offenses connected with each of the acts listed in Articles 6, 7 and 8; and, third, use existing general law offenses to prosecute the perpetrators of genocide, crimes against humanity and war crimes, using offenses sufficiently serious to describe the crime perpetrated.[391] Moreover, comparative criminal law research might be necessary to buttress the adoption of any of the aforesaid methods, especially the last.[392]

2. Addressing Other Philippine Concerns

The singular focus of this thesis on criminalization of the core crimes leaves the other legal concerns raised in the October 5 Roundtable Discussion unresolved — i.e., enactment of laws placing the core crimes within the jurisdiction of Philippine courts, the impact of the Statute's provisions on irrelevance of official capacity and responsibility of military commanders and other superiors, and the obligation to cooperate in the arrest and surrender of persons and in evidence procurement and preservation. That they remain such does not in anyway denigrate their importance. In fact, each concern may reasonably merit separate treatment.

391. Adapted from MANUAL, *supra* note 195, at 89, 91-92 & 95.

392. *See* Bassiouni, *Functional Approach*, *supra* note 220, at 814-16.

Testing the Legality of the Attack on Afghanistan

*Michelle Ann U. Juan**

ABSTRACT

The United Nations (U.N.) was established primarily to ensure the maintenance of world peace and security and save future generations from the scourge of war. To this end, with respect to the entitlement of states to use force, the matter was meant to be resolved by the combined application of Articles 2(4) and 51 of the U.N. Charter. Consequently, the Charter effectively removes from the states the power to unilaterally determine if and when the use of force is justified, by limiting the right to use force in self-defense to instances when "an armed attack" occurs.

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So far, inspite of legal controversies among both states and scholars, the legal picture was sufficiently clear. In case of an armed attack by a state on another state, the victim could react in individual self-defense, subject to very stringent conditions.

As the last fifty years has shown, however, this doctrine of self-defense has been insufficient to address the problem of international terrorism. States, by and large, have been powerless to defend themselves against the clandestine attacks that characterize this global phenomenon. In their attempt to prevent and suppress this international crime, certain countries such as the United States (U.S.) have invoked self-defense to justify their use of armed force against another state. This recourse to self-defense was predicated on the principle that such states, by harboring terrorist organizations, in some way promoted or at least tolerated terrorism, and were therefore 'accomplices' responsible for indirect armed aggression. However, the international community has rejected this view, and armed reprisals in response to the small-scale use of force short of an 'armed attack' have been regarded as unlawful.

The events of 11 September seem to have dramatically altered this legal framework.

The U.S. has invoked the doctrine of self-defense to justify their armed incursion into the state of Afghanistan. In sharp contrast to the U.S. view, it is this author's position that such recourse to self-defense is unavailing. The right of self-defense, as articulated in the U.N. Charter, does not permit an armed response to an attack from a terrorist organization operating in another state, absent a showing of effective control exercised by the state. Furthermore, America's incursion into Afghanistan not only fails to meet the substantive requirements of self-defense, it also constitutes an impermissible act of intervention into the sovereignty of another state.

It is undeniable that international law is created not merely in scholarly writings, but also in the practice of states. However, the practice of America and its allies is not sufficient to discredit the doctrinal approaches to legal analysis. This work examines the legitimacy and implications of America's use of force to combat terrorism. It shall appraise the lawfulness of the U.S. strikes upon Afghanistan in the light of the law on the use of force, as well as presently accepted international responses to terrorism. Finally, since the U.N. Charter should be interpreted in light of contemporary problems and conditions, and could not have required states to be powerless in the face of grave threats to their security and integrity, this work proposes a possible framework for the use of force to combat terrorism

I. Introduction

A. America Under Attack[1]

On 11 September 2001, 8:45 a.m., a hijacked passenger jet, American Airlines Flight 11 out of Boston, Massachusetts, crashed into the north tower of the World Trade Center, tearing a gaping hole in the building and setting it afire. Eighteen minutes later, a second hijacked airliner, United Airlines Flight 175 from Boston, crashed and exploded into the south tower of the World Trade Center. Both buildings were engulfed in flames. At 9:43 a.m., American Airlines Flight 77 crashed into the Pentagon, sending up a huge plume of smoke. Then, at 10:10 a.m., United Airlines Flight 93, also hijacked, crashed in Somerset County, Pennsylvania. By 10:28 a.m., the World Trade Center's north tower collapsed from the top down as if it were being peeled apart, releasing a tremendous cloud of debris and smoke. The south tower soon followed. More than 6,000 people died.

President Bush, after declaring that the country had suffered an "apparent terrorist attack," vowed that "the United States [would] hunt down and punish those responsible for these cowardly acts." The president later stated that the U.S. government will make no distinction between the terrorists who committed the acts and those who harbor them.

The day after the attacks, in an unprecedented gesture of unanimity, members of the Security Council stood up in the chamber to vote for a resolution condemning the massacres "unequivocally" and "in the strongest terms." The full text of Resolution 1368 reads as follows:

> The Security Council,
>
> *Reaffirming* the principles and purposes of the Charter of the United Nations,
>
> *Determined* to combat by all means threats to international peace and security caused by terrorist acts,
>
> *Recognizing* the inherent right of individual or collective self-defense in accordance with the Charter,
>
> 1. *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington (D.C.) and Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security;
>
> 2. *Expresses* its deepest sympathy and condolences to the victims and their families and to the People and Government of the United States of America;

1. For a more extensive discussion of the events of September 11th, see September 11: Chronology of terror, *at* http://www.cnn.com/2001/US/09/11/chronology.attack/index.html (last visited 10 November 2001).

3. *Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;

4. *Calls also* on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 of 19 October 1999;

5. *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations;

6. *Decides* to remain seized of the matter.

Subsequently, on September 28, the U.N. Security Council adopted Resolution 1373[2] on steps to combat international terrorism. Resolution 1373 reaffirmed that terrorist acts constitute a threat to international peace and security, and likewise recognized the inherent right of individual or collective self-defense. Acting under Chapter VII of the U.N. Charter, the Security Council decided that all states shall prevent and suppress the financing of terrorist acts, criminalize the willful financing of such acts, freeze the financial assets or economic resources of persons and entities involved in the commission of such acts, and prohibit their nationals or any persons or entities within their territories from making financial assets or economic resources available for the benefit of persons involved in such acts. It also decided that all states shall refrain from supporting anyone involved in terrorist acts, take necessary steps to prevent such acts, deny safe haven to those involved in such acts, prevent those involved in such acts from using their territories for terrorist purposes, ensure that any person who participates in such acts be brought to justice, afford assistance in connection with criminal investigations or other criminal proceedings relating to the financing or support of terrorist acts, and prevent the movement of terrorists by effective border controls and other means.

In addition, when the U.N. General Assembly adopted the first resolution of its annual session, it strongly condemned "the heinous acts of terrorism which caused enormous loss of human life, destruction and damage." The Assembly echoed the Council's position that "those

2. *See* Annex A.

responsible for aiding supporting or harboring the perpetrators, organizers and sponsors of such acts will be held accountable."[3]

Addressing the Assembly session, the Secretary-General stressed that all nations of the world should be united solidarily with the victims of terrorism, as well as in their determination to take action, both against the terrorists themselves and against all those who give them any kind of shelter, assistance or encouragement.[4] Moreover, U.N. High Commissioner for Human Rights, Mary Robinson, declared that the terrorist attacks should be viewed as crimes against humanity, in order to place an immediate responsibility on all governments of the world to help to bring perpetrators to justice.[5]

B. *The U.S. Strikes Back*

In the following days, the U.S. announced that it possessed clear and compelling evidence pointing to the Al Qaeda, led by Saudi-born suspected terrorist Osama bin Laden, as the one responsible for planning and executing the terrorist attacks.[6] The U.S. demanded that Afghanistan, long suspected to have financed and supported bin Laden, surrender him and all the members of his terrorist network.[7] The U.S. also required the ruling Taliban[8] to close

3. *Press Statement On Terrorist Threats By Security Council President*, AFG/152, SC/7167, 8 October 2001, *at* http://www.un.org/News/Press/docs/2001/afg152.doc.htm (last visited on 10 November 2001).

4. *Id.*

5. *Terror attacks must be seen as crimes against humanity: Robinson, at* http://www.un.org/News/dh/20011018.htm#30 (last visited 10 November 2001).

6. *Bush announces opening of attacks, at* http://www.cnn.com/2001/US/10/07/ret.attack.bush/index/html (posted 7 October 2001) (last visited 10 November 2001).

7. *U.S. to U.N.: Reprisals against other countries possible, at* http://www.cnn.com/2001/US/10/08/ret.us.un/index/html (posted 8 October 2001) (last visited 10 November 2001).

8. The Taliban is a group of Islamic fundamentalists, mainly from Afghanistan's Pashtun ethnic group, that formed in the early 1990s after the Soviet withdrawal from the country. Taliban in English means "students of Islam," and its recruits came from the Koranic schools within Afghanistan and in the Afghan refugee camps across the border in Pakistan. The Taliban gained power over most of Afghanistan by 1997.

   Taliban leaders imposed a hard-line form of Islam on the country that forbids educating women and carries out public executions and amputations. While many ordinary Afghans disagree with the strict interpretation of Islam, others say they are willing to endure the Taliban's excesses in exchange for the relative order they brought to the chaotic country. *See Key Players, Powers in Afghanistan,*

all terrorist training camps, give the U.S. access to those camps, and release eight Western aid workers accused of trying to convert Muslims to Christianity.[9] An attempted offer by the Taliban to try bin Laden in Afghanistan under Islamic Law was rejected by the White House.[10]

On October 7, the U.S. and Great Britain,[11] supported by several other nations,[12] and the Northern Alliance,[13] began the "war on terrorism," with a campaign designed to "decapitate" the Taliban and Al Qaeda leadership of Afghanistan.[14] The attacks began with about 50 cruise missiles launched from U.S. ships and U.S. and British submarines. Twenty-five U.S. carrier-based aircraft and 15 land-based bombers also participated in the military campaign's first wave, targeting command and control, radar, and air-defense facilities as well as airports in Kabul, Kandahar, Jalalabad and Herat.

In the second week, almost all the strikes targeted sites in and around the capital, Kabul, and the Taliban stronghold of Kandahar. The Taliban began to report civilian casualties in both cities, few of which could be independently confirmed. On Friday, October 19, U.S. Special Operations troops conducted an overnight raid around Kandahar, targeting a complex used by Taliban ruler Mullah Mohammed Omar, and an airstrip outside the city.

A new, intensified wave of attacks opened the military campaign's third week. On Sunday, October 21, U.S. airstrikes were launched across Afghanistan — from Herat in the west, to Jalalabad in the east, to Kandahar in the south and to Konduz in the north. By week's end, the bombings' focus had shifted to the Shomali Plains, a no-man's-land between the Taliban and Northern Alliance troops north of Kabul. Airstrikes also fell on

at http://www.cnn.com/SPECIALS/2001/trade.center/afghan.section.html (last visited on 17 November 2001).

9. *U.S. rejects Taliban offer to try bin Laden, at* http://www.cnn.com/2001/US/10/07/ret.us.taliban/index.html (last visited 10 November 2001)

10. *Id.*

11. *World reaction at a glance, at* http://www.cnn.com/2001/WORLD/europe/10/07/ret.world.quotes/index.html. (posted October 7, 2001) (last visited 10 November 2001); *Retaliation: U.S., Britain open attack, at* http://www.cnn.com/2001/US/10/07/ret.retaliation.facts/index.html (posted October 7, 2001) (last visited 10 November 2001).

12. *Bush announces opening of attacks, supra* note 6.

13. The Northern Alliance on the other hand, is the military wing of Afghanistan's pre-Taliban government, which is still recognized by most countries and by the United Nations. *See Key Players, supra* note 8.

14. Kofi Anan, *Fighting Terrorism on a Global Front*, N. Y. TIMES, 21 September 2001, *at* http://un.org/news/dh/20011008.htm#40 (last visited on 9 November 2001).

Taliban forces near Mazar-e Sharif, a city in the north whose location, straddling supply routes to Kabul, makes it strategicallly important.

By the fourth week, for the first time, B-52 bombers began "carpet bombing" Taliban lines near Bagram air base north of Kabul. Tactical aircraft also dropped controversial "cluster bombs" on Taliban forces, which responded with shoulder-launched infrared missiles. The week ended with news that the U.S. was also using BLU-82s — highly explosive 15,000-pound bombs. Aided by U.S. airstrikes, Northern Alliance forces claimed gains near Mazar-e Sharif and hinted at an impending advance on Kabul.

The "war" against terror continues until the present day.

C. *U.S. Justification for the Attacks*

The U.S. State Department announced that the strikes against Afghanistan were undertaken pursuant to the U.S.'s "clear right to self defense," in conformity with Article 51 of the U.N. Charter, against all those who aided, abetted, or supported international terrorism.[15] President George W. Bush proclaimed that the action in Afghanistan was only 'phase one' of the allied military campaign,[16] and that attacks against other countries might be necessary in an international campaign against terrorism.[17] The U.N. Secretary General himself referred to actions the United States may take "in defense of its citizens."[18]

On 7 October 2001, the day of America's strike against Afghanistan, the Permanent Representatives from the U.S. and the United Kingdom sent letters to the President of the Security Council, pursuant to Article 51 of the U.N. Charter.[19] These communiques indicated that the military action against Afghanistan was taken in self-defense, directed at terrorists as well as those who harbored them. They stressed that every effort was being made to avoid civilian casualties, and that the action was in no way a strike against the people of Afghanistan, Islam or the Muslim world.[20]

It is against this factual background that this paper analyzes the legitimacy of the use of force in Afghanistan in light of the doctrines of the just war and self-defense.

15. *Press Statement On Terrorist Threats By Security Council President, supra* note 3.

16. *U.S. to U.N.: Reprisals against other countries possible, supra* note 7.

17. *Id.*

18. Anan, *supra* note 14.

19. *Press Statement On Terrorist Threats By Security Council President, supra* note 3.

20. *Id.*

II. TERRORISM

A. *Definition*

Due to its highly subjective and politicized nature,[21] a precise definition of international terrorism remains elusive.[22] Terrorism, as a phenomenon, is so diffuse that the international community has been at a loss as to defining it, much less developing coherent international legal standards in dealing with the phenomenon.[23]

Be that as it may, terrorism constitutes "the application of terror-violence against innocent individuals for the purpose of obtaining thereby some military, political or philosophical end from a 3rd party government or group."[24] It is an "ideologically motivated strategy of internationally proscribed violence designed to inspire terror within a particular segment of a given society, in order to achieve a power-outcome or to propagandize a claim or grievance, irrespective of whether its perpetrators are acting for and on behalf of themselves or on behalf of a state."[25] Its main instrument is violence used against different targets, but particularly against persons who are defenseless, and have no reason to suspect any use of force against them.[26]

Article 24 of the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind defines acts of international terrorism as "acts against another state directed at persons or property and of such nature as to create a state of terror in the minds of public figures, groups of persons, or the general public.[27] Such acts may take many different forms, including:

21. Bruce Palmer, *Codification of International Terrorism*, *in* INTERNATIONAL TERRORISM AND POLITICAL CRIMES 507 (M. Bassiouni ed. 1975).

22. Geoffrey Levitt, *Is Terrorism Worth Defining?*, 13 OHIO N. U. L. REV. 97 (1986).

23. JAMES DOUGHERTY & ROBERT PFALTZGRAFT, CONTENDING THEORIES IN INTERNATIONAL RELATIONS 311 (4TH ed. 1997).

24. The 3rd party government or group may be one's own government, one's own people, or another people which the perpetrators are attempting to intimidate, influence, overthrow or oppress. *See* CHRISTOPHER L. BLAKESLEY, TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY 35 (1991).

25. M.C. Bassiouni, *A Policy-Oriented Inquiry into Different Forms and Manifestations of International Terrorism*, *in* LEGAL REPSONSES TO INTERNATIONAL TERRORISM: UNITED STATES PROCEDURAL ASPECTS xv, xvi (1988) [hereinafter Bassiouni, *Policy*].

26. K. Skubizewsky, *Definition of Terrorism*, 19 INT'L. Y.B. HUM. RTS. 42 (1989).

27. ILC Draft Code of Crimes Against the Peace and Security of Mankind, U.N. Doc. A/46/10/238.

> bombings, kidnappings, assassinations, hijackings, violations of diplomatic immunity, the holding of hostages, and so on. It may reflect a variety of motivations - national liberation, irredentism, and succession ., ideological goals of the left and right...; Latin American drug cartels against rival parties, incumbent governments, police forces, MNC's capitalism and socialism; fundamentalist and/or revolutionary religious rage against implacable enemies...[28]

Given this wide range of subjects, it is not surprising, therefore, that theorists have had a difficult time in defining international terrorism with precision, suggesting effective strategies to control its spread, and assessing its impact on state behavior and the international system.

In sum, although no universally accepted definition exists, it is generally recognized that acts of international terrorism include the following elements: (1) the nature of the act is essentially criminal, and involves indiscriminate use of violence or the threat thereof; (2) the effect obtained through the commission of the act is that of creating a state of terror in the minds of the general public; (3) the targets are generally non-combatants, and (4) the act is politically motivated.[29]

B. *Terrorism Distinguished from Common Domestic Crime*

Customary international law, evidenced by, among others, the web of international treaties on such conduct as hijacking, hostage taking, human rights, the law of war in international and civil strife, and general principles that are derived from the domestic laws of virtually all nations, render certain conduct criminal. Some of this conduct may be called criminal terrorism, because, while the conduct may also constitute simple domestic crime, it may be differentiated based on its international impact and context.[30]

What differentiates criminal terrorism from common domestic crime is this:

> [the] conduct is perpetrated pursuant to some political, military, ideological or religious end by a government or group against innocent civilians in order to influence a third party, government or group. The end sought may include anarchy, nihilism, or rebellion against oppression, or an intent to oppress. It has an international impact, and has been condemned by

28. BLAKESLEY, *supra* note 24, at 310-11.

29. OMER YOUSIF ELAGAB, INTERNATIONAL LAW DOCUMENTS RELATING TO TERRORISM iii (1995).

30. *See* Blakesley, *The Modern Blood Feud: Thoughts on the Philosophy of Terrorism*, 32 THE CATHOLIC LAWYER 177 (1989); Christenson, *Jus Cogens, Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L. L. 585, 616-17 (1988); Blakesley, *Jurisdiction as Legal Protection Against Terrorism*, 19 CONN. L. REV. 895 (1987).

> international customary or positive law. Having political, military, religious or ideological motive and an intent to influence a 3rd party nation or group are not needed for rendering the conduct criminal, but such a motive is an element making it the international crime of terrorism. It is the international impact of this conduct that makes it an international crime triggering universal jurisdiction.[31]

If only to evince the lack of consensus, however, as to an acceptable definition of terrorism, the author concedes that the alleged standards of "international impact" and "context" remain less than precise.

C. *Terrorism Distinguished from Wartime Violence*[32]

On the basis of its intent, scope, and international impact, criminal terrorism is different from war or wartime violence.[33] The distinction exists because there is general acceptance that certain conduct, even within the context of war, and *a fortiori*, during times of relative peace, is neither justifiable nor acceptable. [34] International law does not justify nor accommodate unspeakable behavior, even during a fight for survival or for gaining or retaining power.[35] On one hand, killing enemy combatants during war is akin to killing an attacker for which there is justification, but even during war, one may not intentionally or wantonly kill noncombatants or even captive former combatants. If this is true during war, *a fortiori* should such norms hold during relative peacetime.[36]

31. *See* Blakesley, *Jurisdiction as Legal Protection against Terrorism*, *supra* note 30.

32. *See* discussion *infra*.

33. *See* Bassiouni, *Policy*, *supra* note 25, n. 7. *See also* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG (1947); Wright, *History of the U.N. War Crimes Commission*, *in* 3 A TREATISE ON INTERNATIONAL CRIMINAL LAW 559-635 (Bassiouni & Nanda eds. 1973); Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L. L. J. 207 (1979).

34. *See* Franz W. Paasche, *The Use of Force in Combating Terrorism*, 25 COLUMBIA J. TRANS. LAW 377, 382-83 (1987). *See also* BLAKESLEY, *supra* note 24.

35. For instance, in 634 A.D., Caliph Abu Bakr charged the Moslem Arab army invading Christian Syria: "Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman ..." This is no less true today. Killing of babies in arms or captives or other noncombatant types is not acceptable; it is a war crime, terrorism, or murder, depending on the context. Perpetrators or such murder are prosecutable and have been prosecuted.

36. BLAKESLEY, *supra* note 24.

D. *The Legal Characterization of Terrorism*

Intentional acts of violence and threats against innocent 3rd parties, in order to coerce governments into actions towards a demanded outcome,[37] are wrongful under international law regardless of the perpetrator, his motive or the cause for which he fights.[38] Necessarily, therefore, terrorist acts are illegitimate, regardless of the underlying ideological motivation.[39]

1. Hostis Humanis Generis[40] - In Comparison to Piracy

For centuries, customary international law considered the pirate an international outlaw. Piracy[41] was condemned by all civilized nations; the

37. J. Paust, *Correspondence: Some Thoughts on "Preliminary Thoughts" on Terrorism* 68 AM. J. INT'L. L. 5002 (1974); *See, e.g.*, VON GLAHN, LAW AMONG NATIONS 347 (1992); A. Sofaer, *Terrorism, The Lane, and the National Defense*, 126 MIL. L. REV. 89 (1989); Gilbert Geoff, *Transnational Fugitive Offenders in International Law Extradition & Other Mechanisms*, *in* INTERNATIONAL STUDIES IN HUMAN RIGHTS 252 (1998).

38. Cambridge, *Terrorism and Humanitarian Law*, 19 ISRAEL Y.B. HUM. RTS. 189 (1989).

39. The United Nations has been the scene of much debate over ideological justifications for terrorism. A recent General Assembly Resolution "unequivocally condemned as criminal all acts, methods and practices." Yet still reaffirmed each people's right to self-determination and the legitimacy of struggles against colonial and racist regimes. *See* G.A. Res. 61, 40 G.A.O.R. Supp. (No. 53) at 301, U.N. Doc. A/40/53 (1985), *reprinted in* 25 I.L.M. 239 (1986).

40. The Statute of the International Criminal Court, which is in the process of obtaining the necessary ratifications to enter into force, defines a crime against humanity as any of several listed acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." The acts include murder and "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

41. Piracy is defined in international law as

> Any illegal acts of violence, detention, or any act of depredation committed for private ends b the crew or the passengers of a private ship or a private aircraft, and directed:
>
> On the high seas, against another ship or aircraft, or against persons or property ob board such ship or aircraft;
>
> Against a ship, aircraft, persons, or property in a placeo utside the jurisdiction of any state;
>
> any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft

pirate received no protection from any government that recognized the law of nations.[42] Piracy was considered "an offense against the law of nations, an offense against the universal law of society, a pirate being deemed the enemy of the human race."[43] As an enemy of humanity, the pirate could either be tried by any state that captured him or extradited for prosecution elsewhere. Pursuant to this, all states had a right, if not an obligation, to combat this violation of the customary law of nations.[44]

Piracy was, and is, considered an affront to the laws of conduct between nations, and a serious threat to international order, for the violence of pirates affected every nation engaged in commerce. This customary law of piracy has proven effective in protecting nations from the scourge of pirates and privateers.[45] Today, this legal precedent of classifying the terrorist as an international outlaw and an enemy of humanity has been invoked to help create a framework for measures responding to terrorism.[46]

In 1985, the *Achille Lauro* incident raised questions about the applicability of the traditional law of piracy to terrorism. The seizure of the *Achille Lauro* and her crew and passengers by Palestinian extremists[47] was a classic piracy situation: a ship was seized on the high seas, and hostages taken for ransom. After U.S. warplanes forced down the Egyptian airliner transporting the *Achille Lauro* terrorists, the U.S. invoked the law of piracy, which mandates the seizure of pirates on the high seas or airways, as justification for the

any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

See UN Conference on the Law of the Sea, Geneva Convention on the High Seas (1958), art. 15, 450 UNTS 82 (1958).

42. *See, e.g.,* United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1920). *See generally* B. DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY (1980).

43. United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820).

44. *See* The Marianna Flora, 24 U.S. (11 Wheat.) 1 (1826); United States v. Bowers, 18 U.S. (5 Wheat.) 184, 192-196 (1820). For a modern codification of this principle, *see* Geneva Convention on the High Seas, April 29, 1958, art. 19, 13 U.S.T. 2312, 2317, T.I.A.S. No. 5200, at 6, 450 U.N.T.S. 82, 92 (granting every state the right, on the high seas or in any other place outside the jurisdiction of any state, to "seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board").

45. *See* F. Stark, The Abolition of Privateering and the Declaration of Paris (1897) (unpublished manuscript available in Columbia Law School Library); R. FRIEDLANDER, TERRORISM 11-12 (1982).

46. Soafer, *Terrorism and the Law*, 64 FOREIGN AFFAIRS 901, 905 (1986).

47. *See* Paasche, *supra* note 34, at 380-81.

action.[48] Such reference to the law of piracy was drawn from the precedent of "hot pursuit" of pirates in American history and on the traditional obligations of states to capture and prosecute pirates.[49]

Like the pirate, the terrorist lies outside the accepted norms of civilized conduct, and does not recognize any act within the law of nations. By using violence against innocents or non-war combatants to intimidate and coerce governments, the terrorist violates fundamental principles of international law. Terrorism, like piracy, undermines the legal rules that civilized peoples have developed to guide the conduct of nations. Thus, international terrorists are "*hostis humanis generis,*" or common enemies of humanity.[50] Notably, even the United Nations Secretary General has declared that "terrorism is an attack upon all humanity, and all humanity has a stake in defeating the forces behind it."[51]

2. Terrorism as an International Crime

As terrorism violates fundamental human rights[52] and the principles of the Charter,[53] extensive State practice and *opinio juris* demonstrate that terrorism is unlawful under customary law.[54] The international community, through the Security Council,[55] the General Assembly,[56] the U.N. itself,[57] and the International Law Commission,[58] have affirmed the illegality of terrorism.

48. *Id.* In this instance the piracy model may serve only by analogy.. Under the customary law of piracy and its twentieth century codification, only a pirate vessel may be seized. *See* Geneva Convention on the High Seas.

49. *See id.*

50. *See* JOHNSON, CAN MODERN WAR BE JUST? 60 (1984) ("Terrorism strikes at the defenseless, not at the combatant forces of a social unit, and is thus by nature a crime against humanity."). On 5 July 1979, Justice Meir Shamgar of the Supreme Court of Israel proposed a declaration classifying terrorism as a crime against humanity at the Jonathan Institute's Jerusalem Conference on International Terrorism. *See* INTERNATIONAL TERRORISM: CHALLENGE AND RESPONSE 273 (B. Netanyahu ed. 1981). *See also* INTERNATIONAL LAW ASSOCIATION PARIS CONFERENCE, FOURTH INTERIM REPORT OF THE COMMITTEE ON INTERNATIONAL TERRORISM 43 (1984) [hereinafter PARIS CONFERENCE], *reprinted in* 7 TERRORISM: ANN. INT'L. J. 129 (1985).

51. Anan, *supra* note 14.

52. Universal Declaration of Human Rights, arts. 3 & 5, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, 11 ILM 368 (1967).

53. U.N. CHARTER, Preamble and arts. 1(1), 1(3), 2(4).

54. Paust, *An Introduction to and Commentary on Terrorism and the Law*, 19 CONN. L. REV. 697, 698 (1987); Pollock, *Terrorism as a Tort in Violation of the Law of Nations,* 6 FORDHAM INT'L.L.J. 236, 27 (1982).

55. S.C. Res. 748, U.N. SCOR, 47TH Sess., U.N. Doc. S/23992 (1992).

Extensive state practice and *opinio juris* demonstrate that terrorism is a crime of serious international concern, [59] considered unlawful under both treaty[60] and customary international law.[61] The international impact of this conduct makes it an international crime triggering universal jurisdiction.[62] Consequently, all states have jurisdiction to capture and prosecute perpetrators of such crimes.[63]

Given the universal condemnation of terrorism, it is indisputably an international crime[64] that threatens the peace of nations. Expressly, terrorism, as a unilateral violent action against a state, is contrary to Article 2 (3) and (4) of the Charter of the United Nations.[65] Under certain circumstances, it may also fall under the definition of genocide, pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide.[66]

56. U.N. Doc. A/Res/40/61 (1985).

57. The Vienna Declaration, pt.1, ¶ 17, U.N. Doc. A/CONF. 157/24 (1993).

58. *Commentary on the Draft Code of Crimes Against the Peace and Security of Mankind: Report of the ILC to the General Assembly on the Work of its 40th Session,* [1988] 2 Y.B. ILC 55, at 59, U.N. Doc. A/CN.4/SER.A/1988/Add.1 (pt. 2).

59. MIRIAM DEFENSOR-SANTIAGO, POLITICAL OFFENCES IN INTERNATIONAL LAW 246 (1977).

60. *See, e.g.,* Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), 24 U.S.T. 564; Convention to Prevent and Punish Acts of Terrorism Taking the Forms of Crimes Against Persons and Related Extortion that are of International Significance (1971) 27 U.S.T. 3949; International Convention Against the Taking of Hostages, G.A Res. 146, U.N. GAOR, 34TH Sess., Supp. No. 39 (1979); European Convention on the Suppression of Terrorism, 15 ILM 1272 (1977).

61. Paust, *supra* note 54, at 698; Pollock, *Terrorism as a Tort in Violation of the Law of Nations,* 6 FORDHAM INTL'L L. J. 236, 27 (1982).

62. BLAKESLEY, *supra* note 24, at 40.

63. International Law Commission Draft Articles on State Responsibility, art. 19(2), U.N. Doc. A/CN.4/366/ADD.1; *See* RICHARD FALK, REVOLUTIONARIES & FUNCTIONARIES: THE DUAL FACE OF TERRORISM (1988).

64. *See* DIGEST OF OPS. OF JAG, ARMY 244 (1866); PAUST, BASSIOUNI, ET AL., INTERNATIONAL CRIMINAL LAW 244-48 (2000).

65. Art. 2 (3). All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Art. 2 (4). All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

66. Article II states that "in the present Convention, genocide means any of the following acts committed with intent to destroy:

3. Obligations on States

a. The Duty to Suppress the Crime of Terrorism

In recognizing peremptory norms prohibiting all acts of terrorism, and declaring terrorists international outlaws, all nations are obligated to suppress terrorist activity regardless of its cause.[67]

Acts of international terrorism are acts that, by their very nature, threaten the stability of other states or undermine the international order.[68] They have so evoked the execration of the entire international community[69] that, necessarily, all states are bound to cooperate in restoring international peace and security and ensure that terrorists are brought to justice.[70]

(a) killing members of the group

(b) causing serious bodily harm to the members of the group

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

Further, the Statute of the International Criminal Tribunal for the Former Yugoslavia defined genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."

67. *See* G.A. Res. 2625. *See also* Schachter, *The Extraterritorial Use of Force Against Terrorist Bases,* 11 HOUS. J. INT'L L.J. 309, 310 (1989) [hereinafter Schachter, *Terrorist Bases*]; Paust, *supra* note 37; Sofaer, *Terrorism, the Lane, and the National Defense,* 126 MIL. L. REV. 89 (1989); Geoff, *supra* note 37, at 252.

68. In re Meunier, 2 Q.B. 415 (1894); DEFENSOR-SANTIAGO, *supra* note 59, at 250.

69. *See* G.A. Res. 3034, U.N. GAOR, 27TH Sess., Supp. No. 30, at 1, U.N. Doc. A/RES/3034 (XXVII) (1973); G.A. Res. 31/102, U.N. GAOR, 31ST Sess., Agenda Item 113, at 1, U.N. Doc. A/RES/102 (1976); G.A. Res. 34/145, U.N. GAOR, 34TH Sess., Agenda Item 112, ¶ 3, at 2, U.N. Doc. A/RES/145 (1980); G.A. Res. 32/147, U.N. GAOR. 32ND Sess., Agenda Item 118, at 1, U.N. Doc. A/RES/147 (1978); G.A. Res. 36/109, U.N. GAOR, 36TH Sess., Agenda 114, pmbl., at 2, U.N. Doc. A/RES/36/109 (1981); *Prevention of Terrorism,* 1981 U.N.Y.B. 1221-1221; G.A. Res. 38/180, U.N. GAOR, 38TH Sess., U.N. Doc. A/RES/38/180 (1983); G.A. Res. 40/61, U.N. GAOR, 40TH Sess., Agenda Item 129, at 3, U.N. Doc. A/RES/40/61 (1985); G.A. Res. 42/159, U.N. GAOR, 42ND Sess., Agenda Item 126, at 1, U.N. Doc. A/RES/42/150 (1987); G.A. Res. 46/51, U.N. GAOR, 46TH Sess., Agenda Item 125, at 4, U.N. Doc. A/RES/46/51 (1991).

70. M. CHERIF BASSIOUNI & EDMUND M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE 21 (1995). *See* Statement of the Rules of International Law Applicable to International Terrorism, *in* INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-FIRST CONFERENCE 6-7 (1985); UN Resolution on Measures to Prevent International Terrorism, G.A. Res. 40/61, *reprinted in* 25 I.L.M. 239 (1986); Bradley Larscahan, *Legal Aspects to the Control of Transnational Terrorism: An Overview,* 13 OHIO N.U. L. REV. 117 (1986).

Likewise, numerous multilateral treaties[71] directed towards the suppression of terrorist acts[72] place a firm obligation on States to ensure that the perpetrators are brought to justice.[73] Therefore, customary law imposes a duty on states to take all necessary and effective measures to prevent and eliminate terrorism.[74]

b. The Duty to Refrain from Supporting the Crime of Terrorism

The general duty of non-intervention prohibits interference in the affairs of other states, including the indirect form of support for subversive, terrorist, or armed activities.[75] Furthermore, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, considered an authoritative interpretation of the United Nations Charter,[76] requires states not to assist or tolerate terrorist or armed activities directed towards the overthrow of the government of another state,[77] and to refrain from acquiescing in organized activities within its territory directed towards the commission of acts involving the threat or use of force against another state.[78] Any breach of this duty is a violation of international law.[79]

71. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 24 U.S.T. 564 (1971); Convention to Prevent and Punish Acts of Terrorism Taking the Forms of Crimes Against Persons and Related Extorsion that are of International Significance, 27 U.S.T. 3949 (1971); International Convention Against the Taking of Hostages, G.A Res. 146, U.N. GAOR, 34TH Sess., Supp. No. 39, UN Doc A/34/819 (1979); European Convention on the Suppression of Terrorism, 15 I.L.M. 1272 (1977).

72. *See* Schachter, *Terrorist Bases*, *supra* note 67, at 310.

73. N. Kittrie, *Patriots and Terrorists: Reconciling Human Rights with World Order*, 13 CASE W. RES. J. INT'L L. 299 (1981). *See* MYRES MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM PUBLIC WORLD ORDER 719 (1961).

74. *See* Human Rights and Terrorism, UNGAR 48/122, UNYB 962 (1993); Human Rights and Terrorism, 40/61. 40 UN GAOR Supp. (No. 53) at 301, UN Doc A/40/53 (1983).

75. Nicaragua, 1986 I.C.J 14, 108.

76. Damrosch, *Politics Across Borders: Non-intervention and Non-forcible Influence over Domestic Affairs*, 83 AM. J. INT'L. L. 1 (1989); SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 189 (1991) [hereinafter SCHACHTER, THEORY AND PRACTICE].

77. G.A. Res. 2625, Principle 3, ¶ 2.

78. G.A. Res. 2625, Principle 1, ¶ 9, *reaffirmed in* U.N. G.A. Res. No. 40/61; Draft Resolution on Measures to Prevent Terrorism, 6TH Committee (Legal) (42ND Session Agenda Item 126) U.N. Doc. A/C6/42/L24 (1987). *See also* the Organization of American States' Convention to Prevent and Punish Acts of Terrorism, AG/Doc 88 Rev. 1 Corr. 1, *reprinted in* 10 I.L.M. 255 (1971).

79. G.A. Res. 2625, Principle 3, ¶ 2.

This Declaration is, in the context of the duty of non-intervention, declaratory of binding customary law.[80] Thus, assistance to rebels[81] amounts to intervention violating customary international law.[82]

This obligation to refrain from supporting terrorism is plainly demonstrated in Security Council Resolutions No. 1267 (1999) and 1333 (2000). In said Resolutions, the Council demanded that the Taliban surrender Osama bin Laden to the appropriate authorities, and that they "cease the provision of sanctuary and training for international terrorists and their organizations and take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps..."[83]

4. State Responsibility for Acts of International Terrorism

The International Law Commission's Draft Articles on State Responsibility[84] provide a framework for attribution to a state of terrorist acts, that of the state giving instructions or directing or controlling persons or groups of persons.[85] The relevant Draft Articles provide:

> Article 6. *Attribution to the State of conduct in fact carried out on its instructions or under its direction or control.* The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.
>
> Article 11. *Conduct which is acknowledged and adopted by the State as its own.* Conduct which is not attributable to a State under Articles 4, 5, 6, 7, 8, or 10 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 in question as its own.

80. *See* Schachter, *United Nations Law*, 88 AM. J. INT'L. L. 1 at 3, 18 (1991); Schwebel, *Intervention and Self-Defense*, 136 RECUEIL DES COURS 411, 452 (1972); CASTAÑEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 165-96 (1969).

81. Nicaragua, 1986 I.C.J. 103, at 104.

82. *Id.* at 123-27.

83. Alain Pellet, *No, This is not War!*, *in* THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES, EJIL Discussion Forum, *at* http://www.ejil.org/forum_WTC/ny-pellet.html (last visited 17 November 2001).

84. I.L.C. Draft Articles on State Responsibility, 52ND Sess. A/CN.5/l.600 (21 August 2000) (provisionally adopted by the Drafting Committee on second reading). *See also* Gaja, *In What Sense was there an "Armed Attack"?* *in* THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES, EJIL Discussion Forum, *at* http://www.ejil.org/forum_WTC/ny-gaja.html.

85. Draft Articles on State Responsibility, art. 8.

As is well known, the ICJ adopted a restrictive view of state responsibility and attribution in *Nicaragua,* when it ruled that

> The Court has to determine whether the relationship of the *contras* to the United States Government was such that it would be right to equate the *contras,* for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. The Court considers that the evidence available to it is insufficient to demonstrate the total dependence of the *contras* on United States aid. A partial dependency, the exact extent of which the Court cannot establish, may be inferred from the fact that the leaders were selected by the United States, and from other factors such as the organisation, training and equipping of the force, planning of operations, the choosing of targets and the operational support provided. There is no clear evidence that the United States actually exercised such a degree of control as to justify treating the *contras* as acting on its behalf.
>
> Having reached the above conclusion, the Court takes the view that the *contras* remain responsible for their acts, in particular the alleged violations by them of *humanitarian law.* For the United States to be legally responsible, it would have to be proved that that State had effective control of the operations in the course of which the alleged violations were committed.[86]

To summarize, in order for the acts of terrorist groups to be attributable to a state, *i.e.,* state-sponsored terrorism, there must be a showing of the requisite control and dependence between a state and terrorist attacks, that would render a country directly liable for terrorist actions.[87] In reality, however, it is difficult to determine that the group responsible for the terrorist acts acted under the instructions, direction or control of a state.[88]

Even absent a showing of effective control, however, state responsibility for terrorist acts may still be engaged, although not directly for the terrorist acts themselves. Since international law proscribes intervention by one state in the sovereign affairs of another,[89] state support of terrorist activities constitutes a breach of this customary duty[90] of non-intervention.[91]

86. Nicaragua, 1986 ICJ at 62, ¶ 101 (emphasis supplied).

87. *See* Meron, *Classification of Armed Conflict in the former Yugoslavia: Nicaragua's Fallout,* 92 AM. J. INT'L. L. 236 (1998).

88. Gaja, *supra* note 84.

89. U.N. CHARTER, art. 2(7); Jackamo, *From the Cold War to the New Multilateral World Order: The Evolution of Covert Operations and the Customary Law of Non-Intervention,* 32 V. J. INT'L. L. 929 at 953 (1992); Nicaragua, 1986 I.C.J. 103, at 108.

90. *See* Schachter, *United Nations Law, supra* note 80, at 18 (1991); Schwebel, *supra* note 80, at 452; CASTAÑEDA, *supra* note 80, at 165-96.

91. Nicaragua, 1986 I.C.J.103, at 108; *see* 1965 Declaration on Non-Intervention, ¶ 1,G.A. Res 2131; G.A. Res. 2625, Principle 3, ¶ 1.

The principle of preventive action, moreover, based on the principles of foreseeability and due diligence in the exercise of a state's control over its territory, obliges states to prevent foreseeable harm from emanating from within its controlled territory.[92] This principle "is now part of the corpus of international law."[93] Thus, in the *Trail Smelter Arbitration,* it was articulated that "a State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction."[94] Similarly, in the *Corfu Channel Case,*[95] it was maintained that incumbent on every state is the duty "not to allow knowingly its territory to be used for acts contrary to the rights of other states."[96]

A state is obligated to prevent those within its territory from committing injurious acts against other states. Prior knowledge, consent, aid,[97] encouragement[98] and acquiescence to forcible activities against other states,[99] are contrary to the duty not to knowingly allow one's territory to be used for acts contrary to the rights of other states.[100] Likewise, permitting terrorist organizations to operate within a state's territory, constitutes a failure to exercise the requisite diligence[101] to prevent one's own subjects, as well as persons within a state's territorial jurisdiction, from committing injurious acts against other states.[102] Furthermore, a state is liable for injurious acts of private persons committed within its territory, for failure to prevent or

92. Freestone, *International Fisheries Law Since Rio: The Continued Rise of the Precautionary Principle, in* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 139 (Boyle and Freestone eds. 1999).

93. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 ¶ 29 (8 July).

94. Trail Smelter Arbitration, 3 RIAA 1911 (1941).

95. 1949 I.C.J. 4.

96. *Id.* at 22.

97. *See* Corfu Channel, 1949 I.C.J.4; Nicaragua, 1986 I.C.J. 14, at 103.

98. *See* Yeager v. Iran 17 Iran-U.S. C.T.R. 92, at 104 (1987); HIGGINS, PROBLEMS AND PROCESS, INTERNATIONAL LAW AND HOW WE USE IT 154(1994).

99. *See* G.A. Res. 2625.

100. *See* Nicaragua, 1986 I.C.J. 14, at 103.

101. Blomeyer-Bartenstein, *Due Diligence, in* ENCYCLOPEDIA OF PUBLIC INT'L LAW 1110-15 (1992); Mazzeschi, *Due Diligence Rule and the Nature of the Int'l Responsibility of States,* 35 GERMAN Y.B. INT'L. L. 9 (1992); *see* Corfu Channel, 1949 I.C.J. 4.

102. *See* Island of Las Palmas (U.S. v. Neth.), 11 R.I.A.A. 829 (1928); Dupuy, *Due Diligence in the International Law of State Responsibility, in* LEGAL ASPECTS OF TRANSFRONTIER POLLUTION 369-79 (1977).

punish or punish those persons, acting within the State's sovereignty, who commit a hostile act against a foreign state.[103]

III. The Availability of Forcible Measures to Combat Terrorism

This section will first examine the nature and required elements of the international right to use force, including the laws of war, the concept of a "just" war, and the right of self-defense. It will then turn to the particular problems posed when self-defense is claimed against terrorist acts.

A. The Legal Regime Governing the Use of Force

1. The Laws of War[104]

As terrorist violence has escalated, the use of military force by victimized nations is, with increasing frequency, proposed as a necessary response to terrorism. However, in taking military action, a nation combating a terrorist threat does not formally engage in warfare, which contemplates armed conflict between state actors,[105] but uses force to enforce international legal norms and to restore and maintain international order.[106] The just war tradition has been proposed as guide for nations contemplating the use of force as a response to terrorism.

From the middle ages, the term "just war" has represented the legitimate, authorized use of force in response to aggression.[107] In classical international

103. *See* Gross, *The Legal Implications of Israel's 1982 Invasion into Lebanon*, 13 CAL. W. INT'L. L. J. 458 (1983).

104. At the outset, it must be stated that the term "laws of war" can have different meanings and refers to both the rules governing the right to resort to armed conflict (*jus ad bellum*) and rules governing the actual conduct of armed conflict (*jus in bello*). It is generally recognized that *jus in bello* is applicable in cases of armed conflict, whether or not the conflict is lawful under *jus ad bellum*.

105 Antonio Cassese, *Terrorism is also Disrupting Some Crucial Legal Categories of International Law*, in THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES, EJIL DISCUSSION FORUM, *at* http://www.ejil.org/forum WTC/ny-cassese.html (last visited November 2001).

106. Paasche, *supra* note 34, at 385.

107. *See* W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 254-255 (1964). *See also* 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 740 (1965). In 1967, the U.N. General Assembly adopted a special committee to study the question of defining aggression. In 1974, the General Assembly adopted a definition of aggression by a state. This definition states: "Aggression is the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state ..." G.A. Res. 3314, 29 UN GAOR Supp (No. 31) at 142; U.N. Doc. A/9890 (1975).

law, a just war is waged to restore the legal and moral order disrupted by aggression.[108] Political philosophers theorized that in certain circumstances the use of force was necessary to fulfill a duty to uphold the law of nations.[109] This principle is exemplified by the customary law governing piracy. As an offense against the law of nations, piracy created a right in nations to use force to capture pirates and punish them.

At the core of this notion of a just war is the distinction drawn between illegal aggression and the use of force necessary to repel aggression.[110] Its basic precept that aggression is a wrong that gives rise to the right to respond forcibly,[111] and the use of force to meet violent aggression may therefore be necessary to protect the rights of the victimized nation and to deter future aggressors.[112] An entity which commits aggression gives its victim a right to use force (creates a *jus ad bellum*), and thus exposes itself to the efforts of other states to defend their rights and maintain order.[113]

Following the just war tradition, terrorism, in any form, cannot represent the just use of force.[114] As non-defensive violent attacks usually made on civilians, terrorist acts are considered illegal acts of aggression which give rise to the right to take forcible defensive action.[115] Thus, it is possible to analogize from just war tradition: terrorist attacks create a *jus ad bellum*; a

108. The notion of a just war derives in part from the theory that the natural state of civilization is one of peaceful political and moral order. Aggression as a disruption of natural order is thus viewed in legal and moral terms. *See* JOHNSON, *supra* note 67, at 4.

109. Hugo Grotius' treatise, *De Jure Belli ac Pacis* (Of the Law of War and Peace), published in 1625, was the first systematic treatise of international law. Grotius' work is regarded as the foundation of the modern law of nations.

110. *See* 12 Dept. St. Bull. 228 (1945), where Justice Robert Jackson explained that "whatever grievances a nation may have, however objectionable it finds the status quo, aggressive warfare is an illegal means for settling those grievances or for altering those conditions." *See also* JOHNSON, *supra* note 50, at xxii. *But cf.* U.N. CHARTER art. 2(4) & art. 51; Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

111. R. TUCKER, THE JUST WAR 15 (1960).

112. M. WALZER, JUST AND UNJUST WARS 59 (1977). *See also* Nardin, *The Moral Basis of the Law of War*, 37 J. INT'L. AFF. 295, 301 (1984).

113. WALZER, *supra* note 112, at 63.

114. Paasche, *supra* note 34, at 387.

115. Schachter, *In Defense of International Rules on the Use of Force*, 53 CHI. L. REV. 113, 141 (1986). *See also* P. WILKINSON, TERRORISM AND THE LIBERAL STATE 53 (1986).

right to respond to aggression with force to restore and maintain peaceful order.[116]

Note, however, that with the advent of the U.N., the right of states to use force, even to restore the moral or legal order, is circumscribed by Articles 2(4) and 51 of the U.N. Charter. Therefore, the use of force may be considered "just" only if it is applied in a manner that is in "accordance with internationally recognized standards."[117]

2. Terrorists as Combatants

Considerable controversy surrounds the proposition that terrorism should be treated as warfare and terrorists as combatants.[118] The 1984 report of the International Law Association's Committee on International Terrorism advocates the development of humanitarian law applicable to terrorism along the lines of existing humanitarian law concerning armed conflict.[119] The Committee draws a parallel between crimes of war and acts of terrorism directed against civil populations,[120] thereby imposing on states an obligation to suppress terrorism that is as compelling as the obligation to cooperate in the suppression of war crimes.[121] The Committee's report points out the legal anomaly whereby combatants are forbidden to exceed the rules of war, while terrorists, who violate the same rules during peacetime, are under no such prohibition. "No reason is perceived why other equally well motivated groups or individuals should be legally insulated by the political ideals from the punishment to which officials or soldiers are subjected to for the same

116. WALZER, *supra* note 112, at 152 (All aggressive acts have one thing in common: they justify forceful resistance).

117. Nardin, *supra* note 112, at 301.

118. The term "combatant" is significant in international conventions defining the rules and limits of warfare. A combatant is defined as a member "of the armed forces of a Party to a conflict" possessing the "right to participate directly in hostilities." Combatants share the legal status of a party to a conflict and have recognized rights if captured during hostilities. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), *entered into force* December 7, 1978, arts. 43-44, U.N. Doc. A/321/144, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

119. PARIS CONFERENCE, *supra* note 50.

120. International conventions prohibit the use of force against civilians. Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 12 August 1949, 6 U.S.T. 3516, 3518-20, T.I.A.S. NO. 3356, at 5-6, 75 U.N.T.S. 287, 288-89 [hereinafter Convention on Protection of Civilian Persons], specifically prohibits parties to a conflict from incurring violence against civilians or the taking of hostages. *See also id.* art. 50.

121. PARIS CONFERENCE, *supra* note 50, at 3.

atrocities ..."[122] No person should be permitted to escape from trial or extradition on the ground of his political motivation who, if he performed the same acts as a soldier engaged in international conflict, would be subject to trial or extradition.[123]

The war crimes analogy has understandable appeal, for it is illogical for an act which would constitute a war crime during wartime to go unpunished during peacetime merely because of the political motivations of the perpetrator of the act.[124] On the basis of brutality toward civilians alone, terrorists are not easily distinguished from war criminals.[125]

Yet, comparing terrorist acts with war crimes inappropriately equate the terrorist and the combatant.[126] The conceptual distinctions between terrorists and combatants and their respective rights under international law are considerable. On one hand, a combatant acts during a period when a peaceful regime has been disrupted by aggression. Under these circumstances, the rules of warfare define the limits of acceptable action, and international conventions grant the combatant particular rights.[127] On the other hand, terrorism occurs during peacetime and disrupts a peaceful regime.[128]

The Committee's proposals, in effect, upgrade "politically motivated terrorist actors to the status of regular combatants in armed conflict."[129] To treat terrorism as warfare is to accept the terrorist on his own terms and to accord legitimacy to the terrorist and his claims.[130] On the contrary, the terrorist must be denied the legitimacy and privileges that a soldier has in wartime, otherwise, terrorist violence becomes an acceptable weapon in certain circumstances.[131] While terrorist attacks may resemble warfare or require a military response, to place the terrorist in the role of combatant is

122. *Id.* at 2.

123. *Id.*

124. Paasche, *supra* note 34, at 383.

125. *Id.*

126. *Id.* at 383-84.

127. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (describing the rights of combatants captured during wartime).

128. Paasche, *supra* note 34, at 383-84.

129. *See* PARIS CONFERENCE, *supra* note 50, at 40.

130. *Id.* at 43.

131. However, *cf.* Abraham Sofaer, Legal Adviser to the Secretary of State, who has cautioned Americans not to assume that international terrorism is considered unacceptable throughout the world. Rather, Sofaer maintains that "the acceptance of terror is ... widespread."

to enhance dangerously his legal and political status;[132] therefore no terrorist group or organization should be treated as an entity engaging in an authorized war.

3. Article 2(4) of the U.N. Charter

Two central features of the modern legal system are the normative attempt to control the use of force by states,[133] and the respect by independent states of each other's territorial sovereignty.[134] Consequently, article 2(4) of the United Nations Charter reads as follows:

> All members shall refrain in their international relations from the threat or use of force against the territorial or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.[135]

This rule is of universal validity. Article 2(4) of the UN Charter, prohibiting aggression and the illegal use of force, [136] is now regarded as a peremptory norm of customary international law,[137] and, as such, is binding upon all states in the world community.[138] There is widespread agreement that the international prohibition of aggression and the illegal use of force is binding on all States as a rule of *jus cogens*, [139] and an example of obligation *erga omnes*.[140]

132. Treating the terrorist as a combatant may accord the terrorist the legal rights embodied in the laws of war. The concomitant implication that the terrorist organization is equivalent to a nation at war dangerously adds legitimacy to the terrorist entity's claim that is has a right to exert coercive force.

133. MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 309 (7d. 1997).

134. *See* Nicaragua, 1986 I.C.J. 14, at 109-10.

135. This paragraph must be read in conjunction with Article 2(3) which provides for the obligation of peaceful settlement of international disputes

136. G.A. Res. 2625, Principle 3, ¶ 1. *See* Nicaragua,1986 I.C.J.103, ¶ 195-9, 211; BROWNLIE, USE OF FORCE, *supra* note 26, at 231-80.

137. *See* Corfu Channel, 1949 I.C.J. 4, at 350; LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 90 (1958).

138. *See* HENKIN, ET. AL., INTERNATIONAL LAW CASES AND MATERIALS 893 (3d. 1993) *See also* THIRD US RESTATEMENT OF FOREIGN RELATIONS LAW 27 (1987).

139. *See Nicaragua* (Merits), 1986 I.C.J. 14 (Singh, J., sep. op.); Christenson, *supra* note 28, at 93-101.

140. *See* RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES (1997). *See* Barcelona Traction (Belgium v. Spain) 1970 I.C.J. 3.

Article 2(4) was elaborated upon and confirmed in the Friendly Relations Declaration, adopted by consensus by the U.N. General Assembly, which states that:

> No state or group of states has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State, or against its political, economic and cultural elements, are in violation of international law.[141]

Although the Declaration is not in itself a binding legal document, it is important as an interpretation of the relevant Charter provisions.[142]

Notably, Article 2(4) covers threats of force as well as use of force.[143] This issue was addressed by the ICJ in its Advisory Opinion to the General Assembly in the *Legality of the Threat or Use of Nuclear Weapons*.[144] The Court stated that a "signaled intention to use force if certain events occur" could constitute a threat under Article 2(4) where the envisaged use of force would itself be unlawful. While the Court accepted that the mere possession of nuclear weapons did not, of itself, constitute a threat, the existence of a threat would depend upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a state or against the purposes of the UN.[145]

Article 2(4) of the Charter prohibits the use of force against the territorial integrity or political independence of any state, in any manner inconsistent with the purposes of the U.N. While there is some debate among publicists as to whether these words should be interpreted restrictively,[146] so as to permit force that would not contravene the clause, or broadly, as reinforcing the primary prohibition,[147] the weight of opinion supports the latter position, as the real concern of the Charter is not the

141. G.A. Res. 2625.

142. *See* G. ARANGIO-RUIZ, THE UN DECLARATION ON FRIENDLY RELATIONS AND THE SYSTEM OF SOURCES OF INTERNATIONAL LAW (1979); R. Rosenstock, *The Declaration on Principles of International Law Concerning Friendly Relations* 65 AM. J. INT'L. L. 713 (1971).

143. BROWNLIE, CASES AND MATERIALS IN INTERNATIONAL LAW 364 (1990), notes that a threat of force consists in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government. *See also* R. Sadurska, *Threats of Force*, 82 AM. J. INT'L. L. 239 (1988).

144. I.C.J. Reports 1996 ¶ 47-48

145. *See* RAGAZZI, *supra* note 140.

146. *See* BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 21 (1958).

147. *See* BROWNLIE, INTERNATIONAL LAW, *supra* note 143, at 268.

prohibition of the use of force *per se*, but rather, the allocation of power in respect of the threat or use of force as a political instrument.[148]

The view that Article 2(4) should be broadly interpreted likewise finds support in the ICJ's ruling in the *Corfu Channel* Case. [149] In that case, British warships were struck by mines while exercising a right of innocent passage through Albanian territorial waters. The United Kingdom sent additional warships to sweep the minefield, in accordance with their claimed right of intervention, to ensure that the mines were secured as evidence for judicial proceedings. The Court specifically declared that

> The alleged right to intervention [was] the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot ... find a place in international law.

Article 2(4) of the Charter does not preclude all kinds of resort to force indiscriminately, but rather, only those which are 'inconsistent with the purposes of the United Nations.'[150] As such, there exist certain circumstances when the use of force is justified.[151] One important recognized exception to Article 2(4) exists with regard to the right of self-defense.[152]

4. The Law on Self-Defense

a. The Content and Scope of the Right

Article 51 of the U.N. Charter provides that:

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

148. BROWNLIE, THE UNITED NATIONS CHARTER AND THE USE OF FORCE 1945-1985.

149. Corfu Channel, 1949 I.C.J. 4, 35. *See also* BROWNLIE, INTERNATIONAL LAW, *supra* note 143, at 283-9. LAUTERPACHT, *supra* note 137, at 90.

150. The preamble of the U.N. Charter says that "the Peoples of the United Nations [are] determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind"; and Article 2(3) obliges members to settle their international disputes in such a manner that *international peace and security*, and justice are not endangered.

151. BROWNLIE, USE OF FORCE, *supra* note 148, at 214-349.

152. *See* SHAW, INTERNATIONAL LAW 787 (4d 1997) at 865.

Article 51 refers to the inherent right to self-defense if an armed attack occurs. However, the content of this right, and the assessment of the various instances on which it has been invoked, are matters of considerable controversy.

On one hand, it has been argued that Article 51, in conjunction with Article 2(4), now specifies the scope and limitations of the doctrine of self-defense. This implies that the armed attack must have already occurred before force can be used in self-defense. In other words, self-defense can only be resorted to if an armed attack occurs, and under no other circumstances.[153] On the other hand, certain publicists maintain that the opening phrase in Article 51 specifying that 'nothing in the present charter shall impair the inherent right of ... self-defense' means that there does exist in customary international law a right of self-defense over and above the specific provisions of article 51, which refers only to the situation where an armed attack has already occurred.[154]

Thus, there is disagreement among publicists about whether the right of self-defense as defined by Article 51 is identical to the customary right, or whether the Charter modifies and supervenes that right.[155] However, the World Court in the *Nicaragua* Case has clearly established that the right of self-defense exists as an inherent right under customary international law as well as under the U.N. Charter.

In *Nicaragua v. United States*, the World Court considered the U.S.'s claim of self-defense in an action brought by Nicaragua in response to the U.S. support of the contra rebels.[156] The U.S. maintained that the customary right and the Charter right of self-defense were identical, but that even if they differed, the court should not base its ruling on customary law, since both parties in the action were parties to the Charter.[157] The Court disagreed, and held that Article 51 clearly refers to a pre-existing, customary right of self-defense, as witnessed by the language prohibiting impairment of the "inherent right" of self defense. The Court noted that "it is hard to see how this can be other than of customary nature, even if its present content

153. *See* BROWNLIE, INTERNATIONAL LAW, *supra* note 143, at 112-143, 264; Jimenez de Arechaga, *International Law in the Past Third of the Century*, 159 HUM. RTS. 1, 87-98. *See also* H. KELSON, THE LAW OF THE UNITED NATIONS 914 (1950).

154. *See* BOWETT, *supra* note 146 at 185-86; J. STONE, AGGRESSION AND WORLD ORDER 43, 95-96; J. BRIERLY, THE LAW OF NATIONS 417-418 (6TH ed 1963); 1 D.P. O'CONNELL, INTERNATIONAL LAW 317 (2ND ed. 1970).

155. Report of the International Law Commission to the General Assembly, 35 U.N. GAOR Supp. (No 10) at 125-127, U.N. Doc. A/35/10 (1980), *reprinted in* 2 Y.B. Int'l L. Comm'n 58-59, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (part 2).

156. Nicaragua, 1986 I.C.J. 4.

157. *See id.* at 94-95.

has been confirmed and influenced by the Charter."[158] Moreover, the court held that the Charter does not supervene custom, but exists alongside the customary law, and the two sources were not absolutely identical, though the customary law had evolved under the Charter's guidance.[159] Without explaining its reasons, the Court decided the case based on customary law, and not on the charter, noting "the differences which may exist between [the Charter and custom] are not, in the Court's view, such as to cause a judgment confined to the field of customary international law to be ineffective or appropriate..."[160]

Most writers agree with the court's assertion that sovereign states maintain their pre-existing rights, because the U.N. Charter is not a source of rights, but is only a limitation on them.[161] Despite this view and the Charter's reference to an "inherent right,"[162] the customary law has evolved through the practice of states, as the *Nicaragua* court suggested, to conform to the right as defined by Article 51.[163] In consequence, therefore, under the current international law regime, while a state may, if subjected to an armed attack on its territory,[164] lawfully resort to the unilateral use of force, absent any such justification,[165] any act in retaliation is an unlawful act of aggression.[166]

b. The Requirements of Self-defense

Self-defense presupposes the existence of a wrongful act (involving, as a rule, the use of force) against which a state protects itself, alone or with the assistance of other states.[167] The classic formulation of the right to self-defense was established in *The Caroline Case* of 1837.[168]

158. *Id.* at 94.

159. *Id.* at 94-95.

160. *Id.* at 97.

161. *See* BOWETT, *supra* note 146, at 185.

162. *Id.* at 187.

163. Maureen Brennan, *Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law*, 59 LOUISIANA L. REV. 1200 (1999).

164. Nicaragua, 1986 I.C.J. 14, ¶. 195-9, 211. *See* BROWNLIE, USE OF FORCE, *supra* note 148, at 231-80; DINSTEIN, *infra* note 173, at 181-83.

165. *See* I.L.C. Draft Articles on State Responsibility, Chapter V, arts. 29-35.

166. U.N. General Assembly on the Definition of Aggression, Preamble, GA Res. 3314 (XXIX), 1974, GAOR 29TH Sess., Supp. No. 31, at 142-4; *1974 UN Definition of Aggression, in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 413-14 (Cassese ed., 1986).

167. Nicaragua, 1986 I.C.J. 14, at ¶ 195-9, 211; BOWETT, *supra* note 146; BROWNLIE, USE OF FORCE, *supra* note 148, at 231-180; DINSTEIN, *supra* note 173. The Customary requirements of necessity and proportionality, to which is self-defense is subject, are examined in Shachter, *UN in the Gulf Conflict*, 85 AM. J. INT'L. L. 460-61 (1991).

A rebel group fighting against British rule in Canada recruited sympathetic American supporters along the U.S.-Canadian border. Although British officials had warned that anyone raiding the rebellion was subject to arrest, the U.S. steamer Caroline was used to transport men and supplies from the U.S. to the rebels on Navy Island in Canada. As a consequence, British forces entered American territory, set the Caroline on fire, and sent her plunging over Niagara Falls.[169]

When the U.S. government protested the action, the British claimed self-defense. In response, U.S. Secretary of State Daniel Webster sent a diplomatic communique to the British arguing that a claim of self-defense requires "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation." Not only were such conditions necessary before self-defense became legitimate, the action taken in pursuance of it should neither be unreasonable or excessive, since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it. These principles have since been accepted as a part of customary international law.[170]

i. The right to self-defense exists only in response to an armed attack.

The notion of an armed attack has a narrower meaning than the phrase 'use or threat of force' within the meaning of Article 2(4).[171] Whereas an 'armed attack' always presupposes a violation of Article 2(4), not all such violations constitute an armed attack.[172] The latter only exists when force is used by a state on a relatively large scale and with substantial effect.[173] Actual military force against the territory of the attacked state is necessary to trigger the Article 51 right.[174] As the World Court found in the *Nicaragua* case:

168. 29 BFSP p 1137 and 30 BFSP, p 195. *See also* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L. L. 82 (1938)

169. *See* BOWETT, *supra* note 146, at 58.

170. SHAW, *supra* note 152, at 787.

171. *See* HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 200-01 (1963).

172. *See* Corfu Channel, 1949 I.C.J. 4; *See also* Nicaragua, 1986 I.C.J. 4, at 103.

173. THE UNITED NATIONS CHARTER: A COMMENTARY 51 (Brunno Simma ed., 1994); *See also* A. Randelzhofer, *Use of Force*, 4 EPIL 271 (1982); *See also* Nicaragua, 1986 I.C.J. 103, at ¶195, DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE, 181-83 (2D. 1994).

174. L. Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, ASIL Proceedings 147, 166 (1963); *See also* P. JESSUP, MODERN LAW OF

> There now appears to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out armed force against another state of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces, or its substantial involvement therein... The Court sees no reason to deny, that in customary law, the prohibition of armed attacks may apply to the sending by a state of armed bands to the territory of another state, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale, but also assistance to rebels in the form of the provision of weapons or other logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.[175]

Other actions falling short of such definition is not an armed attack that would enable a state to act in self-defense.[176] The World Court has, for instance, confirmed the exclusion of frontier incidents in the concept of armed attack.[177] Other types of use of force may well be characterized as a use of force contrary to Article 2(4), but hardly as an 'armed attack.'[178] Therefore, any state affected by another state's unlawful use of force not reaching the threshold of an armed attack is bound, if not exactly to endure the violation, then at least to respond only by means falling short of the use or threat of force.[179]

ii. Self-Defense must comply with the requirements of necessity, immediacy, and proportionality.

Necessity, reasonability and proportionality are at the heart of self-defense,[180] accepted as part of customary international law.[181]

NATIONS 164-7 (1948); *See also* Nicaragua, 1986 I.C.J. 103, at ¶¶ 193-5 & 210-211; *See also* Definition of Aggression GA Res 3314 (XXIX).

175. Nicaragua, 1986 I.C.J. 103-04.

176. *See* Nicaragua, 1986 I.C.J. 103.

177. *Id.* at ¶ 195.

178. THE UNITED NATIONS CHARTER, *supra* note 173, at 669.

179. *Id.* at 663-64.

180. *See* Jennings, *supra* note 168, at 82; *See also* SHAW, *supra* n. 152; O. Schachter, *The Lawful Resort to Unilateral Use of Force*, 10 YALE J. INT'L. L. 292 (1985) [hereinafter Schachter, *Unilateral Force*]; Schachter, *UN in the Gulf Conflict*, 85

The requirement of necessity provides that the use of force must be the only available means of self-defense and that no other peaceful means of redress would be effective.[182] The means employed must be strictly necessary for repelling the attack,[183] and must not entail retaliatory or punitive actions.[184] There must be no other choice of lawful means to secure the desired objective of averting the imminent danger.[185] Consequently, acts committed in excess of what is necessary to avert the danger are unlawful.[186]

The second and third conditions precedent to self-defense, that of proportionality and immediacy, require that the response in self-defense be in proportion to the armed attack, [187] and must be timed either to respond to an attack immediately, or within a reasonable period of time.[188] The means employed must be restricted to the removal of the danger, and cease as soon as the danger no longer exists.[189]

The response must be made close in time to the attack or imminent threat. Without this limitation, self-defense would sanction armed attacks for countless prior acts of aggression and stretch the notion of self-defense far beyond its essential sense of a response to an attack of immediate threat of attack. [190] Thus, a victim of aggression, no longer faced with the emergency of an armed attack, is constrained to refrain from the use of forcible measures.[191] If an armed attack has already occurred, the state acting in self-

AM. J. INT'L. L. 460-61 (1991); Schachter, *The Right of States to Use Armed Force*, 82 MICH L. REV. 1620-46 (1984) [hereinafter Schachter, *Armed Force*].

181. SHAW, *supra* note 152, at 787.

182. SCHACHTER, THEORY AND PRACTICE, *supra* note 76, at 152.

183. THE UNITED NATIONS CHARTER, *supra* note 173, at 677. *See also* J. Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self Defense*, 81 AM. J. INT'L. L. 135, 136 (1987); *See also* HIGGINS, *supra* note 98, at 230-34.

184. AKEHURST, *supra* note 133, at 224; *See also* BROWNLIE, USE OF FORCE, *supra* note 148, at 261-64; Schachter, *Armed Force*, *supra* note 32, at 1637; THE UNITED NATIONS CHARTER, *supra* note 173, at 464.

185. B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL TRIBUNALS 95 (1994).

186. *Id.* at 95. *See also* Schachter, *Unilateral Force*, *supra* note 180.

187. Schachter, *Armed Force*, *supra* note 180, at 1620-46.

188. Brennan, *supra* note 163, at 1202.

189. Baker, *Terrorism and the Inherent Right of Self Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 Hous. J. Int'l. L. 25, 47 (1987).

190. Schachter, *Armed Force*, *supra* note 180.

191. Brennan, *supra* note 163.

defense has a heavy burden of establishing necessity and defeating a strong suggestion that its act amounts to retaliation for an attack that has ended.[192]

State practice, by and large, conforms to this principle of restraint in defense. In fact, Security Council decisions have condemned defensive actions that were greatly in excess of the provocation as illegal reprisals, rather than legitimate self-defense.[193]

c. Reprisals

It is one of the well-known weaknesses of responses to terrorism based on self-defense that these actions may easily turn into illegal reprisals. Reprisals are acts which are in themselves illegal and have been adopted by one state in retaliation for the commission of a prior illegal act by another state.[194] Under modern international law, while reprisals short of force may still be undertaken legitimately, [195] reprisals involving armed force are lawful only if resorted to in conformity to the right of self-defense.[196] The conditions of necessity, proportionality, and immediacy prevent states from acting in retaliation or reprisal, which is considered a violation of international law.[197]

The American position on reprisals in relation to terrorist attacks was set out in a statement released in 1979 by the Office of the Legal Adviser of the Department of State, which stated:

> Initially, the United States joined in the adoption of Security Council resolutions which isolated and condemned as illegal Israeli armed reprisals regardless of the provocations involved.... While the United States has modified its initial position of willingness to isolate armed reprisals and condemn them as illegal by insisting on a balanced condemnation of both the provocative acts, especially acts of terrorism, and the armed reprisals, the United States has not changed its position that reprisals involving the use of force are illegal...
>
> In conclusion, it is clear that the United States has taken the categorical position that reprisals involving the use of force are illegal under international law; that it is generally not willing to condemn reprisals without also condemning provocative terrorist acts; and that it recognizes

192. Jordan Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad,* 8 Whittier L. Rev. 711, 716-18, 722 (1986).

193. *See generally* M. Reisman, *The Raid on Baghdad: Some Reflections on its Lawfulness and Implications,* 5 EUROPEAN J. INT'L. L. 120-33 (1994).

194. DINSTEIN, *supra* note 173, at 220.

195. *See* SHAW, *supra* note 32, at Chapter 14.

196. *Id. See also* The Legality of the Threat or Use of Nuclear Weapons, (1996 I.C.J.) para. 46.

197. I.L.C. Rep. at 54.

> the difficulty of distinguishing between proportionate self-defense and reprisals but maintains the distinction. Where the United States has itself possibly engaged in reprisal action involving the use of force, characterization of the action has been confused by equating it also with self-defense. These so-called reprisal incidents took place in the context of a war justified by the United States Government as collective self-defense, and on this basis, could be distinguished from the reprisal raids conducted by Israel. It is also clear that the United States has determined that patterns of attacks can constitute a level of 'armed attack' justifying the use of force in self-defense.[198]

The U.S., in many cases, has initiated unilateral coercive action in circumstances in which it alone decides that such action is lawful and appropriate, and has justified it as necessary to protect essential American interests. To illustrate, in a speech on 5 January 1993, former President Bush, speaking at West Point, said

> Military force is never a tool to be used lightly, or universally. In some circumstances it may be essential. In others, counterproductive. I know that many people would like to find some formula, some easy formula to apply, to tell us with precision when and where to intervene with force.
>
> ...
>
> But to warn against a futile quest for a set of hard and fast rules to govern the use of military force is not to say there cannot be some principles to inform our decisions. Such guidelines can prove useful in sizing and indeed shaping our forces, and in helping us to think our way through this key question.
>
> Using military force makes sense as a policy where the stakes warrant, where and when force can be effective, where no other policies are likely to prove effective, where its application can be limited in scope and time, and where the potential benefits justify the potential costs and sacrifice.
>
> Once we are satisfied that force makes sense, we must act with the maximum possible support. The United States can and should lead, but we will want to act in concert, where possible, involving the United Nations or other multinational grouping.[199]

In his Inaugural Address shortly thereafter, Bush's successor, President Clinton, said

> When our vital interests are challenged, or the will and conscience of the international community defied, we will act - with peaceful diplomacy when possible, with force when necessary. The brave Americans serving

198. NASH, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1749-52 (1983).

199. *Bush's Talk to Cadets: When Force Makes Sense*, NEW YORK TIMES 6 January 1993, at A6.

> our nation in the Persian Gulf, in Somalia, and wherever else they stand are testament to our resolve.[200]

History is replete with cases of unilateral forcible measures effected by countries, including the U.S., against terrorist actions, in circumstances in which it alone decides that such action is lawful and appropriate.[201] Thus, Israeli's invasion of Southern Lebanon in 1982,[202] American air strikes against Libya in 1986,[203] U.S. destruction of Iranian offshore platforms in 1987,[204] and the attacks by U.S. warships on Iraqi intelligence headquarters in Baghdad in 1993,[205] all indicate a state's use (or misuse) of the doctrine of self-defense against terrorist activity. All of these actions were characterized as acts of self-defense, on the basis that the patterns of attacks upon the state concerned constituted a level of armed attack justifying the use of force in self-defense.[206] By and large, however, these measures were declared to be unlawful.[207]

d. Defensive Retaliation

It has been suggested that reprisals in the nature of defensive retaliation, the prime motive of which is preventive, are legitimate.[208] Thus, it has been proposed that "[a]rmed reprisals do not qualify as legitimate self-defense if they are impelled by purely punitive, non-defensive motives ... [A]rmed reprisals must be future oriented, and not limited to a desire to punish past transgressions.[209] Legitimate self-defense operates to protect essential rights from irreparable harm in circumstances in which alternative means of protection are unavailable; its function is not to take on a remedial or repressive character in order to enforce legal rights.[210]

200. Advance Text of President Bill Clinton's Inaugural Address, Prepared for Delivery at 12:05 pm, US Capital, Washington, D.C., Wednesday, 20 January 1993, *quoted in* Reisman, *supra* note 193.

201. Reisman, *supra* note 193.

202. Gross, *supra* note 103.

203. *See Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT'L. L. 632-36 (1986).

204. Reisman, *supra* note 193.

205. *Id.*

206. *See* Paasche, *supra* note 34, at 378.

207. *See* Reisman, *supra* note 193.

208. DINSTEIN, *supra* note 31, at 173.

209. *Id.* at 208.

210. BOWETT, *supra* note 146, at 11.

It has likewise been suggested that when a pattern of terrorist attacks may be traced to a specific source, this constitutes a quantifiable current and future threat. Thus, it is not unreasonable as a rule, to allow a state to retaliate beyond the immediate area of the attack, when that state has sufficient reason to expect a continuation of attacks from the same source.[211] Necessarily therefore, a nation faced with an ongoing series of attacks may treat the danger of further aggression as an imminent threat that justifies the use of force as a proper measure of self-defense.[212]

Ultimately, however, Article 51 must be interpreted narrowly[213] as prohibiting anticipatory self-defense,[214] or a right of armed reprisal.[215] When an armed attack has already ended, states have to produce evidence that additional attacks are so imminent that there is no moment for deliberation and no other means to prevent them,[216] and that the force used in self-defense is directly related to effectively and immediately eliminating the threat. The mere assertions of the defending state that future attacks will occur are not sufficient, and such assertions may amount to superficial attempts to portray the state's conduct to the international community as conforming with international custom.[217]

IV. THE STRIKES ON AFGHANISTAN VIOLATED INTERNATIONAL LAW

A. Self-Defense was not Engaged

1. There was no armed attack.

a. Ambiguous wording by the Security Council

At the outset, it should be noted that the September 12 Resolution of the Security Council is ambiguous and contradictory.[218] One cannot fail to note that the Security Council is hesitant to formally state the existence of self-defense. In its preamble, it recognizes the right of individual and collective self-defense; however, in paragraph 1 it defines the terrorist attacks of 11

211. Schachter, *Armed Force*, *supra* note 180, 1638-39.

212. *Id.*

213. THE UNITED NATIONS CHARTER, *supra* note 183, at 676.

214. L. Henkin, *Force, Intervention, and Neutrality*, *supra* note 174, at 166; *See* P. JESSUP, *supra* note 174, at 164-67; *See also* M. AKEHURST, A MODERN LAW OF NATIONS 262 (6TH ed. 1987).

215. AKEHURST, *supra* note 133, at 316.

216. Brennan, *supra* note 163, at 1204.

217. *Id.*

218. Cassese, *supra* note 105.

September as a threat to international peace and security, not as an 'armed attack' so as to bring the attack under Article 51 of the U.N. Charter.

This difference in wording becomes particularly relevant if one compares the wording of Resolutions 1368 (2001) and 1373 (2001) with SC Resolution 660 (1999), in which the Council affirmed the "the inherent right of individual or collective self-defense, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter."

Furthermore, in paragraph 5 of Resolution 1368, and again in Resolution 1373, the Security Council expresses its 'readiness to take all necessary steps to respond to the terrorist attacks...in accordance with its responsibilities under the Charter of the United Nations.' In other words, it declares itself to be ready to authorize military and other action, if necessary. By this resolution, therefore, the Security Council wavers between its desire to respond to the terrorist attacks by collective action, and its recognition of the right to unilateral action by the United States. The quoted words are reminiscent of the Council's authorization to member states in Resolution 678 to "use all necessary means" to restore international peace and security after Iraq invaded Kuwait in 1990. But Resolution 1373 does not authorize states to take all necessary steps to implement it. Instead, it stands as a warning that the Council itself is ready to take further steps, which presumably could involve an authorization of some form of armed force that would not necessarily be limited to self-defense, to ensure that the measures taken in the resolution are adequately implemented.[219]

Notably, in its two Resolutions concerning the September 11 attacks, the Council mentions neither a specific state as to the holder of the right to self-defense, nor a concrete author of the attacks.[220] The Security Council likewise refrains from expressly attributing the September 11 attacks to the Taliban regime.[221]

219. *Id.*

220. As explicitly stated in the original French text of Article 51 of the Charter, armed attack is a sub-category of aggression; aggression clearly must emanate from a state. *See* Article I of the definition of aggression annexed to GA resolution 3314(XXIX).

221. This omission gains even more importance, if one takes a closer look at SC Resolutions 1267 (1999) and 1333 (2000) in which the Council made explicit statements with regard to the Taliban, condemning the continuing use of Afghan territory, especially areas controled by the Taliban "for the sheltering and training of terrorists and planning of terrorist acts," allowing Usama bin Laden to and others associated with him to "operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations."

b. Mere Support of Terrorist Activity does not constitute an armed attack

The breach of Afghan sovereignty is premised on the fact that Afghanistan breached its international duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another state, or acquiescing in organized activities within its territory directed towards the commission of such acts. Thus, the U.S. has equated aiding and abetting international terrorism as an 'armed attack' for the purpose of legitimizing the use of force in self-defense.[222]

Forcible action in self-defense is not available against another state, merely because there are terrorists operating in the latter state. Self-defense cannot be broadened so as to justify the use of force against terrorism which is not sponsored or attributable to a state, adjudged by the standards for state responsibility and imputability discussed earlier. Toleration of such an interpretation increases the potential for abuse of the right of self-defense and for the indiscriminate violation of state sovereignty.

First, it remains controversial whether the acts of hijacking and crashing airplanes into populated areas in New York and Washington constitute an "armed" attack on the scale contemplated by the U.N. Charter.[223] In creating the requirement of an armed attack, the drafters of Article 51 contemplated massive attacks between states.[224]

Second, even if one concedes that these acts are, because of their scale and effects, at the level of armed force, both the International Court of Justice and the International Law Commission have addressed the problem of insurgents or terrorists operating from a third country, and have concluded that the right of self-defense does not apply with full force in such cases.[225] Afghanistan is not the author of the attacks, absent a showing of effective control or ratification between the government and bin Laden.

In the *Nicaragua* case, the World Court did not view state assistance to armed bands as giving rise to the right to self-defense. The Court clearly found that mere "assistance to rebels in the form of the provision of weapons or other logistical or other support"[226] did not constitute an armed attack. The court envisioned only "an attack by the State against which self-defense rights are asserted."[227] Furthermore, in a 1980 report to the U.N. General

222. Cassese, *supra* note 105.

223. Gaja, *supra* note 84.

224. Baker, *supra* note 189, at 42.

225. Nicaragua, 1986 I.C.J. 4, at 103-04.

226. *Id.* The Court noted that the provision of weapons or other assistance would nonetheless be an impermissible "threat or use of force," but not necessarily give the right of self-defense.

227. SCHACHTER, THEORY AND PRACTICE, *supra* note 76, at 164.

Assembly, the International Law Commission opined that self-defense may only be invoked where the "danger [was] caused by the State acted against and [was] represented by that State's use of armed force."[228]

Third, while international law prohibits both the support and encouragement, or toleration and passive acquiescence of terrorists within a state's jurisdiction,[229] a breach of this duty does not amount to an armed attack in the scale contemplated by Article 51. Even if the Taliban approved or endorsed the actions of the terrorist organizations,[230] a point which remains inconclusive, although Afghanistan would bear international responsibility for condoning or ratifying the illegal acts,[231] this would still not amount to an armed attack. Consequently, the U.S. bears a very heavy burden in justifying the incursion into Afghanistan's territory in response.

Significantly, the U.N. Security Council has previously decided that mere support by states of terrorist activity is not punishable by military action in self-defense.[232] On October 1, 1985, Israeli planes bombed the headquarters of the Palestine Liberation Organization at Hammam-Plage, near Tunis, Tunisia. In explaining its action to the Security Council, Israel argued that the bombing was justified by Tunisia having knowingly harbored terrorists who had targeted Israel. The Security Council rejected this claim, and voted in Resolution 573 to condemn the Israeli action by a margin of 14-0, with the U.S. abstaining. The resolution condemned "vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct." It described the air raid as a "threat to peace and security in the Mediterranean region." The resolution further requested U.N.

228. Report of the International Law Commission to the General Assembly, 35 U.N. GAOR Supp. (No. 10) at 34, U.N. Doc. A/35/10 (1980), *reprinted in* 2 Y.B. Int'l. L. Comm. 58 (1980), U.N. Doc. A/CN.4/SER.A/1980/Add.1 (part 2) [hereinafter I.L.C. Rep.].

229. For instance, Article 2(6) of the Draft Code of Offenses against the Peace and Security of Mankind provides that states have a duty not to tolerate terrorist activities designed to carry out aggression in another state. *See* Report of the International Law Commission to the General Assembly, U.N. Doc A/1858, *reprinted in* (1951) 2 Y.B. Int'l. L. Comm'n 135, U.N. Doc. A/CN.4/SER.A/1951/Add.1. *See* SCHACHTER, THEORY AND PRACTICE, *supra* note 76, at 163.

230. Cassese, *supra* note 105.

231. *See* Tehran Hostages Case (U.S. v. Iran), (Merits) 1980 I.C.J. 3, 65.

232. *See* Gregory Fox, *Addendum to ASIL Insight on Terrorist Attacks*, *at* http://www.asil.org/insights/insigh77.htm (last visited 17 November 2001).

member-states "to take measures to dissuade Israel from resorting to such acts against the sovereignty and territorial integrity of all states."[233]

Fourth, if one equates the harboring of terrorists with an armed attack, how does one delimit the number of states against which armed force in self-defense may be legitimately employed? The entire network of terrorist cells making up the operation that allegedly masterminded and organized the 11 September incident cuts across as many as 60 countries.[234] Against whom does the U.S. have the right to self-defense against? Such a broad interpretation of state-sponsored armed attacks would open the door for abuse and the use of self-defense as a mere cover for aggression disguised as protection.

From the express wording of the resolution, and the lack of specific indictment by the Security Council, the activities of the Taliban have clearly not been estimated grave enough by the Council to establish a sufficient link to a state-sponsored armed attack.[235] On the contrary, it may be inferred from the Security Council resolutions that the sole act of harboring of terrorists, by itself, was not enough to hold the Taliban accountable for an armed attack. As a consequence, it cannot be maintained that SC Res. 1368 (2001) and 1373 (2001) are turning points in international legal practice, broadening the scope of Art. 51 of the Charter. Against this backdrop, it is, in particular, difficult to invoke SC Resolution 1273 (2001) in support of the view that even non-state sponsored terrorism may amount to an "armed attack," giving rise to the right of self-defense of the target state.[236]

2. Did not comply with the requirements of Self-Defense

Even if Afghanistan actively supported or acquiesced in the Al Qaeda's presence, the U.S. must meet the burdens of necessity, immediacy, and proportionality.[237] If the U.S. may use force against Afghanistan, it would

233. U.N. Doc. S/PV.2615, at 86-7 (Oct. 4, 1985).

234. Geir Ulfstein, *SC resolution 1368 and self-defence*, *in* THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES, EJIL DISCUSSION FORUM, *at* http://www.ejil.org/forum_WTC/ messages/5.html\ (last visited 10 November 2001).

235. Carsten Stahn, *Security Council Resolutions 1368 (2001) and 1373 (2001): What they say and what they do not say*, *at* THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES, EJIL DISCUSSION FORUM, *at* http://www.ejil.org/forum_WTC/messages/15.html (last visited 10 November 2001).

236. *Id.*

237. SCHACHTER, THEORY AND PRACTICE, *supra* note 76, at 721-22.

only be when future attacks are expected and if it has been demonstrated "beyond reasonable doubt" that no alternative means is availing.[238]

In the first place, the attack on Afghanistan, which began on October 7, 2001, was, arguably, not the only available means of self-defense. Certainly other peaceful means of redress could have been resorted to prior to the air strike. No attempt to negotiate with the Taliban was made. The means employed were not strictly necessary to **repel** the attack, nor to **defend** the integrity of the U.S., for the attack upon the World Trade Center had already ceased. In fact, the strike on Afghanistan appears to have been punitive in character, judging from the statements of U.S. officials to the effect that "the United States will hunt down and punish those responsible for these cowardly acts."

The U.S. has, in the past, received condemnation for their non-compliance with the requirement of necessity. For instance, in April 1986, the U.S. bombed Libya, in response to a Libyan terrorist attack against U.S. soldiers in West Berlin, but the U.S. did not attempt to justify the bombing as an armed reprisal. Instead, President Reagan declared that the bombing was justified under Article 51 of the U.N. Charter as a "preemptive action" against Libyan terrorist installations. The U.S. argued that it reacted in self-defense to a series of terrorist attacks, and to prevent future attacks, which the government argued presented an imminent threat. It also argued that its action met the Webster formulation because the threat left no moment for deliberation.[239] The Foreign Ministers of other non-aligned countries condemned the bombing as an unprovoked act of aggression. Moreover, many maintain that there was no immediate threat, but that if the U.S. had convincing evidence to suspect impending attacks, it should have taken "defensive action against the expected attacks rather than bombing the capital of the threatening country."[240] The U.N. General Assembly formally censured the U.S. by a vote of 79 to 28, with 33 abstentions.[241]

Seven years later, the U.S. against suffered criticism for failing to meet the necessity requirement before launching a missile strike against Baghdad, in response to a foiled Iraqi attempt to assassinate former President Bush.[242] There was no compliance with the requirement of necessity, for other means

238. *Id.* at 229.

239. *See* ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 184-85 (1996).

240. *Id.* at 185.

241. *Id.* at 186.

242. Reisman, *supra* note 193.

of defense were available, and no evidence of any future threat against Bush or American nationals existed.[243]

Second, the length of time which elapsed between the attack upon the World Trade Center and the Pentagon, and the air strikes against Afghanistan, militates against a finding of immediacy. It cannot reasonably be suggested that "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation" existed, such as to warrant the action taken against the Taliban, almost one month after the attack on the U.S.

It has been suggested that the "lull" of ten days between the Berlin nightclub bombing and the U.S. strike on Libya in 1986 violated the immediacy requirement because no "armed attack" was occurring by the time the U.S. took action. In addition, by attacking Libya, the U.S. did nothing to prevent the suspected future terrorist attack on a U.S. embassy.[244] Later, in 1993, many in the international community claimed that in launching missile strikes against Baghdad, the U.S. failed to meet the requirement of self-defense because the missile strikes occurred two months after the assassination attempt against President Bush, and the strikes against the Iraqi intelligence headquarters did nothing to alleviate any threat or stave off an armed attack.[245]

Third, any measure taken in self-defense must be neither unreasonable nor excessive. The terrorist attacks of September 11 pose the legal dilemma of how to respond proportionally when the initial attack was itself unreasonable, excessive, and against civilians. Nonetheless, the U.S. policy of holding entire nations accountable and unseating governments for the acts of a few is disproportionate and unlawful since collective punishment would, by definition, entail the unnecessary suffering of innocent populations.

When a nation calculates a military response, it must direct its attack solely towards active terrorists, terrorist bases, or training facilities.[246] To knowingly harm a civilian population or government, even one supporting terrorists, would be a violation of international law. Any use of military force must be limited to the purpose of such use, which is to destroy military objectives, such as infrastructure, training bases, and similar facilities used by the terrorists. Force may not be used to wipe out the Taliban, or destroy Afghan military installations and other military objectives that have nothing to do with the terrorist organizations.

243. *Id.*

244. Jordan Paust, *Responding Lawfully to International Terrorism, supra* note 192, at 730-31.

245. ALEXANDROV, *supra* note 239, at 186-87.

246. *Id.* at 387-88.

B. The Attacks Constitute an Unlawful Act of Intervention

Not only is the U.S. resort to self-defense unavailing, the attempt by the U.S. to topple the Taliban and bring the Al Qaeda leadership to justice, constitutes a violation of the fundamental legal principle of non-interference in domestic affairs of other states.

This principle of non-intervention is founded upon the security of State sovereignty, as established in the U.N. Charter.[247] The International Court of Justice has defined State sovereignty as "the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other states and also in its relations with other states."[248] The fundamental right of states that derives from sovereignty is freedom from interference in its domestic affairs by other states.[249]

The duty of non-interference in the domestic affairs of other states is reflected in customary international law, as evidenced by numerous treaties,[250] General Assembly Resolutions,[251] decisions by the International Court of Justice,[252] and the work of numerous distinguished publicists.[253] In particular, the U.N. Charter states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state..."

247. U.N. CHARTER, art. 2, ¶ 1

248. Corfu Channel, 1949 I.C.J. 4, 43.

249. U.N. CHARTER, art. 2, ¶ 1; *See also* Nicaragua, 1986 I.C.J. 4, at 111.

250. *See, e.g.*, Convention on the Rights and Duties of States (Montevideo Convention), Dec. 26, 1934, art. 8, 165 L.N.T.S. 19; Pact of the League of Arab States, Mar. 22, 1945, art. 8, 70 U.N.T.S. 237; Charter of the Organization of American States, Apr. 30, 1948, art. 18, 119 U.N.T.S. 3; Charter of the Organization of African Unity, May 26, 1963, art. III, 479 U.N.T.S. 39; Final Act of the Conference on Security and Cooperation in Europe (Helsinki Accords), Aug. 1, 1975, principle VI, 73 Dept. St. Bull. 323 (1975), *reprinted in* 14 I.L.M. (1975).

251. *See, e.g.,* Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131, U.N. GAOR, 20TH Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1966), *reprinted in* 5 I.L.M. 374 (1966); G.A. Rès. 2625; Resolutions on Non-Interference in the Internal Affairs of States, G.A. Res. 31/91, U.N. GAOR, 31ST Sess., Supp. No. 39, at 42, U.N. Doc. A/31/39 (1976); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103, U.N. GAOR, 36TH Sess., Supp. No. 51, at 78, U.N. Doc. A/36/51 (1981).

252. Corfu Channel, 1949 I.C.J. 4. Nicaragua, 1986 I.C.J. 14.

253. *See, e.g.*, HEDLEY BULL, INTERVENTION IN WORLD POLITICS 184-187 (1984); Lori Damrosch, *supra* note 93; NARDIN, LAW, MORALITY AND THE RELATIONS OF STATES 269-70 (1983); Schachter, *Armed Force*, *supra* note 180, 1644-45.

In *Nicaragua*, the Court declared that the principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference. A prohibited intervention is one bearing on matters in which each state is permitted, by the principle of State sovereignty, to decide freely.[254] Although the Court noted that there have been a number of instances of foreign intervention in one state for the benefit of forces opposed to the government of that state, the Court concluded that the there is no justification for the view that any general right of intervention in support of an opposition within another state exists in contemporary international law.[255]

Since in *Nicaragua,* it was established that the U.S. intended, by its support of the *contras,* to overthrow the present Government of Nicaragua, the Court declared that this was an impermissible form of intervention. It declared that if one state, with a view to the coercion of another State, supports and assists armed bands in that state whose purpose is to overthrow its government, that amounts to an intervention in its internal affairs, whatever the political objective of the state giving support.[256] Said ruling applies with full force in the case of U.S. intervention in Afghanistan, where the U.S. has entered into Afghan territory not merely in self-defense, but likewise to overthrow the Taliban.

V. ANALYSIS /CONCLUSION

From his first public appearance after the attacks against the U.S., George W. Bush has prepared global public opinion for a military response against the enemy who struck at America, using the charged slogan: '*We are at war.*'[257] As a means to gain a psychological advantage, and as part of American military strategy, this rhetoric is, perhaps, a legitimate political tool; but it is legally false, and potentially very dangerous.

This is not a war, which presupposes armed conflict between adversaries, at least identifiable, against whom the 'laws and customs of war' are opposable.[258] War presumes armed confrontation between two or more states;[259] it is subject to the rules regarding belligerence that fix conditions for

254. For instance, the choice of a political, economic, social and cultural system, and formulation of foreign policy. *See* Nicaragua, 1986 I.C.J. 14, ¶ 202-09.

255. *Id.* ¶ 239-45.

256. *Id.*

257. Pellet, *supra* note 83.

258. *Id.*

259. John Cerone, *Acts of War and State Responsibility in 'Muddy Waters': The Non-state Actor Dilemma, in* ASIL INSIGHTS-TERRORIST ATTACKS ON THE WORLD TRADE CENTER AND THE PENTAGON, *at* http://www.asil.org/insights/insigh77.htm (last visited 17 November 2001).

the opening of hostilities, the modalities of their suspension or their eventual cessation, among others.[260] Even if it results in protracted confrontation, terrorism is not, and cannot be considered as a legitimate means of waging war.[261] This is not a war, but it has led to and come to resemble one, by becoming, in part, an international armed conflict.[262]

To echo the words of Resolution 1368, the terrorist attacks of September 11 are neither armed aggression in the legal sense of the word, nor war crimes.[263] They are, as the Security Council has enunciated, a 'threat to international peace and security.' However, this caveat is not new, for the Council has long held this view.[264]

The Security Council goes so far as to relate the inherent right of individual or collective self-defense to the September 11 terrorist attacks. It must be recalled that Article 51 limits the exercise of self-defense only to cases where an *armed* attack occurs against a U.N. member,[265] and in compliance with the requirements of necessity, immediacy, and proportionality. To infer authorization for the exercise of the right, based on the language of the Resolutions of the Council suggests an inappropriately broad interpretation that ignores the letter of the Charter.[266] Unquestionably, the only notion of self-defense that the Security Council can be expected to espouse permits only armed reaction to armed aggression by another state, within the framework of Article 51. Regrettably, the right of self-defense, as expressed in the language of the Charter, does not contemplate an armed

260. Pierre-Marie Dupuy, *The Law after the Destruction of the Towers, in* THE ATTACK ON THE WORLD TRADE CENTER: LEGAL RESPONSES, EJIL Discussion Forum, *at* http://www.ejil.org/forum_WTC/ny-dupuy.html (last visited 17 November 2001).

261. *See* discussion, *supra*. *See also* Paust, *Addendum: War and Responses to Terrorism, in* ASIL INSIGHTS - TERRORIST ATTACKS ON THE WORLD TRADE CENTER AND THE PENTAGON, *at* http://www.asil.org/insights/insigh77.htm (last visited 17 November 2001)

262. Pierre-Marie Dupuy, *supra* note 260.

263. Pellet, *supra* note 83.

264. *See* Resolutions 731 and 748 (1992) SC Res. 1267 (1999); SC Res. 1214 (1998); SC Res. 1333 (2000); *see also* Resolutions 1054 and 1070 (1996).

265. Note, however, that this is not the first time that the Security Council has recognized the right to individual or collective self-defense at the same time as not expressly recognizing an aggression. Thus, following the invasion of Kuwait by Iraq, it recognized the existence of a breach of the peace (and not an aggression), but nevertheless recognized the right of Kuwait and 'states co-operating' with its government to exercise their right to self-defense against Iraq. But that situation was surely closer to aggression, in the classical, 'inter-state' sense of the word than in the case of the 'attack' against the Twin Towers.

266. Pellet, *supra* note 83.

response to aggression from a nebulous transnational movement.[267] It is equally true that the Charter does not authorize the use of force against a state which supports persons engaged in terrorism. To be sure, mere support falling short of direct control over the terrorists will not engage the responsibility of a state for the acts of terrorism.[268] It is, therefore, doubtful that such support by a state would qualify it as an aggressor. It stands to reason, thus, that a claim to self-defense would be unavailing.

Parenthetically, it is not the author's intention to sanction or condone any participation of Afghanistan in the September 11 attacks. Any complicity or participation by the state of Afghanistan in illegal acts must be dealt with in the proper forum, and not through the unilateral use of force. This is precisely the scenario which Article 2(4) sought to avoid.

Hence, although the breach of an international obligation to refrain from organizing, instigating, assisting or participating in terrorist acts constitutes a threat to international peace and security,[269] there is no support for the interpretation that such a breach can be equated to an "armed attack," in the sense of Article 51.[270] Neither can such a breach justify armed incursion into another state to overthrow its government. In any case, that would amount to an impermissible act of intervention.[271] The Security Council has long condemned Afghanistan for their alleged support for terrorist activity.[272] However, it has not, by any means, authorized or justified the use of force against Afghanistan.

Evidently, Afghanistan is not without responsibility under international law.

The U.N. General Assembly has unanimously declared a customary duty of states to refrain from organizing, instigating, assisting, participating, or

267. Stahn, *supra* note 235.

268. Nicaragua, 1986 I.C.J. 14.

269. *Id.*

270. Pellet, *supra* note 83.

271. Nicaragua, 1986 I.C.J. 14.

272. *See* SC Resolution 1267 (1999), wherein the Council noted that the failure of the Taliban authorities to respond to the demands in paragraph 113 of Resolution 1214 (1998), namely, to stop providing sanctuary and training for international terrorists and their organizations" and to "cooperate ...to bring indicted terrorists to justice", constitutes a threat to international peace and security. This determination was reiterated in SC Resolution 1333 (2000), following the indictment of Usama bin Laden and his associates by the United States of America for, *inter alia*, the 7 August 1998 bombings of the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania and for conspiring to kill American nationals outside the United States.

acquiescing in terrorist acts. [273] Subsequently, the General Assembly condemned all acts of international terrorism that endangered human lives or jeopardized fundamental freedoms.[274] After declaring these activities criminal, the U.N. called for the prevention of terrorism and provided specific measures to deal with the problem.[275] Within a matter of two decades, the General Assembly has redefined the obligation of states from merely not giving support, to a positive duty to suppress and extradite international terrorists. [276] Furthermore, Resolution 1373 identifies a wide range of responses for the prevention of terrorism: administrative, police, economic and financial.[277]

To date, the Security Council has not declared that the U.S. has the right to engage in self-defense, despite the U.S.' formal invocation of the right.[278] Neither has it affirmed the legality of forcible measures undertaken by the U.S. in Afghanistan. In fact, even as of November 12, 2001, the U.N.

273. *See* G.A. Res. 2625.

274. *See* G.A. Res. 34/145, U.N. GAOR, 34TH Sess., Agenda Item 112, ¶ 3, at 2, U.N. Doc. A/RES/145 (1980).

275. *See* G.A. Res. 3034, U.N. GAOR, 27TH Sess., Supp. No. 30, at 1, U.N. Doc. A/RES/3034 (XXVII) (1973); G.A. Res. 31/102, U.N. GAOR, 31ST Sess., Agenda Item 113, at 1, U.N. Doc. A/RES/102 (1976); G.A. Res. 34/145, U.N. GAOR, 34TH Sess., Agenda Item 112, ¶ 3, at 2, U.N. Doc. A/RES/145 (1980); G.A. Res. 32/147, U.N. GAOR. 32ND Sess., Agenda Item 118, at 1, U.N. Doc. A/RES/147 (1978); G.A. Res. 36/109, U.N. GAOR, 36TH Sess., Agenda 114, pmbl., at 2, U.N. Doc. A/RES/36/109 (1981); *Prevention of Terrorism,* 1981 U.N.Y.B. 1221-1221; G.A. Res. 38/180, U.N. GAOR, 38TH Sess., U.N. Doc. A/RES/38/180 (1983); G.A. Res. 40/61, U.N. GAOR, 40TH Sess., Agenda Item 129, at 3, U.N. Doc. A/RES/40/61 (1985); G.A. Res. 42/159, U.N. GAOR, 42ND Sess., Agenda Item 126, at 1, U.N. Doc. A/RES/42/150 (1987); G.A. Res. 46/51, U.N. GAOR, 46TH Sess., Agenda Item 125, at 4, U.N. Doc. A/RES/46/51 (1991).

276. Ross E. Schreiber, *Ascertaining Opinio Juris of States Concerning Norms Involving the Prevention of International Terrorism: A Focus on the U.N. Process,* 16 BOSTON UNI. INT'L. L. J. 309, 329-30 (1998).

277. Pierre-Marie Dupuy, *supra* note 260.

278. This is certainly not to suggest that Security Council approval is necessary before a state is able to invoke the right of self-defense. Precisely, Article 51 of the Charter refers to a state's "inherent right to self-defense, until the Security Council can take measures to maintain international peace and security." However, it seems unusual that the Council makes no mention of the U.S.'s claim to such a right, considering the actions of the U.S. of reporting the matter to the Council, in accordance with Article 51. In contrast with Security Council Resolution 660, where the Council affirmed "the inherent right of individual or collective self-defense, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter."

Security Council has neither authorized nor sanctioned the attacks upon Afghanistan. Their most recent action, Resolution No. 1377 (2001),[279] merely reiterated their condemnation of terrorist acts as criminal, regardless of motivation, form, and manifestations, and urged States to cooperate in the implementation of Resolution 1373 (2001) through technical, financial, regulatory, legislative or other assistance programmes. Notably, however, there was no reference to Chapter VII of the Charter, nor any reference to the right of any state to act in self-defense.[280]

The international community may certainly continue to treat unilateral, non-temporary and uncontrolled use of force as self-defense, but this has nothing to do with the right of self-defense in Article 51 of the U.N. Charter. The invocation of self-defense does not give the U.S. unbridled license to do as it pleases. Admittedly, Article 51 is often interpreted in a rather flexible way, to say the least, by those who claim its exercise.[281] Nevertheless, international commitment to the *rule of law* necessitates rejection of U.S.'s unilateral action in Afghanistan.

America's consistent reliance on armed retaliation is a deviation from standards established by both the U.N. Charter, and correlative customary international law. The U.S. unilateral action does not appear subject to any standards of legality, other than its own assessment of what constitutes an appropriate response to the injury it suffered. It would seem, at this point, that only the U.S. is in a position to determine when its objectives have been accomplished.

It is important to note that the U.S. disregard for the substantive requirements of self-defense do not restructure international legal norms, and are not constitutive of developments in the international legal system. The acquiescence or support of various countries around the world are not based on a reliable demonstration of *opinio juris,* sufficient to alter existing rules of conduct. By reason of U.S. ascendancy and influence, on the political, military, and economic planes, any resulting concurrence of allied states with respect to the "war against terror" is necessarily suspect. Mere declarations, and other forms of passive support for the U.S. action should be accepted with only the greatest skepticism, and not accorded any authoritative character reflective of their legal beliefs.

Of course, it is always possible to change the existing legal regime. In fact, customary law, by its nature, is revised by a general acquiescence in a

279. *Security Council Calls On All States To Intensify Efforts To Eliminate International Terrorism,* Security Council 4413TH Meeting (AM) SC/7207 12 November 2001, *at* http://www.un.org/News/Press/docs/2001/sc7207.doc.htm (last visited 17 November 2001).

280. Gaja, *supra* note 84.

281. Pierre-Marie Dupuy, *supra* note 260.

state's current behavior that violates some prior norm.[282] That acquiescence should, ideally, be based on an *opinio juris* that the proposed changes promise to better serve the common interest in a new context than would the norms they are supplanting.[283] However, the consequences of a change in the norm of self-defense are severe.

The U.S. is presently the only country capable of marshalling sufficient military might and international public opinion to generate support — if not acceptance — for the incursion into Afghanistan. However, this situation may not last; the balance of power may change. In which case, all major players in the international community with ample power would have pretext and precedent to invade a country and oust its leadership on the ground of self-defense, in order to punish a state for violating or threatening another's interests.

The "war against terror" has deteriorated into a blatant political struggle that has violated international borders and killed innocent civilians. Although one can certainly understand the U.S.'s reflex for vengeance, its absolute failure to comply with recognized legal standards renders its action unacceptable.[284] They may desire to respond to the abuse of their nationals, disrupt Afghanistan's ability to carry out terrorist acts, and deter future terrorist attacks from bin Laden. However, the former is the language of retaliation, the latter of reprisals; neither one is really the language of self-defense.[285]

The foregoing arguments notwithstanding, forcible responses to massive attacks within one's territory are not, in all cases, unlawful. However, given the present construction under the Charter, the American military response stands fairly distinct from the scope of self-defense.

Herein lies the problem. Should a state which has been subjected to a terrorist attack upon its territory stand idly by without any recourse under international law? How does a state prosecute and bring to justice persons guilty of the international crime of terrorism?

It is the hallmark of terrorism, that violence is not conducted in the state-to-state encounters or armies envisaged by Article 51, but by covert, violent, and frequently indiscriminate means. Quite obviously, the notion of self-defense has been insufficient to address the problem of terrorism. Considering that acts of terrorism are, by and large, undertaken clandestinely without giving the victim state an opportunity to respond within a

282. Reisman, *supra* note 193.

283. *Id.*

284. Pellet, *supra* note 83.

285. HIGGINS, *supra* note 171, at 245.

reasonable time, what action is a state permitted to undertake, apart from self-defense?

The U.N. Charter must be interpreted in the light of the exigencies of contemporary problems and modern international relations. Under international law, victims of terrorism should not be powerless to defend themselves.[286] As stated by Jean Kitzpatrick, former U.S. Ambassador to the U.N., "prohibitions against the use of force in the Charter are contextual, not absolute ... The Charter does not require that people submit supinely to terror, nor that their neighbors be indifferent to their terrorisation."[287]

On one hand, the use of force to combat terrorism may be authorized by the Security Council, pursuant to Chapter VII of the U.N. Charter.[288] It is worthy to note that the first purpose of the U.N. is unequivocal, *viz.*:

> To maintain international peace and security, and to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[289]

Consequently, Chapter VII of the Charter empowers the Security Council to determine the existence of any threat to the peace, breach of the peace or act of aggression (Article 39), make recommendations, or decide what measures shall be taken to maintain or restore international peace and security (Article 39), employ measures not involving the use of armed force to give effect to its decisions (Article 41), and, upon deciding that such measures ".... would be inadequate or have proved to be inadequate" to "... take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security" (Article 42). As such, the U.N. is uniquely positioned to respond to the international crisis that erupted on 11 September 2001. It may authorize member-states to use all necessary means

286. Soafer, *supra* note 46, at 916.

287. *Quoted in* V. Nanda, *The United States Armed Intervention in Grenada - Impact on World Order* 14 CAL. WEST. INT'L. L. J. 395, 418 (1984).

288. *See, e.g.*, Resolutions 770, 787, 816, 836, 908, 1031, 1088, 1174, 1244, 1247 (former Yugoslavia); Resolution 794 (Somalia); Resolution 875 (Haiti); Resolution 929 (Rwanda); Resolution 940 (Haiti); Resolution 1080 (Great Lakes region); Resolutions 1101 and 1114 (Albania); Resolutions 1125, 1136, 1152, 1155 and 1159 (Central African Republic); Resolution 1132 (Sierra Leone); Resolution 1216 (Guinea-Bissau); and Resolution 1264 (East Timor).

289. U.N. CHARTER, art. 1.

to uphold and implement the Security Council Resolutions, and to restore international peace and security.[290]

On the other hand, the current legal regime recognizes the crime of terrorism as a crime against humanity.[291] As such, all nations have the jurisdiction to prosecute the perpetrators of the attack, in the same manner as piracy.[292] States are mandated to work together to bring to justice the organizers and sponsors of terrorist attacks, and hold those supporting, harboring the perpetrators of terrorist attacks responsible.[293] There is, likewise, a corollary duty to restore international peace and security by bringing the terrorists to justice.[294]

Pursuant to the international criminal character of terrorist acts, any action taken against terrorists, even a limited armed response, should be consistent with a state's right to pursue the perpetrators of the terrorist act, to capture the international outlaws, and to suppress the international crime of terrorism.[295] Certainly, a peremptory norm against aggression and the illegal use of force exists, but what Article 2(4) prohibits is the use of force against the territorial integrity or political independence of a state, or in any manner

290. *See generally* Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security after the Cold War*, 32 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 201-288 (1994); Rossman, *Article 43: Arming the United Nations Security Council*, 27 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 227-263 (1994); L.M. GOODRICH, E. HAMBRO AND A.P. SIMONS, CHARTER OF THE UNITED NATIONS. COMMENTARY AND DOCUMENTS 314-317 (3d. 1969); H. KELSEN, THE LAW OF THE UNITED NATIONS 756 (1950); Freudenschuß, *Between Unilateralism and Collective Security*, 5 EUROPEAN JOURNAL OF INTERNATIONAL LAW 492 (1994); Franck, *The United Nations as Guarantor of International Peace and Security: Past, Present and Future, in* THE UNITED NATIONS AT AGE FIFTY - A LEGAL PERSPECTIVE 25-38 (C. Tomuschat, ed. 1995); B. CONFORTI, THE LAW AND PRACTICE OF THE UNITED NATIONS 203-04 (1996).

291. IKENNA EMEWU, *Terrorism as International Delict in* The Attack on the World Trade Center: Legal Responses, EJIL Discussion Forum, *at* http://www.ejil.org/forum_WTC/messages/2.html.

292. *Id.*

293. G.A. Res. 2625, Principle 1, ¶ 9, *reaffirmed in* U.N. G.A. Res. No. 40/61; Draft Resolution on Measures to Prevent Terrorism, 6TH Committee (Legal) (42ND Session Agenda Item 126) U.N. Doc. A/C6/42/L24 (1987). See also the Organization of American States' Convention to Prevent and Punish Acts of Terrorism, AG/Doc 88 Rev. 1 Corr. 1, *reprinted in* 10 I.L.M. 255 (1971).

294. Ross E. Schreiber, *Ascertaining Opinio Juris of States Concerning Norms Involving the Prevention of International Terrorism: A Focus on the U.N. Process*, 16 BOSTON UNI. INT'L. L. J. 309, 329-30 (1998).

295. *See* Theodor Meron, *Is International Law Moving Towards Criminalization?*, 9 EUR. J. INT'L L. 18 (1998).

inconsistent with the purposes of the U.N.[296] The proscription against the use of force was designed to prevent war, and not to prevent the use of legitimate armed measures to protect an overriding state interest.[297] Neither does it prohibit the use of force against armed bands or terrorists who threaten the integrity or security of a state.[298]

As such, there is support for the proposition that when military intervention is not an attack on the state as such, but an operation simply designed to bring international criminals to justice, there would be no use of force against the territorial integrity of the state, but a mere violation of sovereignty.[299] It would seem that hostile intent, coupled with military activity against the state (beyond the amount of force required for the operation) is what would distinguish a violation of sovereignty from an attack upon a state's integrity.[300] The unilateral use of force to combat terrorism may be justified as a measure of self-help, but not self-defense. Unlike the latter, the measures are directed against the international terrorists, and not against states guilty of harboring or acquiescing to terrorist activity. More importantly, such an armed response must proceed after the manner, means, and objective of the exercise have been identified and cautiously formulated. This deliberate response renders it discreet from the near spontaneous reaction that characterizes a perfect exercise of self-defense.

It stands to reason, therefore, that forcible action may be justified, as a species of self-help, to the extent necessary to detain and prosecute the perpetrators of the crime. In concrete terms, the U.S. has the right *and the duty* to suppress international terrorism and pursue and prosecute the *hostis humanis generis*, in order to bring the criminals in Afghanistan to justice. The valid exercise of such a right presumes that only the highest standard of care has been observed.

Prior to any entry into the another state's territory, every opportunity should be given to the state harboring the terrorists to surrender, extradite or prosecute the terrorist.[301] Any use of force should be limited to the intended purpose, that is, to bring the perpetrators to justice. The punitive use of force cannot be permitted. Lawfulness is assured by employment of the least amount of force or incursion into the sovereignty of another state.[302] The

296. The overriding purpose of the Charter is enunciated in Article 1. *See supra* note 289 and accompanying text.

297. *See* Paasche, *supra* note 34, at 394-401; SHAW, *supra* note 152, at 253-55.

298. Schachter, *Terrorist Bases, supra* note 67.

299. HIGGINS, *supra* note 171, at 245.

300. *Id.* at 245-46

301. Lockerbie Case (Libya v. U.S.) (Provisional Measures) 1992 I.C.J. Rep. 114.

302. Eichmann v. Atty.-Gen. Of Israel, 36 INT'L. L. REP. 277 (1962).

U.S. must exercise such force within the constraints of necessity, proportionality,[303] and discrimination.[304] Consequently, no force may be used against Afghanistan, as such, or its political leadership.

The policy of rectification, exemplified by the Israeli rescue action in Entebbe,[305] may provide a useful analogy to determine the manner by which force may be undertaken in order to protect an overwhelming state interest.[306] This rescue mission was carried out in response to a grave threat to Israeli citizens.[307] It did not exceed what was necessary to rescue the hostages, nor unduly impinge upon the territorial integrity or political independence of Uganda.[308]

The Israeli action at Entebbe has been described as an act of "rectification," [309] which has three elements. First, there must be an

303. The principle of proportionality requires that the use of force in response to aggression not exceed, in magnitude or effect, the harm caused by the offense committed. Proportionality thus prohibits the inflicting of unnecessary injury, for it requires a response that is calculated and limited by reference to both the initial terrorist offense and the magnitude of the continuing threat.

304. Discrimination may also be referred to as non-combatant immunity. The principle of discrimination is a powerful limitation on the range or legitimate forcible responses open to an injured state. When a nation calculates a military response, it must direct its attack towards active terrorists, terrorist bases, or training facilities. 304 To knowingly harm a civilian population, even one supporting terrorists, would violate the principle of discrimination. *See* Paasche, *supra* note 34, at 387-88.

305. The Israeli rescue action in Entebbe is the classic modern example of a state's successful use of force to protect its citizens from terrorists. On June 24, 1976, an Air France Jet traveling from Tel Aviv to Paris was hijacked by members of the Popular Front for the Liberation of Palestine and flown to Entebbe airport in Uganda. The hijackers demanded the release of 53 "freedom fighters" in exchange for the lives of the Israeli hostages. On July 3, after a week of negotiations, the Israeli Defense Forces conducted a military raid on the Entebbe airport and rescued the 103 passengers and crew members held hostage.

306. Boyle, *International Law in Time of Crisis: From Entebbe to the Hijacking of Jet to Uganda,* 75 NW. U. L. REV. 769 (1980).

307. The Ugandan government proved unwilling to fulfill its obligation to protect or secure the release of the Israeli hostages; in fact, Uganda was assisting the terrorists. *Id.* at 795.

308. *See* Schachter, *Armed Force, supra* note 180, at 1630.

309. Sheehan, *The Entebbe Raid: The Principle of Self-Help in International Law as a Justification for State Use of Armed Force,* 1 FELTCHER FORUM 135 (1977). The American Society of International Law has defined rectification as follows:

> An actor does what another is required by law to do and which the other cannot or will not do. If the actor will be injured by the failure of another to act, he has the right to act ... [I]t is a very well established quasi-contract basis for recovery which fits the Israeli situation (at Entebbe) precisely.
>
> *See also Control of Terrorism in International Life: Cooperation and Self-Help,* 71 AM. SOC'Y. INT'L. L. PROC. 17, 30-31 (1977).

imminent threat to civilians created by a violation of international law. Second, the rectifying action must be directed only towards securing the safety or rights of the victims, and not to punishing the offender for his acts. Third, the intervention must be strictly limited to righting the particular violation of international law involved.[310]

The April 1980 U.S. action to rescue the American hostages in Tehran is another instance of the protective use of force within the rules of law.[311] In that situation, the American government believed the hostages were in grave danger and responded to the perceived necessity.[312] Despite the difficulties encountered by the U.S. military during the mission,[313] the action was not an excessive or disproportionate use of force.[314]

In sum, it is a grave violation of international law to assault the political independence of a foreign government under the guise of a claimed right to self-defense. There is no legal justification for the "war" undertaken by America. Any hope of vindicating the legality of its conduct must proceed from satisfying the stringent standards aforementioned. It is the same standard of care identified by the international court in the *Corfu Channel Case,* determined by "elementary considerations of humanity, which are more exacting in times of peace than in times of war." [315]

310. *See* Paasche, *supra* note 34.

311. Schachter, *Self-Help in International Law: U.S. Action in the Iranian Hostage Crisis,* 37 J. INT'L. AFF. 231, 231-34 (1984).

312. A hostage situation requires an evaluation by the injured nation of the imminence of the threat at hand. The danger must be analyzed with regard to both the exigencies of the immediate situation and the larger issue of the strength terrorists gain through negotiations and publicity.

313. *See generally* R. GABRIEL, MILITARY INCOMPETENCE (1985).

314. Paasche, *supra* note 34. Note, however, that while the Entebbe rescue and the Iranian rescue attempt are examples of the restrained use of force in a critical situation, the United States has on occasion used excessive force to respond to threats to American citizens. The application of excessive force, even in response to aggression, violates the principles of necessity and proportionality and undermines the regime of customary international law.

315. Corfu Channel (U.K. v. Albania) 1949 I.C.J. 4.