should require a high threshold for the test control.”²¹ In its judgment of July 15, 1999, the ICTY affirmed that:

[i]n order to attribute the acts of a military or paramilitary group to a state, it must be proved that the state wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the state be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the state should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.²²

The ICTY’s ruling could indicate that there has been a certain shift in assessing the state’s involvement in terrorist activities. Terrorist organisations can possess a considerable amount of autonomy and still be regarded as de facto organs of a state.²³ It can be seen from the *Tadić* case that the main difference from the principle set by the *Nicaragua* case seems to rest in the degree of control exercised by the local state. Nonetheless, even the ICTY stated that the degree of control should exceed “the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.”²⁴

Recent history shows that there are instances when a state’s involvement in terrorist activity amounts to an armed attack. As the de facto organs of a state, we might also include the acts and activities of the Al-Qaeda terrorist group in Afghanistan due in particular to the factual relationship between the Taliban regime and Al-Qaeda.²⁵ As a consequence, the Taliban (i.e., the Afghan state) should bear erga omnes responsibility for the breach of imperative rule of public international law. The Taliban regime has been repeatedly urged by the international community (including the UN Security Council²⁶) to prevent Al-Qaeda from using the territory of Afghanistan as a base for

21. *Id.* at ¶ 117.

22. *Id.* at ¶ 131. The case itself did not involve armed attack per se, but the ICTY was assessing whether the acts of Bosnian Serb armed forces could be attributed to the Yugoslav government. *See id.* at ¶¶ 121, 145.

23. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 182-83 (1988).

24. *Tadić*, Case No. IT-94-1-A, Judgment at ¶ 145.

25. Article 16 of the International Law Commission’s Draft Articles on State Responsibility stipulates who might be an accomplice in an internationally wrongful act. JAMES CRAWFORD, *THE INTERNATIONAL COMMISSION’S ARTICLES ON STATE RESPONSIBILITY* 149 (2002). The responsibility, according to the article, arises if the aid or assistance was provided with the “knowledge of the circumstances of the internationally wrongful act,” and the act by the state receiving such aid and assistance was internationally wrongful. *Id.*

26. The Security Council adopted numerous resolutions reaffirming deep disturbance of the council by “the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and the planning of terrorist acts.” S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998). As the Taliban did not act in conformity with the previous resolutions, the Security Council, acting under Chapter VII of the U.N. Charter, insisted that:

the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan, comply promptly with its previous resolutions and in particular cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other states or their citizens, and cooperate with efforts to bring indicted terrorists to justice.

training and to surrender Osama bin Laden. Based on the information available, it is undisputed that the Taliban did not comply with the U.N. Security Council resolutions demanding immediate surrender of bin Laden. The Taliban regime also declined to condemn the terrorist attacks committed by Al-Qaeda. Thus it may be suggested that the relationship between the Taliban regime and Al-Qaeda was mutually beneficial.²⁷

The same structure might be applicable to the suicidal acts of Palestinian terrorists (Hamas, Al-Aqsa Martyrs' Brigades), which, in the opinion of the author, are not acts of private persons but acts of de facto organs of the Palestinian National Authority, executing control over the Gaza Strip and the West Bank.

If the relationship between the terrorist group and the host state equates to cooperation, whereby the state provides significant support to the group, then such cooperation can be understood as complicity of the host state. Such a high degree of complicity means that the respective state incurs responsibility for the acts of the non-state actors, and thus might become a target of actions undertaken in self-defense by another state. Of course there might be, on a case-by-case basis, different levels of complicity that do not imply responsibility of the concerned host state. As previously noted, international legal theory is not in concert on this issue. Whereas some scholars see the level of cooperation very liberally (Sofaer,²⁸ Byers,²⁹ and Randelzhofer³⁰), some put the complicity threshold relatively high (Paust,³¹ Cassese,³² Frowein,³³ and

... [T]he Taliban [must] turn over [O]sama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice.

S.C. Res. 1267, ¶¶ 1-2, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (later reconfirming the obligation).

27. This conclusion was reiterated by the British government as it officially declared that these two entities have a:

close and mutually dependent alliance. Osama Bin Laden and Al Qaida provide the Taliban regime with material, financial and military support. They jointly exploit the drugs trade. The Taliban regime allows Bin Laden to operate his terrorist training camps and activities from Afghanistan, protects him from attacks from outside, and protects the drugs stockpiles. Osama Bin Laden could not operate his terrorist activities without the alliance and support of the Taliban regime. The Taliban's strength would be seriously weakened without Osama Bin Laden's military and financial support.

OFFICE OF THE PRIME MINISTER OF THE U.K., RESPONSIBILITY FOR THE TERRORIST ATROCITIES IN THE UNITED STATES, 11 SEPTEMBER 2001, available at <http://www.fas.org/irp/news/2001/11/ukreport.html>.

28. Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 26 MIL. L. REV., 89 (1989).

29. MICHAEL BYERS, WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT 67 (2005).

30. See RANDELZHOFFER, *supra* note 18, at 801.

31. As Professor Jordan Paust commented, "Far different is mere 'state responsibility' for harbouring or aiding terrorist armed attacks as opposed to direct participation in the non-state attack by a state. Mere 'state responsibility' can subject the state to political, diplomatic, economic, or juridic sanctions, but not lethal military force in self-defense." Jordan Paust, *Detention and Due Process in International Law, in TERRORISM AND THE MILITARY: INTERNATIONAL LEGAL IMPLICATIONS* 39-41 (Wybo P. Heere ed., 2003).

32. Antonio Cassese, *The International Community's "Legal" Response to Terrorism*, 38 INT'L & COMP. L. Q. 589 (1989).

33. See Jochen A. Frowein, *The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research, in THE LEGAL ASPECTS OF INTERNATIONAL TERRORISM* 55, 64 (Hague Academy of International Law, 1988).

Boyle³⁴). For example, Professor Abraham Sofaer advocated a very low complicity threshold, stating:

[I]f no evidence is developed that a state is directly responsible for specific acts, the state's general and continuing support for a group known to be engaged in terrorism should suffice to establish responsibility for aiding or conspiring, if not as a principal for the crime itself. Differences in the degree of proof of actual approval by a state of specific terrorist acts should operate to vary the degree of responsibility and the remedies imposed, rather than to permit a state to exploit the high standard of proof that should govern in determining the propriety of resorting to self-defense.³⁵

It is doubtful that this low threshold can be accepted as being appropriate in international law. It deviates significantly from the doctrine of state responsibility and would cause the "innocent" state, which may have a "terrorist" record from the past, to become a target of another state's self-defense measures. If there is no complicity on the side of a state, an attacked state may not deploy force in self-defense against the former, unless specifically stipulated by a resolution of the Security Council. If the attacked state retaliated against a non-complicit state, such an action would represent a dramatic and unwarranted extension of the right of self-defense. It may not be forgotten that the degree of complicity will definitely vary from case to case, and thus the legitimacy of the defensive action will depend heavily on the specific circumstances of each case. There is a significant school of thought that maintains that a terrorist armed attack of sufficient scale and gravity automatically activates the right of self-defense irrespective of whether it can be attributed to a territorial state or not. These scholars, Professors Greenwood³⁶ and Franck,³⁷ argue that the wording of Article 51 does not preclude such possibility. They also refer to the recent Security Council resolutions (1368 and 1373) adopted in 2001, which reiterated the right of self-defense following large-scale terrorist attacks.

Historically, the liberal view was very close to the American official policy in the fight against terrorism. This fact can be clearly demonstrated by the speech of then-Secretary of State George P. Shultz who, in January 1986 (paradoxically a few weeks before the Libyan involvement in serious terrorist attacks against Americans), stated:

There should be no confusion about the status of nations that sponsor terrorism against Americans and American property. There is substantial legal authority for the view that a state which supports terrorist or subversive attacks against another state, or which supports or encourages terrorist planning and other activities within its own territory, is responsible for such attacks. Such conduct can amount to an ongoing armed aggression against the other state under international law.³⁸

This view has had a long tradition within U.S. administrations and certain aspects thereof can be found in U.S. National Security Strategies of 2002 and 2006.

34. See Francis A. Boyle, *Remarks*, 81 AM. SOC'Y INT'L L. PROC. 288, 297 (1987).

35. See Sofaer, *supra* note 28, at 105.

36. See generally Greenwood, *supra* note 11, at 17.

37. See generally Franck, *supra* note 11, at 840.

38. George Shultz, U.S. Sec'y of State, Address before the Low-Intensity Warfare Conference at the National Defense University (Jan. 15, 1986), in 86 DEP'T ST. BULL., Feb. 1986, at 15.

Finally, it should be mentioned that it is not always possible to discover or investigate the degree of complicity. A state has many means by which to hide or camouflage its complicity with terrorist organizations and is likely to deny any allegations of aiding and harbouring terrorists. It is undeniable that many states in the past have sponsored, aided, or provided sanctuary to terrorists without being held internationally responsible for such conduct. Such states have found various excuses and claimed that the activities of terrorist groups were driven by legitimate concerns. This behavior pattern renders the establishment of a complicity link very subjective and open to potential abuse. The proponents of the liberal approach seem to properly assess the current situation by taking into account the increased number of cases in which the state may be understood to be harbouring terrorists. Their aim is to adapt the restrictive test of “substantial involvement” to be in line with current developments. Overly-cautious reliance on rules of state responsibility does not mirror the current situation any more. After the September 11, 2001, attacks, there seems to be more support for the proposition that the “substantial involvement” standard should encompass the harboring of terrorists. That scenario would cover situations in which a state, which has become a target of an armed attack by a non-state group, may use force in self-defense against its bases on the territory of another state, as long as the state willingly harbors the group.³⁹ Professor Randelzhofer contends that the victimized state might react by military means against the terrorist group within the territory of the other state as “otherwise, a so-called failed state would turn out to be a safe haven for terrorists; [and this is] certainly not what Arts. 2(4) and 51 of the [U.N.] Charter are aiming at.”⁴⁰ Harboring in this respect could mean leaving its own territory at disposal for the training and operation of the group with the knowledge or indication that it might use force against other states.

Notably, the issue regarding a state’s encouragement of terrorism was addressed authoritatively by the U.N. General Assembly in December 1994 when dealing with measures to eliminate international terrorism. The Sixth Committee recommended to the General Assembly a draft resolution with the ultimate purpose of enhancing the struggle against international terrorism. The General Assembly adopted without a vote the wording prepared by the Sixth Committee, stipulating the obligation of a state to:

refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other states or their citizens.⁴¹

Because the international community adopted this resolution unanimously, it may be considered a reflection of an evolving norm of customary international law.⁴² This

39. See BYERS, *supra* note 24, at 67.

40. See RANDELZHOFFER, *supra* note 18, at 802.

41. G.A. Res. 49/60, Annex II, ¶ 4, U.N. Doc. A/RES/49/60 (Feb. 17, 1995).

42. The General Assembly addressed this issue again in 1996, strongly condemning all acts of international terrorism and urging all member states if they had not yet done so to consider becoming parties to conventions aimed at suppressing international terrorism. The General Assembly also adopted provisions supplementing the 1994 Declaration on Measures to Eliminate International Terrorism. In the supplement, the states declared “that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles

obligation was repeatedly reiterated in relevant Security Council resolutions demanding the Taliban to cease providing a safe haven to the Al-Qaeda terrorist network as well as providing training facilities. Violation of such an obligation may cause serious consequences for the respective contravener.

C. Subsequent Adoption of the Conduct as its Own

There may exist a scenario whereby terrorists act independent of the state concerned and therefore the acts are not attributable to that state until it adopts or approves such acts. The Articles on State Responsibility of 2001 reflect this scenario in Article 11, which stipulates that “conduct which is not attributable to a state under the preceding articles shall nevertheless be considered an act of that state under international law if and to the extent that the state acknowledges and adopts the conduct as its own.”⁴³ The International Court of Justice in its 1980 decision titled *Concerning United States Diplomatic and Consular Staff in Tehran*,⁴⁴ echoed this doctrine. At the outset of the seizure of the U.S. Embassy in Tehran in 1979, militant student groups had not initially acted on behalf of Iran, for the Iranian authorities had not specifically instructed them to perform those acts.⁴⁵ At that moment, the attack was not yet imputable to the Iranian government.

Nevertheless, as the court subsequently ruled, Iran was held internationally responsible for failing to prevent the attack on the United States’ diplomatic premises and subsequently to put an end to that attack. A few days later, the Iranian authorities ultimately formally approved and endorsed the occupation of the embassy and the detention of the U.S. nationals by militants. This situation dramatically changed the legal nature of the case. In the view of the court, this was the stage when the groups of militants became de facto agents of the Iranian state, and, as such, their acts became legally attributable to the state.⁴⁶ In the scenario above, once the acts of militant

of the United Nations.” G.A. Res. 51/210, ¶ 2, U.N. Doc. A/RES/51/210 (Jan. 16, 1997).

43. CRAWFORD, *supra* note 25, at 121.

44. *Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 [hereinafter *Tehran*].

45. *Id.* at 11-13. The International Court of Justice explained:

No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognised “agents” or organs of the Iranian state. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that state on that basis. Their conduct might be considered as itself directly imputable to the Iranian state only if it were established that, in fact, on the occasion in question the militants acted on behalf of the state, having been charged by some competent organ of the Iranian state to carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of the state.

Id. at 30.

46. The International Court of Justice determined:

The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian state, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that state. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian state for whose acts the state itself was internationally responsible.

Id. at 35.

groups or terrorists are approved by that state, the targeted state may invoke self-defense. That is to say, in such a case, the act that triggered responsibility under the laws of state responsibility also generated the possibility of a forcible response in self-defense.

D. Duty of Due Diligence and the Failure to Prevent

There is the last scenario regarding the operations of terrorist groups. These groups may use the territory of a state as a starting point for launching armed attacks without direct or indirect involvement of the territorial state. In such situations, a state's complicity cannot be imputed, as the state may be incapable of stopping the terrorist operations. The host state is merely unable or unwilling to stop the activities emanating from its territory. In principle, the state is not responsible for acts of private persons. Nevertheless, this should not mean that the third state would have to sustain illegal acts emanating from these individuals because there is no sovereign state responsible for their behavior. Such an approach would not promote fairness and justice in international relations. There is, however, a well-established duty under general international law requiring a state to exercise due diligence, which means preserving a certain standard of public order: a state is obliged to take all reasonable measures in order to prevent harm and illegal acts to be caused to third states. This obligation has been reiterated authoritatively in the 1970 Declaration on Friendly Relations:

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.⁴⁷

As the provisions stipulated in the declaration are restatements of customary international law, they are binding on all states of the international community. Case law also supports the doctrine of due diligence. As early as 1946, the International Court of Justice held in *Corfu Channel* that "general and well-recognized principles" included "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."⁴⁸ If the *Corfu Channel* principle is applied to modern terrorist activities, then a state possesses an obligation not to permit its territory to be used as a base for acts of terrorism.

Therefore, it can be concluded that the local or host state is in breach of international law towards this third state—a breach of due diligence, an internationally wrongful act—and thus can be held responsible for such a breach. This breach, however, does not logically qualify as an armed attack. A state victimized by terrorist

47. *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), at 123, U.N. Doc. A/8082 (Oct. 24, 1970).

48. *Corfu Channel*, 1949 I.C.J. at 22. *Corfu Channel* involved a situation in which British warships struck mines and were heavily damaged. *Id.* at 27. The International Court of Justice held that there was not enough evidence to prove that the minefield was laid with the connivance of the Albanian government. *Id.* at 16.

activities has the right to defend its territorial integrity against such activities. The host state could be subject to proportional countermeasures by the attacked state.

As stated above, the mere inactivity of the local state may not imply its complicity or responsibility. Controversial questions arise if the attacks conducted from the territory of such an unwilling state are of significant scale and effect. In this respect, the threatened state cannot be left without remedy. Correspondingly, the terrorists may not be allowed to use such a state as a shield for their attacks. As the attack is not attributable to the host state in accordance with respective rules on responsibility of state, there must be other options to avert the danger emanating from the territory. Scholars are not in concert in terms of what measures might be taken by the victimized state. Some scholars accord the state the right of self-defense in such situations. One scholar, Professor Ruth Wedgwood, stated that “if a host country permits use of its territory as a staging area for terrorist attacks . . . the host government cannot expect to insulate its territory against measures of self-defense.”⁴⁹ Recently, there have been several examples in which states invoked the right of self-defense as a response to armed attacks from a state whose government was unable to exercise full jurisdictional power over its territory—i.e., from the so-called “failed” states.⁵⁰ However, state practice seems inconclusive in proving that there would be a general *opinio juris* confirming the possibility of self-defense invocation against failed states.

There may exist a situation in which the territorial state has taken all measures to preclude the activities but groups of private persons still succeed in attacking another (third) state. Therefore, the territorial state should not be held responsible, as it has taken all the precautionary measures. However, the territorial state should cooperate with the attacked or victimized state in order to remove the terrorists from its territory. It is undisputed that private armed groups and terrorists may not profit from the inability or passivity of the territorial state.

Professor Dinstein also addressed this issue, calling for an extraordinary solution.⁵¹ As he stated, self-defense allows a state to react only against an armed attack.⁵² The only solution, as Article 51 is not applicable in this scenario, is the so-called “extraterritorial law enforcement,” whose sole purpose is to destroy the bases of hostile armed bands. Taking these measures, the victimized state only substitutes for the local state in fulfilling the duty of due diligence.⁵³

Dinstein’s thinking seems to be influenced by the conclusions of the 1980 Report of the International Law Commission, which stated—paraphrasing Roberto Ago’s words—that the threatened state could invoke the “state of necessity” and undertake forcible measures against the host state with the sole aim to destroy or paralyse the

49. Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT’L L. 559, 565 (1999).

50. For example, incursions of the Turkish army into the territory of Iraq as a response to terrorist attacks conducted by members of Kurdish Worker’s Party. The Turkish government claimed it was acting because the Iraqi government was unable to prevent the cross-border armed attacks. THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTIONS AGAINST THREATS AND ARMED ATTACKS* 63 (2002).

51. See generally DINSTEIN, *supra* note 23.

52. See *id.* at 182-83.

53. See *id.* at 213-21.

terrorist installations.⁵⁴ Breaching the necessary conditions of “state of necessity,” the acting state could be held accountable for committing an act of aggression. State of necessity should serve as a proper qualification of the scenario. The main difference between self-defense and state of necessity in this respect is the nature of the previous conduct; whereas self-defense requires use of armed force in the form of an armed attack, state of necessity may be triggered by the existence of imminent danger. There is no need to ascertain whether the state in question had previously committed an internationally wrongful act of aggression. This feature renders the state of necessity doctrine an appropriate tool for averting these types of activities, especially in cases where the armed attack has not occurred. It is regrettable that the International Law Commission did not more convincingly articulate an appropriate way to respond to attacks or danger emanating from the territory of another state.

It should not be forgotten that even the famous *Caroline* case of 1837⁵⁵ represented, in fact, something very similar to the above-mentioned doctrine of extraterritorial law enforcement. This relatively “ancient” incident may be viewed from a modern perspective as an incident involving cross-border use of force to counter terrorist activity or possibly cross-border support of insurgents. The rebels against British rule in Canada, together with their American supporters, used the steamboat *Caroline* for transporting men and material to an island on the Niagara River held by the rebels.⁵⁶ As the British government’s demands for the immediate cessation of these activities failed, the British military units crossed the border into the United States and destroyed the steamboat.⁵⁷ This incident generated an important correspondence between the United States and Great Britain, setting the standard for such conduct.

E. *Special Modes of Attribution*

It can be indicated from the recent decision-making activity of the Security Council that the council has indirectly addressed the issue of attributing terrorist attacks to a state. It may be implied that one of the reasons for such a shift is to overcome the problems regarding the restrictive test of “effective control” adopted in the *Nicaragua* case. This new model may be applied to cases where there is not enough factual evidence to satisfy the “effective control” test. There have been numerous occasions in which the Security Council requested a certain state or a territorial sovereign to prevent its territory to be used as a springboard for hostile acts or acts of international terrorism against a third state.⁵⁸ In those cases, the Security

54. 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, STATE RESPONSIBILITY, pt. 1, at 13 (1980), available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1980_v2_p1_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1980_v2_p1_e.pdf). The commission expressly listed the following conducts: incursions into foreign territory to prevent military operations of armed bands, which are preparing to attack the territory of the state; pursuit of armed bands who had crossed the frontier and have their base in that foreign territory; or protection of the lives of nationals or other persons attacked by armed groups on the territory of such state. *Id.* at 39.

55. *The Caroline Case*, *supra* note 5.

56. *Id.*

57. *Id.*

58. For example, the Security Council has urged all states to “[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts” and to “take the necessary steps

Council repeatedly requested, acting under Chapter VII of the United Nations Charter (the Charter), specific action from the addressee, and the addressee, be it a state or other entity, failed to satisfy this request.⁵⁹ Professor Zimmermann describes this approach as a “special norm of attribution.”⁶⁰ The resolution would then serve a *lex specialis*, attributing the armed attacks of private persons to the state due to the non-compliance with the previous resolutions.⁶¹ Professor Zimmermann strictly distinguishes between the aforementioned scenario and the mere absence of action by the host state, as they are significantly different.⁶² He continues by stating that the “inaction of the territorial state which has been expressly requested by the Security Council to take action against armed groups . . . does constitute a specific form of qualified inaction which in turn must enable states concerned, pending Security Council action under Chapter VII, to themselves exercise their right of self-defense.”⁶³ It seems that this proposition is based on Article 25 of the Charter, by which all member states agree to accept and carry out the decisions of the Security Council in accordance with the present charter.⁶⁴ Using this “qualified inaction” principle one might attribute the acts of Hezbollah to Lebanon (2006) and acts of Al-Qaeda to the Taliban (2001). Numerous Security Council resolutions demanded both entities (Lebanon and the Taliban) to prevent their territory from being used as a springboard for the acts of terrorists; in both cases, they failed to do so.⁶⁵

F. Concluding Remarks

It is beyond any doubt that the standard of “effective control” introduced by the *Nicaragua* case seems to be too rigid to meet the current challenges of international law. International law must find an adequate solution and accommodate the issue of attribution. It also is undisputed that non-state actors will conduct the majority of armed attacks in the near future. New rules and a lower standard of attribution should allow for self-defense in extreme cases of terrorist attacks reaching the level of an armed attack. Using this lower threshold of attribution, the Taliban and Lebanon could be held responsible for armed attacks committed by terrorists (i.e., Al-Qaeda and Hezbollah). Based on this new model of attribution, such an approach would mean that states who fail in their duty of due diligence may be held responsible for an armed

to prevent the commission of terrorist acts,” S.C. Res. 1373, ¶ 2, U.N. Doc. S/RES/1373 (Sept. 28, 2001), and it has urged the Taliban regime to “cease the provision of sanctuary and training for international terrorists” and to “take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps,” S.C. Res. 1267, ¶ 1, U.N. Doc. S/RES 1267 (Oct. 15, 1999).

59. See, e.g., *id.* (Taliban’s refusal to take action to eradicate terrorist camps and activities within its borders).

60. Andreas Zimmermann, *The Second Lebanon War: Jus ad Bellum, Jus in Bello and the Issue of Proportionality*, 11 MAX PLANCK U.N.Y.B. 99, 120 (2007).

61. *Id.*

62. *Id.* at 121.

63. *Id.*

64. U.N. Charter art. 25.

65. See S.C. Res. 1614, U.N. Doc. S/RES/1614 (Jul. 19, 2005); S.C. Res. 1655, U.N. Doc. S/RES/1655 (Jan. 31, 2006); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1363, U.N. Doc. S/RES/1363 (Jul. 30, 2001).

attack emanating from their territory. It is necessary to point out that the state concerned would simultaneously be in breach of its international obligations deriving, *inter alia*, from Security Council Resolution 1373 (2001).⁶⁶ It is submitted that it is primarily the International Court of Justice that should consider and elaborate upon this issue. Despite the fact that there is a manifest trend toward relaxing the traditional restrictive criteria, it is probably too early to state that there is no state involvement necessary. In conclusion of this subsection, it needs to be stated that the proper assessment of the state involvement in terrorist groups' activities undoubtedly will rely on the specific features and factual situation of each case.

III. IS AN ATTACK BY A NON-STATE ENTITY AN ARMED ATTACK?

Much attention has been focused on whether an attack by a non-state actor may be regarded as an armed attack for the purposes of Article 51 of the U.N. Charter. Unquestionably, states have an inherent right to defend themselves using forcible measures in self-defense. The state practice and international legal theory is in disagreement on whether this right can be invoked as a response to a previous terrorist attack. Terrorist groups, as non-state entities, may certainly inflict the same damage as an armed attack. Hardly anyone could challenge the argument that the magnitude of some recent terrorist attacks is comparable to those undertaken by regular state forces. It is obvious that the framers of the Charter did not anticipate any types of armed attacks other than those of a state-to-state nature.

Modern history renders the modification of this approach inevitable; it is necessary to adjust it to the latest developments. All the scenarios mentioned above work from the premise that a non-state actor's attack may be regarded as an armed attack. In the first two scenarios, reasonable evidence indicating that a certain terrorist group as a non-state entity is accountable for the attack has to be established. Article 51 of the Charter refers only to the attacked state and makes no reference to the originator of the attack. The wording "against a Member state" confirms this.⁶⁷ The wording of Article 51 itself does not indicate whether the attack has to come directly from the state. At the same time it does not preclude such a reading. This would allow the occurrence of an armed attack carried out by a non-state actor. Non-state actors—such as individuals or organized groups—are becoming increasingly important for international law and are being accorded various norms of behavior. This modern aspect must be taken into consideration when assessing the latest developments. Reaching the ultimate aim of the international legal system—promotion of peace within the international community—is only possible if such a system is fair and able to safeguard states' rights against immediate perils. International law must ensure that attackers will be held responsible and bear the consequences of their previous illegal activity. If the attacker may hide behind the fact that it is a non-state entity and unable to carry out an "armed attack," this would degrade the purpose of and respect for international law.

Consequently, Article 51 of the Charter does not preclude the armed attack from being launched by a non-state entity. When analyzing this issue, a very important

66. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

67. U.N. Charter art. 51, *available at* <http://www.un.org/aboutun/charter/chapter7.shtml>.

distinction must be made, as the September 11, 2001, attacks radically changed the legal framework. Article 51 provides a sufficient legal basis for reinterpretation that is consistent with the current status quo of international relations.

A. Prior to September 11, 2001

The situation prior to September 11, 2001, indicates that the international community was rather divided over whether self-defense may serve as a tool in responding to terrorist attacks by non-state entities. The prevailing view within the academic community was that an “armed attack” may only emanate from a state as a specific subject of public international law.⁶⁸ This pronouncement was reconfirmed by Judge Kooijmans, who recently explained that the requirement that “[an] armed attack must come from another state . . . has been the generally accepted interpretation for more than 50 years.”⁶⁹ There were only a few states (United States, Belgium, South Africa, and Israel, in particular) claiming the right to self-defense when undertaking forcible measures against terrorist bases in other third states. However, it was almost always contested and condemned by various international forums and by other member states, and most frequently by the U.N. Security Council. The state practice prior to September 11, 2001, does not rule out the applicability of self-defense. Although it has been contested and condemned, as already pointed out, in the details of each case, the applicability of self-defense to some cases of terrorist attacks as a legal principle was not disputed at all. What was usually condemned was non-compliance with the customary principles related to self-defense—necessity and proportionality. Due to the Cold War atmosphere, some of the anti-terrorist operations were condemned simply because of political affiliation to one of the two blocks. The Security Council’s condemnations were thus quite inconsistent, as the council is not an assembly of jurists or experts on international law. Therefore, some sessions were not supported by the necessary legal expertise, but rather by exclusively political motives. Professor William O’Brien very eloquently summarized this feature:

[T]he Security Council record during the period studied is conspicuous for the scarcity of serious legal arguments. No delegate remotely approached the level of Bowett’s analyses of reprisals and self-defense. No one even cited his 1972 article. Other publicists are seldom cited—except by the Israelis.⁷⁰

Israeli diplomats and political representatives used scholarly literature in support of their conduct in particular during the Security Council deliberations after the rescue mission at Entebbe International Airport and after the Osiraq aerial raid.

68. BENEDETTI CONFORTI, *THE LAW AND PRACTICE OF THE UNITED NATIONS* 176 (2000); Eric P. J. Myjer & Nigel D. White, *The Twin Towers Attack: An Unlimited Right to Self-Defense?*, 7 *J. CONFLICT & SEC. L.* 5, 7 (2002); see also Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 *EUR. J. INT’L L.* 993, 995 (2001); Carsten Stahn, *International Law at a Crossroads? The Impact of September 11*, 62 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 183, 213-14 (2002).

69. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131.

70. William V. O’Brien, *Reprisals, Deterrence, and Self-Defense in Counterterror Operations*, 30 *VA. J. INT’L L.* 421, 471 (1990).

As previously stated, there is a wide spectrum of thought in international legal theory on whether terrorist actions give rise to self-defense. These opinions range from rather restrictive interpretation (setting a relatively “high threshold”) in a moderate approach, to a liberal (sometimes called “low threshold”) approach.

The International Court of Justice established the standard of a restrictive approach, in particular in the 1986 *Nicaragua* case.⁷¹ The court’s construction of a high threshold for the permissible response in self-defense and its reluctance to extend the notion of armed attack to instances of state’s logistical and weapons support has been addressed above.⁷² Despite criticism, in particular from the United States, the court’s ruling has attracted the attention of numerous scholars and has had a long-lasting influence on the theory.⁷³ The *Nicaragua* judgment is relevant when speaking of counterterrorist operations, with the exception that terrorist groups that replaced the rebels and armed bands pose an even greater threat to the coherence of the international system. State practice supports this proposition, as the United Nations denied accepting the exercise of the right of self-defense as a tool for responding to terrorist attacks. It was primarily Portugal, South Africa, and Israel that claimed the right of extraterritorial use of force against terrorist bases irrespective of whether the local state was responsible for the attacks. During the 1980s, the international community strongly disapproved, for example, of the 1985 Israeli bombardment of PLO’s Headquarters in Tunisia,⁷⁴ the U.S. bombing of the Tunisian cities of Tripoli and Benghazi (1986), or South Africa’s incursion into the territories of neighboring states,⁷⁵ primarily into Botswana.

On the opposite side of the spectrum, scholars propose a relatively liberal approach, which is, as will be shown below, in contrast with the restrictive view.⁷⁶ These commentators would very likely argue that the drafters of the Charter did not anticipate the nature of contemporary asymmetric warfare and therefore, it should be interpreted extensively to include terrorist attacks within the ambit of Article 51. For example, Professor Alberto R. Coll, who has published extensively on counterterrorist issues, claimed, “It would be a tragic mistake to interpret Article 51 as an absolute prohibition on military responses to terrorism,” as Article 51 of the Charter was construed unequivocally to safeguard and protect states and their inhabitants against attacks directed from abroad.⁷⁷ Most proponents of this approach almost unanimously claim that in the last few decades, terrorist activities have become major sources of contemporary conflicts and represent a substantial threat to both national and international security. Therefore, the Charter should be interpreted in accordance with

71. 1986 I.C.J. 14.

72. See *supra* Part II.B.

73. See, e.g., Frowein, *supra* note 33, at 64.

74. The Security Council vigorously condemned the Israeli action as “an act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations.” S.C. Res. 573, ¶ 1, U.N. Doc. S/RES/573 (Oct. 4, 1985).

75. S.C. Res. 568, U.N. Doc. S/RES/568 (Jun. 21, 1985) (“South Africa’s recent unprovoked and unwarranted military attack on the capital of Botswana as an act of aggression against that country and a gross violation of its territorial integrity and national sovereignty.”).

76. See, e.g., Alberto R. Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC’Y INT’L L. PROC. 297 (1987); Stephen M. Schwebel, *Aggression, Intervention and Self-Defense in Modern International Law*, 136 HAGUE RECUEIL 411, 479 (1972).

77. Coll, *supra* note 76, at 307.

real threats.⁷⁸ Probably the most relentless supporter of the liberal approach is former legal advisor to the U.S. State Department, Professor Abraham D. Sofaer. As he categorically stated, “The notion that self-defense relates only to a use of force that materially threatens a state's ‘territorial integrity or political independence,’ as proscribed in Article 2(4), ignores the Charter's preservation of the ‘inherent’ scope of that right.”⁷⁹ When speaking of terrorism, the meaning of “armed attack” should not be unrealistically and artificially limited because terrorists would have substantial advantages if attacking democratic, non-aggressive countries.⁸⁰

There has to be, *de lege ferenda*, a third possible way, which will moderately and carefully combine the positive aspects of the two aforementioned approaches and diminish their deficiencies. Terrorist attacks for these purposes should be set as attacks with significant scale and effects (as the *Nicaragua* ruling stated), as though undertaken by the regular forces of a state; they should not be of sporadic or isolated nature, but rather campaigns of a continuing pattern. Supposedly, attacks meeting these conditions could, depending upon the factual situation of each case, give rise to a response in self-defense. In this regard, it is often argued that many citizens of the attacked state have to be endangered or attacked to trigger actions in self-defense. Professor Dinstein held that in the view of official dignitaries or diplomatic envoys, this would very likely represent an armed attack.⁸¹ This conclusion is tenable, as these individuals for certain specific reasons carry out official or state duties (though for a limited period of time), and therefore they must be seen as *de facto* organs of a state. It very likely would include the attempted assassination of the Israeli Ambassador to United Kingdom Shlomo Argov in 1982 by two Jordanian terrorists.⁸² Adopting this view could render impermissible those forcible responses that were of an isolated nature, including the 1986 bombing of a West Berlin nightclub frequented by U.S. military personnel or the killing of three Israeli civilians on their yacht off the coast of Larnaca, Cyprus.⁸³

Professor Antonio Cassese, one of the leading experts on legal aspects of terrorism, set the standard for the moderate approach back in 1989.⁸⁴ He explained that terrorist action, in order to be ascertained as an armed attack, should be “a very serious attack either on the territory of the injured state or on its agents or citizens while at home or abroad in another state or in international waters or airspace,” and simultaneously, such terrorist acts must “form part of a consistent pattern of violent

78. Professor O'Brien accurately described this feature back in 1990: “Given that much of contemporary conflict takes form of subversive intervention, exported revolution, indirect aggression, and transnational revolutionary warfare emphasizing terrorism, strict interpretations of the right of self-defense against immediate, armed attacks are not compelling.” O'Brien, *supra* note 70, at 470.

79. Sofaer, *supra* note 28, at 96.

80. Professor Sofaer also explained: “A view of the meaning of ‘armed attack’ that restricts it to conventional, ongoing uses of force on the territory of the victim state would as practical matter immunize those who attack sporadically or on foreign territory, even though they can be counted on to attack specific states repeatedly.” *Id.* at 95-96.

81. DINSTEIN, *supra* note 23, at 180.

82. The subsequent events, i.e., the Israeli invasion of Lebanon and expulsion of the PLO therefrom, however, seem greatly disproportionate in relation to the original armed attack of attempted assassination.

83. Special PLO forces claimed responsibility for killings. In reaction, the Israeli cabinet and the Israeli Air Force bombed the Tunis headquarters of the PLO, killing or injuring more than one hundred persons.

84. See generally Cassese, *supra* note 32.

terrorist action rather than just being isolated or sporadic attacks.”⁸⁵ One can conclude from the wording that a terrorist attack on only one individual diplomatic envoy shall not be considered an armed attack as it does not form a part of a “consistent pattern” of acts. This contradicts what was argued in the preceding paragraph. Despite the fact that there was “only” one diplomatic dignitary attacked, the action was, beyond any doubt, part of a consistent pattern of acts by the Abu Nidal terrorist organization, which was notorious for attacking Jewish targets and which ultimately claimed responsibility for this particular attack.

B. Post-September 11, 2001

The attacks perpetrated on September 11, 2001, by terrorists linked to Al-Qaeda against the United States show that armed attacks launched by non-state entities may have the same impact and effects as conventional armed attacks launched by states. The September attacks surely reach the threshold of an armed attack for the purposes of Article 51 of the Charter. Moreover, after the attacks there have been several indications that expanding the notion of self-defense is receiving more and more support from the international community as well as in international legal theory. These events revived the discussion of whether self-defense might be a legitimate response to major acts of global international terrorism. Immediately after the terrorist attacks on the United States, the North Atlantic Council, for the first time in its history, invoked Article 5 of the North Atlantic Treaty. The council issued a statement declaring:

[W]e consider the events of 11 September to be an armed attack not just on one ally, but on us all, and have therefore invoked Article 5 of the Washington Treaty [W]e will continue to strengthen our national and collective capacities to protect our populations, territory and forces from any armed attack, including terrorist attack, directed from abroad.⁸⁶

From the speech of NATO Secretary General Lord Robertson, it could be inferred that the North Atlantic organization opted for a rather extensive notion of an armed attack:

We know that the individuals who carried out these attacks were part of the world-wide terrorist network of Al-Qaida, headed by Osama bin Laden . . . protected by the Taliban [I]t has now been determined that the attack against the United States was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty.⁸⁷

Unlike Security Council resolutions, the reference to the authors of the armed attacks is, in the case of the NATO statement, quite clear. It is based on the premise that it was the Taliban regime that enabled the functioning and operation of the Al-Qaeda network in Afghanistan. Also, it explicitly uses the term “armed attack” in relation to Al-Qaeda activities. Because NATO is a relatively homogenous and well-organized collection of countries sharing similar values, consensus is more easily reached. This is one of

85. Cassese, *supra* note 32, at 596.

86. NATO Press Release M-NAC-2(2001)159, 2001, available at <http://www.nato.int/docu/pr/2001/p01-159e.htm>.

87. Lord Robertson, NATO Secretary General, Statement (Oct. 2, 2001).

the reasons why NATO could elaborate on the issue in more detail than the Security Council could in its resolutions. Furthermore, unlike the Security Council, the North Atlantic Council relied on detailed information from the United States government regarding the background of the armed attacks.

Self-defense as a potential measure for combating terrorism was referred to in Security Council Resolution 1368, which implicitly recognized in the context of the September 11 bombing the “inherent right of individual and collective self-defense in accordance with the Charter.”⁸⁸ This proclamation does not mean, per se, that self-defense is a legitimate response to acts of terrorism.⁸⁹ Nevertheless, the Security Council at least considered this issue in relation to terrorist attacks.⁹⁰ It was not an unprecedented decision in the history of the Security Council. In November 1967, the Security Council dealt with the Democratic Republic of Congo following the armed attacks committed against its territory. Mercenaries had committed attacks from neighboring Angola, which was under Portuguese administration at the time. Although the council did not explicitly recognize the right of self-defense, it declared the attacks of mercenaries across international borders emanating from another state as “armed attacks.”⁹¹

No Security Council document linked the attacks to any state entity or personalized the attackers. The council only referred to general duties contained in the General Assembly’s 1970 Declaration on Friendly Relations,⁹² explicating the duty of every state to refrain from organizing, instigating, assisting, participating in terrorist acts in another state, or acquiescing to organized activities within its territory directed towards the commission of such acts.⁹³ There seems to have been an assertion of the

88. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001). This resolution was reaffirmed few days later in another Security Council resolution. S.C. Res. 1373, *supra* note 66.

89. However, it is important to note that the author cannot find any rule in public international law that would prohibit the applicability of the right of self-defense to major acts of international terrorism.

90. The Organization of American States addressed the issue in similar manner. At the meeting of its ministers on September 21, 2001, the organization adopted a *Resolution on Strengthening Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism*, which recognized “the inherent right of individual and collective self-defense in accordance with the Charters of Organization of American States and the United Nations.” ORGANIZATION OF AMERICAN STATES, STRENGTHENING HEMISPHERIC COOPERATION TO PREVENT, COMBAT, AND ELIMINATE TERRORISM (2001), http://www.yale.edu/lawweb/avalon/sept_11/oas_0921b.htm. The Council of Ministers further declared:

[T]hese terrorist attacks against the United States of America are attacks against all American states and that in accordance with all the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and the principle of continental solidarity, all states [who are] parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state, and to maintain the peace and security of the continent.

ORGANIZATION OF THE AMERICAN STATES, TERRORIST THREAT TO THE AMERICAS (2001), <http://www.oas.org/OASpage/crisis/RC.24e.htm>.

91. As a result, Portugal was condemned by the Security Council for its failure to prevent mercenaries from using the territory of Angola as a base of operations for armed attacks. S.C. Res. 241, U.N. Doc. S/RES/241 (Nov. 15, 1967).

92. *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), Annex, U.N. Doc. A/Res/8082/Annex (Oct. 24, 1970).

93. See S.C. Res. 1373, *supra* note 66.

Security Council at the time that a terrorist attack does not necessarily have to be imputed to a state in order to trigger the right of self-defense under Article 51 of the Charter.

International legal theory is not in concert with the association of major acts of international terrorism and the right of self-defense. To a certain extent, the Security Council's reference to the "inherent right of self-defense" is not without problems. On one hand, it indirectly proposes the association of the terrorist attacks with the right of self-defense, while, on the other hand, it defines terrorist attacks, as opposed to armed attacks, as *only* a threat to the peace. As the Security Council is not purely a legal body, it perhaps did not pay much attention to this issue. In the view of Professor Cassese, these aspects do not clarify the legal issue but conversely, render the resolution too "ambiguous and contradictory."⁹⁴ It is true that the reference to the right of self-defense in both documents is contained in their preamble, but it should not reduce the validity of such a statement.

In this respect, one should not forget that even the most celebrated "self-defense" case—the *Caroline* case—which had long-lasting effects on the formation of the right of self-defense, involved an attack launched by a non-state entity. The extensive correspondence between United States Secretary of State Daniel Webster and his British counterpart Lord Ashburton does not restrict the applicability of the right of self-defense to armed attacks launched exclusively by states. Therefore, it may be implied that customary law of self-defense is not exclusively directed at the state.

IV. RECENT PRONOUNCEMENTS OF THE INTERNATIONAL COURT OF JUSTICE

A. *The Israeli Wall Advisory Opinion*

Recently, the International Court of Justice, in an advisory opinion regarding the legal effects of Israel's construction of a wall in Palestine territory, addressed the "state-to-state" nature of an armed attack. Although it did not address the issue of self-defense in full, the opinion deserves attention. In fact, the decision represents the first time the court had the opportunity to discuss the claims of self-defense invoked against armed attacks conducted by non-state actors. The court, in dismissing the Israeli claim, rather surprisingly affirmed the position that the invocation of the right of self-defense pursuant to Article 51 is strictly limited to an armed attack undertaken by another state. The court stated:

Article 51 of the Charter . . . recognizes the existence of an inherent right of self-defense in the case of armed attack by one state against another state. However, Israel does not claim that the attacks against it are imputable to a foreign state. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defense. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.⁹⁵

94. Cassese, *supra* note 32, at 996.

95. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J.

The court's majority simply regarded the invocation of the right of self-defense as inapplicable because, inter alia, the attacks were not attributable, or imputable, to any foreign state. The court's majority seems to indicate adherence to a restrictive interpretation of Article 51. The court was far from being unanimous when delivering the opinion, with Judges Buergenthal, Kooijmans, and Higgins dissenting on this specific point. Judge Buergenthal criticized the court for a "formalistic" approach to the right of self-defense, which prevented the court from addressing issues that were "at the heart of [the] case."⁹⁶ In fact, he straightforwardly challenged the final ruling of the court for adopting such a restrictive interpretation of Article 51.⁹⁷ This critique seems justified, as the court could have confronted its opinion with the current state practice.

With obvious regret, Judge Kooijmans argued that the court did not draw enough attention to Security Council Resolutions 1368 and 1373, and in particular, to how they qualified acts of international terrorism without attributing them to particular state.⁹⁸ In this respect, Judge Kooijmans pronounced that "this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defense."⁹⁹ It is impossible to tell if the Security Council will follow and reiterate the approach introduced by Resolutions 1368 and 1373, until the Security Council acts. The existence of dissenting opinions within such a highly respected judicial body indicates that the jurisprudence of the court is inconsistent and that the "new" interpretation has not yet received universal acceptance.

136, 194 [hereinafter *Israeli Wall*]. The state of Israel based the construction of the wall on its inherent right of self-defense. The purpose of the wall was to defend itself against attacks by non-state entities emanating from the occupied territories. During the subsequent debate in the General Assembly, the Israel Ambassador Dan Gillerman also noted the Security Council Resolutions 1368 (2001) and 1373 (2001), as they "have clearly recognized the right of States to use force in self-defence against terrorist attacks, and therefore surely recognize the right to use non-forcible measures to that end." U.N. Doc. A/ES-10/PV.21, at 6 (2003).

96. *Israeli Wall*, 2004 I.C.J. at 243 (separate opinion of Judge Buergenthal).

97. Judge Buergenthal stated that the conclusion of the court in this respect is "dubious" and further stated that "the United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another state." *Id.* at 242 (separate opinion of Judge Buergenthal). In support of his view, he mentions Security Council Resolutions 1368 and 1373, which did not "limit their application to terrorist attacks by state actors only, nor was an assumption to that effect implicit in these resolutions. In fact, the contrary appears to have been the case." *Id.* In her dissenting opinion, Judge Rosalyn Higgins stated the following: "There is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defense is available only when an armed attack is made by a state." *Israeli Wall*, 2004 I.C.J. at 215 (separate opinion of Judge Higgins).

98. As far as these two resolutions are concerned, the court stated that they are not relevant because "Israel regards the threat that creates a need for the wall as internal, not external." *Israeli Wall*, 2004 I.C.J. at 230 (separate opinion of Judge Kooijmans).

99. Judge Kooijmans submitted that the aforesaid Security Council resolutions qualified the acts of international terrorism as a threat to international peace and security without assigning these acts to particular state. As he stated, this is "a completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defense on a previous attack without saying that this armed attack must come from another state." *Israeli Wall*, 2004 I.C.J. at 230 (separate opinion of Judge Kooijmans).

B. The Congo Decision

In its ruling, *Concerning Armed Activities on the Territory of the Congo*,¹⁰⁰ the International Court of Justice was presented with another opportunity to address the issue of whether attacks by irregulars from the territory of one state against another state may trigger the right of self-defense.¹⁰¹ Clarification and lowering the high standard of attribution in accordance with the rules on responsibility of states would be desirable primarily in the light of worldwide threats of terrorist attacks. The court decided not to expressly address this issue, arguing that there is “no need to respond . . . as to whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces.”¹⁰² The court thus avoided entering into a detailed discussion about self-defense or the principles of attribution. This approach adopted by the court is rather surprising, as both parties emphasized the issues of self-defense and the attribution of terrorist attacks in detail. Special reference must be made to conflicting submissions of the agents of the parties, presented by Professor Ian Brownlie (on behalf of Uganda) and Professor Pierre Klein (representing Congo). In oral pleadings, Professor Brownlie argued on behalf of Uganda that the *Nicaragua* test of “effective control” is no longer valid in such situations:

[A]rmed attacks by armed bands whose existence is tolerated by the territorial sovereign generate legal responsibility and therefore constitute armed attacks for the purpose of Article 51. And thus, there is a separate, a super-added standard of responsibility, according to which a failure to control the activities of armed bands, creates a susceptibility to action in self-defense by neighboring states.¹⁰³

In response to the Ugandan allegation, the Congolese attorney, Professor Klein, strongly dismissed the existence of any super-added responsibility on the Congolese side arguing that:

to assimilate mere tolerance by the territorial sovereign of armed groups on its territory with an armed attack clearly runs counter to the most established principles in such matters. That position, which consists of considerably lowering the threshold

100. Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Dec. 19, 2005, 45 I.L.M. 71 [hereinafter *Congo*].

101. The Ugandan government was accused by the Democratic Republic of the Congo (DRC) of an act of aggression within the meaning of Article I of the Definition of Aggression set out in General Assembly Resolution 3314 (XXIX) of December 14, 1974, and in contravention of Article 2(4) of the U.N. Charter. *Id.* at 276. As a matter of fact, Uganda further was accused of committing repeated violations of the Geneva Conventions of 1949, and their Additional Protocols of 1977 were in flagrant disregard of the elementary rules of international humanitarian law. *Id.* at 312. Additionally, Uganda was accused of committing massive violations of human rights in the conflict zones, a breach of international human rights law. *Id.* at 312-13. The Ugandan authorities tried to justify their military operations in the territory of Congo as a lawful exercise of the right of self-defense against cross-border attacks by Ugandan insurgents from the Congolese territory. *Id.* at 313.

102. The court also ruled that “the legal and factual circumstances for the exercise of self-defence by Uganda against the DRC were not present.” *Id.* at 306.

103. See Transcript of Petitioner’s Oral Argument at 30, *Congo*, Dec. 19, 2005, 45 I.L.M. 71.

required for the establishment of aggression, obviously finds no support in the Military and Paramilitary Activities in and against Nicaragua.¹⁰⁴

Professor Brownlie seemed to support the broader reading of Article 51 proposing that harboring terrorists and armed bands may become, under standard principles of state responsibility, imputable to such a state. As can be seen from the Congolese response, this argument was not accepted because the mere “acknowledgment” of the existence of armed bands on its own territory is not equal to “tolerance” as inferred by Brownlie. It is submitted that such approach is not “deficient in law,” as the Congolese attorney remarked. It reflects a modern situation and in particular, modern threats of terrorism and armed bands operation. The approach correctly lowers the threshold for imputation and reflects current developments, and it can be inferred based on the final ruling of the court that it did not want to take any firm position or comment on the principle of “super-added” responsibility for harboring terrorists.

The court analyzed the questions of whether there had been an actual armed attack on Uganda, and if so, whether the Democratic Republic of Congo (DRC) was responsible for the attack. Ultimately, the court found no satisfactory evidence that the government of the DRC was involved in the attacks. Therefore, the court rejected Uganda’s claim of self-defense under Article 51 of the charter. The court also upheld that Uganda had violated the sovereignty and territorial integrity of the DRC, and that “the unlawful military intervention by Uganda was of such a magnitude and duration that the court considers it to be a grave violation of the prohibition on the use of force expressed in Art. 2 paragraph 4 of the Charter.”¹⁰⁵

Several judges critically observed that the court escaped its opportunity “to clarify the state of law on a highly controversial matter which is marked by great controversy and confusion—not the least because it was the court itself that has substantially contributed to this confusion by its *Nicaragua* judgement of two decades ago.”¹⁰⁶ Note that the strongest critics of the majority’s ruling were Judges Simma and Kooijmans, who made clearer positions on the issue of self-defense. Judge Simma was extremely critical of the fact that the court maintained its restrictive reading of Article 51, without taking recent developments into account, such as “Security Council resolutions 1368 (2001) and 1373 (2001) [that] cannot but be read as an affirmations of the view that large-scale attacks by non-state actors can qualify as ‘armed attacks’ within the meaning of Article 51.”¹⁰⁷ Both judges seemed to emphasise two scenarios: first, the attacks are not attributable to the respective state under general rules of state responsibility; and, second, where the government control has failed thus allowing the

104. See Transcript of Respondent’s Oral Argument at 26, *Congo*, Dec. 19, 2005, 45 I.L.M. 71.

105. *Congo*, 45 I.L.M. at 308-09.

106. *Id.* at 370 (separate opinion of Judge Simma). Similarly, Judge Kooijmans critically assessed this feature:

[T]he Court refrains from taking a position with regard to the question whether the threshold set out in the *Nicaragua* Judgment is still in conformity with contemporary international law in spite of the fact that that threshold has been subject to increasingly severe criticism ever since it was established in 1986. The Court thus has missed a chance to fine-tune the position it took 20 years ago.

Id. at 357 (separate opinion of Judge Kooijmans).

107. *Id.* at 370 (separate opinion of Judge Simma).

territory to be used by terrorists, i.e., the so-called “failed” states. Judge Kooijmans, fully supported by Judge Simma on this point, stated that “if armed attacks are carried out by irregular bands from such territory against a neighboring state, they are still armed attacks even if they cannot be attributed to the territorial state. It would be unreasonable to deny the attacked state the right of self-defense merely because there is no attacker state, and the Charter does not so require.”¹⁰⁸

As Professor Zimmermann remarked, the court seems to have deviated from the approach taken in its *Israeli Wall* advisory opinion.¹⁰⁹ In the *Congo* case, he argues, the court did not adopt any rigid approach on this matter. Professor Zimmermann’s remarks are certainly correct but it is submitted, however, that the court should have reconsidered its previous restrictive opinion delivered in its *Israeli Wall* advisory opinion and updated its jurisprudence in the light of current developments. It is apparent, irrespective of several separate opinions to the contrary, that the court reaffirmed the traditionally restrictive approach. The court seems to be too cautious to broaden the scope of self-defense and to recognize this right as a lawful response to armed attacks by non-state actors without another state’s involvement. Such pronouncements may have a negative impact on state practice, as they will tend to bypass Article 51, finding alternative ways of justifying their uses of force. This approach is detrimental to member states, as they will be less likely to rely on self-defense in cases of asymmetric or low-level warfare committed by terrorist groups. As Dr. Stahn remarked, maintaining the restrictive view affirmed by the court could increase the overreliance of member states on non-written exceptions of Article 2(4).¹¹⁰ In fact, this scenario could lead to the erosion of the normative principles contained in Article 2(4).

C. Concluding Remarks

The abovementioned resolutions, scholarly literature, and separate opinions of several judges of the International Court of Justice highlight an extremely important point: the question of broadening the notion of armed attack and self-defense as a whole.¹¹¹ It can be argued that, following the September 11, 2001, attacks, basically

108. *Id.* at 358 (separate opinion of Judge Kooijmans).

109. Zimmermann, *supra* note 60, at 116.

110. See generally Carsten Stahn, “Nicaragua Is Dead, Long Live Nicaragua”—*The Right to Self-Defense under Art. 51 U.N. Charter and International Law*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY?* 827, 842 (Christian Walter et al., eds. 2004); Christian J. Tams, *Light Treatment of a Complex Problem: The Law of Self-Defense in the Wall Case*, 16 *EUR. J. INT’L L.* 963, 976 (2005).

111. See, e.g., Cassese, *supra* note 32, at 996-97. Cassese provided:

It would thus seem that that in a matter of a few days, practically all states, (all members of the Security Council plus members of NATO other than those sitting on the Security Council plus all states that have not objected to resort to Article 51) have come to assimilate a terrorist attack by a terrorist organization to an armed aggression by a state, entitling the victim to resort to individual self-defense.

Id. See also CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 165 (2nd ed. 2004) (“It seems clear from the international reaction at the time that the members of the Security Council were in fact willing to accept the use of force in self-defense by the USA in response to the terrorist attacks.”); MALCOLM SHAW, *INTERNATIONAL LAW* 1028 (5th ed. 2003) (“Accordingly, the members of both these

all nineteen member states of NATO consented to a more expansive conception of an “armed attack.” Moreover, the fifteen members of the Security Council and almost thirty members of the Organization of the American States at least implicitly associated the terrorist attacks with the inherent right of self-defense. It is probably too early to state that there might be a new norm of customary law widening the scope of legitimate self-defense as stipulated in Article 51 of the charter being formed; however, the adoption of the wording in the aforementioned resolutions and proclamations demonstrates the willingness of a considerable number of states to accept the applicability of the right of self-defense to acts of terrorism in extreme cases. The resolutions affirm a certain trend that has been progressing within the international community in the last decade. At the same time, it would be fallacious to conclude that the opinio juris of states confirms the existence of a new rule of customary law. It will take time to reconcile the divergence between the recent jurisprudence of the International Court of Justice and current state practice. One aspect must be taken for granted: the ultimate aim of the Charter is to safeguard the security of its member states so that they are not left without remedy after being victimized by an armed attack. Therefore, by adopting the teleological interpretation of Article 51, one may conclude that this article primarily addresses the victimized state irrespective of where the armed attack originated or who was the attacker.

V. CONDITIONS FOR THE LAWFUL EXERCISE OF SELF-DEFENSE AGAINST TERRORISM

If it is taken for granted that terrorist acts might trigger self-defense, one has to consider the specific conditions which will ultimately render a self-defense response as legitimate. Responses to terrorism must conform to traditional conditions of immediacy, necessity, and proportionality.

Traditionally, self-defense responses must be an immediate reaction to the previous armed attack: the defensive measures must be exercised within a reasonable time frame after the attack. Should an unreasonable amount of time elapse between the original armed attack and the defensive response, the reaction could be rendered illegal. Timely response is therefore of the utmost importance. A delayed response might indicate that the action is of a retaliatory nature or an armed reprisal. Fulfilment of this condition—as well as the other two conditions stated below—will need to be assessed in light of the uniqueness of each case. Reasonable time delay due to geographical remoteness or material, financial, or military preparations of the attacked state is, of course, acceptable. When speaking of terrorism, the establishment of the condition of timeliness is not without problems, as the international legal doctrine is definitely not in concert. Some scholars would argue that defensive response is only possible against an actual or imminent armed attack as it might be misused as a pretext for aggressive intentions.¹¹² Other scholars—proponents of the liberal view—even

alliances [NATO and the Organization of American States] accepted that what had happened on 11 September constituted an armed attack within the meaning of Article 51 of the Charter.”)

112. For example, Professor Francis A. Boyle remarked at the 1987 American Society of International Law’s discussion on terrorism that “an expansive reading of the doctrine of self-defense to include retaliation and reprisal would provide gratuitously ample grounds for many other states to come up with all sorts of justifications and pretexts for engaging in the threat and use of force that could significantly undermine international peace and security.” Boyle, *supra* note 34, at 294-95.

argue that self-defense is not the only possible reaction available to a state in such situations, as there is always room for acts of reprisals instead of self-defense.¹¹³ Despite the controversy surrounding armed reprisals, Professor William O'Brien comments that they should be assimilated "into the right of legitimate self-defense."¹¹⁴ A strong follower of the liberal approach, Professor Abraham Sofaer, proposes that self-defense as a measure against terrorism might be used in a preventative or anticipatory manner. He stated that:

A sound construction of Article 51 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.¹¹⁵

If one of the article's priorities is to solve international disputes by peaceful means, then a certain time lag between the original terrorist attack and the deployment of defensive force is logically necessary. The use of force in self-defense should represent the last possible resort. Therefore, states faced with imminent peril should be allowed some lag time in order to negotiate and find a peaceful non-forcible settlement. Arguments about reprisals should not be accepted, as their position in international law is highly controversial, and the majority of states and scholars seem to regard them as being impermissible.

The principle of necessity compels the defending state to show "necessity for self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation," and such a state is also required to do "nothing unreasonable or excessive."¹¹⁶ The principle of necessity should justify any abuse of sovereignty of a state where the terrorist network or group operates. Necessity requires, first, the exhaustion of alternative peaceful measures before employing force. It is desirable that the territorial state should remove the threat itself. If unable to do so, it could accept help from the victimized state. Accepting the help of the local state, within whose borders the terrorists operate, could also show that the defensive state's intentions are clear and that it was truly unable to remove the threat itself. An appeal to the Security Council by the victimized state is also an alternative.

The condition of proportionality requires the response to be proportional in degree and scope to the original threat or attack. As the purpose of the defensive action is to end or repel the attack, the level or scope of defensive force does not always have to be in strict correspondence with the original force or the antecedent coercion. Sometimes the degree of defensive force has to be higher because the defending state's aim is to diminish or paralyze the attacker's capacity to proceed in launching the armed attack or continue in the aggression. Once the military objective of defensive action is fulfilled, the action itself must cease. Some authors, such as O'Brien, have advanced a view that, in some specific cases, the defensive counterterrorism measures should be

113. Professor Coll argued that "the evidence seems to suggest the continuing relevance of reprisals in the face of U.N. impotence to provide its members with protection against illegal uses of force." Coll, *supra* note 76, at 302-03.

114. O'Brien, *supra* note 70, at 476.

115. Sofaer, *supra* note 28, at 95.

116. R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938).

seen “in the total context of hostilities as well as the broader political-military strategic context.”¹¹⁷ At the same time the defensive measures taken should also serve the purpose of certain deterrent and to persuade the would-be aggressor not to engage in such a course of action. Professor Oscar Schachter concluded:

If proportionality consists of a reasonable relation of means to ends, it would not be disproportionate if in some cases the retaliatory force exceeded the original attack in order to serve its deterrent aim. One might say that the force would have to be sufficient to cause the terrorist to change his expectations about costs and benefits so that he would cease terrorist activity.¹¹⁸

This view is applicable to a very limited number of cases in which the pattern of terrorist activity is long-lasting and seriously threatens the victimized state. But the overreliance on strategic concepts and considerations could be dangerous, as it could override legal considerations and thus render the defensive reaction highly questionable or even impermissible.

When discussing proportionality and terrorist attacks, some scholars strongly support the doctrine of cumulative proportionality. The requirement of proportionality is very closely linked to another important issue: legitimacy of the target of the defensive force against terrorism. The United Nations Security Council Resolution 1368 recognized the right of self-defense in the context of terrorist attacks.¹¹⁹ However, it remained silent over the issue of the permissive targets of such defensive operations.

Logically one would suppose that defensive force should be strictly limited to the purpose thereof, namely to the destruction of the military or terrorist objective, including the infrastructure and training facilities. In these situations, force should be used only against terrorist targets, excluding military installations or forces of the respective state. However, this only applies to those situations in which there is no complicity of the state with the operation of terrorist groups. Unfortunately, the reality is not so straightforward, as there are various concepts and doctrines describing the potential targets. As indicated above, there remains the sensitive issue of targeting a potentially innocent state.

Therefore, this issue deserves more attention. It should be mentioned at the very beginning that whatever approach is adopted, the defensive action would have to comply with the relevant principles of international humanitarian law, which mainly involves rules proscribing the targeting of civilians or exposing civilian property to excessive damage or destruction. This is what renders forcible counterterrorism measures highly debatable, as terrorists intentionally keep their bases in densely-populated areas. Terrorists rely on the fact that forcible response against them will—to a certain, though limited, extent—cause civilian casualties and will very likely be condemned by the international community. It requires states that are contemplating using force against terrorists to calculate and plan very precisely the actual target of its forcible action. Target selection becomes an issue of utmost importance. The

117. O'Brien, *supra* note 70, at 477.

118. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1637 (1984).

119. See *supra* note 88.

international legal doctrine is divided on the issue in its assessment of whether specific counterterrorism measures were discriminate or indiscriminate. This division is remarkable in the case of the United States' bombing of Libya in 1986. For example, Professor Francis Boyle critically commented: "The Reagan administration must have known that to launch a large-scale bombing operation on the compound in the middle of the night when visibility would have been diminished significantly only could have resulted in the large-scale loss of innocent human lives."¹²⁰ In conclusion, the civilian casualties were relatively excessive. According to sources, approximately thirty-seven civilians were killed during the air raid.¹²¹

VI. THE AIR STRIKES ON SUDAN AND AFGHANISTAN OF 1998

The below-mentioned incidents in Kenya and Tanzania in 1998 seem to indicate that the practice of states has changed significantly as the phenomenon of state terrorism and terrorism in general has grown in magnitude.

On August 7, 1998, two car bombs exploded at the United States embassies in the East African capital cities of Dar es Salaam, Tanzania, and Nairobi, Kenya. These attacks killed more than 220 people, including twelve American citizens and their family members. In addition, the attacks injured more than 4,000 Kenyans, Tanzanians, and Americans, and severely damaged official American installations.

In response, the United States ordered the launch of a series of cruise-missile strikes on terrorist targets in Sudan and Afghanistan, known as "Operation Infinite Reach," on August 20, 1998. In his speech on the same day, President Clinton stated, "With the compelling evidence that the bin Laden network of terrorist groups was planning to mount further attacks against Americans, . . . the United States carried out simultaneous strikes against terrorist facilities and infrastructure in Afghanistan Our forces also attacked a factory in Sudan associated with the bin Laden network."¹²²

The United States' bombings represented unilateral uses of force against the territorial integrity of two sovereign members of the United Nations. Such an incident normally would be regarded as a *prima facie* violation of public international law. Therefore, the raid might only be justified if it fell under the exception of self-defense. This also was the sole legal justification used by the United States. The Security Council reported that the United States' response to the series of the armed attacks against the United States embassies and nationals constituted the exercise of the right of self-defense.¹²³ The defensive measures targeted Afghanistan's terrorist training

120. Boyle, *supra* note 34, at 296. For a contrary assessment, see, for example, Lieutenant Colonel Gregory F. Intoccia, who stated that the "majority of areas struck by American bombs in the April strike were military targets At least some civilian casualties were due to Libyan military structures placed so close to civilian sites." Gregory Francis Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177, 211 (1987). In this respect, Intoccia also stated that only a limited number of bombs dropped impacted the civilians. *Id.*

121. A. MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II*, at 295 (1997).

122. President William Clinton, Presidential Address (Aug. 20, 1998), available at http://www.pbs.org/newshour/bb/military/july_dec98/clinton2_8-20.html.

123. Letter from the Permanent Representative of the United States of America to the United Nations, Addressed to the President of the Security Council, U.N. Doc. S/1998/780 (Aug. 20, 1998).

camps, installations, and supply facilities under the control of the bin Laden organization, which was supporting terrorist actions against the United States and other countries. In Sudan, U.S. missile strikes targeted the Al-Shifa pharmaceutical plant near Khartoum, which was allegedly used for the production of chemical and biological weapons.

In order to assess the legality of the defensive measures, it is important to assess whether the conditions of necessity and proportionality were met. The United States supported the fulfilment of the condition of necessity by reference to the fact that repeated efforts to convince the government of Sudan and the Taliban regime to “shut these terrorist activities down and to cease their cooperation with the bin Laden organization” proved unsuccessful.¹²⁴ As far as the proportionality of the missile strike is concerned, United States Ambassador Richardson declared: “[T]he targets struck, and the timing and method of attack used, were carefully designed to minimize the risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality.”¹²⁵ The issue, however, is not without its problems. Because the missiles struck two sovereign states, each attack will be analyzed separately. It is also because of the fact that one of them did not meet the customary requirements of the lawful exercise of the right of self-defense. This is the reason for the striking difference in how the international community approved or disapproved of the two incidents.

The missile strike on Afghanistan attracted little criticism. It therefore can be assumed that the international community did accept the United States’ self-defense justification, including the necessary conditions thereof. Many democratic countries were supportive of the American strike, particularly the United Kingdom, Australia, France, Germany, Japan, and Spain. In contrast, some countries that have been traditional opponents of American foreign policy condemned the strike. These included Iran, Iraq, Russia, Libya, Pakistan, and Yemen.¹²⁶ The chairmen of the African Group, Arab Group, and Group of Islamic States within the United Nations in their letters did not address the issue at all, which is in striking contrast to the reaction to the Sudan strike. From this absence of disapproval, at least tacit approval of the legality of the strike can be inferred. There also was no recourse to United Nations bodies or agencies following this strike.

The missile strike on the Sudan was criticized widely. Before the bombing, the Al-Shifa pharmaceutical plant was Sudan’s major producer of chemicals used in the field of agriculture and veterinary medicine. The United States administration justified the raid on the grounds that it allegedly was involved in the production of chemical weapons and that it had strong ties to the bin Laden organization. The decision to strike was taken after concluding that the soil samples from the site—taken by a

124. *Id.*

125. *Id.*

126. Apart from condemnation of the United States missile strike, Pakistan also protested against the violation of its airspace—some of the missiles apparently had flown over its territory. Pakistan hoped that there would have been prior consultation before this action was launched. See Letter from Ahmad Kamil, Ambassador and Permanent Representative of Pakistan to the United Nations, Addressed to the President of the Security Council, U.N. Doc. S/1998/794 (Aug. 24, 1998); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT’L L. 161, 164-65 (1999).

clandestine Central Intelligence Agency operation—of the chemical plant contained components of an acid that might serve as a precursor of VX nerve gas. Moreover, in the view of the United States, the plant was heavily guarded and showed a suspicious lack of ordinary commercial activities. There is little doubt that the raid was exercised on the basis of inadequate and false evidence. Not long after the raid, there was suspicion that the connections between the Al-Shifa and bin Laden were too indirect and there were no nerve gas chemicals being made there. The international community's response, with the exception of the United Kingdom, Australia, France, Germany, Japan, and Spain, was overwhelmingly negative. There were many organizations or groups of states that explicitly criticized the raid.¹²⁷ For example, the chairmen of the African Group, Arab Group and Group of Islamic States within the United Nations individually asked the Security Council, via letter, to convene an urgent meeting and to dispatch a fact-finding mission to Sudan to establish the facts surrounding the activities of the pharmaceutical plant.

How should the raids be characterised under international law? Were these two incidents a legitimate exercise of the right of self-defense? Assessing the raids as retaliatory actions renders them illegal under international law; therefore, the customary elements of self-defense need to be considered—namely, proportionality and necessity. There is only a little doubt that the bombings on the embassies can be considered as armed attacks for the purposes of Article 51 of the charter. The diplomatic missions are the inviolable property of the home, and, in this case, the targeted state. The United States claimed that the information in their possession indicated bin Laden's intention to strike again and to prepare future attacks. The raid on Afghanistan targeted not only terrorist camps and facilities, but also a meeting of bin Laden's advisors who were allegedly planning other attacks of the American targets. Another element of necessity is the duty to resolve the matter through diplomatic negotiation and by exhaustion of the appropriate peaceful channels. Moreover, it would be unrealistic to conclude that the United States could have averted the danger through negotiations with the Taliban or bin Laden's representatives. In this respect, it may be held that such negotiations were practically impossible, as bin

127. The representative of Kuwait to the United Nations conveyed the statement of the League on Arab States (as a chairman thereof) in which he strongly criticized the United States' "blatant act of violation of the sovereignty of a state member of the League of Arab States." U.N. Doc. S/1998/789 (Aug. 21, 1998). The secretariat of the league also called upon the United States:

[A]s a permanent member of the Council and as a super-power with global responsibility for maintaining international peace and security, to respect international legality and to refrain from such acts which constitute violations of national sovereignty, instigate feelings of public outrage and encourage violence and counter-violence, thus endangering international peace and security.

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

Laden's network operates under strict secrecy. At the same time, there was little doubt that the terrorists were operating from the bases in Afghanistan and that there was a link between the embassy bombings and the targets struck by the United States raid. These conclusions seem to indicate a necessity to strike. If one considers proportionality as a necessary amount of force to forestall the immediate danger or to repel the attack, it can be concluded that the strike fulfilled such condition.

Establishing the condition of necessity in the Sudan case seems to be highly questionable. With reference to the *Osiraq* case of 1981,¹²⁸ which concerned the bombing of a nuclear reactor under construction, it is not accepted as a legitimate argument for self-defense if the apparent danger of an armed attack is too distant. Moreover, the link or causal relationship between the attacks on embassies and the pharmaceutical plant is also questionable. It is doubtful whether the respective plant posed any danger to the United States' security; there was no imminent danger.¹²⁹ The United States probably should have used diplomatic channels first to resolve the issue of the plant and its alleged production of chemical weapons. The administration did not provide sufficient evidence to prove that there was any real danger. If one of the two aforementioned conditions is not met, the action is not rendered self-defensive. This is the case for the Sudan bombing. If the necessity principle is left aside, then it can be concluded that the aerial raid also was not proportional to the potential threat. The situation definitely did not necessitate the complete destruction of the factory; the appropriate measure should have been an appeal to the Security Council to send United Nations weapon inspectors to Sudan.

In both cases, however, the arguments of the United States have serious deficiencies that render it difficult to make a legal assessment of the forcible response. The United States based its justification on the existence of reliable intelligence information, which it subsequently never disclosed. The international community thus did not have the information necessary to assess the action; it is in this respect very difficult to establish whether the conditions of necessity and proportionality have been satisfied. Without this information, it is also very difficult to assess the exact involvement of Afghanistan and Sudan in the terrorist plots. Nevertheless, it is quite surprising that most states—particularly Afghanistan—at least tacitly approved of the action even without such information.

This incident shows that there is a certain shift in the states' perception of the imminence of terrorist attacks and their capacity to strike basically anywhere. In other words, there is an evident shift towards the broader definition of armed attack. Low-intensity warfare, asymmetric warfare of terrorist groups, and state-sponsored terrorism has progressed rapidly in recent decades. It is now more evident than ever that an attack does not have to be exercised by scores of tanks or airplanes in order to reach the threshold of an armed attack. There are other modern modes of warfare that can

128. For more information on the factual background of this matter, see TIMOTHY L. H. MCCORMACK, *SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR* 15 (1996).

129. It also was alleged by numerous journalists that the decision to bomb the Al-Shifa pharmaceutical plant already had been adopted months before the actual aerial campaign took place. If true, this information raises serious questions as to whether the United States was actually facing imminent threat. See Vernon Loeb & Bradley Graham, *Sudan Plant Was Probed Months before Attack*, WASH. POST, Sept. 1, 1998, at A14.

inflict extremely grave injury on a foreign state or its nationals that are comparable to the damage more conventional warfare would cause. This approach requires extensive reading of the charter in order to accommodate such dramatic change. One might see this new approach on the cases described above. The approach has caused friction and tension within the international community of states, which has primarily shown its attitude to self-defense claims.

It seems that the United States' perception of the wider concept of self-defense and armed attack might have an effect on the progressive development of international law. The potential danger rests in the fact that this development is not fully consistent with the spirit of the Charter—limitation of unilateral use of force by a state—and might lead to the cycle of violence or revenge. At the same time, states may feel that use of force such as the missile strike can sometimes be the only realistic tool to prevent the danger of terrorism. In this regard, one must distinguish between an action in self-defense and a forcible action of a retaliatory nature. Whereas the former is a lawful use of force, the latter is a contravention of the charter.

VII. CONCLUSION

Special attention should be paid to the broadening interpretation of the right of self-defense in relation to acts of international terrorism. The magnitude and consequences of the September 11, 2001, attacks on the United States have undoubtedly changed the international legal framework regarding the use of force against terrorism. It is desirable to establish, *de lege ferenda*, a specific set of rules that will address the issue of legitimate responses to terrorism. One option, as described above, is the extended right of self-defense encompassing the extensive interpretation of the notion of self-defense. In particular, it should be made clear under what precise conditions member states might legally employ force in self-defense if a non-state actor attacks them. This is a crucial issue and, in this respect, international law has to accommodate the contemporary nature of international relations and modern threats. At the same time, one has to bear in mind that the issue of responding by force to non-state actors might negatively affect innocent states. It is very likely that terrorist groups will operate from the territory of another state.

The new concept of an extended right of self-defense would have to safeguard that only those who have harbored, assisted, or hosted terrorists on their own territory might become targets of forcible measures taken in self-defense. In this respect, force could not be used as a pretext for forcible occupation or removal of an unfriendly regime. There must be an objective process whereby a robust fact-finding authority—ideally under the auspices of the Security Council or any other impartial international body—would enable impartial assessment of the factual relationship between the host state and the terrorist group.¹³⁰ Before a state employs defensive measures it should be obliged to present unambiguous, reliable, and credible evidence legitimizing the use of force. There must be a process in place stipulating conditions

130. First, it is submitted that the host state would have to be given the chance to take its own reasonable and effective steps to remove or extinguish the threat. If this is not possible, or the measures proved inefficient, then the victimized state should be allowed to use limited force in self-defense with the limited objective of removing the threat.

of evidence presentation and its verification. The burden of proof shall rest on the state that is about to use force in self-defense. A high threshold or standard of proof must be established to prevent abuse of the right of self-defense.¹³¹ Currently, there is no consensual definition of such an evidentiary standard. Scholarly opinions differ from “clear and convincing”¹³² to “clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication.”¹³³ Establishing a high standard of proof will not be an easy task, as most of the terrorist operations are planned and conducted covertly without much publicity. Also, access to reliable intelligence information will be difficult. But all these aspects together will serve as an effective deterrent to any abuse of the right of self-defense.¹³⁴ If any such abuse occurs, it must be strictly condemned by the competent international body and the community as a whole, including the imposition of appropriate and effective sanctions on the transgressor state.

The most recent cases—including the September 11, 2001, attacks, the attacks on the United States embassies of Nairobi and Dar es Salaam, or Hezbollah’s attacks on Israel in July 2006—seem to indicate that the international community is much more receptive to claims of self-defense in extreme situations than it has been in the past.¹³⁵ While some states condemned the United States’ defensive reaction—in particular, its action against the Sudanese pharmaceutical plant allegedly involved in chemical weapons production—others were supportive. It must be noted that neither the General Assembly nor the Security Council condemned the United States’ attacks. Surprisingly enough, even the League of Arab States remained silent regarding the attack on Afghanistan; however, it condemned the U.S. attack on the Sudan.¹³⁶ As a matter of legal principle, many states supported the Israeli claim of self-defense when responding to the previous armed attack conducted by Hezbollah fighters. A decade

131. In this respect, Professor Antonio Cassese suggested that it ultimately should be the Security Council authorizing use of force against states assisting or tolerating terrorists. Cassese, *supra* note 32, at 1000. He concluded it is up to this representative body “to decide whether, and on what conditions to authorise the use of force against specific states, on the basis of compelling evidence showing that those states, instead of stopping the action of terrorist organizations and detaining its members, harbour, protect, tolerate or promote such organizations, in breach of the general duty.” *Id.*

132. See Mary Ellen O’Connell, *Evidence of Terror*, 7 J. CONFLICT & SEC. L. 19 (2002).

133. LOUIS HENKIN, *HOW NATIONS BEHAVE* 142 (2nd ed. 1979).

134. Another issue that deserves attention is the “sensitivity” of the evidence, which is to be presented to the international forum. It is very likely that the information possessed by the would-be victim state will be classified or confidential. Its disclosure and presentation to the public might endanger ongoing or future intelligence operations. It seems that this might be one aspect discouraging the respective state from such disclosure. On the other hand, one might argue if the intentions of the “victim” state are clear and fair, it should not be afraid of such disclosure.

135. Professor Franck argues that within the Security Council and the General Assembly, more states seem to show “greater tolerance for states that carry their wars with terrorists and insurgents across borders to strike at safe havens.” FRANCK, *supra* note 50, at 65.

136. Even more support was received in the aerial bombing campaign in Afghanistan following the September 11, 2001, attacks. Numerous states have either directly or indirectly participated in the aerial strikes. Several Arab states, such as Saudi Arabia, Turkey, Uzbekistan, Pakistan, and Qatar provided either their airspace or other subsidiary facilities. It must be also mentioned that approximately fifty members of the Organization for the Islamic Conference demanded the government of the United States not to extend the defensive military response beyond the territory of Afghanistan, but they were not critical of military measures taken against Afghanistan. See Daniel Williams, *Islamic Group Offers U.S. Mild Rebuke*, WASH. POST, Oct. 11, 2001, at A21.

ago, such an international reaction would be highly unusual or even impossible. In light of the aforementioned, it must be held that terrorist attacks of significant scale and effect should be considered as armed attacks for the purposes of Article 51. Of course, the notion of “armed attack” does not reflect the meaning associated thereto in late 1940s; today’s interpretation must inevitably include the most important threats to the most essential interest of a state—its own security.

It is doubtful to what extent it can be claimed that a new custom of general international law is being formed in relation to self-defense against attacks of non-state actors. The acceptance of such custom is far from being universal. It is submitted that the current apparatus of the law of state responsibility forms a sufficient basis for attribution. It is obvious that the highly-criticized principle of attribution—the notion of “effective control” introduced by the International Court of Justice in the *Nicaragua* case—does not reflect the current state of international law. It is incumbent upon the International Court of Justice to find ways of interpreting the term in the light of modern developments. Although the court as a whole has made rather confusing pronouncements on this point, it is undeniable that numerous judges (in particular, Judges Simma, Kooijmans, and Buergenthal) strongly support a reinterpretation of the restrictive reading of Article 51. Judge Simma in his separate opinion in the *Congo* case spoke to this problem:

[T]he Court could well have afforded to approach the question of the use of armed force on a large scale by non-state actors in a realistic vein, instead of avoiding it altogether by a sleight of hand . . . by the unnecessarily cautious way in which it handles this matter, as well as by dodging the issue of “aggression.” the Court creates the impression that it somehow feels uncomfortable being confronted with certain questions of utmost importance in contemporary international relations.¹³⁷

Regrettably, the court seems to avoid discussing issues essential to the international community as a whole. In the absence of persuasive and straightforward decisions, it is the Security Council, invoking semi-judicial functions, that deals with this issue. On the one hand, the Security Council may expedite the process and approach problems in a more flexible way; whereas, on the other hand, as Resolution 1373 highlighted, the council’s pronouncements on the linkage of the right of self-defense with terrorist acts may be somewhat ambivalent and confusing. The court also had a unique opportunity to comment on how the Security Council applies the charter law and possibly approve or disapprove such application. Although the Security Council resolution aimed at a very specific situation, its universal impact is undeniable.

Another option is the precision and elaboration—or maybe revival—of the principles of the “state of necessity” in those cases where there is no responsibility or complicity of the host state. Such a set of rules should not render the use of force impermissible to combat terrorism if other peaceful means prove inappropriate or ineffective. As Professor Henkin explained: “It remains necessary to continue to develop the law of permissible responses to terrorist activities. . . . [I]n my view, it is not part of the law of self-defense against armed attack contemplated by Article 51.”¹³⁸

137. *Congo*, 45 I.L.M. at 371 (separate opinion of Judge Simma).

138. Louis Henkin, *Notes From the President: The Missile Attack on Baghdad and Its Justifications*, AM. SOC’Y INT’L L. NEWSL., June-Aug. 1993, at 3.

There is no doubt that the Charter is a living document, which is open to interpretation. It is flexible enough to incorporate and meet the challenges posed by today's world. It is doubtful that a revision of the Charter would be effective. The process of modifying the Charter is rather complicated and would not be flexible to adapt to modern challenges. Recently, customary law appears to prevail over the charter's text. State practice has in some aspects diverged significantly from the charter's textual meaning, particularly in terms of norms regulating the use of force. It is primarily the evolution of a new customary law that would carefully reflect all of the significant changes that have occurred over the last two decades.¹³⁹

139. Professor Rosalyn Higgins also refers to a very interesting point that should be highlighted. In her opinion, it was the United Nations and its organs and bodies that were afraid to give rise to the wider doctrine of self-defense, although they had the opportunity to do so. Rosalyn Higgins, *The Legal Limits to the Use of Force by Sovereign States: United Nations Practice*, BRIT. Y.B. INT'L L. 269, 302 (1961). Higgins stated in particular "there has merely been a reluctance on the part of the United Nations to encourage it [the extensive interpretation of Article 51], for fear that it may be too fraught with danger for the basic policy of peace and stability." *Id.* It is a valid point, but the opportunity of the Security Council due to the continuation of the Cold War was markedly limited. It must not be forgotten that this proposition was stated almost forty-five years ago. The end of bipolar conflict could have brought change in the decision-making patterns of the Security Council.