



## **Military Response to Terrorism and the *Jus ad Bellum***

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**Abstract.** In the post-Cold War security environment there have been factual developments and ambiguities that pose important challenges to the basic concepts, principles and rules of international law, especially concerning the use of force. The first part of this paper considers the option of multilateral employment of military force to prevent or to respond to acts of terrorism, and looks particularly at the Security Council's gradual enlargement of the notion of threat to international peace and security with respect to (international) terrorism. The second, and central, part of the paper then proceeds to examine the complex issue of a unilateral military response to terrorism, focusing on some its most murky features, such as: (a) the appropriate interpretation of the concept of 'armed attack' in the context of terrorist activities; (b) the requirement of attributability to States of terrorist attacks; and (c) the doctrines of anticipatory and preventive self-defence.

**Keywords.** International law, terrorism, *jus ad bellum*, multilateral military response to terrorism, unilateral military response to terrorism, armed attack, attributability, anticipatory self-defence, preventive self-defence.

### **Introduction**

The post-Cold War security environment entails significant factual developments and ambiguities that pose important challenges to the basic concepts, principles and rules of international law in general, and international law on the use of force in particular. They include the increasing involvement of non-state actors, such as armed bands, insurgents and terrorist groups, in situations of armed conflict; cross-border terrorist violence; and the hostile presence of terrorist groups in foreign territory without full control. At the same time, States have started increasingly to consider the use of military force in confronting terrorist groups abroad and, occasionally, governments that harbour them.

Apart from having generated fierce debates about the efficacy of an armed response to the threat of terrorism, this trend has also raised difficult issues regarding the legal acceptability of such measures: namely, international law on the use of force, or *jus ad bellum*, seriously restricts the ability of States to resort to armed force in their international relations, save in case of an individual or collective self-defence against an armed attack, or on the basis of a Security Council authorization in case of a threat to the peace, breach to the peace, or act of aggression. Yet, since this legal paradigm has been developed on the basis of the state-centred understanding of international order, contemporary terrorist and counter-terrorist violence do not fit easily within these traditional parameters.

This paper thus examines a question central to any contemporary consideration of international law and security: under what circumstances, if any, may the use of armed force by States across national borders be a legally valid response to terrorist activities? It does so by reviewing the existing legal principles and rules on the use of force, as this author believes them to be, while at the same time considering some of the recently (re-)emerging doctrines and State practice in this area, and the extent to which they might affect the validity or the traditionally accepted interpretation of these principles and rules. The first part of the paper considers the option of a multilateral employment of military force to prevent or to respond to acts of terrorism and looks particularly at the Security Council's gradual enlargement of the notion of threat to international peace and security with respect to (international) terrorism. The second, and central, part of the paper then proceeds to examine the complex issue of a unilateral military response to terrorism, focusing on some of its most murky features, such as: (a) the appropriate interpretation of the concept of "armed attack" in the context of terrorist activities; (b) the requirement of attributability to States of terrorist attacks; and (c) the doctrines of anticipatory and preventive self-defence.

At the outset, a couple of methodological notes should be made. First, although the controversial declaration of the 'war on terrorism'<sup>1</sup> in the aftermath of the 9/11 attacks has stimulated this discussion, it is not the aim of this paper to evaluate the legality of any particular governmental policy or action. Rather, it attempts to evaluate the different legal dimensions of a military response to terrorism in general and abstract terms. Second, although the relevance of both strategic considerations and moral dilemmas of this thorny issue cannot be denied, these aspects are beyond the scope of this paper which centres upon the normative arguments regarding the proper response to this contemporary security threat.

### **Point of Departure: The Prohibition of the Use of Force**

The starting point is uncontroversial: the United Nations Charter emphasizes that peace is the fundamental aim of the contemporary international community, and is to be preserved if at all

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<sup>1</sup> 'Terrorism' is a phenomenon. Both practically and legally, war cannot be waged against a phenomenon, but only against an identifiable belligerent party. Therefore, the phrase 'war on terror' is nothing but a rhetorical device without any legal significance. The question of the legal character of the 'war on terror' has been the object of much debate in the academic community; see, eg Christopher Greenwood, *Essays on War in International Law*, (Cambridge, Cambridge University Press, 2006) 409-32; Joan Fitzpatrick, 'Jurisdiction of military commissions and the ambiguous war on terrorism' (2002) 96 *AJIL* 345, 346-50.

possible. The preamble expresses a determination of the United Nations ‘to save succeeding generations from the scourge of war’, ‘to practice tolerance and live together in peace with one another as good neighbours’, ‘to unite our strength to maintain international peace and security’, and to ensure ‘that armed force shall not be used, save in the common interest’. Article 1(1) sets forth as the primary purpose of the United Nations:

‘To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.’

The Charter then goes on to set out two fundamental principles of the United Nations. First, Article 2(3) asks States to settle their international disputes by peaceful means. Second, Article 2(4) makes it clear that:

‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.’

Unquestionably, the prohibition of the use or threat of force articulated in Article 2(4) forms not only part of conventional<sup>2</sup> but also of general customary international law, binding all States, not only members of the United Nations.<sup>3</sup> Moreover, it is today generally accepted that this provision reflects a *jus cogens* rule of customary international law, ‘from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’;<sup>4</sup> in other words, States cannot derogate from this prohibition by virtue of bilateral or multilateral agreements.<sup>5</sup>

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<sup>2</sup> Contained also in *inter alia* The 1933 Montevideo Convention on the Rights and Duties of States, the 1948 Charter of the Organization of American States, the 1947 Inter-American Treaty of Reciprocal Assistance, and the 1982 United Nations Convention on the Law of the Sea.

<sup>3</sup> The International Court of Justice (ICJ) first confirmed this in *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep (hereinafter *Nicaragua*) [99-100].

<sup>4</sup> Article 53 of the Vienna Convention on the Law of Treaties.

<sup>5</sup> The view that the prohibition of the use of force in international relations is one of the most obvious *jus cogens* rules of international law is virtually without exception supported by international scholarship and jurisprudence; see, e.g. ICJ in *Nicaragua* [190]; Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge, Cambridge University Press, 3rd edition, 2004) 93-96; Christine Gray, *International Law and the Use of Force* (Oxford, Oxford University Press, 2000), 24.

This does not mean, of course, that a State cannot be militarily present or active in another State with that State's prior consent, for example with the purpose of carrying out counter-terrorist or counter-insurgency operations along the common border, provided that such agreement does not have as its explicit or implicit purpose or effect the political subordination or territorial occupation of the consenting state's territory, or is *in any other manner inconsistent* with the purposes of the UN Charter.

Thus, the effect of the provision of Article 2(4) is all-encompassing: States are prohibited from using force in international relations and from threatening others with the use of force in all but narrowly defined circumstances. The Charter explicitly envisaged only two exceptions to this general prohibition: a) collective military enforcement action taken or authorized by the UN Security Council in accordance with Chapter VII; or b) the exercise of individual or collective self-defence as outlined in Article 51 of the Charter. The legality of any military action in response to terrorism will, therefore, depend on the applicability of either of these exceptions, to which I now turn.

### **Collective Military Action against Terrorism**

In manifesting the desire to regulate collectively and centrally the use of force between States, the members of the United Nations have delegated to that organization, specifically to the Security Council, the primary and authoritative role in the maintenance of international peace and security. The Council is fully empowered by the Charter to deal with every kind of threat that States may confront, even with military force, if necessary, for the maintenance or restoration of international peace and security (IPS). By provision of Article 39, the Council is entrusted with the exclusive authority to 'determine the existence of any threat to peace, breach of the peace or act of aggression' and upon such determination to make recommendations or to decide what enforcement measures shall be taken in accordance with Article 41 (measures short of armed force) and Article 42 that provides for the undertaking of military action:

'Should the SC consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action *by air, sea, or land forces* as may be necessary to maintain or restore IPS. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the UN.'

Under Charter Article 43, it was envisaged that States would conclude agreements with the United Nations, enabling the Council to require troop contributions to create and carry out military enforcement operations. It was further envisaged that the strategic command of these operations was to be vested in the Military Staff Committee, established under Article 47. However, no such agreements have ever been concluded due to the political climate of the Cold War confrontations, and the Military Staff Committee never functioned as intended. Being unable directly to apply Article 42 of the UN Charter for the lack of UN armed forces at its disposal, the Council cannot actually force Member States to contribute troops to carry out military collective enforcement action, but it may *authorize* them (individually or collectively) to do so.

The Council enjoys very broad (if not unlimited) discretionary powers when determining whether a particular situation or issue is a threat to international peace and security. It does not matter whether the threat emanates from a State or from a non-state actor, such as a terrorist group, and whether it is immediate or more remote in time. Indeed, in recent years, the Council has not hesitated to characterize international terrorism in general as one of the most serious threats to international peace and security.<sup>6</sup> Starting in 1992, the Council has also frequently condemned specific acts of terrorism as well as specific cases of state support for terrorism or state failure to prevent terrorist activities as a threat to international peace and security.<sup>7</sup>

On the basis of such determinations, the Council has often authorized non-military sanctions under Chapter VII, *inter alia* against Libya, Sudan, and Afghanistan/the Taliban regime.<sup>8</sup> In the aftermath of the 11 September 2001 attacks, the Council members unanimously determined in their landmark resolution 1373 (2001) that these attacks, like all acts of international terrorism, constitute a threat to international peace and security, but stopped short of explicitly authorizing the use of force.<sup>9</sup> Although the Council has not yet authorised collective enforcement action involving armed force in response to terrorism, these steps can be taken as an indication of the Council's growing recognition that military actions might in extreme circumstances be necessary when dealing with this mounting global security threat.

Given the broad political discretion the Council enjoys in acting under Chapter VII, the question emerges of how its power should be exercised when the Charter offers no specific criteria, when States see their interests so differently and when some States exercise so much more influence than others. Taking these concerns into consideration, the UN High-level Panel on Threats, Challenges and Change proposed in its 2004 report the following criteria to guide the Council's decision on recourse to armed force: seriousness of threat; proper purpose; last resort; proportional means; and balance of consequences.<sup>10</sup>

Thus, the Charter introduced a system of collective security to replace the previously almost unfettered recourse to unilateral military actions. Should a State face almost any kind of security threat, the Charter gives full authority to the Security Council as the international community's collective security voice to provide a response beginning with non-violent sanctions leading up to use of military force, in order to preserve international peace and security. After all, as Christopher Greenwood observed, 'the Charter is about keeping the peace, not about pacifism'.

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<sup>6</sup> UN Security Council Resolutions 1269 (1999); 1373 (2001); 1456 (2003); 1566 (2004); and 1735 (2006).

<sup>7</sup> UN Security Council Resolutions 1044 (1996); 1189 (1998); 1267 (1999); 1368 (2001); 1530 (2004); 1611 (2005); and 1618 (2005).

<sup>8</sup> UN Security Council Resolutions 748 (1992); 1054 (1996); 1267 (1998); 1526 (2004); and 1617 (2005).

<sup>9</sup> In a non-binding resolution 1368 (2001), adopted a few days earlier, the Council expressed its 'readiness to take *'all necessary steps'* (a phrase traditionally used by the Council to authorize military action) to respond to the attacks and to combat all forms of terrorism.

<sup>10</sup> Report of the High-level Panel on Threats, Challenges and Change, 'A more secure world: our shared responsibility' (2004) UN Doc A/59/565 [207].

### Unilateral Use of Force in Response to Terrorism

Without a Security Council authorization, States may only use force in individual or collective self-defence to repel an armed attack.<sup>11</sup> The provision of Article 51 provides, *inter alia*, that:

‘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.’<sup>12</sup>

In the context of terrorism, at least the following questions need to be considered: (a) Can a terrorist attack constitute an ‘armed attack’ within the meaning of Article 51?; (b) If so, does such an attack give rise to a right of self-defence as understood in international law? (c) If so, what are the conditions of a legitimate response in self-defence?

#### *Terrorist Attacks as ‘Armed Attacks’*

The language of Article 51 clearly postulates that self-defence is lawful only where there is an armed attack. Although the phrase ‘armed attack’ was traditionally understood as referring to the attacks by States, nothing in Article 51 or elsewhere in the Charter indicates that an armed attack can emanate *only* from States. On the contrary, the mere textual reading of Article 51 suggests that the right of self-defence makes no distinction between a State attacker and a non-state attacker. Moreover, a teleological reading of this provision indicates that the *impact* of the attack is considered more decisive than its private or public origin.<sup>13</sup>

It is widely accepted today that the concept of ‘armed attack’ includes acts of armed force by private actors, acting either as a tool of a State or on their own, where such acts are sufficiently grave, or in other words, where such acts are equivalent, by their ‘scale and effects’, to an armed attack by a State. This standard was first put forward by the International Court of Justice (ICJ) in the *Nicaragua* case,<sup>14</sup> where the majority of the Court accepted that self-defence could in certain circumstances include response to non-state acts of armed force “‘of such gravity as to amount to” (*inter alia*) an actual armed attack conducted by regular armed forces’.<sup>15</sup> In another case, the storming of the US Embassy in Tehran was regarded by the ICJ as an armed attack.<sup>16</sup>

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<sup>11</sup> The term ‘self-defence’ is hereinafter used to denote both the individual and collective modes of self-defence.

<sup>12</sup> Charter of the United Nations, Art 51.

<sup>13</sup> See also Carsten Stahn, “Nicaragua is Dead, Long Live Nicaragua” — The Right to Self-defence under Art. 51 UN-Charter and International Terrorism’ in Christian Walter *et al* (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Berlin, Springer, 2004) 827-77.

<sup>14</sup> Above n 3 [194-5].

<sup>15</sup> UNGA Res 3314 (XXIX) (14 December 1974) Annex, Art 3.

<sup>16</sup> *The Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep (hereinafter *Diplomatic and Consular Staff* case) [57 and 91].

Today, most States also seem to support such interpretation of Article 51. In the aftermath of the 9/11 attacks the NATO Member States have expressed their understanding that the incident of 9/11 amounted to an 'armed attack' against the United States;<sup>17</sup> the members of the Security Council, although not explicitly describing the 9/11 events as an 'armed attack', carefully worded resolutions 1368 and 1373 so as to affirm the inherent right of self-defence within a context of a broader response to terrorism;<sup>18</sup> and most other States have not objected to the US-claimed right of self-defence in response to this particular attack. Although many States and legal commentators have criticized the way the US military action in Afghanistan was carried out, they tended to limit their criticism in terms of the choice of a target and the principles of necessity and proportionality rather than the question of whether an 'armed attack' by non-state actors, triggering the US right of self-defence, occurred. The same can be said about the 2006 Israeli military intervention in southern Lebanon, where most States have rejected Israel's 'disproportionate use of force' rather than its basic right to military action in response to acts by Hezbollah.<sup>19</sup> In light of the above, it seems clear that in contemporary international law the concept of 'armed attack' has been considered broad enough to cover terrorist armed actions, provided that they reach a certain level of intensity.

#### ***Armed Response Against a State: The Attributability Requirement***

Although it seems to be safe to claim that military activities of private actors may amount to an 'armed attack' within the meaning of Article 51 of the Charter, the right of the victim State to respond in a form of armed action does not smoothly extend to such scenarios. As a fundamental rule, measures of self-defence can only be directed against the attacker. Since most defensive military measures will, as a matter of fact, violate the sovereignty and territorial integrity of another State,<sup>20</sup> the main question remains whether such measures are restricted to situations where the initial attack can be attributed to that particular State. On its face, the right approach seems to be that in order to balance between one State's right of self-defence and another State's right not to be the victim of the threat or the use of force, a considerable degree of the latter's State involvement in the illegal actions must be established before a defensive military action can be launched against it. However, the necessary level of 'involvement' is not altogether clear.

It is widely accepted that for the acts of the private actors to be attributable to a foreign State for purposes of self-defence, that State must have exercised a certain extent of control over their actions. However, the necessary degree of 'control' is not altogether clear.<sup>21</sup> The ICJ has

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<sup>17</sup> Press Release (2001) 124, Statement by the North Atlantic Council (12 September 2001) 40 *ILM* 1267.

<sup>18</sup> Although the Council members did not explicitly characterise the 9/11 attacks as 'armed attacks' (but rather as a threat to international peace and security in terms of Article 39), the confirmation of the right of self-defence in this particular resolution could only mean that they considered that terrorist attacks constituted armed attacks for the purposes of Article 51 of the UN Charter. See also Greenwood, above n 1, 426-27.

<sup>19</sup> UNSC 'Security Council Debates Escalating Crisis between Israel, Lebanon; UN Officials Urge Restraint, Diplomacy, Protection Of Civilians' (14 July 2006) Press Release SC/8776.

<sup>20</sup> The rare exceptions would be military actions on the high seas or in the international air space.

<sup>21</sup> The only clear-cut scenario involves an attack committed by private actors acting in the capacity of *de jure* or *de facto* organs of a State, which is regarded as an attack of that State under international law,

developed a rather restrictive test of attributability to a State of non-state attacks. In its 1986 *Nicaragua* decision, the Court held that the acts of the Nicaraguan *Contras* could not be imputed to the United States because the latter had not exercised ‘effective control’ over each specific operation at issue.<sup>22</sup> In the Court’s view, ‘financing, organizing, training, supplying and equipping’ or even ‘the selection of its military or paramilitary targets and the planning of the whole of its operation’ was not enough to meet the exacting threshold.<sup>23</sup> On the other hand, the International Criminal Tribunal for the Former Yugoslavia (ICTY) used a looser standard in its 1999 decision in the *Tadić* case, and concluded that the acts of the Bosnian Serb Army could be attributed to Serbia because the latter exercised ‘overall control’ over them, which still extended ‘beyond the mere financing and equipping of such forces and involv[ed] also participation in the planning and supervision of military operations’,<sup>24</sup> but did not necessarily mean that each illegal operation was carried out under the direct control of a State. This alternative approach had little impact on the stringent ‘effective control’ test: the ICJ itself explicitly dismissed the *Tadić* standard as too broad in its most recent decision in the *Bosnia Genocide* case,<sup>25</sup> while its *Nicaragua* standard has been reflected in Article 8 of the 2001 International Law Commission’s (ILC) draft articles on state responsibility, stating that conduct can be attributed to a State if the non-state actors were ‘in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct’.<sup>26</sup>

Alternatively, a State may be held responsible for a non-state armed attack which it *ex post facto* endorsed, either explicitly or tacitly. The ILC accepts the attributability to a State of a private action ‘if and to the extent that the State acknowledges and adopts the conduct in question as its own’.<sup>27</sup> Such a situation was found by the ICJ to have occurred in relation to the attack on and seizure by militants of the United States embassy in Tehran in 1979. In the *Diplomatic and Consular Staff* case, the Court described public statements of approval by the Iranian authorities following the takeover as creating Iran’s responsibility for that incident. According to the Court, Iran’s policy of not ending the hostage taking in order to put pressure on the United States and the compliance to this policy by various Iranian authorities which endorsed the policy on several occasions, transformed the occupation of the American embassy into acts of Iran.<sup>28</sup>

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even when the attack has been carried out contrary to the rules or directions of that State. For more, see Arts 4-7, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries’ in ILC, ‘Report of the International Law Commission on the Work of its Fifty-third Session’ (2001) UN Doc A/56/10 [hereinafter ILC Draft Articles].

<sup>22</sup> *Nicaragua*, above n 4, [115].

<sup>23</sup> *Ibid.*

<sup>24</sup> *Prosecutor v Tadić* (Appeal of the Judgment) (1999) 38 ILM 1518 (hereinafter *Tadić*) [145].

<sup>25</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) 2007 <<http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm>> accessed 27 February 2007.

<sup>26</sup> ILC Draft Articles, Art 8.

<sup>27</sup> ILC Draft Articles, Art 11.

<sup>28</sup> *Diplomatic and Consular Staff* case, above n 16 [74]. See also Tom Ruys and Sten Verhoeven, ‘Attacks by Private Actors and Self-Defence’ (2005) 10 *Journal of Conflict and Security Law* 289, 301.

On the other hand, it has traditionally been understood that a State's assistance to private actors in the form of arms supplies, financial or other support, does not by itself make their specific attacks attributable to the supporting State and it does not render that State a legitimate target of a defensive military action by the victim State.<sup>29</sup> A fortiori, harbouring of terrorists, although a violation of certain provisions of international law,<sup>30</sup> does not justify the *reductio ad mare liberum* of the territory of the 'host State', when that State was otherwise not substantially involved in the particular attack. Similarly, a State that fails to control or prevent illegal terrorist activities on its territory can be held responsible for not having complied with its international obligations regarding international terrorism, but a mere failure to comply with its international obligations is not in itself tantamount to an armed attack attributable to that State, thus the victim State has no right to direct its defensive military actions against that State.<sup>31</sup>

Indeed, some States (notably Israel, the US and South Africa) have suggested in the past that were entitled to the use of force in self-defence in response to terrorist attacks by targeting terrorist bases in the host State even if no substantial involvement of that State could be proven, where that State had actively supported or knowingly harboured terrorist groups. However, most States do not seem to have shared this view: for instance, in 1985, the Security Council unanimously rejected Israel's claim that it had been entitled to use force in self-defence against the Palestinian Liberation Organisation (PLO) headquarters in Tunisia because Tunisia had knowingly harboured terrorists who had targeted Israel.<sup>32</sup> More recently, the US military response to the 9/11 terrorist attacks was regarded by some authors as slackening the established threshold of attributability to extend the right of self-defence so as to justify actions against States which have been actively supporting or willingly harbouring terrorists.<sup>33</sup> Although it might seem that by securing the advance support of a large number of other States for its military action in Afghanistan the US has effectively lowered the traditionally required high threshold of involvement, it is difficult to

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<sup>29</sup> See *Nicaragua* case, above n 4 [195]. Although Judges Schwebel and Jennings partly opposed this position in their dissenting opinions, the majority of legal writers as well as States seem to support it. Even Judge Jennings himself implied that 'the mere provision of arms cannot be said to amount to an armed attack' unless 'coupled with other kinds of involvement' (above n 4 [543]). See also Gray, above n 5, 98-9. For an alternative view, see Greenwood, above n 1, 424-25.

<sup>30</sup> It has been widely recognized as a customary law principle that every State is under an obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of other States' (see eg *The Corfu Channel Case (United Kingdom v Albania)* [1949] ICJ Rep 22. The Security Council has also passed a number of resolutions, most notably resolution 1373 (2001), creating an international obligation on member States to deny safe haven and bring terrorists to justice. A breach of this international obligation to prosecute or extradite offenders might entitle the affected State to take proportionate countermeasures, not involving the use of force, against the offending State.

<sup>31</sup> Given the trans-national nature of the modern terrorist networks, adopting the opposite view would create a wide range of potential target States and increase the potential of inter-state violence, contrary to the supreme goal of the international community to preserve international peace and security if at all possible.

<sup>32</sup> Security Council Resolution 573 (1985); see also Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 *EJIL* 993, 996.

<sup>33</sup> See, eg Michael Byers, 'Terrorism, the Use of Force and International Law after 11 September' (2002) 16 *International Relations* 155; Frederic Kirgis 'Israel's Intensified Military Campaign Against Terrorism' (2001) *ASIL Insight* <<http://www.asil.org/insights.htm>> accessed 28 February 2007.

determine the exact impact of this one-off support for the US legal position on the emergence of a new international norm.

A number of international legal scholars have rightly noted that while the international reaction to the 9/11 events might be indicating an emerging *trend* towards such an expansion of the concept of self-defence, it could hardly be interpreted as an ‘instant custom’, changing the standard of attributability overnight.<sup>34</sup> Apparently, the ICJ shares this view: in two of its post-9/11 decisions, the *Legal Consequences of the Wall*<sup>35</sup> and *DRC v. Uganda*,<sup>36</sup> the Court essentially reconfirmed the *Nicaragua* standard and considered the current state of international law to permit self-defence in the case of an armed attack by a non-state actor only if the attack is attributable to another State.

Admittedly, this traditional approach fails to address adequately the question as to what kind of action a victim State *is* entitled to take in response to a large-scale armed attack by non-state actors where such acts cannot be attributed to a foreign State, a question of utmost relevance in the contemporary security context characterized by terrorist threats emanating from largely independent armed groups, often operating in a territory with no effective governmental presence or authority. That is why several authors have suggested that the victim State might be justified in carrying out defensive military strikes directed only against terrorist targets in such territory within a State which failed to take adequate measures to prevent terrorists from carrying out the specific attack.<sup>37</sup> There are signs that States increasingly support this view. In a very recent case, Israel justified its invasion in southern Lebanon in July 2006 as an action carried out in self-defence in response to the kidnapping of two Israeli soldiers by Hezbollah operating in Lebanese territory. Although Lebanon officially disassociated itself from the attack, most members of the Security Council acknowledged Israel’s inherent right of self-defence against armed actions of Hezbollah; however, some members of the Council simultaneously reiterated the need to respect the sovereignty and territorial integrity of Lebanon, thus indicating their view that Lebanon *as such* was not a legitimate target of the Israeli counter-attack.<sup>38</sup>

### ***Conditions of Legitimate Response: Necessity, Immediacy and Proportionality***

There are a number of authoritative views on what constitutes a legitimate self-defence. One of them is encapsulated in the *Webster formula*, formulated in the context of the UK-US *Caroline*

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<sup>34</sup> Stahn, above n 13; Eric P.J. Myjer and Nigel D. White, ‘The Twin Towers Attack: An Unlimited Right to Self-Defence?’ (2002) 7 *Journal of Conflict and Security Law* 5, 7-8.

<sup>35</sup> *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>> (hereinafter *Advisory Opinion on the Wall*) [139].

<sup>36</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* 2005 <<http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>> accessed 10 March 2007 (hereinafter *DRC v Uganda*) [146].

<sup>37</sup> Markus Krajewski, ‘Preventive Use of Force and Military Actions Against Non-State Actors: Revisiting the Right of Self-Defence in Insecure Times’ (2005) 5 *Baltic Yearbook of International Law* 1. This view was also supported by Judges Kooijmans and Simma in their respective separate opinions in the *DRC v. Uganda*.

<sup>38</sup> Above n 19.

dispute of 1837, in which forcible reaction (to attacks by non-state actors) was deemed legitimate only if the ‘necessity of self-defence [was] instant, overwhelming, leaving no choice of means, and no moment for deliberation...’<sup>39</sup> and when the force used in response was necessary and proportional to the threat at hand. As Gray pointed out, the *Caroline* incident has established criteria for lawful self-defence to which ‘most [S]tates and writers still refer’ when providing justification for their military activities even after 1945.<sup>40</sup> The ICJ confirmed the customary character of the necessity and proportionality requirements in both the *Nicaragua* case (para. 176), and the *Advisory opinion on the legality of the threat or use of nuclear weapons*.<sup>41</sup>

Necessity demands, essentially, that all non-military alternatives of redress have been exhausted and the use of force remains the only viable option to prevent the attack or frustrate its continuation in the particular circumstances.<sup>42</sup> Schachter has stressed that defensive military action cannot be deemed necessary ‘until peaceful measures have been found wanting or when they clearly would be futile’.<sup>43</sup> From this requirement implicitly follows that there must be no ‘undue time-lag between the armed attack and the exercise of self-defence’.<sup>44</sup> In other words, self-defence must be an *immediate* reaction to aggression; if the victim State allows time to elapse, its military reaction would appear to be an armed reprisal, which is forbidden under international law, and must thus be sanctioned by the UN Security Council. However, the immediacy requirement seems to have already been more broadly construed in practice in the age of terrorist attacks, which, to quote Greenwood, are ‘usually over and done with before the victim [S]tate is in a position to undertake a military response’.<sup>45</sup> Arguably, a *reasonably delayed* response should be considered legitimate ‘where there is a need to gather evidence of the attacker’s identity and/or collect the intelligence and [organise the] military force in order to strike back in a targeted manner’.<sup>46</sup>

The third traditional requirement of customary law is that any armed response in self-defence must be *proportionate*. Although the content of this requirement is not entirely clear, the prevailing view in legal scholarship seems to be that military action must be proportionate to its defensive purpose, i.e. no more than necessary to repel the attack.<sup>47</sup> In other words, there must be

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<sup>39</sup> Letter from Daniel Webster, US Secretary of State, to Henry Fox, British Minister in Washington (24 April 1841), reprinted in Kenneth Bourne, ed, *1 British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print*, Part I, Series C 153, 159 (University 1986).

<sup>40</sup> See Gray, above n 5, 105.

<sup>41</sup> ICJ Reports (1996) 1 (hereinafter *Nuclear Weapons Advisory Opinion*) [41-42].

<sup>42</sup> See, eg Michael N. Schmitt, ‘Counter-terrorism and the Use of Force in International Law’ (2002) 5 *The Marshall Center Papers* 530.

<sup>43</sup> Oscar Schachter, ‘The Right of States to Use Armed Force’ (1984) 82 *Michigan Law Review* 1620, 1635.

<sup>44</sup> Dinstein, above n 5: 184.

<sup>45</sup> Greenwood, above n 1, 422.

<sup>46</sup> Angus Martyn, ‘The Right of Self Defence Under International Law; The Response to the Terrorist Attacks of 11 September’ (2002) *Current Issues Brief No. 8, 2001-2002* <<http://www.aph.gov.au/library/pubs/CIB/2001-02/02cib08.pdf>> accessed 15 November 2006.

<sup>47</sup> See, eg Roberto Ago, ‘Addendum to the 8<sup>th</sup> Report on State Responsibility’ (1980) 2 *Yearbook of ILC* 51, 64 and 69. His view was supported, *inter alia*, by Judge Schwebel in his dissenting opinion in *Nicaragua*, above n 4, by Judge Higgins in her dissenting opinion in *Nuclear Weapons Advisory Opinion*, above n 41,

an approximation between the action and its purpose of averting the attack; the purpose of self-defence cannot be retribution, general deterrence, punishment or any other motive. According to this view, the intensity of the response *may* sometimes be disproportionate to the intensity of the initial armed attack as long as it is not designed to do anything more than what is necessary to achieve its legitimate aim to protect the territorial integrity or other vital rights of the defending State.<sup>48</sup>

As early as 1963, McDougal and Feliciano argued that the principle of proportionality must be applied with some flexibility, according to the specifics of a particular context<sup>49</sup> and may under certain circumstances need to exceed the scale and scope of the first attack or the threatened attack. Similarly, although the ICJ pronouncements in *Nicaragua*, *Oil Platforms* and *DRC v Uganda* focus primarily on weighing the intensity of the defensive force against the intensity of the force defended against, the Court recognized in *Oil Platforms* that it cannot assess in isolation the proportionality of avowedly defensive action to the initial armed attack.<sup>50</sup> Furthermore, in *Nuclear Weapons*, the Court indicated the possibility that in cases where the stakes are higher, such as where the preservation of a State is at risk, it would take into account the overall defensive purpose in its assessment of proportionality.<sup>51</sup>

It is worth noting that in the context of terrorism, the legitimate defensive purpose might extend to the detention of the persons allegedly responsible for the attacks, and destruction of the legitimate military objectives under *jus in bello* (considered below), such as infrastructures, training bases and similar facilities used by the terrorists.<sup>52</sup>

#### ***Anticipatory Self-Defence: Averting an Imminent Terrorist Attack***

Another complex question to which the Charter gives no clear answer is whether unilateral military action against a *threat* of a (terrorist) armed attack may ever be justified. Before the Second World War, international customary law traditionally endorsed the idea that a State can respond to an impending attack leaving no sufficient alternative choice of means. The above-mentioned *Caroline* incident serves as a classic case confirming that a threatened armed attack may give rise to a right of self-defence, when the threat of an attack is ‘instant’, or in other words,

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as well as by Judges Kooijmans and Simma in their respective dissenting opinions in *Congo v Uganda*, above n 36.

<sup>48</sup> *Ibid.* For the contrary understanding of the proportionality concept as a requirement of balance between the mode of the initial force and the mode of counter-force see, eg Dinstein, above n 5, 194; Schachter, above n 43, 1637, and Ian Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963) 259 and 261-64.

<sup>49</sup> Myers S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: the Legal Regulation of International Coercion* (New Haven, Yale University Press, 1961) 217.

<sup>50</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v USA)* 2003 <http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm> accessed 17 March 2007 (hereinafter *Oil Platforms*) [77].

<sup>51</sup> *Nuclear Weapons Advisory Opinion*, above n 41 [42].

<sup>52</sup> Cassese, above n 32, 999.

imminent.<sup>53</sup> While the *Caroline*-based doctrine of anticipatory self-defence was reconfirmed by the International Military Tribunal at Nuremberg in relation to the German attack on Norway in 1940,<sup>54</sup> its validity after the entry into force of the UN Charter and its general ban on unilateral force remains open to debate. The language of Article 51 makes it clear that self-defence is lawful only when an armed attack *occurs* and not as a first strike option. But the Charter does not define at which point in time an 'armed attack' begins and nothing in this provision itself implies the legality or illegality of the use of force in cases when an armed attack is *about to occur*.

In practice, States have mostly refrained from invoking the doctrine of anticipatory self-defence to justify their military actions after 1945, even when the facts of the case would allow it.<sup>55</sup> One rare exception is the Israel's attempt to justify its 1981 attack on the Osirak nuclear reactor under construction in Iraq as an anticipatory self-defence. While the Security Council unanimously condemned Israel's action in its resolution 487 (1981), a closer look at the debate reveals that most States refrained from explicitly rejecting (or approving) the anticipatory self-defence doctrine *per se*, but rather refused the Israeli argument that the mere construction of the reactor constituted an *imminent* threat. Although in recent years, some of the key actors, such as the US,<sup>56</sup> the UK,<sup>57</sup> Australia,<sup>58</sup> France,<sup>59</sup> and Russia,<sup>60</sup> have explicitly accepted its validity in case of an *imminent* armed attack, this doctrine has still not been widely accepted by States. International legal scholars have put forward numerous arguments on this issue and although there

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<sup>53</sup> Above n 39.

<sup>54</sup> The Tribunal rejected the German argument that it had attacked Norway in 1940 in anticipatory self-defence because Germany had not acted to forestall an *imminent* invasion by the Allies, but rather to 'prevent an Allied occupation at some future date.' See *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 *AJIL* 172, quoting John Bassett Moore (1906) 2 *International Law Digest* §2.17, 412.

<sup>55</sup> For instance, the Soviet-Cuban maritime quarantine imposed unilaterally by the US in the context of the 1962 Cuban Missile Crisis, which is often cited as an example of anticipatory self-defence, was never justified by the US administration in this way but in terms of a regional enforcement action previously authorized by the OAS. Similarly, Israel based its justification for the 1967 attack against Egypt on a broad construction of the starting point of an 'armed attack', rather than on the doctrine of anticipatory self-defence—it maintained that its action was an act of self-defence under Article 51 of the Charter after Egyptian forces had attacked Israel first.

<sup>56</sup> The National Security Strategy of the United States of America (17 September 2002) <<http://www.whitehouse.gov/nsc/nss.pdf>> accessed 8 March 2007.

<sup>57</sup> Statement by the Attorney General Lord Goldsmith to the House of Lords on 21 April 2004 <[http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm#40421-07\\_spm0](http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm#40421-07_spm0)> accessed 8 March 2007.

<sup>58</sup> Australia's Parliamentary Joint Standing Committee on ASIO, ASIS and DSD: Inquiry into Intelligence on Iraq's Weapons of Mass Destruction <<http://www.aph.gov.au/house/committee/pjcaad/WMD/report.htm>> accessed 10 June 2006.

<sup>59</sup> The 2002 French defence bill: Loi de Programmation Militaire 2003-2008 (11 September 2002) <<http://www.defense.gouv.fr/english/d140/inde.htm>> accessed 10 June 2006.

<sup>60</sup> See, eg Christopher Greenwood, 'The Legality of Using Force against Iraq' (2003) *Memorandum to the Select Committee on Foreign Affairs* <<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmcaff/196/2102406.htm>> accessed 15 November 2006.

is no consensus on the topic, the prevailing view today seems to be that anticipatory self-defence is permitted in the post-Charter international law, but only in extreme circumstances, in order to preempt an *imminent* threat.<sup>61</sup>

Yet, the concept of an *imminent* threat remains without a precise definition in international law and it may be difficult ever to express the imminence of a particular threat in a legally robust fashion. The traditional *Webster* requirement of an ‘instant’ threat seems to centre on the temporal dimension of the notion and it is very stringent: it considers the threat to be imminent when the attack is just about to occur or, in other words, when an attack is ‘in evidence’.<sup>62</sup> Such a restrictive requirement could hardly ever be satisfied in the context of modern warfare and the specific character of contemporary terrorism characterized by clandestine preparations and surprise attacks. Although it is difficult to assess where international law stands at the moment, it must be admitted that States may well need to use force without a prior Security Council authorization, even when an armed attack is not temporally imminent, but the threat of it is overwhelming.

However, clear and objectively verifiable criteria for evaluation of the ‘imminent’ threat would first need to be established to improve the unilateral decision-making and to reduce the risk of error. In the present author’s view, a framework governing unilateral defensive actions against the non-conventional threats could be developed taking into account the following elements: (a) the specific character of the threat, including: the magnitude of potential harm; the nature of strategies, tactics, and methods of warfare (clandestine operations, surprise attacks, sophisticated technology, non-conventional weapons); (b) the capacities and the specific hostile intent of the alleged adversary; (c) the proximity of the threat and time available for defence; (d) the likelihood of the threat being realized in case of inaction; (e) the availability of credible and convincing evidence; (f) complicity with the other Charter and customary law principles of self-defence: necessity, proportionality, duty to report to the Security Council and termination of unilateral action after the Council has taken over.<sup>63</sup>

In practice, some States have developed an argument that in assessing the right of self-defence armed attacks should be viewed cumulatively, especially with regard to attacks originating from private actors. In particular, the existence of past attacks has been relied on to affirm the credibility of future attacks, thus building up the image of a continuing attack. This view seems to make sense especially in the context of terrorist campaigns, which generally consist of a series of actions that

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<sup>61</sup> See, eg Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law* (London, Longman, 9th edition, 1991). This view is shared by many other prominent commentators, including Dinstein, Greenwood, Higgins, and Schachter, and has recently been supported by the UN High-level Panel on Threats, Challenges, and Changes (see above n 10 [188]).

<sup>62</sup> See Mary Ellen O’Connell, ‘The Myth of Preemptive Self-Defense’ (2002) *ASIL Task Force Papers*, <<http://www.asil.org/taskforce/oconnell.pdf>> accessed 10 June 2006.

<sup>63</sup> For similar views, see Rabinder Singh and Alison Macdonald ‘Legality of use of force against Iraq’ (2002) <<http://www.lcnp.org/global/IraqOpinion10.9.02.pdf>> accessed 25 July 2005; Abraham D. Sofaer, ‘On the Necessity of Preemption’ (2003) 14 *EJIL* 209, 220.

occur periodically over extended periods of time.<sup>64</sup> Mainly Israel and the United States have asserted that the right to self-defence includes the right to disrupt ongoing terrorist attacks in some circumstances, where it appears to be necessary to prevent further attacks that are anticipated on the basis of previous experience. Some leading scholars have also suggested that self-defence against future terrorist attacks may be justified where *prior* attacks have occurred and there is *clear and convincing evidence* that more attacks are planned.<sup>65</sup> On the other side, while the UK and France have consistently supported that view, most other members of the Security Council seem to reject the ‘accumulation of events’ theory in the context of counter-terrorist military actions.<sup>66</sup>

Thus, it is hard to assess where exactly law stands in this regard. In any case, an important caveat must be whether the attacks can be viewed as part of a pattern and have occurred within a reasonable time-frame. While the question of ongoing campaigns with another armed attack in effect already underway conceptually differs from the questions of anticipatory self-defence *stricto sensu*,<sup>67</sup> prudence is crucial as the idea of a continuous right to self-defence beyond specific attacks again seems dangerously close to unlawful reprisals.<sup>68</sup> This applies particularly to the recent US administration’s all-inclusive open-ended rhetoric of the ‘war on terror’, intended partly to justify a permanent recourse to armed force that is in exact contradiction with the underlying rationale of the right to self-defence.

### ***Preventive Military Strikes to Forestall Future Terrorist Attacks***

Although the doctrine of anticipatory self-defence itself implies a certain re-interpretation of the traditional self-defence standards, the most radical and far-reaching post-9/11 challenge to the *jus ad bellum* has been posed by the Bush administration’s doctrine of unilateral preventive military intervention as a means of reduction or prevention of terrorist threats. Denying terrorists the sanctuary they seek in failed States is becoming a central feature of the US counter-terrorist strategies and the Bush administration had already declared its willingness to use preventive force against suspected terrorists inside a State that is incapable of policing itself or even to overturn ‘hostile regimes’<sup>69</sup> that willingly harbour and support terrorist activities within their borders.<sup>70</sup>

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<sup>64</sup> Indeed, the 9/11 attacks cannot be seen in isolation. A series of previous international terrorist attacks had been carried out against American targets including the bombing of US embassies in Kenya and Nairobi in 1998 and the attack on *USS Cole* in Aden, Yemen in 2000.

<sup>65</sup> See, eg Dinstein, above n 5, 219-20; Christopher Greenwood, ‘International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’ (2003) 4 *San Diego International Law Journal* 7, 23; Robert Y. Jennings, ‘The Caroline and McLeod Cases’ (1938) 32 *AJIL* 82, 87; O’Connell, above n 62.

<sup>66</sup> Israel-Lebanon (1968) UNYB 228; Israel-Tunisia (1985) UNYB 285; USA-Libya (1986) UNYB 247.

<sup>67</sup> See O’Connell, above n 62; Michael N. Schmitt, ‘Preemptive Strategies in International Law’ (2003) 24 *Michigan Journal of International Law* 513, 535-36.

<sup>68</sup> See also Gray, above n 5, 118-19.

<sup>69</sup> In his speech to the United States Congress on 20 September 2001, President Bush stressed that ‘[f]rom this day forward, any nation that continues to harbour or support terrorism will be regarded by the United States as a hostile regime’. See ‘Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11’ (2001) 37 *Weekly Comp. Press Doc* 1347, 1349.

The main problem with this doctrine is that it seeks to remove any legal constraints on the unilateral use of force. Unlike anticipatory action, preventive strikes are not about pre-empting an immediate and credible security threat, but about foiling the unspecified threats that might occur at some uncertain time in the future. It is an offensive strategic response to a long-term threat, not a defensive tactical response to an impending attack, which is the underlying rationale of the anticipatory action.<sup>71</sup> It is virtually uncontroversial that this doctrine radically departs from the existing regulation of the use of force.<sup>72</sup> This author believes that the logic of unilateral preventive strikes against the threats-to-be should also in the future be rejected in the global order governed by the rule of law due to its many normative flaws.

To highlight just one, the US-proposed expansion of the self-defence rule lacks any conceptual and normative clarity as to the actual scope and objective criteria for its implementation. Introducing an overly vague and unlimited rule on unilateral force into international law would jeopardize the validity of the prohibition of the use of force itself. There must remain at least some objective, non-political standards by which the military actions of States can be evaluated and either supported or condemned as illegitimate. Replacing even the minimum legal standards with purely subjective and arbitrary judgments of States would mean completely denying any normative role of the international law on the use of force. Admittedly, power politics will always play an important role in the international system and the legal constraints on that power will probably never be completely free from uncertainties. But opening the way to military actions subject only to the more or less reliable threat assessments by single States, where formal legal scrutiny is impossible, could lead to an unrestricted exercise of power against some perceived threats.

## Conclusion

The fight against terrorism should primarily be understood in a long-term perspective, which requires a careful reconsideration of the relationship between the rise of terrorism and deep social inequalities such as poverty, economic, social and cultural underdevelopment, lack of political pluralism and democracy, and so on. Looking at it through a military lens can thus be merely a short-term approach and not the most effective in strategic terms, or politically wise. That is why it is especially important for military force to be used only in the last resort and strictly within the limits of international law, so as not to collide with the generally accepted principles of the international system. International law on the use of force has been one of the greatest achievements of the international community in the 21<sup>st</sup> century and whilst contemporary terrorism

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<sup>70</sup> See US National Security Strategy, above n 56.

<sup>71</sup> The distinction is partly borrowed from Jack S. Levy, 'Declining Power and the Preventive Motive for War' (1987) 40(1) *World Politics* 82, 91.

<sup>72</sup> In the classic case, Israel's 1981 attack on the half-built Osirak nuclear reactor in Iraq was roundly rejected by the Security Council, mostly on the grounds that the attack was preventive, not anticipatory, in nature. Apart from Israel and the US, most other States have expressed both political and normative resentment to the idea of preventive strikes. A vast majority of international legal scholars likewise reject this doctrine and the view was recently shared by the UN High-level Panel on Threats, Challenges, and Change (see above n 10 [188]).

carried out by largely independent private actors does not fall smoothly into its traditional paradigms, the relevant decision-makers must strive to respect and develop it further, where necessary, to ensure its continued relevance and to prevent the anarchy so eagerly pursued by the terrorists themselves.

The current international system of collective security combined with the contemporary regime of self-defence allows States to respond to terrorism fully, reactively or preventively, even with military force. In order to comply with the existing legal principles of the international community, any counter-terrorist military action should be carried out on the basis of these fundamental principles of the contemporary *jus ad bellum*:

- (1) **The recognition of the primacy of the collective security system under the UN Charter.** As much as possible, military counter-terrorist operations should be taken on a multilateral basis, which does not collide with the generally accepted principles of the international community; especially any eventual *preventive* military action should be taken *only* with the prior Security Council authorization.
- (2) **A continuing compliance with the fundamental *jus ad bellum* requirements in the exercise of self-defence.** Any State that seeks to invoke the right of self-defence should be required to meet a high standard in showing that its actions are justified due to an actual or imminent large-scale attack by terrorists; even in such situations, the victim State may direct its defensive military action against another State only if those attacks can be attributed to that State under the international law of State responsibility. In any case, armed response is legitimate only when it is both necessary to repel the attack and reasonably proportionate to both the initial threat and to its own defensive purpose. All defensive military operations must be immediately reported to the Security Council and must cease once the Council has taken the necessary steps to maintain international peace and security.

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