Lawfully Defending the Peace: The Bush Doctrine and the Global War on Terrorism

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> Whenever peace – conceived as the avoidance of war – has been the primary objective of a power or group of powers, the international system has been at the mercy of the most ruthless member of the international community.
>
> Henry Kissinger, *A World Restored* (1954)

The barbarians are always at the gate. Conflict is a natural consequence of the human condition. When these simple facts are ignored and the absence of conflict becomes a principle policy objective, a dangerous stage is set: the barbarians will recognize that you are willing to sacrifice fundamental principles in order to avoid conflict, and they will exploit that timidity. It is in vogue to argue that the lesson for America to draw from Edward Gibbon's *The History of the Decline and Fall of the Roman Empire* is to avoid imperial overstretch and thus avoid the barbarians; 9/11 exposed the fallacy of that theory in today's globalized world.

When the United States failed to finish the war with Iraq in 1991, withdrew from Somalia after losing the lives of 18 soldiers, responded with impotent force to the attacks on the US embassies in Kenya and Tanzania, failed to respond with force to the attack on the USS Cole, refused to intervene in Rwanda to prevent or end a massacre, and timidly bombed Serbia in 1999 in response to attempted genocide, a powerful message was telegraphed to the barbarians: the Americans are comfortably ensconced in self-absorbed materialism and they lack the will to fight. The Bush Administration came into office with a view towards changing that perception. Its response to 9/11 removed all doubt. The enemies in the global war on terrorism are the terrorists and tyrants who threaten American security and who deprive others of the "non-negotiable demands of human dignity." They will be rooted out, and they will be destroyed.

There has been considerable criticism of the international legal foundation on which the Bush Doctrine and the global war on terrorism stands. Several questions arise. Is the Bush Doctrine consistent with the international laws regulating the use of force? Can terrorist attacks give rise to a right of self-defense within the normative framework of the United Nations Charter? Is so, when is it lawful to use force against terrorist located in other States? And, does the modern *jus ad bellum* permit the pre-emptive use of military force?

Critics of the Bush Doctrine view it as unilateralist, aggressive, and – ironically – idealistic. A key strategy to thwart the Bush Doctrine is to severely constrain it through legalistic and unfounded interpretations of international law. What greater criticism could one launch than to argue that the Bush Doctrine's vision for promoting the rule of law actually violates international law in its implementation? This essay demonstrates that the Bush Doctrine is consistent with existing international law. The United Nations Charter and customary State practice provide an adequate normative framework for addressing the continuing threat of international terrorism. International law recognizes the primacy of the right of self-defense and it does not require that we wait to act until the barbarians breach our gate.

The Bush Doctrine

> My fellow citizens, the dangers to our country and the world will be overcome. We will pass through this time of peril and carry on the work of peace. We will defend our freedom. We will bring freedom to others and we will prevail.
>
> President George W. Bush
> *Presidential Address to the Nation* (March 19, 2003)

The Bush Doctrine began as a framework to address the threats posed by weapons of mass destruction, expanded after 9/11 to cover terrorism, and was crystallized in the National Security Strategy of the United States released in September 2002. It boldly sets forth three strategic missions: to "defend the peace by fighting terrorists and tyrants," to "preserve the peace by building good relations among great powers," and to "extend the peace by encouraging free and open societies on every continent."[1] The first mission, defending the peace, is a direct challenge to terrorists who are now able to inflict levels of "chaos and suffering" that were once the domain of nation-states. Terrorists "penetrate open societies and turn the power of modern technologies against us." It is at this "crossroads of radicalism and technology" that the United States finds its "gravest danger." This danger comes not just from terrorists, but also from those States that sponsor, support and harbor terrorists. It comes from tyrants or terror States that are determined to acquire weapons of mass destruction.

Contrary to the assumptions of many, the Bush Doctrine preceded the horrific attacks of September 11, 2001. While first formally presented in the National Security Strategy in September 2002, the Bush Doctrine began to germinate much earlier. In a speech at the National Defense University on May 1, 2001, President Bush highlighted the threat posed by tyrants in possession of weapons of mass de-

struction. In a world inhabited by tyrants who hate democracy, freedom and individual liberty, President Bush declared, "Cold War deterrence is no longer enough." A new, proactive strategy of "active nonproliferation, counter-proliferation and defenses" would replace deterrence. President Bush closed the speech by stating: "This is the time for vision; a time for a new way of thinking; a time for bold leadership."

The Bush Doctrine's three goals stand in sharp contrast to the three goals contained in President Clinton's final National Security Strategy: "To enhance America's security. To bolster America's economic prosperity. To promote democracy and human rights abroad." As the historian John Lewis Gaddis observes, the "Bush objectives speak of defending, preserving, and extending peace; the Clinton statement seems to simply assume peace."[2] But, then, it is during times of prosperity that man tends to lose his sense of tragedy – his sense of history. 9/11 was the wake-up call that announced that the world is far from arriving at some postmodern paradise.

The Bush Doctrine recognizes the reality of human conflict and declares that the United States will act to defend peace and freedom. Peace is conceived not as the absence of conflict, but rather, in the words of Martin Luther King Jr., as the presence of justice. Thus, peace is not a utopian destination; it is a journey requiring constant vigilance. For this reason, the Bush Doctrine is more proactive than that of its recent predecessors. It rejects the assumption that democratic prosperity necessarily leads to perpetual peace. It embraces the reality that freedom isn't free.

International Law and the Global War on Terrorism

> We cannot defend America and our friends by hoping for the best. So we must be prepared to defeat our enemies' plans, using the best intelligence and proceeding with deliberation. History will judge harshly those who saw this coming danger but failed to act. In the new world we have entered, the only path to peace and security is the path of action.
>
> President George W. Bush
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> *Letter Transmitting the National Security Strategy* (2002)

The horrific attacks of September 11, 2001, on the Work Trade Center, the Pentagon, and the hijacked airliner that crashed in Pennsylvania awoke the world to the realization that terrorism is a very present threat to international peace and security. After 9/11 the paradigm for combating terrorism shifted dramatically from law enforcement to armed conflict. Terrorism was previously viewed as a matter to be dealt with by domestic law enforcement authorities. This was evidenced when after the attack on the USS Cole destroyer in Yemen, which caused the death of 17 sailors and injured many more, domestic law enforcement officers were among the first people sent to the scene. It was evidenced in the civilian criminal trials held for the perpetrators of the first World Trade Center bombing. It was also evidenced in the Clinton administration's refusal to capture Usama bin Laden due to a perceived lack of evidence to prosecute him in a US civilian court of law.

The United States and many allies have made the eradication of international terrorism their principal mission. The global war on terrorism is a war of indefinite duration fought "against terrorists of global reach."[3] For policy makers and those interested in international law, several questions come immediately to mind: does international law allow a military response to terrorism? Can terrorist attacks amount to an armed attack within the meaning of Article 51? Can a State be held responsible for terrorist attacks carried out by non-State actors? When does the UN Charter permit a State to use force against terrorists located within the territory of another State?

International Law and the Use of Force

The United Nations Charter is understood to have outlawed war and its provisions have governed the use of force by States since 1945. The Charter makes its idealistic purpose manifestly clear: "to save succeeding generations from the scourge of war … and for these ends … to unite our strength to maintain international peace and security…."[4] The cornerstone of the modern *jus ad bellum* – the law regulating the recourse to force – is Article 2, paragraph 4 of the Charter, which prohibits the use of force by States as a means of resolving interstate disputes. Article 2(4) is the most important norm in international law. It states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Article 2(4) declares that peace is a supreme value; ensured by a fundamentally new world order. The Charter envisions that this new world order would be premised on collective security rather than self-help. Yet such obligations only arise voluntarily (collective self-defense) or when the Security Council acts under Article 42. The Security Council has never ordered States to use military force, thus collective security has in practice been ad hoc and voluntary.

The drafters of the Charter envisioned that the Security Council as the guarantor of collective security would counterbalance the prohibition against the use of force. With a standing military force at its beck and call, the Security Council would quickly respond to threats or breaches of international peace and security. The operational reality is that no State has ever seconded its troops to the Security Council, the Military Staff Committee remains an idealistic pipe dream, and collective security is guaranteed by States – occasionally through regional organizations – acting volitionally in individual or collective self-defense.

In the context of terrorism, it is worth noting that Article 2(4) prohibits only "the threat or use of force against the territorial integrity or political independence of any *state*.…" Thus, on its face, the Charter is silently regarding the use of force against non-State actors. However, because terrorists are typically located in States, issues of territorial sovereignty necessarily arise. This essay will examine what factors must be present in order to override the controlling norm of Article 2(4) and permit the pursuit of terrorists located in another State.

Self-Defense in Response to an Armed Attack

While the sovereign right of States to use military force to resolve interstate disputes was outlawed by Article 2(4), their inherent right to use force in individual or collective self-defense was preserved. Article 51 encapsulates this right:

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

While the Security Council is given the right to act in response to threats to international peace and security, Article 51 limits the right of States to use force unilaterally in self-defense to responses against armed attacks. The plain language of the Article 51 states that the inherent right of self-defense may be exercised "*if* an armed attack occurs." Much debate has centered on those four poorly drafted words.[5] The term "armed attack" was left undefined and it is not clear whether the drafters intended for "if" to be an example or a limitation (if and only if).

The very reason Article 51 was inserted into the text of the UN Charter raises questions as to the intent of the drafters. Article 51 was not in the original drafts because the drafters believed the customary international law right of self-defense was incorporated without alteration into the Charter.[6] The US delegation in San Francisco proposed Article 51 to ensure that the obligations of collective self-defense against armed attacks arising from the Chapultepec Act were incorporated into the Charter.[7] While self-defense was uniformly accepted as a customary right of States, collective self-defense was an emerging right.

With fifty years of interpretative State practice to look to, the original intent of the drafters is of diminishing interest.[8] *Opinio juris sive necessitatis* – the practice of States coupled with a belief that the practice was required or consistent with international law – seems to accept the plain language of Article 51, while simultaneously employing a broad interpretation of armed attack. Since the inception of the UN Charter, States defend their uses of force as legitimate acts of self-defense in response to armed attacks. Since the *Nicaragua* decision in 1986, States have taken care to specifically articulate that their unilateral uses of force are justified under Article 51 – regardless of whether there was an actual armed attack, whether that attack occurred on their territory, or whether the attack was carried out by State or non-State actors.

While the Security Council plays an important role in maintaining international peace and security, it is "clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked."[9] States determine when they been the victim of an armed attack and when they will act unilaterally in self-defense. Only after they act does Article 51 impose the requirement that the State notify the Security Council of its actions. This notification provides the Security Council the opportunity to act under Article 39 and rule on the legitimacy of the acts purportedly taken in self-defense. The Security Council can *ex post facto* determine that the State's actions were not lawful, but there is no requirement to get the Security Council's blessings prospectively. As President Bush made abundantly clear in a nationally televised news conference on March 6, 2003, his "most important job is to protect the security of the American people … [and] if we need to act, we will act, and we really don't need United Nations approval to do so."[10]

Terrorist Attacks as Armed Attacks

Because Article 51 limits the unilateral use of force in self-defense to responses against armed attacks, the question must be asked whether terrorist attacks can constitute an armed attack. The answer is, unequivocally, yes. On September 12, 2001, the United Nations Security Council passed Resolution 1368, which condemned the attacks of the preceding day and recognized the existence of the inherent right of individual and collective self-defense.[11] This recognition of the right of self-defense was a landmark decision by the Security Council. By recognizing the right of individual or collective self-defense, the Security Council implicitly acknowledged that an armed attack had occurred. The importance of this point cannot be underestimated. The Security Council does not need to determine there has been an armed attack in order to exercise its enforcement powers under Chapter VII – it need only determine that there is a threat to the peace or an actual breach of the peace. But an individual State may only take unilateral action under Article 51 in response to an armed attack. So when the Security Council passed Resolution 1368, it was acknowledging for the first time that States may unilaterally use military force against terrorists who have committed an armed attack. The

Security Council reaffirmed this right of individual or collective self-defense in two subsequent resolutions.[12]

Both the North Atlantic Treaty Organization (NATO) and the Organization of American States (OAS) also recognized that the United States had been subjected to an armed attack. NATO determined that the attacks of September 11 were covered under Article 5 of the NATO Treaty, which provides that an armed attack against one NATO country shall be considered an attack against all NATO countries.[13] Likewise, OAS invoked the 1947 Inter-American Treaty of Reciprocal Assistance, also known as the Rio Treaty, which also treats an armed attack against one member State as an attack against all.[14] After making their respective determinations that an armed attack had occurred, both NATO and OAS thereby obligated their members to act in the exercise of collective self-defense with the United States. Australia also invoked the ANZUS treaty and several other countries lent bilateral support to the United States.[15] Any debate over whether a terrorist attack can rise to the level of an armed attack under Article 51 has now been forever laid to rest.

The question remains whether a degree of magnitude is required for an attack to be classified as an armed attack. Not all attacks are armed attacks, yet both logic and pragmatism dictate that the "gap between Article 2(4) ('use of force') and Article 51 ('armed attack') ought to be quite narrow."[16] If the Article 51 magnitude was significantly higher than that of Article 39, as many opponents of military action assert, then State A could carry out low-intensity attacks against State B that ostensibly would not amount to armed attacks and State B would be limited in its response by Article 2(4) to only non-force countermeasures. This argument is without precedent in State practice; to think it ever would be is fallacious.

Because Article 51 fails to define armed attack, the International Court of Justice in the *Nicaragua* case looked to customary international law to define the term but in so doing added little clarity. The ICJ confounded the matter by holding that an armed attack is distinguished from a "mere frontier incident" by its "scale and effects." The ICJ did hold that "acts by armed bands" are armed attacks if they occur on a "significant scale."[17] Because "significant" does not seem to be a very high threshold, the distinction of "*mere* frontier incidents" from "*significant*" attacks appears to focus more on the purpose than the actual scale. Furthermore, there is nothing in Article 51 that references severity.

Professor Michael Schmitt offers this instructive clarification of "mere frontier incidents:" "Border incidents are characterized by a minimal level of violence, tend to be transitory and sporadic in nature, and generally do not represent a policy decision by a State to engage an opponent meaningfully. They are usually either 'unintended' or merely communicative in nature."[18] Attacks by international terrorists can hardly be analogized to mere border incidents. Terrorist attacks, which the Bush Doctrine defines as "premeditated, politically motivated violence perpetrated against innocents," are by their very nature significant. They are political acts of violence intended to spread terror by killing innocent civilians, not mere incidents on the frontier; they will nearly always be armed attacks giving rise to a right of self-defense.

Necessity

Actions in self-defense are limited by the customary principles of necessity, proportionality, and immediacy,[19] which attempt to secure a balance between the right of self-defense on one hand and territorial integrity on the other. The Charter's limitation of the right of self-defense to responses to armed attacks entails an element of necessity and immediacy. If an act of aggression or other use of force falls short of an armed attack, then the victim State is limited in its response to claims for reparations, non-force reprisals or other countermeasures short of an armed response. While States may define armed attacks broadly, nevertheless, the existence of one is a necessary prerequisite for military action in self-defense. The prevailing norm of international relations must remain the prohibition on the use of force; thus, the question of necessity essentially turns on whether peaceful means are available to accomplish what is sought through armed means.

The *Corfu Channel* case, decided by the International Court of Justice in 1949, is instructive as an instance of when necessity did not exist.[20] A British vessel struck a mine while transiting through Albanian territorial waters. The Royal Navy thereafter entered Albanian waters to remove mines. While the ICJ recognized Albania's obligation under international law to prevent the launching of armed attacks from its territory, the court decided that Britain's subsequent violation of Albanian sovereignty was not necessary. The ICJ held that the Royal Navy entered Albanian waters to seize the mines, not as a necessary act of self-defense, but rather to collect evidence that could be used in its case for reparations against Albania. So even when there is an armed attack, if measures short of the use of military force can be expected to eliminate further attacks, then the use of force would not be necessary or lawful.

Scholars often look to the *Caroline* case for the customary international law articulation of necessity: "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[21] This exaggerates the modern applicability of the principles set forth in the *Caroline* case, however, because it took place in an era in which the use of force was considered a sovereign right of States. Any justification of the use of force was for *political* rather than *legal* purposes. Furthermore, in his exchange of letters with Lord Ashburton that has come to be known as the *Caroline* case, US Secretary of State Daniel Webster was arguing a reparations case for his client and, thus, his articulation of

necessity includes some hyperbole. While the *Caroline* case is illustrative, it strains credulity to argue that this is the standard of necessity that has been applied in State practice.

For too many years the United States has attempted to use measures short of the use of military force in response to armed attacks by terrorists and States that sponsor them. The result was 9/11. Perhaps necessity in the global war on terrorism is best illustrated by these words painted on the side of a US Navy ship operating in the Arabian Gulf in March of 2003:

Why We Are Here –

Oct 1983	Marine Barracks Beirut, Lebanon	243
Dec 1988	Pan Am FLT 103 Lockerbie, Scotland	244
Feb 1993	World Trade Center NYC, NY	6
Jun 1996	Khobar Towers Dhahrain, SA	19
Aug 1998	US Embassies Kenya/Tanzania	224
Oct 2000	USS Cole Aden, Yemen	17
Sep 11th 2001	World Trade Center NYC, NY Pentagon Washington, DC United Airlines FLT 93	3,000+

Proportionality

The use of force in self-defense must also be proportionate, but this does not require equality in scale and effect.[22] Indeed operational modalities typically dictate a response of greater magnitude than the initial attack. An otherwise lawful military response to an armed attack may be deemed violative of Article 2(4) if it is disproportionate. For example, Israel's invasion of southern Lebanon in 1982, while initially a legitimate response to ongoing armed attacks, was deemed disproportionate by a majority of States because of its extent and duration.

Apart from the war with Iraq – in which the Security Council in Resolution 678 expanded proportionality to include the restoration of "peace and security in the region" – proportionality has particular relevance in the global war on terrorism. The battle against al-Qaida is similar to traditional wars of self-defense in which a proportionate goal is the complete destruction or capitulation of the enemy's military, whereas armed interventions against other international terrorists and terrorist organizations in the global war on terrorism will be more minor skirmishes of limited duration and intensity. In those latter instances, proportionality will be measured against the initial attack. This does not mean that there must be symmetry between the original armed attack and the use of force in self-defense, but rather that force be limited to what is reasonably necessary to promptly thwart or repel the attack and prohibit its resumption – reasonableness being the key aspect.

Both proportionality and necessity will play a significant role in the global war on terrorism as the interplay between the two influences the choice of means. In Afghanistan and Iraq, armed invasions that toppled the governments were necessary and proportional because of the magnitude of their precipitating armed attacks (9/11 and the 1990 invasion of Kuwait) and the continuing threat posed to the United States and the world by those governments. Necessity and proportionality will typically dictate a less-invasive response. If the armed attack can be halted or pre-empted through the surreptitious insertion of special forces or a surgical cruise missile strike, then such means would strike the proper balance between Article 2(4) and the victim State's right of self-defense.

Immediacy: the Preemptive, Anticipatory or Interceptive Use of Force

Nearly four-hundred years ago, Hugo Grotius articulated that actions in self-defense are permissible "only when danger is immediate and certain, not when it is merely assumed."[23] No doubt this was the impetus behind Webster's requirement that an intervention leave "no moment for deliberation." Add to these two statements the Charter's requirement of an "armed attack", and it quickly becomes apparent why so much confusion surrounds the principle of immediacy today.

The greatest debate surrounding immediacy in the post-Charter era is the question of whether a State may respond in advance of the firing of the first shot – pre-emptive, anticipatory, or interceptive self-defense. There is no question that prior to the UN Charter, customary international law recognized the right to use force in self-defense against imminent threats. What has been debated for nearly sixty years is whether the Article 51's stricture "armed attacks" limited the customary right to respond to imminent threats or whether that right was assumed to continue. Writing in 1958, Professor Bowett argued: "It is not believed that Art. 51 restricts the traditional right of self-defense so as to exclude action taken against an imminent danger but before 'an armed attack occurs.'"[24] During the Cold War with its ominous threat of nuclear holocaust, proponents of anticipatory self-defense argued that a State could not be expected to await the first, possibly incapacitating, blow. In 2003, President Bush stated: "Terrorists and terror States do not reveal these threats [chemical, biological and nuclear terror] with fair notice, in formal declarations – and responding to such enemies only after they have struck first is not self-defense, it is suicide."[25] The commonality, then, is the magnitude of the threat and the likely efficacy of a post-attack response.

The Bush Doctrine's bold invocation of pre-emp-

tion was necessitated in part by the emerging realities of the post-Cold War world and in part by the operational divide between the intent and the practice of the UN Charter. The UN Charter envisioned that the Security Council acting through the Military Staff Committee would fill the gap between Article 39 (threats to the peace) and Article 51 (armed attacks). In the absence of such a crucial implementing mechanism, is it really rational to expect a nation that recognizes an Article 39 threat to wait for the international community to address its security – hoping it acts before an Article 51 attack occurs? Remember that the Security Council passed three Chapter VII resolutions prior to 9/11 (one just six weeks prior to 9/11) demanding that the Taliban comply with international law by extraditing Usama bin Laden and closing the terrorist training camps in its country.

It is absurd to argue that States "must await a first, perhaps decisive, military strike before using force to protect themselves," yet is equally absurd to relax Article 51's requirement of an "armed attack" to the point that States may unilaterally use military force anytime they feel "potentially threatened."[26] Recognizing these competing concerns, the State Department Legal Advisor clarified the Bush Administration's position:

> The United States, or any other nation, should not use force to pre-empt every emerging threat or as a pretext for aggression. We are fully aware of the delicacy of this situation we have gotten into. After the exhaustion of peaceful remedies, and after careful consideration of the consequences, in the face of overwhelming evidence of an imminent threat, though, a nation may take pre-emptive action to defend its nationals from catastrophic harm.[27]

Where does this place pre-emption on the spectrum of pre-first-shot actions in self-defense? Does pre-emptive self-defense mean something different than anticipatory self-defense, the term generally favored since 1945? To many, pre-emptive self-defense sounds suspiciously like preventative war – something clearly not consistent with a textual or contextual reading of Article 51. To Professor Dinstein, both anticipatory and pre-emptive self-defense appear to be subjective responses in advance of an armed attack (attempted mind-reading) and, thus, inconsistent with a literal reading of Article 51. He attempts to resolve the competing interests by recognizing that "an armed attack may precede the firing of the first shot" and offering the term "interceptive" as the correct articulation of the modern right.[28] Interceptive does signal that it is in response to an attack actually in motion, yet it is no less subjective than pre-emptive or anticipatory.

Etymological concerns aside, what matters most is how States – in the context of the Bush Doctrine, the United States – act in practice and the legal justifications they put forth in defense of their actions. In this respect, pre-emption is not different from anticipatory and interceptive in that its legality will be evaluated after the fact and State practice has been to justify self-defense actions generally under Article 51, making no distinction between actual or anticipatory.

The key challenge for policy-makers and lawyers alike is divining the precise moment when the armed attack began. To Sir Humphrey Waldock, that moment is when "there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted…."[29] Israel's launching of the Six Day War in 1967 is perhaps the clearest example of lawful interceptive, anticipatory or pre-emptive self-defense. With overwhelming evidence that Egypt was about to launch an attack on Israel (belligerent statements, the massing of troops on the border with Israel, the expulsion of the UN Emergency Force from the Gaza Strip and the Sinai Peninsula, and the closing of the Strait of Tiran to name but a few indications), the international community accepted the legality of Israel's actions. The Security Council, however, condemned the Israeli attack of the Iraqi nuclear reactor in 1981. There, the direct threat to Israel of a nuclear reactor under construction did not rise to the level of immediacy required by Article 51.[30] Yet, as US Secretary of State Colin Powell recently remarked, Israel "got the devil criticized out of them at the time" but everyone now is quite pleased they did it. Ultimately, history is the judge of whether the proper balance was struck between the State's right of self-defense and the controlling norm of Article 2(4).

Cross-Border Counter-Terrorist Operations

Once it is determined that terrorists have carried (or are carrying) out an armed attack, the right of self-defense is still limited by the fact that the responsible terrorists are likely located in another State. Thus the victim State's right of self-defense confronts the right of territorial sovereignty of the State in which the attackers are located. Although al-Qaida and other international terrorist organizations are non-State actors and, as such, have no rights of sovereignty, they are necessarily located within sovereign States. The United States has the right to attack al-Qaida in self-defense, yet it may not violate the sovereignty of another State without justification. Thus, when US forces enter another State to carry out attacks against al-Qaida, it must be either at the invitation of that State or there must be evidence sufficient to establish State responsibility for sponsoring, supporting, or harboring al-Qaida.

1. Entry by Invitation

If the State in which the terrorists are located grants the victim State permission to enter the country and capture or attack the terrorists, then the legality of the intervention is without dispute. This happened in the fall of 2002 when a Predator-launched Hellfire missile killed Qaed Sinan Harithi and five other men in Yemen. Harithi was the al-Qaida leader believed to be responsible for the attack on the USS Cole in Aden Harbor in 2000. US forces operating in Yemen at the invitation of the Yemeni government tracked Harithi. When

Yemeni troops failed to capture Harithi in a valiant operation that left 18 Yemenis dead, an unmanned Predator aircraft operated by CIA operatives was used to launch the missile attack that killed Harithi.

Anytime military forces operate with consent in the territory of another State, the consenting State has every right to place limits upon the extent and duration of the military operations. The host nation restrictions will be legally binding and will limit the freedom of action of the intervening forces unless the host nation's right of State sovereignty is outweighed by the intervening State's right of self-defense. The restrictions must be so onerous as to amount in practice to sheltering or harboring of the terrorists.

2. State Responsibility – Unintentional Harboring

Should terrorists carry out an armed attack in State A while operating from State B, then State B has the responsibility under international law to counter the terrorist activity. The International Court of Justice in the *Corfu Channel* case of 1949 ruled that every State has an obligation to not knowingly allow its territory to be used in a manner contrary to the rights of other States.[31] States cannot allow their territory to be used as a staging area for armed attacks against other States.

In his address to a joint session of Congress and the American people on September 20, 2001, President Bush declared: "Every nation, in every region, now has a decision to make. Either you are with us or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime." This echoed a similar statement he made on the evening of September 11, 2001, as well as the specific language of Security Council Resolution 1368, which "stress[ed] that those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable."[32]

In the case of unintentional harboring, there is no complicity – the State simply does not have the ability to counter the terrorists or the terrorist threat. The terrorists may be operating from territory where the State does not have forces stationed, the State may simply not have the fire-power to counter terrorists that are better armed, or there may not be a functioning State – it may be a failed State with no legitimate, functioning government for the victim State to turn to.

The United States dealt with this very scenario in 1916 during the Mexican revolution. A Mexican opposition leader by the name of Francisco "Pancho" Villa launched a terrorist attack against the United States on the border town of Columbus, New Mexico. Eighteen Americans were killed and much civilian property was destroyed. The attack outraged the United States, and President Woodrow Wilson immediately ordered General John "Black Jack" Pershing to lead a cavalry expedition into Mexico. The Mexican government had no real control over the northern part of Mexico, the operating base for Pancho Villa and his band of nearly 500 outlaws, and was waging its own unsuccessful battle against him. General Pershing led over 700 American troops on an eleven-month mission that penetrated over 800 kilometers inside Mexico in search of Pancho Villa. Three months into the expedition the Mexican government asked the Americans to return to the United States, to which President Wilson replied that the United States could not retreat from its right and duty to prevent further attacks upon American soil.

More recently the United Stated launched cruise missile attacks against al-Qaida targets in Sudan and Afghanistan in 1998 following the bombing of the American embassies in Kenya and Tanzania. While there was some criticism of the choice of the al Shifa pharmaceutical factory as a target, the international community's silence evidenced its acceptance of, or at least acquiescence to, the *jus ad bellum* justification for the attacks.[33] Territorial sovereignty must sometimes yield to the imperative of self-defense.

3. State Responsibility - Ratification of the Terrorist Attack

Article 11 of the International Law Commission's Articles on State Responsibility states: "Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of the State under international law if and to the extent that the State acknowledges and adopts the conduct as its own."[34] When terrorist attacks are carried out by non-State actors operating from or in another State and the host State refuses to stop the attacks or act against a continuing threat, the victim State may use cross-border force in self-defense. The terrorist action is not considered to be State-sponsored, but through either complicity or ratification the terrorist actions are imputed to a State.

The takeover of the United States Embassy in Tehran, Iran in 1979 is illustrative. Although the Iranian government did not plan or execute the attack, the International Court of Justice found Iran responsible for the takeover of the embassy by Iranian students.[35] Iran had a clear obligation under international law to arrest the students after they seized the embassy. The ICJ determined that while the student's actions may not have been initially State-sponsored, the attack could be imputed to Iran because Iran failed to take necessary action in response. In other words, Iranian inaction against the takeover of the Embassy amounted to ratification of the student's actions and complicity in the armed attack. So while the United States would not have been authorized under international law to attack Iran on the day after the Embassy was seized, at some point thereafter it became lawful – once it could be said that Iran had the opportunity to act but failed to do so.

While the full extent to which al-Qaida and the Taliban government of Afghanistan were intertwined may never be known, the Taliban was complicit by ratification in the attacks carried out by al-Qaida on September 11, 2001. In the three years preceding 9/11, the Security Council passed no less than six resolutions demanding that the Taliban take action against

the terrorists and terrorist training camps in Afghanistan; three of those resolutions were passed under Chapter VII and specifically demanded that the Taliban "cease the provision of sanctuary and training for international terrorists and their organizations" and "turn over Usama bin Laden to appropriate authorities in a country where he has been indicted."[36]

The Taliban blatantly refused to comply with the Security Council's demands. On October 7, 2001, President Bush presented the Taliban with his own demands:

> Deliver to the United States authorities all leaders of al-Qaida who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiation or discussion. The Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate.

A little over two weeks later, President Bush announced that the Taliban had failed to meet his demands, and "now the Taliban will pay the price."[37] The Taliban, as the *de facto* government of Afghanistan, had the responsibility to stop the use of its territory for the planning, organizing, and staging of terrorist attacks against other countries. When it failed to act, its right of territorial sovereignty gave way to the right of the United States to use military force in self-defense "to prevent and deter further attacks on the United States."[38]

4. State Responsibility - *De Facto* State Acts

The simplest case for State responsibility is when there is a terrorist attack and the evidence reveals that the terrorists were *de facto* organs of another State. This is the case of State-sponsored terrorism. The terrorists may not be State actors or forces, but a State can assist or encourage the terrorists to a degree that the terrorists become *de facto* organs of the State. Article 8 of the Articles on State Responsibility state that the "conduct of a person or group shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[39]

The example here is the 1986 bombing of the La Belle discotheque in Germany, which American servicemen were known to frequent. The attack killed two American servicemen and a Turkish woman, and wounded 63 American servicemen and 167 other individuals. President Reagan stated that the United States had "incontrovertible" evidence that Libya had supported the attack. By giving material support to the terrorists that carried out the attack, Libya had engaged in armed aggression against the United States just as if it had used its own military forces.[40] The United States responded to the attack and the continuing threat (there was evidence that this was one in a series of attacks) by bombing various Libyan military and intelligence targets that were believed to be assisting the terrorists.

The United States was criticized for bombing Libya by many in the international community who argued that there was not sufficient evidence linking Libya to the disco bombing and that terrorist attacks on American citizens located in a third State could not amount to an armed attack within the meaning of Article 51. Subsequent evidence, including a statement allegedly made by Colonel Gadaffi to a German newspaper, corroborates Libyan involvement in the attack. Most importantly, Security Council Resolution 1368 confirms that terrorist attacks can amount to an armed attack.

The questions of whether and when a State can be held responsible for the actions of terrorists has been addressed by two separate international tribunals – the International Court of Justice (ICJ) and the International Criminal Tribunal for the former Yugoslavia (ICTY). In the *Nicaragua* case, the ICJ held that armed attacks carried out by "armed bands, groups, irregulars or mercenaries" may be imputed to a State only if the State exercised "effective control" over their actions.[41] The ICJ held that effective control exists where a State participates in the planning, direction, support, or execution of the armed attack.

More recently the ICTY ruled that a State may be held responsible for attacks carried out by non-State actors, but it set a much lower threshold than the ICJ's effective control test.[42] The ICTY rejected the "effective control" test, which it held to be too high of a barrier for proving State responsibility. The ICTY held that the control required by international law exists when a State simply has a role in the organizing, coordinating, or planning of the terrorist activity. The State must exercise control over the non-State actors, but the degree of control may "vary according to the factual circumstances of each case."[43] The ICTY also noted: "judicial and State practice … has envisaged State responsibility in circumstances where a lower degree of control than that demanded by the Nicaragua test was exercised."[44] The two courts applied different thresholds for when terrorist actions may be imputed to a State, but the crucial point is that both courts recognized the simple fact that a State may be held responsible for the actions of terrorists. Terrorists may be considered *de facto* organs of a State.

The Use of Force Against Tyrants and Terror States

When the National Security Strategy spoke of the use of military force against tyrants, it referred to those tyrants that use terror as a means of pursuing national policy. The Taliban government was the first terror State to be targeted and Iraq was the second. Several subsequent statements by President Bush expanded on this point. In a nationally televised press conference on March 2, 3003, President Bush stated unequivocally: "Iraq is part of the war on terror."[45] Following the

Atlantic Summit in the Azores on March 16, 2003, President Bush declared that the "first war of the 21st century … is the war against terrorism and weapons of mass destruction in the hands of dictators."[46] In his speech to the American people on March 17, 2003, President Bush emphasized which tyrants would be targeted by the United States when he linked "[t]errorists and terror states." The recourse to force against terror States will need to be justified under Article 51, with most instances focusing on necessity and immediacy – the existence of an armed attack and continuing threat. The use of force against Iraq is no different.

The war with Iraq began on August 2, 1990 when Iraq invaded Kuwait.[47] Later that same day the Security Council declared the Iraqi action a breach of the peace, thus removing any debate over who was the aggressor.[48] The Security Council explicitly recognized the right of Kuwait and its coalition partners to use force in collective self-defense.[49] In an ultimately futile attempt to secure Iraq's voluntary withdrawal from Kuwait, the Security Council passed eleven resolutions in the fall of 1990 that collectively denounced Iraq's invasion, declared it a breach of the peace, demanded Iraq's immediate, unconditional withdrawal from Kuwait, recognized the right of individual or collective self-defense, imposed an arms embargo and economic sanctions, and recognized Iraq's obligation to pay reparations.[50]

As the United States massed a coalition military force on the border of Iraq and Kuwait, it aggressively pursued a Security Council resolution authorizing the use of military force against Iraq. Yet the United States and the coalition never believed such authorization was a legally required prerequisite to military action. United Nations support for the exercise of the right of collective self-defense was important for *political*, not legal, reasons. In the book he co-wrote with George H.W. Bush, *A World Transformed*, Brent Scowcroft unequivocally states that the United States sought United Nations support as "an added cloak of political cover. Never did we think that without its blessing we could not or would not intervene."[51] And so it was while standing on the solid legal foundation of the right of collective self-defense that the coalition, led by intense lobbying by the United States, sought and received the additional political cloak of Security Council authorization.

The Security Council explicitly authorized the use of military force by the coalition against Iraq in Resolution 678 on November 27, 1990. Resolution 678 authorized "all necessary means" to eject Iraq from Kuwait and "to uphold and implement … all subsequent relevant resolutions and to restore international peace and security to the area." The Security Council recognized the right of those "States co-operating with the Government of Kuwait" to use force in collective self-defense, although that right was limited in that it could not be exercised until after January 15, 1991. The Iraqi intransigence continued, and so on the evening of January 16, 1991 a 28-nation, US-led coalition commenced Operation Desert Storm. After six weeks of intense bombing, which was followed by an astonishingly successful 100-hour ground campaign that liberated Kuwait, Operation Desert Storm was unilaterally halted.

On March 3, 1991 General H. Norman Schwarzkopf, the commander of coalition forces, and Lieutenant General Sultan Hashim Ahmad al-Jabburi, the deputy chief of staff of the Iraqi ministry of defense, met at the Safwan airfield in Iraq and negotiated a cease-fire agreement. The cease-fire agreement established a demarcation line and addressed the issue of repatriation of Kuwaitis and prisoners of war held in Iraq. Ahmad al-Jabburi also extracted a concession from Schwarzkopf that allowed Iraq to fly military helicopters in the cease-fire zone.[52]

The cease-fire agreement reached by Schwartzkopf and Ahmad al-Jabburi on March 3, 1991 was put into writing by the United States, vetted by the Security Council, and codified in Resolution 687 on April 3, 1991. It was the longest resolution and most detailed cease-fire agreement ever and its activation was conditioned upon Iraq's unconditional acceptance. Iraq formally accepted the terms of the cease-fire in a letter delivered to the Security Council on April 6, 1991, which denounced the "iniquitous resolution," but ultimately declared that Iraq had "no choice but to accept."

The notion that the war with Iraq ended with the acceptance of the cease-fire agreement is a myth as unsupported by international law as it is by the facts. The state of war that commenced between Iraq and Kuwait on August 2, 1990 and between Iraq and the coalition on January 16, 1991 continued. Coalition combat and reconnaissance aircraft flew over 250,000 sorties over Iraq between April 1991 and March 2003 in enforcement of the cease-fire agreement and no-fly zones. Those aircraft were fired upon by Iraqi forces thousands of times and returned fire thousands of times – dropping bombs, firing missiles, and launching hundreds of cruise missiles into Iraq. According to news reports, coalition aircraft dropped 606 munitions on 391 selected targets in 2002 alone.[53] This may be low-intensity conflict, but only a lawyer could argue it was not an ongoing armed conflict.

To argue that the US-led coalition needed Security Council authorization before resuming offensive combat operations against Iraq in 2003 is to argue that the right of self-defense was either supplanted by the Security Council's authorization in Resolution 678 or extinguished upon acceptance of the cease-fire agreement. Both arguments are illogical, without basis in State practice, and contrary to an international public policy that should encourage utilization of the Security Council – not punish resort to it. How can it be seriously contended that a State, by prospectively gaining Security Council approval of its actions in self-defense, thereby cedes this right to the Security Council? Did the US-led coalition believe it was waiving its right of collective self-defense by entering into the cease-fire agreement with Iraq on March 7, 1991, or by adding the blessings of the Security Council to that agreement on March 25, 1991? By unilaterally implementing a temporary cessation of offensive hostilities in an attempt to save Iraqi

lives, how could the coalition lose its right of collective self-defense and be forever (absent another armed attack) precluded from using force without the explicit authorization of the Security Council? Such arguments expose the absurd idealism of those who believe that all recourse to force is evil.

Article 2(4) is the controlling norm of international relations, yet States agreed to this restriction of their sovereignty on the condition that their inherent right of individual or collective self-defense continued. If the exception recognized in Article 51 were extinguished and the norm set forth in Article 2(4) again became controlling upon acceptance of a cease-fire agreement, then the law would create a perverse disincentive to enter into such agreements. The State prevailing in a conflict would be disinclined to agree to a cease-fire at any time prior to unconditional surrender. Such a law would leave no room for magnanimous efforts to limit the horrors of war through potentially life-saving reprieves.

In addition, the Security Council's 1990 authorization to use force against Iraq never lapsed upon implementation of the cease-fire agreement. The Security Council knew precisely what it was doing when Resolution 678 authorized those "States cooperating with the Government of Kuwait … to use all necessary means to uphold and implement Resolution 660 (1990) *and all* subsequent relevant resolutions *and* to restore international peace and security in the area." The Security Council reaffirmed this authorization in Resolutions 687 and again in 1994 when it recalled "in particular paragraph 2 of resolution 678" (the use of force authorization).[54]

The United States considered Iraq to be in continuing material breach of the cease-fire agreement just weeks after the cease-fire agreement was reached. The Security Council found that Iraq was in material breach of the cease-fire agreement on numerous occasions, yet in the fall of 2002 some still debated this point.[55] By declaring Iraq to be in continuing material breach of Resolution 687 and others in Resolution 1441, the Security Council permanently foreclosed debate on the issue.[56]

Given Iraq's consistent and continuing material violations of the 1991 cease-fire agreement, the United States properly notified the world on March 17, 2003 that it considered the cease-fire agreement to be denounced by Iraq. Just as a right of self-defense may be exercised unilaterally without resort to the Security Council, so too may any party to a cease-fire agreement – even one endorsed by the Security Council – determine that the cease-fire has been materially breached and announce that it is resuming hostilities with the breaching party. As a final opportunity to avoid the resumption of offensive hostilities, the United States gave Saddam Hussein and his sons 48-hours to leave Iraq. Hussein failed to seize this final reprieve. After resuming offensive hostilities against Iraq, the United States and United Kingdom sent letters to the Security Council in accordance with Article 51 that set forth the legal case for the use of force against Iraq.[57]

When the use of force is lawfully employed in response to a violation of a cease-fire agreement, proportionality must be measured against the original aggression. Under the UN Charter and the numerous Security Council resolutions related to the Iraqi invasion of Kuwait, permissible objectives include the restoration of international peace and security.[58] Given Saddam Hussein's pattern of aggression, his absolute disregard for international law and the dictates of the Security Council, his material violations of the cease-fire agreement, and evident desire to develop and deploy chemical, biological, and nuclear weapons, the removal of Saddam Hussein from power was an eminently reasonable, i.e. proportionate, response.

The Lilliputian Threads of International Law

> America's allies want a multilateral order that will essentially constrain American power. But the empire will not be tied down like Gulliver with a thousand strings.
>
> Michael Ignatieff (2003)[59]

The international order that emerged after 9/11 is very different from the one that liberal internationalists envisioned emerging from the Cold War. They believed that if the world would simply follow the European model and voluntarily cede State sovereignty to an increasing array of multilateral institutions, then a global Kantian paradise would emerge. Yet the European's demilitarized paradise was a mirage. As Robert Kagan explained in his brilliant essay *Of Paradise and Power*, it thrived only because it was protected by American military might. Even the quintessentially European use of military force – the belated 1999 "humanitarian intervention" over Kosovo – was possible only because the US military aircraft flew over 90% of the missions.

In his insightful and challenging polemic, The Shield of Achilles, Phillip Bobbit reminds us that "[l]aw and strategy are mutually affecting."[60] The State that ignores law is doomed to permanent war; the State that ignores strategy will fail to protect its values and risks seeing its constitutional order destroyed altogether. Rather than waste time searching for a non-existent magic serum that will cure the world of the illness of war, Bobbitt advises us to recognize that war is a natural consequence of the human condition and, therefore, we should take steps to shape future conflicts and prevent them from becoming cataclysmic. The choice is not between a world without conflict or global anarchy, it is much more subtle and foreboding.

> The epochal war we are about to enter will either be a series of low-intensity, information-guided wars linked by a commitment to re-enforcing world order, or a gradually increasing anarchy that leads to intervention at a much costlier level or even a cataclysm of global proportions preceded by a period of relative if deceptive peace. It is ours to choose.[61]

The Bush Doctrine boldly chooses to act rather than wait for the cataclysmic to occur. Its decisions on the recourse to force are far from a rejection of the international rule of law. Rather, these decisions reflect a fundamental understanding of the reality of international relations in the twenty-first century and a hopeful optimism that free and open societies can be built on every continent. Just as they bemoaned the divisions that racked the Security Council during the Cold War (forgetting, apparently, that having values necessarily means you will have disagreements with those who do not share your values), so too will many continue to criticize the United States and the decisions it makes in the global war on terrorism. They will attempt to tie down the United States with overly legalistic interpretations of international law. In so doing, they risk making international law a farce.

Until man is perfected and we achieve universal law and peace, States will remain the primary guarantors of international peace and security. Only States will hold the power to change the constitutional order of our world. The idealists, with their belief that globalization equals universalism, assume a world order that simply does not exist. They assume a world without barbarians – a world in which peace is assumed and undefended. America, like Gary Cooper in the western classic High Noon, reluctantly assumes the role of the world's marshal – standing up to evil and defending the peace.

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Footnotes

[1] National Security Strategy of the United States ii (Sept. 2002)

[2] John Lewis Gaddis, *A Grand Strategy*, Foreign Policy 50, 51 (Nov./Dec. 2002).

[3] National Security Strategy of the United States 5 (Sept. 2002)

[4] United Nations Charter, *Preamble* (1945)

[5] Yoram Dinstein, War, Aggression and Self-Defence 223-4 (3d ed. 2001); *see* Hans Kelsen, *Collective Security and Collective Self-Defense under the Charter of the United Nations*, 42 Am. J. Int'l L. 783, 792 (1948); *see generally* Thomas Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 Wash. J.L. & Pol'y 51 (2001). Nicholas Rostow, *The International Use of Force after the Cold War*, 32 Harv. Int'l L.J. 411, 420 (1991).

[6] D. W. Bowett, Self-Defense in International Law 182 (1958) citing *Report of the Rapporteur of Committee I to Commission I*, 6 United Nations Conference on International Organization 459 (June 13, 1945).

[7] The Act of Chapultepec was adopted on March 3, 1945 by the Inter-American Conference on War and Peace. It was the precursor to the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) of September 2, 1947, 21 U.N.T.S. 77 (1947), which entered into force on December 3, 1948.

[8] Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969); Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. Rep. 16, 22.

[9] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Merits, I.C.J. Reports 1986, ¶ 103 [hereinafter *Nicaragua*].

[10] Press Release, Office of the Press Secretary, The White House, President George Bush Discusses Iraq in National Press Conference (Mar. 6, 2003).

[11] S.C. Res. 1368, pmbl. (Sep. 12, 2001): "*The Security Council*, *Reaffirming* the principles and purposes of the Charter of the United nations, *Determined* to combat by all means threats to international peace and security caused by terrorist acts, *Recognizing* the inherent right of individual or collective self-defense in accordance with the Charter…" (emphasis in the original).

[12] S.C. Res. 1373 (Sep. 28, 2001); S.C. Res. 1386 (Dec. 20, 2001).

[13] North Atlantic Treaty Organization, Press Release No. 124, Statement by the North Atlantic Council (Sept. 12, 2001) (visited February 5, 2003) <http://www.nato.int/docu/pr/2001/p01-124e.htm>. Article 5 of the North Atlantic Treaty states:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an armed attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

North Atlantic Treaty, Aug. 24, 1959; 34 U.N.T.S. 243.

[14] Terrorist Threat to the Americas, Resolution 1, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs Acting as Organ of Consultation In Application of the Inter-American Treaty of Reciprocal Assistance, OEA/Ser.F/II.24, RC.24/RES.1/01 (Sept. 21, 2001). The Inter-American Treaty of Reciprocal Assistance provides in pertinent part:

> The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.

Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. 3.1, 21 U.N.T.S. 77.

[15] Article VI of the ANZUS Treaty provides: "Each party recognizes that an armed attack in the Pacific Area on any of the parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes." Security Treaty Between Australia, New Zealand, and the United States, Sep. 1, 1951, art. VI, 131 U.N.T.S. 83, 86.

[16] Dinstein, *supra* note 6, at 174.

[17] *Nicaragua*, *supra* note 10, at ¶ 176. In his scathing dissent, Judge Schwebel declares that this entire line of reasoning is both wrong and unnecessary given the arguments before the Court:

> The Court appears to reason this way. Efforts by State A (however insidious, sustained, substantial and effective), to overthrow the government of State B, give rise to no right of self-defence by State B, and hence, to no right of State C to join State B in measures of collective self-defence. State B, the victim State, is entitled to take counter-measures against State A of a dimension the Court does not specify. But State C is not thereby justified in taking counter-measures against State A which involve the use of force.

Dissenting Opinion, *id*, at 349 ¶ 175.

[18] Michael N. Schmitt, Counter-Terrorism and the Use of Force in International Law 18 (Marshall Center Papers, No. 5) (George C. Marshall European Center for Security Studies).

[19] *Nicaragua*, *supra* note 16, at ¶¶ 176, 237, 249; Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 ¶ 141. The UN Charter incorporated these pre-existing customary international law principles. Rights and obligations accorded to States under customary international law continue unless they are explicitly waived under the Charter.

[20] *Corfu Channel case*, Judgment, 1949 I.C.J. Reports 4, 34-35 (Apr. 9, 1949).

[21] Letter from Mr. Webster to Mr. Fox (April 24, 1841), *reprinted in* 29 Brit. & Foreign St. Papers 1129, 1138 (1857), *quoted in* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int'l. L. 82, 85-6 (1938).

[22] DINSTEIN, *supra* note 6 at 198.
[23] HUGO GROTIUS, 2 DE JURE BELLI AC PACIS LIBRI 173 (Carnegie Endowment trans. 1925)(1625).
[24] BOWETT, *supra* note 7, at 191.
[25] Press Release, Office of the Press Secretary, The White House, Remarks by the President in Address to the Nation (Mar. 17, 2003).
[26] THOMAS FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 98 (2002).
[27] William Howard Taft, IV, Speech to Foreign Policy Association Event, Pre-emptive Force: When can it be used? (Jan. 13, 2003), transcript available at http://www.fpa.org/topics_info2414/topics_info_show.htm?doc_id=142893.
[28] DINSTEIN, *supra* note 6, at 172. In his book, Professor Dinstein comments only on anticipatory self-defense. He discussed the concept of pre-emption in conversations with the present author in 2003. Notes on file with the author.
[29] Humphry Waldock, The *Regulation of the Use of Force by Individual States in International Law*, 81 RECUL DES COURS 451, 498 (1952).
[30] The attack could have been justified on other grounds. See DINSTEIN, *supra* note 6, at 45.
[31] Corfu Channel Case (Merits), 1949 I.C.J. Rep. 4, 22. See also John Basset Moore's dissenting opinion in the Lotus case, in which he wrote "it is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people …." S.S. Lotus (Fr. V. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 4, 88 (Moore, J., dissenting).
[32] S.C.Res. 1368 (Sept. 12, 2001).
[33] Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559, 575 (1999).
[34] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002).
[35] United States Diplomatic and Consular Staff in Tehran (Iran v. USA), 1980 I.C.J. 3.
[36] S.C. Res. 1333 (Dec. 19, 2000); *see also* S.C. Res 1363 (Jul 30, 2001), S.C. Res 1267 (Oct. 15, 1999), S.C. Res. 1214 (Dec. 8, 1998), S.C. Res. 1193 (Aug. 28, 1998), S.C. Res. 1189 (Aug. 13, 1998).
[37] Press Release, The White House, Presidential Address to the Nation (Oct. 7, 2001).
[38] Letter 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 (Oct. 7, 2001).
[39] Articles on State Responsibility, *supra* note 33.
[40] In an address at the National Defense University on January 15, 1986, Secretary of State George Schultz stated:

> There is substantial legal authority for the view that a State which supports terrorist or subversive attacks against another State, or which supports or encourages terrorist planning and other activities within its own territory, is responsible for such attacks. Such conduct can amount to an ongoing armed aggression against the other State under international law.

Reprinted in DEPARTMENT OF STATE BULLETIN 15 (March, 1986).
[41] *Nicaragua*, *supra* note 10, at ¶ 14. Nicaragua sued the United States contending that the United State had carried out armed attacks against Nicaragua through US government employees, through paid agents, and through US support of the Contras. The United States countered that its actions were in collective self-defense with El Salvador, because Nicaragua had been assisting and directing guerillas in carrying out attacks against the El Salvadoran government. The United States and El Salvador requested that El Salvador be added as a party, the ICJ refused, and so the United States withdrew its consent to the jurisdiction of the ICJ. The ICJ subsequently held that the United States had committed armed attacks against Nicaragua through its employees and agents, but rejected US responsibility for the actions of the Contras because the United States did not have "effective control" over the Contras. The political motives behind the decision thus became apparent: had the ICJ found the United States responsible for the actions of the Contras, it would have also been forced to acknowledge that Nicaragua was responsible for the actions of the Salvadoran guerillas, thereby validating the United States' position that it was acting in collective self-defense.
[42] Prosecutor v. Tadic (Judgment), ICTY Case IT-94-1 (1999), 38 I.L.M. 1518, ¶ 99 et seq. While some have argued that *Nicaragua* dealt with State responsibility while the Tadic case addressed individual criminal responsibility, the ICTY held that the issue was the same:

> [T]he question is that of establishing the criteria for legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international.

If the Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska did not have links with the Federal Republic of Yugoslavia, then the armed conflict in Bosnia was not an international armed conflict giving rise to individual criminal responsibility for grave breaches of the Geneva Conventions.
[43] *Id*. at ¶ 117.
[44] *Id*. at ¶ 124.
[45] Press Release, Office of the Press Secretary, The White House, President George Bush Discusses Iraq in National Press Conference (Mar. 6, 2003).
[46] Press Release, Office of the Press Secretary, The White House, President Bush: Monday "Moment of Truth" for World on Iraq (Mar. 16, 2003).
[47] For a more detailed examination of the legal basis for the use of force against Iraq, see Paul Schott Stevens, Andru E. Wall, and Ata Dinlenc, The *Just Demands of Peace and Security: International Law and the Case Against Iraq*, The Federalist Society (monograph, Sep. 2002) and Andru E. Wall, *The Legal Case for Invading Iraq and Toppling Hussein*, 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 165 (2002).
[48] S.C. Res. 660 (Aug. 2, 1990).
[49] S.C. Res. 661 (Aug. 6, 1990).
[50] S.C. Res. 660 (Aug. 2, 1990); S.C. Res. 661 (Aug. 6, 1990); S.C. Res. 662 (Aug. 9, 1990); S.C. Res. 664 (Aug. 18, 1990); S.C. Res. 665 (Aug. 25, 1990); S.C. Res. 666 (Sep. 13, 1990); S.C. Res. 667 (Sep. 16, 1990); S.C. Res. 669 (Sep. 24, 1990); S.C. Res. 670 (Sep. 25, 1990); S.C. Res. 674 (Oct. 29, 1990); and S.C. Res. 677 (Nov. 28, 1990).
[51] GEORGE BUSH AND BRENT SCOWCROFT, A WORLD TRANSFORMED 416 (Knopf, 1998). Then-US Secretary of State James Baker echoed this position in his memoir, where he wrote that the United States would have been legally justified to act unilaterally in collective self-defense under Article 51. JAMES BAKER, THE POLITICS OF DIPLOMACY 278 (1995).
[52] See H. NORMAN SCHWARZKOPF, IT DOESN'T TAKE A HERO 485-90 (Bantam, 1992).
[53] *Critics Decry 2002 Air Attacks on Iraq that Predated Key U.S, U.N. Votes*, INSIDE THE PENTAGON, p.1 (Jul. 24, 2003).
[54] S.C. Res. 949 (Oct. 15, 1994).
[55] S.C. Res. 707 (Aug. 15, 1991); Statement of the President of the Security Council, U.N. Doc. S/23609 (Feb. 19, 1992); Statement of the President of the Security Council, U.N. Doc. S/23663 (Feb. 28, 1992); Statement of the President of the Security Council, U.N. Doc. S/23699 (Mar. 11, 1992); Statement of the President of the Security Council, U.N. Doc. S/24240 (Jul. 6, 1992); Statement of the President of the Security Council, U.N. Doc. S/25081 (Jan. 8, 1993); Statement of the President of the Security Council, U.N. Doc. S/25091 (Jan. 11, 1993); Statement of the President of the Security Council, U.N. Doc. S/25606 (Jun. 18, 1993).
[56] "The Security Council … Acting under Chapter VII of the Charter of the United Nations … Decides that Iraq has been and remains in material breach of its obligations under relevant resolutions, including resolution 687…." S.C. Res. 1441 (Nov. 8, 2002).
[57] Letter dated 20 March 2003 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/2003/351 (Mar. 21, 2003).
[58] Resolution 1441 recalled 678 and 687 and stated that 687 "imposed obligations on Iraq as a necessary step for achievement of its stated objective of restoring international peace and security in the area."
[59] Michael Ignatieff, *The American Empire (Get Used To It.)*, NEW YORK TIMES MAGAZINE (Jan. 5, 2003).
[60] PHILLIP BOBBIT, THE SHIELD OF ACHILLES 6 (2002).
[61] *Id*. at 342.