

4-1-2003

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Recommended Citation

Travalio, Greg and Altenburg, John (2003) "Terrorism, State Responsibility, and the Use of Military Force," *Chicago Journal of International Law*: Vol. 4: No. 1, Article 9.

Available at: <https://chicagounbound.uchicago.edu/cjil/vol4/iss1/9>

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Terrorism, State Responsibility, and the Use of Military Force

Greg Travalio* and John Altenburg**

I. INTRODUCTION

We have been told on countless occasions that we are at war against international terrorism. Casualties, both civilian and military, mount in this war—the most noteworthy terrorist attack produced more casualties than the attack on Pearl Harbor. Our military forces are engaged in a multitude of ways, from direct combat overseas, to advising friendly governments and their militaries, to assisting domestic law enforcement.¹ We are advised that this war, like the Cold War before it, will be a long and difficult struggle.

But if we are at war, it is a very different kind of war. Our enemies are not the soldiers of a state. In fact, following the military defeat of the Taliban and al Qaeda in Afghanistan, there is no state in the world that overtly claims to be anything other than our ally in this struggle. Al Qaeda's goals are not to conquer territory, control resources, nor even further traditional political or ideological purposes. They seek weapons of mass destruction—not as deterrents against the actions of other states—but for use at times and in places calculated to cause maximum destruction and horror. The enemy “soldiers” wear no uniforms, have no fixed bases, and are themselves essentially stateless.²

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¹ The Posse Comitatus Act, 18 USC § 1385 (2002), limits the extent to which the military can directly engage in domestic law enforcement. However, there are a variety of ways that the military can indirectly assist law enforcement through the provision of equipment and advice and remain outside the strictures of the Posse Comitatus Act. Further, other statutes specifically authorize military aid to law enforcement in certain circumstances. See, for example, 10 USC § 124(a) (2002) (surveillance of aerial and maritime transit of illegal drugs) and 18 USC § 831(d) (2002) (assistance to law enforcement in crimes involving transactions of nuclear materials).

² Although Osama bin Laden was born a Saudi citizen, over the past twenty years he has lived in Saudi Arabia, Sudan, Somalia, Pakistan, and Afghanistan. In 1994, while in exile in the

Yet those with whom we are at war must operate from somewhere. They must store weapons somewhere; they must train and house their fighters somewhere; they must develop their plans somewhere; and their leaders must sleep somewhere. These activities must occur on the territory of *some* state. Moreover, they must be supported from somewhere. Their weapons must come from somewhere, their funds must come from somewhere, and their supplies must come from somewhere.

How can states counter this new threat? If a country is to attack nonstate actors, what is the appropriate predicate to conduct that attack on the territory of another state? Is the current state of international law adequately addressing the relatively recent phenomenon of nonstate terrorist organizations that have many of the indicia of statehood? What are the legal theories that support possible state responses to varying degrees of terrorism? Do states have responsibilities and duties to counter terrorist acts, and do other states have a legal basis upon which they can effectively act if these duties are breached? This Article addresses these questions and submits that, in fact, current international law provides a basis for state actions that respond effectively to terrorist acts. However, this Article argues that the precepts of state responsibility and the commonly accepted 19th century definition of anticipatory self-defense must be adapted to recognize the technological realities of the 21st century.

II. TWO APPROACHES TO TERRORISM

A state may use two possible legal theories in responding to terrorist acts: (1) a law enforcement approach or (2) a use of armed force (conflict management) approach. Until recently, the law enforcement approach has predominated.³ This approach considers terrorist events as purely criminal acts to be addressed by various civil government functions—essentially the domestic criminal justice system and its components: police, investigators, prosecutors, defense attorneys, judges, juries, appellate courts, and a corrections system. If successful, actors are identified, prosecuted, convicted, and punished. As there is no agreed upon definition of terrorism,⁴ the crimes charged—murder, kidnapping, hijacking, and arson—reflect domestic criminal law with little or no reference to the terrorist motives of the defendants or the international character of their organizations.

Sudan, bin Laden was stripped of his Saudi citizenship and became a stateless sponsor of terrorism. Robert D. McFadden, *A Nation Challenged: In Profile; Bin Laden's Journey From Rich, Pious Boy to the Mask of Evil*, NY Times B1 (Sept 30, 2001).

³ M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 Harv Intl L J 83, 88–96 (2002).

⁴ John Alan Cohan, *Formulation of a State's Response to Terrorism and State-Sponsored Terrorism*, 14 Pace Intl L Rev 77, 78–80 (2002).

Some argue that the possibility of dismissed charges or acquitted defendants should result in the abandonment of the law enforcement approach. They believe that only the use of armed force will result in the degree of decisive action that will minimize the likelihood that offenders will go unpunished. Others suggest that a law enforcement approach is insufficient because there is no effective international police agency, and the police capability of many states is both corrupt and ineffective.⁵ Finally, extradition regimes are far from satisfactory, and no effective international tribunal exists to deal with terrorist acts.

There are, however, many positive aspects of the law enforcement approach. It entails only domestic criminal law, is clearly within the authority of individual nations, and grants no status—other than that of common criminal and common crime—to either those who commit terrorist acts or to the acts themselves. Equally important, a law enforcement response to terrorist acts ensures due process. When the evidence is insufficient, allegations are dropped or fail in court, resulting in a dismissal of the charges or findings of not guilty. The use of military force, on the other hand, provides no due process to those killed or injured, and creates a greater risk of harm to innocents caught up in the battle. The law enforcement approach is a more precise instrument and one much more capable of meting out individualized justice.

These considerations have prompted states to rely primarily on the law enforcement approach in dealing with terrorists—Israel being one exception. States have consistently worked to enhance the law enforcement approach by entering into antiterrorism conventions, extradition agreements, and other forms of jurisdictional cooperation. Only in the mid-1980s did individuals begin to suggest that terrorist acts might be approached from a conflict management (and thus, law of armed conflict) perspective, rather than exclusively from a law enforcement viewpoint.

In his 1989 book, Lieutenant Colonel Richard Erickson, a US military attorney, provided an analytical comparison of the two approaches and thoroughly discussed the pros and cons of each view.⁶ By exposing several myths concerning the application of the law of armed conflict to terrorist acts, he effectively demonstrated that the conflict management approach deserved serious consideration. Erickson pointed out that many believed that the only available alternatives were to treat terrorists either as criminals under the law enforcement approach or as combatants under the law of armed conflict. In the latter case, many believed that this approach would grant terrorists “prisoner of

⁵ See Bassiouni, 43 Harv Int'l L J at 88–97 (cited in note 3).

⁶ Lt Col Richard J. Erickson, *Legitimate Use of Military Force Against State-Sponsored International Terrorism* 57–84 (Air University 1989).

war” status and implicitly characterize their acts as acceptable international behavior.

These widely held beliefs were simply wrong. The law of armed conflict deals with terrorist acts in a manner similar to the domestic law of various nations—as criminal acts. It recognizes terrorists as engaging unlawfully in combatant activity, characterizes them as unlawful combatants, and denies them legitimacy “by identifying them as perpetrators of acts contrary to the fundamental international humanitarian law that serves as a basis of the law of armed conflict.”⁷ Erickson concludes that, under appropriate circumstances, both approaches should be available to a state’s decisionmakers, and the law of armed conflict approach may sometimes be the more appropriate strategy, depending upon the nature and scope of the terrorist acts at issue.

The actions of terrorists (unlawful combatants) that call for a law of armed conflict approach are those that may fairly be characterized as involving an “armed attack” against a state. Individual criminal acts, riots, and minor disorders are not acts that justify the application of the law of armed conflict.⁸ Such acts rightly limit a state to a law enforcement approach.

III. STATE RESPONSIBILITY AND THE USE OF FORCE

The law enforcement approach to terrorism applies domestic law, while the conflict management (use of force) approach applies international law, which includes the law of armed conflict, state responsibility, and the customary inherent right of anticipatory self-defense. Taken together, the rules under each of these categories are sufficient to permit an appropriate forcible response to terrorism. It is beyond dispute that states are directly responsible under international law to control terrorists operating within their borders, as is the fact that states have a responsibility to refrain from actively supporting terrorist organizations. As early as 1970, the United Nations General Assembly, in Resolution 2625,⁹ made it clear that a state’s mere acquiescence in terrorist activity emanating from its soil is a violation of the state’s international obligations. Numerous other resolutions from both the United Nations General Assembly and the United Nations Security Council leave no doubt that harboring or supporting terrorist groups violates a state’s responsibility under international law.¹⁰

⁷ Id at 63.

⁸ Gillian White, *International Terrorism*, in *Report of the Fifty-Seventh Conference* 119, 127 (International Law Association 1978).

⁹ General Assembly Res No 2625, UN Doc No A/8018 (1970).

¹⁰ Id; General Assembly Res No 40/61, UN Doc No A/RES/40/61 (1985); Security Council Res No 748, UN Doc No S/RES/748 (1992).

If all that was necessary for a state to take forcible action against terrorists located within another state was the failure of that state to live up to its international obligations, there would be little question that the statements of President Bush and others¹¹—that those states harboring terrorists will be treated as if they are themselves terrorists—would be fully justified. It is not true, however, that the mere violation of international norms by a state permits a wronged state to use force lawfully in order to right the wrong or to prevent future wrongs. In fact, states are generally *not* permitted to use force under international law against other states that harm them wrongfully.¹² Appropriately so, the rules for the use of force are much more restrictive, allowing states to resort to force only in “self-defense.”

A. SELF-DEFENSE

Article 2(4) of the UN Charter expressly prohibits the use of force by one state against another. It prohibits any use or threat of force that violates the “territorial integrity” or the “political independence” of a state.¹³ This seemingly absolute prohibition is, however, qualified in two significant ways by the Charter itself. The Security Council is authorized to take forcible action whenever it determines that there is a threat to international peace and security.¹⁴ More relevant to this discussion, Article 51 of the Charter provides: “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.”¹⁵ Thus, a state can act in self-defense against an armed attack, but only until the Security Council has taken measures necessary to maintain peace and security.

The Article 51 exception for self-defense is the only explicit exception to the proscription of Article 2(4). The International Court of Justice, in *Nicaragua*

¹¹ In his address to the nation immediately following the terrorist attacks on September 11, President Bush stated that America would “make no distinction between the terrorists who committed these acts and those who harbor them.” *President Bush’s Remarks*, Wash Post A2 (Sept 12, 2001). Similar remarks were made shortly thereafter by Vice President Cheney. Louise Fenner, *Cheney: Terrorists, Those Who Harbor Them, Face “Full Wrath” of U.S.*, interview on NBC’s *Meet the Press* (Sept 16, 2001), available online at <<http://usinfo.state.gov/topical/pol/terror/01091610.htm>> (visited Mar 8, 2003).

¹² *Corfu Channel (Great Britain v Alb)*, 1949 ICJ 4 (Apr 9). See also International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc No A/CN.4/L.602/Rev.1 (2001) (hereinafter Draft Articles on Responsibility) (under Article 50, countermeasures for breach of international obligations cannot involve the threat or use of force).

¹³ United Nations Charter, art 2(4).

¹⁴ *Id.* at art 51.

¹⁵ *Id.*

v. United States,¹⁶ interpreted Article 51 as requiring an actual “armed attack” in most circumstances before a state can respond against another state in self-defense by using military force.¹⁷ This Article assumes that international law presently requires either an armed attack, or at least the prospect of an imminent armed attack (as defined hereafter), before a state may respond militarily against the territorial integrity or political independence of another state.

B. THE EVOLVING LAW OF STATE RESPONSIBILITY

Given this standard, the application of state responsibility precepts to terrorist attacks is straightforward. To justify military force against terrorists, their actions must rise to the level of an armed attack. Acts not rising to this level do not justify a forcible response under international law because the military action would violate, without legal justification, the territorial integrity of the state in which the terrorists were located. The injured state is limited to the law enforcement approach and application of its own domestic law. However, even when the terrorists have committed an armed attack, the authority to use force against the terrorists located in a state is problematic unless the terrorist actions can be ascribed to that state.¹⁸ Thus, a critical issue is attribution—when can terrorist actions be ascribed to the state in which they operate? Because an attack against the terrorists violates the territorial integrity of the host state, the “armed attack” of the terrorists must be attributable to that state. Only then can force be used against the terrorists in that state or against the forces of that state itself.

1. Case Law: *Nicaragua* and *Iran Hostages*

Legal authorities on this crucial question are understandably sparse, but two International Court of Justice (“ICJ”) cases deserve careful attention. Both cases appear to limit the circumstances when nonstate terrorist acts can be attributed to a state, even if the acts would be considered an “armed attack” if committed by the state itself. We submit that these cases are both distinguishable from situations involving transnational terrorism and no longer represent the customary and accepted practices of states in the context of transnational terrorism.

The *Nicaragua* case, mentioned earlier, presented the question of whether the actions of Nicaragua in supporting rebels in El Salvador constituted an

¹⁶ *Military and Paramilitary Activities (Nicar v US)*, 1986 ICJ 14 (June 27) (hereinafter *Nicaragua*).

¹⁷ *Id.* at 35–36.

¹⁸ Oscar Schachter, *The Lawful Use of Force by a State Against Terrorists in Another Country*, in Henry H. Han, ed., *Terrorism & Political Violence: Limits & Possibilities of Legal Control* 243, 249 (Oceana 1993) (one state cannot be invaded by another state in response to terrorism unless responsibility for the terrorist attack can be imputed to the invaded state).

armed attack by Nicaragua sufficient to justify military action by the United States in collective self-defense with El Salvador. Nicaragua provided weapons and logistical support to rebels seeking to overthrow the government of El Salvador. The United States argued that this support justified mining Nicaraguan waters and taking other military action against Nicaragua. The ICJ soundly rejected the arguments of the United States. It said sending “armed bands” into the territory of another state would be sufficient to constitute an armed attack, but “the supply of arms and other support to such bands cannot be equated with armed attack,” and did not justify the use of military force by the United States against Nicaragua.¹⁹

Conversely, and perhaps more significantly, the ICJ in *Nicaragua* also found that the acts of the Nicaraguan Contras could not be attributed to the United States. It was clear from the evidence that, in many ways, the Contras were a proxy army for the United States and could not have existed without the financing and support of the United States. The ICJ recognized the extent of US participation but nonetheless concluded that the acts of the Contras could not be attributed to the United States:

The Court has taken the view ... that United States participation, *even if preponderant or decisive*, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua.²⁰

The court held that there was no clear evidence that the United States had “exercised *such a degree of control in all fields* as to justify treating the contras as acting on [the United States] behalf.”²¹ The court appeared in both situations to be unwilling to attribute the acts of persons supported by a state to the state itself unless the state exercised effective control over the actors.

The second pertinent case is the *Iran Hostages* case.²² The court was faced with whether the action of the Iranian students in occupying the United States embassy and taking embassy staff hostage could be attributed to the government of Iran. In its opinion, the ICJ divided the events into two phases: the initial takeover by the students and the subsequent lengthy occupation of the embassy. The court found that during the initial phase the students did not act on behalf of the state; therefore, the state did not bear responsibility for their actions—despite acknowledging that Iranian authorities were obliged to protect the embassy, and had the means to do so, but failed. According to the court, only

¹⁹ *Nicaragua*, 1986 ICJ at 126–27 (cited in note 16).

²⁰ *Id* at 64 (emphasis added).

²¹ *Id* at 62 (emphasis added).

²² *United States Diplomatic and Consular Staff in Tehran (Iran v US)*, 1980 ICJ 3 (May 24).

after the takeover was complete did the Iranian government bear responsibility for the actions of the students, because only then did the Ayatollah Khomeini express his approval of the occupation and indicate that the embassy and consular staffs were “under arrest.” This fundamentally transformed the legal situation and permitted the occupation from that point to be attributed to the state of Iran.

These authorities strongly suggest that the ability to attack terrorist groups where they live, where they train, where they amass their weapons, and where they plan their attacks is severely limited. The *Nicaragua* and *Iran Hostages* cases indicate that a state must direct and control the activities of the terrorists—or at least expressly sanction and adopt their actions—before their acts will be attributable to that state. Financing, training, and logistical support will not be enough—all of these were provided by the United States to the Nicaraguan Contras, yet the ICJ refused to attribute their actions to the United States. These same elements of direction and control were key in the *Iran Hostages* case as well.

The rationale behind these rules is apparent. A state cannot be held responsible for the acts of all whose activities originate in its territory. A state cannot conceivably be expected to monitor and prevent all activity within its territory that would violate international norms if committed by the state itself. If it were otherwise, Colombia, for example, might be liable for the acts of international drug traffickers working from Colombia, or Russia might be held responsible for the international activities of the “Russian Mafia.”²³ Even if states could exert better control over activities within their borders, they must have broad discretion to allocate their limited resources. States must be able to allocate resources in a manner that balances their obligations to the international community with obligations to their citizens. No one should expect poor states, especially, to concentrate their resources solely, or even primarily, on preventing acts of violence against the citizens or property of other states.

2. Customary International Law since *Nicaragua*

However sensible these rules are in the context of state responsibility for the acts of common criminals or even international drug traffickers, they are inadequate in the context of transnational terrorism. The people who planned

²³ The activities of the Russian Mafia are extensive and well-documented, from conspiring to fix the 2002 Winter Olympic Figure Skating competition, Steven Lee Myers, *Figure Skating: Russians See Conspiracy, One of Tainted Gold*, NY Times D2 (Aug 2, 2002); to using offshore accounts for money laundering, *Tiny Pacific Island Is Facing Money-Laundering Sanctions*, NY Times A5 (Dec 6, 2001). The Russian Mafia has allegedly tried to assist Colombian drug lords in building a submarine. Juanita Darling, *Submarine Links Colombian Drug Traffickers With Russian Mafia*, LA Times A6 (Nov 10, 2000). In the United States, the Russian Mafia is accused of having access to expertise in computer technology, encryption techniques, and money laundering facilities. Douglas Farah, *FBI Chief: Russian Mafias Pose Growing Threat to U.S.; Freeh Cites Possibility of Nuclear Banditry*, Wash Post A18 (Oct 2, 1997).

and executed the attacks on September 11 are qualitatively and quantitatively different from international criminal gangs, international drug traffickers, or even unorganized individual terrorists. Al Qaeda committed an armed attack on the United States. Al Qaeda operatives are *combatants*, “unlawful combatants” to be sure, but not “mere” drug traffickers or international criminals. If the international community is bound by the apparent rules of the *Nicaragua* and *Iran Hostages* cases, effectively countering terrorist groups capable of armed attack is exponentially more difficult, if not impossible. Fortunately, an armed attack by the terrorists presents a quite different context, and the likely legal outcome is different than the authorities discussed above suggest. In fact, neither the *Nicaragua* case nor the *Iran Hostages* case should be considered controlling authority for the fight against nonstate terrorist entities that threaten peace. The facts of both cases were far different than those facing the United States and others in combating transnational terrorism. The international situation has changed dramatically in the last fifteen years. More significantly, there is compelling evidence that the world community has moved beyond these cases; in the past decade and a half, the community of nations has recognized that the limiting principles of these two cases should be confined to their facts and are not applicable to transnational terrorist groups who threaten previously unimagined destruction. Stated simply, the accepted and customary practices of states have changed.

The *Nicaragua* and *Iran Hostages* cases, despite the language quoted above, are far from factually analogous to states harboring transnational terrorists and actively assisting terrorist groups. In neither case was the territory of a state used to give “safe harbor” and assistance to the supported group. Moreover, in both cases, the groups supported by the respective parties were localized threats. Neither had the worldwide reach of groups like al Qaeda, nor did they have goals that threatened entire cultures. It is also critical that both of these cases were decided in the context of a largely bipolar world, in which the United States and the former Soviet Union had fought and were fighting “proxy wars” of varying intensities throughout the world. To hold that both the United States and the Soviet Union had engaged in armed attacks whenever groups that they supported did so would have obviously created a far more dangerous world.

Perhaps even more important is the evidence that the holdings of these two cases do not represent customary international law today. As the international situation has changed, the practices of nations have evolved to keep pace. Since the *Nicaragua* and *Iran Hostages* decisions, a variety of scholars and other writers have argued that substantial support of terrorists by a state can be sufficient to impute the actions of the terrorists to the supporting state.²⁴

²⁴ See, for example, Alberto R. Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 Proceedings Am Socy Intl L 297, 305 (1987); John F. Murphy, *State Support of International*

Among the most prominent is renowned international law scholar Oscar Schachter, who has stated:

[W]hen a government provides weapons, technical advice, transportation, aid and encouragement to terrorists on a substantial scale it is not unreasonable to conclude that the armed attack is imputable to that government.²⁵

These scholars recognize that transnational terrorism presents a new, unanticipated threat and that international law must adapt to deal with it. Although scholars were far from unanimous in their view that the support of terrorists could be a basis upon which actions could be imputed to the supporting state,²⁶ it is clear that there was no consensus in the years following the *Nicaragua* and *Iran Hostages* cases that these cases represented the law as applied to transnational terrorist groups.

In addition, the reaction of states to various military actions taken against state sponsors of terrorism has changed significantly since 1986, indicating an increased willingness to attribute the action of terrorists to the states that sponsor them. In 1986, the United States bombed a number of terrorist-related targets in Libya in response to Libya's participation in the terrorist bombing of a German discotheque in which 2 of the 3 killed and 79 of the 229 wounded were American servicemen. Despite the United States' claim that the Berlin bombing had actually been ordered by the Libyan government, the US action was widely condemned. The UN General Assembly adopted a resolution condemning the United States by a vote of 79–28–33.²⁷ A proposed Security Council resolution condemning the US action failed to pass only because of vetoes by the United States, the United Kingdom, and France.²⁸ As the threat of transnational terrorism became more apparent, however, the world community became more tolerant of military actions against states that supported terrorism. There was little objection to the 1993 cruise missile attacks against Iraq for its role in the foiled assassination attempt on the life of former President Bush. In 1998, when the United States bombed terrorist targets in Afghanistan and Sudan, the world reaction to the US attacks against Afghanistan was unquestionably muted. While the criticism of the bombing of the pharmaceutical factory in Sudan was more intense, the protest was largely confined to the quantity of proof presented by the United States that chemical weapons were processed at the factory. If it had been clear that chemical weapons were, in fact, being processed at the factory, it

Terrorism: Legal, Political, and Economic Dimensions 99–109 (Westview 1989); Rosalyn Higgins, *Problems and Process: International Law and How We Use It* 146–68 (Clarendon 1994).

²⁵ Schachter, *Lawful Use of Force* at 250 (cited in note 18).

²⁶ Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 *Wis Int'l L J* 145, 157–59 (2000) and authorities cited therein.

²⁷ General Assembly Res No 41/38, UN Doc No A/RES/41/38 (1986).

²⁸ Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 *Harv Int'l L J* 41, 47 (2002).

seems likely that the world community would have accepted the United States' action. Neither the Security Council nor the General Assembly took any formal action with regard to either attack.

The increasing attention of the United Nations to the issue of transnational terrorism, and its increasing willingness to condemn the actions of states that harbor and support terrorism, suggest that the very restrictive approach to state accountability advocated in the *Nicaragua* and *Iran Hostages* cases does not represent the current state of international law. Although the General Assembly in 1970 affirmed that every state has a duty to refrain from "participating in" or "acquiescing in" organized terrorist activity within its territory,²⁹ it was not until 1985 that the General Assembly more specifically stated that states have an obligation 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 toward the commission of such acts."³⁰

In 1992, the Security Council explicitly linked involvement in terrorist activity to a state's obligations to refrain from the use of force under Article 2(4) of the Charter. In Resolution 748, the Security Council stated that "assisting" in terrorist acts or "acquiescing" in terrorist acts was sufficient to implicate a state's obligations under Section 2(4) to refrain from the use of force.³¹ In 1994, and again in 1998, the Security Council condemned acquiescence in terrorism in unconditional terms. This trend culminated in Security Council Resolution 1373 following the September 11 attacks. The Security Council for the first time tied a state's inherent right of self-defense to responding to another state's support for terrorism, whether such support was "active or passive."³² This evolution from 1970 to the present was summed up by one commentator:

While a state may have once argued that the actions of terrorist organizations did not impose responsibility on that state under Article 2(4) of the U.N. Charter and did not subject them to forcible measures in response under Article 51, those conditions no longer appear to pertain, at least in circumstances where an attack as devastating as the September 11 attacks are launched on the territory of another state and where the link between the terrorists and the sponsoring state is so well established and recognized by the international community.³³

The final indication that the rules have surely changed is the reaction of the world community to the statements of President Bush and others in his Administration making it clear that the United States equates al Qaeda, and similar terrorist groups, with those states that support them. In repeated

²⁹ General Assembly Res No 2625 (cited in note 9).

³⁰ General Assembly Res No 40/61, UN Doc No A/RES/40/61 (1985).

³¹ Security Council Res No 748, UN Doc No S/RES/748 (1992).

³² Security Council Res No 1373, UN Doc No S/RES/1373 (2001).

³³ Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 Harv J L & Pub Poly 559, 581–82 (2002).

statements, the President and other Administration officials have indicated that there is no distinction between those who harbor or support terrorists and the terrorists themselves. A sampling of the statements illustrates both their force and their breadth. On the day of the attacks, President Bush stated succinctly, "We will make no distinction between the terrorists who committed these acts and those who harbor them."³⁴ In a speech before a joint session of Congress on September 20, 2001, the President said, "From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime,"³⁵ and later elaborated in sweeping terms:

America has a message for the nations of the world: If you harbor terrorists, you are terrorists. If you train or arm a terrorist, you are a terrorist. If you feed a terrorist or fund a terrorist, you're a terrorist, and you will be held accountable by the United States and our friends.³⁶

Vice President Cheney said on September 16, 2001, that "if you provide sanctuary to terrorists, you face the full wrath of the United States of America,"³⁷ and Congress in its joint resolution of September 14, 2001, authorized the use of force against those who "aided" or "harbored" those who carried out the September 11 attacks, as well as those who committed the attacks.³⁸

The policy reflected by these statements to treat those who harbor terrorists no differently than the terrorists themselves was described by White House spokesman Ari Fleischer as "a dramatic change in American policy."³⁹ Yet, despite the breadth of these statements and others, and although they appeared seriously at odds with the decisions in the *Nicaragua* and *Iran Hostages*

³⁴ *President Bush's Remarks*, Wash Post at A2 (cited in note 11).

³⁵ Address to a Joint Session of Congress and the American People, *President Declares "Freedom at War With Fear"* (Sept 20, 2001), available online at <<http://whitehouse.gov/news/releases/2001/09/20010920-8.html>> (visited Mar 8, 2003).

³⁶ Remarks by President to Troops, *President Shares Thanksgiving Meal With Troops* (Nov 21, 2001), available online at <<http://www.whitehouse.gov/news/releases/2001/11/20011121-3.html>> (visited Mar 8, 2003). See also the statement by the United States Ambassador to the United Nations on September 12, 2001, "There should be no doubt: we will deal with those who support and harbor terrorists as we deal with the terrorists themselves." USUN Press Release, *Ambassador Cunningham Statement to UN General Assembly* (Sept 12, 2001), available online at <<http://usinfo.state.gov/topical/pol/terror/01091304.htm>> (visited Mar 8, 2003).

³⁷ Louise Fenner, *Cheney: Terrorists, Those Who Harbor Them, Face "Full Wrath" of U.S.* (cited in note 11).

³⁸ *Congress Authorizes President to Use All Necessary Force* (Sept 15, 2001), available online at <<http://usinfo.state.gov/topical/pol/terror/01091706.htm>> (visited Mar 8, 2003).

³⁹ Wendy S. Ross, *No Discussions, No Negotiations With Taliban, White House Says* (Sept 21, 2001), available online at <<http://usinfo.state.gov/topical/pol/terror/01092111.htm>> (visited Feb 23, 2003). See also another statement by Ari Fleischer in which he said, "I think you need to look at it exactly as the President described it, which is that anybody who harbors terrorism will be the target of our operations and the target of our actions." *Excerpt: Afghan People Not Synonymous With Taliban* (Sept. 25, 2001), available online at <<http://usinfo.state.gov/topical/pol/terror/01092521.htm>> (visited Feb 23, 2003).

cases, the world community barely voiced an objection. Instead, nations either said little about this “dramatic change” in US policy or appeared to endorse it.⁴⁰ In a five-day debate in the United Nations General Assembly, state after state condemned international terrorism; not one objection was voiced to the United States’ position. The world reaction—or more accurately, the lack of a world reaction—to the consistently repeated US position is perhaps the strongest manifestation of evolving customary international law regarding the use of force against terrorism.

The nature of the world today illustrates why the international community could not tolerate the principles of the *Nicaragua* and *Iran Hostages* cases as applied to international terrorism. Developments in technology, communications, and global economics have dramatically and forever altered the landscape, even in the past two decades. People can more easily cross state borders, obtain information, communicate with each other, and move goods and money across the globe. Information can be hidden in the more than one billion worldwide web sites, and that information can be concealed in ever more creative ways. Money can be “laundered,” funneled through “charities” and other seemingly innocent organizations, and instantaneously transferred around the globe. Globalization makes it impossible to assume that threatening activity can be stopped at the border—the important “borders” today are often nongeographic and invisible. By the time the terrorists reach the geographical borders of a state the real work has often been done, and discovering and foiling the terrorists’ plots is often nearly impossible.

In today’s world, some terrorist organizations are as well funded as many state actors. The individual worth of Osama bin Laden alone, prior to the war in Afghanistan, was estimated to be in the hundreds of millions of dollars.⁴¹ Terrorist organizations are as capable as many state actors of inflicting massive harm. The availability of weapons on the international arms markets, combined with the accessibility of funds, creates a situation of unprecedented danger.

Finally, of course, there are “weapons of mass destruction”—chemical, biological, and nuclear weapons. These weapons not only possess nightmarish destructive capacity, but are terrifying because of their horrible effects, indiscriminate nature, and unpredictable consequences. Three factors have combined in the past couple of decades to increase the likelihood that such

⁴⁰ See, for example, the statement by the EU General Affairs Council on October 8, 2001, expressing “full solidarity” with the United States. *EU Declares Full Solidarity With, Support for U.S.* (Oct 8, 2001), available online at <<http://usinfo.state.gov/topical/pol/terror/01101214.htm>> (visited Feb 10, 2003).

⁴¹ Various reports have estimated the personal fortune of Osama bin Laden from a few million to three-hundred million dollars. Robert O’Harrow Jr., David S. Hilzenrath, and Karen DeYoung, *Bin Laden’s Money Takes Hidden Paths to Agents of Terror; Records Hint at Complex Financial Web*, Wash Post A13 (Sept 21, 2002).

weapons will be acquired by terrorists: technological advances in their manufacture, the availability of information, and the inadequacy of international safeguards on their proliferation.

Technological advances have made it easier to manufacture and conceal chemical and biological weapons. The flow of information has expanded the potential availability of weapons of mass destruction—instructions for their manufacture can be found on Internet sites. The United States has spent hundreds of millions of dollars to enhance the safety of the nuclear arsenal of the former Soviet Union, but the security of that arsenal, particularly tactical nuclear weapons, is still very much in doubt. These factors make it almost inevitable that terrorists will acquire weapons of mass destruction unless all nations act in concert, with sufficient incentives to prompt them to do so. Furthermore, the rules of international law must permit states, as a last resort, to force the cooperation of recalcitrant states or to act in their stead.

Victim states cannot effectively combat international terrorism if other states remain immune from a military response, while providing a safe haven for the really difficult work of terrorism: recruitment, training, communications, and weapons development. The world has recognized this fact and acted accordingly.

Before concluding the argument that the rules regarding the imputation of state responsibility for terrorist attacks have evolved since the *Iran Hostages* and *Nicaragua* cases, it is necessary to deal with one other source of authority. In November 2001, the International Law Commission⁴² completed work on its Draft Articles on the Responsibility of States for Internationally Wrongful Acts. Article 8 of these Draft Articles provides: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”⁴³

At first glance, this paragraph appears to adopt the approach of the *Nicaragua* and *Iran Hostages* cases; that is, state responsibility for terrorist acts cannot be imputed to a state unless the terrorists are acting under the direction or control of the state. International terrorism, however, was not the focus of the Draft Articles. Further, the Draft Articles cannot supersede the “inherent” right of self-defense embodied in Article 51 of the UN Charter and must be interpreted consistently with the Charter. To the extent that imputing state responsibility to those who harbor and support terrorist groups is necessary for

⁴² The International Law Commission (ILC) operates under the auspices of the United Nations and is a body responsible for researching international law and drafting conventions. Created in 1947, its primary duty is to assist in fulfilling the legislative duties of the General Assembly as prescribed in Article 13 of the UN Charter. International Law Commission, available online at <<http://www.un.org/law/ilc/ilcintro.htm>> (visited Mar 8, 2003).

⁴³ Draft Articles on Responsibility at art 8 (cited in note 12).

effective self-defense against international terrorism, as this Article argues, the Draft Articles are not inconsistent with the evolving standard recognized by the current acts and expressions of states.⁴⁴

C. THE PARAMETERS OF FORCIBLE RESPONSE

1. Sanctuary and Support

So what does this evolving set of rules look like? Obviously, the evolution continues; it is impossible to state precisely the ultimate end of the process. In fact, to some extent the process is, at best, in its adolescence—still rapidly changing, but with the basic structure in place. The first principle appears relatively clear: a state no longer enjoys legal immunity from military intrusions by other states simply because it does not control or direct the activities of terrorists located in its territory. Rather, the standard for state responsibility is one of *sanctuary or support*, and it has been accepted by the world community. The pronouncements of the United Nations over the past three decades that states have a responsibility under international law to refrain from supporting or harboring terrorists have been transformed into a principle of state *accountability* for the acts of the terrorists. Once a state makes it clear that it is uninterested in eliminating a terrorist threat emanating from its soil, it has assumed responsibility for the actions of the terrorists, and has opened itself to the lawful use of force by a threatened state. Limitations on the use of military force should come from other quarters, not from the fact that a state does not control or direct the terrorists' actions.

In many ways, this principle is closely analogous to the rules relating to neutrality adopted in the Hague Convention (V) almost one hundred years ago.⁴⁵ In this Convention, "neutral powers" may not permit belligerents to move troops, munitions, or supplies across their territory, nor may they allow their territory to be used to form "corps of combatants" nor "recruiting agencies."⁴⁶ In modern parlance, a state that provides logistical support or permits a belligerent to use its territory as a base of operations sacrifices its neutral position. Should a neutral state violate these proscriptions, the other belligerent state is justified in attacking the enemy forces in the territory of the neutral state.⁴⁷

There is no doubt that the United States and others are engaged in a "war" against terrorism no less real than many other wars fought in the past. In his declarations that a state is no longer immune from attack if it supports or

⁴⁴ Id at art 21 (recognizing the right of self-defense in the UN Charter).

⁴⁵ Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 36 Stat 2310 (1907).

⁴⁶ Id at arts 2, 4, 5.

⁴⁷ FM 27-10, *The Law of Land Warfare* ¶ 520 (July 18, 1956).

harbors terrorists, President Bush is little more than repeating this longstanding axiom of land warfare. While it still may be possible for a country to remain “neutral” in the fight against terrorists, a state cannot do so if it provides sanctuary or support to the terrorists.

What are the restrictions on the ability to respond with force against states that harbor or support terrorists? To some extent, these are among the “details” that are evolving. However, present law clearly circumscribes the use of force in some circumstances, and other limitations can be gleaned through adapting certain fundamental principles of international law.

2. Level of Support

The extent of permissible military action used to combat terrorist organizations depends on the level of support provided by the harboring state. This principle is little more than an application of the traditional rule of proportionality. If a state does nothing but allow terrorists to operate from its territory, providing no meaningful support, the extent of the permissible military force is only that which is necessary to deal with the terrorist threat itself. Neither the military of the harboring state nor its infrastructure is a permissible target. This is consistent with the Hague Convention (V) discussed earlier, with the precept of proportionality, and with common sense. The terrorists located in the state, however, and their facilities and supplies are permissible targets, and military force may be employed, even if it means breaching the territorial integrity of the harboring state.

To the extent, however, that the harboring state provides significant supply or logistical support, those personnel and facilities directly engaged in providing the support should be subject to attack to the extent necessary to eliminate or limit the support. Particularly where weapons of mass destruction are concerned, the most critical stages of a terrorist attack are the provision of the weapons and their delivery systems, and the training of terrorists to use those weapons effectively. Evidence that a state is providing terrorists with training in the deployment of weapons of mass destruction should be sufficient to permit the use of military force to eliminate the threat,⁴⁸ even if the attack is directed against the facilities or personnel of the harboring state.

3. The Nature of the Threat

The threat must also be a *terrorist* threat. While it is true that there is no consensus definition of “terrorism,”⁴⁹ any relaxation of the traditional rules regarding the use of military force should be confined to combating terrorist

⁴⁸ The training will have to be specific enough to permit the terrorists to employ the weapons following the training. It would not be sufficient, for example, if a state provides terrorist with education in nuclear physics.

⁴⁹ Travalio, 18 *Wis Intl L J* at 181 (cited in note 26).

groups like al Qaeda. That is, there must be a threat by an organized group to engage in violent activity against civilian populations for political or ideological purposes, and the state giving sanctuary or support to the terrorist group must be unwilling to act.⁵⁰ The fact that an adversary state has weapons that are threatening to another state, or that there is the potential for violence between states, does not justify the use of military force except as permitted under the UN Charter or as otherwise permitted by customary international law. This Article does not advocate a wholesale change or abandonment of the rules regarding the use of military force—to the contrary, it argues only for an interpretation of the existing rules to deal with unique adversaries unforeseen at the time of the adoption of the UN Charter. The inability to influence terrorist groups by traditional diplomatic and economic means, their decentralized and transnational character, their lack of accountability to constituencies to which governments are traditionally accountable, their clandestine nature, and their eagerness to acquire and willingness to use weapons of mass destruction, all argue for the perspective set forth in this Article—one that suggests that the rules of state accountability as espoused in the *Nicaragua* and *Iran Hostages* cases are not applicable in the context of international terrorism. The existence of such terrorist groups does not, however, argue for the reinterpretation or relaxation of these rules in other contexts.

4. Military Force Must Be the Only Reasonable Option

Under both customary international law and the United Nations Charter, military force may only be used when it is necessary to do so—this is the customary criterion of “necessity.” This criterion is particularly important in the context of state responsibility for the actions of terrorist organizations. As mentioned earlier, states should be held responsible for actively harboring or supporting terrorist organizations, and their territorial integrity should be susceptible to incursion if they do so. Military force, however, must only be used when there is no other reasonable way in which the harboring state can be persuaded or forced to cease its sanctuary or support. In unusual circumstances, it may be that mere public exposure of their support or sanctuary, or other diplomatic measures, may cause a state to cease its sanctuary or support. In other cases, economic sanctions by the threatened state and others will be enough. Resort to international bodies, such as the United Nations Security Council, must also have proven to be impractical or unavailing. Simply stated, a state cannot use force against a state providing sanctuary or support to terrorist groups unless that state has been given the opportunity to remove the terrorist

⁵⁰ See, for example, the DoD definition of terrorism in *DoD Antiterrorism/Force Protection (AT/FP) Program*, DoD Directive 2000.12 23–24 (Apr 13, 1999), available online at <http://www.dtic.mil/whs/directives/corres/pdf/d200012_041399/d200012p.pdf> (visited Mar 8, 2003).

threat from its soil or cease its support. The only exception to this might be where the threat is so grave and the likelihood of its removal by any other means so slight, that the use of force is the only reasonable alternative.⁵¹

IV. ANTICIPATORY SELF-DEFENSE: 21ST CENTURY

The effect of the United Nations Charter on a nation's inherent right to engage in customary self-defense has long been a matter of debate. Today, however, many believe that the customary international law right to self-defense is unaffected by Article 51 of the Charter and that this inherent right to self-defense includes a right of anticipatory self-defense. Others argue that Article 51 effectively eliminated anticipatory self-defense as a legal basis for the use of armed force, and that, absent an armed attack, a state must limit itself to preparations to resist such an attack—even in the face of obvious attack preparations being taken by another state. This Article supports the position of those who contend that nations retain the customary inherent right of anticipatory self-defense. Thus, the purpose here will be to discuss the commonly accepted 19th century definition of anticipatory self-defense—in light of 21st century realities—and to test the current relevance and usefulness of this concept to today's world.

The 19th century definition that became widely accepted in customary international law was the product of an 1842 exchange of diplomatic notes between the United States Secretary of State, Daniel Webster, and the British Foreign Minister, Lord Ashburton. Their correspondence concerned an 1837 raid in US waters on a US steamship, the *Caroline*, by British troops responding to the fact that the *Caroline* was providing support to Canadian rebels by transporting troops and supplies to Canadian territory in order to fight against

⁵¹ The nature of the state from which the terrorists are operating should also impact the legitimacy of the use of military force. There should be less concern for the territorial integrity and political independence of a state whose government, while in de facto control, is not an accepted part of the international community. A state whose government is both undemocratic and which is also not recognized as legitimate by the international community of states should be accorded the least respect. The Taliban government, prior to September 11, was recognized by only one state. It was violent, repressive, and undemocratic, violating numerous international norms concerning the treatment of its own people. While the undemocratic nature of the regime, and its regular violation of international norms, should not alone make it subject to the use of military force, there should be less concern for the territorial integrity of a state or its political independence when the government that is making the decision to harbor or support terrorists does not represent the will of its people. Obviously, this argument should not be carried too far. There are many governments that do not neatly fit the Western definition of "democratic," and in most instances they must be accorded the same rights in international law as other states. Nonetheless, certainly in extreme cases, the lack of legitimacy in the world's eyes of a government that chooses to harbor or support terrorist groups should factor into whether or not the use of force is justified.

the British. The latter reasoned that their raid was an act of self-defense, mandated by the necessity to prevent further actions by US persons against British interests in Canada.

Webster advised Lord Ashburton that, in his view, a state might use armed force against another state in the name of self-defense only under very specific circumstances. He stated that in order to justify a use of force based on self-defense, Great Britain would have “to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”⁵²

Among the reasons that Webster’s definition became a part of customary international law are the clarity and conciseness of his language and the fact that both parties agreed, in principle, immediately, and with no dispute as to Webster’s language. Webster’s definition of anticipatory self-defense has been employed in the 20th century on numerous occasions. The Cold War led to superpower policies involving the use of nuclear weapons that were premised on Webster’s definition of anticipatory self-defense. Valid indicators of an imminent nuclear attack could indeed be characterized as instantaneous and overwhelming, leaving no choice of means or moment for deliberation. How else might one describe a situation in which evidence of the simultaneous mobilization of rocket forces, the movement of ballistic missile submarines to firing positions, and an alert of bomber forces is presented to national leaders? In the context of the nuclear age, Webster’s definition was as applicable in the 20th century Cold War period as it was in the 19th century. At the core of Webster’s definition is the fact that it focuses on the need to assess certain factors that, when viewed collectively, may serve as a trigger for the use of force in self-defense. Though he did not use the word “imminent,” this term is frequently substituted for his requirements that a threat be “instant, overwhelming and leav[ing] no choice of means and no moment of deliberation.” “Imminent” to the superpowers meant missiles in the air within moments. Imminent to Israel in 1967 meant the unmistakable evidence of a certain attack by neighboring states within days. In each case, the majority of the international community agreed that the use of force was justified under Webster’s definition of self-defense. For the purpose of this Article, then, the pivotal question becomes, will this same definition serve as a basis for a state’s use of force in the context of transnational terrorism?

Transnational terrorist threats now occur in the form of stateless entities that possess most of the attributes of a state: wealth, willing forces, training, organization, and potential access to weapons of mass destruction. However, unlike states, these terrorist organizations are led by individuals who are prepared to employ suicide missions on a regular basis and who display an utter disregard for both human life and the rule of law. Moreover, terrorist attacks—

⁵² Letter from Daniel Webster, US Secretary of State, to Mr. Fox (Apr 24, 1841), reprinted in 29 *British and Foreign State Papers* 1129, 1138 (James Ridgway & Sons 1857).

even on a global scale—do not rise to the level of sustained combat. Indeed, the very effectiveness of such attacks depends on a state not knowing when—or how—such attacks will next occur. How, then, can such attacks be characterized as “imminent” in nature?

Given these facts, one might be inclined to conclude that Webster’s self-defense standard is no longer a workable threshold for a state’s use of force against such organizations. It is the thesis of this Article, however, that this standard need simply be adapted to both the unique nature and *modus operandi* of international terrorism and the growing international consensus that every state in the world community has an affirmative obligation to combat terrorism. Thus, a state may legitimately act on the assumption that, given the consistently demonstrated unconventional nature and operational methods of certain international terrorist organizations, an attack by such organizations is *always* “imminent.” If a terrorist organization has committed prior attacks, or has explicitly or implicitly announced its intention to do so, then any future attack can be considered imminent for purposes of the Webster standard. Accordingly, should a state be unwilling or unable to prevent its territory from being used as a sanctuary or base of operations by a transnational terrorist organization, a state threatened with an imminent attack by such an organization may—subject to the considerations and caveats earlier noted in this Article—engage in a self-defense use of force to deal with this threat. Moreover, while it would be greatly preferred that such a use of force would occur with the consent and support of the host state, the refusal of the host to provide its consent will not necessarily vitiate the right of the threatened state to take self-defense use of force measures.

Reasonably interpreted in this way—adapted to the political and operational realities of transnational terrorism—Webster’s definition of anticipatory self-defense is as relevant and workable today as it was in the 19th and 20th centuries.

V. THE CONTINUING EVOLUTION

Evolving rules are developing from the world’s response to the terrorist threat posed by al Qaeda and its allies. As argued above, the evolution since the *Iran Hostages* and *Nicaragua* cases has been necessary and appropriate. Under the presently accepted standards of international conduct, the United States’ actions against al Qaeda are fully justified. However, it is critical that nations, especially the United States, take great care in both expressing their understanding of the appropriate limits on the use of military force, and in conducting themselves in a manner consistent with this understanding. Two aspects of the evolution described in this Article are troublesome in this regard.

The first is the failure of the Bush administration to provide any nuance to its statements that there is no difference between terrorists and states that harbor them. It is our sense that, stated this categorically, the “Bush Doctrine” is both too broad and too ill-defined. A state may “harbor” one terrorist or ten thousand; the terrorists may be armed with aging Kalishnikovs or with nuclear weapons; the state may provide crucial weaponry, training, or intelligence; or may simply provide fewer resources to counteract the terrorists than another state believes to be adequate. The terrorists may be in a nascent stage in which they are poorly organized and their cause poorly defined, or they could be highly organized (and at the same time frustratingly decentralized) with a well-accepted and understood set of beliefs for which people are clearly willing to sacrifice all. The limitations on the right to use armed force stated earlier in this Article should be made explicit by the administration, lest the doctrine backfire when applied broadly by other states to justify aggression in the name of self-defense. Unless we clearly articulate both the justifications for our actions and, more importantly, the limitations on our conduct, as well as persuade the international community to accept these justifications and limitations, our restraint will mean little to the Russian government contemplating military action against Georgia, or to the Indian government considering its options in dealing with Pakistan. To date, the public pronouncements of the United States, which seem to impose few limits upon the use of military force in combating terrorism, will not deter the use of force. To the contrary, the breadth of these public statements will only encourage governments to resort to force.

More importantly, however, this evolution seems to have spawned an entirely new doctrine—that of “preemption.” First announced in a Presidential speech at West Point in June 2002, this doctrine asserts that the US maintains the right to strike first to eliminate weapons that might be used against us or supplied to terrorists. This is the basis, in large part, for the Administration’s justification for military action against Iraq, and it is in our newest *National Security Strategy*.⁵³ It was recently reported that a classified appendix to the recently released *National Strategy to Combat Weapons of Mass Destruction* authorizes preemptive strikes on states and terrorist groups that are close to acquiring weapons of mass destruction or the long-range missiles capable of delivering them.⁵⁴ We contend that permitting the evolving rules of state responsibility to

⁵³ *The National Security Strategy of the United States of America* (Sept 2002), available online at <<http://www.whitehouse.gov/nsc/nss.pdf>> (visited Mar 19, 2003).

⁵⁴ Mike Allen and Barton Gellman, *Preemptive Strikes Part of U.S. Strategic Doctrine; ‘All Options’ Open for Countering Unconventional Arms*, Wash Post A1 (Dec 11, 2002). The full text of the *National Security Strategy to Combat Weapons of Mass Destruction* (Dec 2002) is available online at <<http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf>> (visited Mar 19, 2003).

metamorphose into a doctrine of preemption is both unnecessary and ill-advised.

The doctrine of preemption is not recognized by the international community and has been opposed in the past by the United States. In 1981, for example, the United Nations Security Council unanimously passed a resolution condemning Israel's preemptive attack on the Iraqi nuclear facility at Osiraq.⁵⁵ Furthermore, the vast majority of commentators reject any claim of a right to preemptive self-defense. The doctrine of preemption is not necessary to counter the terrorist threat and, more importantly, its potential costs outweigh its benefits. The requirements for state responsibility and for anticipatory self-defense, as articulated in this Article, provide a sufficient basis for the United States to act to prevent terrorist attacks and the use of weapons of mass destruction without entering the uncharted and previously prohibited waters of preemption. An open-ended doctrine of preemption is a Pandora's box we should be very reluctant to open.

There are good reasons for the United States not to open this box. The combination of the law enforcement approach, where appropriate, and the use of military force, where justified, should serve the community of nations well in the fight against global terrorism. The level of international cooperation in law enforcement has grown significantly since September 11, and key terrorist suspects have been arrested in a number of countries. In addition, a number of terrorist plots have been recently foiled, and these are only the ones made public—other foiled attempts obviously cannot be disclosed for intelligence reasons.

Moreover, the limits on the use of military force are not so confining that countries cannot apply force when necessary without resort to an ill-conceived doctrine of preemption. The doctrines of state responsibility and anticipatory self-defense, as articulated in this Article, are sufficiently robust that countries can counter successfully terrorist groups like al Qaeda, and the states that harbor them. Groups that commit armed attacks on the United States, and states that give them substantial support or sanctuary, are already subject to attack with military force without resorting to an ill-defined preemption doctrine.

The United States has traditionally been one of the world's staunchest defenders of international law. To move in a direction that is clearly contrary to customary law, with no indication that the rest of the world believes that such a change is necessary, undermines the moral authority of the United States to rely upon an international order and to demand that others adhere to it. The United States, despite its military preeminence, must work within the international community and seek, to the largest extent possible, cooperation and consensus.

⁵⁵ Security Council Res No 487, UN Doc No S/RES/487 (1981).

To do otherwise would, as Henry Kissinger has said, “isolate and exhaust us.”⁵⁶ In the long-term, our military supremacy is hardly assured; even if it were, a world regime of international anarchy in which “might makes right” is hardly in our moral or political interest.

A preemption doctrine also creates the possibility that a state will accelerate its arms development, or even launch its own preemptive strike, in order to avoid being “preempted” itself. For example, the perceived preemptive strike on Iraq may cause North Korea or Iran to accelerate its development of nuclear weapons in order to deter US preemption.⁵⁷ This potential destabilization has apparently not been thoughtfully considered by those who advocate a preemption strategy. In addition, how do we contain the use of the preemption norm by others? How do we prevent the Chinese from relying upon it to invade Taiwan, or the Indians from relying upon it to attack Pakistan? In short, preemption portends a stark and lawless world.

The rules of international law must and do evolve to meet new and changing circumstances. But this evolution is circumscribed by necessity and accomplished only by the explicit and implicit agreement of the world community. The rules relating to state responsibility and to anticipatory self-defense have evolved and are sufficiently robust and flexible to permit us to defend ourselves. We cannot allow what is admittedly a real and terrible threat to lead us down paths that are best left unexplored.

VI. CONCLUSION

Most states have accepted, at least implicitly, a paradigm that recognizes that the *Nicaragua* and *Iran Hostages* cases do not reflect the prevailing international standard of state accountability for the acts of terrorist organizations. States that give sanctuary or significant support to terrorist groups, in certain cases, sacrifice their territorial integrity to the extent necessary for the victim states to deal effectively with the terrorist threat. The rules regarding anticipatory self-defense must also be understood in the light of a new reality. “Imminence” simply does not mean the same thing in 2003 as it did in 1842. Nonetheless, the standard itself is a serviceable one. The rules of international law presently accepted by the world community provide the legal authority to combat terrorism. Years from now, the international community will sit in judgment of us, as it did in 1929 following World War I and in 1949 following World War II. It would be a serious mistake to have failed to take the opportunity to create a truly safer and more secure world.

⁵⁶ Henry Kissinger, *Beyond Baghdad After Regime Change, Says Henry Kissinger, the U.S. Must Help Craft a New International Order*, NY Post 24 (Aug 11, 2002).

⁵⁷ See Peter Slevin, *Analysts: New Strategy Courts Unseen Dangers; First Strike Could Be Precedent for Other Nations*, Wash Post A1 (Sept 22, 2002).



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