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TERRORISM AND THE RIGHT OF SELF-DEFENCE: RETHINKING OF LEGAL AND POLICY ISSUES

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Terrorism and the Right of Self-defence:
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Self-defence has long been understood as a right applicable only in an inter-State armed conflict. After September 11, however, there have been attempts to widen the scope of self defence to include attacks by terrorists - non-State actors. This paper reappraises the legal and policy considerations that promote a right of self-defence against terrorists, or against States harbouring terrorists. The paper advocates three main arguments: (1) that ‘armed attack’ as required under Article 51 must come from a State or at least the attack must be attributable to the State to the extent that it is taken as the act of the State; (2) that there is nothing in the Security Council resolutions to suggest that a terrorist attack as such is an ‘armed attack’ under Article 51; and (3) that to use military force against another State is a serious matter that requires a higher threshold of attribution than mere harbouring. International terrorism has international dimension and it cannot be wiped out by means of unilateral use of force and regime change in the name of self-defence. As unilateralism may lead to subjectivity, selectivity, double standard, and injustices, the paper concludes that multilateralism is the most appropriate way to combat international terrorism and that the latter can be effectively dealt with by coordinated and comprehensive law enforcement measures through proper international bodies, like the UN Security Council, and through appropriate regional organizations and cooperation.

INTRODUCTION

Self-defence has long been understood as an inherent right of a State when it is militarily attacked by another State. It has generally been regarded as a right applicable only in an inter-State armed conflict. It is to be admitted that there were self-defence claims against terrorist attacks in the past. In the 1980s and 90s the United States and Israel had in a number of situations used force against States which allegedly sponsored terrorism and were mostly condemned by the international community.1

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1 In 1982, for example, Israel invoked a right of self-defence to justify an incursion deep into Lebanon for purposes of eliminating the ability of the Palestine Liberation Organization (PLO) to conduct the alleged terrorist actions in northern Israel, but that justification met with criticism from both the Security Council (See S.C. Res. 508/1982) and the General Assembly (See G.A. Res. ES 7/9 – 1982). In 1985, when Israeli planes bombed PLO Headquarters in Tunisia as a response to the alleged PLO terrorist attacks, the Security Council condemned the action by a vote of 14 to zero (the United States abstained)(See S.C. Res. 573 (1985).
After September 11, however, there have been attempts to reinterpret the meaning of ‘armed attack’ under Article 51 of the UN Charter to include attacks by terrorists - non-State actors - and thus rendering the use of force against terrorists, or against a State that harbours terrorists, a lawful exercise of self defence. It has been argued that certain resolutions of the Security Council authoritatively pronounced that a terrorist attack could be equated to an ‘armed attack’ within the meaning of Article 51. Again there have also been arguments that for a State to be responsible for terrorist attacks, higher threshold of attribution is not required and mere harbouring of terrorists may trigger the use of force in self-defence by the victim State against the harbouring State.

The present paper reappraises the legal and policy considerations that promote a right of self-defence against terrorists, or against States harbouring terrorists. The three main arguments made by this paper are: (1) that the ‘armed attack’ as required under Article 51 must come from a State or at least the attack must be attributable to the State to the extent that it is taken as the act of the State; (2) that there is nothing in the Security Council resolutions to suggest that a terrorist attack as such is an ‘armed attack’ under Article 51 that may trigger the right of self defence; and (3) that to use military force against another State is an extremely serious matter that requires a higher threshold of attribution than mere harbouring. The writer agrees that if there is convincing evidence that a State is directly responsible for the terrorist attack and that the attack is on a large scale and has substantial effects, it would amount to an ‘armed attack’ within the meaning of Article 51, triggering the right to use of force in self defence by the victim State. Apart from the above, the only possible use of force that appears to be blameless in the terrorist context is the so-called ‘extraterritorial law enforcement’, as exemplified in the Caroline incident, that is, the limited and controlled use of force, directing against the terrorists only and not in any way affecting the territorial integrity of the State where the terrorists happen to be.

International terrorism has international dimension and it cannot be wiped out by means of unilateral use of force and regime change in the name of self-defence. Unilateralism may lead to subjectivity, selectivity, double standard, and injustices. The paper concludes that multilateralism is the most appropriate way to combat international terrorism and that the latter can be effectively dealt with by coordinated and comprehensive law enforcement measures through proper international bodies, like the UN Security Council, and through appropriate regional organizations and cooperation.

I. THE ESSENTIAL ELEMENTS OF A LAWFUL SELF DEFENCE

The system of maintaining international peace and security under the Charter of the United Nations is based on three fundamental ‘pillars’. First, the threat or use of armed force is banned forever (the general prohibition of the use of force). Second, a collective body, the United Nations Security Council, is empowered to exercise police power; if there is a threat to the peace, breach of the peace or act of aggression, it can take enforcement measures against the wrong-doer or aggressor (the collective security system). Third, in exceptional circumstances, a State can defend itself as long as it is the victim of an armed attack, and until such time as the Security Council itself intervenes (the right of self-defence).

The essence of self-defence is that if a State is attacked it is entitled, in circumstances of necessity, to use armed force in order to defend itself against the attack, to repel the attackers, and expel them from its territory. Therefore, self-defence can be defined as a lawful use of force, under conditions prescribed by international law, in response to an unlawful use of force. The right of self-defence of States is enshrined in Article 51 of the Charter in these terms:

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

It is accepted by States as well as publicists that Article 51 is the most authoritative statement of the right of self-defence of States. States relying on self-defence always and invariably refer to Article 51. Then what are the essential requirements of self-defence under Article 51? The Article explicitly prescribes two main elements, namely: (1) armed attack; and (2) the primary role of the Security Council. However, by virtue of the phrase ‘inherent right’, which implicitly refers to customary international law right of self-defence, we need to add to the list the two elements under customary law: necessity and proportionality. These essential elements of a lawful self-defence need to be examined one by one before considering the issue of whether the right of self-defence is applicable to a terrorist situation.

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7 Article 2(4), the Charter of the United Nations.
8 *Id.*, Articles 39, 41, and 42.
9 *Id.*, Article 51.
A. The requirement of ‘armed attack’

Article 51 prescribes for “the inherent right of … self-defence if an armed attack occurs.” There are two opposing interpretations of this provision of the Charter: the permissive and the restrictive.

The ‘permissive school’ maintains that Article 51 does not restrict the right of self-defence to cases of armed attack only and that States have wider rights of self-defence permitted by customary international law. Bowett, for example, relying on travaux préparatoires, argues that the Article should safeguard the right of self-defence, not restrict it and that The right implicitly excepted is not confined to reaction to ‘armed attack’ within Article 51 but permits of certain substantive rights.\(^\text{11}\) Waldock is of the view that: “If an armed attack is imminent within the strict doctrine of the Caroline, then it would seem to bring the case within Article 51. To read Article 51 otherwise is to protect the aggressor’s right to the first stroke.”\(^\text{12}\) The controversial concept of the right of anticipatory self-defence is founded on the permissive interpretation of Article 51.\(^\text{13}\)

The ‘restrictive school’, on the other hand, argues that Article 51 restricts the right of self-defence to cases of armed attack only. Hans Kelsen, for example, stated: “The Charter restricts the right of self-defence by stipulating that the rule applies only against ‘an armed attack’, and only as long as the Security Council has taken the measures necessary to maintain international peace and security.”\(^\text{14}\) Jessup supports the restrictive interpretation in these terms: “Article 51 of the Charter suggests a further limitation on the right of self-defence: it may be exercised only ‘if an armed attack occurs’…”\(^\text{15}\) According to Henkin, “The exception of Article 51 was limited to the situation ‘if an armed attack occurs’, which is comparatively clear, objective, easy to prove, difficult to misinterpret or fabricate.”\(^\text{16}\)

A treaty is to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.\(^\text{17}\) So long as the text of the treaty is clear and unambiguous, the law does not allow relying on the drafting history, which is merely a supplementary means of interpretation.\(^\text{18}\) The phrase, if an armed attack occurs, is a very clear and unambiguous part of a written text. The natural and ordinary meaning of this phrase can be nothing less than restriction of the right of self-defence to a case where there is an actual armed attack against a State.

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\(^{11}\) D. W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW, 185-6 (1958).

\(^{12}\) Waldock, The Regulation of the Use of Force by Individual States in International Law, 81 RECUEIL DES COURS, 451, at 496 (1952).


\(^{15}\) PHILIP C. JESSUP, A MODERN LAW OF NATIONS, 166 (New York The Macmillan Co 1952).

\(^{16}\) Louis Henkin, Force, Intervention, and Neutrality in Contemporary International Law, 147, at 151, ASIL PROCEEDINGS (1963).

\(^{17}\) See Article 31(1), the Vienna Convention on the Law of Treaties 1969.

\(^{18}\) See Article 32, id.
Armed attack as a requirement for a lawful self-defence is in accord with the consistent jurisprudence of the International Court of Justice. Although the Court has not had before it any concrete case for it to once and for all determine the legality or otherwise of anticipatory self-defence, in all the four landmark cases involving issues of self-defence (Nicaragua, Oil Platforms, Palestinian Wall, Armed activities in Congo cases) it implicitly affirms the requirement of an ‘armed attack’ as a pre-requisite for a lawful self-defence. The jurisprudence of the Court appears to be in favour of a right of self-defence in the event of an armed attack and not in favour of the so-called right of anticipatory self-defence.  

While the overwhelming majority of States does not preach or practice the so-called right of anticipatory self-defence, believing that it would create a dangerous precedent, it is ironic that many writers, some very enthusiastically, support the idea. The old doctrinal debate has resurfaced with stronger vigour after September 11 and many more writers come to support the idea of anticipatory self-defence probably due to the scary threats of terrorism and weapons of mass destruction.

Nevertheless, if one makes a thorough analysis of Article 51 of the UN Charter and the post-UN Charter State practice, supplemented by the jurisprudence of the International Court of justice, one cannot escape from concluding that even in the 21st century world order, there is no place for anticipatory self-defence and self-defence is only lawful in the case of an armed attack. It is, therefore, a settled law that ‘armed attack’ is the first and the most important element of the right of self-defence.

1. Armed attack must be in progress or on-going

According to Article 51 of the Charter, a State can exercise self-defence “if an armed attack occurs” against it. An armed attack, like any other event, “occurs” when it “take[s] place” or “happen[s]” or “exist[s]”. As rightly put by Quigley, the phrase that appears in the four authentic texts of the Charter, other than English, more clearly confirms the

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19 In Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) (Merits), I.C.J. REP. 14, (Judgment of 27 June 1986) [herein after Nicaragua case], the Court very clearly stated that “the exercise of this right is subject to the State concerned having been the victim of an armed attack,” id. at 103, para 195. In the Case Concerning Oil Platforms (Iran v US), 2003 ICI Rep. 161 (6 Nov. 2003) [hereinafter Oil Platforms case], the Court ruled that the “burden of proof of the facts showing the existence of an armed attack rests on the state justifying its own use of force as self-defence.” In the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136 (9 July 2004) [hereinafter Palestinian Wall Advisory Opinion], at 194, para. 139, the Court was even stricter in interpreting Article 51 and concluded that ‘Article 51 of the Charter… recognizes the existence of an inherent right of self-defence in the case of armed attack by one state against another state’. In the Case Concerning Armed Activities on the Territory of the Congo (Congo v Uganda) (Judgment of 19 December 2005) [hereinafter Armed Activities in Congo case], para. 146, the Court noted that “while Uganda claimed to have acted in self-defence, it did not claim that it had been subjected to an armed attack by the armed forces of the DRC.”

meaning that an armed attack must have been commenced or on-going.\textsuperscript{21} The meaning, therefore, is clear and unambiguous. Most publicists support this view.\textsuperscript{22} The International Court of Justice, in the \textit{Nicaragua} case, very clearly stated that: “…the exercise of this right is subject to the State concerned \textit{having been the victim of an armed attack}…”\textsuperscript{23} It is, therefore, well established that for a self-defence to be justified, the armed attack must be an actual and on-going one, that is, the victim State must be under an armed attack.

2. \textit{Retaliation for a prior completed attack is not self-defence but reprisals}

A State that has been the victim of a \textit{completed attack} may not use armed force in response and claim self-defence. A State that does so is said to engage in reprisal rather than in self-defence.\textsuperscript{24} Armed reprisals are contrary to Article 2(4) of the Charter and are illegal.\textsuperscript{25}

\begin{center}
\textbf{B. Necessity and proportionality}
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The principles of necessity and proportionality are at the heart of self-defence in international law.\textsuperscript{26} The Court in the \textit{Nicaragua} case observed that there was a ‘specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well-establised in customary international law.’\textsuperscript{27} In its Advisory Opinion on the \textit{Legality of the Threat or Use of Nuclear Weapons}, the Court emphatically stated that ‘the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.’\textsuperscript{28}

\textit{‘Necessity’} is the second element of self-defence. The reason for stressing that action taken in self-defence must be ‘necessary’ is that the State attacked must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force. In other words, if it had been able to achieve the same result by measures

\begin{itemize}
\item \textsuperscript{21} John Quigley, \textit{The Afghanistan War and Self-Defence}, 37 VALPARAISO UNI. L. REV. 541 at 544 (2003); see also Quincy Wright, \textit{The Prevention of Aggression}, 50 AM. J. INT’L L. 514 at 529 (1956); Sean Murphy, \textit{Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the UN Charter}, 43 HARV. INT’L L.J. 41 at 44 (2002).
\item \textsuperscript{23} \textit{Nicaragua} case, \textit{supra} note 19, para 195 (Italics added).
\item \textsuperscript{24} See Quigley, \textit{supra} note 21, at 543.
\item \textsuperscript{26} MALCOLM N. SHAW, \textit{INTERNATIONAL LAW}, 1140 (Cambridge, 6\textsuperscript{th} ed., 2008).
\item \textsuperscript{27} \textit{Nicaragua} Case, \textit{supra} note 19, at 94, 103.[Emphasis added.]
\item \textsuperscript{28} \textit{Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion}, 1996 ICJ reports 226, at 245 (8 July 1996).
\end{itemize}
not involving the use of armed force, it would have no justification for using armed force in self-defence.\textsuperscript{29}

‘Proportionality’\textsuperscript{30} is the third element of self-defence. It is the general principle of law that the defensive action must be commensurate with and in proportion to the armed attack which gave rise to the exercise of the right of self-defence.\textsuperscript{31}

Cessation of self-defence when the Objectives of Self-Defence have been met:

Kaikobad rightfully observes that the objectives of self-defence are threefold: (I) fending off current, persistent attacks; (ii) fending off and protection from further attacks which constitute an integral part of the continuum of hostilities; and (iii) the restoration of the territorial status quo ante bellum.\textsuperscript{32} The objectives of self-defence are to be carried out as restrictively as possible.\textsuperscript{33} Measures that are not entirely compatible with the stated objectives cannot be regarded as lawful defensive acts. The occupation of the delinquent State’s territory for an indefinite period of time or with the objective of overthrowing its legitimate government are not stricto sensu measures of self-defence and may tend to create delictual responsibility in the defending State. As Rowles observed, if this were not so, it would invite the unrestricted use of force on a grand scale whenever the right of self-defence might be invoked.\textsuperscript{34} Once the above objectives have been achieved, there is a duty to end defensive measures.\textsuperscript{35} This duty to cease defensive measures, even though not a separate element, can be regarded as part and parcel of either ‘necessity’ or ‘proportionality’.

C. The Security Council’s primary role: to report to the SC and to cease defensive action when the SC has taken measures

Article 51 demonstrates the pivotal role for the Security Council in respect of the exercise of self-defence: (1) Measures taken in self-defence shall be immediately reported to the Security Council; and (2) The right of self-defence can be exercised until the Security Council has taken measures necessary to maintain international peace and security.

The important question here is: Is the requirement of reporting to the Security Council mandatory (in the sense that non-compliance with the requirement invalidates

\begin{itemize}
\item \textsuperscript{29} Ago, \textit{Addendum to the Eighth Report on State Responsibility}, 2 (1) Y. B. INT’L L. C. 69 (1980).
\item \textsuperscript{30} For the origins of proportionality see Judith Gail Gardam, \textit{Proportionality and Force in International Law}, 87 AM. J. INT’L L., 391, at 394 (1993).
\item \textsuperscript{31} Jime’nez de Are’chaga, \textit{General Course in Public International Law}, 159 RECUEIL DES COURS 9 (1978); Baxter, \textit{The Legal Consequences of the Unlawful Use of Force under the Charter}, ASIL PROCEEDINGS, 68 at 174 (1968); Combacau, \textit{The Exception of Self-Defence in United Nations Practice}, in \textit{THE CURRENT LEGAL REGULATION OF THE USE OF FORCE}, 9 at 28 (Cassese, ed. 1986); Ago, supra note 29, at 69. See also \textit{Nicaragua} case, supra note 19, at 122, para. 237.
\item \textsuperscript{34} See Rowles, \textit{Secret Wars, Self-Defence and the Charter – A Reply to Professor Moore}, 80 AM. J. INT’L L. 568, at 580 (1986).
\item \textsuperscript{35} See for example \textit{Nicaragua} case, supra note 19, at 122-3.
\end{itemize}
the plea of self-defence), or is it only directory? In the Nicaragua case, the World Court ruled that a State couldn’t invoke the right of self-defence if it failed to comply with the requirement of reporting to the Security Council.36

Another issue that arises is the duration of self-defence. How long does an action in self-defence remain legitimate? When does the right of the victim of an armed attack to take defensive action cease? The provision of Article 51 is clear. The victim State must stop its action in self-defence as soon as the Security Council takes the measures necessary to maintain or restore peace. Therefore, self-defence is merely a temporary measure, subject to the authority of the Security Council to maintain peace and security.

To sum up, the requirements under international law of a lawful self-defence are:
(1) “Armed attack”: The defending State must have been the victim of an ‘armed attack’;
(2) “Necessity of self-defence”: It must be ‘necessary’ (no other choice or no time to resort to the Security Council) for the defending State to use force to fend off the armed attack;
(3) “Proportionality”: The force used must be ‘proportionate’ to the armed attack;
(4) “Primary role of the Security Council”: Defensive measures must be immediately reported to the Security Council and must be ceased when the Council takes measures to maintain peace and security.

II. IS A TERRORIST ATTACK AN ‘ARMED ATTACK’ UNDER ARTICLE 51 OF THE CHARTER?

Article 51 of the Charter of the United Nations contemplates self-defence only ‘if an armed attack occurs against a Member of the United Nations’. As affirmed by the International Court of Justice in the Nicaragua case, “States do not have a right of … armed response to acts which do not constitute an ‘armed attack’”.37

Immediately after the terrorist attacks of 11 September 2001, the former US President Bush considered that they “were more than acts of terror. They were acts of war”. The legal and political strategy of the United States was to place in the same category “those nations, organizations or persons [who] planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons”.38

What is important here is to determine whether this categorization of terrorist attacks as armed attack is in accordance with the rules of international law regulating the use of force or whether terrorist attacks can be considered as constituting ‘armed attacks’ within the meaning of Article 51.

36 Id. at 121.
37 Id. para 110.
A. Meaning of ‘armed attack’: Nicaragua is still Good law

Article 51 restricts the right of self-defence to the case of an armed attack against a State. But what is meant by the term ‘armed attack’? The United Nations Charter, in speaking of the use of armed force, employs different terms: the use of force, threat or breach of the peace, act of aggression, and armed attack.\(^{39}\) It is of major importance to note that Article 51 does not use the term ‘aggression’ or ‘use of force’ but the much narrower concept of ‘armed attack’.\(^{40}\) ‘Armed attack’ is a species of ‘aggression’ or ‘use of force’ but a more severe form and much narrower in scope. All ‘armed attacks’ are also acts of ‘aggression’ or ‘use of force’ but not all acts of ‘aggression’ or ‘use of force’ may reach the status of an ‘armed attack’.

There is no explanation of the phrase ‘armed attack’ in the records of the San Francisco Conference, perhaps because the words were regarded as sufficiently clear. The Foreign Relations Committee of the United States Senate commented as follows on the phrase ‘armed attack’ in Article 5 of the North Atlantic Treaty:

> Experience has shown that armed attack is ordinarily self-evident….; it should be pointed out that the words ‘armed attack’ clearly do not mean an incident created by irresponsible groups or individuals, but rather an attack by one State upon another. Obviously, purely internal disorders or revolutions would not be considered ‘armed attack’ within the meaning of Article 5. However, if a revolution were aided and abetted by an outside power such assistance might possibly be considered an armed attack.\(^{41}\)

According to Brownlie, “it is very doubtful if ‘armed attack’ applies to the case of aid to revolutionary groups…. However, it is conceivable that a coordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the Government of a State from which they operate, would constitute an armed attack.”\(^{42}\)

It is only in the ‘Nicaragua case’ in 1986 that the meaning of the term ‘armed attack’ received the authoritative interpretation. The World Court rejected the assertion of the American administration that the right to self-defence arose not only in response to an armed attack but also in the case of various subversive or terrorist acts, border incidents, or aid to insurgents in another State.\(^{43}\) In his dissenting opinion in the Nicaragua case, Judge Stephen Schwebel (United States) considered the seizure of the American embassy

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\(^{40}\) Kelsen, *supra* note 14, at 498.


\(^{42}\) See Brownlie, *id*.

\(^{43}\) For the view of the US State Department, see A. D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFFAIRS, 919 (1986).
in Tehran in late 1979 to be an armed attack and, accordingly, the American rescue mission aimed at extricating the hostages in 1980 was in the exercise of its inherent right of self-defence.\textsuperscript{44} The World Court rejected such a broad treatment of the concept of ‘armed attack’ and consequently rejected as a basis for self-defence. The ruling of the World Court on the meaning of ‘armed attack’ is in these words:

An armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another State of such gravity as to amount to” \textit{(inter alia)} an actual armed attack conducted by regular forces, “or its substantial involvement therein”.\textsuperscript{45}

The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.

But the Court does not believe that the concept of “armed attack” includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of provisions of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.\textsuperscript{46}

The Court obviously places emphasis for its analysis on the United Nations General Assembly’s 1974 Definition of Aggression.\textsuperscript{47} The definition of armed attack by the Court can be divided into two categories: (1) direct armed attack; and (2) indirect armed attack.

\textit{Direct armed attack by a State}

The most straightforward type of armed attack is that by a regular army of one State against the territory or against the land, sea or air forces of another.\textsuperscript{48} Referring the General Assembly Definition of Aggression, the direct armed attack by a State may include:

(a) The invasion or attack by the armed forces of a State of the territory of another State;\textsuperscript{49}

\begin{itemize}
  \item \textsuperscript{44} Nicaragua case, \textit{supra} note 19, at 349 (dissenting opinion of Judge Schwebel).
  \item \textsuperscript{45} \textit{Id}. at 103-104, para. 195; \textit{see also id}. paras 228, 230 [Emphasis added].
  \item \textsuperscript{46} Definition of Aggression. UN G.A.O.R. 29\textsuperscript{th} Sess., Annex, Supp No 31, at 142. UN Doc. A/ 9631 (1974).
  \item \textsuperscript{47} Christine Gray, \textit{The Use of Force and the International Legal Order}, in \textit{INTERNATIONAL LAW}, 599 (Malcolm D. Evans, ed. 2\textsuperscript{nd} ed., Oxford, 2006).
  \item \textsuperscript{48} General Assembly Definition of Aggression, \textit{supra} note 46, Article 3(a).
\end{itemize}
(b) Any military occupation however temporary, resulting from such invasion or attack,\textsuperscript{49} (military occupation is a form of ‘continued armed attack’, giving rise to the right to use of force against the occupation in the lawful exercise of self-defence’); or
(c) 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 State.\textsuperscript{50}

To be deemed as an armed attack, even the attack by the armed forces of a state of the territory of another State needs to be ‘of sufficient gravity’.\textsuperscript{51} \textit{De minimis} rule applies here. A mere frontier incident, for example exchange of shots between border guards of the two States, cannot be classified as an armed attack.\textsuperscript{52} The meaning of armed attack at sea was considered at some length in the \textit{Oil Platforms} case, where it was held that mining of a United States-flagged military vessel could constitute an ‘armed attack’, but an attack on a ship owned, but not flagged, by the United States did not amount to an armed attack on the State.\textsuperscript{53}

*Indirect armed attack: armed attack by non-State actors which is attributable to a State*

It is clear from the ruling of the World Court that the meaning of armed attack has been expanded to include the cases of the so-called ‘indirect use of force’ or ‘indirect aggression’\textsuperscript{54} (that is the \textit{sending} of armed bands or irregulars which carry out acts of armed forces against another state on a large scale).\textsuperscript{55} The Court emphasizes the fact that the action of such armed bands or irregulars sent by a State can be classified as an armed attack because of its “scale and effects”. In the case of \textit{sending}, a sufficiently close link exists between the State and the private groups so that the latter’s position is nearly that of \textit{de facto} state organs, and if the action carried out by those armed groups are of the required gravity, it seems perfectly justified to hold the sending State responsible for an armed attack.\textsuperscript{56}

However, in addition to the sending itself, the Court considers that the \textit{substantial involvement} of a State in the action of such armed bands or irregulars to carry out acts of armed force against another State may constitute an armed attack. The term “substantial involvement” appears to be a flexible one and if it is not interpreted restrictively, it may make the meaning of armed attack to be blurred. That is why the Court in the \textit{Nicaragua} case restricted the phrase and did not consider “assistance to rebels in the form of the provision of weapons or logistical or other support as an armed attack justifying the use of force in self-defence.”

\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Id. Article 3(b).}
\textsuperscript{51} \textit{Id. Article 2.}
\textsuperscript{52} \textit{Nicaragua} case, \textit{supra} note 19, para. 195.
\textsuperscript{53} \textit{Oil- Platforms} case, \textit{supra} note 19, at 189 and 190.
\textsuperscript{54} \textit{See} Rein Mullerson, \textit{supra} note 39, at 18.
\textsuperscript{55} \textit{Nicaragua} case, \textit{supra} note 19, para 195. This is in accord with the General Assembly Definition of Aggression, which contains in Article 2 a ‘\textit{de minimis}’ rule; \textit{see}, G.A. Res. 3314(29), (1974).
The Court also added that mere knowing assistance to rebels in the form of the provision of weapons or logistical or other support” might involve an impermissible use of force or intervention that can create State responsibility under international law and is thus subject to certain forms of sanction, but would not constitute an armed attack for purposes of self-defence.57

Some writers argue that the meaning of armed attack as formulated by the World Court is not wide enough to be adaptable to the modern terrorist situations.58 Some even go so far as to say that the World Court decision is no more relevant now and has been overruled by the overwhelming situation of September 11.59

The present writer, nevertheless, strongly believe that the Nicaragua decision of the World Court on the meaning of armed attack can be adapted to modern-day terrorist situations, that it is still valid and good law and not in any way altered by the changed circumstances and that it is justified by legal as well as policy considerations.

First, the meaning of ‘armed attack’ as enunciated by the World Court in the Nicaragua case can very well be applied to the modern-day terrorist situation:

1. The Court has expanded the meaning of “armed attack” to go beyond an attack by regular armed forces of a State across an international border (traditional meaning of armed attack) and to include attacks by terrorists or non-State-actors.
2. But to be regarded as an ‘armed attack’ within the meaning of Article 51, non-State actors such as armed bands, irregulars, or terrorists must be sent by or on behalf of a State. This essential requirement clearly indicates the crucial nexus of ‘attribution’ between the State and the non-State actors (terrorists).
3. Two essential elements must be satisfied for a terrorist attack to be qualified as an ‘armed attack’ under Article 51:
   a. Attribution: Terrorists must be either State organs (State-terrorism) or agents of the State (State-sponsored terrorism).
   b. Scale and effects: the attack must be of such gravity as to amount to an actual armed attack conducted by regular armed forces
4. The notion of ‘armed attack’ does not include assistance to terrorists in the form of provisions of weapons or logistical or other support.

The Court’s opinion clearly demonstrates the fact that even knowing assistance to terrorists, much less harbouring, tolerating, or acquiescing, each of which can lead to

57 Nicaragua case, supra note 19, para 228 (‘mere supply of funds’ is not a use of force); id. para 230 (‘provision of arms’ is not an armed attack).
58 Greg Travatio and John Altenburg, Terrorism, State Responsibility and the Use of Military Force, 4 CHICARGO. J. INT’L L., 97 at 105 (2003) (concluding, with reference to Nicaragua and Tehran Hostage cases, that there was compelling evidence that the world community had moved beyond these cases, and that the limiting principles of these cases should be confined to their facts and were not applicable to transnational terrorist groups.)
State responsibility, may not rise to the level of an armed attack. Thus more direct participation, such as the sending or controlling and directing of terrorists during an attack is required. To elaborate further, if a terrorist attack, which reaches the required threshold of ‘scale and effects’, is sponsored by a State (direct participation of a State), it amounts to an armed attack by a State. Nevertheless, such a terrorist attack, which does not reach the threshold of scale and effects, or mere support of terrorists by a State, although it may amount to impermissible use of force, threat or breach of the peace or act of aggression and the responsible State may be subject to every kind of sanction by the victim State or enforcement action (even involving the use of military force) by the Security Council, does not amount to an armed attack which may trigger the right of self-defence.

Secondly, *Nicaragua* decision is still a good law for legal as well as policy reasons. From the legal perspective, as self-defence is an exception to the general rule of ‘prohibition of the use of force’ as enshrined in Article 2(4) of the Charter, which is a rule having the character of *jus cogens*, it has to be interpreted strictly. From the policy point of view as well, as ‘armed attack’ is an essential element of a lawful self-defence, it has to be interpreted strictly in order to be able to avoid abuses and the danger of opening the floodgates. It is self-evident that most of the alleged self-defence claims by States were not genuine and were attempts to abuse the right. Even now there have been quite a number of abuses of the right of self-defence and one can imagine what would happen to the present world if the scope of the meaning of armed attack were widened so as to encompass all types of terrorist attacks and if the threshold of State responsibility were also lowered so as to cover not only direct participation of States in terrorist acts but also various forms of harbouring, tolerating, and acquiescing of terrorists activities.

*B. The SC Resolutions 1368 and 1373 do not unequivocally decide that a terrorist attack as such is an armed attack under Article 51 of the Charter*

Many writers argue that the Security Council Resolutions 1368 and 1373 are epoch-making and that they unequivocally decide once and for all that a terrorist attack constitutes an ‘armed attack’ under Article 51 of the Charter and thus international law in this respect has dramatically changed and that even the consistent jurisprudence of the International Court of Justice, maintaining that Article 51 only talks about ‘armed attack’ by a State or imputable to a State, is wrong. This view has been rampant in publications and media.

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62 DINSTEIN, *supra* note 5, at 204: *Palestinian Wall Advisory Opinion, supra* note 19, 136; Separate Opinion of Judge Higgins, para. 33; separate Opinion of Judge Kooijmans, paras. 35-36.
With respect, it is submitted that the two Security Council resolutions by no means decide that a terrorist attack as such is an armed attack within the meaning of Article 51. The following are the direct quotations from the resolutions:

Security Council Resolution 1368 (12 September 2001)

_The Security Council, …_

_Recognizing_ the inherent right of individual or collective self-defence in accordance with the Charter,

1. _Unequivocally condemns_ in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001…;

3. _Calls_ on all states to work together urgently to bring to justice the perpetrators… of these terrorist attacks …;

5. _Expresses_ its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001…;

6. _Decides to_ remain seized of the matter.

Security Council Resolution 1373 (28 September 2001)

_The Security Council,…_

_Reaffirming also_ its unequivocal condemnation of the terrorist attacks which took place… on 11 September 2001…,

_Reaffirming further_ that such acts… constitute a threat to international peace and security,

_Reaffirming_ the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001), …

_Acting_ under Chapter VII of the Charter of the United Nations,

1. _Decides_ that all states shall:
   (a) Prevent and suppress the financing of terrorist acts; …

2. _Decides also_ that all states shall:
   (a) Refrain from providing all form of support…; …

3. _Calls upon_ all states to: …
   (c) Cooperate…to prevent and suppress terrorist attacks and take actions against perpetrators of such acts; …

A good faith reading of the natural and ordinary meaning of the words of the resolutions in their context without any doubt demonstrates that:

(1) There is nothing in the resolutions which expressly says that September 11 terrorist attacks constitute an ‘armed attack’ within the meaning of Article 51 of the Charter.

(2) The resolutions just reaffirm that September 11 terrorist attacks constitute a threat to international peace and security, which may trigger Security Council enforcement

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measures under Chapter VII of the Charter but have nothing to do with unilateral use of force in self-defence.

(3) It is only in the *preamble* to these resolutions (not in the operative paragraphs) that we can find a vague and casual reference to “the inherent right of self-defence”, without even mentioning the word ‘armed attack’ which is an essential requirement of self-defence under Article 51, and without specifically referring to any State as the perpetrator of the armed attack against which force can be used and the victim of the armed attack which can use force in self-defence.

(4) The Preamble to Resolution 1368 just speaks of “Recognizing the inherent right of individual or collective self-defence in accordance with the Charter”, without any further elaboration. What does it mean? It means nothing more than that the Council recognizes the inherent right of self-defence of States in accordance with the Charter (a very general statement). If the Council actually wanted to express its unequivocal determination that September 11 terrorist attacks constituted ‘armed attack’ under Article 51 of the Charter and that the United States had the legitimate right of self-defence in that particular case, it could very easily have used definitive words to convey that message.

(5) To make the present argument more convincing, the wordings of the above resolutions can be compared with those of the actual determination by the Council of a genuine self-defence situation in respect of the Iraqi invasion of Kuwait. In Resolution 661, the Council affirmed “the inherent right of individual or collective self-defence, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter”.

The Security Council in these resolutions refrains from expressly attributing the September 11 attacks to the Taliban regime. This omission is even more important if we look at the earlier SC Resolutions 1267 (1999) and 1333 (2000) in which the Council made explicit statements in respect of the Taliban, condemning the continuing use of Afghan territory, especially areas controlled by the Taliban “for the sheltering and training of terrorists and the planning of terrorist acts,” allowing Osama bin Laden and his associates to ‘operate a network of terrorist training camps and to use Afghanistan as a base from which to sponsor international terrorist operations.’

Nevertheless, these activities of the Taliban have obviously not been considered grave enough by the Council to establish a sufficient link to a State-sponsored armed attack. On the contrary, we can even infer from the reluctance of the Council to make use of these findings in the context of Resolutions 1368 and 1373 that the mere harbouring of terrorists as such was apparently not reason enough to hold the Taliban accountable for an armed attack. The consistent rejection by the Security Council of the so-called ‘harbouring theory’ (of the United States and Israel) can be found in the successive

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68 S.C. Res. 1267 (1999), para. 6 of the Preamble.

Taking into consideration all these legal and factual uncertainties, one can hardly conclude that the Security Council has approved the applicability of Article 51 of the Charter to the US-led use of force against Afghanistan.\footnote{See Carsten Stahn, \textit{supra} note 56.} It is difficult to positively invoke the two SC resolutions in support of the view that even non-State-sponsored terrorist attacks may amount to an ‘armed attack’, giving rise to the right of self-defence of the State which has been the target of the attack.

The conclusion then is that it is not true at all that the SC Resolutions 1368 and 1373 unequivocally decide that terrorist attacks are ‘armed attack’ within the meaning of Article 51 of the Charter, triggering the right of self-defence of the victim State. At the same time, it is to be noted that the Council does not exclude the possibility that acts of the nature of the September 11 attacks, due to its scale and effect, may come within the ambit of the right of self-defence\footnote{See Frederic L. Kirgis, \textit{Addendum: Security Council Adopts Resolution on Combating International Terrorism}, ASIL INSIGHT (1 October 2001) at \url{www.asil.org/insights.htm}.} provided that there is concrete evidence that they are State-sponsored. If such a situation happened, the attack would be an act of a State and thus squarely fell within the meaning of ‘armed attack’ under Article 51 of the Charter.

\textbf{C. Concluding remarks}

From the foregoing analysis, it can fairly be concluded that as a general rule a terrorist attack as such cannot be an ‘armed attack’ under Article 51 of the Charter and that for a terrorist attack to be classified as an ‘armed attack within the meaning of Article 51 (not an armed attack as understood by a layman), the following requirements must be satisfied:

(1) The terrorist attack must come from a foreign State\footnote{Palestinian Wall Advisory Opinion, \textit{supra} note 19, para. 139.} in the sense that it must be an act of a State or directly imputable to a State\footnote{Nicaragua case, \textit{supra} note 19, para. 195; see also \textit{Oil Platforms case}, \textit{supra} note 19, 161.};

(2) It must be of such gravity as to amount to\’\(\) \textit{(inter alia)} \textit{an actual armed attack conducted by regular armed forces of a State}\footnote{Nicaragua case, \textit{supra} note 19, para 195.} \textit{(the test of scale and effects)};

(3) The armed attack must be in progress or there must be concrete and convincing evidence of imminent further attacks; if the attack is entirely completed, and there is no concrete and convincing evidence of imminent further attacks, force cannot be used in self-defence, and doing so would amount to illegitimate reprisal.

Before examining the issue of State responsibility in the terrorist context, it would be more appropriate to touch upon the very controversial issue of whether a State can use...
force (invoking the international law right of self-defence) against terrorists who are located in another state, which is not at all responsible for the wrongful acts of terrorists.

III. CAN THE INTERNATIONAL LAW RIGHT OF SELF-DEFENCE BE INVOKED AGAINST TERRORISTS AS SUCH

There are in fact various terrorist situations to which various types of responses are called for. First of all, a distinction needs to be made between the so-called ‘domestic terrorism’ and ‘international terrorism.’ When terrorists attack a State from within and no other State is involved, this is a case of domestic terrorism pure and proper. Since it is essentially a domestic matter, Article 51 or the international law right of self-defence does not come to play at all. Only when terrorists strike a State from outside, in particular, from the territory of another State, we can categorise it as ‘international terrorism’.

As far as international terrorism is concerned, that a terrorist attack originates in another State does not mean that that State is necessarily implicated in the attack. For the sake of convenience, it is more appropriate to make a distinction between three main categories of terrorist situations:

1. Terrorist attacks for which another State is directly responsible;
2. Terrorist attacks for which another State is only indirectly responsible; and
3. Terrorist attacks for which another State is not at all responsible.

The legal implications of the first two categories, i.e., terrorist attacks for which a state is directly or indirectly responsible under international law, will be examined in a later section. The present section is concerned with terrorist attacks for which another state is not at all responsible. In this respect, the crucial question that can be raised is whether the international law right of self-defence can be invoked against terrorists located in a foreign country, for whose activities the territorial State is not at all responsible.

The answer is definitely in the negative. No international law right of self-defence can be invoked against terrorists as such. This is due to multiple reasons:

1. Terrorists are non-State actors and Articles 2(4), 51 and other relevant rules of international law governing the use of force or armed conflict are primarily meant for inter-State relations.
2. A good faith interpretation of Article 51 in its context in the light of its purpose and object rules out the exercise of the right of self-defence against mere non-State actors (without any attribution to a State).
3. This interpretation is in conformity with the consistent jurisprudence of the International Court of Justice.
4. International law is still State-centred and State sovereignty is the foundation of all international relations.
(5) If a State uses military force against terrorists located in another State which is in no way imputable for the terrorists attacks, this is a clear violation of the territorial sovereignty of the other State.

(6) Even though there are arguments that swift surgical strikes against terrorists only should be allowed, it is easily said than done and in practice so many lives of innocent people are lost and property damaged due to missile launches or bombings against the so-called terrorist sites.

(7) There are plenty of ways and means to deal with terrorists apart from the international law right of self-defence.

A. Good faith interpretation of Articles 2(4) and 51 of the Charter

There are writers who advocate the thesis that a terrorist attack as such can be regarded as an ‘armed attack’ under Article 51 of the Charter and thus the victim State may use force in self-defence against terrorists located in another State. Their stand is that Article 51 only identify the potential target of an armed attack to be a State and does not specifically state that the perpetrator of that armed attack also needs to be a State. They therefore assume that an armed attack can be carried out by non-State actors.

With respect, it is submitted that it is an unwarranted interpretation of the Charter. It is true that the wording of Article 51 is merely: “if an armed attack occurs against a Member of the United Nations”. Even though it is not expressly mentioned that armed attack must come from a State, the meaning is implicit and it is well understood and established. The armed attack must come from a State, meaning that it must be an ‘act of a State or must be directly imputable to a State’. This is in line with the view of the majority of eminent jurists, the interpretation of the Article in accordance with the canons of treaty interpretation, and the jurisprudence of the International Court of Justice.

B. Has international law changed after September 11?:

The case of Afghanistan

The legal justification for military action in Afghanistan, advanced by both the United States and its principal ally, the United Kingdom, was self-defence. The key question that arises is whether the use of force in self-defence was justified where al-Qaeda, as

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75 See for example Carsten Stahn, supra note 63, at 42 (thinking that the requirement of attributability does not play a role in the definition of armed attack and that it is necessary to break with the conception of Article 51 as a state-centred norm).

76 DINSTEIN, supra note 5, 204.


78 See infra Section IV (A) for the consistent jurisprudence of the International Court of Justice in this respect.
opposed to the State of Afghanistan, was considered responsible for the September 11 attacks. In other words, where individuals, networks or organizations are responsible for an attack, can self-defence be used against them on the territory of another State, even where their actions cannot be attributed to that State? Does the case of Afghanistan suggest that non-State actors can be responsible for an ‘armed attack’ and that State responsibility is no longer a prerequisite for the use of force in self-defence?

The legality of the use of force in Afghanistan by the US and its allies was hotly debated among commentators and they were deeply divided. Some argued for while others argued against the US use of force. Those who opposed the US use of force against Afghanistan argued that the September 11 attacks were not armed attacks under Article 51.79 Some argued that the perpetrators were terrorists (non-State actors), not State organs or agents of Afghanistan, and Afghanistan was not directly imputable for their acts. They rejected the harbouring theory and stated that the use of military force against a State that merely harboured terrorists or was unable to control misuse of its territory, in the absence of direct involvement in the attack, would be impermissible.80 Some commentators expressed the view that although the initial use of force by the US and its allies were not unlawful because the attacks were attributable to Afghanistan but later acts of use of force after the Taliban fell in December 2001 violated the law of necessity and proportionality.81

On the other hand, there were commentators who believe that September 11 terrorist attacks could be regarded as an ‘armed attack’82 and that it was lawful for the victim State to use force against the State which harboured the terrorists.83 Many of these commentators concluded that the existing international law on the use of force could be taken to have been changed and the notion of the right of self-defence broadened.84 Their main contention is the possible emergence of a new rule of international law by virtue of

81 See Mary Ellen O’Connell, Lawful Self-Defence to Terrorism, 63 UN. PITT. L. REV. 889 at 904 (2002).
84 See, for example, Antonio Cassese, Terrorism is also Disrupting Some Crucial Legal Categories of International Law, 12 (5) EUR. J. INT’L L., 993-1001 (2002).
a precedent-creating practice of the sole superpower, supported by or abstained from criticism of most of the States.

It is true that most States did not oppose or openly condemn the use of force against Afghanistan. There are several reasons for this. First, the September 11 incident was a tragedy not only for the US but also for the international community and therefore the use of force to attack Al Qaeda terrorists who were allegedly responsible for the attacks had a just cause and could even be said as a just war (absent regime change motive and absent killing innocent Afghan people). Second, most States did not recognize the Taliban regime and had no diplomatic ties with it; due to gross violations of human and women rights and destruction of cultural heritage, most States disliked the Taliban. If the use of force were not against the Taliban, but against another sovereign State, the reaction of the international community would certainly be different. Third, the United States appeared to have been given leeway with respect to its initial reaction to September 11 because of the gravity of the attack. Fourth, in the face of a challenge of the sole superpower that ‘if you are not with us, you are against us,’ no country in the world would risk its own national interest to openly oppose it.

Therefore, the absence of protest against the use of force in Afghanistan could not constitute ‘acquiescence’ by States (in the absence of the required opinio juris). It could not create a normative precedent, which might evolve into a new rule of customary international law. The opinion of the ICJ in the Palestinian Wall case, given after September 11, is a clear reaffirmation of the established law that self-defence arises in response to an attack by or on behalf of a State. This decision was not simply a majority one, as painted by some commentators, but the almost unanimous decision of the most eminent international law experts of the present-day world. Thus international law is intact in this respect and to be a legitimate self-defence under Article 51 of the Charter, ‘armed attack’ is an essential requirement and it must come from or be attributable to a State.

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86 States here means official circles in States. Various private actors, from political parties to student groups to journalists to academics, protested the US action. See Steven R. Ratner, Jus ad Bellum and Jus in Bello After September 11, 96 AM. J. INT’L L., 905 at 909 (2002).
87 Nevertheless, strong condemnations were made by Iraq, Sudan, and North Korea, stating that an attack on the people of Afghanistan for the acts of terrorists was unjustified. Condemnations were also made by Iran, Cuba, and Malaysia. Vietnam voiced concerns over the attacks. See id., at 909-10.
88 ABDUL GHAFUR HAMID @ KHIN MAUNG SEIN, PUBLIC INTERNATIONAL LAW: A PRACTICAL APPROACH, 471 (Kuala Lumpur, Pearson-Prentice Hall 2nd ed. 2007).
89 See the State of the Union Speech by the United States President, 20 September 2001: ‘Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbour or support terrorism will be regarded by the United States as a hostile regime’, available at <http://www.whitehouse.gov/news/releases/2001/09/200109208.html>, (last visited September 25, 2010).
90 Palestinian Wall Advisory Opinion, supra note 19, para 139.
C. International law remains State-centred despite the terrorist situation

International law is primarily the law that governs inter-State relations although individuals can have certain rights and duties under it. The 21st century international law necessarily remains State-centred and State sovereignty is still its foundation. Despite the fact that terrorism has come to the forefront, whenever we talk about the use of force we mean inter-State use of force. The entire Charter system is founded on the inter-State use of force. Article 2(4), the most important provision of the Charter in this respect and a rule having the character of *jus cogens*, provides for the prohibition of the use of force in “international relations,” which clearly means the use of force by one State against another State. If the general rule is restricted to the prohibition of the inter-State use of force only, it is total absurdity to interpret the exceptions to this general rule to mean use of force by non-State actors without the attribution of a State.

The exceptions to this prohibition can be found in Chapter VII of the Charter that uses the terms - measures against ‘act of aggression’ (Article 39) and ‘armed attack’ (Article 51) - both of which are narrower in scope than the term use of force. ‘Aggression’ is a grave type of use of force and ‘armed attack’ is a more severe form of ‘aggression’. If we read them in the context of the Charter, both aggression and armed attack can mean nothing less than severe forms of use of force by one State against another State. This is the interpretation of the phrase “if an armed attack occurs against a Member of the United Nations” in good faith in accordance with ordinary meaning of the terms in their context in the light of its aim and purpose.92

D. Serious legal implications may arise from the recognition of terrorists as parties in an armed conflict situation

The history of international law is full of attempts at widening the scope of the right of self-defence, the latest of these being the claim of the right of self-defence against terrorists. This claim has become rampant in particular after September 11. The proponents of such a claim, however, fail to consider the fact that as terrorists are non-State-actors, the claim definitely raises the status of terrorists to full-fledged subjects of international law, possessing rights and duties under international law in the same way as sovereign States. It has been argued that a State can use force against terrorists in self-defence but these terrorists are devoid of any rights under international law, in particular under international humanitarian law and human rights law.93 They argue that terrorists are ‘unlawful combatants’ and thus are denied all protections under the Four Geneva

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92 See Article 31, the Vienna Convention on the Law of Treaties 1969
93 See Steven R. Ratner, *The War on Terrorism and International Humanitarian Law*, 14 MICHI. ST. J. INT’L L., 19 (2006) (stating that “the United States government is trying to have it both ways. It is asserting various rights to commit armed acts against terrorists under *jus ad bellum*, the law on recourse to force, notably the right of self-defense; however, it denies the applicability of international humanitarian law, *jus in bello*”).
Conventions and the Two Additional Protocols\textsuperscript{94} (in fact there is no such thing as ‘unlawful combatants’ under the international law of armed conflict and no human being is left unprotected by the law). They also argue that as terrorists are worst enemies of mankind they are not protected by fundamental human rights; they can, for example, be tortured to get information from them and can be detained without trial (Abu Gharaib Prison scandal and Guantanamo Bay detention are good examples).

These arguments are fundamentally flawed and contrary to well established international law rules. If we have to accept such a claim of self-defence against terrorists, international law of armed conflict or the law regulating the use of force has to be entirely overhauled or restructured; that is, we need to make revolutionary changes of a number of fundamental precepts of international law, the accomplishment of which is very much unlikely in the present state of the international community.

\textbf{E. Concluding remarks}

It can, therefore, be fairly concluded that the so-called right of self-defence against terrorists is not supported by legal as well as policy considerations. Terrorists can be dealt with by so many other ways and means and law enforcement measures but not by invoking the notion of self-defence, which is meant only for inter-State relations. Whenever there is a terrorist attack we need to consider whether a particular State is imputable to the attack in order to determine the applicability of the right of self-defence under international law.

\textbf{IV. TO BE AN ‘ARMED ATTACK’ THE ‘TERRORIST ATTACK’ MUST BE ATTRIBUTABLE TO A STATE: THE ISSUE OF STATE RESPONSIBILITY}

It is now clear beyond reasonable doubt that the crucial legal nexus to be established between terrorist attacks and the right of self-defence of a State is the linkage of ‘State responsibility’: whether the terrorist attack is attributable to the State and to what extent it is attributable in order that it can be regarded as an act of the State.

\textbf{A. Consistent jurisprudence of the International Court of Justice:}
‘armed attack’ must come from or be imputable to a State

\textit{Nicaragua} case (1986)

As has been stated earlier, the International Court of Justice in the \textit{Nicaragua} case authoritatively enunciated the meaning of ‘armed attack’ to include an action of a State by its regular armed forces across an international border, the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed

\textsuperscript{94} See id., (illustrating the US government’s stance with squaring the circle through the notion of illegal or unlawful combatant, under which a state can kill somebody without affording them the full protections.)
forces against another State on a large scale, or the State’s substantial involvement in these acts. The Court very clearly rules that to be an armed attack under Article 51 of the Charter, the attack must come from a State in the sense that it must be an act of the State or imputable to the state. Without attribution to a State, the act of rebels or private armed bands or terrorists does not as such constitute an armed attack within the meaning of Article 51 of the Charter.

*Oil Platforms case (2003)*

In the *Oil Platforms* case, the International Court of Justice reaffirmed its position that only when an armed attack is imputable to a State can the victim State exercise self-defence against that State; the judgment reads:

> In order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible.

The Court went on to say that “in view of …the inconclusiveness of the evidence of Iran’s responsibility for the mining of the USS Samuel B. Roberts, the Court is unable to hold that the attacks on the …platforms have been shown to have been justifiably made…”

*Palestinian Wall Advisory Opinion (2004)*

Despite the view of some writers to the contrary, the ICJ has, even after September 11, reiterated its view in 2004 in the *Palestinian Wall Advisory Opinion* that “Article 51 of the Charter… recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State” and went on to say that “Israel does not claim that the attacks against it are imputable to a foreign State.” It is an unequivocal reaffirmation of its consistent jurisprudence that ‘armed attack’ under Article 51 must come from a sovereign State; in other words, it must be an ‘act of a State’, or a State must be imputable for the armed attack.

This is a very recent ruling (pronounced after September 11 terrorist attacks) of the World Court made by almost unanimous decision. Out of the fourteen concurring judges, all the thirteen Judges of the World Court (that is, excluding Judge Higgins)
concur on this point.\footnote{Judge Kooijmans agrees with the Judgment and states that the statement (that Article 51 recognizes the existence of an inherent right of self-defence in the case of an armed attack by one state against another state) is undoubtedly correct and that it has been the generally accepted interpretation for more than 50 years. However, the learned judge makes a reservation and states that Resolutions 1268 and 1373 created a new element and that the Court should not by-pass this new element; see Palestinian Wall Advisory Opinion, above note 36, Separate Opinion of Judge Kooijmans, paras. 35-36.} Although Higgins in her Separate Opinion expresses her reservation in this respect,\footnote{Id. Separate Opinion of Judge Higgins, para 33.} the learned judge very clearly admitted that this statement of the Court must be regarded as a statement of the law as it now stands.

*Armed Activities in Congo (2005)*

This is the most recent case, where self-defence was a main issue, decided by the International Court of Justice. The Court rejected Uganda’a claim of self-defence for its attacks against the Democratic Republic of Congo (DRC) in these terms:

> While Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The “armed attacks” to which reference was made came rather from the ADF\footnote{Allied Democratic Forces (ADR) is a non-State actor.}….there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC… The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.\footnote{The only dissenting judge was judge *ad hoc* Kateka, appointed by Uganda.}

Again, the International Court of Justice reaffirmed the established law that for a State to rely on the right of self-defence, the armed attack must come from another State or at least be attributable to that State. This is a land mark decision decided by 16 votes to 1 (almost unanimous).\footnote{However, Judge Kooijmans again made the same reservation as in the Palestinian Wall Advisory Opinion. See Armed Activities in Congo, *supra* note 19, Separate Opinion of Judge Kooijmans, paras. 28-29.} Unlike in the *Palestinian Wall* Advisory Opinion, even Judge Higgins this time did not attach any separate opinion, apparently supporting the law that it now stands.

The conclusion then is that in order for a use of force against a State on account of terrorist attacks to be lawful, it must be proven beyond reasonable doubt that the terrorist attacks must be tantamount to an ‘armed attack’ under international law, and it must be an act of a State or attributable to a State.
C. Different levels of State responsibility and the right to use force in self-defence

Whenever there is a terrorist attack, the law of State responsibility plays a decisive role. International law is primarily concerned with States and even in the 21st century, it remains State-centred. Sovereignty is sacred for all States. We can take actions or countermeasures against a State only when it is responsible under international law. Two elements must be satisfied in order that a State is responsible under international law: (1) attribution; and (2) breach of an international obligation. “Attribution” here means the wrongful conduct must be attributable or imputable to the State.

According to the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, a conduct is attributable to the State if it is done by State organs, those who are exercising elements of governmental authority, those who are in fact acting on the instructions of, or under the direction or control of a State. The fact is that a State is an abstract entity and it cannot act on its own. It has to act through its organs or agents. An action or omission of an organ or agent of a State is regarded as an act of that State, or directly attributable to the State. However, sometimes a State may not be directly attributable but may be indirectly attributable for an internationally wrongful act. For example, a State may actively support, or tolerate terrorists or simply unable to deal effectively with terrorists. In other words, there may be different levels of State involvement or support in the terrorist activities and it would not be fair to allow the use of military force in self-defence in all these different levels of responsibility of a State.

It is a fact that a State violates international law if it involves in acts of international terrorism. Nevertheless, it is generally accepted that the mere violation by one State of a duty owed to another State under international law does not justify the use of military force by the victim State. This is a well-established principle of international law affirmed by the International Court of Justice in the Corfu Channel case. In this case, the United Kingdom engaged in a forcible minesweeping operation in the Corfu Straits,

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109 Article 4, id.
110 Article 5, id.
111 Article 8, id.
113 See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, UN Doc. A/8018 (1970), (declaring that “Every state has a 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 in its territory directed toward the commission of such acts”).
115 Corfu Channel case (Albania v UK) 1949 ICJ Reports 4.
which were within Albanian territorial waters in order to establish free passage and to enforce Albania to comply with its international obligation in respect of illegal mining of the strait. The International Court of Justice found that Albania’s actions were a violation of its responsibility under international law. It was held, however, that the fact that Albania’s actions were violations of international law did not by itself justify the use of military force by the United Kingdom.

It would, therefore, be incorrect to say that the unilateral use of force in the name of self-defence is justifiable in whatever terrorist attack for which a State is in one way or another responsible. It is imperative that we need to make a distinction between two types of State responsibility for terrorist attacks:¹¹⁶

(a) Terrorist attacks for which a State is directly responsible (committed by State organs or agents of the State or was done under the direction or control of the State) and, due to its scale and effect, are tantamount to an armed attack under Article 51 of the UN Charter; in such a situation, as Article 51 requirements of ‘armed attack’ is satisfied, the use of force in the exercise of self-defence would be lawful.

(b) Terrorist attacks for which a State is only indirectly responsible (by merely harbouring terrorists, or by failing to exercising due diligence to suppress terrorism) and in these situations as terrorists cannot be regarded as agents of the State, the use of force in self-defence would not be lawful. However, it is still a violation of international law and various remedies or sanctions, short of the use of force, are available to the victim of the attack.

In other words, in the case of a terrorist attack which does not amount to an armed attack under Article 51 because of its scale and effect and/or because a State is not directly responsible for the attack, self-defence is not a lawful response but the victim of the attack is open to a number of remedies including the Security Council authorization of the use of force, peaceful means of enforcement (recourse to international courts and tribunals, arbitration), and coercive means of enforcement (countermeasures, retorsion, and reprisals).

V. ALTERNATIVES TO SELF-DEFENCE

Even in cases where the conditions for self-defense are not met, a State still has three options: it can seek Security Council authorization for the use of force; it can employ coercive countermeasures; or it can resort to domestic criminal justice system.¹¹⁷

A. Security Council authorization for the use of force

The Security Council may authorize the use of armed force when it finds a threat to the peace, breach of the peace, or act of aggression. The Council may respond with the use of force to a broader range of violence than may States acting in self-defense do because it may respond to mere threats, and not just armed attacks.

B. Resort to criminal justice system

Where the right of self-defense against a State is not triggered and where the Security Council does not act, the other alternative for a victim of terror is the domestic criminal justice system of States. Individuals and groups carrying out attacks without the sponsorship of a State are common criminals. They clearly fall under the jurisdiction of the State on whose territory they are found: IRA terrorists in the United States are examples. Territorial States have an obligation to extradite or try individuals accused of terrorism. If the terrorist attacks amount to international crimes such as crimes against humanity or genocide, the international criminal justice system can also be invoked and the international criminal tribunals like the International Criminal Court will come into a prominent role.

C. Coercive countermeasures

Failure to fulfill obligations in international law, including obligations to try or extradite accused terrorists, may give rise to the right to take countermeasures. Countermeasures are also the option for a State responding to another State’s use of violence or even armed force, if the act is a single incident, rather than an on-going series. In such a case, a State may use countermeasures until the wrongdoer ceases the wrong and provides a remedy. The most common form of countermeasure is economic sanctions. Appropriate remedies can include compensation and assurances of non-repetition.

Countermeasures may be taken by the injured States but in the case of a breach of an obligation *erga omnes*, it may be lawful for any State to take measures. The attacks of September 11 involved the intentional killing of so many innocent people that they

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118 Articles 39 and 42, the Charter of the United Nations.
120 On the rules of jurisdiction in international cases, see *Jurisdiction, Library of Essays in International Law* (W. Michael Reisman ed., 1999).
122 See Articles 6 (Genocide), 7 (Crimes against humanity), and 25 (individual criminal responsibility), the Rome Statute of the International Criminal Court, (Document A/CONF.183/9 of 17 July 1998, entered into force on 1 July 2002).
123 See Articles 49-52, *Articles on Responsibility of States, supra note `108.
124 Id., Articles 40-41.
qualify as crimes against humanity, which are universal jurisdiction crimes.\textsuperscript{125} Any State’s courts should be able to exercise judicial jurisdiction over persons accused of universal jurisdiction crimes.\textsuperscript{126} Any State may enforce the law prohibiting such crimes by taking countermeasures.

\section*{VI. HOW TO EFFECTIVELY COMBAT INTERNATIONAL TERRORISM}

Terrorists are the common enemy of mankind. But we must be wise, rational, and objective if we want to be successful in combating international terrorism. The following are factors that are crucial to effectively combating international terrorism.

\subsection*{A. Addressing the underlying causes that allow terrorism to thrive}

Counter-terrorism takes two forms. One is curative and involves such measures as diplomacy and police work. The other is preventive and looks at eradicating the root causes of terrorism.\textsuperscript{127} Because terrorists rely on a friendly environment, and because such an environment is created culturally and politically, any counter terrorist strategy must focus on transforming this environment so that wherever terrorists go they will be opposed. This requires ‘prevention’, including ‘addressing the root causes of terrorism.’ Not everyone agrees on what the root causes of terrorism are but everyone agrees that any serious counter-terrorism effort must at least address, if not eradicate, circumstances under which terrorism flourishes.\textsuperscript{128}

It is not actually easy to identify the underlying causes of terrorism. Terrorism is a tactic employed by many different groups in many parts of the world in pursuit of many different objectives. At any rate, the basis for the identification of the root causes of terrorism appears to be the General Assembly Resolution 42/159, which:

urges all States …to contribute to the progressive elimination of the causes underlying international terrorism and to pay special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien domination and occupation, that may give rise to international terrorism….\textsuperscript{129}

The General Assembly Resolution identifies the four root causes of terrorism:

\begin{itemize}
\item[(1)] Colonialism;
\item[(2)] Racism;
\end{itemize}

\begin{footnotes}


\textsuperscript{128} Id. at 220.

\end{footnotes}
(3) Mass and flagrant violation of human rights and fundamental freedoms; and
(4) Alien domination and occupation.

Emphasis should be placed on ‘Alien domination and occupation’ as a root cause of terrorism because it involves political violence against an entire group of civilians. Not only being a root cause, the occupation itself is a form of terrorism, known as ‘State terrorism’. To acknowledge ‘foreign occupation’ as a root cause of terrorism is significant and it should also be stressed here that this resolution was adopted by the entire international community minus only two States: the U.S. and Israel.\(^{130}\)

Are there any other underlying causes of terrorism apart from the ones mentioned in the above resolution? The leader of Christianity the late Pope John Paul II appealed to world leaders to combat terrorism by fighting its roots, especially injustice and oppression.\(^{131}\) There is no doubt that ‘injustice’ and ‘oppression’ should also be regarded as the root causes of terrorism.

A striking example of ‘injustice’ is the total neglect and inaction on the part of the United States, the EU, and other powerful countries of the decades-old plight and sufferings of the Palestinian people at the hands of Israel.\(^{132}\) The continued Israeli occupation of Palestinian territories is one of the most important elements of instability, terrorist recruitment, and anti-American sentiment in the world.\(^{133}\) America’s long-standing support for Israel allows terrorist leaders like bin Laden to proclaim American complicity in Israeli human rights abuses, extra-judicial killings, illegal settlement expansions, and illegal land confiscations.\(^{134}\)

If the international community could settle the Palestinian problem and allow the establishment of a peaceful and stable Palestinian State side by side with Israel, the Middle East would become a safer place for its people and it would definitely be a fatal blow to the terrorist propaganda and agenda.

Attacking the root causes of terrorism is an often discussed but a seldom practiced concept. Addressing the problem would require extensive diplomatic efforts, long-term economic growth plans, and significant social and cultural adjustments.\(^{135}\)

\(^{130}\) The Resolution was adopted by 159 voted for, 2 voted against (US and Israel) and 1 abstention.


\(^{135}\) Kevin J. Fandl, Terrorism, Development & Trade: Winning the War on Terror Without the War, 19 AM. UNI. L. REV. 587, at 604-05 (2004).
The international community has not made a great deal of progress in tackling the underlying causes. Instead, we have concentrated on fighting the symptoms only and, in doing so, have enormously exacerbated the problem and swelled the ranks of terrorists. If we have learnt anything in the nine years since September 11, it is that addressing the symptoms does not work. A military response to terrorism did not work for the Russians in Chechnya, the Israelis in Lebanon, the British in Northern Ireland and it is not working for the US in Iraq – in spite of the asymmetry of power in each instance.\(^{136}\) Many people including counter-terrorism experts have come to the conclusion that the military is too blunt an instrument to be exclusively relied upon to combat terrorism.\(^{137}\) Sheer military might does not win hearts and minds of the people - an indispensable factor in blocking recruits for terrorists.

**B. The use of military force: not always the correct answer to battle terrorism**

Under Chapter VII of the Charter, the Security Council is entrusted with the authority to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to decide what enforcement measures should be taken.\(^ {138}\) If there is a situation that may likely to endanger peace and security, a State has no right to use force but to settle it by peaceful means, including submitting it to the Security Council.\(^ {139}\) Due to this overriding authority of the Security Council, Article 51 limits the right of self-defence to an ‘armed attack’ which is specie of ‘aggression’ but a more severe type. Only when there is an armed attack or a severe type of aggression by another State, the victim State may use force in self-defence. Even then that State must immediately report the situation to the Security Council and once the Council has taken measures, the victim State must cease its use of force.\(^ {140}\) Anticipatory self-defence is simply not consistent with this Charter system of maintaining international peace and security, according to which a State cannot use force in anticipation of a future attack (even though it may be imminent) and a State facing with a threat or danger of attack has still the obligation to use alternatives to force and seek the assistance of the Security Council to take measures against the potential aggressor.

Therefore, the central theme of the entire UN Charter system is to avoid war, maintain peace, give the highest value to collective measures under the authority of the

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136 See Arunabha Bhoumik, 33 DENVER J. INT’L L. & POLICY, 285, at 344 (2005) (stating that “The U.S. government should be the most inclined to examine the root causes of terrorism, rather than employing the war mentality it has adopted to combat terrorism. There is a seemingly endless supply of recruits to anti-American causes due to a variety of U.S. policies. These have included: (1) support for repressive regimes in the Middle East, including Saudi Arabia, (2) unconditional U.S. support for Israel, and (3) indifference to the plight of Muslims in Chechnya, Kashmir, and the Balkans. The war on terror, including the invasion of Iraq in spring 2003, has given more ammunition to the anti-American cause.)

137 Article 39, the Charter of the United Nations.

138 Chapter VI, id.

139 Article 51, id.

140 Article 51, id.
Security Council to remove threats to the peace and acts of aggression, and keep unilateral use of force by States to a minimum. It is crystal clear that according to the Charter scheme the right of self-defence or unilateral use of force is a narrow exception to the general prohibition of the use of force and should be construed and applied narrowly within strict limitations and restrictions.

Terrorists have no international personality. They are non-State actors and they have no territory of their own. They may be nationals of different countries. They may have cells or hideouts in different countries. Certain countries may tolerate or harbour these terrorists. Even if a large-scale attack of these terrorists were regarded as an armed attack, how would the victim state use military force in self-defence against these terrorists? The terrorists might be hiding in a secluded area of a State without the latter’s knowledge. If the victim State in the alleged exercise of self-defence invaded the State where terrorists were hiding to destroy the terrorist cells or bombarded their hideouts, it would very clearly amount to a violation of the territorial sovereignty of the latter State.

The nay sayers may argue that ‘in the name of war on terrorism’ States should tolerate an invasion of its territory for a certain period of time (without actually occupying the territory) to attack the terrorists or just a few missile attacks or bombardments against terrorists that are hiding in their territories. One can nevertheless imagine the far-reaching negative consequences of such a comprehensive permission of the use of military force in self-defence in the name of combating terrorism. Suppose that secretive terrorist cells, based in somewhere in the United States, attacked and destroyed the Russian National Space Headquarters. Suppose again that the Russian Government regarded this as an ‘armed attack’ against Russia and launched missile attacks, in the exercise of self-defence in accordance with Article 51 of the Charter, against that part of the US territory where the terrorists were supposed to be hiding. Would the US Government tolerate this and accept this as a lawful use of military force? Would the patriotic Americans tolerate this and accept this with open arms because this amounted to a lawful exercise of self-defence by Russia?

What would happen to the international community and the contemporary world order if the traditional international law on self-defence were replaced by a new law according to which each and every terrorist attack were regarded as an ‘armed attack’ and allowed the victim State to use military force against these terrorists without taking into consideration the attributability nexus between the terrorists and the State where they were in. India, for example, would attack Pakistan on the ground that the perpetrators of the Mumbai bombing were Pakistani terrorists. The United States would attack Saudi Arabia because most of the 11 September terrorists were Saudi nationals. The United Kingdom would attack Pakistan because the culprits of London bombing were originated from Pakistan. Indonesia would attack Malaysia because the mastermind behind Bali bombing was a Malaysian terrorist. With the growing increase in terrorist attacks in the world, there would be unending use of military force. If we chose the warpath for whatever we do when will there be peace.
Let us take lessons from the three contemporary experiences of the military adventurism in the name of combating terrorism: the use of force in Afghanistan after September 11, the US invasion of Iraq in 2003 and the most recent Israeli invasion of Lebanon in 2006. Are all of these success stories? Did the use of force achieve the desired result of eradicating terrorism? Has the world become a safer place because of these uses of military force?

Even if the initial use of force by the US in Afghanistan after September 11 were accepted as lawful, a significant number of international legal scholars conclude that the US response which went beyond Al-Qaeda to encompass toppling the Taliban and secure regime change violates the doctrine of proportionality.\textsuperscript{141} The invasion of Iraq was founded on an unsubstantiated claim of link to Al-Qaeda and stockpiles of WMDs. Here again there was a regime change and Saddam Hussein was dethroned. Israel invaded Lebanon in 2006 to destroy Hezbollah militants because of their alleged terrorist attacks against Israel. Lebanon’s territorial sovereignty was violated but the invasion could not annihilate Hezbollah. In all three major incidents, what is very clear is that the objective to eradicate or at least to put under control terrorism was not at all achieved. Rather, these incidents have now been seen by many as grounds that fan the terrorist fire and cause more terrorist networks to spread around the world. The world has not become a safer place but rather a more dangerous one to live in.

**C. The need to strengthen multilateralism**

Some governments and media, perhaps in furtherance of their own agenda, have raised the issue of terrorism to the highest level to the extent that there is no important matter in the present world other than terrorism. According to them, to combat terrorism is much more important than compliance with fundamental human rights and the sacred principles of international law.

Everybody accepts that terrorists are enemies of mankind, and to combat terrorism is so important. However, what cannot be accepted is to use military force arbitrarily and unilaterally against a sovereign State on the ground of combating terrorism and in the name of self-defence, totally disregarding the well-established principles of international law,\textsuperscript{142} which is the very foundation of the contemporary world order. Once this foundation is destroyed, then the present world order will become hegemonic or anarchistic. As Professor Drumbl has rightly put:

> A collective institutional response to terrorism may be more effective than ad hoc unilateralism or narrow coalition building. It may be difficult to prevent ad hoc unilateralism from devolving into self-interested opportunism. Who defines what is an armed attack? A ‘threat to the peace’? Who defines when,

\textsuperscript{141} Jackson Nyamuya Maogoto, Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror, 122 (Ashgate Aldershot 2005).

\textsuperscript{142} See Michael Bothe, Terrorism and the Legality of Pre-emptive Force, 14 EUR. J. INT’L L., 227, at 233 (2003) (pointing out that: ‘[a] usual procedure to modify customary law is to break it and to accompany the breach by a new legal claim’).
where, how, and why the use of force can be initiated to contain (or punish) rogue states? If the US can use extensive military force to respond to terrorism, there is no principled basis to deny others that entitlement.\textsuperscript{143}

Therefore, terrorism, even though so dangerous, cannot have any normative effect. Terrorism can be dealt with effectively without the necessity of breaking or bending the law. The truth is that international terrorism cannot be successfully wiped out unilaterally or by means of unilateral use of force.\textsuperscript{144} It has international dimension and collectivity is the only answer to combat international terrorism. The best way to combat international terrorism is by means of collective will of States through the proper UN bodies, in particular the Security Council and the General Assembly, and the appropriate regional organizations.

The 60\textsuperscript{th} Session of the UN General Assembly was unique because it was an extraordinary session marked with the High Level Plenary Meeting of the World Leaders (the World Summit 2005). The General Assembly Resolution 60/1 adopted the 2005 World Summit Outcome.\textsuperscript{145} In the Resolution, the world leaders agree that:

\begin{quote}
We reiterate the importance of promoting and strengthening the multilateral process and addressing international challenges and problems by strictly abiding by the Charter and the principles of international law, and further stress our commitment to multilateralism.

We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain international peace and security…\textsuperscript{146}
\end{quote}

The consensus of the world leaders at the World Summit is unequivocal that ‘multilateralism’ is the only answer to combating international terrorism. Despite the flaws of the United Nations, no one has proposed a better system for the maintenance of international peace and security. The Charter-based system of world order can very well serve the international community even after the September 11 terrorist attacks and in the context of the 21\textsuperscript{st} century world order. States, especially the United States and other Big Powers, should initiate a policy of strong adherence to the Charter and help make the Security Council central to the international community’s response to the threats to international peace and security, be they terrorists or failed States. Only in this way can we save our succeeding generations from the scourge of war.

\textsuperscript{143} Mark Drumbl, Victimhood in Our Neighbourhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal order, 81 NOR. CAROLINA L. REV., 1, 32-33 (2002).
\textsuperscript{144} See Jackson Nyamuya Maogoto, supra note 129, 193 (stating that the modern terrorists function in loose-knit cells and the fight against terrorism cannot be purely by force).
\textsuperscript{145} G.A. Res. 60/1, 2005 World Summit Outcome, UN Doc. A/RES/60/1, 24 October 2005, para. 72.
\textsuperscript{146} Id., paras 78-79.
CONCLUSION

The right of self-defence of States is in fact a sacred principle, meant for the protection of countries that are small and weak from the aggression of powerful countries. Nevertheless, what is ironic in the extreme is that throughout the period of over sixty years after 1945, only the Big Powers or militarily strong countries dearly invoked this right of self-defence as justification for their uses of force against other countries. To justify their uses (or rather abuses) of force, the powerful countries invariably referred to Article 51 of the Charter of the United Nations.

What makes the matter worst is that after September 11 there have been attempts to reinterpret the meaning of ‘armed attack’ under Article 51 of the UN Charter to include attacks by terrorists - non-State actors - and thus rendering the use of force against terrorists, or against a State that harbours terrorists, a lawful exercise of self-defence. The United States used force in Afghanistan in the name of self-defence against terrorists. The Taliban regime was replaced by a new pro-Western one. Israeli invaded Lebanon in 2006 and the justification was the so-called terrorist attacks by Hezbollah. The US is threatening to use force against Iran because of its nuclear ambition and its alleged support of terrorist activities in Iraq.

The present paper reevaluates the international law of self-defence to determine whether it is applicable to a terrorist situation, and if so how and to what extent. The paper concludes that as a general rule the international law of self-defence is not applicable to a terrorist situation. This is because as terrorists are non-State actors, they cannot be treated on the same footing as sovereign States and criminal law enforcement is most appropriate for them. The right of self-defence is only applicable in an inter-State situation and thus whenever there is a terrorist attack, we need to examine whether a State is responsible under international law to the extent that the terrorist attack can be regarded as an act of that State. For mere harbouring the terrorists or failing to exercise due diligence to suppress terrorism, it is not justified to use force against the responsible State in the name of self-defence although a number of other remedies are available to the victim of the attack, such as authorization of the Security Council to use force and peaceful and coercive means of enforcement. Only in an exceptional situation of a State directly responsible for a terrorist attack, which is of a large scale and has substantial

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147 The following are the major incidents in which self-defence was claimed: (1) The Anglo-French Invasion of Suez (1956); (2) The Cuban Quarantine (1962); (3) The Vietnam War (1964-1973); (4) The Six Day War (1967); (5) The Entebbe Raid (1976); (6) The Soviet Intervention of Afghanistan (1979); (7) The US rescue mission in Tehran Hostage case (1980); (8) The Iran-Iraq War (1980-1988); (9) The Israeli Destruction of Iraq's Nuclear Reactor (1981); (10) The Falkland Islands War (1982); (11) The US Intervention of Grenada (1983); (12) The Nicaragua Case (1986); (13) The US Air Raid on Libya (1986); (14) The US Intervention of Panama (1989); (15) The Iraqi Invasion of Kuwait (1990); (16) The US Missle Strike on Iraq (1993); (17) The US missiles strikes against Sudan and Afghanistan (1998); (18) The US use of force in Afghanistan (2001); (19) The US invasion of Iraq (2003); (20) the Israeli invasion of Lebanon (2006); and (21) the Israeli attack on Gaza (2009). Out of the 21 incidents, the United States of America is the one that most frequently used force and claimed self-defence (used military force in 7 major incidents). Israel ranks second and use military force in 6 major incidents, the UK and Iraq 2 each and the Soviet Union, France, Iran and Argentina 1 each.
effect, military force can be used in self-defence by the victim State against the responsible State.

The avowed aim of the international community is ‘peace’ and not war. Apart from a few warmongers, the peoples of the world love peace and hate war. Peace is regarded as the supreme value and whatever may imperil or jeopardize such value should be reined in as much as possible. If this is so, in waging the so-called war on terrorism, unilateral use of force in the name of self-defence, which does not satisfy the requirements of Article 51 of the Charter, should not be allowed since it is prone to abuses and may have perilous consequences.