
Combating Terrorism and the Use of Force against a State: A Relook at the Contemporary World Order

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Self-defence has long been understood as an inherent right of a State when it is militarily attacked by another State. After September 11 attacks, 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. This paper critically examines the legal and policy considerations that promote a right of self-defence against terrorists by means of thoroughly analyzing the text of the UN Charter, State practice and the jurisprudence of the ICJ. The paper finds that a terrorist attack as such may not be an armed attack within the meaning of Article 51 of the Charter unless it is an act of a State or directly imputable to a State and is on a large scale with substantial effects. The paper concludes that unilateral use of force against a State in the name of self-defence is not the correct way of combating terrorism and that there are effective alternatives such as addressing the root causes of terrorism, resorting to law enforcement mechanisms or coercive countermeasures, and strengthening multilateralism.

Keywords

Terrorism, Self-defence, Article 51. Armed Attack, State Responsibility, Security Council, ICJ

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I. Introduction

Self-defence has long been understood as an inherent right of a State when militarily attacked by another State.¹ It has generally been regarded as a right applicable only in cases of inter-State armed conflict. Since the September 11 attacks, however, there have been attempts to include the term 'terrorist attack' to mean 'armed attack' under Article 51 of the UN Charter, thereby rendering the use of force against terrorists, or against a State that harbors terrorists, as a lawful exercise of self-defence.² It has been argued that certain resolutions of the Security Council authoritatively pronounce that a terrorist attack could be equated to an 'armed attack' within the meaning of Article 51.³ There have also been arguments purporting that for a State to be responsible for terrorist attacks, a higher threshold of attribution is not required and that mere harboring of terrorists may trigger the use of force in self-defence.⁴

This paper will reappraise the legal and policy considerations that promote a right of self-defence against terrorists, or against States harboring terrorists. The two main arguments made by this paper are as follows: (1) one is that the 'armed attack' as required under Article 51 must come from a State or the attack must be attributable to the extent that it is considered as the act of the State; and (2) the other is that to use military force against another State is an extremely serious matter that requires a higher threshold of attribution than mere harboring. The author nevertheless agrees that if there is convincing evidence that a State is directly responsible for a terrorist attack conducted on a large scale and has substantial effects, it would amount to an 'armed attack' within the meaning of Article 51, triggering the right to use of force in self-defence by the victim State.

This paper is composed of seven parts including Introduction and Conclusion. Part two will discuss whether a terrorist attack can be regarded as an 'armed attack' under Article 51 of the Charter. Part three will analyze invoking the right of self-defence against terrorists in a foreign country. Part four will examine the question of State responsibility by analyzing three landmark rulings of the International

¹ U.N. Charter art. 51. For details, see C. Greenwood, *Self-Defence*, in 9 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 103-4 (R. Wolfrum ed., 2012).

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

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

⁴ A. Slaughter & W. Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L. L. J. 20 (2002).

Court of Justice. It will focus on whether the use of military force in self-defence is appropriate for the levels of responsibility of a State. Part five will explore alternatives to self-defence, such as the Security Council authorization of the use of force; resorting to criminal justice system and coercive countermeasures. Part six will argue that the use of military force is not always the appropriate means to combating terrorism.

II. Is a Terrorist Attack an ‘Armed Attack’ under Article 51 of the UN Charter?

Immediately after September 11, 2001, the former U.S President, Bush considered that they “were more than acts of terror. They were acts of war.”⁵ The legal and political strategy of the US 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 harbored such organizations or persons.”⁶ It is important here to determine whether this categorization is in accordance with international legal regulation of the use of force or terrorist attacks could be considered as constituting ‘armed attacks’ within the meaning of Article 51 of the Charter.

A. Meaning of ‘Armed Attack’: Nicaragua still Good Law?

Article 51 restricts the right of self-defence to armed attacks against a State. The UN Charter, in referring to the use of armed force, employs different terms such as the use of force, act of aggression, and armed attack.⁷ Article 51 lays down ‘armed attack,’ a narrower concept than “use of force.”⁸ ‘Armed attack’ is also a ‘use of force’.

⁵ K. Seelye & E. Bumiller, *After The Attacks: The President; Bush Labels Aerial Terrorist Attacks ‘Acts of War’*, N.Y. TIMES, Sep. 13, 2001, available at <http://www.nytimes.com/2001/09/13/us/after-the-attacks-the-president-bush-labels-aerial-terrorist-attacks-acts-of-war.html> (last visited on May 7, 2015).

⁶ ‘Authorization for Use of Military Force’ Joint Resolution of the Senate and the House of Representatives, S.J. Res. 23, 107th Cong. (Sept. 17, 2001) (enacted)

⁷ R. Mullerson, *Self-Defence in the Contemporary World*, in *LAW AND FORCE IN THE NEW INTERNATIONAL WORLD ORDER* 16 (L. Damrosch & D. Scheffer eds., 1991).

⁸ A. Randelzhofer, *Article 51*, 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1409 (B. Simma ed., 2012). It states that: “Articles 51 and 2(4) do not exactly correspond to one another in scope. ‘Armed attack’ is a narrower notion than ‘threat or use of force’” The author also specifies “whereas an ‘armed attack’ always includes a use of force in the sense of Article 2(4), not all such uses of force constitute an ‘armed attack’”. The latter only exists when force is used on a relatively large scale, is of a sufficient gravity and has a substantial effect. Thus mere frontier incidents may well be

However, it is a more severe in form and much narrower in scope. Although the two terms are not synonymous, an 'armed attack' is indeed a species of 'aggression.' The French version of the term 'armed attack' in Article 51 illustrates the point better because it uses the French term "*une aggression armée*," that is, "aggression which is armed."⁹

The *Nicaragua* case in 1986 awarded an authoritative interpretation to the meaning of the term 'armed attack'. In his dissenting opinion in the *Nicaragua* case, Judge Stephen Schwebel (US) considered the seizure of the American embassy in Tehran in late 1979 to be an armed attack, so that the American rescue mission aimed at extricating hostages in 1980 should be in the exercise of its inherent right of self-defence.¹⁰ The International Court of Justice ("ICJ") rejected such a broad treatment of the concept of 'armed attack' as a basis for self-defence. The Court obviously places emphasized the UN General Assembly's 1974 Definition of Aggression.¹¹ The ruling of the ICJ 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"....

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.¹²

It is clear from the ruling of the Court that the meaning of 'armed attack' has been expanded to include cases of the so-called "indirect use of force" or 'indirect aggression'¹³

characterized as a use of force contrary to Article 2(4), but not necessarily as an 'armed attack.'" See also H. Kelsen, *THE LAW OF THE UNITED NATIONS* 498 (1950).

⁹ Y. Dinstein, *WAR, AGGRESSION AND SELF DEFENCE* 184 (4th ed. 2005). For details, see A. Pellet, *L'état Victime D'un Acte Terroriste Peut -Il Recourir à La Force Armée?*, *NOUVELLES MENACES CONTRE LA PAIX ET LA SECURITE INTERNATIONALES* 95-107 (A. Pedone Ed., 2004).

¹⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicar. v U.S.)* (1986) I.C.J. 349 (dissenting opinion of Judge Schwebel).

¹¹ G.A. Res. 3314, UN GAOR 29th Sess., Annex, Supp No 31, UN Doc A/ 9631, at 142 (Dec. 14, 1974).

¹² *Id.* at 103-4, ¶¶ 195 & 228-30. [Emphasis added]

¹³ *Supra* note 7, at 18.

(that is the sending of armed bands or irregulars which carry out acts of armed forces against another state) on a large scale.¹⁴ The Court stressed that the action of such armed bands or irregulars sent by a State, can be classified into an armed attack if it satisfies the required 'scale and effects.'¹⁵ However, the Court in the *Nicaragua* case 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.'¹⁶ The Court also added that mere knowledge of 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. It is thus subject to certain forms of sanction, but would not constitute an armed attack for purpose of self-defence.¹⁷

Some international lawyers argue that the meaning of armed attack as formulated by the ICJ is not wide enough to be adaptable to modern terrorist situations.¹⁸ Others even go as far as saying that the decision is no longer relevant and has been overruled by the September 11 incident.¹⁹ Nevertheless, the Court's position on the meaning of 'armed attack' is believed to be applied to contemporary terrorist situations so that its validity may ensue even at changed circumstances. Legal and policy considerations may also be justified. Firstly, the author argues that the meaning of 'armed attack' as enunciated in the *Nicaragua* case can very well be applied to the modern-day terrorist situation in the following manner:

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 non-State-actors or terrorists.

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

It is a logical deduction from the judgment that two requirements need to be satisfied

¹⁴ *Supra* note 10, ¶ 195. This is in accordance with the General Assembly Definition of Aggression, which is contained in Article 2(a) 'de minimis rule.' See G.A. Res. 29/3314, U.N. Doc. A/RES/29/3314 (Dec. 14, 1974).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Supra* note 10, ¶ 228 ("mere supply of funds" is not a use of force); ¶ 230 ("provision of arms" is not an armed attack).

¹⁸ G. Travalio & J. Altenburg, *Terrorism, State Responsibility and the Use of Military Force*, 4 CHL. J. INT'L. L. 105 (2003).

¹⁹ C. Stahn, *Terrorist Acts as "Armed Attack": The Right to Self-defence, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 45 (2003).

for an attack by non-State actors (or terrorists to be qualified as an ‘armed attack’ under Article 51): (a) *Attribution*: Non-State organs or terrorists must either be State organs (State-terrorism) or agents of the State (State-sponsored terrorism); (b) *Scale and effects*: the attack must be of such gravity as to amount to an actual armed attack conducted by regular armed forces

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 that the knowledge of assistance to terrorists, much less harboring, tolerating, or acquiescing, each of which can lead to State responsibility, may not be equated to an armed attack. A 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, does not amount to an armed attack which may trigger the right of self-defence. [Emphasis added]

Second, the Nicaragua decision is still good law from a legal and policy 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, in a legal sense, it has to be interpreted strictly.²⁰ As ‘armed attack’ is an essential requirement to claim lawful self-defence, from a policy consideration, it is to also be interpreted strictly in order to avoid abuses and the danger of opening floodgates. It is self-evident that many of the alleged self-defence claims by States might abuse the right. What if then the scope of the meaning of armed attack were widened and the threshold of State responsibility lowered?

B. The Security Council Resolutions 1268 and 1373

Many publicists argue that the Security Council Resolutions of 1368 and 1373 are epoch-making which have unequivocally constituted, once and for all, a terrorist attack as an ‘armed attack’ under Article 51 of the Charter.²¹ International law in this

²⁰ Kelsen, *supra* note 8, at 497. See also Q. Wright, *The Cuban Quarantine*, 57 AM. J. INT’L. L. 560 (1963); J. Kunz, *Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations*, 41 AM. J. INT’L. L. 876 (1947).

²¹ *Supra* note 3, at 16-7. See also North Atlantic Council, Statement on Collective Self Defense (Sept. 12, 2001), available at <http://www.state.gov/j/ct/rls/crt/2001/html/10264.htm> (last visited on Apr. 30, 2015).

respect has dramatically changed the consistent jurisprudence exhibited by the ICJ, maintaining that Article 51 only talks about ‘armed attack’ by a State or imputable to a State, is wrong.²² It is submitted that the two Security Council resolutions, by no means, decide that a terrorist attack is an armed attack under Article 51.²³ The Security Council Resolution 1368 addresses:

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.²⁴

The Security Council Resolution 1373 affirmed:

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place... on 11 September 2001..., *Reaffirming further* that such acts... constitute a threat to international peace and security, *Reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001), ... *Acting* under Chapter VII of the Charter of the United Nations, 1. *Decides* that all states shall: (a) Prevent and suppress the financing of terrorist acts; ... 2. *Decides also* that all states shall: (a) Refrain from providing all form of support...; ... 3. *Calls upon* all states to: ... (c) Cooperate...to prevent and suppress terrorist attacks and take actions against perpetrators of such acts;²⁵

A good faith reading of the natural and ordinary meaning of the words of the resolutions in their context 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; Resolution 1373 just reaffirms that September 11 terrorist attacks constitute *a threat*

²² *Supra* note 9, at 204. *See also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J 136, ¶ 33 (Separate Opinion of Judge Higgins) & ¶¶ 35-6 (Separate Opinion of Judge Kooijmans).

²³ C. Stahn, *Security Council Resolutions 1368(2001) and 1373(2001): What They Say and What They Do not Say, in The Attack on the World Trade Center: Legal Responses*, E.J.I.L DISCUSSION FORUM, available at http://www.ejil.org/forum_WTC/ny-stahn.html (last visited on Apr. 11, 2015).

²⁴ S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

²⁵ S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

to international peace and security, which may trigger Security Council enforcement measures under Chapter VII of the Charter, but not unilateral use of force in self-defence;

It is only in the preamble to these resolutions 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; 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;

The Preamble to Resolution 1268 just speaks of “*Recognizing* the inherent right of individual or collective self-defence in accordance with the Charter”, without any further elaboration. 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 have used definitive words to convey that message; and

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.*”²⁶

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 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”²⁷ and 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.”²⁸

Nevertheless, these Taliban activities have obviously not been considered grave enough by the Council to establish a sufficient link to a State-sponsored armed attack. On the contrary, it can be even inferred from the reluctance of the Council

²⁶ S. C. Res. 661, U.N. Doc S/Res/661 (Aug. 6, 1990). [Emphasis added]

²⁷ S.C. Res. 1267, U.N. Doc S/Res/1267, pmb. ¶ 5 (Oct. 15, 1999); S.C. Res. 1333, U.N. Doc. S/Res/1333, pmb. ¶ 7 (Dec. 19, 2000).

²⁸ S.C. Res 1267, pmb. ¶ 6.

to make use of these findings in the context of Resolutions 1268 and 1373 that the mere harboring 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 US and Israel) can be found in the successive condemnation, among others, of Israeli counter terror operations as impermissible under international law.²⁹

Taking into consideration all these legal and factual uncertainties, one can hardly conclude that the Security Council has approved applicability of Article 51 of the Charter to the US-led use of force against Afghanistan.³⁰ 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.

Therefore, it is not true that Resolutions 1268 and 1373 signify that terrorist attacks are 'armed attacks' within the meaning of Article 51 of the Charter, triggering the right of self-defence of the victim State. Simultaneously, it is to be noted that the Council does not exclude the possibility that acts of the nature similar to September 11, due to its scale and effect, may be within the scope of the right of self-defence³¹ provided that there is concrete evidence of State-sponsored terrorism. If such a situation happened, the attack would be an act of a State and thus squarely fall within the meaning of 'armed attack' under Article 51 of the Charter.

C. Evaluation

As mentioned above, a terrorist attack cannot generally be an 'armed attack' under Article 51 of the Charter. In order for a terrorist attack to be classified as an 'armed attack' within the meaning of Article 51, the following requirements must be satisfied:

The terrorist attack must come from a foreign State³² in the sense that it must be an act

²⁹ For details on the Security Council practice in this respect, see D. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L. L. 1 (1972); O' Brien, *Reprisals, Deterrence and Self-Defence in Counterterror Operations*, 30 VA. J. INT'L. L. 421 (1990).

³⁰ *Supra* note 19.

³¹ F. Kirgis, *Addendum: Security Council Adopts Resolution on Combating International Terrorism*, ASIL INSIGHT, (Oct. 1, 2001), available at <http://www.asil.org/insights/volume/6/issue/18/terrorist-attacks-world-trade-center-and-pentagon> (last visited on May 1, 2015).

³² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. ¶ 139 (July 9), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=mwp&case=131&k=5a&p3=0> (last visited on May 1, 2015).

of a State or directly imputable to a State;³³

It must be of such gravity as to amount to ' (*inter alia*) an actual armed attack conducted by regular armed forces of a State'³⁴ (the test of scale and effects); and

The armed attack must be in progress or there must be concrete and convincing evidence of further imminent 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 question 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 Right of Self-Defence be Invoked against Terrorists in a Foreign Country under International Law?

A. Categories of Terrorist Attack

There are various terrorist situations which require various types of responses. Firstly, the distinction between 'domestic' and 'international' terrorism needs to be made. When terrorists attack a State in its domestic territory and no other State is involved, it is a case of domestic terrorism. In this case, Article 51 or the right of self-defence does not come to play at all. When terrorists strike a State from the territory of another State, it is categorized as 'international terrorism.' As far as international terrorism is concerned, another State is not necessarily implicated in the attack. Terrorist attacks are divided into three main categories as follows:

Terrorist attacks for which another State is directly responsible;

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

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

³³ *Supra* note 10, ¶ 195. See also Case Concerning Oil Platforms (Iran v U.S.), Judgment, 2003 I.C.J. 161 (Nov. 6), available at <http://www.icj-cij.org/docket/?p1=3&p2=3&case=90&code=op&p3=4> (last visited on May 1, 2015).

³⁴ *Supra* note 10, ¶ 195.

In the meantime, the crucial question is whether the right of self-defence can be invoked against terrorists located in a foreign country, not at all responsible for terrorist attacks. The answer is negative for the following reasons:

A good faith interpretation of Article 51 rules out the exercise of the right of self-defence against non-State actors as the UN Charter and other rules of international law governing the use of force are meant for inter-State relations; and
 Serious legal implications may arise from the recognition of terrorists as combatants in an armed conflict situation.

B. Good Faith Interpretation of Article 51

International law is primarily governing the relations between States. State sovereignty is still a fundamental ground for these rules and customs. Article 2(4) of the Charter, *e.g.*, prohibits the use of force against another State.

The exceptions to this prohibition can be found in Chapter VII of the Charter. It refers to the measures against “act of aggression” (Article 39) and ‘armed attack’ (Article 51), both of which show the forms of use of force from one State to another.

Some international lawyers advocate that a terrorist attack can be regarded as an ‘armed attack’ under Article 51 of the Charter so that the victim State may use force based on the right of self-defence against terrorists located in another State.³⁵ They maintain that Article 51 only identifies the potential target of an armed attack to be a State; it does not require the perpetrator of armed attack specifically to be a State. According to them, an armed attack can be carried out by non-State actors.³⁶

Even though the wording of Article 51 (if an armed attack occurs against a member of the UN) does not expressly mention that armed attack must come from a State, the meaning is implicit and well established.³⁷ This interpretation is in accordance with the principles of the Vienna Convention on the Law of Treaties³⁸ and the jurisprudence of the ICJ.³⁹

³⁵ *Supra* note 18, at 42.

³⁶ *Supra* note 24, at 204.

³⁷ D. Huskisson, *The Air Bridge Denial Program and the Shootdown of Civil Aircraft under International Law*, 56 A.F. L. REV. 144 (2005). This point of view is shared by Judge Antonio Cassese. *See also* A. Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 997 (2001). *See also* G. Guillame, *Terrorism and International Law*, 53 INT'L & COMP. L. Q. 546 (2004).

³⁸ The Vienna Convention on the Law of Treaties (“VCLT”) art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

³⁹ The consistent jurisprudence of the ICJ in all the three cases where self-defence was the main issue is that the armed attack must be an act of a State or a State must be directly responsible for the armed attack.

C. Legal Implications of Recognizing Terrorists as Combatants

The claim of the right of self-defence against terrorists has become rampant particularly after September 11. It started with the declaration of “war on terror” by President Bush in his “Address to the Nation on the Terrorist Attacks.”⁴⁰ This presidential declaration of “war on Terror” has seriously challenged the existing rules governing *jus ad bellum* as the traditional notion of war or armed conflict is hostility between two or more sovereign States.⁴¹ Such a claim of a right of self-defence against terrorists, however, fail to consider that ‘terrorists’ are non-State-actors and are not subjects of international law; and therefore cannot be a party to a war or an armed conflict.

On October 7, 2001, the US informed the UN Security Council that it was exercising its “inherent right of individual and collective self-defence” by attacking Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.⁴² Thus, the US clearly affirmed its position on the right of a State that has been attacked by terrorists to respond in self-defence against those terrorists and the State ‘harboring’ them. It means that the US raised the terrorists to the status of ‘combatants’ in terms of *jus ad bellum*.

On the other hand, William Taft (The then Legal Adviser of the US Department of State) addressed that: “Terrorists are belligerents who lack the entitlements of those legitimately engaged in combat. No colorable argument has been put forward that terrorists are entitled to any special status under the law of armed conflict - and certainly not to the status of prisoners of war.”⁴³ As Article 4 of the Third Geneva Convention (hereinafter POW Convention) imposes a distinction between the legitimate and the illegitimate combatant, the terrorists are to be treated as unlawful combatants.⁴⁴ That is why the detainees in Guantanamo Bay have been described on many occasions, as unlawful combatants;⁴⁵ they are denied the protection of

⁴⁰ G. Bush, Address to the Nation on the Terrorist Attacks, Sept. 11, 2001, available at <http://www.presidency.ucsb.edu/ws/?pid=58057> (last visited on Apr. 11, 2015).

⁴¹ E. LAUTERPACHT ED., 2 OPPENHEIM INTERNATIONAL LAW: A TREATISE (DISPUTE, WAR AND NEUTRALITY) 202 (1965). It states that: “War is a contention between two or more States through their armed forces.” See also Geneva Conventions, art. 2.

⁴² See Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946, reprinted in 40 I.L.M. 1281 (2001).

⁴³ W. Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 320 (2003).

⁴⁴ *Id.* at 321.

⁴⁵ D. Rumsfeld & R. Myers, Dep’t of Defense News Briefing (Jan. 11, 2002), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2031> (last visited on May 7, 2015). For details, see H. DUFFY, THE WAR ON TERROR AND THE FRAMEWORK OF INTERNATIONAL LAW 398 (2005); P. Goedde, *Human Rights of Guantánomo Detainees*

the Geneva Conventions. Contrary to the Government position, however the US Supreme Court ruled in *Hamdan v Rumsfeld* on June 29, 2006 that detainees were entitled to the minimal protections under the common Article 3 of the Geneva Conventions.⁴⁶ As Ratner has rightly put:

The United States government is trying to have it both ways. It is asserting various rights to commit armed acts against terrorists under *jus ad bellum*, the law on recourse to force, notably the right of self-defense; however, it denies the applicability of international humanitarian law, *jus in bello*. It seems two-faced that the United States can both invoke the war paradigm to use force against the terrorists, but then deny the war paradigm to say that no terrorists are entitled to protected status.⁴⁷

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

D. Evaluation

The so-called right of self-defence against terrorists is not supported by either legal or policy considerations. Terrorists should receive response from other law enforcement measures, instead of the right of self-defence which is applied only for inter-State relations. Whenever there is a terrorist attack it should be considered whether a particular State is imputable to the attack before determining the applicability of the right of self-defence under international law.

under International and US Law: Revisiting the US Supreme Court Cases, 7 J. EAST ASIA & INT'L L. 11 (2014).

⁴⁶ *Hamdan v Rumsfeld*, 548 U.S. 557 (2006).

⁴⁷ S. Ratner, *The War on Terrorism and International Humanitarian Law*, 14 MICH. STATE J. INT'L L. 23-4 (2006).

IV. Question of State Responsibility

A. Jurisprudence of the International Court of Justice

1. *Nicaragua case*

As has been stated earlier, the ICJ 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.⁴⁸ The Court very clearly rules that to be an armed attack under Article 51 of the Charter, the attack must come from a State, i.e., 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.⁴⁹

2. *Oil Platforms case*

In the *Oil Platforms* case, the ICJ reaffirmed its position that only when an armed attack is imputable to a State can the victim State exercise self-defence against that attacking State. The Court adjudicated:

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.⁵⁰

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...”⁵¹

⁴⁸ *Supra* note 10, ¶ 195.

⁴⁹ 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.

⁵⁰ Case Concerning Oil Platforms (Iran v U.S.), Judgment, 2003 I.C.J. ¶ 51 (Nov. 6), *reprinted in* 42 I.L.M. 1334.

⁵¹ *Id.* ¶ 72.

3. *Palestinian Wall Advisory Opinion*

The ICJ has, even after September 11, reiterated 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.”⁵² The Court went on to say that: “Israel does not claim that the attacks against it are imputable to a foreign state.”⁵³ It is an unequivocal reaffirmation of its consistent jurisprudence that ‘armed attack’ under Article 51 must come from a sovereign State.

This is the most recent ruling (made after September 11 terrorist attacks) of the ICJ by the overwhelming majority.⁵⁴ Thirteen out of the fourteen concurring judges agreed on this point.⁵⁵ Although Judge Higgins in her separate opinion expresses her reservation in this respect, she clearly admitted that “this statement of the Court must be regarded as a statement of the law as it now stands.”⁵⁶

As a consequence, 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 an act of a State or attributable to a State.

B. Different Levels of State Responsibility and the Right to Use Force in Self-Defence

International law is primarily based on sovereign States even in the twenty-first century. Sovereignty is sacred for all States. A State can take actions or countermeasures against another State only when it is held responsible under international law. Two elements must be satisfied in order for a State to be responsible under international law: (1) attribution; and (2) breach of an international

⁵² Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. ¶ 139 (July 9).

⁵³ *Id.*

⁵⁴ The Advisory Opinion was established by 14 votes to 1. In favour: President Shi, Vice-President Ranjeva, Judges Guillaume, Koroma, Vereshchetin, Higgins, Para-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka; Against: Judge Buergenthal.

⁵⁵ Judge Kooijmans agreed with the judgment and held that the statement (Article 51 recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another State) is undoubtedly correct and that it has been the generally accepted interpretation for more than 50 years. However, the learned judge makes a reservation and states that Resolutions 1268 and 1373 created a new element and that the Court should not by-pass this new element. *See supra* note 52, ¶¶ 35-6 (Separate Opinion of Judge Kooijmans).

⁵⁶ *Id.* Separate Opinion of Judge Higgins, ¶ 33.

obligation.⁵⁷ ‘Attribution’ means that 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 of 2001, “conduct” is attributable to the State if it is done by State organs⁵⁸ exercising elements of governmental authority,⁵⁹ acting on the instructions of, or under the direction or control of a State.⁶⁰ A State is an abstract entity and 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.⁶¹ However, sometimes a State may not be directly attributable for an internationally wrongful act. *E.g.*, a State may actively support, or tolerate terrorists or simply be unable to deal effectively with terrorists. In other words, there may be different levels of State involvement or support of terrorist activities;⁶² 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.

In fact, a State violates international law if it involves itself in acts of international terrorism.⁶³ Nevertheless, it is generally accepted that the mere violation of one State under international law does not justify the use of military force by the victim State.⁶⁴ This principle has been well established by the ICJ in the *Corfu Channel* case.⁶⁵ In this case, the UK engaged in a forcible minesweeping operation in the Corfu Straits, which were within Albanian territorial waters in order to establish free passage and to force Albania to comply with its international obligation in respect of illegal mining of the strait. The ICJ found that Albania’s actions were a violation of its responsibility under international law. The Court, however, held that although Albania’s actions were violations of international law, it did not by itself justify the

⁵⁷ The International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, 2001 [hereinafter Articles on the State Responsibility] art. 2.

⁵⁸ Responsibility of States for Internationally Wrongful Acts, [2001] II Y.B. INT’L L. COMM’N, U.N. Doc. A/56/10, at art. 2.

⁵⁹ *Id.* art. 5.

⁶⁰ *Id.* art. 8.

⁶¹ J. CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 91, ¶ 2 (2002). See also I. BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (pt. 1) 132-66 (1983).

⁶² R. Erickson, *Legitimate Use of Force against State-Sponsored Terrorism* 32-4 (1989), as quoted in G. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT’L. L. J. 150 (2000).

⁶³ G.A. Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, 121, U.N. Doc. A/8018 (Oct. 24, 1970). It declares 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.”

⁶⁴ O. Schachter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1626 (1984).

⁶⁵ *Corfu Channel* case (Alb. v UK), Judgment, 1949 I.C.J. 4 (Apr. 9).

use of military force by the UK.⁶⁶

It would, therefore, be incorrect to say that the unilateral use of force in the name of self-defence is justifiable in any terrorist attack for which a State is in one way or another responsible. It is imperative to make a distinction between two types of State responsibility for terrorist attacks:⁶⁷

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' are 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 harboring terrorists, or by failing to exercise 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, self-defence is not a lawful response, but the victim of the attack is open to alternatives to self-defence.

V. Alternatives to Self-Defence

Even when the conditions for self-defence are not met, a State still has three options: (1) it can seek Security Council authorization for the use of force; (2) it can employ coercive countermeasures; or (3) it can resort to domestic criminal justice system.⁶⁸

⁶⁶ *Id.* at 35. The judgment reads: "Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty."

⁶⁷ D. Brown, *Use of Force against Terrorism after September 11th: State Responsibility, Self-Defence and Other Responses*, 11 *CARDOZO INT'L. & COMP. L. J.* 7-8 (2003).

⁶⁸ J. Delbrück, *The Fight Against Global Terrorism: Self-Defense or Collective Security as International Police Action? Some Comments on International Legal Implications of the 'War against Terrorism'*, 44 *GER. Y.B. INT'L L.* 19-24 (2001).

A. Security Council's Authorization for the Use of Force

The Security Council may authorize the use of armed force when it finds a threat to the peace, breach of the peace, or act of aggression.⁶⁹ The Council's response may be more influential than States acting in self-defense can do because the Council may respond to mere threats, and not just 'armed attacks.'⁷⁰

B. Resort to Criminal Justice System

Where the right of self-defense against a State is not triggered and where the Security Council does not act, a victim of terror can resort to the domestic criminal justice system.⁷¹ Individuals and groups carrying out attacks without the sponsorship of a State are common criminals. They clearly fall under the criminal jurisdiction of the State on whose territory they are found such as IRA terrorists in the US. Within their territories, States have an obligation to extradite or try individuals accused of terrorism.⁷²

C. Coercive Countermeasures

Breach of an international obligation by a State, including an obligation to try or extradite accused terrorists, may give rise to the right to take countermeasures on the part of the injured State.⁷³ In such a case, the injured State may take such countermeasures until the wrongdoer ceases the wrong and compensates with a remedy.⁷⁴ Appropriate remedies can include restitution, compensation and satisfaction.⁷⁵

In the case of a breach of an obligation *erga omnes*, however, it may be lawful

⁶⁹ U.N. Charter arts. 39 & 42.

⁷⁰ M. O'Connell, *Debating the Law of Sanctions*, 13 EUR. J. INT'L L. 71-2 (2002).

⁷¹ On the rules of jurisdiction in international cases, see W. REISMAN ED., JURISDICTION, LIBRARY OF ESSAYS IN INTERNATIONAL LAW (1999).

⁷² See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 565; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641.

⁷³ M. O'Connell, *Lawful Self-Defence to Terrorism*, 63 U. PITT. L. REV. 907 (2002). It states that: "...though the most common form of countermeasure is economic sanctions, forceful action short of armed force also fits the definition of lawful countermeasure. For example, a state may be able to send agents to apprehend terrorists from another state that refuses to extradite or try them."

⁷⁴ On the 'counter measures,' see Articles on the State Responsibility, arts. 49-54, G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (2002).

⁷⁵ *Id.* arts. 34-37.

for any State to take counter measures.⁷⁶ The attacks of September 11 involved intentional killing of innocent people in that they should be qualified as “crimes against humanity” under universal jurisdiction.⁷⁷ Any State’s courts should be able to exercise jurisdiction over persons accused of universal jurisdiction crimes.⁷⁸

VI. Combating International Terrorism

A. Underlying Causes for Terrorism

Counter-terrorism takes two forms. One is curative involving measures such as diplomacy and police work, while the other is preventive, eradicating the root causes of terrorism.⁷⁹ Because terrorists rely on a friendly environment which has been created both culturally and politically, any counter terrorist strategy must focus on transforming this environment so that terrorists are opposed universally. This requires ‘prevention,’ including “addressing the root causes of terrorism.” It is not easy to identify the root causes of terrorism. However, serious counter-terrorism efforts must at least address, if not eradicate, circumstances under which terrorism flourishes.⁸⁰ As for the root causes of terrorism, the UN General Assembly addressed that:

...urges all States ...to contribute to the progressive elimination of the causes underlying international terrorism and to pay special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien domination and occupation, that may give rise to international terrorism....⁸¹

The General Assembly Resolution identifies four root causes of terrorism, namely: (1) Colonialism; (2) Racism; (3) Mass and flagrant violation of human rights and

⁷⁶ *Id.* arts. 40-41.

⁷⁷ F. Kirgis, *Terrorist Attacks on the World Trade Center and the Pentagon*, ASIL INSIGHTS, available at <http://www.asil.org/insights/volume/6/issue/18/terrorist-attacks-world-trade-center-and-pentagon> (last visited on May 1, 2015).

⁷⁸ K. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785 (1988).

⁷⁹ S. Zeidan, *Agreeing to Disagree: Cultural Relativism and the Difficulty of Defining Terrorism in a Post-9/11 World*, 29 HASTINGS INT’L. & COMP. L. REV. 218 (2006).

⁸⁰ *Id.* at 220.

⁸¹ G.A. Res. 42/159, U.N. Doc. A/RES/42/159 (Dec. 7, 1987).

fundamental freedoms; and (4) Alien domination and occupation.

Emphasis should be placed on “Alien domination and occupation” as a root cause of terrorism because it involves political violence against an entire group of civilians; the occupation itself is a form of terrorism, known as ‘State terrorism.’ It is prudent to acknowledge ‘foreign occupation’ as a root cause of terrorism by the entire international community except for the US and Israel.⁸²

Other underlying causes of terrorism are ‘injustice’ and ‘oppression.’ The late Pope John Paul II referred to them as root causes which require the attention of the international community to combat terrorism.⁸³

A striking example of ‘injustice’ is the total neglect and inaction on the part of the US, the EU, and other power-wielding countries, in the longstanding, decades-old issue of the Palestinian people at the hands of Israel. The continued Israeli occupation of Palestinian territories is one of the most important elements of instability, terrorist recruitment, and anti-American sentiment in the world.⁸⁴ America’s long-standing support for Israel allows terrorist leaders like Osama bin Laden to proclaim American complicity in Israeli human rights abuses, extra-judicial killings, illegal settlement expansions, and illegal land confiscations.⁸⁵

If the international community could settle the Palestinian problem and allow the establishment of a peaceful and stable Palestinian State alongside of Israel, the Middle East would become a largely terrorism-free area. Attacking the root cause of terrorism is an often discussed but a seldom practiced concept. Addressing the problem would require extensive diplomatic efforts, long-term economic growth plans, and significant social and cultural adjustments.⁸⁶ It appears that the international community is not serious enough about tackling the underlying causes of terrorism. Instead, they have focused on the symptoms only and dealt with terrorism in a crude way, that is, by excessive use of military force.

⁸² The Resolution was adopted with 159:2 (US and Israel) and 1 abstaining.

⁸³ C. Gandolfo, *To Fight Terrorism, Go to Its Root Causes, Says John Paul II*, (Sept. 8, 2002), available at <http://www.zenit.org/en/articles/to-fight-terrorism-go-to-its-root-causes-says-john-paul-ii> (last visited on Apr. 30, 2015).

⁸⁴ See *National Strategy for Combating Terrorism* 24 (2003), available at <https://archive.org/details/nationalstrategy29185gut> (last visited on Apr. 30, 2015).

⁸⁵ For details on the human rights situation in the Occupied Palestinian Territories, see U.N. Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, U.N. Doc. A/HRC/4/17 (Jan. 29, 2007), available at <http://unispal.un.org/UNISPAL.NSF/0/B59FE224D4A4587D8525728B00697DAA> (last visited on May 1, 2015).

⁸⁶ K. Fandl, *Terrorism, Development & Trade: Winning the War on Terror Without the War*, 19 AM. U. INT’L L. REV. 604-5 (2004).

B. Is the Use of Military Force always a Correct Answer?

If there is a situation that is likely to endanger peace and security, a State should submit the issue to the Security Council to settle it by peaceful means.⁸⁷ Due to this overriding authority of the Security Council,⁸⁸ Article 51 limits the right of self-defence to an 'armed attack.' Only when there is an armed attack carried out by another State, the victim State may use force in self-defence. Even in that case, the State must immediately report the situation to the Security Council. Once the Council has taken measures, the victim State must cease its use of force.⁸⁹

Terrorists have no international personality as such. They have no territory of their own and may be nationals of different countries. Certain countries may tolerate or harbor such terrorists. Even if a large-scale attack of these terrorists were regarded as an armed attack, how would the victim State use military force in self-defence against terrorists? They might be hiding in a secluded area of a State. If the victim State, in an attempt to exercise the right of self-defence, invades the State where terrorists are reportedly hiding to destroy terrorist cells or bombard their hideouts, it would still amount to a violation of the territorial sovereignty of the latter State.

It can be argued, on the basis of the 'permissive view' on the use of force that "if the use of force does not result in the loss or permanent occupation of territory... a 'swift surgical strike,' as with Israel at Entebbe airport in 1976, is not unlawful."⁹⁰ One can nevertheless imagine the far-reaching negative consequences of such a comprehensive permission of the use of military force in self-defence in the name of combating terrorism. Suppose that secretive terrorist cells, based somewhere in the US, attacked and destroyed the Russian National Space Headquarters. What if then the Russian Government regarded this as an 'armed attack' against Russia and launched missile attacks, in the exercise of self-defence, in accordance with Article 51 of the Charter, against that part of the US territory where the terrorists were alleged to be hiding? Would the US Government accept this as a lawful use of military force? Would the Americans tolerate this since it amounts to the lawful exercise of the right of self-defence by Russia?

What would happen to the international community and the contemporary world order if the traditional international law on self-defence were replaced by a new law according to which every terrorist attack was regarded as an 'armed attack';

⁸⁷ *Id.* ch. IV.

⁸⁸ U.N. Charter art. 39.

⁸⁹ *Id.* art. 51.

⁹⁰ M. DIXON, *TEXTBOOK ON INTERNATIONAL LAW* 326 (7th ed. 2013).

allowing the victim State to use military force against terrorists without taking into consideration the attributability nexus between terrorists and the State where they were in. India, *e.g.*, could attack Pakistan on the ground that the perpetrators of the Mumbai terror attacks were Pakistani terrorists. The US could attack Saudi Arabia because most of the September 11 terrorists were reportedly Saudi nationals. The UK could attack Pakistan because the culprits of the London bombing originated from Pakistan. Indonesia could attack Malaysia because the mastermind behind the Bali bombing was a Malaysian terrorist. With the growing increase in terrorist attacks across the world, there would be an unending use of military force. If we chose the path of war for whatever we do, the chances of peace and amicable solution would vanish altogether.

Let us take lessons from the three contemporary experiences of military adventurism in the name of combating terrorism: the use of force in Afghanistan after September 11, the US invasion of Iraq in 2003 and the Israeli invasion of Lebanon in 2006. Were all of these incidents success stories? Did the use of force achieve desired results of eradicating terrorism? Has the world become a safer place because of these uses of military force?

Even if the initial use of force by the US in Afghanistan after September 11 were accepted as lawful, a significant number of international legal scholars conclude that the US response which went beyond Al-Qaeda to encompass the toppling of the Taliban and secure regime change violates the doctrine of proportionality.⁹¹ The invasion of Iraq was founded on an unsubstantiated claim of link to the Al-Qaeda and allegations of existing stockpiles of Weapons of Mass Destruction. Here again, there was a regime change and Saddam Hussein was dethroned. Israel invaded Lebanon in 2006 to destroy Hezbollah militants because of their alleged terrorist attacks against Israel. Lebanon's territorial sovereignty was disregarded, but the invasion could not annihilate Hezbollah. In all three major incidents, the objective of eradicating or at least to keep under control terrorism was not achieved at all. Rather, these incidents have now been seen by many as grounds that fan the terrorist fire and cause for establishing more terrorist networks to spread around the world. The world has not become a safer place to live in.

C. The Need for Strengthening Multilateralism

Some governments and media have raised the issue of terrorism to the highest level. They would say that there is no important matter in the present world other than

⁹¹ J. MAOGOTO, *BATTLING TERRORISM: LEGAL PERSPECTIVES ON THE USE OF FORCE AND THE WAR ON TERROR* 122 (2005).

terrorism. According to them, combating terrorism is much more important than compliance with fundamental human right related laws and sacred principles of international law.

Everybody accepts that terrorists are enemies of mankind and combating terrorism is of primary importance. However, it cannot also be accepted that military force has been arbitrarily and unilaterally used against a sovereign State under the pretext of “war on terror” or self-defense. It would completely disregard well-established principles of international law,⁹² which are the very foundation of the contemporary world order. Once this foundation is destroyed, then the present world order would become hegemonic or anarchic. As Professor Drumbl has rightly put:

A collective institutional response to terrorism may be more effective than ad hoc unilateralism or narrow coalition building. It may be difficult to prevent ad hoc unilateralism from devolving into self-interested opportunism. Who defines what is an armed attack? A ‘threat to the peace’? Who defines when, where, how, and why the use of force can be initiated to contain (or punish) rogue states? If the US can use extensive military force to respond to terrorism, there is no principled basis to deny others that entitlement.⁹³

Therefore, terrorism, even though relatively dangerous, cannot have any normative effect. Terrorism can be dealt with effectively, without any necessity of breaking or bending the law. International terrorism cannot be successfully wiped out unilaterally or by means of unilateral use of force⁹⁴ considerably because it has international dimension. The best way to combat international terrorism is with the collective will of States through proper UN bodies as channels, in particular the Security Council, the General Assembly, and appropriate regional organizations.

The 60th Session of the UN General Assembly was unique because it was marked with the presence of High Level Plenary Meeting of the World Leaders (hereinafter World Summit 2005). The General Assembly Resolution 60/1 effectively adopted the 2005 World Summit Outcome.⁹⁵ In the Resolution, the world leaders agree that:

⁹² M. Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT’L. L. 233 (2003). It points out that: “A usual procedure to modify customary law is to break it and to accompany the breach by a new legal claim.”

⁹³ M. Drumbl, *Victimhood in Our Neighbourhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 32-3 (2002).

⁹⁴ *Supra* note 91, at 193. It states that the modern terrorists function in loose-knit cells and the fight against terrorism cannot be purely by force.

⁹⁵ G.A. Res. 60/1, UN Doc. A/RES/60/1 (Oct. 24, 2005), ¶ 72.

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

We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the *authority of the Security Council* to mandate coercive action to maintain international peace and security...⁹⁶

There, the world leaders clearly delivered their consensus to the effect that ‘multilateralism’ is the only answer to combating international terrorism. Despite the flaws of the UN, no one has proposed a better system for the maintenance of international peace and security. The Charter-based system may very well serve for world order and the contemporary international community even after the September 11 incident. Especially, the US and other hegemonic Powers should try and initiate a policy of strong adherence to the Charter and help make the Security Council central to the international community’s response to threats to international peace and security. Only in this way can humankind be saved from the untold tragedy of war.

VII. Conclusion

Since 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,- thereby rendering the use of force against terrorists, or against a State that harbours terrorists, a lawful exercise of self-defence. This research has reevaluated the international law of self-defence in order to determine the extent and applicability to a terrorist situation. The author has argued that the right of self-defence is applicable only in an inter-State situation. Thus, whenever there is a terrorist attack, it should be examined whether a State is responsible under international law to the extent that the terrorist attack can be regarded as an act of that State. As today’s terrorism has ‘international’ dimension, it cannot be wiped out simply by means of unilateral use of force and regime change in the name of self-defence. Unilateralism may lead to

⁹⁶ *Id.*, ¶¶ 78-9. [Emphasis added]

subjectivity, selectivity, double standard, and injustices. The author concludes that 'multilateralism' is the most appropriate way to combat international terrorism. The global community urgently needs coordinated and comprehensive law enforcement measures through proper international bodies, like the UN Security Council and appropriate regional organizations.

