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A Paradigm for the Analysis of the Legality of the Use of Armed Force Against Terrorists and States that Aid and Abet Them

Dr. Barry A. Feinstein*

I. INTRODUCTION

Terrorism is the scourge of the entire planet. It is an anathema and the antithesis of respect for human rights, fundamental freedoms, and human decency.¹ Global-security environment and international terrorism expert, Bruce Hoffman, defined terrorism as “the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change.”² He continued:

[T]errorism is specifically designed to have far-reaching psychological effects beyond the immediate victim(s) or object of the terrorist attack.

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1. See, e.g., Mayor Rudolph W. Giuliani, Opening Remarks to the United Nations General Assembly Special Session on Terrorism (Oct. 1, 2001), at <http://www.un.org/terrorism/statements/giuliani.html> (last visited Sept. 5, 2003) (copy on file with *The Transnational Lawyer*); see also White House press secretary Scott McClellan, in Sarah el Deeb, *Bin Laden Said to Warn of Attacks in U.S.* (Oct. 18, 2003), at http://story.news.yahoo.com/news?tmpl=story&cid=514&e=1&u=/ap/20031018/ap_on_re_mi_ea/bin_laden_tpe_17 (last visited Oct. 19, 2003) (copy on file with *The Transnational Lawyer*).

2. BRUCE HOFFMAN, *INSIDE TERRORISM* 43 (Victor Gollancz ed., 1998), cited in Brad Roberts, *America the vulnerable?* BULL. OF THE ATOMIC SCIENTISTS, Jan./Feb. 1999, at 55 (1), available at <http://www.bullatomsci.org/issues/1999/jf99/jf99reviews.html#anchor464756> (last visited Oct. 16, 2003) (copy on file with *The Transnational Lawyer*), cited in Kim Cragin & Peter Chalk, *Terrorism & Development: Using Social and Economic Development to Inhibit a Resurgence of Terrorism*, RAND (2003), available at www.rand.org/publications/MR/MR1630/MR1630.pdf (last visited Oct. 16, 2003) (copy on file with *The Transnational Lawyer*). The United States Department of State defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience,” cited in Rex A. Hudson, *The Sociology and Psychology of Terrorism: Who Becomes a Terrorist and Why?*, A Report Prepared under an Interagency Agreement by the Federal Research Division, Library of Congress 12 (Sept. 1999), at www.loc.gov/rfrd/pdf-files/Soc_Psych_of_Terrorism.pdf (last visited Oct. 16, 2003) (copy on file with *The Transnational Lawyer*); http://66.218.71.225/search/cache?p=%22Rex+A.+Hudson%22+and+%22who+becomes+a+terrorist+and+why%22+and+%22Federal+Research+Division%22+and+%22Library+of+Congress%22&ei=UTF-8&n=20&fl=1&vl=lang_en&all=0&url=ObyRoTWLd9MJ:www.loc.gov/rfrd/pdf-files/Soc_Psych_of_Terrorism.pdf (last visited Oct. 16, 2003) (copy on file with *The Transnational Lawyer*). “Unable to achieve their unrealistic goals by conventional means, international terrorists attempt to send an ideological or religious message by terrorizing the general public. Through the choice of their targets, which are often symbolic or representative of the targeted nation, terrorists attempt to create a high-profile impact on the public of their targeted enemy or enemies with their act of violence, despite the limited material resources that are usually at their disposal. In doing so, they hope to demonstrate various points, such as that the targeted government(s) cannot protect its (their) own citizens, or that by assassinating a specific victim they can teach the general public a lesson about espousing viewpoints or policies antithetical to their own.” *Id.*

Terrorism is meant to instill fear within, and thereby intimidate, a wider “target audience” that might include a rival ethnic or religious group, an entire country, a national government or political party, or public opinion in general.... Through the publicity generated by their violence, terrorists seek to obtain the leverage, influence, and power they otherwise lack to effect political change on either a local or an international scale.³

Terrorism poses an ominous threat to humanity⁴ and to the peace and security of the world.⁵ It knows no international border, nor does it distinguish between civilians and combatants.⁶ In the past, terrorists typically armed with conventional weaponry used such tactics in an attempt to bring attention to their cause, to gain political support, and typically, to evoke a harsh response from the government against whose citizens they acted in order to attain both domestic and international support and sympathy. However, in today’s ever-changing world of advanced technology and increasing mobility, terrorists have changed their focus from conventional to non-conventional warfare.⁷ Thus, modern-day terrorists seek, and have the potential to acquire, weapons of mass destruction⁸—nuclear, biological, and chemical. The idea that a nation-state would use non-conventional weapons

3. HOFFMAN, *supra* note 2, at 43–44, cited in Craig & Chalk, *supra* note 2. In President George W. Bush’s Executive Order on Terrorist Financing Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism (Sept. 24, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/20010924-1.html> (last visited Oct. 22, 2003) (copy on file with *The Transnational Lawyer*), “the term ‘terrorism’ means an activity that—

- (i) involves a violent act or an act dangerous to human life, property, or infrastructure; and
- (ii) appears to be intended—
 - (A) to intimidate or coerce a civilian population;
 - (B) to influence the policy of a government by intimidation or coercion; or
 - (C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.”

4. See, e.g., Human Rights Watch, *Erased in a Moment: Suicide Bombing Attacks Against Israeli Civilians*, 45–46 (Oct. 2002), available at www.hrw.org/reports/2002/isrl-pa/ISRAELPA1002.pdf (last visited Oct. 18, 2003), also available at <http://216.239.59.104/search?q=cache:ZbN7R3TT0psJ:www.hrw.org/reports/2002/isrl-pa/ISRAELPA1002.pdf+site:hrw.org+suicide+terrorism&hl=en&ie=UTF-8> (last visited Oct. 18, 2003) (copy on file with *The Transnational Lawyer*).

5. See, e.g., INT’L LAW COMMISSION, CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND (Draft), arts. 2(4), 2(6), available at <http://www.un.org/law/ilc/texts/offences.htm> (last visited Sept. 30, 2003) [hereinafter INT’L LAW COMMISSION] (copy on file with *The Transnational Lawyer*).

6. See, e.g., President William J. Clinton, Addressing the opening session of the 53rd United Nations General Assembly, partially cited in Judy Aita, *Clinton Opens UN General Assembly with Call to Combat Terrorism*, UNITED STATES INFORMATION AGENCY, Sept. 21, 1998, at <http://usinfo.state.gov/topical/pol/terror/98092102.htm> (last visited Sept. 5, 2003) (copy on file with *The Transnational Lawyer*).

7. See, e.g., President George W. Bush, Remarks by the President to United Nations General Assembly, USUN PRESS RELEASE # 162 (01) (Nov. 10, 2001), at http://www.un.int/usa/01_162.htm (visited Sept. 5, 2003) [hereinafter Remarks to the United Nations] (copy on file with *The Transnational Lawyer*); *The National Security Strategy of the United States* (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss.html> (last visited Oct. 16, 2003) (copy on file with *The Transnational Lawyer*).

8. See, e.g., President George W. Bush, Address by the President to the Philippine Congress (Oct. 18, 2003), at <http://www.whitehouse.gov/news/releases/2003/10/20031018-12.html> (last visited Oct. 19, 2003) (copy on file with *The Transnational Lawyer*).

is frightening enough, but at least the “balance of fear” in the past helped to minimize the chances of such an occurrence.⁹ However, terrorists, by definition, are characterized by their lack of adherence to the self-imposed restraints of moral standards.¹⁰ Instead, they place “the cause” above all in the belief that the end justifies the means used to achieve it. As United States President George W. Bush, explained, “[d]eterrence—the promise of massive retaliation against nations—means nothing against shadowy terrorist networks with no nation or citizens to defend.”¹¹

Against this background, the inherent eclectic, unpredictable, and indiscriminate nature of terrorism has turned what some excuse as acts of desperation by “victims of oppression” into one of the greatest threats to the free world and modern civilization. Recent events, particularly and unquestionably the horrifying suicide terrorist attacks on the United States on September 11, 2001, have finally brought the world to the realization that nothing can justify the murder of innocent civilians, and political and social grievances of any particular group do not entitle that group to violate the basic right to life of civilians.¹² Regardless of its alleged objectives or who perpetrates it, terrorism can never be legitimized.

Terrorists claim that they fight in the name of freedom and justice and that they represent those suffering from subjugation and exploitation. However, it is the free democratic societies that serve as prime and vulnerable targets for terrorism.¹³ Ironically, it is the very moral strength of these societies’ openness, tolerance, and respect for human rights that makes them so susceptible to harm by those driven by their antipathy to these Western moral standards. As a result, the world today is often viewed as a dichotomy, with civilization on one end and terrorism on the other.¹⁴

9. See, e.g., President George W. Bush, The President's State of the Union Address (Jan. 29, 2002), at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (last visited Oct. 3, 2003) [hereinafter State of the Union] (copy on file with *The Transnational Lawyer*).

10. See, e.g., President George W. Bush, Address at the United Nations General Assembly (Sept. 12, 2002), at <http://www.state.gov/p/nea/rls/rm/13434.htm> (last visited Sept. 5, 2003) (copy on file with *The Transnational Lawyer*).

11. President George W. Bush, Address by the President at 2002 Graduation Exercise of the United States Military Academy at West Point, NY. (June 1, 2002), at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html> (last visited Oct. 3, 2003) [hereinafter Address at Graduation Exercise] (copy on file with *The Transnational Lawyer*).

12. See, e.g., Giuliani, *supra* note 1. “The terrorists are wrong, and in fact evil, in their mass destruction of human life in the name of addressing alleged injustices There is no excuse for mass murder. . . . Those who practice terrorism - murdering or victimizing innocent civilians - lose any right to have their cause understood by decent people and lawful nations.” *Id.*

13. See, e.g., Clinton, *supra* note 6.

14. See, e.g., Bush, Remarks to the United Nations, *supra* note 7; see also McClellan, *supra* note 1; *The National Security Strategy of the United States*, *supra* note 7. “Terrorists are enemies of the civilized world who seek to spread fear and chaos and they have no regard for innocent life.” Giuliani, *supra* note 1. “[T]here is no room for neutrality on the issue of terrorism,” explained Mayor Giuliani. “You’re either with civilization or with terrorists.” *Id.* “This threat cannot be ignored,” elucidated President Bush. “This threat cannot be appeased. Civilization, itself, the civilization we share, is threatened.” Bush, Remarks to the United Nations, *supra* note 7.

The prevalent threat posed by terrorism to international peace, security, and global stability¹⁵ has resulted in a mounting awareness of its danger and extent. When combined with the obvious responsibility and duty of every State to protect its citizens,¹⁶ this awareness has helped bring at least some of the free world¹⁷ to the simple realization that in order to ensure the fundamental values of democracy, freedom, liberty, and security for future generations, it is not only prudent but also necessary to declare war on terrorism.¹⁸ The war on terror, however, is unlike any other war the world has experienced.¹⁹ Even though the threat and actions of the terrorist enemy emanate from within a State, this is a war against an enemy that does not operate within clearly defined borders. In fact, this is not necessarily a war against a given sovereign State. There is no clearly identified legitimate combatant that adheres to international customs, laws, and rules of war. Moreover, rarely does one know when, where, or how terrorists will next strike, or who or what their target will be at any given time.²⁰ How then, can Western democracies that do adhere to the rule of law engage in timely and effective defensive action against such an amorphous²¹ and dreadful menace as terrorism? What protective actions may be justified under international law?

15. See, e.g., Paul Wilkinson, *Terrorism: Motivations and Causes*, TERRORISM RESEARCH CENTER (Jan. 1995), at <http://www.terrorism.com/modules.php?op=modload&name=News&file=article&sid=5693&mode=thread&order=0&thold=0> (last visited Aug. 31, 2003) (copy on file with *The Transnational Lawyer*).

16. See, e.g., *NewsHour with Jim Lehrer: Sec. Donald Rumsfeld: Part 2*, (PBS television broadcast, Feb. 4, 2002), transcript at http://www.pbs.org/newshour/bb/military/jan-june02/rumsfeld_parttwo_2-4.html (last visited Oct. 3, 2003) [hereinafter *NewsHour*] (copy on file with *The Transnational Lawyer*). “[W]e have no choice but to defend ourselves, and the only way to do that is to go find them,” Secretary of Defense Donald H. Rumsfeld pointed out. “Certainly self-defense suggests that if we had reason to believe that that nexus was being bridged or that al-Qaida . . . terrorists were being provided haven, clearly we have an obligation to try to find them,” concluded the Secretary of Defense. *Id.*

17. Wilkinson, *supra* note 15. “The true litmus test,” explained Paul Wilkinson, “will be the Western states’ consistency and courage in maintaining a firm and effective policy against terrorism in all its forms. They must abhor the idea that terrorism can be tolerated as long as it is only affecting someone else’s democratic rights and rule of law. They must adopt the clear principle that one democracy’s terrorist is another democracy’s terrorist.” *Id.*

18. See, e.g., Bush, Remarks to the United Nations, *supra* note 7. As President George W. Bush made clear following the horrific suicide terrorist attacks on New York and Washington, D.C., and in Pennsylvania, “the most basic commitment of civilization . . . [is that] [w]e will defend ourselves and our future against terror and lawless violence.” *Id.*

19. See, e.g., President George W. Bush, Address of the President to the Nation (Sept. 7, 2003), at <http://www.whitehouse.gov/news/releases/2003/09/20030907-1.html> (last visited Sept. 9, 2003) (copy on file with *The Transnational Lawyer*). “[T]he war on terror . . . [is] a lengthy war, a different kind of war, fought on many fronts in many places,” explained President Bush. “We have learned,” he continued, “that terrorist attacks are not caused by the use of strength; they are invited by the perception of weakness. And the surest way to avoid attacks on our own people is to engage the enemy where he lives and plans.” *Id.*

20. See, e.g., *The National Security Strategy of the United States*, *supra* note 7; see also *NewsHour*, *supra* note 16.

21. See, e.g., Bruce Hoffman, *Dealing with Asymmetric Threats*, WORLD ECONOMIC FORUM, Annual Meeting Jan. 24, 2003, at http://www.weforum.org/site/knowledgenavigator.nsf/Content/Dealing%20with%20Asymmetric%20Threats_2003?open&country_id= (last visited Oct. 13, 2003) (copy on file with *The Transnational Lawyer*).

Terrorists demonstrate brazen disregard for rules of international behavior and accepted moral codes, while at the same time hiding behind these very rules and moral codes to prevent the free world from protecting itself. Hence, one of the most serious challenges facing the world today is the application of existing international rules to the fight against terror. However, existing rules did not envisage situations like an enemy using his or her body as a living bomb or a democratic state fighting against a network of terrorist organizations and cells, intent on disrupting civilian life. Clearly, this new reality requires interpretation and application of the existing rules in an innovative and dynamic fashion to effectively confront this modern phenomenon. “[N]ew threats,” astutely observed President George W. Bush, “require new thinking.”²² Those fighting this new type of war must be given the legal tools with which to do it, so as to enable them to conduct the fight against terrorism in a manner that will allow them to carry out their mission successfully. Surely, the best and possibly only way to successfully combat such terrorism is to seek out the terrorists wherever they are and destroy their infrastructure before they wreak more devastating havoc.²³ Certainly, in this modern technological age, international law cannot require a State to sit back and wait while unfathomable terror threats crystallize and the risks and dangers materialize²⁴ portending inconceivable and unimaginable consequences.²⁵ “[T]he war on terror will not be won on the defensive,” reasoned the President of the United States. “We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge.”²⁶ Hence, it is necessary to engage in “preemptive action when necessary.”²⁷ As *The National Security Strategy of the United States* of September 2002 expounds, “[t]he greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.”²⁸

22. Bush, Address at Graduation Exercise, *supra* note 11.

23. See, e.g., *id.*; *NewsHour*, *supra* note 16. “A terrorist can attack at any time at any place using a range of techniques,” explained U.S. Secretary of Defense Donald Rumsfeld. “It is physically impossible to defend at every time in every location against every conceivable technique of terrorism. Therefore, if your goal is to stop it, you cannot stop it by defense. You can only stop it by taking the battle to the terrorists, where they are and going after them.” Secretary Rumsfeld continued: “[Y]ou say to yourself, well, if we can’t stop terrorists at every location of every technique at every moment of the day or night, what must we do—Just sit here and take the blows like the World Trade, take the blows that biological weapons would pose to us? The answer is no. You have a responsibility to defend your country. . . . [T]he UN Charter provides—for the right of self-defense. And the only self-defense, the only effective way to defend is to take the battle to where the terrorists are. They are planning, they are plotting, they have trained thousands of terrorists very well, and we have no choice but to find those people and root them out, as the president said, and stop them from doing what they’re doing and stop countries from harboring them.” *Id.*

24. See *The National Security Strategy of the United States*, *supra* note 7. “[I]n an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.” *Id.*

25. See, e.g., Bush, State of the Union, *supra* note 9. “If we wait for threats to fully materialize, we will have waited too long,” remarked President George W. Bush. Bush, Address at Graduation Exercise, *supra* note 11.

26. Bush, Address at Graduation Exercise, *supra* note 11.

27. *Id.*; *The National Security Strategy of the United States*, *supra* note 7.

28. *The National Security Strategy of the United States*, *supra* note 7.

The use of armed force in or against a State harboring, sheltering, supporting, aiding or abetting terrorists, in response to tragedy and devastation perpetrated in another State by terrorists employing either “conventional” means or “unconventional” methods such as suicide attacks and/or nuclear, biological, or chemical weapons, raises far-reaching issues that transcend any particular circumstance. One of the significant issues raised in this context is the legality of the use of armed force by a State to counter terrorists directing their attacks against its citizens from within the territory of another State. The use of the territory of one State by armed groups as a base in which to organize and train, and later from which to attack another State, has been an unremitting occurrence in all parts of the world.

Accordingly, the following paradigm and accompanying analysis are applicable to any situation in which a State supports, abets, aids, shelters, or harbors, terrorists. This paradigm and accompanying analysis will help in analyzing many terrorist incidents which have already occurred, or which could occur anywhere at any future time.

II. THE OBLIGATIONS AND RESPONSIBILITY OF STATES THAT ACT IN COMPLICITY WITH TERRORISTS AND TERROR ORGANIZATIONS UNDER INTERNATIONAL LAW: THE LAW UNDER THE UNITED NATIONS CHARTER

Every State is bound by Article 2(4) of the United Nations Charter to refrain “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.”²⁹ The goals of terrorists usually involve the threat or use of force against the territorial integrity of the target State. “*The entry into or presence* in the territory of another state of . . . self-organised armed bands constitute . . . a *violation of the territorial integrity* of that state,” explained J. E. S. Fawcett. “A state will be *using such force* in so far as it sends these . . . bands across, or *encourages or tolerates* their crossing the frontier, or assists them when they are already in the territory, of the other state.”³⁰ Thus, every State is prohibited from sheltering and providing aid and support to terrorists, because such assistance is exploited by the terrorists in furthering their threats and use of force.

Consequently, if a State sanctions terrorist activity emanating from it against another State and/or its citizens, and/or fails to prevent such terrorist activity, and/or tolerates such terrorist activity, and/or does not eliminate this terrorist presence from its territory, it will be unquestionably in violation of Article 2(4) of the United Nations Charter. The United Nations Security Council in its Resolution 748 of March

29. U.N. CHARTER art. 2, para. 4, available at www.UN.org/aboutun/charter/ (last visited March, 24, 2004).

30. J. E. S. Fawcett, *Intervention in International Law, A Study of Some Recent Cases*, 103 RECUEIL DES COURS 343, 358-59 (1961-II) (emphasis added).

31, 1992, made this clear by explicitly linking a State's involvement with terrorism to its obligations under Article 2(4) of the United Nations Charter, when it imposed diplomatic, arms and related material, and air sanctions on Libya for its continuing involvement with terrorist activities and for its refusal to comply with requests to fully cooperate in establishing responsibility for terrorist acts in 1988 against Pan Am Flight 103 over Lockerbie, Scotland. It re-affirmed that, "*in accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force. . .*"³¹ Ian Brownlie, some thirty years before Resolution 748, aptly concluded:

An examination of the State practice in disputes arising out of *State complicity in, or toleration of, the activities of armed bands directed against other States* shows conclusively that no State can now claim that such behavior is lawful. The illegality may be expressed in terms of charges of aggression, intervention, interference in internal affairs, violation of territorial integrity and political independence, or a *violation of Article 2, paragraph 4, of the United Nations Charter*.³²

Unquestionably, then, the use of indirect force is prohibited by Article 2(4).³³

III. THE OBLIGATIONS AND RESPONSIBILITY OF STATES THAT ACT IN COMPLICITY WITH TERRORISTS AND TERROR ORGANIZATIONS UNDER INTERNATIONAL LAW: CUSTOMARY INTERNATIONAL LAW

A. *Responsibility of States to Ensure that Their Territory is not used for Terrorist Acts*

Every State is bound by customary international law concerning non-intervention, which is premised "on the principle of the sovereign equality of all [States]" as also reflected in Article 2(1) of the United Nations Charter.³⁴ Every State has the responsibility of insuring that its territory is not used as a base from which to carry out acts that are injurious and hostile to other States.³⁵ As held in the *Corfu Channel Case* by the International Court of Justice, every State has an

31. S.C. Res. 748, U.N. SCOR, 3063rd mtg, U.N. Doc. S/RES/748 (1992) (emphasis added), available at <http://www.un.org/documents/sc/res/1992/scres92.htm> (last visited Sept. 29, 2003).

32. Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 INT'L & COMP. L. Q. 712, 734 (1958) [hereinafter Brownlie, *Activities of Armed Bands*] (emphasis added).

33. See Albrecht Randelzhofer, *Article 2(4)*, in BRUNO SIMMA (ed.), I THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 112, 119-20 (2d ed. 2002)..

34. See, e.g., John C. Novogrod, *Indirect Aggression*, in I A TREATISE ON INTERNATIONAL CRIMINAL LAW: CRIME AND PUNISHMENT 198, 214-15 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

35. See, e.g., *id.*

“obligation *not to allow knowingly its territory to be used for acts contrary to the rights of other States.*”³⁶ Traditionally, “each state was responsible for all activity within its borders,” explained W. Michael Reisman, “and if military action emanated from its boundaries into the territory of another state, it *remained liable to that other state* for the actual and constructive violations of the other’s sovereignty.”³⁷ The concept of attributability to a State, then, applies if the State was “reluctant to impede these acts.”³⁸

B. States Must Actively Prevent Their Territory from Being Used for Terrorist Acts

Beyond the responsibility of a State for all acts conducted within its territory which violate the rights of another State as well as for any resulting violations of the other State’s sovereignty, it moreover must actively prevent such acts and violations. As Judge John Moore explained in the *S. S. Lotus Case*, “[i]t 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.*”³⁹ Clearly then, according to Hans Kelsen, a State is obligated under international law to prevent the commission on its territory of acts injurious to another State such as “hostile expeditions organized in [its] territory . . . and directed against the territorial integrity of . . . [the] foreign state”⁴⁰ Consequently, concluded Robert Jennings and Arthur Watts, “there is little room for doubt where the subversive activities of private persons in a state take the form of organising on its territory armed hostile expeditions against another state . . . [a] state is bound

36. *Corfu Channel Case* (Gr. Brit. v. Alb.), 1949 I.C.J. REPORTS 3, 22 (emphasis added); see ANN VAN WYNEN THOMAS & A. J. THOMAS, JR., NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS 134 (1956).

37. W. Michael Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT’L L. 1, 3 (1973) (emphasis added). For instance, as then-acting U.S. Secretary of State Kenneth Rush wrote in 1974, “it is the established policy of the United States that a State is *responsible for the international armed force originating from its territory, whether that force be direct and overt or indirect and covert.*” Arthur W. Rovine, *Contemporary Practice of the United States Relating to International Law*, 68 AM. J. INT’L L. 720, 736 (1974) (citing Letter to Eugene Rostow of the Yale Law School from Acting Secretary of State Kenneth Rush (May 29, 1974)) (emphasis added).

38. Albrecht Randelzhofer, *Article 51*, in BRUNO SIMMA (ed.), I THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 788, 802 (2d ed. 2002) [hereinafter Randelzhofer, *Article 51*].

39. *S. S. Lotus*, 1927 P.C.I.J. (Fr. v. Turk) (ser. A) No. 10, at 88 (Sept. 7, 1927) (Moore, J., dissenting), cited in II WORLD COURT REPORTS, A COLLECTION OF THE JUDGMENTS ORDERS AND OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1927-1932, at 65, 80 (Manley O. Hudson ed., 1935) (emphasis added). “[W]hat a State claims the right exclusively to control, such as its own territory,” reasoned Charles C. Hyde, “it must possess the power and accept the obligation to endeavor so to control as *to prevent occurrences therein from becoming by any process the immediate cause of such injury to a foreign State* as the latter, in consequence of the propriety of its own conduct, should not be subjected to at the hands of a neighbor.” CHARLES C. HYDE, I INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 723 (2d rev. ed. 1947) (emphasis added).

40. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 205-06 (Robert W. Tucker ed., 2d ed. rev. 1966).

not to allow its territory to be used for such hostile expeditions, and *must suppress and prevent them.*"⁴¹

C. Conclusion of Customary International Law

Incontrovertibly, a State may neither organize, support, or host on its territory terrorists directing their attacks against another State and is required to guarantee that terrorists do not use its territory as a base for operations.⁴² When a State fails, whether as a result of carelessness or devise, to exercise due diligence to prevent the carrying out of injurious acts against other States, its failure is considered an offense under customary international law.⁴³ Moreover, the failure to prevent such activities from taking place may result in the State being considered as acting in complicity with the perpetrators of the activities illegal under customary international law. Such "state tolerance," which "raises a presumption of governmental complicity . . . amounts to an international delinquency," reasoned Manuel R. Garcia-Mora.⁴⁴

IV. THE OBLIGATIONS AND RESPONSIBILITY OF STATES THAT ACT IN COMPLICITY WITH TERRORISTS AND TERROR ORGANIZATIONS UNDER INTERNATIONAL LAW: INTERNATIONAL AGREEMENTS AND RESOLUTIONS OF INTERNATIONAL ORGANIZATIONS

Rules of customary international law governing the obligation of a State to ensure that terrorists do not use its territory as a base from which to direct attacks against another State are reflected in multilateral conventions and in resolutions of international organizations. Some seventy years ago, for instance, international conventions already characterized the phrase "*aggression by a State*" as comprising, among other things, the "[p]rovision of support to armed bands

41. I OPPENHEIM'S INTERNATIONAL LAW 394 (Robert Jennings & Arthur Watts eds., 9th ed. 1996) [hereinafter OPPENHEIM'S INTERNATIONAL LAW] (emphasis added). "*States are under a duty to prevent and suppress such subversive activity against foreign Governments as assumes the form of armed hostile expeditions or attempts to commit common crimes against life or property.*" L. OPPENHEIM, I INTERNATIONAL LAW: A TREATISE 292-93 (H. Lauterpacht ed., 8th ed. 1955) [hereinafter OPPENHEIM, I A TREATISE] (emphasis added).

42. See, e.g., Novogrod, *supra* note 34, at 215.

43. See *id.*; THOMAS & THOMAS, *supra* note 36, at 217; Fawcett, *supra* note 30, at 356-57; OPPENHEIM, I A TREATISE, *supra* note 41, at 365; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 41, at 549-50.

44. MANUEL R. GARCIA-MORA, INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES 51 (1962). Certainly in those instances in which a State actually "encourages and even promotes the organization of [armed groups and] . . . provides them with financial assistance, training, and weapons" these groups may be considered "*de facto* organs" of the State. "When such groups carry out the activities planned, those activities are attributed to the State and constitute internationally wrongful acts of the State . . ." Roberto Ago, *Fourth report on State responsibility*, A/CN.4/264 and Add.1, II Y.B. INT'L L. COMM'N 1972, at 71, 120 (1974) (emphasis supplied). Whenever individuals or groups do in deed in fact act on behalf of a State, their conduct is attributed to that State and is "considered as an act of the State under international law. . . ." *Report of the International Law Commission on the work of its twenty-sixth session*, A/9610/Rev.1, II(1) Y.B. INT'L L. COMM'N 1974, at 157, 277 (1975).

formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection.”⁴⁵ Likewise, on December 10, 1934, the Council of the League of Nations adopted a resolution that reiterated the same basic tenants of customary international law, specifically that a State is responsible to ensure that its territory is not used for terrorist acts against other States and that a State must furthermore actively prevent its territory from being used for such terrorist acts. Article II of the resolution stipulated that “it is the duty of every State *neither to encourage nor tolerate on its territory any terrorist activity* with a political purpose, [and] every State must do all in its power to *prevent and repress acts of this nature* and must for this purpose lend its assistance to Governments which request it.”⁴⁶ The Convention for the Prevention and Punishment of Terrorism of 1937, also reaffirmed “the principle of international law in virtue of which it is the duty of every State to *refrain from any act designed to encourage terrorist activities* directed against another State and to *prevent the acts* in which such activities take shape”⁴⁷

In similar fashion, enumerated among the offenses in Article 2(4) of the Draft Code of Offences against the Peace and Security of Mankind of 1954, are the following:

The organization, or the *encouragement of the organization*, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the *toleration of the organization of such bands in its own territory*, or the *toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State*, as well as direct participation in or support of such incursions.⁴⁸

45. See, e.g., VI INTERNATIONAL LEGISLATION, A COLLECTION OF THE TEXTS OF MULTIPARTITE INTERNATIONAL INSTRUMENTS OF GENERAL INTEREST: 1932-1934, at 413, 418 (Manley O. Hudson, ed., 1937) (citing various conventions defining aggression that contain this language). Garcia-Mora, writing in 1962, also concisely articulated “[t]he general conviction . . . that support to, and toleration of, armed bands likely to make incursions into foreign territory engage the international responsibility of the state *amounting to an act of aggression*.” GARCIA-MORA, *supra* note 44, at 114 (emphasis added). Quincy Wright, as well, believed that “*failure of a government to prevent armed bands or insurgents from organizing within its territory to engage in hostilities across a frontier, will make it responsible for aggression, if such hostilities actually occur*.” Quincy Wright, *The Prevention of Aggression*, 50 AM. J. INT’L L. 514, 527 (1956) (emphasis added).

46. LEAGUE OF NATIONS Doc. C. 543. 1934.VII, art II, 15 LEAGUE OF NATIONS O.J. (No. 12, Part II) 1759, 1760 (1934) (emphasis added).

47. ROBERT A. FRIEDLANDER, I TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 253 (1979); VII INTERNATIONAL LEGISLATION, A COLLECTION OF THE TEXTS OF MULTIPARTITE INTERNATIONAL INSTRUMENTS OF GENERAL INTEREST: 1935-1937, at 862, 865 (Manley O. Hudson ed., 1941) (citing CONVENTION FOR THE PREVENTION AND PUNISHMENT OF TERRORISM, art. 1(1) (1937)) (emphasis added).

48. INT’L LAW COMMISSION, *supra* note 5, art. 2(4) (emphasis added). A 1996 draft version of the Code does not contain this clause. See *id.*

Moreover, Article 2(6) of the Draft Code of 1954 includes as an offense against the peace and security of mankind “[t]he undertaking or *encouragement* by the authorities of a State of *terrorist activities in another State*, or the *toleration* by the authorities of a State of *organized activities calculated to carry out terrorist acts in another State*.”⁴⁹

In its Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty of December 21, 1965, the United Nations General Assembly also condemned the toleration by a State of terrorist or armed activity on its territory aimed against another State, stipulating that “no State shall organize, assist, foment, finance, incite or *tolerate subversive, terrorist or armed activities* directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.”⁵⁰

On October 24, 1970, the United Nations General Assembly, in its Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, forbade even the acquiescence of a State in organized activities in its territory directed at committing acts of terrorism in another State: “Every State has the duty to *refrain from organizing or encouraging the organization of irregular forces or armed bands*, including mercenaries, for incursion into the territory of another State.”⁵¹ Moreover, “[e]very 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 within its territory directed towards the commission of such acts*, when the acts referred to . . . involve a threat or use of force.”⁵²

Furthermore, in Article 3(g) of the United Nations General Assembly’s Definition of Aggression, adopted on December 14, 1974, among the acts considered *aggression* is included “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts [of aggression] listed above, or *its substantial involvement therein*.”⁵³ Certainly, the

49. *Id.* art. 2(6) (emphasis added). This clause does not appear in the 1996 draft version of the Code. See *id.*

50. *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, G.A. Res. 2131, U. N. GAOR 1st Comm., 20th Sess., 1408th plen. mtg., at 12 (1965) (emphasis added), available at <http://www.un.org/documents/ga/res/20/ares20.htm> (last visited Sept. 30, 2003) (copy on file with *The Transnational Lawyer*).

51. *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U. N. GAOR 6th Comm., 25th Sess., 1883rd plen. mtg., at 123 (1970) (emphasis added), available at <http://www.un.org/documents/ga/res/25/ares25.htm> (last visited Sept. 30, 2003) (copy on file with *The Transnational Lawyer*).

52. *Id.* (emphasis added).

53. *Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., 2319th plen. mtg., art. 3(g) (1974) (emphasis added), available at <http://www.un.org/documents/ga/res/29/ares29.htm> (last visited Sept. 30, 2003) (copy on file with *The Transnational Lawyer*).

last portion of this designation, “or its substantial involvement therein,” may comprise “involvement in the sending of armed bands by or on behalf of a State,” as Julius Stone rightly indicated, even though the delinquent State may not in point of fact be the one that is launching the bands attacking the target State.⁵⁴

Many more examples of resolutions of international organizations abound that reflect the rules of customary international law that require a State to ensure that its territory is not used by terrorists as a base from which to direct attacks against another State. For instance, on December 9, 1985, the United Nations General Assembly adopted Resolution 40/61 that unequivocally condemned “as criminal, all acts, methods and practices of terrorism *wherever and by whomever committed*” and thereupon called upon all States “*to fulfil their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts. . . .*”⁵⁵

Further, the United Nations General Assembly adopted Resolution 42/22 on November 18, 1987, that solemnly declared that “*States shall fulfil their obligations under international law to refrain from organizing, instigating, or assisting or participating in paramilitary, terrorist or subversive acts, including acts of mercenaries, in other States, or acquiescing in organized activities within their territory directed towards the commission of such acts.*”⁵⁶

As earlier mentioned in a slightly different context, on March 31, 1992, United Nations Security Council Resolution 748 imposed diplomatic, arms and related material, and air sanctions on Libya for its ongoing connection with terrorist activities and for its rejection to abide by requests to fully assist in establishing responsibility for 1988 terrorist acts perpetrated against a Pan Am flight while over Scotland. The Security Council resolution re-affirmed that “in accordance with the principle in Article 2, paragraph 4, of the Charter of the United Nations, *every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force. . . .*”⁵⁷

On December 9, 1994, the United Nations General Assembly adopted Resolution 49/60, which approved the Declaration on Measures to Eliminate International Terrorism that reaffirmed the “unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, *wherever and by whomever committed*, including those which . . . threaten the territorial

54. JULIUS STONE, CONFLICT THROUGH CONSENSUS: UNITED NATIONS APPROACHES TO AGGRESSION 74 (1977).

55. G.A. Res. 40/61, 108th plen. mtg. (1985) (emphasis added), available at <http://www.un.org/documents/ga/res/40/a40r061.htm> (last visited Sept. 30, 2003) (copy on file with *The Transnational Lawyer*).

56. G.A. Res. 42/22, 73rd plen. mtg. (1987) (emphasis added), available at <http://www.un.org/documents/ga/res/42/a42r022.htm> (last visited Sept. 30, 2003) (copy on file with *The Transnational Lawyer*).

57. S.C. Res. 748, *supra* note 31 (emphasis added).

integrity and security of States”⁵⁸ This Declaration further stipulated that “States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, *must refrain from organizing, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts . . .*”⁵⁹ Also in accordance with the Declaration:

States must . . . fulfil their obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism and are urged to take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism, in particular . . . [t]o *refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens. . .*⁶⁰

Along the same line, on December 17, 1996, the United Nations General Assembly adopted Resolution 51/210. This resolution approved the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, which reaffirmed the “unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, *wherever and by whomsoever committed*, including those which . . . threaten the territorial integrity and security of States”⁶¹ General Assembly Resolution 51/210 also reiterated the “call upon States to *refrain from financing, encouraging, providing training for or otherwise supporting terrorist activities . . .*”⁶²

On August 13, 1998, the United Nations Security Council, in Resolution 1189, condemned such acts as the “indiscriminate and outrageous acts of international terrorism” on August 7, 1998, against the United States’ embassies in Nairobi, Kenya, and Dar-es-Salaam, Tanzania, that “claimed hundreds of innocent lives, injured thousands of people and caused massive destruction to

58. *Declaration on Measures to Eliminate International Terrorism*, G.A. Res. 49/60, 84th plen. mtg., art. 1 (1994) (emphasis added), available at <http://www.un.org/documents/ga/res/49/a49r060.htm> (last visited Sept. 30, 2003) (copy on file with *The Transnational Lawyer*).

59. *Id.* (emphasis added).

60. *Id.* (emphasis added).

61. *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism*, G.A. Res. 51/210, 88th plen. mtg., art. 1 (1996) (emphasis added), available at <http://www.un.org/documents/ga/res/51/a51r210.htm> (last visited Sept. 30, 2003) (copy on file with *The Transnational Lawyer*).

62. G. A. Res. 51/210, 88th plen. mtg., art. 5 (1996) (emphasis added), available at <http://www.un.org/documents/ga/res/51/a51r210.htm> (visited Sept. 30, 2003) (copy on file with *The Transnational Lawyer*).

property.” The resolution stressed that “every Member State has the *duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts . . .*”⁶³

United Nations Security Council Resolution 1267, adopted on October 15, 1999, strongly condemned “the continuing use of Afghan territory, especially areas controlled by the Taliban, for the *sheltering and training of terrorists and planning of terrorist acts. . .*”⁶⁴ It deplored the fact that Afghanistan’s Taliban authorities continued “to *provide safe haven*” to Osama bin Laden and allowed “him and others associated with him *to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations. . .*”⁶⁵ The resolution further insisted that Afghanistan’s Taliban authorities “*cease the provision of sanctuary and training for international terrorists and their organizations*” and “*take appropriate effective measures to ensure that the territory under [Taliban] control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens . . .*”⁶⁶

On October 19, 1999, Resolution 1269 of the United Nations Security Council expressed deep concern for “the increase in acts of international terrorism which endangers the lives and well-being of individuals worldwide as well as the peace and security of all States.”⁶⁷ It explicitly condemned “all acts of terrorism, *irrespective of motive, wherever and by whomever committed.*”⁶⁸ Furthermore, it unequivocally condemned “all acts, methods and practices of terrorism as criminal and unjustifiable, *regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed,* in particular those which could threaten international peace and security,” and called “upon all States to take . . . appropriate steps to . . . *prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism [and] deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition . . .*”⁶⁹

United Nations Security Council Resolution 1333 of December 19, 2000, strongly condemned “the continuing use of the areas of Afghanistan under the control of . . . the Taliban . . . for the *sheltering and training of terrorists and*

63. S.C. Res. 1189, 3915th mtg. (1998) (emphasis added), available at <http://www.un.org/Docs/scres/1998/scres98.htm> (last visited Sept. 30, 2003) (copy on file with *The Transnational Lawyer*).

64. S.C. Res. 1267, 4051st mtg. (1999) (emphasis added), available at <http://www.un.org/Docs/scres/1999/sc99.htm> (last visited Oct. 1, 2003) (copy on file with *The Transnational Lawyer*).

65. *Id.* (emphasis added).

66. *Id.* (emphasis added).

67. S.C. Res. 1269, 4053d mtg. (1999), available at [http://www.un.org/Docs/sc/committees/1373/Sres1269\(1999\).htm](http://www.un.org/Docs/sc/committees/1373/Sres1269(1999).htm) (last visited Mar.24, 2003) (copy on file with *The Transnational Lawyer*).

68. *Id.* (emphasis added).

69. *Id.* (emphasis added).

planning of terrorist acts."⁷⁰ It deplored the fact that Afghanistan's Taliban authorities continued "to provide *safe haven*" to Osama bin Laden and allowed "*him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations.*"⁷¹ Resolution 1333 demanded that Afghanistan's Taliban authorities "*cease the provision of sanctuary and training for international terrorists and their organizations.*"⁷² It also instructed Afghanistan to "*take appropriate effective measures to ensure that the territory under [Taliban] control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens,*" and further demanded that Afghanistan's Taliban authorities "*act swiftly to close all camps where terrorists are trained within the territory under [Taliban] control. . . .*"⁷³

More recently, the United Nations Security Council, in Resolution 1368, adopted on September 12, 2001, unequivocally condemned "in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania."⁷⁴ The resolution stressed "that those responsible for *aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable. . . .*"⁷⁵ The Security Council also "[d]etermined to combat by all means threats to international peace and security caused by terrorist acts," recognized "the inherent right of individual or collective self-defense in accordance with the Charter," and regarded "such acts, like any act of international terrorism, as a threat to international peace and security. . . ."⁷⁶

On September 28, 2001, the United Nations Security Council reaffirmed in Resolution 1373 that such acts as "the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001 . . . like any act of international terrorism, constitute a threat to international peace and security"⁷⁷ It further reaffirmed "the principle . . . that every State has the duty to *refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.*"⁷⁸ The resolution also stipulated that States

70. S.C. Res. 1333, 4251st mtg. (2000) (emphasis added), available at <http://www.un.org/Docs/scres/2000/sc2000.htm> (last visited Oct. 1, 2003) (copy on file with *The Transnational Lawyer*).

71. *Id.* (emphasis added).

72. *Id.* (emphasis added).

73. *Id.* (emphasis added).

74. S.C. Res. 1368, 4370th mtg. (2001), available at <http://www.un.org/Docs/scres/2001/sc2001.htm> (last visited Oct. 1, 2003) (copy on file with *The Transnational Lawyer*).

75. *Id.* (emphasis added).

76. *Id.*

77. S.C. Res. 1373, 4385th mtg. (2001), available at <http://www.un.org/Docs/scres/2001/sc2001.htm> (last visited Oct. 1, 2003) (copy on file with *The Transnational Lawyer*).

78. *Id.* (emphasis added).

shall “[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists.”⁷⁹ It instructed States to “[t]ake the necessary steps to prevent the commission of terrorist acts” and “[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens.”⁸⁰ The Security Council further directed States to “[p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens”⁸¹ The resolution reaffirmed as well “the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations” in addition to “the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts”⁸²

United Nations Security Council Resolution 1378, adopted on November 14, 2001, condemned “the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist groups and for providing safe haven to Usama bin Laden, Al-Qaida and others associated with them”⁸³

V. CONCLUSION OF THE OBLIGATIONS AND RESPONSIBILITY OF STATES THAT ACT IN COMPLICITY WITH TERRORISTS AND TERROR ORGANIZATIONS UNDER INTERNATIONAL LAW

In accordance with the law under the United Nations Charter, with customary international law, with international conventions, as well as with numerous resolutions of the Security Council and the General Assembly of the United Nations, a State is categorically responsible for all acts carried out within its territory which are contrary to the rights of other States, and is liable for any resulting violations of the sovereignty of another State. Furthermore, the delinquent State must actively prevent such acts and violations. Hence, the failure by a State to prevent attacks by terrorists against the target State constitutes a violation of the rights of the target State.⁸⁴ Moreover, if a State does nothing to stop terrorist actions aimed at the target State, its inaction in and of itself constitutes complicity in the acts of terrorism: “[G]overnmental inactivity in preventing the organization of a military expedition amounts to complicity in the hostile attack and can logically be regarded as *actual governmental participation*

79. *Id.* (emphasis added).

80. *Id.* (emphasis added).

81. *Id.* (emphasis added).

82. *Id.*

83. S.C. Res. 1378, 4415th mtg. (2001) (emphasis added), available at <http://www.un.org/Docs/scres/2001/sc2001.htm> (last visited Oct. 1, 2003) (copy on file with *The Transnational Lawyer*).

84. See GARCIA-MORA, *supra* note 44, at 51.

in the conflict,” explained Garcia-Mora.⁸⁵ Even “if a state has obviously used all the means at its disposal to prevent a hostile act of a person against a foreign nation but is *physically unable to suppress it*, it certainly has not discharged its international duty.”⁸⁶ The international obligations of a State flow from its sovereign status, and its responsibilities as a State are unrelated to its ability to control the carrying out of acts which emanate from its territory and which are injurious to others beyond its borders. Accordingly, any claimed inability to control the terrorists may not relieve a State of its international obligation to curb use of its soil by terrorists to launch activities against other States.⁸⁷ Examined in this fashion, a State’s failure to prevent assaults by terrorists against another State constitutes a violation of the rights of the other State.⁸⁸

VI. THE USE OF ARMED FORCE AGAINST TERRORISTS AND STATES THAT AID AND ABET THEM AND SELF-DEFENSE IN INTERNATIONAL LAW: “ARMED ATTACK” AND ARTICLE 51 OF THE UNITED NATIONS CHARTER AND THEIR APPLICATION TO TERRORISM

When a State is unwilling, or unable, to prevent terrorists from using its territory as a base from which to attack another State, the State thereby attacked is permitted to exercise force to protect itself pursuant to its inherent right of self-defense. The operative section of Article 51 of the United Nations Charter stipulates that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security”

Attacks against one State by terrorists emanating from the territory of another State certainly constitute “an armed attack” and are deemed perpetrated not only by the terrorists and their organizations themselves, but also by the State from which they are operating. As far as the attacks perpetrated by the terrorists themselves, J. E. S. Fawcett explained that “the intrusion of armed bands may . . . constitute an armed attack for purposes of Article 51 of the Charter.”⁸⁹ Nothing contained in the United Nations Charter specifies that “an armed attack” may

85. *Id.* (emphasis added). After all, “when a state is under a legal duty to act or under a legal duty not to act and it breaches that duty with knowledge that the consequences of that breach of duty will interfere in the affairs of another state by altering or maintaining the condition of things without its consent, the state which breached its duty intends the consequences just as truly as it intended to do or to omit the thing done. And in intending the consequences, it has thereby imposed its will upon another state. In such a case actual intent to alter or maintain the condition of things or to compel action or inaction becomes unimportant; intervention occurs, so that interference comes close to being synonymous with intervention.” THOMAS AND THOMAS, *supra* note 36, at 73.

86. GARCIA-MORA, *supra* note 44, at 30 (emphasis added).

87. *Cf.* Barry Levenfeld, *Israel’s Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law*, 21 COLUM. J. TRANSNAT’L L. 1, 12 (1982).

88. *Cf. id.* at 45-46.

89. Fawcett, *supra* note 30, at 388 (emphasis added).

only be perpetrated by a State, and Article 51 was drafted in a broad enough manner to permit the use of force in self-defense to counter non-state actors.⁹⁰ Thus, “[i]t is accepted today that attacks of private terrorist groups may qualify as ‘armed attacks,’”⁹¹ concluded Carsten Stahn.

In regard to the State from which the terrorist attacks originated, it too definitely may be considered to have committed “an armed attack.” “[T]he undertaking or *encouragement by a state of terrorist activities in another state* or the *toleration by a state of organized activities calculated to result in terrorist acts* in another state,” indicated Hans Kelsen, “may be interpreted as *constituting an armed attack . . .*”⁹² Ian Brownlie as well, made clear that “it is conceivable that a coordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a state from which they operate, would *constitute an ‘armed attack’*.”⁹³ The toleration or encouragement by a State of the organization of hostile expeditions on its territory aimed against another State is at the very least a “*constructive attack*” by the State in which these preparations occur, and as a consequence, “it becomes responsible for the illicit acts which it has failed to prevent,” summarized Ellery C. Stowell.⁹⁴

“[F]or the attribution to a State of acts of . . . groups” such as armed bands of irregulars or rebels, according to the judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Dusko Tadic*, “it is sufficient to require that the group as a whole be *under the overall control* of the State.”⁹⁵ The test enunciated in the International Court of Justice *Case concerning Military and Paramilitary Activities in and against Nicaragua*, and subsequently rejected by the International Criminal Tribunal, was that in order to find a State legally accountable for the actions of armed groups, evidence was needed that the

90. See Carsten Stahn, “*Nicaragua is dead, long live Nicaragua*”—*The Right to Self-Defense under Art. 51 UN Charter and International Terrorism (sic)*, at 24, Conference “Terrorism as a Challenge for National and International Law,” Max Planck Institute for Comparative Public Law and International Law (2003), available at <http://edoc.mpil.de/conference-on-terrorism/presentation.cfm> (last visited Oct. 14, 2003) (copy on file with *The Transnational Lawyer*).

91. *Id.* at 33.

92. KELSEN, *supra* note 40, at 62-63 (emphasis added).

93. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 279 (1963); Brownlie, *Activities of Armed Bands*, *supra* note 32, at 731 (emphasis added).

94. ELLERY C. STOWELL, INTERNATIONAL LAW: A RESTATEMENT OF PRINCIPLES IN CONFORMITY WITH ACTUAL PRACTICE 89-91 (1931).

95. *Prosecutor v. Dusko Tadic*, JUDGEMENT (1999), INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, ¶ 120, available at <http://www.un.org/icty/tadic/appeal/judgement/index.htm> (last visited Oct. 16, 2003) (emphasis added). “This kind of State control over a military group and the fact that the State is held responsible for acts performed by a group independently of any State instructions, or even contrary to instructions, to some extent equates the group with State organs proper.” *Id.* ¶ 121. “Under the rules of State responsibility, as restated in Article 10 of the Draft on State Responsibility as provisionally adopted by the International Law Commission, a State . . . incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities.” *Id.* ¶ 121.

State “directed or enforced the perpetration of the acts” in question.⁹⁶ In other words, it would “have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.”⁹⁷ In *Prosecutor v. Dusko Tadic*, the International Criminal Tribunal for the Former Yugoslavia found that if an organized group “is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, *whether or not each of them was specifically imposed, requested or directed by the State.*”⁹⁸ The Tribunal ruled that “international law renders any State responsible for acts in breach of international law performed . . . by individuals who make up organised groups subject to the State’s control . . . regardless of whether or not the State has issued *specific instructions* to those individuals.”⁹⁹ “The ‘effective control’ test propounded by the International Court of Justice as an exclusive and all-embracing test is at variance with international judicial and State practice: such practice has envisaged State responsibility in circumstances where a lower degree of control than that demanded by the *Nicaragua* test was exercised,” explained the International Criminal Tribunal.¹⁰⁰ “In cases dealing with members of *military or paramilitary groups*,” the Tribunal elaborated, “courts have clearly departed from the notion of ‘effective control’ set out by the International Court of Justice (i.e., control that extends to the issuance of specific instructions concerning the various activities of the individuals in question).”¹⁰¹ Indubitably then, as the Criminal Tribunal held:

Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international

96. *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 64, available at <http://www.icj-cij.org/iccjwww/lcases/iNus/inusframe.htm> (last visited Oct. 16, 2003) [hereinafter “the *Nicaragua* case”]. With its ruling, the International Criminal Tribunal held that the International Court of Justice’s “effective control” test articulated in the *Nicaragua* case was not “persuasive.” *Prosecutor v. Dusko Tadic*, *supra* note 95, ¶ 115.

97. The *Nicaragua* case, *supra* note 96, at 65.

98. *Prosecutor v. Dusko Tadic*, *supra* note 95, ¶ 122 (emphasis supplied).

99. *Id.* ¶ 123 (emphasis supplied).

100. *Id.* ¶ 124.

101. *Id.* ¶ 125 (emphasis supplied). “In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.” *Id.* ¶ 131. “[C]ontrol by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation.” *Id.* ¶ 137 (emphasis supplied).

humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.¹⁰²

Thus, since the International Court of Justice's "effective control" test from the *Nicaragua* decision

does not adequately address new forms of terrorism, emerging from largely independent private actors . . . [a] viable and reasonable alternative to [this test] is, in particular, the "overall control test" adopted by the [International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Dusko Tadic*], which relieves the defending state from the (unrealistic) obligation to provide evidence about specific instructions or directions of the host state relating to the terrorist act, triggering the right to self-defence.¹⁰³

"[W]hat is required for criminal responsibility to arise is some measure of control by a Party to the conflict over the perpetrators."¹⁰⁴ Besides, "[a]ny suggestion that there are any acts of unlawful force between states that international law forbids a state from defending against by proportionate force,

102. *Id.* ¶ 137 (emphasis supplied). It bears mention that the International Court of Justice ("ICJ") in *Nicaragua* did not believe that an "armed attack" could include "assistance to rebels in the form of the provision of weapons or logistical or other support . . ." notwithstanding the fact that "[s]uch assistance may be regarded as a threat to or use of force, or amount to intervention in the internal or external affairs of other States." The *Nicaragua* case, *supra* note 96, at 104; *see id.* at 119. That having been said, "[t]aking into consideration modern practice of international terrorism . . . the statement of the ICJ is much too sweeping," wrote Albrecht Randelzhofer, ". . . and needs further differentiation. Otherwise, it would lead to the result that States were not sufficiently protected by Art. 51 of the Charter, against force committed by other States in an individual manner, thus eroding the very purpose of this rule. If, for example, a State knows that a private group is willing to commit acts of military force against another State and [it] places its territory at the disposal of this group to train its members and to offer them a safe haven after they have committed these acts and additionally provides them with weapons and logistical support, it is hardly to be understood why this should be a lesser participation in the acts of the group than the mere sending of it. It is not adequate to exclude generally certain types of supporting terrorism from being qualified as 'substantial involvement' and consequently 'armed attack'." Randelzhofer, *Article 51, supra* note 38, at 801. In other words, as Judge Sir Robert Jennings observed in his dissenting opinion in the *Nicaragua* case, "to say that the provision of arms, coupled with 'logistical or other support' is not armed attack is going much too far." Dissenting Opinion of Judge Sir Robert Jennings, the *Nicaragua* case, *supra* note 96, at 528, 543 available at <http://www.icj-cij.org/icjwww/ICases/iNus/inusframe.htm> (last visited Oct. 16, 2003) (copy on file with *The Transnational Lawyer*). Furthermore, Judge Stephen Schwebel in his dissent in the *Nicaragua* case rejects the "construction of the United Nations Charter which would read Article 51 as if it were worded . . . 'if, and only if, an armed attack occurs . . .'" Dissenting Opinion of Judge Schwebel, the *Nicaragua* case, *supra* note 96, at 259, 347 (last visited Oct. 16, 2003) (copy on file with *The Transnational Lawyer*).

103. Stahn, *supra* note 90, at 41.

104. *Prosecutor v. Dusko Tadic, supra* note 95, ¶ 96.

by the means and to the extent reasonably necessary to protect itself, degrades the concept of international law, and diminishes the inducement for a responsible political leader to take its constraints seriously into account in conflict situations in the actual planning and conduct of that state's affairs."¹⁰⁵

Moreover, deduced Carsten Stahn, "there may be cases in which [an accumulation] of several acts of support to a terrorist group causes much greater harm to the defending state than the mere sending of it. To exclude these cases from the scope of application of Art. 51 would deprive states of their protection against indirect aggression."¹⁰⁶

Further, it should be pointed out that while Article 51 does not specifically indicate the way in which "an armed attack occurs,"¹⁰⁷ it could not be logically contended, for example, that using airplanes loaded with fuel to crash into buildings on September 11th was anything but "an armed attack" under Article 51; at the very least, their damage capability was far greater than many military weapons purposely calculated to bring about vast loss of life and enormous property devastation. Certainly the consequences of the suicide attacks were tantamount to those of a military operation. Moreover, even where an attack takes place against citizens of the target State who were at the time located abroad, Article 51 would still be applicable.¹⁰⁸ Likewise, the *scale* of the attack, whether large or small, is irrelevant to it being considered "an armed attack."¹⁰⁹ "[T]he plain language of Article 51 . . . in no way limits itself to especially large, direct or important armed attacks," explained John L. Hargrove.¹¹⁰ Therefore, "[i]f 'armed attack' means illegal armed attack it means, on the other hand, any

105. John Lawrence Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT'L L. 135, 139 (1987).

106. Stahn, *supra* note 90, at 49 (emphasis supplied).

107. See Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. OF INT'L L. 25, 42 (1987).

108. See, e.g., Stahn, *supra* note 90, at 33; see also Antonio Cassese, *The International Community's "Legal" Response to Terrorism*, 38 INT'L & COMP. L. Q., 589, 596 (1989); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 197 (2d ed. 1994) [hereinafter DINSTEIN, WAR]. "[A]n armed attack can be perpetrated against a State's nationals abroad. The act would be tantamount to an armed attack against the State itself, if the nationals are attacked deliberately because of the specific bound of nationality If so, the attack against those nationals constitutes an armed attack . . . under Article 51." Yoram Dinstein, *Comment*, Conference "Terrorism as a Challenge for National and International Law," Max Planck Institute for Comparative Public Law and International Law 4 (Jan. 2003), available at <http://edoc.mpiil.de/conference-on-terrorism/presentation.cfm> (last visited Oct. 14, 2003) [hereinafter Dinstein, *Comment*].

109. See, e.g., DINSTEIN, WAR, *supra* note 108, at 192; Dinstein, *Comment*, *supra* note 108, at 4. In spite of the International Court of Justice's finding in the *Nicaragua* case that it was "necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms" [the *Nicaragua* case, *supra* note 96, at 101.], "in reality, there is no cause to remove small-scale armed attacks from the spectrum of armed attacks." DINSTEIN, WAR, *supra* note 108, at 192.

110. Hargrove, *supra* note 105, at 139. "The Charter does not specify the means by which an armed attack must occur, nor does it set a minimum level of attack which must be surpassed. Terrorist acts carried out by armed bands with the support or encouragement of a foreign state is (sic), in a literal sense, an armed attack." Baker, *supra* note 107, at 42. *But see id.*

illegal armed attack, even a small border incident,” wrote Josef L. Kunz.¹¹¹ Certainly, then, “[s]maller terrorist attacks which form part of a consistent pattern of violent terrorist action may constitute an armed attack. . . .”¹¹²

In decisive fashion, previously mentioned United Nations Security Council Resolution 1368, adopted on September 12, 2001, specifically recognized “the *inherent right of individual or collective self-defence* in accordance with the Charter” in light of “the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania.” The Security Council in this resolution also regarded “such acts, like any act of international terrorism, as a threat to international peace and security, [and stressed] that those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable.”¹¹³ The Security Council also determined “to combat by all means threats to international peace and security caused by terrorist acts”¹¹⁴ Some two weeks later, the United Nations Security Council, in Resolution 1373 of September 28, 2001, reaffirmed “the *inherent right of individual or collective self-defence* as recognized by the Charter of the United Nations” in view of “the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, . . . [that] like any act of international terrorism, constitute a threat to international peace and security” The resolution further reaffirmed “the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts” as well as “the principle established . . . that every State has the duty to refrain from organizing, *instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts*”¹¹⁵

Consequently, while it is incontrovertible that the activities of terrorists against a target State and its citizens would in and of themselves constitute “an armed attack,” within even the most restrictive reading of United Nations Charter Article 51, the actions, or inactions, of States that aid and abet terrorists may also constitute “an armed attack” within the narrow meaning of the article. Thus, concluded J. E. S. Fawcett:

[W]here incursion of armed bands is a precursor to an armed attack, or itself constitutes an attack, and the authorities in the territory, from which

111. Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM.J.INT’L L. 872, 878 (1947).

112. Stahn, *supra* note 90, at 38; cf. Baker, *supra* note 107, at 43. *But see* Cassese, *supra* note 108, at 596; Randelzhofer, *Article 51*, *supra* note 38, at 802; James P. Rowles, *Military Responses to Terrorism: Substantive and Procedural Constraints in International Law*, 81 PROC. AM. SOC’Y INT’L L. 307, 314 (1987).

113. S.C. Res. 1368, *supra* note 74 (emphasis added).

114. *Id.*

115. S.C. Res. 1373, *supra* note 77 (emphasis added).

the armed bands came, are either unable or unwilling to control and restrain them then armed intervention, having as its sole object the removal or destruction of their bases, would—it is believed—be *justifiable under Article 51*.¹¹⁶

Furthermore, as Albrecht Randelzhofer aptly pointed out, even “if a State gives shelter to terrorists *after* they have committed an act of terrorism within another State,” the “terrorist acts . . . [amounting] to an armed attack . . . are attributable to [it]. . . .”¹¹⁷ Hence, although a State may not have been used as a staging base for the terrorists, but rather, that State gave sanctuary to terrorists who had perpetrated an attack, “the defending state would also be entitled to take military measures against [it]. . . . Why should a terrorist actor, who simply changes jurisdiction, benefit from the ‘shield of sovereignty’ of another host state which fails to fulfil its duty to suppress terrorist activities emanating from its soil?”¹¹⁸ As Albrecht Randelzhofer correctly concluded, even if a State were “incapable of impeding acts of terrorism committed by making use of its territory . . . the State victim of the acts is not precluded from reacting by military means against the terrorists within the territory of the other State. Otherwise, a so-called failed State would turn out to be a safe haven for terrorists, certainly not what [Articles] 2(4) and 51 of the Charter are aiming at.”¹¹⁹

VII. THE USE OF ARMED FORCE AGAINST TERRORISTS AND STATES THAT
AID AND ABET THEM AND SELF-DEFENSE IN INTERNATIONAL LAW:
ANTICIPATORY SELF-DEFENSE AND ITS APPLICATION
TO TERRORISM

Under customary international law, the right of self-defense has always been “anticipatory” and could be exercised against dangers and attacks that are imminent as well as actual.¹²⁰ As Ellery C. Stowell explained, “[a] state may . . . defend itself, *by preventive means* if . . . necessary, against attack by another state, threat of attack, *or preparations or other conduct from which an intention to attack may reasonably be apprehended*.”¹²¹ Consequently, wrote C.

116. Fawcett, *supra* note 39, at 363 (emphasis added); see also Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 5, 173 (1957-II); Edward Miller, *Self-Defence, International Law and the Six-Day War*, 20 ISRAEL L.R. 49, 57-58 (1985); Barry Feinstein, *Self-Defence and Israel in International Law: A Reappraisal*, 11 ISRAEL L.R. 516, 539-40 (1976); Barry A. Feinstein, *The Legality of the Use of Armed Force by Israel in Lebanon—June 1982*, 20 ISRAEL L. REV. 362 (1985), reprinted in TERRORISM 93, 117 (Conor Gearty ed., 1996) (a title in the series THE INTERNATIONAL LIBRARY OF CRIMINOLOGY, CRIMINAL JUSTICE AND PENOLOGY (Gerald Mars & David Nelken eds.)).

117. Randelzhofer, *Article 51*, *supra* note 38, at 802 (emphasis added).

118. Stahn, *supra* note 90, at 44.

119. Randelzhofer, *Article 51*, *supra* note 38, at 802.

120. See D. W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 188-89 (1958).

121. STOWELL, *supra* note 94, at 113-14 (emphasis added).

H. M. Waldock, the inherent right of self-defense may be exercised against an imminent threat of armed attack.¹²²

The language of Article 51 of the United Nations Charter itself preserves “the inherent right of . . . self-defence:” “*Nothing* in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security”¹²³ To adopt an unrealistic approach to Article 51 of the Charter, an approach that does not comport with reality, would be irreconcilable with the reasonable interests of States, since circumstances “may arise prior to an actual attack and call for self-defence immediately if it is to be of any avail at all,” explained Derek W. Bowett.¹²⁴ Besides, “[i]t is hardly likely that those who drafted Article 51,” elucidated D. W. Greig, “would have been prepared to disregard the lessons of recent history and to insist that a state should wait for the aggressor’s blow to fall before taking positive measures for its own protection. There is no need to read Article 51 in such a way, and it would be totally unrealistic to do so.”¹²⁵ Thus, Article 51 did not restrict the traditional right of a State to respond in self-defense in a manner that would exclude the right to take action against an imminent danger that had not yet taken the form of an actual “armed attack.”¹²⁶ Therefore, as Robert Jennings and Arthur Watts pointed out, if an appeal by the target State to the host State to remove a danger, presented by armed groups being formed on the territory of the host State for the purpose of a raid into the target State, were “fruitless or not possible, or if there is danger in delay, a case of necessity arises,” which permits the threatened State to enter the host State and eradicate the “intending raiders.”¹²⁷

122. See C. H. M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 500-01 (1952-II).

123. U.N. CHARTER art. 51, available at www.UN.org/aboutun/charter/ (last visited March, 24, 2004).

124. BOWETT, *supra* note 120, at 191.

125. D. W. GREIG, *INTERNATIONAL LAW* 682 (1970).

126. BOWETT, *supra* note 120, at 191.

127. OPPENHEIM’S *INTERNATIONAL LAW*, *supra* note 41, at 421; see OPPENHEIM, I A TREATISE, *supra* note 41, at 298. A State is definitely allowed to employ measures of force in anticipatory self-defense if, as Rosalyn Higgins pointed out, it “has been subjected, over a period of time, to border raids by nationals of another state, which are openly supported by the government of that state; to threats of a future, and possibly imminent, large-scale attack, and to the harassments of alleged belligerent rights.” ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 201(1963); see also Yehuda Blum, *State Response to Acts of Terrorism*, 19 JAHRBUCH FÜR INTERNATIONALES RECHT 223, 234 (1976). By analogy, the international law of neutrality may be of help to analyze the obligations of a State that has failed to stop the perpetration of injurious acts emanating from its territory against other States. See Hersch Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, 22 AM. J. INT’L L. 105, 127 (1928); Brownlie, *Activities of Armed Bands*, *supra* note 32, at 723; GARCIA-MORA, *supra* note 44, at 50. “[I]t is well established in customary international law,” wrote John N. Moore, “that a belligerent Power may take action to end serious violations of neutral territory by an opposing belligerent when the neutral Power is unable to prevent belligerent use of its territory and when the action is necessary and proportional to lawful defensive objectives.” John Norton Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, in III THE VIETNAM WAR AND INTERNATIONAL LAW: THE WIDENING CONTEXT 58, 71 (Richard Falk ed., 1972) [hereinafter Falk, THE WIDENING CONTEXT]; see also John C. Bender, *Self-Defense*

The principle is simple, according to Carsten Stahn. “The defending state is . . . under a duty to resort initially to diplomatic means in requesting the government in whose territory the terrorist acts have been planned or trained to take suppressive measures. If it becomes evident that the host state is unable or unwilling to act, the injured may, as an *ultima ratio* measure, take military action to stop the persisting threat.”¹²⁸

The “necessity,” which would thus comprise a “necessity for the purpose of self-defense,” has been characterized as “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”¹²⁹

Accordingly, if a State does not, or cannot control the inhabitants in the territory over which it is sovereign, or police its borders, and if the target State is faced with an imminent danger as a direct consequence of this unwillingness or incapacity, the target State is justified in engaging in its own efforts to quell the threatened hostile actions from within the abetting State¹³⁰ when peaceful attempts to eliminate the danger to the target State are to no avail. In circumstances such as these, a “case of necessity” will consequently have arisen leaving the target State no choice but to exercise its legitimate right of self-defense by entering the abetting State to subdue the terrorists and destroy the terrorist bases and apparatus poised against the target State.¹³¹ A “strong probability of armed attack,” that is, “an imminent threat of armed attack,” is therefore sufficient to trigger a State’s right to self-defense.¹³² Thus, in addition to the legitimate exercise of self-defense directed against an actual “armed attack” of terrorists, anticipatory action, aimed at preventing serious injury, may also be taken against the abetting State. In any case, according to Peter Rowe, “[i]t may be that . . . the only realistic options available to a state to deal with [the] ‘new breed of apocalyptic terrorist’” are approaches that “involve a state using military force to bring terrorists ‘to justice.’”¹³³

and Cambodia: A Critical Appraisal, in Falk, THE WIDENING CONTEXT, *supra*, at 138, 146. As Myres S. McDougal and Florentino P. Feliciano explained, “[w]here a non-participant is unable or unwilling to prevent one belligerent from carrying on hostile activities within neutral territory, or from utilizing such territory as a ‘base of operations,’ the opposing belligerent, seriously disadvantaged by neutral failure or weakness, becomes authorized to enter neutral territory and there to take the necessary measures to counter and stop the hostile activities.” MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 568 (1961); *see, e.g.*, Note, *International Law and Military Operations against Insurgents in Neutral Territory*, 68 COLUM. L.R. 1127, 1129 (1968).

128. Stahn, *supra* note 90, at 42; *see* Roberto Ago, *Addendum to the eighth report on State responsibility*, A/CN.4/318/ADD.5-7, II(1) Y.B. INT’L L. COMM’N 1980, at 13, 69 (1982) [hereinafter Ago, *eighth report*].

129. This criterion appears in former U.S. Secretary of State Daniel Webster’s August 6, 1842 communiqué to British official representative Lord Ashburton regarding the *Caroline* incident, *ascited in* JOHN B. MOORE, II A DIGEST OF INTERNATIONAL LAW 412 (1906).

130. *Cf.* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 220 (1977); STONE, *supra* note 51, at 79.

131. *See* OPPENHEIM’S INTERNATIONAL LAW, *supra* note 41, at 42; OPPENHEIM, I A TREATISE, at 298.

132. Waldock, *supra* note 122, at 500; BOWETT, *supra* note 120, at 189.

133. Peter Rowe, *Responses to Terror: The New ‘War’*, 3 MELB. J INT’L LAW 321 (2002), available at [www.law.unimelb.edu.au/mjil/issues/archive/2002\(2\)/04Rowe.pdf](http://www.law.unimelb.edu.au/mjil/issues/archive/2002(2)/04Rowe.pdf) (last visited Oct. 17, 2003).

Furthermore, and even more far-reaching in specific reference to terrorism as such, according to Rainer Grote, is that “the right to intervention against terrorist groups does not only apply in situations where the threat is imminent, but also in those cases where the danger is more remote but nevertheless real. This wide interpretation of the time limits for intervention corresponds to the specific nature of terrorism, which does not manifest itself in sustained operations, but rather in intermittent acts of violence the times and places of which are difficult, if not impossible to predict. In practice, this allows states to strike at terrorist groups independent of any imminent threat in the narrow sense . . . where a terrorist group has already demonstrated by past acts its capacity to wreak havoc upon foreign nations. . . .”¹³⁴

Yet, there still remains the important issue as to how to determine whether or not a risk of considerable consequences indeed exists, such as will trigger the right to exercise armed force in self-defense.¹³⁵ Certainly the right of self-defense can always be abused, but this is just to state the obvious. Self-defense can even be abused by an individual claiming that a personal attack against him had occurred. All legal doctrines can be abused, but that does not make them all suspect. The potential for abuse is reduced though if the events are carefully scrutinized, evaluated, and analyzed in a reasonable and evenhanded manner.¹³⁶ “It seems perfectly evident,” according to Roberto Ago, “that a State which considers itself the victim of an armed attack or, in more general terms, of conduct entitling it to react in self-defence against the author of that conduct, should not have to seek anybody’s permission beforehand to do so; to maintain the opposite would be to contradict the very essence of the notion of self-defence.”¹³⁷ Thus, as Robert Jennings and Arthur Watts point out, “[i]n practice it is for every state to judge for itself, in the first instance, whether a case of necessity in self-defence has arisen.”¹³⁸

134. Rainer Grote, *Between Crime Prevention and the Laws of War: Are the Traditional Categories of International Law adequate for Assessing the Use of Force against International Terrorism?*, at 31-32, Conference “Terrorism as a Challenge for National and International Law,” Max Planck Institute for Comparative Public Law and International Law (Jan. 2003), available at <http://edoc.mpil.de/conference-on-terrorism/presentation.cfm> (last visited Oct. 14, 2003).

135. See, e.g., *id.* at 32. Rainer Grote believes that it is incumbent upon the State that acts to demonstrate significant verification of the terrorist threat and its immediacy. See *id.*

136. Cf. DINSTEIN, *WAR*, *supra* note 108, at 191.

137. Ago, *eighth report*, *supra* note 128, at 70.

138. OPPENHEIM’S INTERNATIONAL LAW, *supra* note 41, at 422; see OPPENHEIM, 1 A TREATISE, *supra* note 41, at 299.

VIII. THE USE OF ARMED FORCE AGAINST TERRORISTS AND STATES THAT AID AND ABET THEM AND SELF-DEFENSE IN INTERNATIONAL LAW: THE RIGHTS OF STATES THAT AID AND ABET TERRORISTS VIS-À-VIS THE RIGHTS OF THE TARGET STATE

When a State does not perform legal obligations incumbent upon it vis-à-vis another State, it cannot justifiably claim that its own rights, including sovereignty, should be respected. According to Judge Max Huber, the consequent duty of the right of territorial sovereignty is “the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war.”¹³⁹ Robert Jennings and Arthur Watts similarly expressed the principle that “[t]he duty of every state itself to abstain, and to prevent its agents and, in certain cases, nationals, from committing any violation of another state’s independence or territorial or personal authority is correlative to the corresponding right possessed by other states.”¹⁴⁰ States cannot set themselves above international law, but rather, they are subject to it, and clearly the sovereignty of a State is limited. A State that will not, or cannot, act in accordance with its obligations pursuant to international law cannot reasonably anticipate that it will be able to retain the right of sovereign decision-making identified as independence.¹⁴¹ Thus, a State may not simultaneously allege that it is unable “to perform its undoubted legal obligations,” and that it has a “right to be immune from responsibility in respect of such defaults,” elucidated Yehuda Z. Blum.¹⁴²

Territorial integrity is not an absolute.¹⁴³ It must give way to the threatened State’s stronger right of self-defense, since it is considered an abuse of rights for a State to tolerate activities within it that are detrimental to another State.¹⁴⁴ As Derek W. Bowett astutely pointed out, “a right of absolute inviolability is not conferred by [Article 2(4)] and the right of territorial integrity remains, under the Charter, subject to the rights of other states to exercise self-defence within the conditions prescribed by general international law and the Charter.”¹⁴⁵ Accordingly, “the unspoken premise of the 11 September attacks,” wrote Carsten Stahn, “is that terrorist groups shall not receive an ‘unwitting shield’ from the

139. Judge Max Huber, *Island of Palmas Case* (U.S. v. Neth.) (1928), II REPORTS OF INTERNATIONAL ARBITRAL AWARDS 829, 839 (1949).

140. OPPENHEIM’S INTERNATIONAL LAW, *supra* note 41, at 385; *see* OPPENHEIM, I A TREATISE, *supra* note 41, at 288.

141. *See* THOMAS AND THOMAS, *supra* note 36, at 77. A State that breaches its international law obligations is likely to face intervention on the part of the State against which it has committed the offense or on the part of other States that view this unlawful behavior as an assault on the underlying principles needed for the proper functioning of international society. *See id.* at 78.

142. Yehuda Blum, *The Beirut Raid and the International Double Standard: A Reply to Professor Richard A. Falk*, 64 AM. J. INT’L L. 73, 85 (1970).

143. *See, e.g.*, Stahn, *supra* note 90, at 42.

144. *See* GARCIA-MORA, *supra* note 44, at 27; Grote, *supra* note 134, at 31.

145. BOWETT, *supra* note 120, at 34.

territorial integrity of a state which is unable or unwilling to put an end to terrorist activity giving rise to an armed attack.” Stahn continued and explained that “[t]he normative corollary of this hypothesis is the emergence of a principle, which posits that the right to territorial integrity must, in some instances, yield to the exercise of another state’s right to protect itself and its citizens under the right to self-defence.”¹⁴⁶

Thus, use of force, which ordinarily may be illegal is, under such circumstances, in accord with international law.¹⁴⁷ “For it is the abuse of the rights of the territorial sovereign, in allowing his territory to harbour a danger to the security of a . . . state,” explained Bowett, “that justifies the . . . state in resorting to measures *prima facie* unlawful.”¹⁴⁸ A State, which does not prevent the use of its territory for terrorist activities directed against and injurious to another State, cannot justifiably complain if the target State uses force in order to quell the danger that threatens it.¹⁴⁹ Actions taken by the target State, which are aimed at curbing hostile activities of terrorist groups originating in and emanating from the abetting State, may be correctly described as actions not against the territorial integrity of the abetting State, but rather as actions against terrorists operating in the abetting State.¹⁵⁰

IX. THE USE OF ARMED FORCE AGAINST TERRORISTS AND STATES THAT
AID AND ABET THEM AND SELF-DEFENSE IN INTERNATIONAL
LAW: THE PRINCIPLE OF PROPORTIONALITY AND ITS
APPLICATION TO TERRORISM

In addition to the conditions established regarding the “necessity for the purpose of self-defense,” the exercise of a State’s inherent right of self-defense must involve “nothing unreasonable or excessive; since the act justified by the necessity of self-defense must be limited by that necessity, and kept clearly within it.”¹⁵¹ The action taken in self-defense must be proportionate, both in scale and disposition, to the previous illegal act or imminent attack that required such measures.¹⁵² Action engaged in self-defense must be restricted to the aim of thwarting or avoiding the injury, and must be reasonably proportionate to that necessity in order to achieve this outcome.¹⁵³

146. Stahn, *supra* note 90, at 33.

147. See GARCIA-MORA, *supra* note 44, at 27.

148. BOWETT, *supra* note 120, at 40.

149. See CLYDE EAGLETON, INTERNATIONAL GOVERNMENT 82 (3rd ed. 1957).

150. See Roy Curtis, *The Law of Hostile Military Expeditions as Applied by the United States*, 8 AM. J. INT’L L. 224, 236 (1914).

151. See, e.g., IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, *supra* note 93, at 261.

152. See HIGGINS, *supra* note 127, at 201.

153. See Waldock, *supra* note 122, at 464.

Yet, according to Roberto Ago,

It would be a mistake to think that there must be proportionality between the conduct constituting the armed attack and the *opposing conduct*. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. What matters in this respect is the result to be achieved by the “defensive” action, and not the forms, substance and strength of the action itself. . . . [A] State which is the victim of an attack cannot really be expected to adopt measures that in no way exceed the limits of what might just suffice to prevent the attack from succeeding and bring it to an end. If, for example, a State suffers a series of successive and different acts of armed attack from another State, the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks.¹⁵⁴

Indeed, and especially considering the circumstances of constant terrorist attacks, “it is notoriously difficult to maintain an adequate defensive system which relies upon meeting attacks incident by incident,” explained Derek W. Bowett. “Even more important, a series of small-scale defensive measures will not have the same deterrent capacity as a large-scale strike and may even be more costly to the defending state.”¹⁵⁵

Moreover, Oscar Schachter concluded, “it does not seem unreasonable, as a rule, to allow a state to retaliate beyond the immediate area of attack, when that state has sufficient reason to expect a continuation of attacks . . . from the same source.”¹⁵⁶ Thus, “self-defence . . . may carry the combat to the source of the aggression, whether direct or indirect,” opined Judge Stephen Schwebel in the *Nicaragua* case.¹⁵⁷ As a consequence, if a State is constantly threatened and harassed by terrorists, it may legitimately seek out and destroy the center of organization of the attacks, even if the action taken in self-defense is of a much

154. Ago, *eighth report*, *supra* note 129, at 69-70 (emphasis added).

155. Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT’L L. 1, 9 (1972).

When a particular terrorist attack is merely one in a long series, it would only be reasonable to consider all the terrorist attacks (or “needle pricks”) as one. The whole range and extent of terrorist activity perpetrated against the target State ought to be taken into account when evaluating the State’s reactions to the acts of terrorism, since the target State may be forced into circumstances of an even bigger risk by the extensive string of terrorist actions than by a single conventional attack. See Blum, *State Response to Acts of Terrorism*, *supra* note 127, at 235; see also Laurence M. Gross, Comment, *The Legal Implications of Israel’s 1982 Invasion into Lebanon*, 13 CAL. W. INT’L L.J. 458, 486-87 (1983).

156. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1638 (1984). Obviously, then, to use armed force against the State from which the terrorists are emanating if, say, the host State’s forces link up with the terrorists and/or protect them or the State hosting the terrorists impedes the target State’s defensive actions, may be acceptable. See Stahn, *supra* note 90, at 48.

157. Dissenting Opinion of Judge Schwebel, *supra* note 102, at 371.

greater scale than each individual harassment, or is greater than the entirety of the infringements; the desired goal of the self-defense action is to avert future attacks or to reduce their effectiveness and frequency.¹⁵⁸ In the end, it seems fair and reasonable to conclude that States “exposed to constant violence may have legitimate reasons to respond differently to acts of terrorism than states which are not under permanent threat.”¹⁵⁹

After all, maintained Hans Kelsen, “severe restriction of measures taken in self-defense may prove unreasonable in that it may defeat the essential purpose for which measures of self-defense are permitted in the first place.”¹⁶⁰ Any action limited to warding off peril may lose its objective if conditions were to allow the recurrence of that danger; “[t]he argument is not without merit,” wrote Robert W. Tucker, that “given the circumstances attending the exercise of self-defense by nations, it is only reasonable that the requirement of proportionality should be interpreted as permitting the *removal of the danger* which initially justified the resort to measures of self-defense.”¹⁶¹ There is, therefore, “a strong case for measures taken to remove the source of the threat . . . to the security of the state generally,” Tucker explained, “provided that these measures do not result in disproportionate death and destruction. Given the persistently avowed purposes of the [terrorists], and the activities undertaken in pursuit of those purposes, [their] destruction is a legitimate end in itself.”¹⁶² While self-defense is basically designed to thwart an illegitimate armed attack, it does allow a State to engage beyond this illegal attack in a legitimate war until victory and the aggressor’s total defeat.¹⁶³ Ultimately, “the purpose of war,” explained Lassa Oppenheim, “is . . . the overpowering and utter defeat of the opponent,” and therefore, “no moral or legal duty exists for a belligerent to stop the war when his opponent is ready to concede the object for which war was made.”¹⁶⁴

158. See GREIG, *supra* note 125, at 678.

159. Stahn, *supra* note 90, at 51.

160. KELSEN, *supra* note 40, at 83.

161. See Robert W. Tucker, *A Reply To Critics: Morality And The War*, N.Y. TIMES, July 15, 1982, at A15 (emphasis added).

162. ROBERT W. TUCKER, *THE JUST WAR: A STUDY IN CONTEMPORARY AMERICAN DOCTRINE* 130 (1960).

163. See Kunz, *supra* note 111, at 876-77.

164. L. OPPENHEIM, *II INTERNATIONAL LAW: A TREATISE* 225 (H. Lauterpacht ed., 7th ed. 1952). After all, according to A. V. Levontin, war “is unlimited in object in the sense that every war may be regarded, potentially, as undertaken with a view to the total subjugation or *debellatio* of the enemy.” A. V. LEVONTIN, *THE MYTH OF INTERNATIONAL SECURITY: A JURIDICAL AND CRITICAL ANALYSIS* 63-64 (1957) (emphasis supplied).

X. FINAL CONCLUSIONS

While September 11th and its aftermath have reinforced for everyone the reality of terrorism as a tragic part of daily life, a realization of the clear and present danger to the security of today's international environment,¹⁶⁵ the war on international terror is considered by far the most critical test confronting Western civilization. Any legal analysis regarding the use of armed force against terrorists and States that aid and abet them must take into consideration an abetting State's official sanctioning of, or acquiescence in, the freedom of action of terrorists operating from within the State, against the target State. By not preventing terrorist attacks originating in, and emanating from, the territory of an abetting State against the target State, the abetting State violates its international legal obligation to curb the execution of such injurious acts against other sovereign States. Even if an abetting State were incapable of preventing the terrorists from using its territory to carry out attacks on the target State, or as sanctuary after the attacks, it is not relieved of this international legal obligation. The failure of an abetting State to prevent the training and organization of terrorists, or the providing of a safe haven or shelter for them on its territory, and the perpetration of terrorist attacks against the target State by terrorists using the abetting State's territory to carry them out, raises a presumption of complicity with the terrorists. Consequently, not only do such terrorist activities constitute an "armed attack" against the target State, but the complicity of an abetting State in these actions may also be considered an "armed attack" under Article 51 of the United Nations Charter. Both trigger the target State's legitimate, inherent right to employ force in self-defense. Furthermore, in order to forestall serious injury to the target State and its citizens, the target State is fully justified in engaging in anticipatory measures of self-defense in an abetting State. Actions thus taken in self-defense by the target State may be considered the legitimate direct response to the unwillingness or inability of the abetting State to fulfill its international legal obligations to halt terrorist attacks, or the imminent threat of terrorist attacks, which originate within its borders, and are directed against the target State.

165. Even prior to September 11, 2001, the "clear and present danger" of international terrorism was obvious, as President William J. Clinton announced to the United Nations General Assembly in 1998: "[T]errorism . . . is a clear and present danger to tolerant and open societies and innocent people everywhere. No one . . . [is] immune." Clinton, *supra* note 6.

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