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## **The U.S. Attacks on Afghanistan: An Act of Self-Defense Under Article 51?**

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Sikander Ahmed Shah<sup>1</sup>

### INTRODUCTION

On September 11, 2001, a tragic chain of events stunned the world. On the morning of that fateful day, terrorists hijacked four U.S. commercial jetliners, ramming two of the hijacked planes into the two towers of the World Trade Center in New York City.<sup>2</sup> The towers were eventually reduced to rubble.<sup>3</sup> Moments later, the third jetliner rammed into the Pentagon in Washington, D.C., and the fourth plane crashed in the Pennsylvania countryside, supposedly on its way toward the capital.<sup>4</sup> The results were devastating, leaving 2,973 people dead, most of them civilians.<sup>5</sup> On October 7, 2001, U.S. and British forces commenced bombing raids on Afghanistan.<sup>6</sup> The United States declared that the attack was self-defense, under Article 51 of the United Nations (UN) Charter.<sup>7</sup> To date, countless Afghani civilians have been killed as a result of continuing allied air strikes and operations.<sup>8</sup> Many more individuals have suffered starvation because of the continued air raids and suspended food supply deliveries.<sup>9</sup> Most individuals have been displaced from their homes and are refugees in, or on the borders of, Pakistan, Iran, and the Central Asian Republics.<sup>10</sup> Even given the history of warfare and internal strife that has plagued Afghanistan for the last thirty years, and the breakdown of the administrative and distributive capacity that this has engendered, the suffering of the Afghani people arising from U.S. action in the country is without measure. Posterity will judge U.S. action in Afghanistan not only on the basis of the legality of its military actions, but also on the basis of restorative and rehabilitative actions undertaken in acknowledgement of such suffering. Despite the significant impact this war has had on many Afghani civilians, few have

seriously considered whether the U.S. attack on Afghanistan qualifies as self-defense under Article 51 of the UN Charter.<sup>11</sup>

Accordingly, Part I of this article begins this discussion with an analysis of the requirements for self-defense under Article 51 of the UN Charter, including a definition of terrorism. Part II argues that the U.S. attacks on Afghanistan were not self-defense under Article 51. Assuming for argument's sake that the United States' initial attacks were justified, Part III considers whether the United States' continued attacks on Afghanistan can also be justified as self-defense. Finally, Part IV addresses what the international community can do to remedy this problem. One idea would be to empower specialized monitoring bodies under the UN to determine the occurrence of an armed attack, assist all concerned parties to settle their disputes amicably, and prevent unnecessary acts of retaliation and retribution under the guise of self-defense. Finally, this paper concludes that the U.S. attack on Afghanistan was not self-defense under Article 51 of the UN Charter.

#### I. SELF-DEFENSE UNDER THE UN CHARTER

This section defines exactly what behaviors constitute self-defense under Article 51 of the UN Charter. The section begins with a summary of the applicable text of the UN Charter. This textual summary is followed by a discussion of the term terrorism with a focus on state terrorism. Finally, the section concludes with a discussion of the term "armed attack" under Article 51.

Under Article 2(4) of the UN Charter, member states are to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."<sup>12</sup> Unless such force is specifically authorized by the Security Council, member states are only allowed to use force or aggression under the Charter if such force or aggression is taken in self-defence.<sup>13</sup> Article 51 states that "[n]othing 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.”<sup>14</sup>

*A. Definition of Terrorism*

Terrorism must be defined in order to determine if an attack of terrorism warrants self-defense by the state under attack. To date, terrorism is an undefined term in international law. To understand the concept of terrorism, it is imperative first to trace its history and evolution under international law. In addition, regardless of the somewhat nebulous definition that accompanies the definition of terrorism, it is important to remember that “[u]se of the term [terrorism] implies a moral judgment; and if one party can successfully attach the label terrorism to its opponent, then it has indirectly persuaded others to adopt its moral viewpoint.”<sup>15</sup>

After the UN was created, two schools of thought emerged which shaped the dialogue about the definition of terrorism.<sup>16</sup> On one side were those who argued that normative responses to prohibited conduct could not be devised, unless there was agreement on what activities were actually prohibited.<sup>17</sup> On the other side, the realists believed that it was impossible to agree upon a definition of terrorism and that the best way to proceed was to define terrorism on a case by case basis.<sup>18</sup> To the realists, no bright-line rule existed; therefore, whether or not particular conduct was sanctioned as terrorism could depend on very slight variations in the factual circumstances surrounding the conduct.<sup>19</sup>

In 1979, the Ad-Hoc Committee on Terrorism, which was created by the UN General Assembly, attempted and failed to come up with a concrete definition of terrorism.<sup>20</sup> Some individuals argued that actions against prohibited targets should be defined as terrorism. Others emphasized that the purpose of the action(s) undertaken was the crucial determinant, while others looked at the characteristics and motives of the perpetrators.<sup>21</sup> The problem with these definitions was that they were too broad, created

uncertainty, and could be used against actions undertaken by states, which the states themselves considered to be legitimate under the norms of international law.<sup>22</sup> Despite years of effort on the General Assembly's part, significant difficulties like those outlined in this section prevented the Assembly from providing more than a few elements of what constituted terrorism.<sup>23</sup>

One significant issue that has hindered the establishment of a concrete definition of terrorism has been the lack of initiative by the world community. Specifically, developed Western nations were afraid that if terrorism was concretely defined, the actions they undertook for self-defense or for international peace purposes might eventually be perceived as terrorism.<sup>24</sup> In addition, third world nations were afraid that legitimate freedom and national liberation movements would be classified as terrorism.<sup>25</sup>

With the fall of the Soviet Empire, for all practical purposes, the UN came under the direct control of the West.<sup>26</sup> In 1989, the UN passed a resolution that no terrorist activity could be justified even if it was committed during a freedom struggle.<sup>27</sup> Henceforth, the Western realists slowly started establishing norms and behavior that were termed as "terrorism" under specific circumstances. Offenses against diplomats, states taking hostages, allowing one's territory to be used for military action against another state, and actions against another state's civilians (real acts or threats that instill fear or terrorize the public) were all deemed terrorist activities. However, these norms have not been universally applied.<sup>28</sup>

### **1. State Terrorism**

Even though the international definition of terrorism is still evolving, state terrorism has been defined with somewhat more specificity because it is distinct in that it necessarily implies that acts of international terrorism are taking place.<sup>29</sup> With regard to state terrorism, the question arises whether there is sufficient nexus between the state and terrorist activities

associated with it, in order to establish that state terrorism exists therein. More specifically, state terrorism has been defined as “acts of violence which are outside the accepted acts of international diplomacy and rules of war.”<sup>30</sup> It is important to note that the General Assembly’s *Declaration on Friendly Relations* (2625 (XXV)) stated that “each State has a duty not to organize or encourage acts of civil war and terrorism on another State’s territory or to tolerate on its own territory, activities organized with a view to perpetrating such acts.”<sup>31</sup> Thus, the key issue in a state terrorism inquiry is whether there is a sufficient nexus between the state and terrorist activities associated with it. Specifically, four levels of state involvement in terrorism have been identified: (1) state inaction, (2) state toleration, (3) state support, and (4) state sponsorship.<sup>32</sup>

a) Level One: State Inaction

The first level of state terrorism is known as *state inaction*. State inaction occurs when a state lacks the ability to control terrorist activities taking place from its soil.<sup>33</sup> Under such circumstances, states have sometimes asked for external assistance to deal with this form of terrorism.<sup>34</sup> However, states have also used state inaction as an excuse to violate the territorial integrity of other states without waiting for requests for assistance.<sup>35</sup> Unfortunately, world condemnation of such incursions has been muted or the responsibilities of the intervening states have been held to be diminished.<sup>36</sup> The legal basis for the intervening state’s conduct was established in the Corfu Channel case.<sup>37</sup> The case involved British warships traversing Albanian territorial waters, where a number of British sailors were killed when British ships unexpectedly struck mines.<sup>38</sup> The court, while finding that Albanian sovereignty had been violated, nonetheless observed that Albania’s complete failure to exercise its sovereign powers created “attenuating circumstances for the United Kingdom government.”<sup>39</sup>

Using state inaction to justify violations of a state’s territoriality is gravely problematic because more often than not it will be the poor third

world countries that are perceived as unable to handle supposed terrorist outfits operating from their soil. Consequently, such justifications provide a pretext for richer, more powerful states to imperil the norms of international law by arguing that the gravity of the terrorist acts justified their response.

This result is problematic because the UN was created for the very purpose of maintaining international peace and security.<sup>40</sup> Bypassing the procedures laid out within the UN Charter questions the purpose of the Charter's existence. While the UN has not always been effective, and while it is easily dominated by a few states, it still enjoys the support of the international community.<sup>41</sup> Therefore, allowing individual states to establish a variable standard for violating another state's sovereignty grossly undermines the basis upon which the international community exists. When this process is bypassed, the safety of the international community is compromised.<sup>42</sup>

*b) Level Two: State Toleration*

The next level of state involvement in terrorism is termed *state toleration*. State toleration takes place when a state is aware that terrorist outfits are operating from its soil, and the state, though possessing the capacity to suppress such activities, abstains from doing so.<sup>43</sup> Significantly, the state does not provide any sort of a support to such outfits.<sup>44</sup> Additionally, these outfits are self-supporting and generally have some form of foreign assistance.<sup>45</sup>

*c) Level Three: State Support*

A higher level of state involvement is *state support*. Here the state provides all kinds of support to terrorist outfits—military training, arms, rhetorical support, financing, tactical support, safe havens, logistical support, travel documentation, intelligence, and transportation.<sup>46</sup> However, such states do not direct the specific terrorist acts; in other words, these states stop short of assuming command and control of such outfits.<sup>47</sup>

d) Level Four: State Sponsorship

The gravest form of state involvement is *state sponsorship*.<sup>48</sup> State sponsorship occurs when states utilize terrorism “as another weapon of warfare to gain strategic advantage where they cannot use conventional means.”<sup>49</sup> The terrorist is, in all practicality, a de facto agent of the culpable state. State sponsorship therefore occurs when a state directs, controls, and commands the terrorist outfits and their activities.<sup>50</sup>

**2. Determination of State Involvement as Terrorism**

Many questions arise at this juncture. How is one to determine the level of state involvement, and how can one determine the authenticity and level of proof required to determine the level of state involvement? Are remedial actions undertaken by states accused of terrorism intended to curb terrorism or to punish terrorists in order to exonerate themselves?

It is difficult, if not impossible, to provide answers to these questions. For example, there is absolutely no international consensus on the level of proof necessary to determine state sponsorship.<sup>51</sup> Unfortunately, in the past, the majority of states that have retaliated on the basis of possessing sufficient proof against other states have later been found to be incorrect in their assessment and wrong about the soundness of proof relative to the degree of terrorist involvement.<sup>52</sup> Even when states are later found to be involved in terrorism, their degree of involvement has often been insignificant enough that an armed retaliation was not justified. Thus, as a result of fallacious reasoning to determine state sponsorship, many innocent states and quasi-innocent states have been attacked and numerous civilian installations have been destroyed.<sup>53</sup>

Retaliating states often respond hastily and do not wait to substantiate the questionable proof they possess.<sup>54</sup> The primary reason for hasty decisions to attack states for the purpose of curbing terrorism is that the states making these decisions are predominantly strong military powers and often possess disproportionate military strength relative to the states they attack. These

heavily armed states are often reluctant to retaliate hastily or forcefully against states with equal or greater military might in comparison, despite the perception that the other state may be a sponsor of terrorism.<sup>55</sup> The rationale for this decision is that the repercussions of such retaliatory attacks can be immense and the well-placed fear of a full-fledged war is obvious.<sup>56</sup> In other words, a deterrent is in place.

The behavior that attacking states exhibit on the basis of inadequate proof sends the wrong signals to the world community and sets a precedent for all states. It encourages states to impetuously commit aggression against other states on the basis of self-defense without the risk of being reprimanded for any errors in judgment. This is true not only for the states that use this precedent as a pretext for justifying their self-interests, but also for those that suffer from the absence of an adequate paradigm for determining factual disputes (such as proof regarding state terrorism), as these states become frustrated and then make unilateral determinations.

*B. Definition of Armed Attack for Purposes of Article 51*

For any measures to be taken in self-defense under Article 51, there must be an armed attack. The framers of Article 51 purposely utilized the restrictive terminology of an “armed attack” instead of an act of “aggression” as a necessary condition for undertaking self-defense.<sup>57</sup> According to Article 31 of the Vienna Convention on the Law of Treaties, while interpreting statutes, words are to be given their ordinary meanings.<sup>58</sup> Thus, applying Article 31’s interpretation to Article 51, armed attack is a subset of aggression.<sup>59</sup> The consensus definition of aggression,<sup>60</sup> which was formally adopted by the General Assembly in 1974,<sup>61</sup> is a much broader concept and does not require actual use of force. Rather, mere threats of force qualify as acts of aggression, which in turn are prohibited under Article 2(4).<sup>62</sup> Aggression can also be economic in nature.

On the other hand, states have acknowledged this extremely restrictive definition of an armed attack.<sup>63</sup> The meanings adduced for armed attack

from several dictionaries all imply the actual occurrence of harm, as opposed to the mere threat of force.<sup>64</sup> Furthermore, Article 51 of the UN Charter, which is one of the two exceptions to the prohibition on the use of force in Article 2(4), uses the word “occurs” with reference to armed attack, and does not talk about the threat of an armed attack.<sup>65</sup> Thus, only the actual use of force, which results in the violation of the territorial integrity of another state, qualifies as an armed attack.<sup>66</sup> Retaliation against action that does not qualify as an armed attack is anticipatory self-defense which has not, as of yet, been condoned in international law.<sup>67</sup> However, it is important to note that the degree of attack is not so pertinent an inquiry when determining if an armed attack has occurred.<sup>68</sup> The reason for such a holding is that retaliatory responses to armed attacks must be proportional under customary international law as discussed in Part IV of this paper. Therefore, states are unable to use a trivial incident by cloaking it as an armed attack to justify disproportionate retaliatory responses.<sup>69</sup>

A more difficult analysis is required when the argument put forward is that an armed attack against a retaliating state has occurred and a retaliating state indulges in an interceptive attack for self-defensive purposes. An interceptive attack can be defined as an action undertaken to repulse an armed attack, “which is imminent and practically unavoidable,”<sup>70</sup> when an irreversible course of action has taken place,<sup>71</sup> but no actual force has yet been felt by the retaliating state.<sup>72</sup> This theory raises the issue of the degree of irreversibility that a course of action needs to attain for it to legitimately qualify as an armed attack. If such actions are truly irreversible, then a force is in motion that is no longer under the control of the attacking state; therefore, an armed attack has already occurred.<sup>73</sup> An interceptive attack in such circumstances would be appropriate. For example, an armed attack would take place if a nuclear warhead has been fired by a particular state unto another state, and the aggressor state no longer possesses the capability to stop the warhead, but the warhead had not yet entered the air space of the attacked state. Conversely, an armed attack would not take place if planes

have commenced their journey to conduct air raids on enemy territory, but have not yet entered enemy air space or attacked enemy territory. The reason for these different results is that in the latter example, the aggressor state has the capability to stop the potential attack.<sup>74</sup>

However, this paradigm has some serious shortcomings. For example, it is difficult to determine with absolute certainty the point at which a state does or does not possess the capability to stop a potential force it has put in motion. This might be a simple task in the case of aircrafts about to begin air raids, but is a nearly impossible task in the context of fired nuclear weapons. The enemy attack can only be repulsed or intercepted when the force put in motion is reversible. In other words, when the force is irreversible, the intercepting state lacks the capability to stop the armed attack.

This less-than-perfect paradigm is a better option than its alternatives. In the absence of such a system of restraint, states will use the concepts of anticipatory and interceptive self-defense as pretexts to infringe on the territoriality of other states. Such acts will threaten international peace and security and, in the worse case scenario, might lead to the breakdown of the present international system.<sup>75</sup> Therefore, having this draconian paradigm in place provides a disincentive for states to freely violate international norms on the basis of self-defense. This paradigm also places a heavy burden of proof, sometimes impossible to satisfy, on states indulging in so-called retaliatory actions. Unfortunately, these unreasonable constraints and undue hardships will be placed on states that genuinely have a cause of action for retaliation. The world community in such circumstances will be less critical of breaches of territorial sovereignty by retaliating states, and the force of their condemnation will accordingly be muted.<sup>76</sup>

### *C. Whether State Terrorism is an Armed Attack*

The answer to the question of whether state terrorism is an armed attack is less than clear. Traditionally, states have been held responsible only for

actions taken on behalf of the state.<sup>77</sup> States have not been accountable for private acts.<sup>78</sup> However, according to the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, a state is responsible for actions of non-state actors when such actors are in direct control of the state.<sup>79</sup>

As discussed above, assuming terrorism and an armed attack have been perpetuated against a state, the question becomes what degrees of state involvement relative to terrorist activities are grave enough to implicate and hold responsible the aggressor state for the armed attack. Fortunately, this question has been answered, though in somewhat broad and general terms, by the International Court of Justice in *Nicaragua v. United States*.<sup>80</sup> The court held that Nicaragua's intervention in El Salvador by providing "assistance to rebels in the form of the provision of weapons or logistical or other support" did not constitute an armed attack for self-defense purposes.<sup>81</sup> This phrase has been interpreted to imply that unless an organ of the state itself is involved in the terrorism, any form of tactical, logistical, financial support, etc., to a terrorist group is insufficient to implicate a state for undertaking an armed attack.

In other words, under the *Nicaragua* case, a cause for self-defense is appropriate only when there is state sponsorship of a terrorist outfit—when the outfit is under the direct command and control of the state and is thus a *de facto* organ of the state.<sup>82</sup> However, in *Nicaragua*, the court held that where the nexus between the state and the terrorist outfit involved logistical support (state support), etc., but did not amount to state sponsorship, a wronged state could take "proportionate countermeasures" against the use of force.<sup>83</sup> What constituted proportionate countermeasures was left largely undefined, but the court explicitly stated that coming to the aid of other states for collective self-defensive purposes was not within its contours.<sup>84</sup>

The level of command and control present between a state and a terrorist outfit raises another issue. What about a situation when, instead of a terrorist outfit being a *de facto* organ of a particular state, a state itself

becomes a terrorist organ when it comes under the command and control of a terrorist outfit? Surely this cannot be an instance of state sponsorship. This situation is more akin to state inaction, but it is different in the sense that citizens of the terrorist-based state might actually be victims of terrorism. In other words, such a state has been hijacked. Apart from justifying its action as self-defense, the retaliating state could bolster its position by arguing that application of force against the terrorists does not infringe upon the territoriality of the hijacked state because the state is not within its own control. Rather, such application of force would liberate that hijacked state and could be termed as a weak form of collective self-defense—the self-defense being that of the hijacked state. This form of self-defense is weak because the presumption is that the states involved herein did not have any kind of a collective self-defense pact. However, this justification is much stronger than the one put forward in the Corfu Channel case for violating territoriality. This is because not only is the terrorist-based state not in a position to reign in these terrorists, but the state itself is a victim of terrorism. However, this preceding self-defense paradigm justification, similar to the one advanced for “state inaction,” is subject to abuse and can provide a pretext for infringement upon state territoriality, especially that of third world countries, as discussed earlier. What might be a freedom movement for a third world country could easily be termed as state hijacking by some developed nations.

## II. THE ATTACK ON AFGHANISTAN AND SELF-DEFENSE

The September 11 attack on the United States would be classified as a terrorist attack under the present rules and norms of international law.<sup>85</sup> The attack primarily targeted civilians and was undertaken to send a message to the U.S. government.<sup>86</sup> By instilling fear in the citizens of the United States, the attackers intended to pressure the U.S. government to reconsider foreign policy. As mentioned earlier, since the demise of the Soviet Union, realists have managed to overcome and subdue the normative

ideology; therefore, the realist notion of terrorism is controlling today.<sup>87</sup> In the past, the realists have clearly classified attacks similar in nature to those that took place on September 11 as terrorism.<sup>88</sup> In addition, normative thinkers may also classify the September 11 attacks as terrorism. Such thinkers would argue that there was clear agreement between the overwhelming majority of states before the attack took place that such an act would fall within the definition of terrorism.

Some have argued that September 11 was not an act of terrorism but was a legitimate use of force undertaken to achieve the inherent right of self-determination and was part and parcel of a freedom struggle.<sup>89</sup> Such an argument is without substance, for even if the act had been qualified as an act undertaken during the course of a freedom movement, it would still be considered an act of terrorism: under the current realist regime, the UN General Assembly adopted a resolution in 1989, giving examples of situations in which the right of self-determination cannot permit acts of terror.<sup>90</sup>

In addition, given the specific circumstances of the September 11 attacks, the freedom movement justification can be rejected on alternative grounds. Assuming that the perpetrators were Islamic militants or members of al Qaeda, their freedom objective can either be freedom of Islam from the West, specifically the United States, or the freedom of Palestine from Israeli occupation,<sup>91</sup> the latter directly funded and supported by the United States. The former reasoning—that the attack was a freedom struggle—can easily be discarded because, as defined under international norms and rules, a freedom struggle relates only to nations and states based on the Westphalia system. Islam is not a state, and it is extremely hard, if not impossible, to argue that all people practicing the Islamic faith qualify as a nation. The latter freedom justification can be rejected on the fact that the overwhelming majority of the attackers were non-Palestinians. Furthermore, the Palestine Liberation Organization, which is universally

recognized as the true representative of the Palestinian cause and people, condemned the attacks as terrorist acts.<sup>92</sup>

The September 11 attacks also constituted a terrorist attack on the United States because its territorial integrity was purposely and clearly infringed upon. Some critics utilizing a formalistic approach argue that under the UN Charter only states are capable of indulging in armed attacks and independent terrorist organizations, unless organs of states themselves, cannot undertake an armed attack for purposes of Article 51.<sup>93</sup> Based on a broad interpretation of the intent of the Charter's framers, the stronger argument would be to the contrary because the framers of the Charter did not contemplate that one day some terrorist organizations would be as strong as states and would have the capability to severely harm states. Taking into account the purpose of the framers—protection against an armed attack—renders the nature and identity of the individual perpetrators as state or non-state actors irrelevant.

The final inquiry is whether the nexus between the state of Afghanistan and the al Qaeda terrorist network is such that al Qaeda is nothing but an organ or agent of the Afghani State. In other words, the question is whether state sponsorship is taking place. This is surely not the case. Afghanistan is one of the poorest countries in the world and is in ruins because of years of civil war and drought.<sup>94</sup> Furthermore, it does not possess the monetary or human capital or any other resources to command and control organizations such as al Qaeda.<sup>95</sup>

Following the inception of Operation Enduring Freedom, the UN Security Council endorsed the U.S. attack on Afghanistan, thereby effectively lowering the required threshold of state involvement below what had previously been established in both the *Nicaragua* and *Tadic* judgments.<sup>96</sup> The Security Council went on to condemn the Taliban regime for allowing Afghanistan to be used by terrorist networks.<sup>97</sup> By acknowledging that the September 11 attack sanctioned the United States to invoke its inherent right to self-defense under Article 51 of the UN Charter,

the UN Security Council effectively opened the door for states to make unilateral decisions on whether an armed attack has taken place on their territory. This paved the way for the U.S. invasion of Iraq, Israel's attack on Lebanon, and the development of the Bush doctrine, which clearly announced the United States' intention to preemptively attack in self-defense.<sup>98</sup> The Bush doctrine indicates a clear reversal of U.S. strategy because the United States has always opposed preemptive attacks in self-defense.<sup>99</sup> Attacks in preemptive self-defense are still illegal under international law.<sup>100</sup> Such laxity on the part of the UN Security Council could very well unleash state attacks against one another in preemptive action.<sup>101</sup>

Afghanistan's involvement could at best be classified as a weak form of state support, as they were harboring and providing a safe haven to supposed terrorists. They are considered "supposed" terrorists because the Afghani establishment, the Taliban, even on insistence, was not given any evidence by the United States regarding the culpability of al Qaeda members, with regard to the September 11 attacks.<sup>102</sup> In fact, the ruling Taliban regime, whatever its true intentions, unlike Libya, which had refused to hand over Lockerbie suspects,<sup>103</sup> had offered to hand over Osama bin Laden to a neutral Islamic country such as Jordan upon a showing of credible evidence.<sup>104</sup> This offer would have allowed the neutral country to try bin Laden for the charges levied against him or his organization.<sup>105</sup> By refusing this offer, the United States might be considered the party in violation of Article 2(3) and Article 33 of the UN Charter.<sup>106</sup> Article 2 requires states to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."<sup>107</sup> Article 33 requires parties to a dispute, "the continuance of which is likely to endanger the maintenance of international peace and security," to first seek a solution by peaceful means.<sup>108</sup>

Furthermore, in addition to violating Articles 2(3) and 33 of the UN Charter, the United States' retaliatory attack on Afghanistan should not be

regarded as an act of self-defense even though the Security Council held that the U.S. attacks on Afghanistan were justified under Article 51.<sup>109</sup> Afghanistan's involvement in the attacks on U.S. soil did not rise to the degree of state sponsorship. The United States has a better argument that its attacks were justified because state inaction was present under the Corfu Channel rationale, though that rationale provides a fundamentally weak justification.

The other U.S. justification, not entirely based on self-defense, is that al Qaeda and the Taliban had hijacked the state of Afghanistan and the United States was not only protecting its interest but was also liberating Afghanistan. The United States could also argue that it was not undertaking self-defense measures, which are subject to some necessary preconditions, but was after being directly attacked, taking "proportionate countermeasures" (a phrase that is yet largely undefined, under the rationale of the *Nicaragua* case) after being directly attacked.<sup>110</sup>

### III. THE CONTINUED ATTACKS ON AFGHANISTAN AND SELF-DEFENSE

Alternatively, assuming that the initial U.S. attack on Afghanistan satisfied the requirements of Article 51, the question becomes whether the United States' continued bombing of Afghanistan would still qualify as self-defense under Article 51. It should be noted that self-defense measures under the Article can only be taken to the extent that the "armed attack" has not ended.<sup>111</sup> If the armed attack has ended, any retaliation would be retributive or punitive in nature, and thus, the action would not conform with Article 51.<sup>112</sup>

Determining whether the armed attack against the United States had ended prior to its extensive bombing of Afghanistan requires defining when the termination of an armed attack occurs. The international community has restrictively defined the termination of an armed attack.<sup>113</sup> For example, the 1986 U.S. bombing raids on Libya were condemned, as Libya

was not engaged in a current ongoing armed attack against the United States.<sup>114</sup> Likewise, Israeli military incursions across the UN armistice line in 1956<sup>115</sup> and the Israeli bombing of Hezbollah positions in Southern Lebanon in 2006 were internationally condemned.<sup>116</sup> Israel's justification for its actions, based on the accumulation of event theory, was rejected.<sup>117</sup> The international community took the contrary view and held that sporadic and isolated incidents by armed groups, even if with state support, did not constitute an armed attack.<sup>118</sup>

Some critics forcefully argue that the UN has recently preferred an expansive view relative to the notion of the duration of an armed attack.<sup>119</sup> This was the case when the United States attacked Iraq in 1993 with cruise missiles.<sup>120</sup> The cruise attack was based on the rationale that an assassination attempt against the former U.S. President George Bush when visiting Kuwait was an armed attack in process against the United States.<sup>121</sup> This was not an armed attack because the attempt was never carried to fruition, and the threat of such an act had subsided before the United States attacked Iraq because President Bush had safely returned to the United States.<sup>122</sup>

Despite this questionable logic, criticism of the United States for its attacks on Iraq during the 1990s by the UN was lacking.<sup>123</sup> A superficial analysis of such recent developments does seem to suggest that the expansive view of the duration of an armed attack has displaced the restrictive view.<sup>124</sup> However, that is not the case. The UN's muted reaction to American attacks on Iraq was not because the view of the international community relative to the duration of armed attack had changed. The real reason for the lack of criticism was because the United States had surfaced as a hegemonic state in the 1990s, and individual states had strategically decided not to be critical of the United States. States were concerned that any criticism could make them vulnerable to the possibility of adverse measures taken against them by the United States. These states rightly feared that the serious unilateral U.S. punitive measures that might follow

would have a crippling effect on their respective economies. It is reasonable to suggest that if any other state besides the United States had taken such retaliatory actions against Iraq, it would have indeed been subject to immense condemnation by the world community. The restrictive notion of armed attack therefore still exists.

The September 11 attacks ended after they were perpetrated. In addition, the fact that no subsequent attacks have been witnessed against the United States confirms this conclusion. Any future probability of an attack is a mere threat. As mentioned earlier, any retaliation to threats is an act of anticipatory self-defense and therefore cannot be justified under Article 51.<sup>125</sup>

#### *A. Customary International Law and Self-Defense under Article 51*

Even when self-defense is appropriate under Article 51, a state must conform to the requirements of necessity, proportionality,<sup>126</sup> and immediacy.<sup>127</sup> These three variables act as constraints on unqualified retaliatory action and are essential elements of customary international law.<sup>128</sup> It is imperative that these three variables are analyzed against the backdrop of Article 51's enactment. Utilizing such an analysis will not only provide a clearer comprehension of such elements, but will also clarify the intent of the drafters of the Charters with regard to the scope of the use of force to fall under Article 51.

During the era preceding the enactment of Article 51, certain acts of anticipatory self-defense were held to conform to the necessity and proportionality requirements of customary international law. For example, the world community somewhat accepted British actions in 1940 as reasonable and proportional in nature for the purposes of self-defense when Britain destroyed the Oran fleet of the Vichy French government<sup>129</sup> before it fell in the hands of the Germans and could have been used against Britain. After witnessing the ruins of World War II, the world community drafted the Charter with the precise goal of preventing future war at all costs.<sup>130</sup>

The drafters no longer considered anticipatory forms of self-defense as a viable option of self-defense, as it was precisely the kind of act that fomented an armed conflict. When the adequacies of the requirements of necessity, proportionality, and immediacy are examined, it is essential that an extremely restrictive approach be taken in order to realize the intent of the framers of the UN Charter in proscribing anticipatory forms of self-defense.

### **1. Immediacy Requirement**

First, the immediacy requirement of self-defense is inextricably tied to the necessity requirement<sup>131</sup>—if an action taken in self-defense does not require immediacy, then it is de facto unnecessary. Waiting too long to retaliate is also proof that the action eventually taken was not one of last resort.<sup>132</sup> The time limitation is also present to prevent innumerable state reprisals to prior unlawful acts of force. The critical nature of a timely response can best be illustrated by analyzing the Caroline dispute between the United States and the United Kingdom, which related to the unsuccessful 1837 rebellion in Upper Canada against British rule.<sup>133</sup> Then U.S. Secretary Daniel Webber, during the exchange of diplomatic notes between the involved governments, presented the often-quoted framework for self-defense relative to immediacy and necessity. Under the framework for the Caroline paradigm, only when the danger posed to a state is “instant, overwhelming, leaving no choice of means, and no moment for deliberation”<sup>134</sup> can a state respond.

The United States attacked Afghanistan a whole month after the September 11 attacks. This was a calculated decision and was subject to extensive deliberation. Such a decision suggests that the danger posed to the United States was neither instant nor overwhelming. Thus, the immediacy requirement was not met.<sup>135</sup>

## 2. Necessity Requirement

Second, the necessity requirement can only be met when all other alternative peaceful means of resolution of the dispute or issue are exhausted, given the time constraints involved.<sup>136</sup> The Caroline paradigm is equally applicable to the necessity requirement<sup>137</sup>—there must be no other choices nor moments of deliberation available before undertaking self-defense.<sup>138</sup>

In recent decades, rapid technological advancements in the warfare industry have rendered the necessity analysis extremely complex,<sup>139</sup> as hostile states possess nuclear-laced delivery systems capable of destroying states within a span of minutes. Although these new technological developments need to be factored into the necessity analysis, no form of anticipatory defensive measures can be tolerated. This system might be far from perfect, but adoption of alternative paradigms would invite disaster. In today's nuclear day and age, any form of anticipatory self-defense justification can easily trigger a nuclear war.

It was unnecessary for the United States to attack Afghanistan for self-defense purposes. Afghanistan, which is not a state sponsoring terrorism, had made repeated requests to the United States for credible evidence of bin Laden's as well as al Qaeda's involvement in the terrorist attacks. This was a reasonable request, but the United States paid it no heed. Afghanistan had also offered to hand over bin Laden to a neutral country such as Jordan,<sup>140</sup> where he would have been tried for a determination of culpability under Jordanian law. The United States again ignored Afghanistan's proposal, which was extremely unreasonable on its part, because of the United States' ratification of the Montevideo Convention and because of the UN Charter's provision for sovereign equality of all states.

The United States has ratified the Montevideo Convention of 1933, under which states are juridically equal.<sup>141</sup> The UN Charter provides for the sovereign equality of all states.<sup>142</sup> An essential corollary of sovereign equality is the principle that the courts of one state do not question the

validity of acts carried out in another.<sup>143</sup> Hence, the United States is under an obligation to respect the credibility of the judicial systems of other member states. In addition, the United States enjoys considerable political, military, and economic prowess as compared to Jordan, a key U.S. ally.<sup>144</sup> If bin Laden were handed over to Jordan,<sup>145</sup> the United States would in fact have had the power to influence bin Laden's indictment, even if in reality there was not enough proof to indict him under the Jordanian judicial system. In fact, the United States even may have been able to extradite bin Laden to the United States from Jordan.

This dilemma of choice of law is the result of U.S. foreign policy. Specifically, the United States impeded the creation of the International Criminal Court (ICC) because of fears that U.S. executives and Israeli officials would become subject to the authority of the ICC and possibly be indicted for war crimes as a result of military adventurism. Had the ICC been in existence, bin Laden and other al Qaeda members would have been charged with international crimes under the jurisdiction of the ICC and would then be adjudged within the auspices of this unbiased international court.

The unreasonableness of the United States' stance is further substantiated by the fact that President Bush publicly stated on several occasions that no bargaining was to take place with Afghanistan.<sup>146</sup> The only way the Taliban could avoid a U.S. armed attack was to hand over bin Laden immediately and allow the United States to maintain a military presence in Afghanistan for the purpose of hunting down supposed terrorists and ensuring the closure of all training camps, "the Madrassahs,"<sup>147</sup> which provided both Islamic education and military training.<sup>148</sup> In fact, President Bush had further sent a message to the Taliban administration that it would "pay a price"<sup>149</sup> if it did not hand over bin Laden.<sup>150</sup> This is surely not the proper way to bargain, especially with a fundamentalist regime like the Taliban.

Afghanistan functions under a tribal code of conduct under which honor is the most salient feature of the system. Any act challenging the honor of

the Afghans compels them to sacrifice their lives if the need is felt, no matter the consequences.<sup>151</sup> Rather than challenging the Afghani culture and values, the United States should have been more tolerant and understanding of the Afghani culture. Surely engaging the Afghans in a less hostile manner could have rendered productive results, even to the extent that this whole dispute could have been solved through alternative, peaceful means over time. All these various facts are sufficient proof that the United States did not exhaust all alternative peaceful,<sup>152</sup> diplomatic, political, and bargaining means to deal with the issue at hand.<sup>153</sup>

The concept of necessity in self-defense also requires that the use of self-defense bring an end to the dangers present. The U.S. bombing did not accomplish this feat in any way. First, none of the terrorists involved in the terrorist activities on September 11 were Afghans; they were all Arabs.<sup>154</sup> This suggests that the root cause of such terrorism, as well as the major operatives and finances of these outfits, are not present in Afghanistan but in countries like Saudi Arabia and Egypt. Thus, an attack by the United States against Afghanistan cannot purport to address the initial threat of terrorism emanating from the Middle East. However, the United States has not penalized these other countries because that would jeopardize the U.S. oil supply provided by these Arab states.

Second, the objectives of the bombing were vague, and no concrete goals in this fight against terrorism had been clearly outlined. Other Muslim states such as Iran have been vaguely indicated as likely future targets for fomenting terrorism.<sup>155</sup> Carpet and cluster bombing from miles in the sky resulted in the deaths of thousands of Afghan civilians and children, and the destruction of numerous mosques.<sup>156</sup> These actions infuriated the Muslim masses all around the world,<sup>157</sup> and as a result, for every genuine terrorist killed in such military encounters, hundreds are born daily in the Muslim world. Even by crushing the Taliban, the U.S. bombing campaign in Afghanistan did not alleviate, but rather increased, the danger of future

attacks on the United States. Therefore, the U.S. actions did not end the danger as required for self-defense.

The correct, advisable, and peaceful alternative solution to this terrorism problem is for the United States to revise its foreign policy. By not taking sides in the Palestine and Israel conflict and by not supporting and/or providing military assistance to Israel, the United States would help decrease the distrust, hatred, and anger it faces in the Muslim world. As a result, such terrorist acts fueled by frustration would not be supported or undertaken by most Muslims. Israel has used U.S. military equipment and economic aid for all sorts of aggression against Palestine and other Arab states and has, on numerous occasions, been condemned by the UN for such aggression.<sup>158</sup> However, with the UN General Assembly resolutions ineffectual in the face of U.S. resistance,<sup>159</sup> these Arab states view Israel and the United States as the same entity—the aggressor.

### **3. Proportionality Requirement**

The final requirement of self-defense, proportionality, is two-pronged.<sup>160</sup> Under the first prong, the response must be proportional to the wrong suffered.<sup>161</sup> In other words, the adverse impact on the attacked party must be proportionate to the damages suffered by the state acting in self-defense. Therefore, a self-defense action in which large parts of enemy territory are occupied on the basis of self-defense would not be proportional<sup>162</sup> if the action was taken in retaliation to minor border skirmishes.<sup>163</sup>

Some believe that proportionality should be measured not by the impact and damage inflicted on the enemy state's military and governmental installations, but rather by the impact on innocent civilians. This is unreasonable because damage to government infrastructure will indirectly and invariably result in an adverse impact on civilians. The 1991 and 1993 Gulf Wars are prime examples of this phenomenon, in which a disproportionate number of civilians died as a result of American destruction of Iraqi infrastructure and international sanctions.<sup>164</sup>

The second prong of proportionality is that “the response must be proportional in terms of the nature and the amount of force employed to achieve the objective or goal”,<sup>165</sup> therefore, the acting state’s actions must be confined to the removal of the danger. Indiscriminate bombing of a state charged with terrorism, rather than strategic precision-guided bombing of only terrorist camps and related infrastructure, is not a proportionate response.<sup>166</sup>

The U.S. attack on Afghanistan was far from proportionate under customary international law.<sup>167</sup> First, under the first prong of the proportionality requirement, the culpability of the Afghani establishment (state support) with regard to the terrorist attacks on September 11 was not of such a level that it could be subjected to a full-fledged war. The damage inflicted on Afghanistan was extremely disproportionate to the damage inflicted on the United States on September 11.<sup>168</sup>

The United States destroyed an already moth-ridden government infrastructure. It demolished what remained of airports, government buildings, mosques, old homes, and hospitals which barely operated in this poor state. In addition, on numerous occasions, international aid workers were killed, and buildings belonging to international organizations such as the International Red Cross were also destroyed.<sup>169</sup> The United States also continued pointless bombing of the cities of Kabul and Gardez even when the Taliban had long retreated from these cities.

With regard to direct human lives lost, the response was grossly disproportionate between the United States and Afghanistan. The loss of life in the United States was estimated at 2,973 people.<sup>170</sup> On the other hand, not only did thousands of innocent Afghani civilians die directly as a result of American bombs, but 900,000 people faced imminent starvation—twenty percent of which were under the age of five.<sup>171</sup> An additional 2.5 million people were displaced and attained refugee status.<sup>172</sup> The U.S. bombing has also created a political vacuum in the country, raising renewed fears of a civil war and strife.

Under the second prong of the proportionality requirement, the intensity of the U.S. bombing was far from the lowest degree of force needed to attain the stated objective. Rather than sending U.S. ground troops to Afghanistan to battle with the Taliban and the al Qaeda network at the outset, which would have ensured minimal Afghani civilian casualties and other forms of related damages, the United States engaged in air bombing to avoid suffering war casualties. Bombs and missiles cannot distinguish between terrorists and civilians. In turn, these bombs did not specifically target so-called terrorist camps, but rather were indiscriminately used.<sup>173</sup> More civilians than Taliban fighters died in the attacks.<sup>174</sup> The United States' use of carpet and cluster bombs was not precision guided. Exploded cluster bombs killed hundreds of civilians, and unexploded bombs became land mines causing casualties when mistaken for food drops.<sup>175</sup> For all these reasons, U.S. activities in Afghanistan did not meet the proportionality requirement.

*B. Self-Defense as an Interim Right*

Self-defense under Article 51 of the UN Charter is an interim right—a state must cease retaliatory operation when “the Security Council has taken measures necessary to maintain international peace and security.”<sup>176</sup> The United States' bombing of Afghanistan was more or less unilateral. One has to reject as circular any argument on the part of the United States justifying its continuing war against the Taliban and al Qaeda on the grounds that the Security Council had not taken the appropriate measures under Article 51. After all, it was the United States and NATO which prevented the Security Council from taking the adequate measures.<sup>177</sup>

Notably, the General Assembly and the Security Council had passed numerous resolutions on the War on Terror.<sup>178</sup> The General Assembly resolution passed on September 12, 2001, stressed that “those responsible for aiding, supporting, or harboring the perpetrators, organizers, and sponsors of such acts will be held accountable.”<sup>179</sup> It further outlined the

need for all actions taken in the future to be concerted and multilateral.<sup>180</sup> The Security Council on September 28, 2001, again unanimously agreed upon the need to tackle terrorism and undertake collective action.<sup>181</sup> Building upon its previous resolution<sup>182</sup> and overriding the conventional regime concerning international terrorism, Resolution 1373 affirmed the right to self-defense; however, it failed to lay down a definition of *international terrorism*,<sup>183</sup> thereby leaving the decision as to what counts as international terrorism to individual states. Resolution 1373 provides states with the discretion to take unilateral action in the name of countering international terrorism.<sup>184</sup>

In the case of Afghanistan, the United States continued to act by itself, with some assistance from its NATO ally, Britain.<sup>185</sup> Similar unilateral decision making on the part of the United States was witnessed in 2003 with its operations in Iraq. One could argue that after escaping any liability in Afghanistan, the United States used Iraq as a way to further gauge its position vis-à-vis the Security Council. There is also debate over whether Operation Iraqi Freedom was the United States' way of testing ground for Iran.<sup>186</sup>

Once the Security Council agreed that the United States was justified in its initial attack against the Taliban<sup>187</sup> and that a severe act of aggression and breach of peace had taken place, it was relatively easy for the United States to make the Security Council determine under Article 39<sup>188</sup> that use of force was required under Article 42<sup>189</sup> of the Charter. This is because Article 41<sup>190</sup> measures had already been deemed ineffective against Afghanistan. (Article 41 includes the use of economic, communication, and diplomatic measures for the purpose of forcing a state to comply with the mandates of the Security Council.<sup>191</sup>) In recent years, all but three states had severed diplomatic relations with Afghanistan.<sup>192</sup> Afghanistan was also under severe economic sanctions, and all international flights to and from Afghanistan, with the exception of a handful of humanitarian aid-related

flights, were banned. However, as previously noted, such measures did not affect the strength or the policies of the Taliban government.

Hence under Article 43,<sup>193</sup> the United States and any other UN member could have been directed to continue using force against the Taliban and al Qaeda; such collective action and resources would have been more effective in tackling the threat of terrorism emanating from Afghanistan. In other words, international peace and security could have been maintained. It defeats the purpose of the Charter if a claim of inaction is made on behalf of the UN when the United States itself is wholly responsible for such UN inaction.

The environment that prevailed in the world arena at that time was also very conducive to a concerted and multilateral force sanctioned by the Security Council being deployed against Afghanistan. The nature of the current terrorism problem is such that the vested interests of all the permanent members of the Security Council are aligned.<sup>194</sup> Russia and China, who generally oppose U.S. international policy decisions, have provided unstinted support to the United States.<sup>195</sup> These states themselves hold the Taliban and Osama bin Laden responsible for instigating Islamic insurgent movements on their soil. Besides, by aligning with the United States, Russia and China are aware that the United States would no longer be as critical, in at least the interim, of human rights violations that they have committed or will continue to commit generally or in the course of crushing secessionist movements. These two nations have always viewed their actions as internal matters.<sup>196</sup> In fact, other large countries such as India have aligned with the United States for precisely the same reasons.<sup>197</sup>

In addition, different and more efficient military tactics could have been utilized by the aforementioned multilateral force with the objective of fully accomplishing the goals that the United States is striving to achieve. Small, specialized, and trained commando units, drawing recruits from a multitude of nations, directly under the command and control of the UN,<sup>198</sup> could have targeted al Qaeda camps in a hit-and-run ground offensive with the aim of

assassinating or capturing bin Laden, his operatives, and the top brass of the Taliban government. This operation could have been undertaken by utilizing the most sophisticated weaponry coupled with the assistance of the Northern Alliance, which consists of the army of northern Afghans fighting the Taliban.

Once individuals such as bin Laden and Mullah Omer, the supreme commander of the Taliban, had been disposed of, the Taliban regime would have automatically crumbled. Afghanistan is a fragmented country, torn by civil war and ethnic strife for decades. Without a central Taliban command, this militia would have been too weak and unable to stop the numerous powerful local warlords from overrunning it. Therefore, under this alternative military tactic, thousands of civilian lives, which were lost through indiscriminate U.S. bombings, could have been saved.

#### IV. REMEDIAL MEASURES

Though seemingly appealing, revising Article 51 would have adverse repercussions for international peace and security, especially if the balance of powers shifted in the international arena. Unilateral action by states would inevitably lead to attacks in anticipatory self-defense. The language the framers of Article 51 utilized was very specific and was chosen after extensive analysis and deliberations, with the objective of minimizing the evil of war—the major variable that threatens international peace and security. Article 51, from its inception, has been extremely effective in achieving the objective of controlling and preventing wars. Any modifications to Article 51 are, therefore, a recipe for disaster.

The solution to this problem is that states should not attack other states without waiting for the results of a thorough international investigation of factual disputes regarding state terrorism. In other words, states must not retaliate against other states unless the threat of terrorist attacks, based on publicly disclosed facts, is of utmost gravity, and no other options are available for the retaliating state to prevent an imminent attack. In addition,

the UN must undertake a two-step retroactive review of actions taken after all the events have unfolded.<sup>199</sup> The UN must undertake a retroactive review of actions to determine: (1) the credibility of the threat faced by the retaliating state, and (2) the appropriateness of the state's use of force.<sup>200</sup> The UN must not sanction unwarranted conduct.<sup>201</sup>

The UN must also determine what level of remedial action undertaken by a state said to have indulged in terrorism alleviates the culpability of that state, and to what extent. There is, however, some guidance on this issue. In 1988, the International Court of Justice considered whether remedial actions taken by Libya were sufficient to mitigate the terrorist conduct in which it was accused of participating. The court rejected Libya's claim that Libya's trial of its own nationals for terrorism against civil aviation was sufficient under the Montreal Convention of September 23, 1971.<sup>202</sup> The court held that the supposed terrorists, who were thought to be Libyan agents, had to be extradited. Therefore, it can reasonably be argued that nothing short of handing over a state terrorist can even qualify as a remedial measure.<sup>203</sup>

## V. CONCLUSION

The U.S. attacks on Afghanistan cannot be justified on the basis of self-defense. Although the United States was subjected to an armed attack, Afghanistan cannot be seen to have undertaken the attack itself because the nature of the relationship between Afghanistan's ruling Taliban militia and the terrorists who had undertaken the attack was not sufficient to establish the existence of state sponsorship. However, even assuming the United States had authority under Article 51 to attack initially, its ongoing bombing of Afghanistan was not authorized because the action against the United States stopped on September 11, 2001, and the United States failed to consistently conform with norms of customary international law of necessity, immediacy, and proportionality. The United States' response and similar actions undertaken by other states would only be in compliance with

international law if the UN Charter itself is revised to explicitly broaden the scope of Article 51 to accommodate and sanction such use of force. However, because this approach is not advisable, the UN should play a more proactive role, with a greater involvement of the General Assembly in tandem with the Security Council, in establishing processes and mechanisms to deter conflagration of conflicts.

Specialized and empowered UN monitoring bodies (i.e., the United Nations Counter-Terrorism Committee)<sup>204</sup> must make swift, transparent, and comprehensive fact-finding determinations concerning any acts of aggression that can potentially invite retaliatory responses from states. Such UN bodies would themselves be directly answerable to both the UN General Assembly and Security Council. All states contemplating retaliation under Article 51 must engage with such bodies and give due consideration to the determinations provided before taking any military action. Unless no other options are available for the retaliating state to prevent the imminent attack, the retaliating state should be subject to UN sanctions. The mechanism should be such that all states, regardless of their economic and military status, should feel confident in approaching the UN and having their grievances resolved in an equitable and a diplomatic manner.

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<sup>2</sup> *NY Mayor Urges Anti-Terror Pact*, BBC NEWS, Oct. 2, 2001, [http://news.bbc.co.uk/hi/english/world/americas/newsid\\_1573000/1573818.stm](http://news.bbc.co.uk/hi/english/world/americas/newsid_1573000/1573818.stm).

<sup>3</sup> *September 11: Chronology of Terror*, CNN.COM, Sept. 12, 2001, <http://edition.cnn.com/2001/US/09/11/chronology.attack/>.

<sup>4</sup> *Id.*

<sup>5</sup> *U.S. Deaths in Iraq, War on Terror Surpass 9/11 Toll*, CNN.COM, Sept. 3, 2006, <http://edition.cnn.com/2006/WORLD/meast/09/03/death.toll/>.

<sup>6</sup> Malcolm Shaw, *War View: Keep the Response Legal*, BBC NEWS, Oct. 9, 2001, [http://www.bbc.co.uk/worldservice/uk/newsid\\_1587000/1587034.stm](http://www.bbc.co.uk/worldservice/uk/newsid_1587000/1587034.stm).

<sup>7</sup> Letter from John D. Negroponte, Permanent Representative of the U.S. to the United Nations, to President of the United Nations Sec. Council (Oct. 7, 2001), U.N. Doc. S/2001/946 (2001).

<sup>8</sup> *Afghanistan's Civilian Deaths Mount*, BBC NEWS, Jan. 3, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/1740538.stm](http://news.bbc.co.uk/2/hi/south_asia/1740538.stm).

<sup>9</sup> HUMAN RIGHTS WATCH, BACKGROUNDER, NO SAFE REFUGE: THE IMPACT OF THE SEPTEMBER 11 ATTACKS ON REFUGEES, ASYLUM SEEKERS AND MIGRANTS IN THE AFGHANISTAN REGION AND WORLDWIDE 3–4 (2001), available at <http://www.hrw.org/backgrounder/refugees/refugee-bck1017.pdf>.

<sup>10</sup> See generally *id.* at 4.

<sup>11</sup> U.N. Charter art. 51.

<sup>12</sup> U.N. Charter art. 2, para. 4.

<sup>13</sup> See U.N. Charter art. 39.

<sup>14</sup> U.N. Charter art. 51.

<sup>15</sup> RICHARD J. ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM 25 (1989) (citing BRIAN JENKINS, THE STUDY OF TERRORISM: DEFINITIONAL PROBLEMS I (1981)).

<sup>16</sup> See TERRORISM AND INTERNATIONAL LAW 14 (Rosalyn Higgins & Maurice Flory eds., 1997).

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *id.* at 15.

<sup>21</sup> See *id.*

<sup>22</sup> Jaume Saura, *Some Remarks on the Use of Force Against Terrorism in Contemporary International Law and the Role of the Security Council*, 26 LOY. L.A. INT'L & COMP. L. REV. 7, 13 n.24 (2003). For example, under the realist definition for terrorism, during the gulf war, Iraq could have convincingly argued that United States indulged in a terrorist activity when it instilled fear in the Iraqi public as well as when it coerced the Iraqi regime for the purpose of attaining Iraqi withdrawal from Kuwait.

<sup>23</sup> *Id.* at 13.

<sup>24</sup> See TERRORISM AND INTERNATIONAL LAW, *supra* note 16, at 16.

<sup>25</sup> The Secretary-General, *Report of the Secretary-General on Measures to Prevent Terrorism*, U.N. Doc. A/44/456/Add. 1 (Oct. 10, 1989); Saura, *supra* note 22, at 13 n.24.

<sup>26</sup> With the removal of the Soviet view to counter the realist perspective, whatever definition of terrorism that suited developed western nations now prevailed.

<sup>27</sup> G.A. Res. 44/22, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/29 (Nov. 16, 1989) (recognizing the territorial sovereignty and integrity of all parties, and affirming the needs for both parties to adhere to international law, during the occupation of Kampuchea).

<sup>28</sup> For example, when the United States bombed a Sudanese pharmaceutical factory on August 20, 1998, the superpower claimed that its activities were not terrorism. See Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 537 (1999). Although many innocent Sudanese civilians were killed, the United States managed to appease the UN by arguing that,

keeping in view the present circumstances, such action was taken in self-defense. *See id.* The United States provided similar answers to its critics, who argue that the killing of innocent Afghani civilians and the threat of death to many more of their countrymen as a result of extensive U.S. bombing raids were, in fact, instances of terrorism. It is important to point out that the United States often bombed residential areas in Afghanistan and caused massive civilian casualties, explaining the incidents as results of technical mistakes and/or “collateral damage.”

<sup>29</sup> *See* JOHN F. MURPHY, STATE SUPPORT OF INTERNATIONAL TERRORISM 31–32 (1989).

<sup>30</sup> ERICKSON, *supra* note 15, at 31.

<sup>31</sup> *See generally* TERRORISM AND INTERNATIONAL LAW, *supra* note 16, at 202.

<sup>32</sup> ERICKSON, *supra* note 15, at 32.

<sup>33</sup> *See id.* at 33.

<sup>34</sup> Such was the case, for example, when the Somalian government requested help from West Germany during an air hijacking in 1977. *Id.* at 33.

<sup>35</sup> *See id.*

<sup>36</sup> *See generally* TERRORISM AND INTERNATIONAL LAW, *supra* note 16, at 207.

<sup>37</sup> *See id.* at 207.

<sup>38</sup> D.G. Stephens & M.D. Fitzpatrick, *Legal Aspects of Naval Mine Warfare*, 21 LOY. L.A. INT’L & COMP. L.J. 553, 572 (1999).

<sup>39</sup> Later Israel, using the same principle as the United Kingdom, violated the territorial integrity of Uganda. *See* TERRORISM AND INTERNATIONAL LAW, *supra* note 16. The Israelis argued that their intervention in Entebbe was justified because Uganda was not in a position to handle the hijacking. They also argued that they were substituting for Uganda, which was justified as some nationals on the Air France flight were Israelis.

<sup>40</sup> U.N. Charter art. 1, para. 1.

<sup>41</sup> *See generally* Erik Suy, *Is the United Nations Security Council Still Relevant? And Was it Ever?*, 12 TUL. J. INT’L & COMP. L. 7 (2004).

<sup>42</sup> In July 2006, for example, such a situation was encountered when Israel unilaterally decided to attack and invade Lebanon without the advice, consent, or approval of either the United Nations Security Council or the General Assembly. Israel’s sole justification for the attack was that Hizbollah had captured Israeli soldiers in Israel, thereby compelling Israel to retaliate in the interest of its national security. Joshua Frank, *Kidnapped in Israel or Captured in Lebanon?: Official Justification for Israel’s Invasion on Thin Ice*, Jul. 25, 2006, <http://www.antiwar.com/frank/?articleid=9401>. Additionally, Israel leveled the allegation that Lebanon had shown inaction in controlling Hizbollah, a “powerful political and military organisation of Shia Muslims in Lebanon.” *Who Are Hezbollah?*, BBC NEWS, Jul. 13, 2006, [http://news.bbc.co.uk/2/hi/middle\\_east/4314423.stm](http://news.bbc.co.uk/2/hi/middle_east/4314423.stm). Israel’s armed aggression against Lebanon resulted in extensive damage to the Lebanese economy and infrastructure. Israel grossly violated the international laws of war through its indiscriminate bombings. Hizbollah’s counter retaliation, shelling Israel with cluster-bombs in contravention of international humanitarian law, threatened international peace and security. Frank, *supra*; *see also* *Who Are Hezbollah?*, *supra*.

<sup>43</sup> *See* ERICKSON, *supra* note 15, at 33.

<sup>44</sup> *See id.* at 33.

<sup>45</sup> Pakistan has often been accused of tolerating terrorist groups that operate from its territory. These accusations are made especially by India, in the context of the longstanding conflict between the two countries over the disputed territories of Kashmir. Many in Pakistan support such activity on the basis of Islam, which they see as the cause. Kashmir Hussain Haqqani, Pakistan's Terrorism Dilemma, National Defense University, <http://www.ndu.edu/inss/symposia/pacific2003/haqqani.htm> (last visited May 1, 2007).

<sup>46</sup> *Id.*; MURPHY, *supra* note 29, at 33. However, transportation provided to hijackers by Egypt as part of negotiations in the Achilles Lauro case was not seen as state support. Customary international law does not *oblige* states to punish pirates. See TERRORISM AND INTERNATIONAL LAW, *supra* note 16, at 208; MURPHY, *supra* note 29, at 99. Egypt was to either try the offenders in its own jurisdiction or extradite them to a third state. Gerald P. McGinley, *The Achille Lauro Affair – Implications for International Law*, 52 TENN. L. REV. 691, 717 (1985). Since Egypt had no extradition treaty with the United States, it was under no obligation to extradite the offenders to the U.S. *Id.*

<sup>47</sup> See ERICKSON, *supra* note 15, at 33.

<sup>48</sup> See *id.* at 32.

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See Sara N. Scheideman, *Standards of Proof in Forcible Responses to Terrorism*, 50 SYRACUSE L. REV. 249, 260 (2000).

<sup>52</sup> See *supra* text accompanying note 28.

<sup>53</sup> One way to address the dangers of unnecessary state retaliation is to disallow states from attacking other states on the premise of state sponsorship, at least until the United Nations Counter-Terrorism Committee (CTC) determines that the level of proof it possesses, after extensive inquiries gathered from all concerned parties, is sufficient to warrant an armed intervention. See generally S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>54</sup> For example, the U.S. attack on the El Shifa pharmaceutical factory in Sudan occurred on August 20, 1998, shortly after the U.S. embassy bombings in Tanzania and Kenya. Lobel, *supra* note 28, at 537. The United States claimed that it had credible evidence that the factory was producing, or was about to produce, chemical weapons for Osama bin Laden's al Qaeda organization and that the weapons were going to be used on various U.S. targets. Sandy Berger, Nat'l Sec. Advisor, White House Special Briefing: Continued U.S. Efforts Against Terrorism (Aug. 21, 1998), in FED. NEWS SERVICE. Later, investigations suggested that the El Shifa was in fact a pharmaceutical plant and a major pharmaceutical producer in Sudan. Lobel, *supra* note 28, at 546. Soil samples from the site revealed no proof of chemical weapons production. See James Risen & David Johnston, *Experts Find No Arms Chemicals at Bombed Sudan Plant*, N.Y. TIMES, Feb. 9, 1999, at A3. But see Walter Gary Sharp, Sr., *The Use of Armed Force Against Terrorism: American Hegemony or Impotence?*, 1 CHI. J. INT'L L. 37, 45 (2000). In addition, the American engineer who designed the plant claimed that the plant had no capability to produce nerve gas. Hassan Ibrahim et al., *The Missiles, the Bungling Pentagon and the Nerve Gas Factory that Never Was: The U.S. Engineer Who Drew up the Plans for the Al-Shifa Plant Has Shaken American Claims that it Was Producing Chemical Weapons*, THE OBSERVER (London), Aug. 30, 1998, at 4. The owner of the

plant was later cleared of any links to the al Qaeda network. The end result was that a major pharmaceutical plant routinely visited by World Health Organization representatives and foreign dignitaries, which was also a major source of essential medicines for a poor country, was destroyed. See Lobel, *supra* note 28, at 546; Risen & Johnston, *supra*; Ibrahim et al., *supra*. But see Sharp, *supra*.

<sup>55</sup> See *South Asia's Nuclear Shadow*, BBC NEWS, May 27, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/2010622.stm](http://news.bbc.co.uk/2/hi/south_asia/2010622.stm); *Time "Running out" over Kashmir*, BBC NEWS, June 5, 2002, [http://www.news.bbc.co.uk/2/hi/uk\\_news/politics/2026573.stm](http://www.news.bbc.co.uk/2/hi/uk_news/politics/2026573.stm); *Analysis: South Asia's Nuclear Brinkmanship*, BBC NEWS, May 29, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/2013471.stm](http://news.bbc.co.uk/2/hi/south_asia/2013471.stm).

<sup>56</sup> *Time "Running out" over Kashmir*, *supra* note 55; *Analysis*, *supra* note 55; *Impact of a Nuclear Strike*, BBC NEWS, May 29, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/2012543.stm](http://news.bbc.co.uk/2/hi/south_asia/2012543.stm).

<sup>57</sup> YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 166 (3d ed. 2001).

<sup>58</sup> Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT'L L. 227, 229 (2003).

<sup>59</sup> See Carsten Stahn, *Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35, Fall–Spring 2003, at 37.

<sup>60</sup> G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1974); see Bothe, *supra* note 58, at 230.

<sup>61</sup> See Scheideman, *supra* note 51, at 268 n.129.

<sup>62</sup> U.N. Charter art. 2, para. 4.

<sup>63</sup> See Amy E. Eckert & Manooher Mofidi, *Doctrine or Doctrinaire—The First Strike Doctrine and Preemptive Self-Defense Under International Law*, 12 TUL. J. INT'L & COMP. L. 117, 135 (2004).

<sup>64</sup> See DINSTEIN, *supra* note 57; Eckert & Mofidi, *supra* note 63, at 133–34.

<sup>65</sup> Bothe, *supra* note 58, at 229.

<sup>66</sup> See DINSTEIN, *supra* note 57; Eckert & Mofidi, *supra* note 63, at 133–34.

<sup>67</sup> THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma ed., 2d ed. 2002); DINSTEIN, *supra* note 57, at 167; see Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, AM. SOC'Y OF INT'L LAW TASK FORCE ON TERRORISM, Aug. 2002, available at <http://www.asil.org/taskforce/oconnell.pdf>.

<sup>68</sup> DINSTEIN, *supra* note 57, at 176.

<sup>69</sup> For example, the world community largely accepted the United States' argument that the Soviet Union's installation of missiles in Cuba near the American shores was an armed attack on the United States, which justified the U.S. quarantine of Cuba in 1962. See John R. Henriksen, *International Claims to Anticipatory Self-Defense: A Juridical Analysis* 20, 30 (Sept. 30, 1981) (unpublished LLM thesis, The George Washington University) (on file with The George Washington University). In contrast, the Israeli air raids on an Iraqi nuclear reactor that was under construction in 1981 were condemned and held to be in violation of international law. See *id.* at 96. Israel's justification that an armed attack had occurred against it because nuclear devices once produced by Iraq would eventually be delivered against Israel was comprehensively rejected. See *id.* at 96–97. These examples illustrate that armed attacks against retaliating states are not truly

“armed attacks” where those states take anticipatory self-defensive measures. This is because anticipatory self-defense allows the retaliating state to take defensive measures before the imminence of the armed attack has actually been established. *See id.* at 15. *But see* Thomas M. Franck, *When, if Ever, May States Deploy Military Force without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL’Y 51, 59 (2001). In other words, an armed attack is only imminent when it is underway. *See generally* DINSTEIN, *supra* note 57.

<sup>70</sup> *See* DINSTEIN, *supra* note 57, at 172.

<sup>71</sup> *Id.*

<sup>72</sup> *See* O’Connell, *supra* note 67, at 13.

<sup>73</sup> DINSTEIN, *supra* note 57, at 172.

<sup>74</sup> *See id.*

<sup>75</sup> Ivo Daalder, policy brief, Pre-emptive Attack – Old Constraints, New Challenges, United Nations & Global Security, [http://www.un-globalsecurity.org/pdf/daalder\\_paper\\_preemption.pdf](http://www.un-globalsecurity.org/pdf/daalder_paper_preemption.pdf), (last visited Dec. 4, 2007).

<sup>76</sup> *See generally* Stuart G. Baker, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT’L & COMP. L. 99, 100 (1994).

<sup>77</sup> Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT’L L. 83, 88 (2003).

<sup>78</sup> *Cf.* Saura, *supra* note 22, at 23 n.86 (attributing unlawful use of force to the former Afghan government based on its acquiescence with perpetrators of crimes).

<sup>79</sup> Jinks, *supra* note 77.

<sup>80</sup> *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

<sup>81</sup> *Id.* at 104.

<sup>82</sup> *See* DINSTEIN, *supra* note 57, at 182.

<sup>83</sup> *Nicar*, 1986 I.C.J. at 119.

<sup>84</sup> *Id.* at 120.

<sup>85</sup> S.C. Res. 1368, U.N. Doc. S/Res/1368; S.C. Res. 1373, *supra* note 53, ¶ 3–4; G.A. Res. 56/1, U.N. GAOR, 56th Sess., Supp. No. 49, U.N. Doc. A/RES/56/1 (Sept. 12, 2001).

<sup>86</sup> *See* Charles F. Parker & Eric K. Stern, *Blindsided?: September 11 and the Origins of Strategic Surprise*, 23 POL. PSYCHOL. 601, 604 (2002).

<sup>87</sup> *See* TERRORISM AND INTERNATIONAL LAW, *supra* note 16, at 18.

<sup>88</sup> *See id.* at 20 (discussing the Lockerbie incident).

<sup>89</sup> *See generally* NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE FOUNDATION OF THE NEW TERRORISM, [http://www.9-11commission.gov/report/911Report\\_Ch2.htm](http://www.9-11commission.gov/report/911Report_Ch2.htm).

<sup>90</sup> *See generally* G.A. Res. 34/37, U.N. GAOR, 34th Sess., Supp. No. 37, U.N. Doc. A/34/37 (1979).

<sup>91</sup> *See IMPACT: Holy Terror* (CNN television broadcast Aug. 10, 1997) (transcript available at <http://cnn.com/CNN/Programs?impact/9705/09/feature/transcript.ladin.html>) (interviewing Osama bin Laden).

<sup>92</sup> *Panorama: Ask Dr. Naseem* (BBC television broadcast Oct. 16, 2001) (interviewing the lay Chairman of Birmingham Central Mosque).

<sup>93</sup> See DINSTEIN, *supra* note 57, at 182–83.

<sup>94</sup> *Country Profile: Afghanistan*, BBC NEWS, Aug. 3, 2007, [http://news.bbc.co.uk/2/hi/south\\_asia/country\\_profiles/1162668.stm](http://news.bbc.co.uk/2/hi/south_asia/country_profiles/1162668.stm).

<sup>95</sup> The International Court of Justice had laid “effective control” (*Nicar. v. U.S.*), 1986 I.C.J. 14 (June 27) as the minimum requirement level of involvement required on the part of a state for it to be held liable for activity being undertaken in another state. *Nicar.* 1986 I.C.J. at 65. The International Criminal Tribunal for Yugoslavia lowered that requirement to “overall control.” (*Prosecutor v. Tadic*, Case No. IT-94-1-T, T.Ch. II, (Aug. 10, 1995)).

<sup>96</sup> See Jinks, *supra* note 77, at 90; see Stahn, *supra* note 59, at 47.

<sup>97</sup> Jinks, *supra* note 77, at 86.

<sup>98</sup> See O’Connell, *supra* note 67, at 17. See generally Eckert & Mofidi, *supra* note 63.

<sup>99</sup> O’Connell, *supra* note 67, at 3.

<sup>100</sup> *Id.*

<sup>101</sup> See Daalder, *supra* note 75.

<sup>102</sup> David Sullivan, *The Bombing of Afghanistan*, 151 NEW L.J. 1778 (2001).

<sup>103</sup> TERRORISM AND INTERNATIONAL LAW, *supra* note 16, at 21.

<sup>104</sup> *Special Report: America Strikes Back* (CNN television broadcast Oct. 14, 2001) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0110/14/se.03.html>).

<sup>105</sup> *Special Report: Attack on Afghanistan, Bush Rejects Taliban Offer to Hand bin Laden Over*, GUARDIAN UNLIMITED, Oct. 14, 2001, <http://www.guardian.co.uk/waronterror/story/0,136,573975,00.html>.

<sup>106</sup> See U.N. Charter art. 2, para. 3; U.N. Charter art. 33.

<sup>107</sup> U.N. Charter art. 2, para. 3.

<sup>108</sup> U.N. Charter, art. 33.

<sup>109</sup> See Shaw, *supra* note 6.

<sup>110</sup> See Lobel, *supra* note 28, at 556.

<sup>111</sup> See Saura, *supra* note 22, at 23.

<sup>112</sup> DINSTEIN, *supra* note 57, at 183–84; see CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 121 (2d ed. 2004); Saura, *supra* note 22, at 25; see also Baker, *supra* note 76, at 111–12. See generally Dino Kritsiotis, *The Legality of the 1993 US Missile Strike on Iraq and the Right of Self-Defence in International Law*, 45 INT’L & COMP. L.Q. 162 (1996).

<sup>113</sup> See Baker, *supra* note 76, at 111–12.

<sup>114</sup> *Id.*

<sup>115</sup> See ERICKSON, *supra* note 15, at 143.

<sup>116</sup> See generally The Secretary-General, *Remarks to the Security Council on the Situation in Lebanon*, available at <http://www.un.org/apps/sg/sgstats.asp?nid=2152> (July 30, 2006).

<sup>117</sup> See *id.*

<sup>118</sup> See Stahn, *supra* note 59, at 46.

<sup>119</sup> See Baker, *supra* note 76, at 109–10.

<sup>120</sup> See *id.* at 112.

- <sup>121</sup> Kritsiotis, *supra* note 112, at 163.
- <sup>122</sup> See LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES*, 126 (1995).
- <sup>123</sup> See, e.g., Baker, *supra* note 76, at 99.
- <sup>124</sup> See *id.* at 115–16.
- <sup>125</sup> See generally Lobel, *supra* note 28, at 544.
- <sup>126</sup> HENKIN, *supra* note 122, at 121.
- <sup>127</sup> See ERICKSON, *supra* note 15, at 144–46.
- <sup>128</sup> See generally Kritsiotis, *supra* note 112.
- <sup>129</sup> See Henriksen, *supra* note 69, at 8–9.
- <sup>130</sup> See U.N. Charter, preamble.
- <sup>131</sup> See Scheideman, *supra* note 51, at 272.
- <sup>132</sup> See ERICKSON, *supra* note 15, at 144.
- <sup>133</sup> See generally Louis Rene Beres, *Israel, Lebanon, and Hizbullah: A Jurisprudential Assessment*, 14 ARIZ. J. INT'L & COMP. L. 141, 150 (1997).
- <sup>134</sup> See Henriksen, *supra* note 69, at 5 (quoting Letter from Daniel Webster to Mr. Fox, Apr. 24, 1841, 29 B.S.P. 1129 (1843)); HENKIN, *supra* note 122, at 121.
- <sup>135</sup> See Saura, *supra* note 22, at 25.
- <sup>136</sup> Sullivan, *supra* note 102.
- <sup>137</sup> See ERICKSON, *supra* note 15, at 145.
- <sup>138</sup> See Eckert & Mofidi, *supra* note 63, at 136 (“necessity in self-defense means that the use of force must be absolutely necessary to repel the threat and that ‘peaceful measures have been found wanting or . . . clearly would be futile.’” (quoting Oscar Schachter, *International Law in Theory and Practice*, in *DEVELOPMENTS IN INTERNATIONAL LAW* 152 (1991))). Similarly, in the Nicaragua case, the I.C.J. held that actions taken in self-defense were unnecessary when related dangers of action intended to be countered had subsided. Scheideman, *supra* note 51, at 272. This holding was partly the result of the observation that American actions had been taken, “several months after the major offensive of the armed opposition against the government of El Salvador had been completely repulsed.” *Nicar.*, 1986 I.C.J. at 122. That “it was possible to eliminate the main danger to the Salvadoran Government without the United States embarking on activities in and against Nicaragua” was also essential to the I.C.J.’s findings. *Id.*
- <sup>139</sup> In its 1996 Advisory Opinion on the Legality of the Use of Nuclear Weapons in Armed Conflict, the I.C.J. was itself unable to decide whether use of nuclear weapons in anticipatory self-defense would be lawful if the very existence of the state was threatened.
- <sup>140</sup> *The Military Campaign*, BBC NEWS, Oct. 23, 2001, [http://news.bbc.co.uk/hi/english/world/newsid\\_1597000/1597509.stm](http://news.bbc.co.uk/hi/english/world/newsid_1597000/1597509.stm).
- <sup>141</sup> Convention on Rights and Duties of States, Dec. 26, 1933, art. 4, 49 Stat. 3097.
- <sup>142</sup> U.N. Charter, art 2, para. 1.
- <sup>143</sup> Faisal O. Al-Rfouh, Protection of National Sovereign Rights Under International Law, Brigham Young University, <http://kennedy.byu.edu/partners/WFPC/alrfouh.html> (last visited Dec. 4, 2007).
- <sup>144</sup> See ALFRED B. PRADOS, JORDAN: U.S. RELATIONS AND BILATERAL ISSUES 2–3 (Cong. Research Serv. 2006), available at <http://www.au.af.mil/au/awc/awcgate/crs/ib93085.pdf> (last visited Nov. 19, 2007).

<sup>145</sup> Rory McCarthy, *Special Report: Attack on Afghanistan, New Offer on bin Laden: Minister Makes Secret Trip to Offer Trial in Third Country*, GUARDIAN UNLIMITED, Oct. 17, 2001, available at <http://www.guardian.co.uk/waronterror/story/0,,575593,00.html>.

<sup>146</sup> Daniel Lak, *Analysis: Decoding Taleban's Message*, BBC NEWS, Sept. 30, 2001, [http://news.bbc.co.uk/1/hi/english/world/south\\_asia/newsid\\_1571000/1571891.stm](http://news.bbc.co.uk/1/hi/english/world/south_asia/newsid_1571000/1571891.stm).

<sup>147</sup> GRAY, *supra* note 112, at 159.

<sup>148</sup> See generally Christine Fair, South Asia Expert, Research & Studies Program, The United States and Pakistan: Navigating a Complex Relationship, Address Before the U.S. Commission on International Religious Freedom (June 30, 2005) (summary available at [http://www.usip.org/congress/testimony/2005/0630\\_fair.html](http://www.usip.org/congress/testimony/2005/0630_fair.html)).

<sup>149</sup> George W. Bush, President of the United States, Address to the Nation (Oct. 7, 2001) (transcript available at <http://www.press.uchicago.edu/Misc/Chicago/481921texts.html>).

<sup>150</sup> *Id.*

<sup>151</sup> Jere Van Dyck, *The Afghan Rulers: Fiercely Traditional Tribes*, N.Y. TIMES, Dec. 21, 1981, at A2.

<sup>152</sup> Cf. ERICKSON, *supra* note 15, at 145 (“[T]here must be . . . no other available peaceful solution.”).

<sup>153</sup> There were numerous diplomatic and political avenues open to the United States; it could have worked through Pakistan, which exercised immense influence over the Taliban. The Taliban also maintained relations with other influential governments, including Saudi Arabia. In the past, the United States has also successfully engaged countries that have limited relations with the outside world, such as North Korea and Iran.

<sup>154</sup> *Official: 15 of 19 Sept. 11 Hijackers Were Saudi*, USA TODAY, Feb. 6, 2002, available at <http://www.usatoday.com/news/world/2002/02/06/saudi.htm>.

<sup>155</sup> David Shukman, *Analysis: US Walks a Tightrope*, BBC NEWS, Oct. 9, 2001, [http://news.bbc.co.uk/1/hi/english/world/middle\\_east/newsid\\_1590000/1590118.stm](http://news.bbc.co.uk/1/hi/english/world/middle_east/newsid_1590000/1590118.stm).

<sup>156</sup> *Campaign Targets Lethal Cluster Bombs*, BBC NEWS, Dec. 2, 2001, [http://news.bbc.co.uk/1/hi/english/uk/newsid\\_1688000/1688556.stm](http://news.bbc.co.uk/1/hi/english/uk/newsid_1688000/1688556.stm).

<sup>157</sup> Kathy Marks, *Islamic Militants Threaten to Hunt Down Foreigners*, THE INDEPENDENT, Oct. 9, 2001, available at <http://news.independent.co.uk/world/americas/article161006.ece>.

<sup>158</sup> TERRORISM AND INTERNATIONAL LAW, *supra* note 16, at 204 (describing an Israeli raid of Palestinian camps in Lebanon in 1975).

<sup>159</sup> Mark Devenport, *UN Holds Emergency Mid-East Debate*, BBC NEWS, Oct. 17, 2001, [http://news.bbc.co.uk/1/hi/english/world/middle\\_east/newsid\\_977000/977587.stm](http://news.bbc.co.uk/1/hi/english/world/middle_east/newsid_977000/977587.stm).

<sup>160</sup> See generally Sullivan, *supra* note 102.

<sup>161</sup> ERICKSON, *supra* note 15, at 146.

<sup>162</sup> *Id.*

<sup>163</sup> Germany had indulged in such an undertaking when it occupied Poland during World War II.

<sup>164</sup> See generally *The Unfinished War: A Decade since Desert Storm Intent v. Effect: Bombings and Sanctions Create Humanitarian Crisis in Iraq*, CNN.COM (2001), <http://edition.cnn.com/SPECIALS/2001/gulf.war/unfinished/war/index1.html>

(summarizing CNN's Special Report, *The Unfinished War: A Decade Since Desert Storm*).

<sup>165</sup> ERICKSON, *supra* note 15, at 146.

<sup>166</sup> *See id.* at 146–47; Eckert & Mofidi, *supra* note 63, at 137.

<sup>167</sup> Saura, *supra* note 22, at 25; *see also* Eckert & Mofidi, *supra* note 63, at 144–45.

<sup>168</sup> *See* GRAY, *supra* note 112, at 168.

<sup>169</sup> *The Military Campaign*, *supra* note 140.

<sup>170</sup> *The Bitter Legacy of 9/11*, THE INDEPENDENT, Sept. 11, 2006, <http://news.independent.co.uk/world/politics/article1466758.ece>.

<sup>171</sup> *See generally* HUMAN RIGHTS WATCH, FATALLY FLAWED: CLUSTER BOMBS AND THEIR USE BY THE UNITED STATES IN AFGHANISTAN (2002).

<sup>172</sup> U.N. HIGH COMM'R FOR REFUGEES, 2005 *UNHCR Statistical Yearbook: Afghanistan*, <http://www.unhcr.org/statistics/STATISTICS/464183592.pdf>.

<sup>173</sup> *See generally* HUMAN RIGHTS WATCH, "ENDURING FREEDOM": ABUSES BY U.S. FORCES IN AFGHANISTAN, at 9 (March 2004).

<sup>174</sup> *Correspondent: The Dispossessed* (BBC television broadcast Jan. 18, 2002), available at <http://news.bbc.co.uk/2/hi/programmes/correspondent/1764418.stm>.

<sup>175</sup> *The Cluster Bomb Controversy*, BBC NEWS, Apr. 3, 2003, [http://news.bbc.co.uk/2/hi/uk\\_news/2912617.stm](http://news.bbc.co.uk/2/hi/uk_news/2912617.stm).

<sup>176</sup> U.N. Charter art. 51.

<sup>177</sup> Posting of Rashi Khanderia to [http://www.ejil.org/forum\\_WTC/messages/42.html](http://www.ejil.org/forum_WTC/messages/42.html) (Feb. 27, 2002, 10:30:38).

<sup>178</sup> Security Council Resolutions include S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001); S.C. Res. 1383, U.N. Doc. S/RES/1383 (Dec. 6, 2001); U.N. Doc. S/RES/1378 (Nov. 14, 2001); S.C. Res. 1373, *supra* note 53.

<sup>179</sup> G.A. Res. 56/1, *supra* note 85.

<sup>180</sup> *Id.*

<sup>181</sup> S.C. Res. 1373, *supra* note 53.

<sup>182</sup> S.C. Res. 1269, U.N. Doc. S/RES/1269 (Oct. 19, 1999).

<sup>183</sup> Saura, *supra* note 22, at 21.

<sup>184</sup> *See* S.C. Res. 1373, *supra* note 53.

<sup>185</sup> *See* Saura, *supra* note 22, at 22.

<sup>186</sup> *See Journalist: U.S. Planning for Possible Attack on Iran*, CNN.COM, Jan. 17, 2005, <http://www.cnn.com/2005/ALLPOLITICS/01/16/hersh.iran/>.

<sup>187</sup> *See* S.C. Res. 1386, *supra* note 178, ¶ 3; S.C. Res. 1378, *supra* note 178, ¶ 3–5; Jinks, *supra* note 77, at 86.

<sup>188</sup> U.N. Charter art. 39.

<sup>189</sup> U.N. Charter art. 42.

<sup>190</sup> U.N. Charter art. 41.

<sup>191</sup> *Id.*

<sup>192</sup> *Who Are the Taliban*, BBC NEWS, Sept. 2, 2006, [http://news.bbc.co.uk/2/hi/south\\_asia/1549285.stm](http://news.bbc.co.uk/2/hi/south_asia/1549285.stm).

<sup>193</sup> U.N. Charter art. 43.

<sup>194</sup> Saura, *supra* note 22, at 28.

<sup>195</sup> SHIRLEY KAN, SPECIALIST IN NATIONAL SECURITY POLICY, FOREIGN AFFAIRS, DEFENSE, AND TRADE DIVISION, U.S.–CHINA COUNTER TERRORISM COOPERATION: ISSUES FOR U.S. POLICY (2004), available at <http://www.fas.org/irp/crs/RS21995.pdf>; Pavel Felgenhauer, *A Vicious Circle of Terror*, MOSCOW TIMES, Sept. 27, 2001, available at <http://www.cdi.org/russia/173.html>.

<sup>196</sup> See generally *China Asks US to Look Beyond NATO*, BBC NEWS, Sept. 13, 2001, <http://news.bbc.co.uk/2/hi/americas/1541656.stm>.

<sup>197</sup> But see Sullivan, *supra* note 102 (“[T]o establish *opinion juris* it would be necessary to show that the motive for this assistance is the belief that the U.S. has a *legal* right to use force by way of self-defence because of Afghanistan’s harbouring of al Qaeda, rather than political or economic motives.”).

<sup>198</sup> It is not a desirable option in the present context, and it is unrealistic to assume that the UN can command and sustain a complete functional army in today’s day and age.

<sup>199</sup> See generally Lobel, *supra* note 28, at 553.

<sup>200</sup> See generally *id.*

<sup>201</sup> See generally *supra* text accompanying note 54.

<sup>202</sup> See generally TERRORISM AND INTERNATIONAL LAW, *supra* note 16, at 23.

<sup>203</sup> See Michael Plachta, *The Lockerbie Case: The Role of the Security Council in Enforcing the Principle Aut Dedere Aut Judicare*, 12 EUR. J. INT’L L. 125, 139–40 (2001).

<sup>204</sup> See *supra* note 54.