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RIGHT OF SELF DEFENCE AND TERRORISM

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INTRODUCTION

International terrorism is one of the most significant threats to peace and security in the 21st century, so to combat, remove or neutralize it is a very valuable question for the whole community. The legal question whether the right of self-defence includes response to terrorist acts and moreover, whether a terrorist act amounts to an "armed attack" defined in article 51 of the Charter is an issue of wide discussion among states and scholars. Self-defence has long been understood as an inherent right of a State when it is militarily attacked by another State. It has generally been regarded as a right applicable only in an inter-State armed conflict. It is to be admitted that there were self-defence claims against terrorist attacks in the past. In the 1980s and 90s the United States and Israel had in a number of situations used force against States which allegedly sponsored terrorism and were mostly condemned by the international community.[1] After September 11, however, there have been attempts to reinterpret the meaning of 'armed attack' under Article 51 of the UN Charter to include attacks by terrorists - non-State actors - and thus rendering the use of force against terrorists, or against a State that harbours terrorists, a lawful exercise of self defence.[2] It has been argued that certain resolutions of the Security Council authoritatively pronounced that a terrorist attack could be equated to an 'armed attack' within the meaning of Article 51.[3] Again there have also been arguments that for a State to be responsible for terrorist attacks, higher threshold of attribution is not required and mere harbouring of terrorists may trigger the use of force in self-defence by the victim State against the harbouring State.[4]

This paper reappraises the legal and policy considerations that promote a right of self-defence against terrorists, or against States harbouring terrorists. The paper advocates three main arguments: (1) that 'armed attack' as required under Article 51 must come from a State or at least the attack must be attributable to the State to the extent that it is taken as the act of the State; (2) that there is nothing in the Security Council resolutions to suggest that a terrorist attack as such is an 'armed attack' under Article 51; and (3) that to use military force against another State is a serious matter that requires a higher threshold of attribution than mere harbouring. International terrorism has international dimension and it cannot be wiped out by means of unilateral use of force and regime change in the name of self-defence. As unilateralism may lead to subjectivity, selectivity, double standard, and injustices, the paper concludes that multilateralism is the most appropriate way to combat international terrorism and that the latter can be effectively dealt with by

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[1] In 1982, for example, Israel invoked a right of self-defence to justify an incursion deep into Lebanon for purposes of eliminating the ability of the Palestine Liberation Organization (PLO) to conduct the alleged terrorist actions in northern Israel, but that justification met with criticism from both the Security Council (*See* S.C. Res. 508/ 1982) and the General Assembly (*See* G.A. Res. ES 7/9 – 1982). In 1985, when Israeli planes bombed PLO Headquarters in Tunisia as a response to the alleged PLO terrorist attacks, the Security Council condemned the action by a vote of 14 to zero (the United States abstained)(*See* S.C. Res. 573 (1985).

[2] Davis Brown, *Use of Force against Terrorism after September 11: State Responsibility, Self-Defence and Other Responses*, 11CARDOZO. J. INT'L & COMP. L., at 28 (2003).

[3] Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, at 17 (2003).

[4] *See* for example, Anne-Marie Slaughter and William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J., 1, at 20 (2002).

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coordinated and comprehensive law enforcement measures through proper international bodies, like the UN Security Council, and through appropriate regional organizations and cooperation.

I. THE ESSENTIAL ELEMENTS OF A LAWFUL SELF DEFENCE

The system of maintaining international peace and security under the Charter of the United Nations is based on three fundamental 'pillars'. First, the threat or use of armed force is banned forever (the general prohibition of the use of force).[1] Second, a collective body, the United Nations Security Council, is empowered to exercise police power; if there is a threat to the peace, breach of the peace or act of aggression, it can take enforcement measures against the wrong-doer or aggressor (the collective security system).[2] Third, in exceptional circumstances, a State can defend itself as long as it is the victim of an armed attack, and until such time as the Security Council itself intervenes (the right of self-defence).[3]

The right of self-defence of States is enshrined in Article 51 of the Charter in these terms:

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

The requirements under international law of a lawful self-defence are:

(1) "Armed attack": The defending State must have been the victim of an 'armed attack';

(2) "Necessity of self-defence": It must be 'necessary' (no other choice or no time to resort to the Security Council) for the defending State to use force to fend off the armed attack;

(3) "Proportionality": The force used must be 'proportionate' to the armed attack;

(4) "Primary role of the Security Council": Defensive measures must be immediately reported to the Security Council and must be ceased when the Council takes measures to maintain peace and security.

II. IS A TERORRIST ATTACK AN 'ARMED ATTACK' UNDER ARTICLE 51 OF THE CHARTER?

Article 51 of the Charter of the United Nations contemplates self-defence only 'if an armed attack occurs against a Member of the United Nations". As affirmed by the International Court of Justice in the *Nicaragua* case, "States do not have a right of … armed response to acts which do not constitute an 'armed attack'".[4]

Immediately after the terrorist attacks of 11 September 2001, the former US President Bush considered that they "were more than acts of terror. They were acts of war". The legal and political strategy of the United States was to place in the same category "those nations, organizations or persons [who] planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons".[5]

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

A. ***Meaning of 'armed attack': Nicaragua is still Good law***

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[1] Article 2(4), the Charter of the United Nations.

[2] *Id.*, Articles 39, 41, and 42.

[3] *Id.*, Article 51.

[4] *Nicaragua case.*

[5] 'Authorization for Use of Military Force' Joint Resolution of the Senate and the House of Representatives, 107th Congress, 1st session S.J. RES. 23, 17 Sept. 2001, available at http://www.thomas.loc.gov.

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Article 51 restricts the right of self-defence to the case of an armed attack against a State. But what is meant by the term 'armed attack'? The United Nations Charter, in speaking of the use of armed force, employs different terms: the use of force, threat or breach of the peace, act of aggression, and armed attack.[1] It is of major importance to note that Article 51 does not use the term 'aggression' or 'use of force' but the much narrower concept of 'armed attack'. 'Armed attack' is a species of 'aggression' or 'use of force' but a more severe form and much narrower in scope. All 'armed attacks' are also acts of 'aggression' or 'use of force' but not all acts of 'aggression' or 'use of force' may reach the status of an 'armed attack'.

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

Experience has shown that armed attack is ordinarily self-evident…; it should be pointed out that the words 'armed attack' clearly do not mean an incident created by irresponsible groups or individuals, but rather an attack by one State upon another. Obviously, purely internal disorders or revolutions would not be considered 'armed attack' within the meaning of Article 5. However, if a revolution were aided and abetted by an outside power such assistance might possibly be considered an armed attack.[2]

It is only in the '*Nicaragua* case' in 1986 that the meaning of the term 'armed attack' received the authoritative interpretation. The World Court rejected the assertion of the American administration that the right to self-defence arose not only in response to an armed attack but also in the case of various subversive or terrorist acts, border incidents, or aid to insurgents in another State.[3] In his dissenting opinion in the *Nicaragua* case, Judge Stephen Schwebel (United States) considered the seizure of the American embassy in Tehran in late 1979 to be an armed attack and, accordingly, the American rescue mission aimed at extricating the hostages in 1980 was in the exercise of its inherent right of self-defence.[4] The World Court rejected such a broad treatment of the concept of 'armed attack' and consequently rejected as a basis for self-defence. The ruling of the World Court on the meaning of 'armed attack' is in these words:

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

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

But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of provisions of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.[5]

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[1] Rein Mullerson, *Self-Defence in the Contemporary World*, in LAW AND FORCE IN NEW INTERNATIONAL ORDER, 16 (Damrosch & Scheffer, eds., Oxford Westview Press, 1991).

[2] United States Senate *Report of the Committee on Foreign Relations on the North Atlantic Treaty* Executive Report No 8, 13, cited in Ian Brownlie, The Use of Force in Self-Defence, 37 BRIT. YBK. INT'L L., 183, at 245 (1961).

[3] For the view of the US State Department, *see* A. D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFFAIRS, 919 (1986).

[4] *Nicaragua* case, (dissenting opinion of Judge Schwebel).

[5] *Nicaragua case.*

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

Direct armed attack by a State

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

i) The invasion or attack by the armed forces of a State of the territory of another State;[2]

ii) Any military occupation however temporary, resulting from such invasion or attack[3] (military occupation is a form of 'continued armed attack', giving rise to the right to use of force against the occupation in the lawful exercise of self-defence)'; or

iii) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.[4]

To be deemed as an armed attack, even the attack by the armed forces of a state of the territory of another State needs to be 'of sufficient gravity'.[5] *De minimis* rule applies here. A mere frontier incident, for example exchange of shots between border guards of the two States, cannot be classified as an armed attack.[6] The meaning of armed attack at sea was considered at some length in the *Oil Platforms* case, where it was held that mining of a United States-flagged military vessel could constitute an 'armed attack', but an attack on a ship owned, but not flagged, by the United States did not amount to an armed attack on the State.[7]

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

It is clear from the ruling of the World Court that the meaning of armed attack has been expanded to include the cases of the so-called '*indirect use of force*' or '*indirect aggression*'[8] (that is the *sending* of armed bands or irregulars which carry out acts of armed forces against another state on a large scale).[9] The Court emphasizes the fact that the action of such armed bands or irregulars sent by a State can be classified as an armed attack because of its "scale and effects". In the case of *sending*, a sufficiently close link exists between the State and the private groups so that the latter's position is nearly that of *de facto* state organs, and if the action carried out by those armed groups are of the required gravity, it seems perfectly justified to hold the sending State responsible for an armed attack.[10]

However, in addition to the sending itself, the Court considers that the *substantial involvement* of a State in the action of such armed bands or irregulars to carry out acts of armed force against another State may constitute an armed attack. The term "substantial involvement" appears to be a flexible one and if it is not interpreted restrictively, it may make the meaning of armed attack to be blurred. That is why the Court in the

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[1] Definition of Aggression. UN G.A.O.R. 29th Sess., Annex, Supp No 31, at 142. UN Doc. A/ 9631 (1974).

[2] General Assembly Definition of Aggression, Article 3(a).

[3] *Id*.

[4] *Id.* Article 3(b).

[5] *Id*. Article 2.

[6] *Nicaragua* case.

[7] *Oil- Platforms* case.

[8] *See* Rein Mullerson, *supra* note 39, at 18.

[9] *Nicaragua* case, *supra* note 19, para 195. This is in accord with the General Assembly Definition of Aggression, which contains in Article 2 a '*de minimis* rule; *see*, G.A. Res. 3314(29), (1974).

[10] *See* A Randelzhofer, *Article 51*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 801 (Vol. I, Bruno Simma, ed., Oxford University Press, 2nd. ed 2002).

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Nicaragua case restricted the phrase and did not consider "assistance to rebels in the form of the provision of weapons or logistical or other support as an armed attack justifying the use of force in self-defence."

The Court also added that mere knowing assistance to rebels in the form of the provision of weapons or logistical or other support" might involve an impermissible use of force or intervention that can create State responsibility under international law and is thus subject to certain forms of sanction, but would not constitute an armed attack for purposes of self-defence.[1]

Some writers argue that the meaning of armed attack as formulated by the World Court is not wide enough to be adaptable to the modern terrorist situations.[2] Some even go so far as to say that the World Court decision is no more relevant now and has been overruled by the overwhelming situation of September 11.[3]

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

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

c) The Court has expanded the meaning of "armed attack" to go beyond an attack by regular armed forces of a State across an international border (traditional meaning of armed attack) and to include attacks by terrorists or non-State-actors.

ci) But to be regarded as an 'armed attack' within the meaning of Article 51, non-State actors such as armed bands, irregulars, or terrorists must be sent by or on behalf of a State. This essential requirement clearly indicates the crucial nexus of 'attribution' between the State and the non-State actors (terrorists).

cii) Two essential elements must be satisfied for a terrorist attack to be qualified as an 'armed attack' under Article 51:

1. *Attribution*: Terrorists must be either State organs (State-terrorism) or agents of the State (State-sponsored terrorism).
2. *Scale and effects*: the attack must be of such gravity as to amount to an actual armed attack conducted by regular armed forces

ciii) The notion of 'armed attack' does not include assistance to terrorists in the form of provisions of weapons or logistical or other support.

The Court's opinion clearly demonstrates the fact that even knowing assistance to terrorists, much less harbouring, tolerating, or acquiescing, each of which can lead to State responsibility, may not rise to the level of an armed attack. Thus more direct participation, such as the sending or controlling and directing of terrorists during an attack is required. To elaborate further, if a terrorist attack, which reaches the required threshold of '*scale and effects*', is sponsored by a State (direct participation of a State), it amounts to an armed attack by a State. Nevertheless, such a terrorist attack, which does not reach the threshold of scale and effects, or mere support of terrorists by a State, although it may amount to impermissible use of force, threat or breach of the peace or act of aggression and the responsible State may be subject to every kind of sanction by the victim State or enforcement action (even involving the use of military force) by the Security Council, does not amount to an armed attack which may trigger the right of self-defence.

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[1] *Nicaragua* case,

[2] Greg Travalio and John Altenburg, *Terrorism, State Responsibility and the Use of Military Force*.

[3] *See* Carsten Stahn, *Terrorist Acts as 'Armed Attack': The Right to Self-defence, Article 51 (1/2) of the UN Charter, and International Terrorism*.

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

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

Many writers argue that the Security Council Resolutions 1368 and 1373 are epoch-making and that they unequivocally decide once and for all that a terrorist attack constitutes an 'armed attack' under Article 51 of the Charter[1] and thus international law in this respect has dramatically changed and that even the consistent jurisprudence of the International Court of Justice, maintaining that Article 51 only talks about 'armed attack' by a State or imputable to a State, is wrong.[2] This view has been rampant in publications and media.

With respect, it is submitted that the two Security Council resolutions by no means decide that a terrorist attack as such is an armed attack within the meaning of Article 51. The following are the direct quotations from the resolutions:

Security Council Resolution 1368 (12 September 2001)

The Security Council, …

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

1. *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001…; …

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

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

6. *Decides to* remain seized of the matter.[3]

Security Council Resolution 1373 (28 September 2001)

The Security Council,…

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

Reaffirming further that such acts… constitute a threat to international peace and security,

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

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

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[1] Christopher Greenwood, *International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaeda and Iraq*, 4 SAN DIEGO INT'L L. J., 12 at 16-17 (2003).

[2] *Palestinian Wall Advisory Opinion*, Separate Opinion of Judge Higgins andJudge Kooijmans,

[3] S.C. Res. 1368 (12 September 2001), S/RES/1368 (2001).

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1. *Decides* that all states shall:

(a) Prevent and suppress the financing of terrorist acts; …

2. *Decides also* that all states shall:

(a) Refrain from providing all form of support…; …

3. *Calls upon* all states to: …

(c) Cooperate…to prevent and suppress terrorist attacks and take actions against perpetrators of such acts; ….[1]

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

➢ There is nothing in the resolutions which expressly says that September 11 terrorist attacks constitute an 'armed attack' within the meaning of Article 51 of the Charter.

(2) The resolutions just reaffirm that September 11 terrorist attacks constitute a threat to international peace and security, which may trigger Security Council enforcement measures under Chapter VII of the Charter but have nothing to do with unilateral use of force in self-defence.

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

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

(5) To make the present argument more convincing, the wordings of the above resolutions can be compared with those of the actual determination by the Council of a genuine self- defence situation in respect of the Iraqi invasion of Kuwait. In Resolution 661, the Council affirmed "the inherent right of individual or collective self-defence, in response to the *armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter*".[2]

The Security Council in these resolutions refrains from expressly attributing the September 11 attacks to the Taliban regime. This omission is even more important if we look at the earlier SC Resolutions 1267 (1999) and 1333 (2000) in which the Council made explicit statements in respect of the Taliban, condemning the continuing use of Afghan territory, especially areas controlled by the Taliban 'for the sheltering and training of terrorists and the planning of terrorist acts,'[3] allowing Osama bin Laden and his associates to 'operate a network of terrorist training camps and to use Afghanistan as a base from which to sponsor international terrorist operations.'[4]

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[1] S.C. Res. 1373 (28 September 2001), S/RES/1373 (2001).

[2] S.C. Res. 661 (1990) of 6 August 1990 (emphasis added).

[3] S.C. Res. 1267 (1999) of 15 October 1999, para. 5 of the Preamble; S.C. Res. 1333 (2000) of 19 December 2000, para. 7 of the Preamble.

[4] S.C. Res. 1267 (1999), para. 6 of the Preamble.

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Nevertheless, these activities of the Taliban have obviously not been considered grave enough by the Council to establish a sufficient link to a State-sponsored armed attack. On the contrary, we can even infer from the reluctance of the Council to make use of these findings in the context of Resolutions 1368 and 1373 that the mere harbouring of terrorists as such was apparently not reason enough to hold the Taliban accountable for an armed attack. The consistent rejection by the Security Council of the so-called 'harbouring theory' (of the United States and Israel) can be found in the successive condemnations, among others, of Israeli counter terror operations as impermissible under international law.[1]

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

The conclusion then is that it is not true at all that the SC Resolutions 1368 and 1373 unequivocally decide that terrorist attacks are 'armed attack' within the meaning of Article 51 of the Charter, triggering the right of self-defence of the victim State. At the same time, it is to be noted that the Council does not exclude the possibility that acts of the nature of the September 11 attacks, due to its scale and effect, may come within the ambit of the right of self-defence[2] provided that there is concrete evidence that they are State-sponsored. If such a situation happened, the attack would be an act of a State and thus squarely fell within the meaning of 'armed attack' under Article 51 of the Charter.

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

(1) The terrorist attack must come from a foreign State[3] in the sense that it must be an act of a State or directly imputable to a State[4];

(2) It must be of such gravity as to amount to' (*inter alia*) an actual armed attack conducted by regular armed forces of a State[5] (the test of scale and effects);

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

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

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

There are in fact various terrorist situations to which various types of responses are called for. First of all, a distinction needs to be made between the so-called '*domestic terrorism*' and '*international terrorism*.' When terrorists attack a State from within and no other State is involved, this is a case of domestic terrorism pure

[1] D.W. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L., 1 (1972).

[2] *See* Frederic L. Kirgis, *Addendum: Security Council Adopts Resolution on Combating International Terrorism,* ASIL INSIGHT (1 October 2001) at www.asil.org/insights.htm.

[3] *Palestinian Wall Advisory* Opinion,

[4] *Nicaragua* case; *see* also *Oil Platforms* case.

[5] *Nicaragua* case.

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and proper. Since it is essentially a domestic matter, Article 51 or the international law right of self-defence does not come to play at all. Only when terrorists strike a State from outside, in particular, from the territory of another State, we can categorise it as 'international terrorism'.

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

(1) Terrorist attacks for which another State is directly responsible;

(2) Terrorist attacks for which another State is only indirectly responsible; and

(3) Terrorist attacks for which another State is not at all responsible.

The present section is concerned with terrorist attacks for which another state is not at all responsible. In this respect, the crucial question that can be raised is whether the international law right of self-defence can be invoked against terrorists located in a foreign country, for whose activities the territorial State is not at all responsible.

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

1. Terrorists are non-State actors and Articles 2(4), 51 and other relevant rules of international law governing the use of force or armed conflict are primarily meant for inter-State relations.
2. A good faith interpretation of Article 51 in its context in the light of its purpose and object rules out the exercise of the right of self-defence against mere non-State actors (without any attribution to a State).
3. This interpretation is in conformity with the consistent jurisprudence of the International Court of Justice.
4. International law is still State-centred and State sovereignty is the foundation of all international relations.
5. If a State uses military force against terrorists located in another State which is in no way imputable for the terrorists attacks, this is a clear violation of the territorial sovereignty of the other State.
6. Even though there are arguments that swift surgical strikes against terrorists only should be allowed, it is easily said than done and in practice so many lives of innocent people are lost and property damaged due to missile launches or bombings against the so-called terrorist sites.
7. There are plenty of ways and means to deal with terrorists apart from the international law right of self-defence.

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

There are writers who advocate the thesis that a terrorist attack as such can be regarded as an 'armed attack' under Article 51 of the Charter[1] and thus the victim State may use force in self-defence against terrorists located in another State. Their stand is that Article 51 only identify the potential target of an armed attack to be a State and does not specifically state that the perpetrator of that armed attack also needs to be a State. They therefore assume that an armed attack can be carried out by non-State actors.

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

[1] *See* Carsten Stahn, *Security Council Resolutions 1368(2001) and 1373(2001): What They Say and What They Do not Say*, EUR, J, INT'L L. Discussion Forum, *The Attack on the World Trade Center: Legal Responses*, http://www.ejil.org/forum_WTC/ny-stahn.html.

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jurists,[1] the interpretation of the Article in accordance with the canons of treaty interpretation, and the jurisprudence of the International Court of Justice.[2]

Consistent jurisprudence of the International Court of Justice: 'armed attack' must come from or be imputable to a State

Nicaragua case (1986)

As has been stated earlier, the International Court of Justice in the *Nicaragua* case authoritatively enunciated the meaning of 'armed attack' to include an action of a State by its regular armed forces across an international border, the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another State on a large scale, or the State's substantial involvement in these acts.[3] The Court very clearly rules that to be an armed attack under Article 51 of the Charter, the attack must come from a State in the sense that it must be an act of the State or imputable to the state. Without attribution to a State, the act of rebels or private armed bands or terrorists does not as such constitute an armed attack within the meaning of Article 51 of the Charter.[4]

Oil Platforms case (2003)

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

In order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible.[5]

The Court went on to say that "in view of …the inconclusiveness of the evidence of Iran's responsibility for the mining of the USS Samuel B. Roberts, the Court is unable to hold that the attacks on the …platforms have been shown to have been justifiably made…"[6]

Palestinian Wall Advisory Opinion (2004)

Despite the view of some writers to the contrary, the ICJ has, even after September 11, reiterated its view in 2004 in the *Palestinian Wall Advisory Opinion* that "Article 51 of the Charter… recognizes the existence of an inherent right of self-defence in the case of *armed attack by one State against another State*"[7] and went on to say that "Israel does not claim that the attacks against it are imputable to a foreign State."[8] It is an unequivocal reaffirmation of its consistent jurisprudence that 'armed attack' under Article 51 must come from a sovereign State; in other words, it must be an 'act of a State', or a State must be imputable for the armed attack.

This is a very recent ruling (pronounced after September 11 terrorist attacks) of the World Court made by *almost unanimous decision*. Out of the fourteen concurring judges, all the thirteen Judges of the World Court

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[1] See Pierre-Marie Dupuy, *The Law after the Destruction of Towers*, EUR, J, INT'L L. Discussion Forum, *The Attack on the World Trade Center: Legal Responses*, http://www.ejil.org/forum_WTC/ny-dupuy.html.

[2] *See infra* the consistent jurisprudence of the International Court of Justice in this respect.

[3] *Nicaragua* case, *supra* note 17, 103-1-4, para 195.

[4] It is a well established principle of international law that a State is not as a general rule responsible for the conduct of private individuals, rebels or insurgents.

[5] *Case Concerning Oil Platforms (Iran v US)* 2003.

[6] *Id*.

[7] *Palestinian Wall Advisory Opinion*, *supra* note 55, 195, para. 139 [Emphasis added].

[8] *Id*.

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(that is, excluding Judge Higgins) concur on this point. Although Higgins in her Separate Opinion expresses her reservation in this respect, the learned judge very clearly admitted that this statement of the Court must be regarded as a statement of the law as it now stands.

Armed Activities in Congo (2005)

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

While Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF[1]….there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC… The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.[2]

Again, the International Court of Justice reaffirmed the established law that for a State to rely on the right of self-defence, the armed attack must come from another State or at least be attributable to that State. This is a land mark decision decided by 16 votes to 1 (almost unanimous).[3] Unlike in the *Palestinian Wall* Advisory Opinion, even Judge Higgins this time did not attach any separate opinion, apparently supporting the law that it now stands.[4]

The conclusion then is that in order for a use of force against a State on account of terrorist attacks to be lawful, it must be proven beyond reasonable doubt that the terrorist attacks must be tantamount to an 'armed attack' under international law, and it must be an act of a State or attributable to a State.

Different levels of State responsibility and the right to use force in self-defence

Whenever there is a terrorist attack, the law of State responsibility plays a decisive role. International law is primarily concerned with States and even in the 21st century, it remains State-centred. Sovereignty is sacred for all States. We can take actions or countermeasures against a State only when it is responsible under international law. Two elements must be satisfied in order that a State is responsible under international law: (1) attribution; and (2) breach of an international obligation.[5] "*Attribution*' here means the wrongful conduct must be attributable or imputable to the State.

According to the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, a conduct is attributable to the State if it is done by State organs,[6] those who are exercising elements of governmental authority,[7] those who are in fact acting on the instructions of, or under the direction or control of a State.[8] The fact is that a State is an abstract entity and it cannot act on its own. It has to act through its organs or agents. An action or omission of an organ or agent of a State is regarded as an act of that State, or directly attributable to the State. However, sometimes a State may not be directly

[1] Allied Democratic Forces (ADR) is a non-State actor.

[2] *Armed Activities in Congo*,para. 146.

[3] The only dissenting judge was judge *ad hoc* Kateka, appointed by Uganda.

[4] However, Judge Kooijmans again made the same reservation as in the *Palestinian Wall* Advisory Opinion. *See Armed Activities in Congo*, *supra* note 19, Separate Opinion of Judge Kooijmans, paras, 28-29.

[5] Article 2, The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, 2001[Hereinafter "Articles on Responsibility of States"].

[6] Article 4, *id*.

[7] Article 5, *id.*

[8] Article 8, *id.*

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attributable but may be indirectly attributable for an internationally wrongful act. For example, a State may actively support, or tolerate terrorists or simply unable to deal effectively with terrorists. In other words, there may be different levels of State involvement or support in the terrorist activities and it would not be fair to allow the use of military force in self-defence in all these different levels of responsibility of a State.

It is a fact that a State violates international law if it involves in acts of international terrorism.[1] Nevertheless, it is generally accepted that the mere violation by one State of a duty owed to another State under international law does not justify the use of military force by the victim State.[2] This is a well-established principle of international law affirmed by the International Court of Justice in the *Corfu Channel* case.[3] In this case, the United Kingdom engaged in a forcible minesweeping operation in the Corfu Straits, which were within Albanian territorial waters in order to establish free passage and to enforce Albania to comply with its international obligation in respect of illegal mining of the strait. The International Court of Justice found that Albania's actions were a violation of its responsibility under international law. It was held, however, that the fact that Albania's actions were violations of international law did not by itself justify the use of military force by the United Kingdom.

It would, therefore, be incorrect to say that the unilateral use of force in the name of self-defence is justifiable in whatever terrorist attack for which a State is in one way or another responsible. It is imperative that we need to make a distinction between two types of State responsibility for terrorist attacks:[4]

- Terrorist attacks for which a State is directly responsible (committed by State organs or agents of the State or was done under the direction or control of the State) and, due to its scale and effect, are tantamount to an armed attack under Article 51 of the UN Charter; in such a situation, as Article 51 requirements of 'armed attack' is satisfied, the use of force in the exercise of self-defence would be lawful.
- Terrorist attacks for which a State is only indirectly responsible (by merely harbouring terrorists, or by failing to exercising due diligence to suppress terrorism) and in these situations as terrorists cannot be regarded as agents of the State, the use of force in self-defence would not be lawful. However, it is still a violation of international law and various remedies or sanctions, short of the use of force, are available to the victim of the attack.

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

CONCLUSION

The right of self-defence of States is in fact a sacred principle, meant for the protection of countries that are small and weak from the aggression of powerful countries. Nevertheless, what is ironic in the extreme is that throughout the period of over sixty years after 1945, only the Big Powers or militarily strong countries dearly

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[1] *See* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, UN Doc. A/8018 (1970), (declaring that "Every state has a duty to refrain from organizing, instigating, assisting, or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities in its territory directed toward the commission of such acts").

[2] *See* Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 *Mich. L. Rev.* 1620, at 1626 (1984).

[3] *Corfu Channel* case (Albania v UK) 1949 ICJ Reports 4.

[4] *Cf.* Davis Brown, *Use of Force against Terrorism after September 11th: State Responsibility, Self-Defence and Other Responses*, 11 CARDOZO INT'L & COMP. L. J., 1-53, at 7-8 (2003).

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invoked this right of self-defence as justification for their uses of force against other countries.[1] To justify their uses (or rather abuses) of force, the powerful countries invariably referred to Article 51 of the Charter of the United Nations.

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

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

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

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