

Stetson University

From the Selected Works of Luz Estella Nagle

March 11, 2008

Colombia's Incursion into Ecuadorian Territory: Justified Hot Pursuit or Pugnacious Error?

Luz Estella Nagle, *Stetson University College of Law*



SELECTEDWORKS™

Available at: http://works.bepress.com/luz_nagle/1/

Colombia's Incursion into Ecuadorian Territory: Justified Hot Pursuit or Pugnacious Error?

Luz E. Nagle*

Professor of Law

Stetson University College of Law

Introduction

FARC is the oldest and largest leftist guerrilla group in Colombia, founded in 1964 to overthrow the government and install a Marxist regime through armed struggle. Various governments of Colombia have battled the group. The organization claims to number at least 16,000 fighters and operates throughout the national territory. FARC finances its operations with kidnapping-for-ransom, extortion, and various forms of smuggling and drug trafficking. FARC is on the United States' and European Union's lists of terrorist groups.

Colombia's Foreign Minister Fernando Araujo Perdomo has justified Colombia's recent incursion into Ecuador to attack a FARC encampment with the statement that, "The terrorists, among them Raul Reyes, have had the habit of murdering in Colombia and invading the territory of neighboring countries to find refuge." Therefore, the Minister continued, "Colombia did not violate the sovereignty, but instead acted under the principle of legitimate defense."

The facts as they are reported show the following:

1. Tips from informers verified by the intelligence services established that Reyes would be present Friday at a camp on the other side of the Putumayo River in Ecuadorian territory.
2. The Colombian air force staged air strikes around 12:25 a.m. Saturday morning.
3. The operation was launched from Colombian territory.
4. Following the bombardment on the Camp, Colombian ground forces were ordered in to secure the area and neutralize the enemy.

* Professor of Law, Stetson University College of Law. LL.D., Universidad Pontificia Bolivariana; J.D., College of William & Mary; LL.M., UCLA Law School; M.A., University of California, Los Angeles.

5. Colombian forces entered Ecuadorian territory and transported to Colombia the bodies of Reyes and Conrado, leaving behind the other dead and wounded guerrillas.
6. On Saturday morning, Colombian President Alvaro Uribe Velez called Ecuadorian President Rafael Correa to inform him of the operation in which Reyes died. Uribe claimed that the incursion into Ecuadorian territory was in “hot pursuit” because Colombian troops responded to fire from the FARC combatants, who had entered Ecuadorian territory to escape the fighting.
7. Reports from Ecuadorian military patrols indicated that the scene of the fighting was 1.2 miles inside Ecuador’s frontier with Colombia.
8. In an improvised encampment, the Ecuadorian troops found the bodies of 15 guerrillas and two wounded female guerrillas. The dead were in their underwear.
9. According to Correa, the guerrillas “were bombed and massacred while sleeping, using pinpoint technology, which located them at night, in the jungle, surely with the assistance of foreign powers.”

Colombia asserts that it has repeatedly warned Ecuador of the existence of guerrilla groups in their territory and asked them to stop the flow of these terrorists onto Ecuadorian soil. Colombia launched an air attack to hunt down FARC members on Ecuadorian soil, arguing that such a strike was justified under international law because FARC is a terrorist group and the Colombia military was engaged in a “hot pursuit” operation.

Proper Method to Act: Hot Pursuit vs. Apprehension

Some could argue that Colombia should have captured Reyes and the other FARC members since it does not seem that there was an actual exchange of fire to have justified the killings.¹ Prosecuting them for crimes against humanity, war crimes, and other money laundering and drug related offenses would have been a better approach.²

¹ See Alan M. Dershowitz, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* 121 (W.W. Norton, 2006) (noting that “tactic of choice against suspected terrorists” is detention. However, it is not often feasible to capture terrorists who pose an immediate and serious danger to a state. Under these circumstances, several states prefer a “more drastic form of preventive incapacitation—namely, targeted killing”).

² Some argue that “terrorism is a law enforcement issue,” therefore, terrorists should be arrested and not “hunted down and killed” without due process of a trial. Killing should be only in self-defense “if they pose an immediate danger to the arresting officer.” Killing terrorists constitutes “extrajudicial execution.” Others consider terrorism a military issue since terrorists are at war with the West and that “all military

Because Colombia and Ecuador do not have an extradition treaty, waiting to intercept the party when they came back across the border would have been the proper method of obtaining them. Colombia maintains that they were on “hot pursuit” of the group therefore they were justified in using the method they chose.

Hot Pursuit “pertains to the law of the sea and the ability of one state’s navy to pursue a foreign ship that has violated laws and regulations in its territorial waters (twelve nautical miles from shore), even if the ship flees to the high seas.”³ In International law, the right to hot pursuit on land is recognized as the *chasing* of armed aggressor s across international borders. Still, the issue of hot pursuit applicable to sovereign territories “remains unsettled.” Few nations would complain about a government waiting for terrorists to cross into another nation and launch an attack and then chase them over a third nation’s border. But “to invade another country without an actual pursuit on is going to stretch the idea of international law.”⁴

The hot pursuit argument could work if Colombian forces had been chasing FARC members over the Ecuadorian border and then launched the attack. However, the argument does not work if Colombia crossed into Ecuador without “following the tail” of the FARC members.⁵ Even then, under international law this active hot pursuit argument

killings are by their nature extrajudicial.” However, to consider those killings lawful and moral the evidence must show “that the targeted suspect is in fact a terrorist involved in ongoing operations, the imminence and likelihood that these terrorist operations will succeed, the availability of other less lethal alternatives, and the possibility that others will be killed or injured in the targeted attack.” See Alan M. Dershowitz, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* 124-125 (W.W. Norton, 2006).

³ Lionel Beehner, *Can States Invoke Hot Pursuit to Hunt Rebels?*

http://www.cfr.org/publication/13440/can_states_invoke_hot_pursuit_to_hunt_rebels.html?breadcrumb=%2Fregion%2F414%2Fsyria.

⁴ According to Michael P. Scharf. See Lionel Beehner, *Can States Invoke Hot Pursuit to Hunt Rebels?*

http://www.cfr.org/publication/13440/can_states_invoke_hot_pursuit_to_hunt_rebels.html?breadcrumb=%2Fregion%2F414%2Fsyria.

⁵ According to Michael P. Scharf, hot pursuit means that a force is “literally and temporally in pursuit and following the tail of a fugitive.” See Lionel Beehner, *Can States Invoke Hot Pursuit to Hunt Rebels?*

is debatable. Hot pursuit entails the use of force against the territory of a sovereign nation, which in turn conjures sensitive and delicate issues involving state sovereignty. While it may be argued that hot pursuit is justifiable under principles of self-defense, it is difficult to make the case that the Colombian forces can go into Ecuadorian territory and kill FARC members without Ecuador's consent.

Neutrality Argument

Could Colombia claim that Ecuador is a Neutral Party and under the rules of armed conflict, Colombia could pursue the FARC members onto Ecuadorian soil? The principle of neutrality applies to international armed conflicts by using customary international law and treaties designed for international armed conflicts.⁶ The first thing Colombia must do is to acknowledge that the conflict in Colombia is an internal armed conflict and not what President Uribe has insisted is a terrorist threat.⁷ But, the implications for acknowledging there is an internal armed conflict is bad for a nation's economy, and that is why Uribe cannot have it both ways.⁸ Colombia could contend that the principle of neutrality should apply to Colombia's internal armed conflict by claiming that the discriminatory application of rules between international and internal armed conflicts must change, and that based in humanitarian reasons, it is time to treat the

http://www.cfr.org/publication/13440/can_states_invoke_hot_pursuit_to_hunt_rebels.html?breadcrumb=%2Fregion%2F414%2Fsyria.

⁶ The Paris Declaration of 1856, the 1907 Hague Convention No. V respecting the Rights and Duties of Neutral Power and Person in Case of War on Land, the 1907 Hague Convention No. XII concerning the Rights and Duties of Neutral Power in Naval War, the four 1949 Geneva Conventions and Additional Protocol I of 1977. See The Law of Armed Conflict: Neutrality, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5P8EX4/\\$File/LAW8_final.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5P8EX4/$File/LAW8_final.pdf).

⁷ Refugees International, *Colombia Cannot Deny Internal Armed Conflict* (Jan. 24, 2005), <http://www.refugeesinternational.org/content/article/detail/4962>.

⁸ See *Donors Set Conditions for Support for Paramilitary Disarmament*, IPSNEWS, Feb. 7, 2005 (in which a Colombian business leader, Luis Carlos Villegas, speaking about Uribe's position, stated that it is "a serious thing to say there is an armed conflict when there isn't one. But to me it is inconceivable to say that there is no armed in Colombia").

victims of both types of conflicts equally. Colombia could further argue historical evidence that there are more internal conflicts today, that there is a diminution in the application of the laws of war to internal armed conflicts, and that all the internal armed conflicts taken place establish that those “in most need of legal protection are the civilians.”⁹

Under established principles of neutrality, it has been accepted that an adversary party is entitled to undertake hot pursuit and attack the belligerent in the neutral party territory if 1) the belligerent forces enter neutral territory, and 2) the neutral territory is unable or unwilling to expel or intern them. The adversary can even seek compensation from the neutral nation for the breach of neutrality.¹⁰

On the facts, it does not seem that Colombia could prove that Ecuador was “unable or unwilling to expel or intern” FARC members. On the contrary, the information presents a nation that was/is able and willing to expel and go after them.

In arguing that the principle of neutrality is applicable to internal armed conflict, Colombia could also argue that entering Ecuadorian territory was justified because 1) FARC entered Ecuadorian, and 2) that Ecuador was unable or unwilling to expel FARC members despite knowing that FARC had been using Ecuadorian soil for some time. Yet, it seems problematic for Colombia to prove that Ecuador was unable or unwilling to expel FARC combatants. Ecuador has not harbored FARC members, according to Ecuador’s vice-president. On the contrary, “Ecuador has dismantled guerrilla campsites

⁹ The traditional laws of war rely on the ability and willingness of the contending parties to distinguish between civilians and combatants, and between military and non-military targets. During internal armed conflict, however, such clear distinctions may be impossible. See LINSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT: THE HISTORIC REGULATION OF INTERNAL ARMED CONFLICT* 2, http://assets.cambridge.org/97805217/72167/excerpt/9780521772167_excerpt.pdf (last visited Mar. 7, 2008).

¹⁰ See International Committee of the Red Cross, *The Law of Armed Conflict: Neutrality* (June 2002), [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5P8EX4/\\$File/LAW8_final.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5P8EX4/$File/LAW8_final.pdf).

each time they detected them and Ecuador has captured eleven guerrillas who reside in its prisons.”¹¹ Moreover, the vice-president asserts, the Colombian government was aware of meetings between FARC and Ecuadorian officials and that that presidents of Colombia and Ecuador met as recently as December to establish “channels of facilitation for the liberation of the hostages.”¹²

Anticipatory Self-defense

Colombia could also try to justify its incursion into Ecuadorian territory by arguing the doctrine of Anticipatory Self-Defense. However, the anticipatory self-defense doctrine is very controversial. Some legal scholars hold the view that under Art. 2 (4) of the UN Charter, nations are to “refrain in their international relations from the threat or use of force” by limiting their right of individual or collective self-defense to situations in which an armed attack has already occurred.¹³ To these scholars, a United Nations Security Council resolution is required before armed force could be used, and then it could be used only to repel an armed attack on one’s own territory. The argument against its practice is based on the fear that the use of force can become a frequent occurrence when based on suspicions, assumptions, intelligence warnings, or mistakes—which can lead to larger scale warfare and national and regional destabilization.

Some legal scholars maintain that within the right of self-defense resides a right to anticipatory self-defense to prevent an armed attack from happening. A state may

¹¹ Noticias WFM, *Ecuador no es alberfue de guerrilleros de la FARC: Vicepresidente* (Mar. 5, 2008), <http://www.wradio.com.co/nota.asp?id=558767>.

¹² ¹² Noticias WFM, *Ecuador no es alberfue de guerrilleros de la FARC: Vicepresidente* (Mar. 5, 2008), <http://www.wradio.com.co/nota.asp?id=558767>.

¹³ United Nations Charter, Art. 51. Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

anticipate self-defense “where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted.”¹⁴ At that point, an armed attack may then be said to have begun even if the actual combat has not yet crossed a frontier.¹⁵ Clear and convincing intelligence must show that a group or a state is under orders to attack the nation using anticipatory self-defense or that such a group or state would attack and that preparations to commit forces to combat were underway.

The United States bases its right to anticipatory self defense on the 1837 *Caroline Case*.¹⁶ In *Caroline*, the British self-defense claim, that the ship was suspected of carrying weapons to anti-British rebels, failed to show a need of self-defense that was “instant, overwhelming, and leav[es] no choice of means and no moment for deliberation.” This case articulated the circumstances in which the anticipatory self-defense formula properly applies. In modern times, this formula represents common sense and fits the intentions of the United Nations Charter when applied to determining the starting point of an armed attack or whether an attack is in evidence. “[I]t is the attack that provides the decisive test.”¹⁷ This case offers strict limits that preclude action against states that present potential threats, unless it could be credible shown that an attack were imminent.¹⁸

The United States Secretary of State in the *Caroline* conflict, Daniel Webster, held a position in the *Caroline Case* that could be useful to the Colombian-Ecuadorian

¹⁴ C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL 451, 498 (emphasis added) quoted in Mary Ellen O’Connell, *The Myth of Preemptive Self Defense*, ASIL, Aug. 2002, <http://www.asil.org/taskforce/oconnell.pdf>.

¹⁵ C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL 451, 498 (emphasis added) quoted in Mary Ellen O’Connell, *The Myth of Preemptive Self Defense*, ASIL, Aug. 2002, <http://www.asil.org/taskforce/oconnell.pdf>.

¹⁶ In December 1837, British and Canadian rebels crossed the Niagara River from Canada into New York to attack and destroy the steamer *Caroline*, which had been carrying supplies to Canadian insurgents. The *Caroline* burned and drifted downriver, and at least one United States citizen was killed and several others were wounded.

¹⁷ See Mary Ellen O’Connell, *The Myth of Preemptive Self Defense*, ASIL, Aug. 2002, <http://www.asil.org/taskforce/oconnell.pdf>.

¹⁸ WYBO P. HEERE, *TERRORISM AND THE MILITARY: INTERNATIONAL LEGAL IMPLICATIONS* 36 (2002).

situation. Assuming that Ecuador had respected its obligation under international law, it is for Colombia to justify its actions by demonstrating a “necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”¹⁹ Supposing the necessity of the moment authorized Colombia to enter Ecuadorian territory, Colombia would also need to show that it “did nothing unreasonable or excessive; since the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.”²⁰ Colombia will also need to prove that warning the party in the Ecuadorian encampment was “impracticable, or would have been unavailing.” Colombia would have to prove, as Webster asserted more than 160 years before, that “daylight could not be waited for, that there could be no attempt at discrimination between the innocent and the guilty, that it would not have been enough to seize and detain” those in the encampment, and that “there was a necessity, present and inevitable, for attacking [them] in the darkness of the night,” while they were asleep, “killing some, and wounding others.”²¹

The inviolability of territorial integrity and the sovereignty of nations is recognized as crucial for the security and maintenance of peace among nations. Nonetheless, there are times, some will argue, when this principle must be suspended. If suspension is due to the invocation of anticipatory self-defense, then the suspension must be due to an *overwhelming necessity and urgency*. Colombia can invoke the anticipatory self-defense argument only if there was not a moment to spare for deliberating a diplomatic course, and that the circumstances and necessity of denying the FARC group from further use of the encampment as a site for planning further attacks in Colombia, for

¹⁹ Robert Yewdall Jennings, *The Caroline and Mcleod Cases*, 32 AM. J. INT'L L. 82 (1938).

²⁰ Robert Yewdall Jennings, *The Caroline and Mcleod Cases*, 32 AM. J. INT'L L. 82 (1938).

²¹ Robert Yewdall Jennings, *The Caroline and Mcleod Cases*, 32 AM. J. INT'L L. 82 (1938).

regrouping, or for seeking safe haven overwhelmed the normal respect of one nation for the national territory of its neighboring state.

The *Caroline* case was also cited by the Nuremberg judges and it has been a recognized international standard for anticipatory self-defense and preemptive action. Even if one accepts the legality of anticipatory self-defense within the strict limits of *Caroline*, doing so precludes action against states that present potential threats, unless it could be credibly shown that an attack were imminent. In the Norway case of Nuremberg, the judges rejected the argument made by the German defendants that their invasion of Norway was justified on a reasonable fear that Norway would become a base for an Allied attack on Germany. According to the judges, the plans to attack Norway “were not made for the purpose of forestalling an imminent Allied landing, but at the most, that they might prevent an Allied occupation at some future date.”²² The court stated that Germany alone could not decide if preventive action was a necessity. According to the court, such decision “must ultimately be subject to investigation and adjudication if international law is ever to be enforced.”²³

Based on the principles established by the *Caroline* case and the Nuremberg Norway case, Colombia has some work to do to justify its incursion into Ecuador using anticipatory self-defense. Colombia needs to prove that the attack was a case of necessity and immediacy, and even then, a unilateral decision on the applicability of a right of self-

²² International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), *reprinted in* 41 AM. J. INT’L L. 172, 206 (1947).

²³ International Military Tribunal, The Trial of the Major War Criminals . . . (Nuremberg: 1947, I 208, *cited in* LEO GROSS, ESSAYS ON INTERNATIONAL LAW AND ORGANIZATIONS 389 (1984).

defense can be found by a tribunal to be “no more than the right of auto-interpretation subject to investigation and conclusive adjudication.”²⁴

Following the terrorist attacks of September 11, 2001, action by the United Nations Security Council can be cited to support anticipatory self-defense in situations where: 1) an armed attack has occurred, and 2) there is convincing evidence that more attacks are planned, even if not yet underway.²⁵ Instead of waiting for new attacks to occur, a victim, once attacked, can use force *where there is clear and convincing evidence that the assailant is preparing to attack again*. The victim can also defend itself within a reasonable time following the initial attack.²⁶

If terrorists are planning a sequence of attacks in a campaign of terror, a state may respond in order to stop future attacks *if it can be shown that convincing evidence exists that future attacks are contemplated or being planned*. Lacking such convincing evidence could constitute unlawful reprisal. According to the Security Council’s Resolution 1368 (2001) and Resolution 1373 (2001) in the aftermath of the September 11, any right to resort to anticipatory attack for purposes of self-defense “*requires a priori predictability: flawless intelligence and the absence of doubt*.”²⁷

Colombia could use the actions by the United Nations Security Council to support its anticipatory self-defense by proving that it took action against the FARC group on the strength of evidence that more attacks would be forthcoming. Colombia would need to show that prior to the use of force on Ecuadorian soil, the FARC group had attacked

²⁴ LEO GROSS, ESSAYS ON INTERNATIONAL LAW AND ORGANIZATIONS 389 (1984).

²⁵ Mary Ellen O’Connell, *The Myth of Preemptive Self Defense*, ASIL, Aug. 2002, <http://www.asil.org/taskforce/oconnell.pdf>.

²⁶ Mary Ellen O’Connell, *The Myth of Preemptive Self Defense*, ASIL, Aug. 2002, <http://www.asil.org/taskforce/oconnell.pdf>.

²⁷ Adam Lichtenheld, *The Practicality of Preemption in United States Foreign Policy*, UW-MADISON: POLITICAL SCIENCE DEPARTMENT, <http://polisci.wisc.edu/~psa/Journal/Lichtenheld.doc> (last visited Mar. 7, 2008).

Colombia as part of a series of offensives, and that more assaults were planned. This assertion can be proven by offering evidence tying the group to prior attacks in Colombian soil and perhaps producing the testimony or testimonies of apprehended individuals who revealed that more attacks were planned.

Preemptive Self-Defense: The Bush Doctrine and its Application to the Colombia-Ecuador Situation.²⁸

Preemptive self-defense is defined as “military action against a potential adversary in advance of a suspected attack.”²⁹ Under this defense, a military reaction is divested of defensive character since the defense is future-oriented and the threat is merely a potential one.³⁰ After long consistent support by the United States government for the prohibition of preemptive use of force, the Bush administration changed the government’s position. Preemption is the use of military actions against a state to disable an enemy in order to prevent an attack.³¹

Today, under what is known as the Bush Doctrine, the United States legitimizes preemptive attacks.³² This is a doctrine the United States relies on to justify military

²⁸ Adam Lichtenheld, *The Practicality of Preemption in United States Foreign Policy*, UW-MADISON: POLITICAL SCIENCE DEPARTMENT, <http://polisci.wisc.edu/~psa/Journal/Lichtenheld.doc> (last visited Mar. 7, 2008) (noting that “the Bush Doctrine was included in the new National Security Strategy of 2002, claiming that the U.S. could strike against any enemies perceived as posing a “serious” (though not necessarily imminent) threat to American security”).

²⁹ Preemptive self-defense is distinguished from interceptive self-defense. See TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 200* (Manchester University Press, 2005).

³⁰ TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 200* (Manchester University Press, 2005).

³¹ Adam Lichtenheld, *The Practicality of Preemption in United States Foreign Policy*, UW-MADISON: POLITICAL SCIENCE DEPARTMENT, <http://polisci.wisc.edu/~psa/Journal/Lichtenheld.doc> (last visited Mar. 7, 2008).

³² This policy began its development in 1992 during the first Bush Administration. The drafters and consultants included then-Defense Secretary Dick Cheney, Lewis Libby and Paul Wolfowitz, and Donald Rumsfeld. The document was essentially a “blue print for maintaining U.S. preeminence, precluding the rise of a great power rival, and shaping the international security order in line with American principles and

action against terrorist states. The Bush Doctrine is cavalier with regard to proceeding with little support, or in spite of lack of support, from the United Nations. The doctrine “is not a Clintonian multilateralism, it does not appeal to the United Nations, does not profess faith in arms control, or raise hopes for any peace process.”³³ The Doctrine contains three essential elements: Active American global leadership, regime change, and promoting liberal democratic principles,³⁴ and is a reaffirmation that lasting peace and security are to be won and preserved by stressing both U.S. military strength and American political principles.

The United States relies on this Doctrine to justify military action against terrorist states. President Bush alluded to this in a policy address at West Point when he noted that “we must take the battle to the enemy, disrupt his plans, and confront the worst

interests,” outlined United States military strategies, and set out a framework for developing the defense budget. Although classified, the document was leaked before being formally approved, subjected to harsh criticism, and subsequently buried by the Clinton administration. Another policy document, the Defense Planning Guidance (DPG), delineated several points, including “the use of preventive-or preemptive-force, and the idea of forsaking multilateralism if it didn’t suit U.S. interests.” The DPG advocated intervention in disputes throughout the world, even when the disputes were not directly related to U.S. interests, and argued that the United States should “retain the preeminent responsibility for addressing selectively those wrongs which threaten not only our interests, but those of our allies or friends, or which could seriously disrupt international relations.” See *1992 Draft Defense Guidance*, <http://rightweb.irc-online.org/profile/1571.html>.

In 1997, the Project for the New American Century (PNAC) was established in order to “promote American global leadership.” In September 2000, the PNAC issued a report, “Rebuilding America’s Defenses: Strategy, Forces, and Resources For a New Century.” (Lewis Libby and Paul Wolfowitz were among the project participants.) The report outlined four basic points: Homeland defense, fight and win “multiple, simultaneous large-scale wars,” performance of constabulary duties associated with shaping the security environment in critical regions, and transforming U.S. forces to exploit the revolution in military affairs. See Thomas Donnelly, *REBUILDING AMERICAS DEFENSES*, <http://www.newamericancentury.org/RebuildingAmericasDefenses.pdf>.

The PNAC constituted an effective proponent of neoconservative ideas between Clinton’s second administration and the 2003 invasion of Iraq.” See *Project for the New American Century*, <http://rightweb.irc-online.org/profile/1535.html>.

³³ *Project for the New American Century, January 30, 2002, Memorandum to: Opinion Leaders*, <http://www.newamericancentury.org/defense-20020130.htm>.

³⁴ *Project for the New American Century, January 30, 2002, Memorandum to: Opinion Leaders*, <http://www.newamericancentury.org/defense-20020130.htm>.

threats before they emerge.”³⁵ Moreover, the 2002 National Security Strategy document articulates the scope of the Bush Doctrine:

The greater the threat, the greater the threat of inaction--and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively...in an age where the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather.³⁶

President Bush eluded to this doctrine when he noted that “we must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge.”³⁷

Those following President Bush’s position argue that the threats posed by terrorist groups and rogue regimes in today’s world are very different from those of World War I or II.

Danger today emerges from terrorist groups and rouge regimes that care nothing about international law or commitments under treaties³⁸ They relish in the use of excessive violence, follow no rules, and only recognize the power of military force. In the face of such an implacable foe, one can argue that preemptive action is the best means for intimidating, containing, and ultimately defeating them.

According to the Bush Doctrine, the concept of imminent threat requires an adaptation to “the capabilities and objectives of today’s adversaries,” who rely on acts of

³⁵ *President Bush Delivers Graduation Speech at West Point*, <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>.

³⁶ Adam Lichtenheld, *The Practicality of Preemption in United States Foreign Policy*, UW-MADISON: POLITICAL SCIENCE DEPARTMENT, <http://polisci.wisc.edu/~psa/Journal/Lichtenheld.doc> (last visited Mar. 7, 2008).

³⁷ George W. Bush, President of the United States, *President Bush Delivers Graduation Speech at West Point* (June 1, 2002), <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>.

³⁸ United States defines rogue states as states that “brutalize their own people and squander their national resources for the personal gain of the rulers; display no regard for international law, threaten their neighbours, and callously violate international treaties to which they are party; are determined to acquire weapons of mass destruction, along with other advanced military technology, to be used as threats or offensively to achieve the aggressive designs of these regimes; sponsor terrorism around the globe; and reject basic human values and hate the United States and everything for which it stands.” See The White House, *National Security Strategy of the United States of America* (Sept. 2002), www.whitehouse.gov/ncs/nss.html.

terror and seek out the use of weapons of mass destruction.³⁹ Recalling that the Caroline case recognized that the right to self-defense is inherent to a State, such a right is “conditional to the occurrence of an armed attack.”⁴⁰ The statement “an armed attack occurs” requires interpretation in the “contemporary international and technological context of limited reaction time.”⁴¹

Today’s trend among some strategists in the United States is to advocate exceptions of non-intervention when governments fail on their international obligation because, “there is a need for protecting civilians against terrorist attacks and a need to uphold their sovereignty by striking first against those who menace the international community.”⁴² The proponents of the doctrine consider it extended self-defense. “Preemption warrants the execution of offensive war, usually hinging on the interpretation of the imminence of the threat.”⁴³

This doctrine, however, fails to adhere to present legal norms and offers a different approach to international law. For instance, international law sanctions the use of force in self-defense against potential threats; the threat must be an actual threat. Yet, the doctrine allows precisely that, that the use of force is available when the threat is

³⁹ The United States position is that under international law states do not need to suffer an attack before they can lawfully defend themselves. “We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.” The White House, *National Security Strategy of the United States of America*, (Sept. 2002), www.whitehouse.gov/ncs/nss.html.

⁴⁰ Louis-Philippe Rouillard, *The Caroline Case: Anticipatory Self-Defence in Contemporary International Law*, 1 MISKOLC J. OF INT’L L. 104 (2004).

⁴¹ Louis-Philippe Rouillard, *The Caroline Case: Anticipatory Self-Defence in Contemporary International Law*, 1 MISKOLC J. OF INT’L L. 104 (2004).

⁴² S.M. Murphy, *Contemporary Practice of the United States: US Adoption of New Doctrine on the Use of Force*, 97 AJIL 203, 204-205 (2003).

⁴³ Adam Lichtenheld, *The Practicality of Preemption in United States Foreign Policy*, UW-MADISON: POLITICAL SCIENCE DEPARTMENT, <http://polisci.wisc.edu/~psa/Journal/Lichtenheld.doc> (last visited Mar. 7, 2008).

potential. The *jus ad bellum* doctrine applies when a “just cause, honest intentions, and war as last resort only after other means of solving a conflict have been exhausted.”⁴⁴ To use force, as quoted earlier, “even if uncertainty remains as to the time and place of the enemy’s attack,” implies to use force against the *jus ad bellum* principle. If attacks can occur based not on imminence of a threat, but on perceived threats, this renders the use of force as a first option rather than as last resort option.

The Bush doctrine, then, seems to legitimize aggressive warfare by encouraging “the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.”⁴⁵ If this is true, then the doctrine is legitimizing the Statute of the International Military Tribunal and the United Nations positions that aggressive wars are illegal. Taken one step further, the role of the Security Council, to determine what acts warrant military action, then becomes extraneous. Under the Bush doctrine, nations alone will be the ones determining what merits military action. This approach threatens the security and peace of the world by allowing individual nations to determine when to use force, thereby infringing upon state sovereignty and inviting a world run by individual rather than collective interests.⁴⁶

Turning “inward” and rejecting existing institutions is not going to bring victory. The reality is that the fighting international terrorism is not “a strategic challenge [the

⁴⁴ John Hammond, *The Bush Doctrine, Preventive War, and International Law*, THE PHILOSOPHICAL FORUM 105 (Spring 2005).

⁴⁵ “Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.” Jurist Legal News and Research, *United Nations General Assembly Resolution 3314 (XXIX). Definition of Aggression*, <http://jurist.law.pitt.edu/3314.htm> (last visited Mar. 7, 2008).

⁴⁶ Adam Lichtenheld, *The Practicality of Preemption in United States Foreign Policy*, UW-MADISON: POLITICAL SCIENCE DEPARTMENT, <http://polisci.wisc.edu/~psa/Journal/Lichtenheld.doc> (last visited Mar. 7, 2008).

United States] can or should meet alone.” In order to “wage the present struggle and to built a safer future,”⁴⁷ the United States needs “to strengthen the traditional alliances that can stand with us over the long haul, not neglect them in favor of temporary ad hoc coalitions.”⁴⁸ True victory requires stronger institutions that can prevent and resist another terrorist attack.

Additionally, such an extension to the right to self-defense has yet to be accepted by the international community and therefore has yet to be part of international law. Nevertheless, using the Bush Doctrine, Colombia could argue that it was justified to act under the principle of preemptory self-defense by proving that FARC was using acts of terror, that Ecuador failed in its international obligations, that Colombia had a need to protect its citizens against the acts of this particular FARC unit, and that there was a clear and urgent need to uphold Colombian sovereignty and imperatives by striking first against that FARC unit.

Self-Defense⁴⁹

The United Nations Charter specifies a prohibition of the right to use force.

Article 2(4) bans the use of force.

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

⁴⁷ Robert Kagan and Ronald D. Asmus, *Commit for the Long Run*, THE WASHINGTON POST, Jan. 29, 2002, <http://www.newamericancentury.org/defense-20020129.htm>.

⁴⁸ Robert Kagan and Ronald D. Asmus, *Commit for the Long Run*, THE WASHINGTON POST, Jan. 29, 2002, <http://www.newamericancentury.org/defense-20020129.htm>.

⁴⁹ See M. N. Schmitt, *Preemptive Strategies in International Law*, 24 MJIL 513, 539 (2003) (who notes that states today treat self defense as law applicable to acts committed by non-State actors).

The Charter offers only two exceptions: 1) Collective security actions. As provided under Chapter VII, the Security Council may use force to keep the peace, and 2) Under Article 51, States have the right to use force in individual and collective self-defense. The section expressly permits cross-border military force:

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.⁵⁰

The UN Charter prohibition on use of force is a broad prohibition inviting various interpretations. One is the restrictive view, which was rejected by the Security Council and the international community.⁵¹ According to this view, “Article 2(4) is not a general prohibition on force, but rather only a prohibition on force aimed at the territorial integrity and political independence of states or inconsistent with the purposes of the United Nations.”⁵² Under this interpretation, Colombia could rationalize the strike against this FARC group in Ecuador by claiming that Colombia was justified in order to prevent this group from attacking Colombia, that the attack was aimed at the FARC group, that the attack in no way compromised the territorial integrity or political

⁵⁰ Article 51, United Nations Charter.

⁵¹ According to O’Connell, Professor Anthony D’Amato used this interpretation to “justify Israel’s 1981 strike against the Iraqi nuclear reactor at Osirik. Israel wished to prevent Iraq from developing nuclear weapons. The strike aimed at long-term Israeli security. In D’Amato’s view, the Israeli attack did not compromise the territorial integrity or political independence of Iraq, nor was it inconsistent with the purposes of the UN. By this narrow view of sovereignty, D’Amato concludes that the strike did not violate the prohibition in Article 2(4). International reaction to the Israeli strike, however, was uniformly negative. The Security Council passed a unanimous resolution condemning it as a violation of the Charter.” Mary Ellen O’Connell, *The Myth of Preemptive Self Defense*, ASIL, Aug. 2002, <http://www.asil.org/taskforce/oconnell.pdf>.

⁵² Mary Ellen O’Connell, *The Myth of Preemptive Self Defense*, ASIL, Aug. 2002, <http://www.asil.org/taskforce/oconnell.pdf>.

independence of Ecuador, and that the attack was not inconsistent with the purpose of the United Nations.

The second exception to Article 51 concerns the prohibition on the unilateral use of force and the right of a State to use force in self-defense against an armed attack. The wording of the Article 51 determines when the right of self-defense starts. The right is conditional to the happening of an armed attack.⁵³ Armed action in self-defense is allowed only against armed attack. The Security Council and the ICJ have tried to clarify “when an armed attack begins.” Accordingly, in order to trigger the right of unilateral self-defense an “attack must be underway or must have already occurred. Any earlier response requires the approval of the Security Council.”⁵⁴ Colombia has no right to use force to *prevent a possible armed attack*. It can however, use force to prevent an *actual armed attack*.

The International Court of Justice (ICJ) in the Nicaragua case concluded that the United States could not invoke self-defense if the threshold of the actual armed attack was not reached.⁵⁵ According to the Court, Nicaragua’s provision of weapons to rebels in El Salvador was not an armed attack, and that an armed attack eliciting a unilateral self-defense may include “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to . . . an actual armed attack conducted by regular forces.”⁵⁶

⁵³ “For self-defense to be a legitimate response, to a threat of force, the threat would have to meet the Webster tests in the *Caroline*.” See ROSALYN HIGGINGS, *PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 248 (Oxford University Press, 1995).

⁵⁴ Mary Ellen O’Connell, *The Myth of Preemptive Self Defense*, ASIL, Aug. 2002, <http://www.asil.org/taskforce/oconnell.pdf>.

⁵⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)*, 1986 I.C.J. 14 (June 27).

⁵⁶ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)*, 1986 I.C.J. 14 (June 27), at ¶¶194-95.

Under the Nicaragua case, Colombia could not argue that FARC's presence alone in Ecuadorian territory was a threat by force. Because the threat did not amount to an armed attack, Colombia needed to resort to measures less than armed self-defense, or should have sought Security Council authorization to do more. Furthermore, under the immediacy limit to self-defense in the fight against international terrorism, the military measures must be executed *during terrorist attack*.⁵⁷ Massive use of force against terrorist groups can be defended as indispensable to counter *ongoing threats* posed by terrorist groups operating from a country *with the support of the local government*. If the terrorists activities were being carried out from Ecuadorian territory within the framework of a large hostile military plan, Colombia could resort to force in self-defense only if it can prove: 1) that FARC operated from Ecuador *with the support of the Ecuadorian government*; 2) the massive use of force was indispensable to counter FARC's "ongoing armed attack" carried out from Ecuadorian territory, and; 3) there was a continuous armed attack from FARC coupled with the *imminent and concrete risk* of further FARC attacks.⁵⁸

Moreover, in order to use force in self-defense, it is "generally not enough that the enemy attack originated from the territory of a state." Use of force in self-defense can be used against a state that is legally responsible for the armed attack. A state would be responsible if it used its own agents to carry out the attack,⁵⁹ if it controlled or supported

⁵⁷ The limits on of self-defense on the fight against terrorism are: 1) immediacy, 2) necessity, and 3) proportionality. See TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* 191-199 (Manchester University Press, 2005).

⁵⁸ See TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* 193 (Manchester University Press, 2005).

⁵⁹ See *Responsibility of States for Internationally Wrongful Acts*, Arts. 4-11, UN G.A. Res. 56/83 (2002); Definition of Aggression, *supra* note 20, at art. 3.

the attackers,⁶⁰ perhaps when it failed to control the attacks,⁶¹ or when it subsequently adopted the acts of the attackers as its own.⁶²

Under these principles, for Colombia to justify the use of force in self-defense, it will need to show that Ecuador is legally responsible for any armed attack perpetrated by FARC. It will need to prove that Ecuador used its agents to carry out attacks with FARC, or that Ecuador controlled or supported FARC, or that Ecuador failed to control FARC attacks, or that after the attacks were perpetrated, Ecuador adopted them as its own. For Ecuador to be directly responsible of FARC's actions, Colombia will need to prove that Ecuador exercised "effective control" or "overall control" over the FARC group.

Under international law, the acts of private individuals can be attributed to states that have "effective control" over their conduct. Drawing from the lessons learned in the Nicaragua case, the Contras' activities were not attributed to the United States even though the United States helped to finance, equip, organize, and train the Nicaraguan Contras. This test has a very high threshold for attribution.

In its Tadic decision, the ICTY applied the Nicaraguan test. The Trial Chamber noted that "different tests applied in respect to private individuals who are not militarily organized and paramilitary or similar groups." For the Trial Chamber, the test for the paramilitary or similar groups was whether the state exercised overall control over the

⁶⁰ See *Definition of Aggression*, Art. 3(g): "The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein." G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1974). See also *Prosecutor v. Tadic*, Opinion and Judgment, No. IT-94-1-T, para. 137 (May 7, 1997).

⁶¹ According to Mary Ellen O'Connell, "Turkey and Iran have taken armed action against Kurdish irregulars in northern Iraq in an area beyond Iraq's control. These actions were reported to the Security Council which did not dispute the claim of self-defense. Israel, Portugal, South Africa, and the United Kingdom have used force on a similar basis, too, but with more equivocal reactions. See Mary Ellen O'Connell, *The Myth of Preemptive Self Defense*, ASIL, <http://www.asil.org/taskforce/oconnell.pdf>.

⁶² Mary Ellen O'Connell, *The Myth of Preemptive Self Defense*, ASIL, Aug. 2002, <http://www.asil.org/taskforce/oconnell.pdf>.

activities of the group.” It stated that “the relationship between the groups and the state must be more than one of great dependency, amounting instead to a relationship of control.”⁶³ In other words, the state has to have a role in organizing, coordinating or planning the military actions and that financial assistance, military equipment or training only were insufficient factors to meet the threshold test.

Looking at these two cases, Colombia will need to make a very strong case to prove responsibility by the Ecuadorian government for any attacks carried out by FARC operating from Ecuadorian soil. The Security Council is the organ entitled “to adjudge the legality of a State’s resort to self-defense and to decide whether such recourse is legitimate.”⁶⁴

Military action directed at curbing terrorism must respect strictly the principles of necessity and proportionality. Necessity limits the use of military force to the achievement of legitimate military objectives.⁶⁵ States are allowed to take military actions “when countering a terrorist attack which is still underway,” only “*extrema ratio*” and the option must be smaller scale of force.⁶⁶ Colombia must have reported immediately to the Security Council and provided it with evidence that the military action was necessary to prevent and deter future FARC attacks.

⁶³ HELEN DUFFY, *THE WAR ON TERROR AND THE FRAMEWORK OF INTERNATIONAL LAW* 49-50 (2005).

⁶⁴ In a dissenting opinion in the Nicaraguan case, Judge Schwebel concluded that the Security Council is clearly “entitled to adjudge the legality of a State’s resort to self-defense and to decide whether such recourse is legitimate or, on the contrary, an act of aggression.” See Nicaragua case, Merits, supra note . . . p. 285.

⁶⁵ The I.J.C. asserted that in any decision to use armed force both necessity and proportionality must be respected. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, para. 41, cited in footnote 35 in Mary Ellen O’Connell, *The Myth of Preemptive Self Defense*, ASIL, Aug. 2002, <http://www.asil.org/taskforce/oconnell.pdf>.

⁶⁶ See TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* 193 (Manchester University Press, 2005).

Under the principle of necessity, Colombia must prove 1) Ecuador's continuing involvement in terrorist activities; 2) that based on past FARC attacks, Colombia has convincing indications that future FARC attacks may be expected "accompanied by bellicose statements by those associated with [FARC],"⁶⁷ and; 3) that Colombia chose use force after repeated efforts failed "to convince the Government of [Ecuador] to shut terrorist activities down and to cease their co-operation with the [FARC] organization."⁶⁸

Moreover, a claim of self-defense using military measures to counter a terrorist attack requires proportionality.⁶⁹ "Acts done in self-defense must not exceed in manner or aim the necessity provoking them."⁷⁰ A military action must be proportionate to the objective purpose, specifically impeding the terrorists attack or minimizing its effects.⁷¹ The neutralization of the terrorists groups or the reduction of their capacity to conduct

⁶⁷ Israeli justified its bombing of the P.L.O. in Tunisia on a series of past attacks, claiming that Israel had convincing indications that future attacks may be expected based on "a series of attacks accompanied by bellicose statements by those associated with terrorism." On the contrary, the United States justified its bombing of Libya on one attack, relying on "an intelligence finding (revealed by intercepted communications) that Libya was planning a series of future attacks on U.S. installations in various parts of the world." The United States was subsequently criticized for its failure to "produce evidence that future attacks were planned by Libya." See Oscar Schachter in *INTERNATIONAL LAW AND THEORY AND PRACTICE* 167-168, edited by Maurizio Ragazzi (Martinus Nihoff Publishers and BSP, 2005).

⁶⁸ "State practice shows that reacting States feel legally obliged to resort to non-military measures before using force." The United States, with regard to the 1986 strike against Libya, argued before the Security Council that a self-defense action became the only alternative after quiet diplomacy, public condemnation, and economic sanctions failed to get Colonel Qaddafi's attention. See TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* 194, fn 61 (Manchester University Press, 2005).

⁶⁹ This doctrine originated with the 1907 Hague Conventions and was codified in Article 49 of the 1980 Draft on State Responsibility of the International Law Commission. It is also included in the 1977 Additional Protocols of the Geneva Conventions. Regardless of whether states are party to these instruments, the principle is an important component of customary international law. See *Israel and the Doctrine of Proportionality*, <http://www.cfr.org/publication/11115>.

⁷⁰ See Oscar Schachter in *INTERNATIONAL LAW AND THEORY AND PRACTICE* 153, edited by Maurizio Ragazzi (Martinus Nihoff Publishers and BSP, 2005).

⁷¹ This perspective is preferred with regards to terrorism instead of the comparison of the quantum of force and counter-force used. Such an approach is acceptable when "the defensive action targets the attacking armed forces." See TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* 197 (Manchester University Press, 2005).

terrorist activities is “the most important objective of the defensive action.”⁷² Self-defense can not be justified when measures are not “expected to affect the terrorist network and activities.”⁷³ Self-defense actions by the use of force against terrorists still require the application of humanitarian rules relevant to armed conflict. The problem rests with the lack of international guidance as to limit to a defensive action when dealing with terrorist groups. The typical defensive measure is air strikes “directed at destroying terrorist training camps *actively engaged* in hostile military activities.” International opinion tends to condemn defensive actions as illegally disproportionate when they are greatly excessive to the provocation, with proportion being determined by measuring casualties and the scale of weaponry deployed.⁷⁴

Under the proportionality principle, Colombia will need to prove: 1) that it refrained from targeting civilians and property; 2) that it did not use force excessive of targeting the FARC, and; 3) that the offensive was directed at destroying a FARC training camp known to be actively engaged in hostile military activities against Colombia.

Colombia could state that United Nations Security Council Resolutions 1373 and 1368 not only authorized it to act in self-defense but that the Resolutions authorized Colombia to use “all means” to combat terrorist threats to international peace and

⁷² Such actions have to be dealt with under the category of armed reprisals since they may have a deterring or punitive effect. See TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 198* (Manchester University Press, 2005).

⁷³ See TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 198* (Manchester University Press, 2005).

⁷⁴ See Oscar Schachter, in *INTERNATIONAL LAW AND THEORY AND PRACTICE 153*, edited by Maurizio Ragazzi, (Martinus Nijhoff Publishers, 2005). According to Gazzini there is a compelling need for international control. Gazzini qualified the Security Council’s passivity during the Afghan crisis as one “to be regretted,” and expressed his concern over the failure of any criticism regarding proportionality and the disproportional character of the intervention. TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 198* (Manchester University Press, 2005).

security.⁷⁵ This would include authorization to use force.⁷⁶ However, the Resolution specifically states that nations must combat terrorism “in accordance with the Charter of the United Nations.”⁷⁷ Colombia cannot use means that violate another nation’s sovereignty, not only because those means are against the Charter itself, using and constitute *jus cogens* violation,⁷⁸ but because such aggression can trigger acts of retaliation. Moreover, using means in violation of the Charter represent a threat to the international peace and security, thereby defeating the purpose of attacking terrorist groups to preserve that which is perturbed by the means used.⁷⁹

Duties/Rights of Governments under International Law in Light of Terrorism

Under principles of state responsibility and United Nations Security Council Resolution 1373, states have the duty to “work together” in order to “prevent and suppress terrorist acts,” and to suppress all financing of terrorism. Under the Resolution, state sovereignty entails a duty to control one’s territory and to deny safe haven to those who commit terrorist acts, to prevent the movement of terrorists by asserting effective border controls, and to disallow its territory from being used by terrorist groups to carry out attacks against its neighbors. The Resolution imposes upon States the duty to “take the necessary steps to prevent the commission of terrorist acts, including by provision of

⁷⁵ United Nations, *Security Council Resolution 1373*, <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>. United States Department of State, *US Security Council Resolution 1368 (2001)*, <http://www.state.gov/p/io/rls/othr/2001/4899.htm>.

⁷⁶ Security Council Resolution 1373, <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>. Security Council Resolution 1368 (2001), <http://www.state.gov/p/io/rls/othr/2001/4899.htm>.

⁷⁷ Security Council Resolution 1373, <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>.

⁷⁸ Article 2(4) is a *jus cogens* norm, and as such, cannot be changed or contracted against it. See Nicaragua, para. 190.

⁷⁹ The Colombian incursion into Ecuadorian territory triggered a strong reaction by both Venezuelan and Ecuadorian governments, with both governments ordering troops to their respective frontiers with Colombia. See *Tensions Rise in Latin America after Colombia Raid*, THE ONLINE NEWSHOUR, http://www.pbs.org/newshour/bb/latin_america/jan-june08/andes_03-04.html.

early warning to other States by exchange of information.”⁸⁰ Moreover, States must cooperate with each other.

Colombia could claim that Ecuador failed in its responsibilities under Resolution 1373 because there were no effective border controls to prevent FARC movements back and forth across the frontier. However, the test to apply should be “effective border control under the circumstances.” The topography of the border region includes rugged Andean mountain ranges, dense Amazonian rain forest, and a river networks that render border control difficult even under the best of conditions. The main point of transit across the Colombian-Ecuadorian frontier is located at the International Bridge of San Miguel (Puente Internacional de San Miguel). The bridge has been the location of several clashes between Colombian army units and FARC combatants.

Under the new government in Ecuador, the military budget was increased thirty percent in order to address growing security concerns.⁸¹ Forces along border region were reinforced and reorganized, at a cost of two million dollars a month, into 13 military units comprising more than 8,000 personnel tasked with patrolling the 629 kilometer Ecuadorian-Colombian frontier.⁸² Ecuador also redeployed to the Colombian-Ecuadorian border units that had been stationed along the border with Peru.⁸³

⁸⁰ Press Release, Security Council, Security Council Unanimously Adopts Wide-Ranging Anti-Terrorism Resolution; Calls For Suppressing Financing, Improving International Cooperation, U.N. Doc. SC/7158 (Sept. 28, 2001).

⁸¹ BBC, *Un conflicto improbable* (Mar. 5, 2008), http://news.bbc.co.uk/1/hi/spanish/latin_america/newsid_7274000/7274866.stm.

⁸² Expreso, *La Frontera es vigilada por 13 destacamentos* (2006), <http://www.expreso.ec/Especial%20expreso/html/frontera.asp>.

⁸³ A partir del 2000, la Marina creó el Comando de Operaciones Norte (Esmeraldas), construyó un destacamento en la población de Mataje y reforzó su unidad en puerto El Carmen, en la provincia de Sucumbíos, con el envío de más hombres y lanchas para patrullaje.

El Ejército, por su parte, estableció destacamentos en Tobar Donoso (límite entre Esmeraldas y Carchi), Chical, Maldonado; el Carmelo, Puerto Nuevo, Cantagallo y en Puerto Rodríguez. Además, desplazó hacia la frontera a personal militar que hasta entonces había estacado vigilando el límite político con Perú.

The facts at issue in the current crisis indicate that the Ecuadorian government fulfilled its responsibility under Resolution 1373 by reinforcing its border security, by building infrastructure to house more military units, and by better equipping personnel. While it can be argued that the terrain along the border is a factor that makes effective detection of FARC combatants difficult, on the other hand, Ecuador seems to have displayed effective border controls when a routine identification and migration procedure resulted in the capture in Quito of Simon Trinidad in Quito, Ecuador,⁸⁴ the highest ranking FARC leader to be captured during Colombia's 40-year-long insurgency.”⁸⁵ Since the cooperation of the Ecuadorian president was crucial in Trinidad's capture, this would indicate that Ecuador has fully complied with its international obligations under Resolution 1373. By adding military forces to secure its border, by capturing several FARC combatants, and by denying safe haven to “those who commit terrorist acts,” Ecuador has tried to “prevent the movement of terrorists,” has implemented “effective border controls,” and has “disallowed its territory from being used by terrorist groups to carry out attacks against” Colombia.

On the other hand, Ecuador could argue that Colombia has failed to fulfill its duties under Resolution 1373. Strengthening the border security with Ecuador has been a priority not only because of guerrilla movements across the border but because

El reforzamiento militar ha sido constante y en estos momentos más de 8.000 hombres patrullan la frontera, en donde ya hay asentados 13 destacamentos, totalmente equipados, cuyo sostenimiento le cuesta al Estado 2 millones de dólares al mes.

Del lado colombiano, la presencia militar es mínima porque la vigilancia se realiza con patrullas móviles ante el temor de los ataques. La única unidad militar permanente es el grupo de Caballería Cabal, en Ipiales (departamento de Nariño), que parece una fortaleza. *See* Expreso, *La Frontera es vigilada por 13 destacamentos* (2006), <http://www.expreso.ec/Especial%20expreso/html/frontera.asp>.

⁸⁴ Actualidad Colombiana, *Paz y Conflicto, La detencion de Simon Trinidad*, ACTUALIDAD COLOMBIANA, Edición 375 de enero 23 a febrero 4 de 2004, <http://www.actualidadcolombiana.org/boletin.shtml?x=593>.

⁸⁵ Simon Trinidad is the *nom de guerre* of Juvenal Ovidio Ricardo Palmera Pineda. *See* Mundoandino.com, *Simon Trinidad*, <http://www.mundoandino.com/Colombia/Simon-Trinidad> (last visited Mar. 7, 2008).

Colombia's internal armed conflict has caused a refugee crisis for Ecuador as well as exacerbating international criminal activities such as kidnappings, drug trafficking, and various forms of smuggling.⁸⁶

The Ecuadorian Minister of Defense stated that "Ecuador performs great economic sacrifice to look after the security of its population at the border and it needs reciprocity from Bogotá in this regard." According to the Minister, despite requests to Colombia to look after its own side of the border, "there is no military presence" on the Colombian side commensurate with that in Ecuador.⁸⁷ "The weight to control the border is on Ecuador's shoulders."⁸⁸ Colombia prefers to deploy a mobile rather than permanent border presence due to the logistics of patrolling and defending a very long frontier spanning across several nations. Also, because Colombia's internal security strategy, known as Plan Patriot, aims to recover broad swathes of territory from FARC control while hunting down guerrilla leaders, maintaining permanent border outposts is not practicable,⁸⁹ and in fact, may likely have resulted in the military having neglected critical border departments of Nariño (Iscuandé) and Putumayo (Teteyé) where recent FARC surprise attacks rendered the military unable to repel the guerrillas.⁹⁰

Ecuador could also assert that Colombia violated the Resolution by failing to cooperate in improving and accelerating the exchange of operational information

⁸⁶ La Fogata, *Un Fin de semana Perturbador*, *El Tiempo*, http://www.lafogata.org/05latino/latino7/colo_01_3.htm (last visited Mar. 7, 2008).

⁸⁷ Prensa Latina, *Ecuador reclama presencia militar colombiana en su frontera*, <http://www.prensalatina.com.mx/article.asp?ID=%7B8CF4DD9B-216A-4B29-A48C-04AC5D0FA7E4%7D> (last visited Mar. 7, 2008).

⁸⁸ Hector Latorre, *El ejercito Colombiano busca el control*, BBC, July 29, 2005, http://news.bbc.co.uk/hi/spanish/latin_america/newsid_4726000/4726551.stm.

⁸⁹ Transnational Institute, *Aerial Spraying Knows No Borders, Ecuador brings international case over aerial spying* (Sep. 15, 2005), <http://www.tni.org/policybriefings/brief15.pdf>?

⁹⁰ Alfredo Rangel, *Lecciones del Putumayo*, *Fundación Seguridad y Democracia, Bogotá*, cited in footnote 5, Transnational Institute, *Aerial Spraying Knows No Borders, Ecuador brings international case over aerial spying* (Sep. 15, 2005), <http://www.tni.org/policybriefings/brief15.pdf>?

regarding FARC movements across the frontiers and FARC's usage of sophisticated communications technologies. After all, Ecuador argues, Plan Colombia has placed at Colombia's disposal access to the most sophisticated intelligence gathering and communications capabilities, including state-of-the-art radar-equipped aircraft⁹¹ that would have allowed both governments to obtain real time or near real time information on FARC movements.

Finally, because Ecuador had already captured several FARC members within its territory, including the high ranking FARC official, Simon Trinidad, Colombia could not claim that mistrust of Ecuador's capabilities and commitments justified its failing to fulfill these obligations.

What Are Ecuador's Responsibilities under International Law?

Under United States Security Council Resolution 1373, Ecuador must prevent its territory from being used as a safe haven for terrorists and patrol its border to prevent terrorists from entering its soil. Ecuador, must, as stated in the Resolution, "deny safe haven to those who . . . commit terrorist acts from using [its territory] for those purposes against other states or their citizens." Citing UN Security Council Resolution 1373, Colombia could argue that Ecuador has the responsibility to prevent the misuse of its territory by FARC. As presented before, the facts do not support Colombia's argument. Not only had Ecuador displayed extra forces and spent millions in border security but it has captured several FARC members in its territory.⁹²

⁹¹ U.S. Department of Drug Enforcement, DEA Congressional Testimony, Statement by Donnie R. Marshall, Mar. 2, 2001, <http://www.dea.gov/pubs/cngrtest/ct030201.htm>.

⁹² Wikinoticias, *Ecuador Captura supuesto Integrante de la FARC*, Sep. 25, 2005, http://es.wikinews.org/wiki/Ecuador_captura_supuesto_integrante_de_las_FARC. See also El Universo,

Ecuador also has duties under the Declaration on Principles of International Law regarding Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations approved by the United Nations General Assembly on October 24, 1970. This declaration states that “every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.” In no uncertain terms, Ecuador must refrain from assisting FARC in any way and the facts show that it has done so.

Were Colombia to argue that the Law of Neutrality as it applies to international armed conflict should apply to Colombia’s longstanding internal armed conflict, the following will be the duties of Ecuador as a Neutral State:

1. Ecuador must take measures to ensure and enforce the protection of its neutrality in the neutral space for which it is responsible in relation to the belligerent parties and especially to their armed forces.
2. The government must give “clear instructions on who they are to operate in relation to the defense of their territory and in dealing with incursions. For isolated and accidental violations of neutral space, the instructions might include the need to issue warnings or give a demonstration of force. For increasingly numerous and serious violations, a general warning might be called for and the use of force ramped up.
3. Ecuador must ensure respect for its neutrality, using force, if necessary, to repel any violation of its territory. In defending its neutrality, Ecuador must respect the limits which international law imposes on the use of force.
4. Ecuador must never assist the FARC, a party to the armed conflict. Specifically, Ecuador must not supply weapons, ammunition or other war materials directly or indirectly to the FARC.⁹³

Conclusion

FARC critica al presidente de Ecuador por captura de rebelde, Jan. 14, 2004, <http://www.eluniverso.com/2004/01/14/0001/8/84363723DBB645D1A89A0A1C8DA16270.aspx>. See also *La Vision NewsPaper.com, Ecuador captura a nueve supuestos rebeldes de las FARC*, Feb. 19, 2006, <http://lavisionnewspaper.com/online/content/view/1124/30/>.

⁹³ *The Law of Armed Conflict: Neutrality*, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5P8EX4/\\$File/LAW8_final.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5P8EX4/$File/LAW8_final.pdf)

The feasibility of the rules on the use of force has been questioned. Some argue that the Charter system and its rules are no longer practical due to the constant breach of Charter rules. Others have declared the Charter is dead because it is continuously ignored.⁹⁴

However, if a state's practice of ignoring or breaching the law constitutes a violation and not a "practice moving toward a new customary rule, the rules remain viable. If the international community continues to express support for the rules—another form of state practice—the rules remain."⁹⁵ Colombia has not argued for new rules nor that the existing rules are obsolete and passé.

As of today the reports of a dead Charter system and rules on use of force and self-defense seem exaggerated.⁹⁶ Yes, there are complaints and suggestions, but nations continue using the Charter and its rules.

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that

⁹⁴ See Mary Ellen O'Connell, *The Myth of Preemptive Self Defense*, ASIL, Aug. 2002, <http://www.asil.org/taskforce/oconnell.pdf> (citing Thomas M. Franck, *Who Killed Article 2(4)?* 64 AM. J. INT'L L. 809 (1970); Jean Combacau, *The Exception of Self-Defense in U.N. Practice*, LEGAL REGULATION OF THE USE OF FORCE 32; Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter* 25 HARV. J. L. & PUB. POL'Y 539, 546 (2002)). See also Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WKLY. STANDARD 24, (Jan. 28, 2002); Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL'Y 539, 546 (2002).

⁹⁵ Mary Ellen O'Connell, *The Myth of Preemptive Self Defense*, ASIL, Aug. 2002, <http://www.asil.org/taskforce/oconnell.pdf>.

⁹⁶ Mary Ellen O'Connell, *The Myth of Preemptive Self Defense*, ASIL, Aug. 2002, <http://www.asil.org/taskforce/oconnell.pdf> (citing Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971)).

basis, the significance of that attitude is to confirm rather than to weaken the rule.⁹⁷

These are the rules we have today and we need to see if the present “threats” will lead to a different practice and implementation of a new law.

The unfettered usage of anticipatory self-defense invites nations fighting terrorism to opt for unchecked militarism over diplomatic approaches. In order to avoid resorting to further controversial anticipatory or preemptive action, Colombia and its neighbors in the region need to promote multilateral strategies, alliances, intelligence and information resource sharing. The Colombian government must ask itself, “Was this action the last choice, the last option? Will terrorism be defeated at the hands of these types of offensive strikes, or will these approaches intensify the same problem they aimed at destroying: terrorism?” One hopes that diplomacy can be a better solution than using force, because continuing to use force in an anticipatory manner could perpetuate wars with no end.

⁹⁷ Nicaragua case, at ¶ 186.