

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

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

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## I INTRODUCTION

The tragic events of 11 September 2001, prompted the international community to examine international terrorism anew. The magnitude of the acts went beyond terrorism as it was known, and statements from various capitals around the world pointed to a need to develop new strategies to confront a new reality. The response of the United States (with the active support of the international community) was to launch a broad assault on al-Qaeda and its host

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government, the Taliban regime of Afghanistan. The attacks of September 11, the US response and the international community's approval of the military action represent a new paradigm in international law relating to the use of force. Previously, acts of terrorism were seen as criminal acts, carried out by private, non-governmental entities. In contrast, the September 11 attacks were regarded as an act of war. This effectively marked a turning point in the long-standing premise of international law that force, aggression and 'armed attacks' are instruments of relations between states. Terrorism was no longer merely a serious threat to peace and stability to be combated through domestic and international penal mechanisms — use of force was now an avenue for managing the consequences of terrorist strikes.

This paradigm-shifting event generated a new dimension in international legal and political debate. Though international discourse on terrorism is abundant and terrorism continues to be the subject of sustained debate, the attacks of September 11 elevated the discourse to another level. The attacks instigated the momentum for the international legal system to co-opt military responses to counter terrorism within the regime of lawful force contained in the *Charter of the United Nations*. Many of the strict requirements of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)*<sup>1</sup> which considered the issue of state responsibility in light of international norms on the use of force, are now being challenged, infusing art 51 of the *UN Charter* with a new focus. This of itself is nothing new, as discourse in this field has long grappled with the issue.

This article aims to examine the legitimate use of force in counteracting state-sponsored terrorism, in the light of the September 11 attacks. Firstly, in Part II of this article, the historical definition of terrorism is discussed. In Part III, this article seeks to set the parameters for state-sponsored terrorism through an evaluation of the tenets of state responsibility. It does so by examining ICJ jurisprudence and UN resolutions which have discussed the responsibility of states for terrorist activity. This is an issue that continues to be on uncertain ground, since, under customary international law, states are not perpetrators of terrorism because terrorism is a penal offence and states are not subjects of international criminal law.<sup>2</sup> Nonetheless, General Assembly resolutions that repeatedly condemn states undertaking or supporting terrorism implicitly acknowledge that states are involved in terrorist activities.<sup>3</sup>

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<sup>1</sup> [1986] ICJ Rep 14 ('*Nicaragua*').

<sup>2</sup> Krzysztof Skubiszewski, 'Definition of Terrorism' (1989) 19 *Israel Yearbook of Human Rights* 39, 45.

<sup>3</sup> See, eg, *Resolution 31/102*, GA Res 31/102, UN GAOR, 31<sup>st</sup> sess, 99<sup>th</sup> plen mtg, UN Doc A/RES/31/102 (1976); *Resolution 34/145*, GA Res 34/145, UN GAOR, 34<sup>th</sup> sess, 105<sup>th</sup> plen mtg, UN Doc A/RES/34/145 (1979); *Resolution 38/130*, GA Res 38/130, UN GAOR, 38<sup>th</sup> sess, 101<sup>st</sup> mtg, UN Doc A/RES/38/130 (1983); *Resolution 44/29*, GA Res 44/29, UN GAOR, 44<sup>th</sup> sess, 72<sup>nd</sup> plen mtg, UN Doc A/RES/44/29 (1989); *Resolution 46/51*, GA Res 46/51, UN GAOR, 46<sup>th</sup> sess, 67<sup>th</sup> plen mtg, UN Doc A/RES/46/51 (1991); *Resolution 51/210*, GA Res 51/210, UN GAOR, 51<sup>st</sup> sess, 88<sup>th</sup> plen mtg, UN Doc A/RES/51/210 (1996); *Resolution 53/108*, GA Res 53/108, UN GAOR, 53<sup>rd</sup> sess, 83<sup>rd</sup> plen mtg, Agenda Item 155, UN Doc A/RES/53/108 (1999); *Resolution 56/160*, GA Res 56/160, UN GAOR, 56<sup>th</sup> sess, 88<sup>th</sup> plen mtg, Agenda Item 119b, UN Doc A/RES/56/160 (2001) ('*General Assembly Resolutions*').

Part IV will discuss the move by states to take countermeasures against terrorist activity, developing internal mechanisms by which terrorists may be criminally prosecuted. Part V will then discuss the enshrined norms on the use of force regime proscribed in the *UN Charter*. It will argue that the prohibition on the use of force has traditionally been balanced against the 'inherent' right to self-defence as contained in the *UN Charter*. It will be then be submitted that the use of force regime as proscribed in the *UN Charter* is visibly engaged in a process of change, especially in the light of the September 11 attacks, and evaluates this within the framework of the uncertainty and indeterminacy of the doctrine of state responsibility in providing the necessary linkage between state-sponsored terrorist acts and the use of military force against those states.

Within this context, Part VI of the article discusses the relationship between 'armed attacks' and terrorist attacks. Considering that the relative danger of a given terrorist attack may vary in terms of the intensity and destructiveness of force deployed, ranging from the bombing of a small group to the large-scale slaughter of 11 September 2001, can terrorist attacks be co-opted into the understanding of 'armed attack' and thus a basis for the use of military force against the responsible entity? This question is furthermore important since the potential for abuse of the option of military force is significantly reduced if states observe the evidentiary thresholds that apply when determining who is responsible for the attack. The recognition that actions of private actors may give rise to an 'armed attack' is anything but revolutionary. However, it is not entirely clear from the practice in the aftermath of 11 September whether the requirement of the attribution of a terrorist act to a specific state actor was, in fact, fully abandoned, or whether the qualification of 'armed attack' still requires a nexus of the terrorist act to a state entity. Tied to this is the contentious issue of situations in which the attack is launched from failed states or territories governed by *de facto* regimes.

Finally, Part VII sums up the argument by considering the defensive response to state-sponsored terrorism and the dictates of customary and conventional international law requirements. The unspoken premise of the September 11 attacks is that terrorist groups will not receive an absolute shield from the territorial integrity of a state. However, the normative corollary of this approach, which posits that the right to territorial integrity must on occasion yield to the exercise of another state's right to protect itself and its citizens under the rubric of self-defence, may set a dangerous precedent.

## II DEFINING TERRORISM

The term 'terrorism' is of French origin and was first coined in connection with the Jacobin 'Reign of Terror',<sup>4</sup> a period of the bloody French Revolution in which the French State asserted its authority by knitting a fabric of fear over the populace through the summary executions of thousands. However, it was not until 1934, following the assassination of French statesman Jean-Louis Barthou and King Alexander of Yugoslavia, that terrorism appeared on the international

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<sup>4</sup> The French State, under the control of Robespierre, executed approximately 17 000 presumed enemies of the state. See John Murphy, 'Defining International Terrorism: A Way Out of the Quagmire' (1989) 19 *Israel Yearbook on Human Rights* 13, 14.

agenda.<sup>5</sup> This event induced the League of Nations to draft the first ever penal instrument making terrorism an international offence: the *Convention for the Prevention and Punishment of Terrorism*.<sup>6</sup> The *CPPT* defined terrorism in a broad way, as 'criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.'<sup>7</sup> The *CPPT* never entered into force. Nevertheless, certain customary norms of international law relating to the use of armed force, most notably the duty of states 'to prevent and suppress attempts to commit common crimes against life or property where such crimes are directed against other states',<sup>8</sup> implicitly proscribed certain instances of terrorism.

After World War II, the international community codified certain binding norms of international law in the *UN Charter*. The *UN Charter* has as its primary goal the prevention of war — working with the political system to govern conflicts between states by outlawing a wide range of uses of force and defining permissible and lawful uses of force.<sup>9</sup> The *UN Charter* does not expressly mention terrorism. The drafters of the *UN Charter* 'did not fully anticipate the existence, tenacity and technology of modern day terrorism',<sup>10</sup> nor contemplate the existence of international terrorists, with the result that the *UN Charter* simply does not directly address the more subtle uses of force which terrorists began to actively pursue in the post-World War II period.

The absence of an explicit recognition of terrorism in the *UN Charter* was later matched by the absence of a single definition of terrorism in either customary or conventional international law. To date, efforts by the UN to draft a single broad definition of terrorism acceptable to all states, such as that found in the *CPPT*, have failed.<sup>11</sup> Conventional international law on terrorism is presently limited to a relatively small number of widely accepted conventions that proscribe particular types of terrorism, which likely reflect customary norms of international law.<sup>12</sup> The most common types of terrorism covered by these conventions include crimes against the safety of civil aviation and maritime navigation, the taking of hostages, the use of nuclear and chemical weapons, and crimes against internationally protected persons.<sup>13</sup>

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<sup>5</sup> Joel Cavicchia, 'The Prospects for an International Criminal Court in the 1990s' (1992) *Dickinson Journal of International Law* 223, 225.

<sup>6</sup> *Convention for the Prevention and Punishment of Terrorism* (1938) 19 *League of Nations Official Journal* 23, (not in force) ('*CPPT*').

<sup>7</sup> *Ibid* 23.

<sup>8</sup> Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (9<sup>th</sup> ed, 1996) vol 1, 400.

<sup>9</sup> See James Rowles, 'The Legal and Moral Adequacy of Military Responses to Terrorism: Substantive and Procedural Constraints in International Law' (1987) *American Society of International Law: Proceedings of the 81<sup>st</sup> Annual Meeting* 307, 310.

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

<sup>11</sup> Judge Rosalyn Higgins, 'The General International Law of Terrorism' in Judge Rosalyn Higgins and Maurice Flory (eds), *Terrorism and International Law* (1997) 13, 14.

<sup>12</sup> See Louis Rene Beres, 'On International Law and Nuclear Terrorism' (1994) 24 *Georgia Journal of International and Comparative Law* 1, 3.

<sup>13</sup> See Yonah Alexander, 'Terrorism in the Twenty-First Century: Threats and Responses' (1999) 12 *DePaul Business Law Journal* 59, 92–4.

During the early years of the UN the distinction between terrorists and revolutionaries was the subject of much disagreement.<sup>14</sup> The volatile Cold War era loomed large over any effort to establish a firm international definition of terrorism as it relates to states that sponsor or support terrorists. The UN was presented with its greatest opportunity to bring terrorism within the ambit of the *UN Charter* through the key 1957 UN General Assembly *Resolution 3314* defining 'aggression'.<sup>15</sup> Sidestepping the volatile issue, the UN elected to ignore using the word 'terrorism' choosing instead to classify the activities of states who send, organise, or support 'armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State'<sup>16</sup> as engaging in unlawful aggression in direct violation of the *UN Charter*. During the 1970s and

<sup>14</sup> For example when Nelson Mandela first visited the US, he was on the State Department's list of international terrorists. Mandela is now a Nobel Peace Prize Laureate and pre-eminent international statesman. In the Middle East, another 'international terrorist', Yasser Arafat, won the Nobel Peace Prize, but questions remain as to whether he is an architect of peace or a purveyor of terrorism. As recently as February 2001, Mr Hasmy, a Malaysian representative to the Ad Hoc Committee of the General Assembly created to draft a comprehensive convention on terrorism, spoke on behalf of the Organisation of the Islamic Conference and commented that a definition of terrorism was desirable so that terrorism could be 'differentiated from the legitimate struggles of peoples under colonial or alien domination and foreign occupation for self-determination and national liberation, as recognized by the relevant resolutions of the United Nations': *Measures to Eliminate International Terrorism*, UN GAOR, 56<sup>th</sup> sess, 14<sup>th</sup> plen mtg, UN Doc A/56/PV.14 (2001) 11.

<sup>15</sup> *Definition of Aggression*, GA Res 3314, UN GAOR, 29<sup>th</sup> Sess, 2319<sup>th</sup> plen mtg, Annex, Supp No 31, UN Doc A/RES/3314 (1974) 142.

The *Definition of Aggression* states in the main:

- Art 1 Aggression is the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any manner inconsistent with the *UN Charter*.
- Art 2 The first use of armed force by a State in contravention of the *Charter* shall constitute prima facie evidence of an act of aggression ...
- Art 3 Any of the following acts, regardless of a declaration of war, shall ... qualify as an act of aggression:
  - (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack or any annexation by the use of force of the territory of another State or part thereof;
  - (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another;
  - (c) The blockade of the ports or coasts of a State by the armed forces of another State;
  - (d) An attack by the armed forces of a State on the land, sea, or air forces, or marine and air fleets of another State;
  - (e) The use of armed forces of one State ... in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
  - (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; or,
  - (g) The sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State, of such gravity as to amount to the acts listed above, or its substantial involvement therein.

<sup>16</sup> *Ibid* art 3(g).

1980s, the attempts of the UN to define the term failed mainly due to differences of opinion between various members about the use of violence in the context of conflicts over national liberation and self-determination. In spite of its failure to define terrorism, in 1985 the UN General Assembly adopted *Resolution 40/61*,

[u]nequivocally condemn[ing], as criminal, all acts, methods and practices of terrorism wherever and by whomever committed ... [and] call[ing] upon all States to fulfil their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts.<sup>17</sup>

Similar language can be found in a number of subsequent General Assembly and Security Council resolutions over the last fifteen years, many of which state that terrorism is contrary to the purposes and the principles of the UN and represents a ‘threat to international peace and security’.<sup>18</sup> Various definitions of terrorism refer to unlawful force as opposed to lawful force. However, a problem arises with respect to the fundamental distinction between unlawful force and lawful force. Furthermore, in choosing to avoid defining terrorism conclusively, the UN has either used it in a more general sense or selected specific acts as constituting terrorist activity.<sup>19</sup> Consequently, the international community has taken a piecemeal approach and addressed the problem of international terrorism by identifying particular criminal acts inherently terrorist in nature to be prevented and punished by domestic law. The result has been the adoption of a number of global treaties, regional conventions, and bilateral agreements that are relevant to the suppression of international terrorism, and corresponding domestic laws that implement those arrangements.<sup>20</sup>

Some basic features that might contribute to an acceptable and working definition can be gleaned from the following four definitions which encapsulate various aspects of terrorism:

The unlawful use or threatened use of force or violence by a revolutionary organization against individuals or property with the intention of coercing or intimidating governments or societies, often for political or ideological purposes.<sup>21</sup>

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<sup>17</sup> GA Res 40/61, 40<sup>th</sup> sess, 108<sup>th</sup> plen mtg, UN Doc A/RES/40/61 (1985) [1], [6] (emphasis added).

<sup>18</sup> See *General Assembly Resolutions*, above n 3.

<sup>19</sup> Jeffrey Addicott, ‘Legal and Policy Implications for a New Era: The “War On Terror”’ (2002) 4 *Scholar: St Mary’s Law Review on Minority Issues* 209, 213–14 (citations omitted).

<sup>20</sup> ‘The international conventions by and large address the form or target of the terrorist attack, rather than the terrorists themselves’: Leah Campbell, ‘Defending against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan’ (2000) 74 *Tulane Law Review* 1067, 1071–2.

<sup>21</sup> Department of Defense (US), cited in Rushworth Kidder, ‘Unmasking Terrorism: The Fear of Fear Itself’ in Bernard Schechterman and Martin Slann, *Violence and Terrorism* (3<sup>rd</sup> ed, 1993) 14.

The unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.<sup>22</sup>

Premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.<sup>23</sup>

Violent criminal conduct apparently intended: (a) to intimidate or coerce a civilian population; (b) to influence the conduct of a government by intimidation or coercion; or (c) to affect the conduct of a government by assassination or kidnapping.<sup>24</sup>

The synthesis of these elements is broadly consistent with most definitions in academic literature, which generally require two elements: actual or threatened violence against civilians or persons not actively taking part in hostilities and the implicit or explicit purpose of the act being to intimidate or compel a population, government or organisation into some course of action.<sup>25</sup> This broad definition is supported by a proposed convention drafted by the International Law Association, which defines an international terrorist offence as

*any serious act of violence or threat* thereof by an individual whether acting alone or in association with other persons, organizations, places, transportation or communications systems or against members of the general public *for the purpose of intimidating* such persons, *causing injury to or the death* of such persons, disrupting the activities of such international organisations, of causing loss, detriment or damage to such places or property, or of interfering with such transportation and communications systems in order to undermine friendly relations among States or among the nationals of different States or *to extort concessions from States*.<sup>26</sup>

In the words of Addicott:

Despite the lack of a fixed universal agreement defining terrorism, the essential goal of terrorism is readily identifiable. As the root word implies, the goal of terrorism is to instil fear in a given civilian population by means of violence. In the oft-repeated Chinese proverb, the objective of the terrorist is to kill one and frighten 10,000. While specific acts of terrorism may appear to be mindless and irrational, terrorism is the antithesis of confused behaviour. Terrorism is a goal-directed, calculated, and premeditated use of force.<sup>27</sup>

<sup>22</sup> *Judicial Administration*, 28 CFR § 0.85.

<sup>23</sup> *Foreign Relations and Intercourse*, 22 USC § 2656f (d)(2).

<sup>24</sup> Department of Justice (US), cited in Rushworth Kidder, 'Unmasking Terrorism: The Fear of Fear Itself' in Bernard Schechterman and Martin Slann, *Violence and Terrorism* (3<sup>rd</sup> ed, 1993) 14.

<sup>25</sup> See, eg, Harry Henderson, *Global Terrorism: The Complete Reference Guide* (2001) 1–30; David Long, *The Anatomy of Terrorism* (1990) 1–13; Ken Booth and Tim Dunne, 'Worlds in Collision' in Ken Booth and Tim Dunne (eds), *Worlds in Collision: Terror and the Future of Global Order* (2002) 8.

<sup>26</sup> International Law Association, 'Draft Single Convention on the Legal Control of International Terrorism', art 1(j) in International Law Association, *Report of the Fifty-Ninth Conference* (1982) 497.

<sup>27</sup> Addicott, above n 19, 216 (emphasis added, citations omitted).

## III ANATOMY OF STATE-SPONSORED TERRORISM

A *Defining State-Sponsored Terrorism*

Historically, rules on the lawful use of force have developed within a framework of state-to-state relationships. This poses a problem when this framework is applied to terrorist acts. Colonel James Terry states that '[t]errorism's uniqueness lies in its use of armed force against targets that would be exceptional or aberrational in regular warfare, with results that have little relationship to traditional military necessity.'<sup>28</sup> He notes that the involvement in terrorist activity by states may result from both practical and ideological influences. For example, where traditional forms of warfare are considered overtly costly or would result in uncertain outcomes, terrorism may be regarded as an appropriate substitute. This may result in state provision of a range of support mechanisms, including propaganda, financial aid, training, intelligence, weapons and even direct involvement.<sup>29</sup>

However, just like terrorism, the notion of state-sponsored terrorism lacks a universal definition. Furthermore, the confusion over a precise definition of state-sponsored terrorism is in large part reflective of the basic disagreement over the elements of terrorism itself. There are, however, certain basic elements of state-sponsored terrorism: a politically subversive violent act or threat thereof; a state sponsor; an intended political outcome; and a target, whether civilian, military or material, whose death, injury or destruction can be expected to influence to some degree the desired political outcome.<sup>30</sup>

State sponsorship of terrorism involves both acts of commission and omission.<sup>31</sup> This can range from a state directly supporting the terrorist attacks, to less direct state involvement such as providing training, financing, or support one way or another. This may include a toleration of particular terrorist groups which base their activities in a state's territory.<sup>32</sup>

From as far back as 1977, commentators have suggested that the attempt

to hold states responsible in damages for the acts of terrorists when such acts can be attributed to them represents a strategic use of traditional international law

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<sup>28</sup> James Terry, 'Countering State-Sponsored Terrorism: A Law-Policy Analysis' (1986) 36 *Naval Law Review* 159, 161.

<sup>29</sup> *Ibid.*

<sup>30</sup> In defining state-sponsored terrorism, Cline and Alexander sum up this category thus:

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

Senate Subcommittee on Security and Terrorism, Senate Committee on the Judiciary (US), 99<sup>th</sup> Congress, *Report on State-Sponsored Terrorism* (1985) 40, (report of R S Cline and Y Alexander).

<sup>31</sup> See, eg. Long, above n 25, 105–14; John Murphy, *State Support of International Terrorism: Legal, Political and Economic Dimensions* (1989) 31–44.

<sup>32</sup> *Definition of Aggression*, above n 15, 142.

norms which may produce short-run benefits and ... contribute to long-run interests of the world community.<sup>33</sup>

This position has been actively pursued by the International Law Commission ('ILC')<sup>34</sup> in its quest to codify customary international law relating to state responsibility in its Draft Articles on Responsibility of States for Internationally Wrongful Acts.<sup>35</sup> Articles 8 and 11 codify the relevant rules pertaining to state responsibility for terrorist acts committed by private persons. Article 8 is the classic formulation of the de facto agency principle. It reads:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.<sup>36</sup>

Historically, the ILC has firmly insisted that in order to meet this test, it must be proved in each and every case that the person or persons 'had really been charged by the State organs to carry out that specific act.'<sup>37</sup>

Article 11, in contrast, does not require proof of a state's prior knowledge, instruction or control of a terrorist act in order to attribute a private person's conduct to the state. Under this rule, conduct ordinarily not attributable to a state under antecedent articles shall nevertheless be attributed to a state if they acknowledge such conduct as their own.<sup>38</sup> Elaborating on this rule, Scott Malzahn notes that it

differs from the classic formulation of the de facto agency principle in that the private person is not acting on behalf of the state at the time of the act's commission, rather state responsibility is based on the State identifying the conduct and either expressly or impliedly making the conduct its own at some later date.<sup>39</sup>

This is a position consonant with ILC elaboration.<sup>40</sup>

## B *ICJ Jurisprudence and the Declaration concerning Friendly Relations*

In two different cases the International Court of Justice ('ICJ') has had to determine whether a state was responsible for criminal and terrorist activities committed by private persons. In the *United States Diplomatic and Consular*

<sup>33</sup> Richard Lillich and John Paxman, 'State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities' (1976) 26 *American University Law Review* 217, 221.

<sup>34</sup> The ILC is established by the UN General Assembly under *Resolution 174*, GA Res 174 (II), UN GAOR, 123<sup>rd</sup> plen mtg, (1947) UN Doc A/RES/174 (II) to make recommendations for the codification of customary international law.

<sup>35</sup> See ILC, 'Draft Articles on State Responsibility', in ILC, *Report of the International Law Commission on the Work of its 53<sup>rd</sup> Session*, UN Doc A/56/10 (2001), 44-5 ('Draft Articles').

<sup>36</sup> *Ibid* 45.

<sup>37</sup> Luigi Condorelli, 'The Imputability to States of Acts of International Terrorism' (1989) 19 *Israel Yearbook on Human Rights* 233, 239 (citations omitted).

<sup>38</sup> ILC, Draft Articles, above n 35, 45.

<sup>39</sup> Scott Malzahn, 'State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility' (2002) 26 *Hastings International and Comparative Law Review* 83, 98.

<sup>40</sup> ILC, Draft Articles, above n 35, 122.

*Staff in Tehran (US v Iran) (Merits)*,<sup>41</sup> the ICJ held that Iran was responsible for the taking of US hostages by private militants because the Iranian Government sanctioned and perpetuated the hostage crisis.<sup>42</sup> Six years later in *Nicaragua*, the ICJ ruled that the US was not responsible for the rebel activities of Nicaraguan Contras because evidence that the Contras were controlled and dependent on the US was insufficient to establish that the US directed the Contras' each and every act.<sup>43</sup> The ICJ ruled that US support for the Contras infringed on Nicaragua's territorial sovereignty in contravention of international law,<sup>44</sup> but concluded that the evidence did not demonstrate that the US 'actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.'<sup>45</sup> In order to attribute the actions of the Contras to the US, the ICJ required proof in each instance that operations launched by the Contras 'reflected strategy and tactics wholly devised by the United States.'<sup>46</sup> Malzahn states that

[w]hereas the judgment in the *Tehran Case* was met with general approval and approbation, the *Nicaragua* decision was criticised for its 'painstaking examination' of specific acts. The ICJ's act-by-act approach to *de facto* agency, reflected in Article 8 of the ILC Draft Articles requires proof of State authorisation of each and every act carried out by private persons before the conduct is attributed to the State.<sup>47</sup>

In *Nicaragua*, the ICJ adopted an 'all or nothing' approach to state responsibility. In the absence of sufficient proof to demonstrate that the Contras were *de facto* agents of the US government, the US escaped any responsibility for the actions of the Contras.<sup>48</sup> Despite the criticism of the case, one of its most important aspects was that the ICJ suggested that active support by a state constitutes a substantial degree of state control, which would be sufficient to legally charge a state for an 'armed attack' (as used in art 51 of the *UN Charter*) committed by international terrorists within its borders.<sup>49</sup>

While state responsibility for terrorist activities that are actively supported by the state logically follows from the state's complicity in the offence,<sup>50</sup> more problematic is a state's responsibility for acts of terrorism that it failed to prevent. A state is not expected to prevent every act of international terrorism

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<sup>41</sup> [1980] ICJ Rep 3 ('*Tehran Hostages*').

<sup>42</sup> *Ibid* [74].

<sup>43</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [109].

<sup>44</sup> *Ibid* [108].

<sup>45</sup> *Ibid* [109].

<sup>46</sup> *Ibid*.

<sup>47</sup> Malzahn, above n 39, 100–1. For a detailed exposition of this assertion, see Keith Highet, 'Evidence, the Court, and the *Nicaragua Case*' (1987) 81 *American Journal of International Law* 1, 40–1. See also Francis Boyle, 'Determining US Responsibility for Contra Activities in International Law' in Harold Maier (ed), 'Appraisals of the ICJ's Decision: *Nicaragua v United States (Merits)*' (1987) 81 *American Journal of International Law* 77, 86.

<sup>48</sup> Mark Gibney, Katarina Tomaševski and Jens Vensted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 *Harvard Human Rights Journal* 267, 287.

<sup>49</sup> See Gregory Travalio, 'Terrorism, International Law, and the Use of Military Force' (2000) 18 *Wisconsin International Law Journal* 144, 155.

<sup>50</sup> See Lillich and Paxman, above n 33, 236–7.

that originates from within its territory.<sup>51</sup> What is expected is that states exercise due diligence in the performance of their international obligations so as to take all reasonable measures under the circumstances to protect the rights and securities of other states.<sup>52</sup> Richard Lillich, a leading scholar on international terrorism and state responsibility, agrees that customary international law expects states to prevent their territory from being used by terrorists for the preparation or commission of acts of terrorism against aliens within its territory or against the territory of another state.<sup>53</sup>

Concurring with Lillich, it is submitted that under international law, states now are under a general duty to carry out prevention of terrorism by exercising measures that are reasonable in the circumstances in order to prevent the occurrence of terrorist attacks.<sup>54</sup> The tolerance by a state of the use of its resources for terrorist activity against foreigners also serves as a basis for liability under state responsibility principles.<sup>55</sup> Indeed, it is rarely asserted that state acquiescence in or tolerance of acts of international terrorism is lawful — states are more inclined to deny that their action or inaction rises to the level of state support or that the alleged act of terror meets the legal definition of terrorism.

The ICJ jurisprudence discussed above and supported by writings of leading scholarship leads me to the position that art 2(4) of the *UN Charter* implicitly prohibits state support of international terrorism by explicitly ordering all member states to ‘refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’<sup>56</sup> It is argued that this implied prohibition was made express in 1970 when the General Assembly approved *Resolution 2625*,<sup>57</sup> which states:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.<sup>58</sup>

Unlike art 2(4) of the *UN Charter*, which only requires that states refrain from the threat or use of force, the *Declaration concerning Friendly Relations* requires positive action on the part of the state so as not to acquiesce in or tolerate terrorist activities originating from within its territory. Malzhan notes that

<sup>51</sup> Jennings and Watts (eds), above n 8, 549.

<sup>52</sup> *Ibid.*

<sup>53</sup> Lillich and Paxman, above n 33, 245, 261. See also, Jennings and Watts, above n 8, 400–1.

<sup>54</sup> Lillich and Paxman, above n 33, 245–6.

<sup>55</sup> *Ibid.* 257, 274.

<sup>56</sup> *UN Charter* art 2(4).

<sup>57</sup> *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, 25<sup>th</sup> sess, 1883<sup>rd</sup> plen mtg, Supp 28, UN Doc A/8082 (XXV) (1970) 121–3 (‘*Declaration concerning Friendly Relations*’).

<sup>58</sup> *Ibid.* 123.

[a]lthough passed only once, some commentators regard the *Declaration Concerning Friendly Relations* as an authoritative interpretation of the *Charter of the UN* because of the drafting committee's mandate to restate the fundamental principles of international law.<sup>59</sup>

In any case, there is a long-standing General Assembly practice of passing resolutions that condemn both active and passive state support of terrorism,<sup>60</sup> and in recent years, the Security Council has stated that 'all States shall [r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts'.<sup>61</sup>

#### IV COUNTERMEASURES AGAINST TERRORISM

Despite universal acceptance of terrorism as an international crime, contention revolves around the issue of acceptable and permitted countermeasures. This is especially so since the UN has traditionally treated the general subject of terrorism as a General Assembly issue. Specifically, the matter mainly fell within the jurisdiction of the Sixth (Legal) Committee of the General Assembly ('Sixth Committee'). Through the Sixth Committee and other UN bodies, the UN has played a part in elaborating conventions addressing specific crimes committed by terrorists, although most of the conventions omit the word 'terrorism'.<sup>62</sup> Though the goal of the General Assembly was to create a basis for universal jurisdiction over, and condemnation and criminalisation of, the types of crimes that terrorists commit, it did not extend this to terrorism. The Assembly was perhaps keen to ward off the intrusion of the Security Council, which might have invoked its role as guardian of international peace and security (something

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<sup>59</sup> Malzahn, above n 39, 88.

<sup>60</sup> See *General Assembly Resolutions*, above n 3.

<sup>61</sup> SC Res 1373, UN SCOR, 56<sup>th</sup> sess, 4385<sup>th</sup> mtg, UN Doc S/RES/1373 (2001). See also SC Res 1269, UN SCOR, 54<sup>th</sup> sess, 4053<sup>rd</sup> mtg, UN Doc S/RES/1269 (1999); SC Res 1377, UN SCOR, 56<sup>th</sup> sess, 4413<sup>rd</sup> mtg, Annex, UN Doc S/RES/1377 (2001).

<sup>62</sup> See *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, opened for signature 14 September 1963, 704 UNTS 219 (entered into force 4 December 1969); *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973); *Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971); *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*, opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977); *International Convention against the Taking of Hostages*, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983) ('Terrorism Conventions'); *Convention on the Physical Protection of Nuclear Material*, opened for signature 3 March 1980, 1456 UNTS 124 (entered into force 8 February 1987); *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 10 March 1988, 1777 UNTS 588 (entered into force 1 March 1992); *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, opened for signature 24 February 1988, 1652 UNTS 499 (entered into force 6 August 1989); *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf*, opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992); *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, opened for signature 1 March 1991, 30 ILM 726 (1991) (entered into force 21 June 1998).

that it eventually did in the aftermath of the September 11 attacks by adopting *Resolution 1368*).<sup>63</sup>

Because there is no cohesive enumeration of appropriate responses to terrorist acts in the international system,<sup>64</sup> individual states have developed internal mechanisms for dealing with terrorists through criminal laws.<sup>65</sup> Frequently, these internal mechanisms are the result of treaty agreements.<sup>66</sup> However, the system remains weak owing to the reality that terrorists may evade capture in the same way other criminals do — by exploiting faulty extradition treaties and weaknesses in law enforcement.<sup>67</sup> In addition to these realities, the state–terrorist relationship can be protected at the discretion of the sponsor, thereby sheltering the perpetrator from immediate coercion and other legal claims offered by victim states. Since terrorism is ambiguous, it unsettles victim states as they must search for an appropriate means of response, or determine if any response is legitimate.

Coupled with the uncertain nature of permissible countermeasures against international terrorism within the international system, the efficacy of domestic criminal laws is weakened in the face of transnational terrorist groups whose membership and conspiracy may spread across many borders.<sup>68</sup> The challenge to states and the international community is compounded when states (actively or passively) support terrorism, thus enhancing the capabilities of terrorist organisations, as well as their ability to avoid both domestic and international enforcement regimes paving the way for impunity. Though traditionally state responsibility has been the vehicle through which pressure is exerted on states sponsoring terrorism, the lethal capabilities of terrorists demonstrated by the September 11 attacks has fundamentally changed the political and legal landscape.

The attacks against the US changed the context of UN activities. As noted above, the UN generally treated the subject of terrorism as a General Assembly issue. After September 11, the Security Council weighed in on the matter and quickly became the locus of action.<sup>69</sup> *Resolution 1368* unequivocally condemned the terrorist attacks of 11 September 2001, calling on all states to ‘work together urgently to bring to justice the perpetrators, organizers and sponsors’<sup>70</sup> of the attacks, and reaffirmed the inherent right of self-defence in accordance with art 51 of the *UN Charter*. Nicholas Rostow states that ‘[g]iven the circumstances,

<sup>63</sup> UN SCOR, 56<sup>th</sup> sess, 4370<sup>th</sup> mtg, UN Doc S/RES/1368 (2001). The resolution unequivocally condemns the terrorist attacks of 11 September 2001.

<sup>64</sup> See Spencer Crona and Neal Richardson, ‘Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism’ (1996) 21 *Oklahoma City University Law Review* 349, 355.

<sup>65</sup> *Ibid* 350–4.

<sup>66</sup> See, eg, the *International Convention against the Taking of Hostages*, above n 63; the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, above n 63; Crona and Richardson, above n 64, 355.

<sup>67</sup> See Bradley Larschan, ‘Legal Aspects to the Control of Transnational Terrorism: An Overview’ (1986) 13 *Ohio Northern University Law Review* 117, 140–4.

<sup>68</sup> *Ibid* 134.

<sup>69</sup> ‘That the larger world could not agree on a definition of terrorism or condemnation of terrorism in all circumstances became irrelevant’: Nicholas Rostow, ‘Before and After: The Changed UN Response to Terrorism since September 11<sup>th</sup>’ (2001) 35 *Cornell International Law Journal* 475, 481.

<sup>70</sup> *Resolution 1368*, above n 63, [3].

this affirmation was significant: it implied that the attacks triggered the right even if, at the time of adoption, the UN Security Council knew almost nothing about who or what had launched them.<sup>71</sup>

This shift in the law is evident when one considers that in 1985, the international response to retaliatory military strikes made by Israel against Tunisia was strongly condemnatory. So much so that the Security Council in *Resolution 573* condemned the air attack on PLO headquarters as an ‘act of armed aggression ... in flagrant violation of the *Charter of the United Nations*, international law and norms of conduct.’<sup>72</sup> This was despite Israel’s argument that Tunisia’s acts of harbouring, supplying, and assisting non-state actors who they claimed committed terrorist acts in Israel should be sufficient to attribute the acts of those non-state actors to it.<sup>73</sup> The fact that *Resolution 573* condemned Israel’s attack as contrary to the *UN Charter* implied that no justification based on self-defence was found. The claim of self-defence was subsequently also rejected by states as justification for the US bombing of Tripoli (in response to a terrorist bomb in a Berlin nightclub) and the 1993 bombing of the Iraqi Secret Service (after an assassination attempt was made on former US President George H W Bush in Kuwait).<sup>74</sup>

In an important departure from *Resolution 573*, the Security Council’s resolutions on Afghanistan explicitly mention the right of individual and collective self-defence and do not contain any condemnation of the military strikes.<sup>75</sup> In view of the dangers posed by terrorism, broadening state responsibility and imposing severe punishment for breaches seems understandable. However the issue is whether once responsibility is triggered by establishing that the state in question knowingly tolerates the responsible parties, encourages them, or fails to do anything about them, should this be followed up with the lethal use of force? Military action in Afghanistan in the aftermath of the September 11 attacks drew favourable responses to the use of force; the US right of self-defence often being mentioned in the same breath as the terrorist attacks. However, the recent military action in Iraq following the ‘Axis of Evil’ speech by US President George W Bush, provoked strong opposition given its definite overtones of unilateral military action by the US against countries that support terror. This was in spite of US insistence that the act was a strategic imperative in its strategy of ‘offensive defence’.

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<sup>71</sup> Rostow, above n 69, 481.

<sup>72</sup> UN SCOR, 40<sup>th</sup> sess, 2615th mtg, UN Doc S/RES/573 (1985) [1]. See generally Marian Nash Leich, ‘Contemporary Practice of the United States Relating to International Law’ (1986) 80 *American Journal of International Law* 151, 165–7, which discusses the UN Security Council’s condemnation of Israel’s air attack.

<sup>73</sup> Admittedly the situation differed from the exact factual circumstance of 11 September 2001, but does reflect the general stance of the international community prior to that event. The Security Council was obviously faced with a situation that profoundly differs from the previous incidents where there were limited casualties.

<sup>74</sup> Michael Byers, ‘Terrorism, the Use of Force and International Law after 11 September’ (2002) 51 *International and Comparative Law Quarterly* 401, 407.

<sup>75</sup> See, eg, *Resolution 1390*, SC Res 1390, UN SCOR, 57<sup>th</sup> sess, 4452<sup>nd</sup> mtg, UN Doc S/RES/1390 (2002); *Resolution 1401*, SC Res 1401, UN SCOR, 57<sup>th</sup> sess, 4501<sup>st</sup> mtg, UN Doc S/RES/1401 (2002).

The question that arises especially after the post-September 11 endorsements is: to what extent may a state lawfully respond with armed force against the state that has sponsored the terrorists deemed responsible for the attack? Under international law, the response of a targeted state is predicated on principles of self-defence, and these are in turn based on what the international community regards as the 'inherent' right to ensure national security and the attendant duty to protect one's citizens from terrorist attacks.<sup>76</sup> The norms of self-defence revolve around survival, and a state's inherent right to protect and defend its sovereignty. This in turn brings into play the *UN Charter* regime on the use of force vis-a-vis terrorism.

## V TERRORIST ACTS AND THE *UN CHARTER* REGIME ON THE USE OF FORCE

### A *Article 2(4) and the Prohibition of the Use of Force*

Until 1945, there was no customary prohibition on the unilateral resort to force if circumstances warranted it. For signatories to particular instruments, if certain preliminary procedures had been exhausted, states reserved the right to resort to force. The *UN Charter* introduced to international politics a radically new notion: a general prohibition of the unilateral resort to force by states. The principle is encapsulated in its most authoritative form in art 2(4) of the *UN Charter*. Pursuant to art 2(4), all members shall refrain in their international relations from the threat or use of force. This prohibition is not confined to the actual use of force, but extends to the mere threat of force. Today art 2(4) constitutes the basis of any discourse on the legitimacy of the use of force by states. Its significance has been emphasised by authors who have labelled it 'the corner stone'<sup>77</sup> and 'the heart'<sup>78</sup> of the *Charter*. The use of force, rather than solely war, is prohibited.

The scope and content of the prohibition of the use of force in contemporary international law cannot be determined by an interpretation of art 2(4) alone. Rather than standing by itself, art 2(4) is part of a complex security system. The provision must be read in context with arts 39, 51 and 53. Here the problem arises that those articles contain a number of terms which, though related to one another, differ considerably in their meaning. The *UN Charter* uses the terms 'attack' or 'aggression' in arts 1(1), 39, 51 and 53, albeit without defining them anywhere. The Security Council has the authority to make findings regarding threats to, or breaches of, international peace and security and to authorise states to impose coercive sanctions or use armed force in response to any act of terrorism that violates art 2(4).<sup>79</sup> However, neither legal writings nor state practice have yet clarified the threshold of these terms beyond doubt.

<sup>76</sup> See generally Department of State (US), *UN Secretary-General Affirms US Rights to Self-Defence* (8 October 2001) <<http://usinfo.state.gov/topical/pol/terror/01100903.htm>> at 1 October 2003.

<sup>77</sup> Douglas Eisner, 'Humanitarian Intervention in the Post-Cold War Era' (1993) 11 *Boston University International Law Journal* 195, 196;

<sup>78</sup> Bartram Brown, 'Humanitarian Intervention at a Crossroads' (2000) 41 *William and Mary Law Review* 1683, fn 59.

<sup>79</sup> Bruno Simma, *The Charter of the United Nations: A Commentary* (1994) 407–18.

Furthermore, attempts within the framework of the UN to clarify these terms have yet to lead to a satisfactory interpretation.<sup>80</sup>

Regardless of the uncertainties that accompany international law and the shortcomings of the UN, it stands as the authoritative body that continues to define conventional and customary standards for the use of force in international law.<sup>81</sup> Contemporary law concerning the use of force abroad holds that self-defence is the main, if not only justification recognised for the resort to force.<sup>82</sup> Thus, despite the widespread condemnation of international terrorism, and the threat it presents to the international community, the use of military force across international boundaries to counter terrorism is not necessarily permissible under international law.<sup>83</sup> This is despite the fact that terrorism and conventional war may be argued to have parallel goals and rationales; that is, attacking the political, social and economic structures of a given state.<sup>84</sup>

The problem for the state-centric regime on the use of force is that terrorist groups do not claim to represent or constitute internationally-recognised states.

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<sup>80</sup> The records of the UN Conference for 10 June 1945 include the report of Joseph Paul-Bancour, the Rapporteur for what was then chapter VIII of the *Charter*. In the section headed 'Determination of Acts of Aggression', Paul-Bancour sidestepped the issue of threshold requirements simply stating that the Committee decided 'to leave to the Council the entire decision as to what constitutes ... an act of aggression': Joseph Paul-Bancour, Rapporteur on Chapter VIII, (Statement to the Opening Meeting of the Committee on Chapter VIII, United Nations Conference on International Organisation ('UNCIO'), San Francisco, 1945) (1945) 12 *UNCIO Documents* 134. Three decades later, the issue was again avoided in the *Definition of Aggression*, above n 15. Operative paragraph 4 of the *Definition of Aggression* simply

[c]alls the attention of the Security Council to the *Definition of Aggression*, as set out below, and recommends that it should, as appropriate, take account of that *Definition* as guidance in determination, in accordance with the *Charter*, the existence of an act of aggression.

About two decades later, the ILC, in its *Draft Statute for an International Criminal Court*, once again provided in broad general terms that no complaint related to an act of aggression could be brought before the Court 'unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint': ILC, 'Draft Statute for an International Criminal Court', art 23(2) in ILC, *Report of the International Law Commission on the Work of its 46<sup>th</sup> Session*, UN Doc A/49/10 (1994). The threshold issue continues to be on uncertain ground with no consensus in sight. This issue has been considered through more than eight Preparatory Commissions held by the Working Group on the Crime of Aggression, within the context of the *Rome Statute for an International Criminal Court*, opened for signature 17 July 1998, [2002] ATS 15 (1998) (entered into force 1 July 2002): see, eg, Preparatory Commission for the International Criminal Court, *Proposal Submitted by Germany: Definition of Aggression*, UN Doc PCNICC/1999/DP.13 (1999); Preparatory Commission for the International Criminal Court, *Proposal Submitted by the Russian Federation: Definition of Aggression*, UN Doc PCNICC/1999/DP.12 (1999); Preparatory Commission for the International Criminal Court, *Proposal Submitted by Greece and Portugal*, UN Doc PCNICC/2000/WGCA/DP.5 (2000).

<sup>81</sup> Campbell, above n 20, 1074. See also Peter Daniel DiPaola, 'A Noble Sacrifice? *Jus ad Bellum* and the International Community's Gamble in Chechnya' (1997) 4 *Indiana Journal of Global Legal Studies* 435, 436. The ICJ has recognised the *UN Charter as jus cogens: Nicaragua (Merits)* [1986] ICJ Rep 14, 442 (Dissenting Opinion of Judge Schwebel).

<sup>82</sup> See Wallace Warriner, 'The Unilateral Use of Coercion under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986' (1988) 37 *Naval Law Review* 49, 56.

<sup>83</sup> Travaglio, above n 49, 149–50.

<sup>84</sup> See Richard Falk, *Revolutionaries and Functionaries: The Dual Face of Terrorism* (1988) 76, 90–3.

The drafters of the *UN Charter* were concerned with a completely different set of problems — the use of armed force by a state against the sovereignty, territorial integrity or political integrity or political independence of another state. Further, the traditional theories of customary international law were developed in a completely different era, with no concern for the danger presented by a modern well-financed terrorist organisation in a world of chemical, biological, and nuclear weapons capable of horrific destruction, yet portable by a single individual. A terrorist ‘war’ does not consist of a massive attack across an international border. Nor does it consist of one isolated incident that occurs and is then past: it is a drawn out, patient, sporadic pattern of attacks.

In view of the fact that terrorist groups may have reach and sophistication that is global, there is little doubt that international terrorism presents a threat that traditional theories for the use of military force are inadequate to deal with, and that were not contemplated at the time of the *UN Charter*.<sup>85</sup>

### B *The Move towards the Legitimate Use of Force against Terrorism*

The first move to address force as a permissible countermeasure against terrorism within the purview of the international system arose from within the state sphere. In the early 1980s, the US forcefully pronounced and expressly linked military responses to counter terrorism to international law. The move was clearly signalled amidst increased terrorist attacks against US interests and nationals. In 1983, the US Department of Defence Commission, in commenting upon the devastating attack on the US Marine Headquarters in Beirut, concluded that

state sponsored terrorism is an important part of the spectrum of warfare and that adequate response to this increasing threat requires an active national policy which seeks to deter attack or reduce its effectiveness. The Commission further concludes that this policy needs to be supported by political and diplomatic actions and by a wide range of timely military response capabilities.<sup>86</sup>

A year later, then US President Ronald Reagan, signed National Security Decision Directive 119, which assigned responsibility for developing strategies for countering terrorism and made clear that, while the US must use all the non-military weapons in its arsenal to the fullest, it must also be prepared to respond within the parameters set by the law of armed conflict.<sup>87</sup> Robert McFarlane, a former Assistant to the President for National Security Affairs, suggested at a Defence Strategy Forum on 25 March 1985, that the directive supported resistance by force to state-sponsored terrorism ‘by all legal means.’<sup>88</sup>

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<sup>85</sup> Warriner, above n 84, 64.

<sup>86</sup> Department of Defense (US), *Report of Department of Defense Commission on Beirut International Airport Terrorist Act, October 23, 1983* (20 December 1983) 129 <<http://www.ibiblio.org/hyperwar/AMH/XX/MidEast/Lebanon-1982-1984/DOD-Report/>> at 1 October 2003.

<sup>87</sup> National Security Decision Directive 119, *Strategic Defense Initiative* (6 January 1984) <<http://www.fas.org/spp/starwars/offdocs/nsdd119.htm>> at 1 October 2003.

<sup>88</sup> Robert McFarlane, ‘Terrorism and the Future of Free Society’ (Speech delivered at the Defense Strategy Forum, National Strategic Information Centre, Washington DC, US, 15 March 1985).

The Vice-President's Task Force refined this construct and explained that:

States that practice terrorism or actively support it will not do so without consequence. If there is evidence that a State is mounting or intends to conduct an act of terrorism against this country, the United States will take measures to protect its citizens, property and interests.<sup>89</sup>

Despite the forceful pronouncements of the US that were backed by actual military responses to counter terrorism, from the international legal perspective, purported defensive responses to state-sponsored terrorism need to be valid under customary and conventional legal requirements. Managing the terrorist threat posed by state sponsors requires identification of the threat, clear establishment of linkage to a state sponsor and, in the event of use of military force, the meeting of the dual legal requirements of self-defence: necessity and proportionality.<sup>90</sup> The problem is that responses to terrorism are coloured, often negatively, by the reality that states intertwine responses with their own national interest. This reality weakens the substantive international legal bases which support military action, despite frequent justifications that action is supported in customary international law by the inherent right of self-defence and a realistic interpretation of art 51 of the *UN Charter*, which takes into account modern weapons capabilities.

Any move to endorse the right of states to attack terrorist organisations located in other states with military force must necessarily be consistent with the requirements of art 2(4) of the *UN Charter*. Gregory Travalio has suggested that art 2(4) can only be used if the degree of support by the host state is to such an extent that terrorists are effectively the instruments through which the armed forces of that state are exercised.<sup>91</sup> To use force under circumstances where the host country is merely supporting terrorists indirectly would amount to a breach of art 2(4), which precludes the use of force against the political independence or territorial integrity of the host country.

However, if terrorism is state-sponsored, other nations can direct their response to terrorist attacks at the state itself (in addition to the terrorist groups). If it can be established that state-sponsored terrorism exists, then the sponsoring state may be in violation of art 2(4). This article has been interpreted to apply to non-member states as well.<sup>92</sup> That provision was applied in *Resolution 748* in 1992 to impose economic sanctions on Libya for its connection with terrorist activities and for its refusal to extradite two Libyan nationals alleged to have

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<sup>89</sup> Centre for Research on Population and Security, *Vice-President's Task Force on Combating Terrorism: Public Report 2* (February 1986) 7 <[http://www.population-security.org/bush\\_and\\_terror.pdf](http://www.population-security.org/bush_and_terror.pdf)> at 1 October 2003

<sup>90</sup> *UN Charter* art 51. See also Byers, above n 76, 406; Carsten Stahn, 'Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say' (2003) *European Journal of International Law Discussion Forum: The Attack on the World Trade Center — Legal Responses* 13–14 <[http://www.ejil.org/forum\\_WTC/ny-stahn.html](http://www.ejil.org/forum_WTC/ny-stahn.html)> at 1 October 2003.

<sup>91</sup> Travalio, above n 49, 171–2 (citations omitted).

<sup>92</sup> See also Hermann Mosler, 'The International Society as a Legal Community' (1974) 140 *Recueil des Cours* 283.

participated in the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland.<sup>93</sup> *Resolution 748* stated:

every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force.<sup>94</sup>

In addition, the UN had this explication of state-sponsored terrorism affecting regions outside a state:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.<sup>95</sup>

This has been interpreted to constrain states from the maintenance of terrorist training camps in the techniques of assassination, destruction and sabotage; the direct or indirect collection of funds; the provision of direct financing for training camps and other programs; the purchase of arms, ammunition and explosives; and preparation of foreign propaganda.<sup>96</sup> When the location of a terrorist camp is known and the territorial state refuses to cooperate within the 'extradite or prosecute' framework laid down by international conventions,<sup>97</sup> domestic law enforcement is completely ineffective in defending a state and its interests abroad. In this situation where states openly engage in, or support acts of

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<sup>93</sup> *Resolution 748*, UN SCOR, 3063<sup>rd</sup> mtg, 47<sup>th</sup> sess, UN Doc S/RES/748 (1992). See also Paul Lewis, 'Security Council Votes to Prohibit Arms Exports and Flights to Libya' *New York Times* (New York, US), 1 April 1992, A1.

<sup>94</sup> *Resolution 748*, above n 93, preamble.

<sup>95</sup> *Declaration concerning Friendly Relations*, above n 57, 123.

<sup>96</sup> See Ruwantissa Abeyratne, 'The Effects of Unlawful Interference with International Civil Aviation on World Peace and the Social Order' (1995) 22 *Transportation Law Journal* 449, 466.

<sup>97</sup> See, eg. *Convention for the Prevention of Unlawful Seizure of Aircraft*, above n 62, art 4; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*, above n 62, art 3; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, above n 62, art 5; *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, above n 62, art 6.

violence and attacks on another state, an appropriate response of the victim state may be the use of armed force.<sup>98</sup>

Although arguably effective and temporarily satisfying, the important concern is whether a policy of armed response is wise in view of its probable violation of international law. If a state concludes that an illegal use of force is too costly a response, the state is left with a limited choice of alternatives for dealing with terrorist incidents. Countries are therefore in search of a permissible and effective response in order to thwart terrorism. That search has led to the use of art 51 of the *UN Charter*, the claim of self-defence, as a way of legitimising the use of armed force. Article 51 permits a victimised state to engage in 'individual or collective self-defence' until recourse has been taken by the Security Council to establish peace.<sup>99</sup> Nothing in the *UN Charter* restricts the identity of aggressors against whom states may respond, since private agents as well as governments may be the sources of aggression.

### C Self-Defence in the Context of Terrorism

Use of art 51 of the *UN Charter* to defend a state's decision to use armed force against terrorists and terrorist havens is not novel. The Israelis used it in defence of its raid on Entebbe, Uganda,<sup>100</sup> as did the US in attempting to justify its bombing of Libya. Such claims did not win a favourable response from the international community.<sup>101</sup> Although the right of self-defence may be described as 'inherent', even the *UN Charter* does not specify what is intended by the word.<sup>102</sup> It is clear that the word was intentionally used because the initial draft

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<sup>98</sup> As John Cohan notes, one might analyse the existence of state-sponsored terrorism along the lines of a four-part continuum ranging from active to passive support:

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

John Cohan, 'Formulation of a State's Response to Terrorism and State-Sponsored Terrorism' (2002) 14 *Pace International Law Review* 77, 90–1. See also Travalio, above n 49, 150.

<sup>99</sup> See *UN Charter* art 51, which states that:

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

<sup>100</sup> John Murphy, *Legal Aspects of International Terrorism* (1978) 556.

<sup>101</sup> See Francis Boyle, 'Preserving the Rule of Law in the War against International Terrorism' (1986) 8 *Whittier Law Review* 735, 736–8.

<sup>102</sup> Baker, above n 10, 31.

of art 51 did not contain the term 'inherent'.<sup>103</sup> This has been interpreted by a number of international law scholars to mean that the right of self-defence is one which antedates and exists independently of the *UN Charter*.<sup>104</sup> In contrast to international customary law, the *UN Charter* appears to have added a new requirement to the 'inherent' right: the occurrence of an 'armed attack'. It is unclear whether this new criteria was intended to narrow the existing right of self-defence. Even if this were the intention, it is equally unclear how and to what extent the right is limited. There appears to be no discussion of the phrase 'armed attack' in the records of the UN Conference on International Organisation ('UNCIO'). One explanation might be that the drafters felt that the words themselves were sufficiently clear. Given that the main concern of the *UN Charter* is the unilateral use of force, the prerequisites of an actual attack by armed forces would severely limit such action. Therefore, the *UN Charter* may be interpreted as limiting the use of force to only those situations involving the most serious and dangerous forms of threats to international peace.

It is also significant that the drafters chose the word 'attack' over the term 'aggression' which is used repeatedly throughout the *UN Charter*. Under the *UN Charter* the term 'aggression' is undefined.<sup>105</sup> Instead, it is up to the Security Council to determine on a case-by-case basis whether a particular action constitutes unlawful aggression. The drafters at UNCIO chose this more flexible system because 'the progress of the technique of modern warfare renders very difficult the definition of all cases of aggression.'<sup>106</sup> There is, however, no evidence that such flexibility and subjectivity was to be accorded to the exercise of the right of self-defence. As Fawcett points out:

It could be said that there is some evidence that the drafters of the *Charter* used the precise and restrictive notion of 'armed attack' in preference to 'aggression' or 'threat to the peace', precisely because they wished to avoid giving too much latitude within the *Charter* system to the recognised right of self-defence[.]<sup>107</sup>

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<sup>103</sup> Ibid.

<sup>104</sup> Yehuda Blum, 'The Legality of State Response to Acts of Terrorism' in Benjamin Netanyahu (ed), *Terrorism: How the West Can Win* (1986) 137. Derrek Bowett writes:

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

Derek Bowett, *Self-Defence in International Law* (1958) 185. See also Arthur Goodhart, 'The North Atlantic Treaty of 1949' (1951) 79 *Recueil des Cours* 187, 192, where the author states that the 'members of the United Nations when exercising their inherent powers do so not by grant but by already existing rights.' In the opinion of one of the committees at San Francisco, inherent meant that the 'use of arms in legitimate self-defense remains admitted and unimpaired': (1945) 6 *UNCIO Documents* 459.

<sup>105</sup> See *Definition of Aggression*, above n 15, which attempts to give guidance to the Security Council in dealing with this matter. Note, however, that the annex and arts 2, 4 and 6 of the *Definition of Aggression* clearly indicate that the Security Council is not limited by the *Definition* and further, that the *Definition* is not intended as a modification or amendment of the *Charter*.

<sup>106</sup> (1945) 12 *UNCIO Documents*, 505.

<sup>107</sup> J E S Fawcett, 'Intervention in International Law: A Study of Some Recent Cases' (1961) 103 *Recueil des Cours* 361.

Though legality of the use of force under international law, *jus ad bellum*, is instructive in matters relating to state-sponsored terrorism, the nature of terrorism renders this concept rather vague and blurred since terrorism does not fall easily into traditional principles of international law. Terrorists are not state actors bound by international law, but rather are similar to criminals in that they act outside of the scope of law.<sup>108</sup> This condition presents states with an intractable problem — how to respond legally to groups who are not adhering to legal strictures.

It is arguable that well-organised terrorist groups with the means to reach across international borders and inflict significant damage on a country on an ongoing basis, such as al-Qaeda, must represent the sort of threat against which self-defence is legitimate if the doctrine is to have any practical contemporary value. There are no obvious examples of UN members claiming that the 1998 missile strikes against al-Qaeda camps could not be acts of self-defence because the alleged perpetrators of the embassy bombings were a non-state group. State practice would therefore seem to support the hypothesis that an art 51 ‘armed attack’ may be perpetrated by a non-state group. In any case, the symbiotic relationship of al-Qaeda in Afghanistan and the Taliban regime meant that at least the al-Qaeda leadership could not be seen purely as a non-state entity, and that the Taliban shared significant responsibility for al-Qaeda’s actions in the September 11 attack. Nonetheless, depending on the factual circumstances, the definition of the terrorist acts of 11 September 2001 as ‘armed attacks’ may not necessarily imply that the concept of ‘armed attacks’ actually refers to acts attributable to a state. For example, in *Nicaragua*, the ICJ gave a restrictive view of attribution when it found that there was ‘no clear evidence of the US having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.’<sup>109</sup>

In the face of the ever-increasing threat of terrorism and the inability to root out terrorist groups, states such as Israel and the US have resorted to retaliatory strikes against terrorist cells located in sovereign states.<sup>110</sup> These states contend that terrorist threats represent a legitimate justification for the use of force abroad. The idea of strategic deterrence of future terrorist attacks is not without controversy considering that the *UN Charter* and customary international law authorise the use of force only for self-defence. When the *UN Charter* was drafted in 1945, the right of self-defence was the only included exception to the prohibition of the use of force, though customary international law had previously accepted reprisal, retaliation, and retribution as legitimate responses as well.<sup>111</sup>

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<sup>108</sup> Warriner, above n 82, 76–7.

<sup>109</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [109].

<sup>110</sup> See, eg, Jennings and Watts, above n 8, 423–7.

<sup>111</sup> Reprisal allows a state to commit an act that is otherwise illegal to counter the illegal act of another state. Retaliation is the infliction upon the delinquent state of the same injury that it has caused the victim. Retribution is a criminal law concept implying vengeance that is sometimes used loosely in the international law context as a synonym for retaliation: see generally Malcolm Shaw, *International Law* (4<sup>th</sup> ed, 1997) 777–91.

Reprisals and retaliatory strikes are illegal under contemporary international law because they are punitive, rather than legitimate actions of self-defence.<sup>112</sup> It would be difficult to reconcile acts of reprisal with the overriding dictate in the *UN Charter* that all disputes must be settled by peaceful means. Further, under the *UN Charter* art 51, there are three main principles that go into examining the *jus ad bellum* dimensions of a state's response if it has suffered a terrorist attack. These principles dealing with the timeliness of the response, and the requirements of necessity and proportionality are difficult to reconcile with retaliatory strikes. Indeed, the use of reprisals represents a regression to the 'just war' theory, which was abandoned in the 17<sup>th</sup> century. To permit reprisals would seemingly thwart the very goal to which states have committed themselves by membership of the UN.

In customary law, conventional law and *opinio juris*, the practice of reprisals through the use of unilateral force has been denounced.<sup>113</sup> A sharp distinction has also been drawn between the use of force in self-defence and its use in reprisals.<sup>114</sup> The legal status of reprisals is stated very succinctly by Ian Brownlie, who states that '[t]he provisions of the *Charter* relating to the peaceful settlement of disputes and non-resort to the use of force are universally regarded as prohibiting reprisals which involve the use of force.'<sup>115</sup> Since 1953, the use of force by way of reprisals has been strongly condemned by the UN as an illegal use of force under the *UN Charter*.<sup>116</sup> The UN condemned Israel when it used force against Palestinians in Tunisia in retaliation for repeated terrorist attacks in 1985.<sup>117</sup> It had the same response to Britain when it attacked Yemen for similar reasons in 1964.<sup>118</sup> Though some in the international community would argue that reprisal action is inherent to maintaining security, most states condemn the practice.<sup>119</sup>

Cast against the backdrop of the brief survey above on the use of force to counter terrorism, the legal response to the September 11 attacks was unusual. The international community broadly qualified the September 11 attacks as 'armed attacks' against the US, justifying the exercise of self-defence with quasi-unanimous statements of support coupled with offers of assistance to the US to facilitate the military action that soon followed.<sup>120</sup> By recognising the 'inherent right of individual and collective self-defence' in the preambles of *Resolution 1368* and *Resolution 1373*,<sup>121</sup> the doctrine of self-defence clearly underlies the military strikes against the Taliban in 2001. The main question is

<sup>112</sup> See Bowett, above n 104, 13.

<sup>113</sup> Warriner, above n 82, 63–4, 77.

<sup>114</sup> See, eg, Jennings and Watts, above n 8, 419, fn 12.

<sup>115</sup> Ian Brownlie, *International Law and the Use of Force by States* (1963) 281 (citation omitted).

<sup>116</sup> Bowett, above n 104, 13–14.

<sup>117</sup> Warriner, above n 82, 63–4.

<sup>118</sup> *Ibid* 64.

<sup>119</sup> Byard Clemmons and Gary Brown, 'Rethinking International Self-Defense: The United Nations' Emerging Role' (1998) 45 *Naval Law Review* 217, 225.

<sup>120</sup> See Jack Beard, 'Military Action against Terrorists under International Law: America's New War on Terror — The Case for Self-Defense under International Law' (2002) 25 *Harvard Journal of Law and Public Policy* 559, 571.

<sup>121</sup> See *Resolution 1368*, above n 63, preamble; and *Resolution 1373*, above n 61, preamble.

how the events of 11 September 2001 affect the interpretation of the 'armed attack' requirement under the *UN Charter*. It is this difficult question that will now be considered.

## VI EXPANDING THE DEFINITION OF AN ARMED ATTACK

The prohibition of the use of force embodied in art 2(4) of the *UN Charter* not only extends to prohibiting war, but any use or threat of force in general. Apart from the clauses (now obsolete) concerning the former enemy states, the *UN Charter* contains only two exceptions to the prohibition of force: namely Security Council enforcement actions pursuant to Chapter VII, and the right to individual and collective self-defence laid down in art 51. As the system of collective security has been of little practical significance, international legal practice since 1945, contrary to the intentions of the authors of the *UN Charter*, continues to be determined by the unilateral use of force by states.<sup>122</sup> Yet in this respect the *UN Charter* provides in art 51 for an exclusive regulation, allowing individual states the threat or use of force only under the conditions stipulated there. The right of self-defence laid down in art 51 of the *UN Charter* (being the only exception to the prohibition of force of practical significance) is therefore the pivotal point upon which disputes concerning the lawfulness of the use of force in inter-state relations usually concentrates. Commenting on the practical implications of art 51, Brownlie explains that:

It is believed that the ordinary meaning of the phrase precludes action which is preventive in character ... There is no further clarification of the phrase to be gained from study of the *travaux préparatoires*. However, the discussions at San Francisco assumed that any permission for the unilateral use of force would be exceptional and would be secondary to the general prohibition in Article 2, paragraph 4. There was a presumption against self-help and even action in self-defence within Article 51 was made subject to control by the Security Council. In these circumstances the precision of Article 51 is explicable.<sup>123</sup>

A major question is whether the right of self-defence under art 51 is limited to cases of 'armed attack' or whether there are other instances in which self-defence may be available. A number of writers argue that an 'armed attack' is the exclusive circumstance in which the use of armed force is sanctioned under art 51.<sup>124</sup> Furthermore, the ICJ in *Nicaragua* clearly stated that the right of self-defence under art 51 only accrues in the event of an 'armed attack'.<sup>125</sup> Also,

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<sup>122</sup> See, eg, Edwin Smith, 'The United Nations Response to a Changing World: International Law Implications' (1992) 86 *American Society of International Law: Proceedings of the 86<sup>th</sup> Annual Meeting* 303; Carolyn Willson, 'Changing the Charter: The United Nations Prepares for the Twenty-First Century' (1996) 90 *American Journal of International Law* 115.

<sup>123</sup> Brownlie, above n 115, 275 (citation omitted).

<sup>124</sup> See, eg, Yoram Dinstein, *War, Aggression, and Self-Defence* (3<sup>rd</sup> ed, 2001) 168. Dinstein argues that as the choice of words in art 51 is deliberately restrictive, the right of self-defence is limited to armed attack. See also Philip Jessup, *A Modern Law of Nations* (1948) 166.

<sup>125</sup> The ICJ stipulated in *Nicaragua* that the exercise of the right of self-defence by a state under art 51 'is subject to the State concerned having been the victim of an armed attack': *Nicaragua (Merits)* [1986] ICJ Rep 14, [103].

it is a traditional requirement of self-defence that a triggering event justifying a military response has already occurred or at least be imminent.<sup>126</sup>

Apart from reference to phrases in art 2(4) to which it is sought to give a restricted meaning, it can be argued that arts 2(4) and 51 were not intended to, and do not restrict the right of member states to use force in self-defence within the meaning of that concept to be found in the customary law. Article 51, it is said, refers merely to 'armed attack' because it was inserted for the particular purpose of clarifying the position of defence treaties which are concerned only with external attack, and being in this way specific it leaves the broader customary right, which is always implicitly reserved, intact. Derek Bowett's view supports the position that art 2(4) left the right of self-defence unimpaired, and that the right implicitly accepted was not confined to reaction to 'armed attack' within art 51 but permitted the protection of certain substantive rights:

Action undertaken for the purpose of, and limited to, the defence of a State's political independence, territorial integrity, the lives and property of its nationals (and even to protect its economic independence) cannot by definition involve a threat or use of force 'against the territorial integrity or political independence' of any other State.<sup>127</sup>

However, a significant number of commentators argue that the right to use force in self-defence under art 51 is not limited to cases of 'armed attack'.<sup>128</sup> As Travalio observes:

These commentators generally argue that the intention of the drafters of the *United Nations Charter* was to incorporate into Article 51 all of the rights of self-defence that existed in customary international law at the time of the *Charter*. In addition, the International Court of Justice in the *Nicaragua Case*, indicated that the right of self-defence in Article 51 simply recognised a pre-existing right of customary international law.<sup>129</sup>

It has been argued that because the customary right of self-defence includes instances in addition to an 'armed attack', military force may be legally available as an option against terrorists even if an 'armed attack' has not occurred. This view holds that the presence of an 'armed attack' is one of the bases for the exercise of the right of self-defence under art 51, but not the exclusive basis.<sup>130</sup> Oscar Schacter sums up this position thus:

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

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<sup>126</sup> See generally Hilaire McCoubrey and Nigel White, *International Law and Armed Conflict* (1992) 91–2.

<sup>127</sup> Bowett, above n 104, 185–6 (citation omitted).

<sup>128</sup> See, eg, Myres McDougal and Florentino Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961) 234–41.

<sup>129</sup> Travalio, above n 49, 159–60 (citations omitted).

<sup>130</sup> Oscar Schacter, 'The Right of States to Use Armed Force' (1984) 82 *Michigan Law Review* 1620, 1633–4; Terry, above n 28, 170.

therefore not implausible to interpret article 51 as leaving unimpaired the right of self-defence as it existed prior to the *Charter*.<sup>131</sup>

Richard Erickson, in his monograph on international terrorism and the use of military force, states that ‘the traditional view is that State toleration or encouragement is an insufficient State connection’ to constitute an ‘armed attack’ under art 51 of the *UN Charter*.<sup>132</sup> This position is shared by a number of other commentators and can be readily supported by arguments distilled from provisions in the *UN Charter*.<sup>133</sup> Even if the right of self-defence extends beyond the ‘armed attack’ provision of art 51, there are, at the very least, serious hurdles that must be overcome before self-defence, as traditionally understood, can be used to justify attacks against terrorists or terrorist facilities located in another state.

Furthermore, the recognition that actions of private actors may give rise to an ‘armed attack’ is anything but revolutionary. The term ‘armed attack’ was traditionally applied to states, but nothing in the *UN Charter* indicates that ‘armed attacks’ can only emanate from states. The main question is whether a terrorist act must be in some form attributable to another state in order to qualify as an ‘armed attack’ for the purposes of the *UN Charter*. It is not entirely clear from the practice in the aftermath of 11 September 2001 whether the requirement of the attribution of a terrorist act to a specific state actor was, in fact, fully abandoned. The North Atlantic Treaty Organisation (‘NATO’), for instance, introduced an interesting new formula when determining whether the September 11 attacks amounted to ‘armed attacks.’ It did not expressly inquire whether the attacks were ‘attributable’ to the Taliban or Afghanistan, but instead asked whether ‘the attack against the United States on September 11 was directed from abroad’ and could therefore ‘be regarded as an action covered by Article 5 of the *Washington Treaty*.’<sup>134</sup>

It may be of greater consequence to admit openly that the requirement of attribution does not play a role in the definition of ‘armed attack’. A similar argument can be made with regard to ‘armed attacks’ under art 51. One may argue that the criterion of the attribution of an ‘armed attack’ is only relevant in the context of the question towards whom the forcible response may be directed, but not in the context of the definition of an ‘armed attack’. Carsten Stahn postulates that ‘the main criteria to determine whether a terrorist attack falls within the scope of application of Art. 51 should not be attributability, but whether the attack presents an external link to the state victim of the attack.’<sup>135</sup>

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<sup>131</sup> Ibid.

<sup>132</sup> Richard Erickson, *Legitimate Use of Military Force against State-Sponsored International Terrorism* (1989) 134.

<sup>133</sup> Louis Henkin, ‘The Use of Force: Law and US Policy’ in Louis Henkin et al (eds), *Right v Might: International Law and the Use of Force* (1989) 44–6.

<sup>134</sup> See NATO, ‘Statement of the North Atlantic Council’ (Press Release No 124, 12 September 2001) <<http://www.nato.int/docu/pr/2001/p01-124e.htm>> at 1 October 2003.

<sup>135</sup> Carsten Stahn, “‘Nicaragua is Dead, Long Live Nicaragua’: The Right to Self-Defence under Art 51 *UN Charter* and International Terrorism” (Paper presented at the Impressum Conference, Terrorism as a Challenge for National and International Law, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany, 24–25 February 2003) 27 <<http://edoc.mpil.de/conference-on-terrorism/present/stahn.pdf>> at 1 October 2003.

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

Article 2(4) refers to both the threat and use of force and commits the Members to refrain from ‘threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’; the customary right of defense, as limited by the requirements of necessity and proportionality, can scarcely be regarded as inconsistent with the purposes of the United Nations, and a decent respect for balance and effectiveness would suggest that a conception of impermissible coercion, which includes threats of force, should be countered with an equally comprehensive and adequate conception of permissible or defensive coercion[.]<sup>136</sup>

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

In Professor McDougal’s interpretation is the recognition of the right to counter the imminent threat of unlawful coercion as well as an actual attack. This comprehensive conception of permissible or defensive coercion, honoring appropriate response to threats of an imminent nature, is merely reflective of the customary international law. It is precisely this anticipatory element of lawful self-defense that is critical to an effective policy to counter state-sponsored terrorism...<sup>137</sup>

US Secretary of State Shultz emphasised this point when he said:

The *UN Charter* is not a suicide pact. The law is a weapon on our side and it is up to us to use it to its maximum extent ... There should be no confusion about the status of nations that sponsor terrorism against Americans and American property.<sup>138</sup>

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

Nonetheless, even though the language of art 51 may be thought to lend itself to an expansive interpretation, so that the manner in which a state protects itself from suffering a further terrorist attack must be flexible, this would permit any state to employ force against those who they believe to be responsible for the attack when a terrorist attack occurs or is imminent.<sup>139</sup> Self-defence was addressed by the drafters of the *UN Charter* in the context of large-scale attacks by the regular armed forces of one state against another, not the mere harbouring

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<sup>136</sup> Myres McDougal, ‘The Soviet–Cuban Quarantine and Self-Defense’ (1963) 57 *American Journal of International Law* 597, 600 (citation and emphasis omitted).

<sup>137</sup> Terry, above n 28, 171.

<sup>138</sup> George Shultz, Department of State (US), *Low Intensity Warfare: The Challenge of Ambiguity*, Current Policy No 783 (January 1986) 3.

<sup>139</sup> Abraham Sofaer, ‘Terrorism, the Law and the National Defence’ (1989) 126 *Military Law Review* 89, 95.

of a terrorist group. However, it can be argued that given the radically different contemporary circumstances compared to 1949, art 51 needs to be interpreted more broadly. Considering that the preferred *modus operandi* of terrorist organisations is drawn out, patient, sporadic pattern of attacks, it is very difficult to know when or where the next incident will occur. This state of affairs was simply not contemplated at the time the *UN Charter* was drafted. As observed by Travalio:

Reasonable arguments can be made that the definition of ‘armed attack’ should be interpreted to include the purposeful harbouring of international terrorists. The potential destructive capacity of weapons of mass destruction, the modest means required to deliver them, and the substantial financial resources of some terrorist organizations, combine to make the threat posed by some terrorist organizations much greater than that posed by the militaries of many states.<sup>140</sup>

The UN was founded on the unfulfilled promise that the UN Security Council would protect international peace and security and in return, states would forgo self-help in favour of collective help. The reality is that the *UN Charter* system is not strongly coherent or controlling. It is arguable that in the face of the reality of the alleged weaknesses of the UN system in guaranteeing peace and security, the right of self-defence under art 51 ought be read to include all of the rights of self-defence that existed in customary international law at the time it was drafted.<sup>141</sup> Indeed, the customary right of self-defence has included instances in which military force might be legally appropriate as self-defence, even when no ‘armed attack’ has occurred.<sup>142</sup> The fact however is that unseating regimes that adopt terror as a tool of statecraft is not supported by existing current legal doctrines governing the use of force, nor does the international system adequately account for the threat posed by such states.

Before 11 September 2001, art 51 of the *UN Charter* was generally interpreted in a restrictive fashion. Most states (with the exception of Israel and the US) did not recognise a right of self-defence against terrorist networks hiding in territories of other states. Nor did a majority of states recognise the legitimacy of military action intended to prevent future attacks. Self-defence was seen as an action of immediate response to an ongoing armed attack. Preventive or anticipatory self-defence was more or less ruled out. However, the terrorist attacks on 11 September marked a turning point in the international regime on the use of force. The world community came to understand terrorism as an act of war — a new manifestation of the changing nature of armed conflict. As such, it poses not only new challenges for the historically fixed international rules relating to armed conflict, but it also demands the development of new legal regimes that can effectively address the threat of global terrorism. This is necessary in view of the international community having largely assented to the invocation of self-defence and thus in essence characterising the attacks as ‘armed attacks’. This characterisation invoked a legal basis for the use of force

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<sup>140</sup> Travalio, above n 49, 155 (citations omitted).

<sup>141</sup> *Ibid* 156.

<sup>142</sup> *Ibid* 160.

initiated by the United Kingdom and the US against Afghanistan on 7 October 2001.

When stating the conditions for individual and collective self-defence, art 51 of the *UN Charter* does not specify that an 'armed attack' has to originate from a state. However, this condition may be taken as implicit. The provision deals with international relations and envisages an exception to the general prohibition of the use of force against states. Moreover, 'armed attack' is a subcategory of aggression, as is explicit in the French text of art 51 of *UN Charter*. Furthermore, aggression clearly has to come from a state.<sup>143</sup> There has been some academic debate as to whether the concept of 'armed attack' as contained in art 51 must originate from a state (ie a government) rather than a non-state actor (such as al-Qaeda).<sup>144</sup>

*Resolution 1368* is ambiguous on the issue. In its preamble, *Resolution 1368* 'recogni[ses] the inherent right of individual or collective self-defence in accordance with the *Charter*', but in the operative part of the resolution describes the attacks as 'terrorist attacks' (not armed attacks) that 'represent a threat to international peace and security'.<sup>145</sup> In summary, *Resolution 1368* the resolution does not explicitly recognise that the right of self-defence applies in relation to any parties as a consequence of the September 11 attacks.

#### VII STATE-SPONSORED TERRORISM AND ARMED ATTACKS

When a state harbouring<sup>146</sup> terrorists provides active support for the terrorist group, as distinct from mere tolerance and encouragement, there is a raging debate among international lawyers over whether, and under what circumstances, such support can constitute an 'armed attack' pursuant to art 51 of the *UN Charter* against the target state. On this point there is considerable authority for the proposition that under some circumstances active support to terrorist groups can constitute an 'armed attack' against another state. For example, Schacter has stated that 'when a government provides weapons, technical advice, transportation, aid and encouragement to terrorists on a substantial scale it is not unreasonable to conclude that the armed attack is imputable to that government'.<sup>147</sup>

*Nicaragua* is the most analogous case on this issue. In this case, the ICJ rejected the claim of the US that the support of Nicaragua to the rebels in El Salvador justified the use of force by the US against Nicaragua in self-defence under art 51. The Court clearly stated that the provision of weapons or logistical

<sup>143</sup> See *Definition of Aggression*, above n 15, art 1.

<sup>144</sup> See, eg, Byers, above n 74, 406–12; Stahn, above n 135, 49–50.

<sup>145</sup> *Resolution 1368*, above n 63, [1].

<sup>146</sup> Harbouring entails providing sanctuary and training to international terrorists as well as conditions that support their ability to engage in terrorist activities: see, eg, *Resolution 1193*, SC Res 1193, UN SCOR, 53<sup>rd</sup> sess, 3921<sup>st</sup> mtg, UN Doc S/RES/1193 (1998) 3; *Resolution 1214*, SC Res 1214, UN SCOR, 53<sup>rd</sup> sess, 3952<sup>nd</sup> mtg, UN Doc S/RES/1214 (1998) 4.

<sup>147</sup> Oscar Schacter, 'The Lawful Use of Force by a State against Terrorists in Another Country' in Henry Han (ed), *Terrorism and Political Violence: Limits and Possibilities of Legal Control* (1993) 250. See also Alberto Coll, 'The Legal and Moral Adequacy of Military Responses to Terrorism' (1987) 81 *American Society of International Law: Proceedings of the 81<sup>st</sup> Annual Meeting* 297, 298.

support by one state to the opposition in another state is not an 'armed attack' under art 51.<sup>148</sup> Consequently, this opinion suggests that even active support by a state to terrorist groups would not be an armed attack under art 51. *Nicaragua*, however, is far from directly on point and leaves many questions unanswered. For example, what if the support includes not only weapons and logistical support, but includes the provision of training and a secure base of operations? Does it change matters if the terrorists might have access to weapons of mass destruction? Might support to terrorists acting transnationally be sufficient to constitute an 'armed attack' against a target state even though support to an armed opposition located within the target country would not? None of these questions are addressed by *Nicaragua*. Rosalyn Higgins indicates that if the support reaches a sufficient scale, it can constitute an 'armed attack' for the purpose of art 51.<sup>149</sup> Other commentators support the idea that the level of support to terrorist groups can rise to a level sufficient to become an armed attack under art 51.<sup>150</sup>

The distinction between 'armed attacks' and 'terrorist acts' has become blurred in the aftermath of the acts that took place on 11 September, possibly because of the enormous consequences of this event. By 'recognizing the inherent right of individual or collective self-defence in accordance with the *Charter*' a preambular paragraph of *Resolution 1368* appears to imply that the terrorist acts in Pennsylvania, New York and Washington DC represented an 'armed attack' within the meaning of art 51 of the *UN Charter*. A similar preambular paragraph was also included in *Resolution 1373*. The point that an armed attack occurred was outlined more explicitly by the North Atlantic Council on 12 September 2001. The Council stated that if the attack on the US were from abroad, it would fall under art 5 of the *Washington Treaty*, which deems that 'an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all'.<sup>151</sup> Neither the Security Council resolutions nor the NATO statement attempted to establish a link between the terrorist acts and a particular state. However, these texts do not provide a clear indication whether they intend to refer to a wide concept of 'armed attack' which would also comprise acts which are not attributable to a state. The issue whether the acts in question could be regarded as state acts depends on factual elements that are still controversial.

The terrorist attacks on the World Trade Centre and the Pentagon seemed to create a political will to adapt the concept of self-defence to a new threat — the threat of large-scale terrorist attacks against nations as such. For traditional self-defence scenarios, the restrictive interpretation of art 51 would still be valid, but in defence of 'open societies' against the new threat there was a widespread

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<sup>148</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, [228].

<sup>149</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) 250.

<sup>150</sup> See, eg, Sage Knauff, 'Proposed Guidelines for Measuring the Propriety of Armed State Responses to Terrorist Attacks' (1996) 19 *Hastings International and Comparative Law Review* 763, 765; Jeffrey McCredie, 'The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal?' (1987) 19 *Case Western Reserve Journal of International Law* 215, 219; John Murphy, *State Support of International Terrorism: Legal, Political and Economic Dimensions* (1989) 120.

<sup>151</sup> NATO, above n 134.

feeling among political decision-makers that preventive military action should no longer be ruled out. Through a process of state practice between September 12 2001 and 10 October 2003 — which included UN Security Council resolutions, NATO declarations, supportive statements by the European Union, and a declaration by the Organisation of Islamic States — the traditional rule of self-defence was extended.<sup>152</sup> Particularly important was the meeting of the UN Security Council on 8 October 2001. The Council met to receive information on and discuss the US–UK bombings of targets in Afghanistan which had started the preceding day. In a statement by the President of the Council, it was underlined that the military action had been reported to the Council as measures of self-defence.<sup>153</sup> The Council members were reported to have received the presentation of the US and the UK appreciatively.<sup>154</sup> No member of the Security Council, the most important body of the international community, objected to the new interpretation of art 51.<sup>155</sup>

#### VIII CONCLUSION

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

The significance of 11 September 2001 lies in the apparent official recognition by states that acts of terrorism carried out by independent private actors fit, albeit somewhat uneasily, within the parameters of art 51. However, the events of 11 September have another more profound impact on the law of self-defence — they affect the system itself. Stahn has postulated that the effects of 11 September are likely to be a strengthening of art 51 as a '*Grundnorm*

<sup>152</sup> See *The Patriot Resource — History: September 11, 2001* <<http://www.patriotresource.com/wtc.html>> at 1 October 2003; *The September 11 Web Archive* <<http://september11.archive.org>> at 1 October 2003, which exhibit a collection of statements by various states and organisations in the aftermath of the September 11 attacks condemning the acts, pledging support and calling on the international community to confront terrorism, while trumpeting the right to self-defence of the US.

<sup>153</sup> See *UN Charter* art 51, which requires that actions in self-defence should be so reported.

<sup>154</sup> Richard Ryan, 'Press Statement on Terrorist Threats by Security Council President' (Press Release, 8 October 2001), UN Doc S/PRST/2002/26.

<sup>155</sup> 'Security Council, Moving to Support Global Efforts, Seeks Reports from All Countries on Steps Taken against Terrorism' (Press Release, 8 October 2001), UN Doc SC/7524 (2002).

governing the unilateral use of force by states against armed violence.<sup>156</sup> The corollary of this is a broadened conception of ‘armed attack’ with a relaxation of the nexus concerning the act of terrorism to state actors. Stahn postulates that the relaxation in the nexus will lead to a long-term increase in the invocation and extension of the scope of art 51.<sup>157</sup> Stahn identifies that another ramification of 11 September is

a growing focus on the use of force in response to violence on Article 51. The lowered threshold for attributing terrorist acts to non-State actors will push States to rely on Article 51 to justify military means, rather than invoke a right to self-defence under customary law or the existence of a State of necessity.<sup>158</sup>

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

On a more general level, the broadening of the notion of armed attack to include acts of terrorism by non-state actors such as al-Qaeda may ... be viewed as a recognition of the adaptability of the system from within. It avoids the perpetuation of the Kosovo dilemma, namely, the emergence of categories of uses of force that may be said to be ‘illegal but justifiable’ while further isolating the ‘Glennonists’ of international law, who call into question the viability of the *Charter* rules on the use of force. Moreover, many of the dangers of a broad definition of the notion of ‘armed attack’ may be attenuated by a reasonable application of the principles of necessity and proportionality, which are the cornerstones of the permissibility of the use of force in self-defense.<sup>159</sup>

Conceptually, there is little dispute concerning the right to exercise the doctrine of self-defence. The difficulty lies in the determination of those conditions which justify the use of military power. This requires an assessment of whether there is actual necessity, whether there is demonstrable justification, and whether the military instrument can be used in a manner proportionate to the threat. It is suggested that self-defence claims must be appraised in the full context in which they occur. One aspect of this contextual appraisal of necessity, especially as it relates to responding to terrorist violence after the fact, is the issue of whether force can be considered necessary if peaceful measures are available to lessen the threat. Once a terrorist attack has occurred, the military

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<sup>156</sup> Carsten Stahn, ‘Terrorist Acts as “Armed Attack”’: The Right to Self-Defense, Article 51(1/2) of the *UN Charter*, and International Terrorism’ (2003) 27 *Fletcher Forum of World Affairs* 35, 37.

<sup>157</sup> *Ibid* (citation omitted).

<sup>158</sup> *Ibid*.

<sup>159</sup> *Ibid* 38 (citations omitted).

response should meet the legal criteria of necessity and proportionate use of force.

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

While the terrorist threat posed by biological, chemical or nuclear attacks is chilling, pre-emptive use of military action opens a Pandora's Box.<sup>160</sup> Intervention to prevent the sinister marriage of international terrorism and weapons of mass destruction raises serious questions of legitimacy. It is not necessarily in the interest of the international community to make the category of 'armed attack' under art 51 so broad and potentially open-ended that nations harbouring groups committing violent acts in other states will be considered to have made armed attacks on the target state. Further, the scope of a nation's permissible military response is almost certainly greater in the event of an 'armed attack' by another state than in other situations in which a more limited military response might be justified. A broad definition of 'armed attack', including occasions where states are simply harbouring terrorists, would too readily justify the robust use of military force. The language of art 51 might permit an extensive interpretation, so that in today's world, with increased terror capabilities, the manner in which a state protects itself from suffering a further attack might be made flexible. However, allowing states to act militarily, through the use of force against those responsible for terrorist acts, in order to prevent or deter further attacks will, without sufficient, recognised benchmarks, set dangerous precedents.

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<sup>160</sup> The US intervention in Iraq constituted a paradigm-altering event. Even though the US resorted to tired political games of legal rationalisation, the legality of its behaviour premised on the 'Bush Doctrine' remains in serious doubt.