

The Apple Does Not Fall Far from the Tree: Self-Defence in the Context of State-Sponsored Terrorism

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Abstract

The Article will examine the parameters of state-sponsored terrorism through an evaluation of the tenets of state responsibility. Under customary international law, States are not perpetrators of terrorism because terrorism is a penal offence and states are not subjects of international criminal law. Nonetheless, General Assembly resolutions repeatedly condemn States that undertake and/or support acts of terrorism. It reflects the absolute prohibition on the use of force except in reaction to a conventional armed attack and the seeming metamorphosis and fluidity of the traditional understanding.

Introduction

The lethal capabilities of terrorists demonstrated by the September 11 terrorist attacks in 2001 were a paradigm-changing event that generated a new dimension in international legal and political discourse. It prompted the international community to examine terrorism anew with statements from capitals around the world pointing to a need to develop new strategies to confront a new reality. The attacks of September 11 and consequential American response with the international community's approval of the use of lethal military action represented a new paradigm in international law relating to the use of force. Previously acts of terrorism were basically seen as criminal acts within the realm of domestic enforcement agencies. The September 11 attacks were regarded as an act of war. This effectively marked a turning point in the long-standing premise of international law that military force was an instrument of relations between States. Terrorism was no longer merely seen as a serious threat to be combated through domestic penal mechanisms. Use of lethal military force was now an avenue for managing the consequences of terrorist strikes.

This article will outline the normative framework on the use of force as enshrined in the UN Charter. It will be posited that the UN Charter regime on the use of force is visibly engaged in a process of change through an evaluation of the uncertainty and indeterminacy of the doctrine of State responsibility. Can terrorist attacks be co-opted into the understanding of 'armed attack' and thus form a basis for the use of military force against the responsible entity? This question is important considering potential abuse of the option of lethal military force when a State seeks to use the broad validation banner of national security. It is not entirely clear from the practice in the aftermath of September 11 whether the requirement of the attribution of a terrorist act to a specific

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State actor was abandoned, or whether the qualification of ‘armed attack’ still requires a nexus of the terrorist act to a State entity.

I. State Responsibility

State responsibility is based upon a State’s physical control over harmful events occurring through its explicit or implicit support. In considering responses to terrorism, it must be determined who is in fact responsible for the acts. If a State is suspected, analysis of the principles governing State responsibility is appropriate.¹ Some six decades ago, Hersch Lauterpacht noted that:

Customary international law holds that a State is normally responsible for those illegalities which it has originated. A State does not bear responsibility for acts injurious to another State committed by private individuals when the illegal deeds do not proceed from the command, authorisation, or culpable negligence of the government. However, a State is responsible vicariously for every act of its own forces, of the members of its government, of private citizens, and of aliens committed on its territory. If the State neglects the duties imposed by vicarious responsibility it incurs original liability for the private acts and is guilty of an international delinquency.²

In 1970, the UN General Assembly in Resolution 2625³ made it clear that a State’s mere acquiescence in terrorist activity emanating from its soil is a violation of the State’s international obligations. Numerous other resolutions from both the UN General Assembly and the UN Security Council leave no doubt that harbouring or supporting terrorist groups violates State responsibility under international law.⁴

A. Guilt by association: attribution of actions In the *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Merits)*,⁵ the International Court of Justice (ICJ) was presented with the question whether Iran was responsible for the taking of US hostages by private militants premised on the fact that the Iranian Government sanctioned and perpetuated the hostage crisis.⁶ The ICJ was faced with whether the action of Iranian students in occupying the US embassy and taking embassy staff hostage

¹ These ideas have been equally developed in Maogoto, JN, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (Routledge, 2016), 153.

² Oppenheim, L, *International Law* (8th ed, Longmans, Green & Co, London, 1955), 337–33838, 365.

³ UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, (1883rd plenary meeting) A/RES/2625 (XXV); UN General Assembly, *Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States* (1970) UN GAOR 25th Session Supp No 18 UN Doc A/8018 (“UN Doc A/8018”). G.A. Res No 2625, U.N. Doc No A/8018 (1970).

⁴ UNGA Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN Doc A/CONF.2/108/Rev.1 (1951); UN General Assembly, *Measures to Prevent International Terrorism*, 9 December 1985, (108th plenary meeting) A/RES/40/61; UNSC Libyan Arab Jamahiriya (31 March 1992) UN Doc No S/RES/748; These ideas have been equally developed in the article of Travaglio, GM, “Terrorism, State Responsibility, and the Use of Military Force” 4(1) *Chicago Journal of International Law* (2003) 97.

⁵ International Court of Justice (ICJ), *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* ICJ Reports 1980, 24 May 1980, paras 32-33, 36 (“*Tehran Hostages*”).

⁶ *Ibid*, para 74.

could be attributed to the government of Iran. In its opinion, the ICJ divided the events into two phases: the initial takeover by the students and the subsequent lengthy occupation of the embassy. The Court found that during the initial phase the students did not act on behalf of the state, therefore, the state did not bear responsibility for their actions — despite acknowledging that Iranian authorities were obliged to protect the embassy, and had the means to do so, but failed.⁷ Only after the takeover was complete did the Iranian government bear responsibility for the actions of the students, through its tacit approval.

Six years later the ICJ handed down its judgment in the *Military and Paramilitary Activities in and against Nicaragua*, which had presented the question of whether the actions of Nicaragua in supporting rebels in El Salvador constituted an armed attack by Nicaragua sufficient to justify military action by the US in collective self-defence with El Salvador. On this basis, the US argued that this support justified its mining of Nicaraguan waters and taking other military action against Nicaragua. The ICJ soundly rejected the arguments of the US. It said sending ‘armed bands’ into the territory of another State would be sufficient to constitute an armed attack, but supply of arms and other support to such bands cannot be equated with an armed attack and did not justify the use of military force by the US against Nicaragua.⁸

Since the Nicaragua and Iran Hostages decisions, a variety of scholars have argued that substantial support of terrorists by a State can be sufficient to impute their actions to the supporting State.⁹ Among the most prominent is Professor Oscar Schachter, who stated, ‘[W]hen a government provides weapons, technical advice, transportation, aid and encouragement to terrorists on a substantial scale it is not unreasonable to conclude that the armed attack is imputable to that government.’¹⁰ However, this position is at variance with the ICJ’s conclusion in Nicaragua that found the acts of the US backed Nicaraguan Contras could not be attributed to the US even though it was clear from the evidence that, in many ways, the Contras were a proxy army for the US and could not have existed without the financing and support of the US. In a critical review of the Court’s judgment, Abraham Sofaer points out that:

The Court had no basis in established practice or custom to limit so drastically the responsibility of States for the foreseeable consequences of their support of groups engaged in illegal actions, whether the actions are called ‘armed resistance’ or whether the perpetrators are called terrorists. Established principles of international law and many specific decisions and actions strongly support the principle that a State violates its duties under international law if it supports or even knowingly

⁷ These ideas have been equally developed in Maogoto, JN, *Battling Terrorism* (n 1), 156.

⁸ *Ibid*, paras 126–127.

⁹ Coll, A, “The Legal and Moral Adequacy of Military Responses to Terrorism” 81 *Proceedings of the American Society of International Law* (1987) 297; Murphy, JF, *State Support of International Terrorism: Legal, Political, And Economic Dimensions* (Westview Press, Boulder; Mansell Publishing, London, 1989), 99–109.

¹⁰ Schachter, O, “The Lawful Use of Force by a State Against Terrorists in Another Country” in Han, HH, ed, *Terrorism and Political Violence: Limits and Possibilities of Legal Control* (Oceana Publications, New York, 1993), 243, 249 (one State cannot be invaded by another State in response to terrorism unless responsibility for the terrorist attack can be imputed to the invaded State).

tolerates within its territory activities constituting aggression against another State.¹¹

Arguably, State responsibility for terrorist activities supported by a State logically forms the linkage to a State's complicity in the offence.¹² More problematic is a State's responsibility for acts of terrorism that it failed to prevent. A State is not expected to prevent every act of international terrorism that originates from within its territory. What is expected is that States exercise due diligence in the performance of their international obligations so as to take all reasonable measures under the circumstances to protect the rights and security of other States since customary international law expects States to prevent their territory from being used by terrorists for the preparation or commission of acts of terrorism against aliens within its territory or against the territory of another State.¹³

II. Use of Force and State-Sponsored Terrorism

In 1945, the drafters of the UN Charter were concerned with a completely different set of problems — the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State. At that point in time, the regime on the use of force was folded within statal perimeters — States as the entities with the monopoly over the use of lethal military force and it was and could not have been envisaged that well-financed and organised non-state entities would emerge in a world of chemical, biological, and nuclear weapons possessing the ability to not only acquire weaponry but equally the organisation and ability to challenge a State.

The question that arises, especially post-9/11, is to what extent may a State lawfully respond with armed force against the State that has sponsored the terrorists deemed responsible for the attack? Under international law, the response of a targeted State is predicated on principles of self-defence, and these are in turn based on what the international community regards as the 'inherent' right to ensure national security and the attendant duty to protect one's citizens from terrorist attacks. The norms of self-defence revolve around survival, and a State's inherent right to protect and defend its sovereignty.¹⁴

Managing the terrorist threat posed by State sponsors requires identification of the threat, clear establishment of linkage to a State sponsor and, in the event of use of military force, the meeting of the dual legal requirements of self-defence — necessity and proportionality.¹⁵ The problem is that responses to terrorism are usually coloured, often negatively, by the reality that States intertwine responses with their own national interest. This reality weakens the substantive international legal bases, which support military

¹¹ Sofaer, AD, "The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense" *Defense* 126 *Military Law Review* (1989) 89, 102.

¹² Lillich, R and Paxman, J, "State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities" 26 *American University Law Review* (1976) 217, 236–237.

¹³ *Id.*, 245, 261. See also, Oppenheim, *supra* nt 2.

¹⁴ These ideas have been equally developed in Maogoto, JN, *Battling Terrorism*, *supra* nt 1.

¹⁵ Stahn, C, "Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say" *European Journal of International Law* (2003), 13–14; Byers, M, "Terrorism, The use of Force and International Law After 11 September" 51 *International & Comparative Law Quarterly* (2002) 401, 406.

action, despite frequent justifications that action is supported in customary international law by the inherent right of self-defence.¹⁶

A. Self-Defence in the context of state-sponsored terrorism

Self-defence under the UN Charter is generally addressed in the context of large-scale attacks by the regular armed forces of one State against the territory of another, not the mere harbouring of a terrorist group or support of the same.¹⁷ However, use of Article 51 of the UN Charter to defend a State's decision to use armed force against terrorists and terrorist havens is not novel.¹⁸ Although the right of self-defence may be described as 'inherent'¹⁹ the UN Charter does not specify what is *specifically* by the phraseology.²⁰ Is it the phraseology that antedates and exists independently of the UN Charter or did the UN Charter subsume any previous understandings in a new holistic encapsulation?²¹

Even allowing for the view that of the right of self-defence antedates the UN Charter and continues to exist, it should be noted though that in contrast to international customary law, the UN Charter appears to have added a new requirement to the 'inherent' right — the occurrence of an 'armed attack.' It is unclear whether this was intended to narrow the existing right of self-defence. Even if this is the intention, it is equally unclear how and to what extent the right is limited. There appears to be no discussion of the phrase 'armed attack' in the records of the United Nations Conference on International Organisation (UNCIO). An explanation might be that the drafters felt that the words themselves were sufficiently clear. It is also significant that the drafters chose the word 'attack' over the term 'aggression' which is used repeatedly throughout the UN Charter. Even then, under the UN Charter the term 'aggression' is undefined but can be logically presumed to have a wider meaning than 'attack'.²² In matters relating to State-sponsored terrorism, the nature of terrorism renders this concept rather vague and blurred since terrorism does not fall easily within traditional doctrines and principles of international law.²³ Terrorists are not State actors bound by international law but rather

¹⁶ These ideas have been equally developed in the article of Maogoto, JN, "War on the Enemy: Self-Defence and State-Sponsored Terrorism", 4(2) *Melbourne Journal of International Law* (2003) 406.

¹⁷ Travalio, GM, "Terrorism, International Law, and The Use of Military Force" 18 *Wisconsin International Law Journal* (2000) 145, 156.

¹⁸ The Israelis used it in defence of its raid on Entebbe as did the US in attempting to justify its bombing of Libya. Such claims did not win a favourable response from the international community. See, Murphy, J, *Legal Aspects of International Terrorism* (Lexington Books, 1978), 556; Boyle, F, "Preserving the Rule of Law in the War against International Terrorism" 8 *Whittier Law Review* (1986) 735, 736–738 ("Preserving the Rule of Law"); Maogoto, JN, "War on the Enemy: Self-Defence and State-Sponsored Terrorism" (n 18), 406 and See Travalio, GM, "Terrorism, International Law, and The Use of Military Force" 18 *Wisconsin International Law Journal* (2000) 145, 156.

¹⁹ *Ibid*; It is clear that the word was intentionally used because the initial draft of Article 51 did not contain the term 'inherent'.

²⁰ Baker, M, "Terrorism and the Inherent Right of Self-Defence (A Call to Amend Article 51 of the United Nations Charter)" 10 *Houston Journal of International Law* (1987) 25, 31.

²¹ These ideas have been equally developed in the article of Maogoto, JN, "War on the Enemy: Self-Defence and State-Sponsored Terrorism" (n 18), 406.

²² See UN General Assembly, *Definition of Aggression*, 14 December 1974, (2319th plenary meeting) A/Res/29/3314 ("Definition of Aggression"), which attempts to give guidance to the Security Council in dealing with this matter. Note, however, that the annex and arts 2, 4, and 6 of the *Definition of Aggression* clearly indicate that the Security Council is not limited by the *Definition* and further, that the *Definition* is not intended as a modification or amendment of the *Charter*.

²³ These ideas have been equally developed in the article of Maogoto, JN, "War on the Enemy: Self-Defence and State-Sponsored Terrorism" (n 18), 406.

are similar to criminals in that they act outside of the scope of law.²⁴ This presents States with an intractable problem — how to respond legally to groups who are not adhering to legal strictures.

B. Resort to retaliatory strikes

Frustration with the legal strictures inherent in the concept of self-defence in the face of the ever-increasing threat of terrorism and the inability to root out terrorist groups, have led States such as the US and Israel to resort to retaliatory strikes against terrorist cells located in sovereign States. These States contend that terrorist threats represent a legitimate justification for the use of force abroad. The idea of strategic deterrence of terrorist attacks is not without controversy considering that the UN Charter and customary international law authorise the use of force only for self-defence. Reprisals and retaliatory strikes are illegal under contemporary international law because they are punitive, rather than legitimate actions of self-defence.²⁵ It would be difficult to reconcile acts of reprisal with the overriding dictate in the UN Charter that all disputes must be settled by peaceful means. Further, under the UN Charter regarding self-defence, there are three main principles that go into examining the *jus ad bellum* dimensions of a State's response if it has suffered a terrorist attack. These principles dealing with the timeliness of the response and the requirements of necessity and proportionality are difficult to reconcile with retaliatory strikes. A sharp distinction exists between use of force in self-defence and its use in reprisals.²⁶ The legal status of reprisals is stated very succinctly by Professor Ian Brownlie thus '[t]he provisions of the Charter relating to the peaceful settlement of disputes and non-resort to the use of force are universally regarded as prohibiting reprisals which involve the use of force.'²⁷

Cast against the backdrop of the snapshot on the use of force to counter terrorism, the legal response to the September 11 attacks was unusual. The international community broadly qualified the September 11 attacks as 'armed attacks' against the US justifying the exercise of self-defence with quasi-unanimous statements of support coupled with offers of assistance to the US to facilitate the lethal military action that ensued.²⁸ The Preambles of Resolution 1368 and Resolution 1373, endorsed anchored the military actions that ensued against the Taliban Regime, within the arena of the 'inherent right of individual and collective self-defence'.²⁹

C. Expanding the definition of armed attack

The right of self-defence laid down in Article 51 of the UN Charter is the pivotal point regarding the use of force in inter-State relations. A major question is whether the right of self-defence under Article 51 is limited to cases of 'armed attack' or whether there are other instances in which self-defence may be available. A number of scholars argue that

²⁴ Warriner, W, "The Unilateral Use of Coercion under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986" 37 *Naval Law Review* (1988) 49, 76–777.

²⁵ Bowett, DW, *Self-Defence in International Law* (Praeger, New York, 1958), 13; Maogoto, JN, "War on the Enemy: Self-Defence and State-Sponsored Terrorism", 4(2) *Melbourne Journal of International Law* (2003) 406.

²⁶ Oppenheim, *supra* nt 2, 419; Maogoto, JN, *Battling Terrorism* *supra* nt 1.

²⁷ Brownlie, I, *International Law and the Use of Force by States* (Oxford Scholarship Online 1963), 281.

²⁸ See Beard, J, "Military Action against Terrorists under International Law: America's New War On Terror: The Case for Self-Defense under International Law" 25 *Harvard Journal of Law and Public Policy* (2002) 559, 571.

²⁹ UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368, Preamble; UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373, Preamble.

an 'armed attack' is the exclusive circumstance in which the use of armed force is sanctioned under Article 51.³⁰ Furthermore, the ICJ in *Nicaragua* clearly stated that the right of self-defence under Article 51 only accrues in the event of an 'armed attack'.³¹

The traditional requirement of self-defence is that a triggering event justifying a military response has already occurred.³² When a State harbouring terrorists³³ provides active support for the terrorist group, as distinguished from mere tolerance and encouragement, there is a raging debate among scholars over whether, and under what circumstances, such support can constitute an 'armed attack' under Article 51 of the UN Charter against the target State. On this point there is considerable authority for the proposition that under some circumstances active support to terrorist groups can constitute an 'armed attack' against another State. For example, Professor Oscar Schachter has stated that 'when a government provides weapons, technical advice, transportation, aid and encouragement to terrorists on a substantial scale it is not unreasonable to conclude that the armed attack is imputable to that government.'³⁴

The *Nicaragua Case* is the most analogous on this issue. In the *Nicaragua Case*, the ICJ rejected the claim of the US that the support of Nicaragua to the rebels in El Salvador justified the use of force by the US against Nicaragua in self-defence under Article 51. The Court said that the provision of weapons or logistical support by one State to the opposition in another State is not an 'armed attack' under Article 51.³⁵ Consequently, this opinion suggests that even active support by a State to terrorist groups would not be an armed attack under Article 51. Nicaragua, however, is far from directly on point and leaves many questions unanswered. For example, what if the support includes not only weapons and logistical support, but includes the provision of training and a secure base of operations? Does it change matters if the terrorists might have access to weapons of mass destruction? Might support to terrorists acting trans-nationally be sufficient to be an armed attack against a target State, even though support to an armed opposition located within the target country would not? None of these questions is addressed by Nicaragua.

D. A silent revolution? Armed attacks and non-state entities

Prior to the September 11 attacks, Article 51 of the UN Charter was generally interpreted in a restrictive fashion. Most States (with the exception of the US and Israel) did not recognise a right of self-defence against terrorist networks hiding in territories of other States. Nor did a majority of States recognise the legitimacy of military action intended to

³⁰ See, for example, Dinstein, Y, *War, Aggression, and Self-Defence* (3rd ed, Cambridge University Press, New York, 2001), 168. Dinstein argues that as the choice of words in art 51 is deliberately restrictive, the right of self-defence is limited to armed attack. See also Jessup, P, *A Modern Law of Nations: An Introduction* (Macmillan, New York, 1948), 166.

³¹ The ICJ stipulated in *Nicaragua* that the exercise of the right of self-defence by a State under art 51 'is subject to the State concerned having been the victim of an armed attack'; see *Nicaragua Case, supra* nt 9, para 103.

³² McCoubrey, H and White, N, *International Law and Armed Conflict* (Aldershot, Hants, Dartmouth, 1992), 91–922.

³³ Harbouring entails providing sanctuary and training to international terrorists as well as conditions that support their ability to engage in terrorist activities: see, eg., UN Security Council, Resolution 1193, *On the Situation in Afghanistan*, 28 August 1998, UN Doc No S/RES/1193; UN Security Council, Resolution 1214, *On the Situation in Afghanistan*, 8 December 1998, UN Doc No S/RES/1214.S.C. Res 1193.

³⁴ Schachter, *supra* nt 12, 250; see also Coll, *supra* nt 11, 298.

³⁵ International Court of Justice (ICJ) *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* ICJ Reports 1986, 27 June 1986, para 228.

prevent future attacks. Self-defence was seen as an action of immediate response to an ongoing armed attack. Preventive or anticipatory self-defence was more or less ruled out. However, the terrorist attacks on 9/11 marked a turning point in the discourse on the use of force.

September 11 ignited heated debate as to whether the concept of ‘armed attack’ as contained in Article 51 must originate from a State rather than a non-State actor like Al Qaeda.³⁶ In its preamble, Resolution 1368 ‘recogni[ses] the inherent right of individual or collective self-defence in accordance with the Charter’.³⁷ The recognition that acts of private actors may give rise to an ‘armed attack’ is revolutionary. The term ‘armed attack’ was traditionally applied to States, but nothing in the UN Charter indicates that ‘armed attacks’ can only emanate from States. The main question is whether a terrorist act must be in some form attributable to a State in order to qualify as an ‘armed attack’ for the purposes of the UN Charter.

It is not entirely clear from the practice in the aftermath of 9/11 whether the requirement of the attribution of a terrorist act to a specific State actor was, in fact, fully abandoned. The North Atlantic Treaty Organization (NATO), for instance, introduced an interesting new formula when determining whether the 9/11 attacks amounted to ‘armed attacks.’ It did not expressly inquire whether the attacks were ‘attributable’ to the Taliban or Afghanistan, but instead asked whether ‘the attack against the United States on 9/11 was directed from abroad’ and could therefore ‘be regarded as an action covered by Article 5 of the Washington Treaty.’³⁸

One may argue that the criterion of the attribution of an ‘armed attack’ is only relevant in the context of the question towards whom the forcible response may be directed, but not in the context of the definition of an ‘armed attack’. Carsten Stahn postulates that ‘the main criteria to determine whether a terrorist attack falls within the scope of application of Article 51 should not be attributability, but whether the attack presents an external link to the State victim of the attack.’³⁹ Reviewing the relationship between Articles 2(4) and 51 vis-à-vis other coercive uses of force, Professor Myres McDougal avers that:

Article 2(4) refers to both the threat and use of force and commits the Members to refrain from ‘threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations’; the customary right of defence, as limited by the requirements of necessity and proportionality, can scarcely be regarded as inconsistent with the purposes of the United Nations, and a decent respect for balance and effectiveness would suggest that a conception of impermissible

³⁶ Byers, *supra* nt 17, 406–412; Stahn, *supra* nt 17, 49–50.

³⁷ However, it is instructive that the operative part of the resolution describes the attacks as ‘terrorist attacks’ (not armed attacks) that ‘represent a threat to international peace and security.’ Thus, Resolution 1368 is ambiguous on the issue whether the right of self-defence applies in relation to any parties as a consequence of the September 11 attacks.

³⁸ NATO, *Statement of the North Atlantic Council*, Press Release 124, 12 September 2001, at <nato.int/docu/pr/2001/p01-124e.htm> (accessed 22 April 2018).

³⁹ Stahn, C, “Nicaragua is Dead, Long Live Nicaragua – The Right to Self-defence under Art. 51 UN Charter and International Terrorism” Terrorism (Impressum Conference, *Terrorism as a Challenge for National and International Law*, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 24–25 February 2003).

coercion, which includes threats of force, should be countered with an equally comprehensive and adequate conception of permissible or defensive coercion[.]⁴⁰

Considering that the preferred *modus operandi* of terrorist organisations is a drawn out, sporadic pattern of attacks, it is very difficult to know when or where the next incident will occur. Professor Gregory Travalio reflects that:

Reasonable arguments can be made that the definition of ‘armed attack’ should be interpreted to include the purposeful harbouring of international terrorists. The potential destructive capacity of weapons of mass destruction, the modest means required to deliver them, and the substantial financial resources of some terrorist organisations, combine to make the threat posed by some terrorist organisations much greater than that posed by the militaries of many States.⁴¹

Conclusion

Terrorism presents several problems: the identification of terrorists is often difficult; the inconsistent international legal system fails to deter terrorist operations; and the complicated cross-border nature of terrorist networks makes it difficult to effectively diminish the threat. In the face of these problems, States that are targeted by terrorists essentially have two options in responding. If the terrorists are located within the target State’s borders, they may be captured and prosecuted under domestic criminal law. However, as is frequently the case, if terrorists are located outside the target State, military strikes against them may be undertaken. Though it is clear that effective deterrence demands that terrorists do not have safe havens and that terrorists must fear that they ultimately will pay a price for their mayhem, there is no indication that the world community is prepared to whole-heartedly accept the use of force against sovereign territories.⁴²

There is no doubt from the discussion above that the distinction between ‘armed attacks’ and ‘terrorist acts’ has become blurred in the aftermath of the acts that took place during 9/11, possibly because of the enormous consequences of this event. By ‘recognizing the inherent right of individual or collective self-defence in accordance with the Charter the preambular paragraph of Resolution 1368 appeared to imply that the terrorist acts were an ‘armed attack within the meaning of Article 51 of the UN Charter.’⁴³ A similar preambular paragraph was also included in Resolution 1373.⁴⁴ Even more explicit was the Statement that ‘an armed attack’ occurred was more explicit in the statement made by NATO on 12 September 2001, which states that if it were deemed that the attack on the US was from abroad, it would fall within the ambit of Article 5 of

⁴⁰ McDougal, M, “The Soviet-Cuban Quarantine and Self-Defense” 57 *American Journal of International Law* (1963) 597, 600.

⁴¹ Travalio, GM, “Terrorism, International Law and the Use of Military Force” 18 *Wisconsin International Law Journal* (2000) 145, 155.

⁴² Maogoto, JN, “War on the Enemy: Self-Defence and State-Sponsored Terrorism” (n 18), 406.

⁴³ UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368.

⁴⁴ UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

the Washington Treaty ('an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all').⁴⁵

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

The terrorist threat posed by biological, chemical or nuclear attacks is chilling, but intervention to prevent the sinister marriage of international terrorism and weapons of mass destruction presents serious questions of legitimacy. It is not necessarily in the interest of the international community to make the category of 'armed attack' under Article 51 so broad and potentially open-ended that nations harbouring groups committing violent acts in other States will be considered to have made armed attacks on the target State. Furthermore, the scope of a nation's permissible military response is almost certainly greater in the event of an 'armed attack' by another State than in other situations in which a more limited military response might be justified, and a broad definition of 'armed attack', including occasions where States are simply harbouring terrorists would too readily justify the robust use of military force.⁴⁶

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⁴⁵ NATO, *Statement of the North Atlantic Council*, Press Release 124, 12 September 2001, <http://www.nato.int/docu/pr/2001/p01-124e.htm> *supra* nt 40, neither the Security Council Resolutions, nor the NATO Statement attempted to establish a link between the terrorist acts and a particular State. However, these texts do not provide a clear indication whether they intend to refer to a wide concept of 'armed attack', which would also comprise acts, which are not attributable to a State. The issue whether the acts in question could be regarded as State acts depends on factual elements, which are still controversial.

⁴⁶ Maogoto, JN, *Battling Terrorism* (n 1), 153ff.