I. Introduction

The attack on the World Trade Center and the Pentagon on September 11, 2001 has sparked a hot debate on the adequacy of the current international law framework and how it will face the increasing challenge of the use of force by non-State actors. The ensuing military actions pursued by the U.S.-led coalition against the Taliban regime and al Qaeda in Afghanistan since October 7, 2001 poses palpably complex issues in jus ad bellum and in jus in bello. In respect to the former domain of international law, intractable questions remain. These questions are in regard to how to provide legal explanations for U.S. military operation in light of both the U.N. Charter and customary international law.

It is possible to argue that Security Council Resolutions 1368 and 1373, which recognize the "inherent right" of self-defence, implicitly authorize the exercise of such a right pred-
icated on customary international law. The argument that the customary international rule on self-defence does not call for an "armed attack," the explicit precondition under Article 51, is contested. Such an argument risks separating the content of the customary rule far apart from the ambit of Article 51 and undermining the intertwined relationship between customary international law and the U.N. Charter.4

There is, however, an argument that the military operation against the al Qaeda organization in Afghanistan could be justified as a stretch, rather than a complete over-haul of the pre-existing customary international law. Military action could be viewed as the right to self-defence when used against alleged or real terrorist bases operating on the soil of other States failing or unable to prevent terrorist attacks. Although the development of international law since September 11, 2001 has not come to embrace such a controversial doctrine of indirect aggression per se, the acquiescence of international community in the military action pursued by the United States and its allies can be approximated to the possibility that such an extensive mode of self-defence without consent of a territorial State may be tolerated in certain exceptional circumstances. On the other hand, the exercise of self-defence against the Taliban regime, namely the State of Afghanistan itself, raises more intractable issues. It must be questioned whether the September 11th attacks could be deemed as acts of the State of Afghanistan, with its responsibility for these internationally wrongful acts in turn enabling it to be the legitimate target of self-defence action conducted by the United States and its allied force. Even if that question is answered in the negative, it seems clear that the Taliban's responsibility was engaged for its failure to prevent and punish acts of international terrorism committed by al Qaeda, including its refusal to hand over Osama bin Laden, in contravention to a series of the Security Council's resolutions.

This article is intended to furnish an analysis of only the jure ad bellum aspects of the military operation against Afghanistan, leaving aside discussions on issues of jure in bello. Since the resort to armed force against al Qaeda and the Taliban was already made, this article seeks to offer a disinterested and thorough legal examination of this fait accompli, focusing on any change in the pre-September 11 acquis concerning the law on self-defence. This article starts by appraising the legal requirements of the right to self-defence in the U.N. Charter and in customary international law with specific regard to an armed attack requirement and the standard of evidence. Second, it seeks to delineate a coherent set of

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4. In the Nicaragua case, in the areas of use of force and the right of self-defence, the ICJ held that:

... so far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations.

Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, at 96-97, para. 181 (June 27).
arguments on State responsibility assumed by the Taliban government, the breaches of which reinforced the United States endeavour to broaden the claim of self-defence to include the attack against the State of Afghanistan itself. By analysing those issues, this article aims to defend the thesis that despite the magnitude of political implications, the role of international law is crucial in providing an expounded legal framework that can adequately meet the challenge of international terrorist organisations. It concludes that insofar as concerns the military offensive against Afghanistan, international law has served to demarcate the shifting (or stretching) boundaries of the right of self-defence. The adjustment of international law to the new political reality after the September 11th attacks, unless this is not stretched to any pre-emptive war against Iraq, has remained within the tight bounds of the non-use of force principle, with limited disruptive effects on the acquis.

II. The Right of Self-Defence

A. General Overview

Article 51 of the U.N. Charter recognizes the “inherent right” (or “droit naturel”) of a State to individual or collective self-defence in the event of an “armed attack.” The right of self-defence, together with enforcement action laid down in Chapter VII of the U.N. Charter, forms one of the two exceptions to the otherwise unconditional and peremptory nature of the non-use of force principle, as recognised in Article 2(4) of the U.N. Charter.

The conditions on which the right of self-defence can be lawfully exercised have long been contemplated in customary international law. Following the Caroline incident in 1837, the then U.S. Secretary of State, Webster, defined the jus ad bellum principle of necessity in his correspondence in 1842, demanding that prior to recourse to use of force, there must be “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.” A caveat, however, must be noted. The Webster formula was a product of the era in which resort to armed force was deemed as an acceptable attribute of State sovereignty, with the right of self-defence not clearly distinguished from the right of self-preservation deriving from natural law.

Whether pre-existing customary international law on the right of self-defence was superseded by, or subsumed into the U.N. Charter in 1945 was extensively analysed by the International Court of Justice (ICJ) in the Nicaragua case. First, the Court stated that the rules concerning non-use of force, non-intervention and the right of self-defence could be found both in the U.N. Charter and in customary international law, and that the customary international rules governing the same areas may not necessarily overlap the normative content of the U.N. Charter. Second, it was held that even if the customary norm and the treaty norm were to have exactly the same content, this would not mean that incorporation

6. End of the Cold War, supra note 3, at 126.
8. Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, at 94, para. 176 (June 27). After discussing that Article 51 does not refer to the well-established customary principles of necessity and proportionality and that the Charter does not lay down the definition of the “armed attack,” the ICJ held:

It cannot therefore be held that Article 51 is a provision which “subsumes and supervenes” customary international law. It rather demonstrates that in the field in question ... customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not

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of the customary norm into treaty law denies the former its separate applicability from the latter. Third, the ICJ held that the reporting obligation on a State invoking the right of self-defence is so closely connected to the content of a treaty obligation that it cannot be regarded as part of customary international law.

B. Issues Relating to an "Armed Attack"

1. Meaning of an "Armed Attack"

State practice till the adoption of the U.N. Charter did not furnish clear guidelines as to what is meant by an "armed attack" within the meaning of Article 51 of the U.N. Charter. Evidently, an "armed attack" constitutes a specific form of an act of "aggression," which falls within the broader category of "use of force." The definition of the term "aggression" is extensively set forth in the unanimously adopted General Assembly Resolution on the Definition of Aggression 1974.

The ICJ in the Nicaragua case upheld the view that various acts as formulated in the Definition of Aggression constitute customary international law. Furthermore, the Court held that the prohibition of armed attacks in customary law covers not only the action by regular armed forces across an international border, but also the sending of armed bands, groups, irregulars or mercenaries to another country "on a significant scale." Yet, merely furnishing weapons or other logistical support (including training) to the opposition in another State was not held to constitute an "armed attack" in the sense of Article 51, albeit such an act may be perceived as "a threat or use of force" in the sense of Article 2(4), or as "intervention" in internal or external affairs of other States as proscribed in Article 2(7). Further, financial aids to insurgents amount merely to an act of intervention but not to the extent of the use of force. The Court's restrictive definition of an armed attack relative to the "indirect use of force" was, however, criticised by Judge Jennings in his dissenting opinion, who, representing the view shared by many western States, stated that "the provision of arms may . . . be a very important element in what might be thought to amount to armed attack, where it is coupled with other kinds of involvement." In a similar vein, Kaikobad suggests that delict of assistance and interference be assimilated to that of aggression/armed attack, provided that the level and effects of assistance and interference are "neither insignificant nor wanting in sufficient gravity."

Overlap exactly, and the rules do not have the same content. This could also be demonstrated for other subjects, in particular for the principle of non-intervention.

9. Id. at 94–95, paras. 177–178.
10. Id. at 105, para. 200.
11. End of the Cold War, supra note 3, at 127.
14. Id. art. 3(g).
16. Id.
17. Id.; see also id. ¶¶ 108, 116, 228.
18. Id. ¶ 228.
19. Id. at 543 (dissenting opinion of Judge Jennings).
2. Dichotomy: Self-Defence in Response to an Armed Attack and Proportionate Countermeasures against the Use of Force Short of an “Armed Attack”?

The ICJ in the Nicaragua case appears to have introduced an element of relativity to the notion of the use of force, stating that “it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms.” When assessing the conditions for lawful countermeasures, the Court observed that

a use of force of a lesser degree of gravity cannot . . . produce any entitlement to take collective countermeasures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.

The ICJ’s reasoning presupposes a bifurcated approach to the category of use of force: on one hand, the existence of a grave form of the use of force that amounts to an “armed attack,” which enables the right of self-defence to be exercised; on the other, the existence of a less serious form of the use of force, that is short of an “armed attack.” Apart from the provision of weapons, the latter instance encompasses the laying of mines in the territorial and internal waters of another State, an unauthorised flight over another State’s territory, a minor frontier scuffle, and an attack against individual vessels or planes, neither of which threatens the existence of a State as such.

The Court has left the question equivocal as regards whether a State can invoke countermeasures involving use of force but not reaching the level of an armed attack. The ambiguous stance of the Court on this matter might be read as warranting the view that the latter instance confers upon a victim State the right to take proportionate countermeasures, though countermeasures are allowed individually only and not collectively with the support of other States. In the “Case concerning the Air Services Agreement of 27 March 1946” (U.S. v. France), the Arbitral Tribunal stated:

If a situation arises which, in one State’s view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through “counter-measures.”

The phrase “within the limits set by the general rules of international law pertaining to the use of armed force” is ambivalent, suggesting that the award might tacitly recognise the entitlement to invoke a counter-measure involving the use of force short of an armed attack. However, the phrase at issue should be read as taking for granted the prohibition of armed reprisals, the rule clearly established in customary international law. James
Crawford, the Special Rapporteur of the International Law Commission (ILC), with respect to the Draft Articles on State Responsibility, notes that the use of the term “countermeasures” is confined to non-forcible part of reprisals. The discussion and reasoning followed in this arbitration and the subsequent ICJ decisions favour the latter construction.

3. Is an “Armed Attack” an Indispensable Requirement for the Right of Self-Defence?

There has been controversy as regards whether an “armed attack” is an essential precondition for a State to invoke the right of self-defence under Article 51 of the U.N. Charter. Bowett avers that with the emphasis on the “inherent right” of self-defence, Article 51 is intended neither to impair the right of self-defence in pre-Charter customary international law nor to render its application dependent on conditions as laid down in this provision. In contrast, Kelsen argues that the right of self-defence, at least for the Members of the United Nations, “has no other content than the one determined by Article 51,” suggesting a constitutive rather than declaratory effect of this provision. According to Kelsen’s view, it would be difficult to sustain the right of anticipatory or pre-emptive self-defence.

The travaux préparatoires of the Committee III/4 at San Francisco, which drafted Article 51, warrant the view that the phrase in Article 51, “inherent rights” of self-defence, purported to provide regional organizations, such as the Organization of American States, with the guarantee that their collective security arrangements would not be prejudiced by the Security Council’s enforcement action. This lends support to the separate and continued operation of the right of self-defence in customary law, unbridled by the “armed attack” requirement. Nevertheless, when assessing the content of a customary law right of self-defence, greater significance must be attached to the development of State practice since 1945, which evidently differs from “a totally unreconstructed pre-1945 right of self-defence.” Evolution of State practice and opinio juris suggests the interlocking relationship between Article 51 of the U.N. Charter and customary international law in the area of self-defence. In the Nicaragua case, the ICJ confirmed “under international law in force today—whether customary international law or that of the United Nations system—States do not have a right of ‘collective’ armed response to acts which do not constitute an ‘armed attack.’” This dictum can be construed a fortiori as presupposing the same terms on which the right of individual self-defence is to be performed, as the right of collective self-defence hinges on the former right. Since this judgment was made in 1986, no conclusive evidence can be

31. Kelsen, supra note 3, at 913-14. He does not favour the “natural law doctrine,” according to which Article 51 of the U.N. Charter is merely declaratory of customary international law. Id. at 792.
32. See the discussion on the compatibility of the draft Article 51 with the Act of Chapultepec 1945 of the Inter-American Conference. Bowett, supra note 3, at 182-83.
33. Id. at 182-87.
adduced that State practice and opinio juris have been altered in such a manner as to negate
the requirement of an armed attack.

4. Protagonist of an Armed Attack

While Article 51 is silent on the question by which an armed attack must be carried out
to call Article 51 into play, it is abundantly clear from State practice since the Charter, that
States invoking self-defence have envisioned an armed attack by another State, and not an
attack by non-State actors such as terrorist organizations.\textsuperscript{16} It has never been envisioned in
the jus ad bellum context that non-State actors, especially those not viewed as part of combatants
(such as a global terrorist organisation), would be equated to a State capable of
launching an “armed attack” in the sense of Article 51. Article I of the 1974 “Definition of
Aggression”\textsuperscript{37} states that aggression needs to stem from a State.\textsuperscript{16} In those circumstances,
it is not surprising that a caution has been voiced as to the inclusion of terrorist acts within
the ambit of “armed attacks.”\textsuperscript{39}

Up until the September 11\textsuperscript{th} attacks, the implicit presumption that only a State is the
author of an armed attack underlay Article 5 of the North Atlantic Treaty, which laid the
foundation for the Western collective self-defence system in the post-WWII trans-Atlantic
order. The “Alliance’s Strategic Concept,” adopted by the North Atlantic Council on April
24, 1999, mentioned that armed attacks on the territory of the Member States “from whatever
direction” was covered by Articles 5 and 6 of the North Atlantic Treaty. Yet terrorism,
just as sabotage and organised crime, was described only as a form of “other risks of a wider
nature” in its paragraph 24.\textsuperscript{40}

C. The Right of Self-Defence and the Reporting Duty

1. General Overview

Significant qualification of the “inherent right” of self-defence may arise from the competing
relationship between this right and the enforcement action of the Security Council.
Article 51 provides that the right of self-defence can be kept intact “until the Security
Council has taken measures necessary to maintain international peace and security,” the
condition echoed in Article 5 of the North Atlantic Treaty. The textual reading of those
provisions suggests that once the Security Council employs measures necessary to restore
peace, the competence of a victim State to interpret the term “armed attack” and to evaluate
the occurrence of an armed attack in a concrete case should be transferred to this organ,

\textsuperscript{36} Schrijver, \textit{supra} note 1, at 284.
\textsuperscript{38} Id. art. 1. This provision reads:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political
independence of another State, or in any other manner inconsistent with the Charter of the United
Nations, as set out in this Definition.” This provision is accompanied by an Explanatory note, which
States that “(i)n this Definition the term “State” . . . [i]s used without prejudice to questions of rec-
ognition or to whether a State is a member of the United Nations. . . .

\textsuperscript{39} Giorgio Gaja, \textit{In What Sense was There an ‘Armed Attack’?} at http://www.ejil.org/forum_WTC/
index.html (last visited Oct. 9, 2002).
\textsuperscript{40} U.S. Dep’t of State, NATO Alliance Strategic Concept, approved by the Heads of States and Govern-
ment participating in the meeting of the North Atlantic Council, Washington D.C., Apr. 24, 1999, available
with the consequence that self-defence action pursuant to Article 51 should remain "pro-
visional." Article 51 of the Charter also entails two implications that can place constraints
on the exercise of self-defence: first, the questions of the burden and standard of proof; and
second, the duration of the self-defence action.

2. The Burden of Proof and the Evidentiary Standard

The reporting duty poses questions of whether a victim State is required to bear the
burden to prove the necessity of self-defence, (the occurrence of use of force constituting
an armed attack), and, if so, what standard of evidence should be considered adequate. It is
possible to contemplate that the requirement of necessity, as established in general inter-
national law since the 1842 Webster formula relative to the Caroline incident in 1837, has
been consolidated into the reporting duty under Article 51 of the U.N. Charter. The string-
gent requirement implied by the text of Article 51 upholds the view that even in an on-
going conflict or campaign, as opposed to a one-off incident, a State should report each
episode separately and discharge the "burden" to prove that the claim of self-defence is
justified on the ground of necessity and proportionality. This means that a State invoking
self-defence needs to substantiate the existence of an armed attack imputable to a specific
State, and that its defensive action must comply with the proportionate test. In contrast, it
is not widely accepted that there has been an ascertainable degree of usus, supported by
opinio juris, as regards the standard of evidence. The dearth of discussion is striking on this
matter, and State practice since 1945 does not furnish much guideline.

A series of instances in which States resorted to unilateral use of force amply demonstrates
the inchoate and ambiguous nature surrounding the discussions on the reporting duty and
especially on the evidentiary standard. The absence of clear guideline on issues of evidence
can be well illustrated, not least in relation to the tendency of the U.S. to exercise broad
defensive action based on thin evidence. The policy of the successive U.S. administrations
gradually discarded the notion of the necessity of proof, reserving an ample scope of dis-
creption to employ unilateral measures under the banner of self-defence. This proclivity was
illustrated in the Clinton administration’s decisions to launch missiles against the Iraqi
Intelligence Headquarters in Baghdad in 1993, to hit bin Laden's terrorist bases in Af-
ghanistan, and to attack a pharmaceutical plant in Sudan in 1998. There is criticism that
those U.S. military strikes were premised on mere inference and not subjected to interna-
tional supervision, straining the delicate balance between the general principle of non-use
of force in Article 2(4) and its exceptional rule in Article 51 of the U.N. Charter. With
specific regard to the attack against the Sudanese pharmaceutical plant, the credibility of
the U.S. administration was questioned by its effort to block Sudan's request for a Security
Council resolution calling for a fact-finding mission.

41. Kelsen, supra note 3, at 800.
42. Gray notes that this seems to be the accepted practice of many States, as demonstrated in the Iran-Iraq
war, the Falkland/Malvinas conflict, and the U.S. involvement in the escort operation in the Gulf during the
Iran-Iraq war. Gray, supra note 3, at 91-92.
43. While the United States successfully blocked a Security Council resolution condemning the U.S. raid
on Libya, the General Assembly condemned it. Jules Lobel, The Use of Force to Respond to Terrorist Attacks: The
Bombing of Sudan and Afghanistan, 24 YALE J. INT’L L. 537, 538 (1999); see also Ruth Wedgwood, Responding to
44. Lobel, supra note 43, at 547.
45. Steven Lee Myers, After the Attacks: The Overview, N.Y. TIMES, Aug. 25, 1998, at A1; see also Lobel,
3. Time Limit on Self-Defence

The reporting duty signifies that there may be a time limit on the exercise of self-defence. The temporal span of the right of self-defence seems to end at the point when the Security Council, acting under Chapter VII, assumes the "primary responsibility" to restore peace and security. The constraint on the right of self-defence is reinforced by the provisos that any measure adopted in the exercise of the right of self-defence must be immediately reported to the Security Council and that they must not affect the authority and responsibility of the Council. The perceived time limit on the entitlement to self-defence is underpinned by the embedded belief of the framers of the Charter that with the Security Council endowed with the primary (albeit not exclusive) responsibility in maintaining international peace and security, even unilateral military action pursuant to self-defence, should be subordinated to the multilateral mechanism established under Chapter VII of the U.N. Charter.

Action pursued in the course of self-defence must normally be an immediate response to an attack. An undue time lag may raise doubt as to compliance with the requirements of necessity and proportionality. The requirement of an immediate response is not literally immediate action, but the immediate invocation of the right of self-defence and the resultant deliberations on implementing measures. Moreover, a victim State can retain the right to have recourse to the first strike pursuant to self-defence, insofar as an unlawful situation created by an armed attack remains unchanged, despite the good-faith effort by a victim State to pursue peaceful means to solve the disputes. These points were confirmed by the Bush administration’s approximately one-month assessment of necessary measures to respond to the September 11th attacks.

However, a mere glance at Article 51 makes it abundantly clear that in case forcible actions are necessary for a lengthy period, it is the Security Council that must take over the responsibility of enforcement action under Chapter VII of the U.N. Charter. The Security Council is endowed with the power to appraise necessary action, including steps to identify delinquent States, against which forcible action should be directed, and to determine the means and methods for enforcement actions, as well as the duration of any coercive operation. There is also a non-obstruction duty on the Member States, with their defensive measures enjoined not to affect the authority and responsibility of the Security Council. It remains unclear under Article 51 of the U.N. Charter whether the Charter confers upon a victim State the power to determine the adequacy of necessary measures that the Security Council has employed to restore peace. Writing in 1951, Kelsen noted that the intention of the drafters was inconclusive, though militating in favour of the competence of the Security Council so to do. Yet, evidently the failure of the Security Council to determine existence of an "act of aggression" or the other two situations ("threat to the peace" and "breach of peace") within the meaning of Article 39 of the U.N. Charter does not require a victim State to cease exercising the right of self-defence. The exercise of the right under Article 51 is not conditional on the decisions of the Council. Nor does the right of self-defence have to be overridden whenever the Security Council adopts measures

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46. Cassese, supra note 1, at 997–98.
47. End of the Cold War, supra note 3, at 227.
48. Id.
49. Kelsen, supra note 3, at 802–03.
50. Id. at 803.
51. Id. at 803–05.
considered necessary in case of an armed attack. There also remains a scope of argument that insofar as a defensive measure by a victim State does not thwart the effectiveness of the Security Council’s enforcement action, its concurrent and continued exercise remains lawful. This seems to be the implicit, albeit not the express and primary legal ground for the U.S. continued operation in Afghanistan.

III. The September 11 Attacks and the *Jus ad Bellum* Appraisal of the Use of Force

A. SECURITY COUNCIL RESOLUTIONS 1368 & 1373

U.N. Security Council Resolution 1368, which was adopted unanimously on the day following the September 11th attacks, recognized the “inherent right of individual or collective self-defence” in its preamble. It also refers to its “readiness to take all necessary steps to respond” to the attacks, and “to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.”

Preliminary observations can be made as regards Resolution 1368. First, reference to the recognition of “the inherent right of individual or collective self-defence” is found in its preamble, with its operative part not expressly recognising the right of the victim State, namely the United States, to use force as a form of self-defence. Second, there is no reference to a target country against which self-defence can be directed. Third, while defining the terrorist attacks as a “threat to international peace and security,” Resolution 1368 is silent on whether the Security Council is acting specifically under Article 39 or under Chapter VII in general. This means that the phrase “all necessary steps,” contrary to the similar phrase used in Chapter VII-based Resolution 678 of November 1990 during the Gulf crisis, may not furnish a basis for authorising what is euphemistically called Article 42 military action. In none of the Security Council resolutions adopted in response to terrorism, has authorisation yet been given for enforcement action involving use of force, with the anti-terrorism measures confined to the sanction regime under Article 41 of the U.N. Charter. Be that as it may, the three preliminary issues are not of material nature, since the United States and its allies relied on Resolution 1373, a Chapter VII-based mandatory resolution, and on the “inherent right of individual and collective self-defence” as stipulated in Article 51 of the U.N. Charter. It will be subsequently examined whether both Article 51 and customary international law have adjusted the armed attack requirement to the immediate political needs, allowing the source of an armed attack to be extended to cover non-State actors.

52. Compare Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM J. INT’L L. 452, 458 (1991) (adding that “the Council has the authority to adopt a measure that would require armed action to cease even if that action was undertaken in self-defence,” but that such a measure would not necessarily “preempt” self-defence), with Dinstein, *supra* note 3, at 189 (theorizing that only a legally binding decision, rather than a recommendation, adopted by the Security Council will engender the “imperative” effect of terminating defensive action).
54. Id.
55. Id.
Resolution 1373 of 28 September 2001, another unanimous resolution, expressly mentions that this was adopted by the Security Council "acting under Chapter VII of the United Nations." In its preambular paragraph, Resolution 1373 reaffirmed a primarily negative duty set out in the General Assembly's Friendly Relations Resolution (1970) and in Security Council Resolution 1189 (1998), emphasising that States should "refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts." In its operative paragraphs, Resolution 1373 elaborated upon the numerous anti-terrorism obligations of both positive and negative nature, which were set forth in Resolution 1269 (1999). First, there exist positive duties to prevent and suppress the financing of terrorist acts, including the freezing of funds and financial assets of those involved in terrorist acts. Second, States are obliged to refrain from providing any support, active or passive, to those engaged in terrorism and to take steps to prevent terrorist acts through early warning and other means. Third, positive obligations go in tandem with the renewed emphasis on the need to penalise acts of international terrorism, with the States bound to ensure that national criminal law defines terrorism as "serious criminal offences" and that any individual taking part in the financing, planning, preparation or perpetration of terrorism must be brought to justice pursuant to national criminal law. States are also enjoined to deny safe havens to those involved in terrorist acts and to prevent their territories from being used for terrorist purposes. Further, Resolution 1373 tapped internal machinery designed to counter international terrorism. Activating the Committee of the Security Council in accordance with rule 28 of its provisional rules of procedure, it called on the Committee to supervise national implementation of anti-terrorism measures on the basis of a reporting system. Condorelli observes that "la Résolution 1373 ne s'occupe nullement d'un cas ou d'une situation déterminés... mais légifère justement en matière de terrorisme international en général, en consacrant des obligations lourdes, prévues comme applicables sans aucune limite temporelle et spatiale..." Such an extraordinary nature of Resolution 1373 allows it to be virtually equated to a universal treaty, corroborating the view that the Security Council's mandatory resolutions can shape "secondary legislation" of international law. The comprehensive nature of a resolution would raise the question whether the Member States of the U.N. have, through Article 24 of the Charter, delegated enforcement power to the Security Council to enact a resolution of such a wide-ranging scope.

58. Id. ¶ 9.
60. Id. ¶ 1.
61. Id. ¶ 2.
62. Id. ¶ 6.
63. Condorelli, supra note 1, at 834.
65. The present writer considers that it is the Member States acting collectively through the Charter that have delegated enforcement power to the Security Council. R. Degni-Segui, Fonctions et pouvoirs—Article 24, in LA CHARTE DES NATIONS UNIES 450 (J. P. Cot & A. Pellet eds. 1991); see also DANESH SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY—the DELEGATION BY THE UN SECURITY COUNCIL of ITS CHAPTER VII POWERS 26-32 (1999).
66. Condorelli, supra note 1, at 835.
B. Have the Security Council Resolutions 1368 and 1373 Authorised the Right of Self-Defence against Afghanistan?

1. Determination of the Threat to the Peace

Although recognizing the inherent right of individual or collective self-defence in their preambles, Security Council Resolutions 1368 and 1373 qualified the September 11th attacks as a "threat to the peace," rather than as an act of "aggression," which includes an "armed attack" within the meaning of Article 51.67 This seems contradictory, yet it is consistent with all the Chapter VII resolutions relating to acts of international terrorism, which entail the findings of a "threat to the peace" or its equivalent situation.68

It is possible that the hesitancy to determine "aggression" stems from the difficulty with defining the aggression and its component, "armed attack." It suffices to remember the ill-fated efforts of the International Law Commission to define the concept of "aggression" in the Draft Code of Crimes Against the Peace and Security of Mankind69 and in the Rome Statute of the International Criminal Court (ICC). The Preparatory Commission of the Rome conference in 1998 failed to muster consensus on the definition of the crime of aggression, the progeny of the crime against peace, postponing the task of providing its adequate definition to the Review Conference that will be held in 2009.70 Even the "Definition of Aggression" resolution failed to furnish a comprehensive understanding of aggression that was free from controversy. There exists a strong perception, as shared by Judge Schwebel in his dissenting opinion in the Nicaragua case, that determination of aggression is not a legal ascertainment but merely a political consideration.71 The similarly reluctant attitude was observed when the Security Council described the Iraqi invasion of Kuwait as "a breach of the peace" in its Resolution 660 in 1990.72 Cassese offers another plausible reason for hesitancy to determine "aggression," noting that the Council was "waving between the desire to take matters into its own hands and resignation to unilateral action by the U.S."73

2. Severance of an Armed Attack from a State Apparatus?

A more intractable question is whether Resolutions 1368 and 1373 allow Article 51 to be interpreted as justifying self-defence in response to an armed attack carried out by

67. Id.; see also Cassese, supra note 1, at 996.
68. Apart from the resolutions relative to Afghanistan cited in the text, see Resolution 731 of 21 January 1992 and Chapter VII-based Resolution 748 of 31 March 1992 (both relating to Libya's alleged implications in the attacks against the Pan-Am aircraft over Lockerbie and against the UTA aircraft); and two Chapter VII-based resolutions, Resolution 1054 of 26 April 1996 and Resolution 1070 of 16 August 1996 (both regarding non-compliance by Sudan with the requests of the Organization of African Unity to extradite to Ethiopia for prosecution purposes the suspects of the assassination, and with the duty to desist from supporting, aiding and abetting terrorism).
69. The ILC left the definitional effort at abeyance, with Article 16 of the Draft Code merely stating that "[a]n individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression." The International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind, available at http://www.un.org/law/ilc/texts/dcodefra.htm.
70. While Article 5 of the Rome Statute includes the crime of aggression within the jurisdiction ratione materiae of the ICC, the task of defining it is, by virtue of Articles 5(2), 121, and 123, left to the Review Conference that will take place in 2009.
73. Cassese, supra note 1, at 996.
non-State actors. The right of self-defence has always been envisaged against an armed attack from a State. Any attempt to expand the scope of the right of self-defence by adding non-State actors to the instigator of an armed attack must be treated with caution, as the exceptions to the non-use of force principle must be construed strictly in light of the paramount value of peace as embedded in the constitutional paradigm of the post-WWII international society.

One way of overcoming the interpretative difficulty of an “armed attack” requirement would be to uphold evolutive interpretation of a conventional rule, the method of interpretation fully recognised in the jurisprudence of international tribunals. Symbolically for the first time in its history, NATO invoked Article 5 of the 1949 Washington Treaty, characterising the attacks on the United States as those against all the other Member States. Though NATO did not, in its press releases, make any reference to Article 51 of the U.N. Charter, the United States and the United Kingdom duly reported to the Security Council when initiating military operations against Afghanistan pursuant to the right of individual and collective self-defence. It should also be noted that when the fifty-six States met in Qatar on October 10, 2001 at the conference of the Organisation for the Islamic Conference, they did not criticise the U.S. and U.K. military assaults on Afghanistan, limiting their opposition only to any attempt to extend military operations beyond Afghanistan.

There is an argument that the practice of the States represented in the Security Council and of Member States of NATO, as well as other States in the General Assembly that have not objected to such a move, could be taken as assimilating an attack by a terrorist organisation to an armed aggression by a State, enabling an injured State to invoke individual self-defence and to request third States to act in collective self-defence under Article 51.

Examining the possibility of “instant custom” also provides legal explanations to this sudden change in the constituent elements required for the right of self-defence. As

74. Condorelli, supra note 1, at 837; see also Schrijver, supra note 1, at 285. While not examining the possibility of instant custom, Schrijver applies this interpretation to consider the change in an armed attack requirement; see also Bardo Fassbender, The United Nations Charter As Constitution of The International Community, 36 COLUM. J. TRANSNAT'L L. 529, 594 (1998) (providing analysis of interpretation based on “a living instrument” relative to the U.N. Charter).


78. Keesings Record of World Events, supra note 2, at 44393.


80. Cassese, supra note 1, at 996–97; see also Condorelli, supra note 1, at 840.
formulated in Article 38(1)(b) of the Statute of the International Court of Justice, deviations from the treaty-based principles can be treated as furnishing "evidence of a general practice accepted as law." Moreover, whether or not such a general practice has accompanied opinio juris and led to the formation of a new customary norm, "any subsequent practice in the application of the treaty" "shall be taken into account" when interpreting the meaning of a treaty rule. The question needs to be addressed as to whether, and if so, to what extent both the objective element of consistent State practice and the subjective element of opinio juris sine necessitatis can be identified in favour of altering the normative scope and element of the right of self-defence in general international law.

In the North Sea Continental Shelf cases, the ICJ suggested the possibility of instant custom, stating that the passage of only a short period of time is not an indispensable condition for the formation of a new customary rule from a conventional provision of norm-creating character. The ICJ emphasised the conditions for such possibility, noting that State practice, as discerned in "a very widespread and representative participation in a convention" including that of "States whose interests are specially affected," must be both "extensive and virtually uniform" (fréquente et pratiquement uniforme) and indicative of a general recognition that a legal obligation is involved. While the ICJ's discussion on instant custom is limited to the capacity of a treaty provision incorporating new meaning and substance to generate a corresponding customary rule, the formation of an instant customary rule without the existence of such a provision is not ipso facto excluded, provided that certain conditions set out by the ICJ are met. This means that reading a new form of an armed attack requirement into Article 51 of the U.N. Charter, a multilateral treaty provision considered declaratory of customary law, is not prevented from having the effect of instantaneously producing a corresponding customary rule. In regard to the requirement of "extensiveness" and "uniformity" of State practice, there appears to be a slight difference in nuance between the two authentic languages, as the word "fréquente" in French connotes an element of time span, a rather contradictory condition for instant custom. The statements and conduct of the States represented in the Security Council and the General Assembly since the September 11th attacks amply support that this requirement, at least in the English text, has been fulfilled to favour the new meaning injected into an armed attack in customary law. Further, the fact that the formation of instant custom appeals especially to highly malleable areas susceptible to rapid technological development, as in the case of space law and continental shelf, does not foreclose such eventuality in other areas. Even if one does not countenance the theory of instant custom as such, the acquiescence by the international

83. Id. at 42-43, paras. 73-74.
85. From this Dailler and Pellet deduce the conclusion that there is no room for instant custom. They note that:

Sur le fond, les exigences classiques sont respectées: préférer le terme ((fréquence)) à celui de ((constance)) ou ((continuité)) revient simplement à tenir compte du caractère aléatoire et irrégulier des occasions concrètes offertes aux États d'adopter un certain comportement sur un sujet donné... La notion de ((coutume instantanée)) ou ((immédiate)) doit donc être rejetée.

Id. at 325.
86. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (5th ed.1998).
community as a whole in the U.S. and its allied action demonstrates that at the time of the
initiation of hostilities (7 October 2001), the rubric of self-defence lex ferenda was emerging
that would refashion the armed attack requirement so as to adequately respond to the
danger posed by a global terrorist network.

The fact that the Bush administration initiated the military offensive against Afghanistan
in October 2001 on the premise both of Security Council Resolutions 1368 and 1373 and
of Article 51 of the U.N. Charter, without invoking the customary law right of self-defence,
means that the analysis of instant custom remains purely academic exercise. While display-
ing a willingness to act within the U.N.-based multilateral legal framework, a politically
salutary move, the U.S. administration has succeeded in allowing the extended form of
the right of self-defense to be read into Article 51 to include action in response to an
armed attack by non-State actors. It is submitted that such dynamic interpretation has given
rise to, and has been complemented by, the concurrent formation of a new customary rule
of self-defense, whose path of development closely follows that of Article 51 of the
U.N. Charter.

3. The Reporting Obligation and the Standard of Evidence

Provided that any obstacles relating to the author of an armed attack are overcome in
favour of a new mode of the right of self-defence, the remaining question is whether the
United States and its allied forces lawfully exercised the right of self-defence. This question
must be addressed through examining the reporting duty on the State invoking the right
of self-defence and the closely associated issue, the standard of evidence.

It may be argued that in order to avoid a State's abusive recourse to unilateral military
action, any defensive action must be carried out only subsequent to the establishment of no
less than sufficient evidence before the Security Council. Such an argument favours a
stringent regime of use of force, attaching to Article 51 of the U.N. Charter an evidentiary
presumption that recourse to self-defence should be grounded on facts that are "clear and
unambiguous." Against such a line of argument, there is a view that it is simply unrealistic,
in an age of high-tech weaponry, to expect a victim State to stay idle and wait for another
imminent and devastating blow, while attempting to obtain sufficient evidence. There is
also a reasonable fear that disclosure of highly sensitive intelligence information might
undermine the operational effectiveness of defence action against an enemy as determined
and efficient as a global terrorist network. In those circumstances, a reporting obliga-
tion should be deemed as satisfied by immediate notification to the Security Council of
the measures employed and of the tactics contemplated to pursue the defensive aims.
Nonetheless, in regard to the standard of evidence, the necessity principle as fully anchored
in customary international law may be progressively construed to require a stringent
standard of evidence to be garnered, ranging from "clear and convincing" evidence to
"compelling evidence."

88. Lobel, supra note 43, at 547.
89. Wedgwood, supra note 43, at 567-68.
90. Lobel, supra note 43, at 551 (suggesting that a government should at least possess "reasonable certainty
and direct evidence of wrongdoing").
91. Cassese, supra note 1, at 1000 (emphasizing the need to garner the "compelling evidence" to demonstrate
that States are harbouring, tolerating or even fostering terrorist organizations in breach of the duties emanating
from the Security Council resolutions adopted under Chapter VII).
In order to justify the joint U.S. and U.K. military assault against the Taliban and al Qaeda network in Afghanistan, there must exist evidence that al Qaeda members had planned and executed the attacks on September 11. On October 2, 2001, the NATO formally announced that it had received, along with U.N. officials, "clear and compelling" evidence from the United States that proved bin Laden's culpability. Two days later, the U.K. government released a twenty-one-page document that entailed, in its view, the "clear conclusion" confirming the implication of the al Qaeda network in executing the September 11th attacks.

4. State Responsibility of the Taliban Government

a. Attribution of the September 11 Attacks to the Taliban

It must be questioned whether the September 11th attacks, the internationally wrongful acts, were imputable to the Taliban government in Kabul under general international law relative to State responsibility. This question should be addressed through the close appraisal of the ILC's Draft Articles on State Responsibility, which largely codifies customary international law. With respect to the question whether the September 11th attacks can be imputed to the Taliban regime in Kabul, it must first be noted that general international law on State responsibility seems neutral on the question of form of fault (wrongful intent, lack of due diligence and other mens rea) making the question largely dependent on primary rules, breach of which would give rise to international responsibility. This general statement does not, however, purport to negate the underlying principles that international delinquency is "essentially delictual and based on fault, requiring either intentional or negligent conduct on the part of the State," and that "strict or objective" responsibility, with "conduct and result alone establishing the breach of an obligation," is a limited possibility. In the Corfu Channel case, the ICJ ruled that all the States owed an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States." While rejecting the view that the mere control over the territory and waters would mean that Albania "necessarily knew" or "ought to have known" unlawful acts therein, the court presumed Albania's knowledge based on indirect evidence such as inferences of fact and circumstantial evidence, finding her responsibility for the explosion of the vessels in Albanian waters. In the context of the September 11th attacks, the fact that al Qaeda was operative on its soil does not necessarily presuppose the Taliban's knowledge of the attacks, even drawing on the notion of culpa.

92. Condorelli, supra note 1, at 837. The U.S. representative at the Security Council made a statement that "[in response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States"; see also Keesing's Record of World Events, supra note 2, at 44393 (indicating that on 4 October 2001, the government of Pakistan, ruled by the military dictator, Gen. Musharraf, announced that in its view the U.S. provided sufficienty strong evidence to indict bin Laden in a court of law).

93. The U.K. Prime Minister, Tony Blair, also stated in the House of Commons that bin Laden had warned his associates before September 11 of an imminent major operation in the United States and told them to return to Afghanistan. Keesing's Record of World Events, supra note 2, at 44393; see also Blair Presents his Case Against Al-Qa'ida Network, INDEP., Oct. 5, 2001, at 4.


98. Id. at 18.
of absolute responsibility, the Taliban’s knowledge could be remotely inferred on the basis of the notion of culpa in the particular circumstances, where obligations had been imposed on the Taliban by a series of the Security Council resolutions to take steps to prevent and punish international terrorism.

Al Qaeda, which is not an “insurrectional or other movement” within the meaning of Article 10 of the Draft Articles on State Responsibility, but a private group not entertaining legal personality, cannot be regarded as a de facto “organ of a State” as provided in Article 4 of the Draft Articles. It was neither instructed, directed, nor controlled by a State in the sense of Article 8 of the Draft Articles. In the Nicaragua case, the Court emphasised that in order to establish attribution of acts of private persons to a State, the latter must exercise “effective control” over the acts, suggesting that “a general situation of dependence and support” alone would not suffice. While the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the Tadic case lowered the requisite degree of control to the “overall control” test to find the armed conflict to be international, this case dealt with different issues, viz., the applicability of humanitarian law and individual criminal responsibility. At any rate, it is hard to recognise that the Taliban held “effective control” over the specific conduct of al Qaeda on September 11, 2001. Further, al Qaeda could not be considered as exercising “elements of the governmental authority” within the meaning of Article 9 of the Draft Articles, albeit arguably the partial territorial control by the Taliban government meant that the terms “in the absence or default of the official authorities” were met.

The perusal must turn to another possibility, conduct of private actors acknowledged and adopted by a State as its own. Article 11 of the “Draft Articles on State Responsibility”

99. While the Taliban leader Mullah Omar did not give express endorsement to the September 11th attacks, it justified the consistent refusal to expel bin Laden; Mullah Omar— in his own words— Guardian, Sept. 26, 2001, available at http://www.guardian.co.uk/g2/story/0,3604,558076,00.htm (last visited Oct. 22, 2002).

100. The fact that al Qaeda did not possess legal personality does not foreclose the applicability of Article 8 of the Draft Articles on State Responsibility, as it expressly refers to “group of persons.”

101. This provision reads that “[t]he 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.” The International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 8, available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm.


103. Crawford, supra note 28, at 111.


105. See also Cyprus v. Turkey, where the European Court of Human Rights ruled that Turkey’s “effective overall control” over northern Cyprus meant that her “acquiescence or connivance” in the acts of private individuals infringing others’ rights secured in the European Convention on Human Rights might give rise to her state responsibility under the Convention. App. No. 25781/94, paras. 77 & 81 (Eur. Ct. H.R. May 10, 2001).

106. Id. Clearly, the instructions, direction or control must be related to the conduct that would constitute an internationally wrongful act.

107. This provision reads that “[t]he 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 exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.” The International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 9, available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm.
provides that "conduct which is not attributable to a State... shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own." The terms, "acknowledgement" and "adoption," are used to distinguish from cases of "mere support or endorsement." The effects of a State's official approval of the conduct of private actors are generally prospective, albeit retroactive effects can be recognised in cases where not mere congratulations but "unequivocal and unqualified" acknowledgement and adoption are made. The stronger word "adoption," goes beyond a general acknowledgement of an event and implies that "the conduct is acknowledged by the State as, in effect, its own conduct." The Taliban's obstinate refusal to cooperate with the Security Council, including its opposition to the expulsion of bin Laden, could be approximated to "acknowledgement and adoption" though not of "unequivocal and unqualified" nature.

All these examinations of the rules on attribution in customary international law on State responsibility suggest that it is difficult and only faintly possible to consider the September 11th attacks per se to be the act of the Taliban government and that the Taliban's more evident responsibility should be found elsewhere. Absent a general and comprehensive treaty, the primary rules governing acts of international terrorism such as the September 11th attacks are limited to a set of customary international law principles that have been generated by the consistent and uniform State practice through the Security Council's Chapter VII-based resolutions and the General Assembly's Friendly Relations Resolution 2625. Closer appraisal of those resolutions needs to be made to establish any breach of obligations engaged by the Taliban government, which serves to strengthen a claimed right to strike the Taliban. In order to gain closer insight into the nature of obligations entailed by the Taliban, the next examination must deal with the question of responsibility stemming from the obligation to prevent and punish terrorism in general international law, as consistently affirmed by resolutions of the Security Council and of the General Assembly. The focus of analysis then shifts to the related issue of indirect aggression, without introducing the notion of indirect responsibility.

b. Counter-Terrorism Duties Emanating from the Resolutions of the Security Council and of the General Assembly

The Friendly Relations Resolution 2625 of the General Assembly furnishes elaborate meaning of the principle of non-use of force in relation to terrorism, stating that "every State has the duty to refrain from organizing, instigating, assisting or participating in.... terrorist acts in another State or acquiescing in organized activities within its territory
directed towards the commission of such acts, when the acts . . . involve a threat or use of
force.'"\footnote{112} This primarily negative duty on the States is supplemented by the principle of
non-interference in domestic affairs of another State, which, according to Resolution 2625,
encompasses the obligation of the States to refrain from organising, assisting, fomenting,
financing, inciting or tolerating terrorist activities. Yet, the application of the latter principle
is circumscribed only to the situation where perceived aims of terrorist acts are directed
towards either the "violent overthrow of the régime of another State, or interference in
civil strife in another State."\footnote{113} While the Friendly Relations Resolution, as a form of Gen-
eral Assembly resolution, is not, \textit{stricto sensu}, legally binding, it is regarded as authoritative
interpretation of the fundamental principles of the U.N. Charter and as mostly declaratory
of general international law.

Since the end of the Cold War, the Security Council has demonstrated a greater will-
ingness to harness mandatory Chapter VII resolutions. It has also reinforced the anti-
terrorism obligations through the incorporation of the duty to take "effective and practical"
steps to prevent and punish acts of terrorism, a move that serves to consolidate the formation
of a duty of due diligence.\footnote{114} It is arguable that such a positive duty had been established in
customary international law long before the September 11th attacks occurred. Security
Council Resolution 1189 of 13 August 1998, which was passed in response to bombings on
the U.S. embassies in Nairobi and Dar-es-Salaam, "call[ed] upon all States to adopt, in
accordance with international law and as a matter of priority, effective and practical mea-
sures for security cooperation, for the prevention of such acts of terrorism, and for the
prosecution and punishment of their perpetrators.'\footnote{115} The fact that this resolution was not
the product of Chapter VII of the U.N. Charter does not, \textit{ipso facto}, exclude the capacity
of such a resolution to generate customary law through the practice of the States.

C. APPROXIMATING THE COMPLICITY IN TERRORISM TO AN "ARMED ATTACK"

It may not be excluded that the cumulative effects of duties as established in the Friendly
Relations Resolution and in a series of the Security Council resolutions can be construed
as approximating the act of aiding and abetting terrorism to an "armed attack."\footnote{116} Such a
possibility would reinforce the attribution of responsibility for the September 11th attacks
to the Taliban and the claimed right of a victim State to employ forcible defensive meas-
ures.\footnote{117} This requires further inquiry into the degree of complicity in terrorism through
the concept of "indirect aggression" or "indirect attack."

The principle of non-use of force as recognised in Article 2(4) of the U.N. Charter and
in customary international law should be viewed as proscribing the so-called "indirect

\begin{itemize}
\item \footnote{112} The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among
States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), Principle 1, para. 8, Annex
\item \footnote{113} Id. prin. 3, para. 2.
\item \footnote{114} Relying on the Court's indication in the case of United States Diplomatic and Consular Staff in Tehran
(1980 I.CJ. 3, at 32-33, para. 68). Condorelli refers to the three elements that would cumulatively amount to
such a duty on a State in respect of acts of private individuals: awareness of the need to take action; necessary
means at its disposal to prevent acts of individuals; and failure to apply such means. Luigi Condorelli, \textit{The
\item \footnote{116} Compare Kaikobad, supra note 20, at 313.
\item \footnote{117} Cassese, supra note 1, at 997.
\end{itemize}
armed force" or its more specific element, "indirect aggression."118 "Indirect armed force" can be identified in circumstances where a State allows another State to use its territory as a training ground or a launching base for an attack against a third State, or in case a State is unwilling or simply unable to prevent the incursion into a third State of armed bands, mercenaries or other armed groups operating within its territory. Consistent practice of Israel119 demonstrates its willingness to reserve a broad scope of self-defence against indirect aggression on the basis of the "accumulation of events" theory, with self-defence becoming close to the form of reprisals.120 The practice of Turkey relative to its incursions into Iraqi territory to attack bases of Kurdish armed bands121 and of Russia with regard to its cross-border attacks on alleged Chechnyan terrorist bases in Pankissi valley in Georgia,122 also suggest that these States feel able to do so, tacitly relying on the right of self-defence against indirect armed attacks.

Article 2(4) of the U.N. Charter should be considered applicable to "indirect armed force," especially in terms of its prohibition of not only the use of force but also the threat of use of force. It remains to be ascertained what form and degree of participation in the military operation of another State or of irregulars can be regarded as amounting to an armed attack within the meaning of Article 51 of the U.N. Charter,123 which is set at a more serious level than that of "the threat or use of force." Article 3(g) of the Definition of Aggression classifies particularly grave forms of assistance to unofficial armed organs as "acts of aggression," which encompasses an armed attack.124 As discussed above, while excluding from the category of an armed attack the mere provision of financial and logistical aids to rebels in another country, the Court in the Nicaragua case stated that the sending, by or on behalf of a State, of irregulars to another State's territory would constitute an armed attack in view of a scale and effects of their operation comparable to an armed attack by regular


121. Dinstein, however, justifies Turkey's action as a form of "extra-territorial law enforcement" based on self-defence. Dinstein, supra note 3, at 213-21.

122. This was the first incident in which a Georgian civilian was killed by the Russian cross-border air raids. Natalie Nougayräde, La Géorgie essuie des bombardements massifs et envoie des troupes dans les gorges de Pankissi, Le Monde, Aug. 27, 2002, at 3. In his letter addressed September 12, 2002 to the Security Council and to the U.N. Secretary-General, Kofi Annan, President Putin announced that Russia would reserve the right to take "inherent right of self-defence" to intervene in Georgia in case the latter does not take specific action against Chechnyan armed groups. Letter from President Putin, President of Russia, to Kofi Annan, U.N. Secretary-General (Sept. 12, 2002), Yomiuri Shimbun, Sept. 13, 2002, at 7.

123. Brownlie accepts that an "armed attack" might encompass "a co-ordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a state from which they operate." He nonetheless considers that stringent compliance with the requirement of proportionality excludes the right to resort to force against indirect aggression under Article 51, with indirect aggression needed to be countered by measures of defence not involving cross-frontier military operations. Brownlie, supra note 3, at 278-79.

124. Article 3(g) regards as an act of aggression "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein." G.A. Res. 3314, U.N. GAOR, 29th Sess., U.N. Doc. A/RES/3314 (1975), Annex, Definition of Aggression, art. 3(g).
forces. The Court's reasoning warrants the conclusion that the varying level of an armed attack is pitched high but capable of accommodating acts of complicity in a terrorist attack, provided that the nature of the attack is of gravity akin to or cognate with that brought about by a State and that a sufficiently close connection is established between the State and a non-State actor. The present writer does not go so far as to recognise the doctrine of "indirect aggression," but it is possible to observe that due to the international community's support of, and acquiescence in, the United States and its allied action in Afghanistan, the path of development of international law is verging on the guarded espousal of such a doctrine in exceptional circumstances.

V. Conclusion

The foregoing examination leads to the conclusion that the military action pursued by the United States and its allies was justified in line with the newly interpreted mode of the right of self-defence as recognised both in Article 51 of the U.N. Charter and in customary international law. The armed attack requirement in both sources of law was, within a short period of time between September 11 and October 7, 2001, modified to include the case where non-State actors instigate an attack. The legal basis of the resort to armed force has been complemented and reinforced by Security Council's mandatory Resolution 1373, which has expressly endorsed the right of self-defence. Further, it might be suggested that the military action constituted collective countermeasures as form of enforcement, responsive to the breach of obligations erga omnes. According to this view, since the September 11th attacks could be described as amounting to crimes against humanity in the sense of Article 7 of the Rome Statute, breach of the rule prohibiting such crimes would give rise to the obligations owed to the international community as a whole. At the current stage of development of international law, this hypothesis, however, must be treated with circumspection in view of the pre-suppositional need to "rehabilitate" armed countermeasures.

As regards the question of the reporting duty and its subsidiary issues of evidence, there was an encouraging sign that before duly reporting to the Security Council the measures of self-defence, both the U.S. and the U.K. governments made the case for such measures, evincing more than a sufficient standard of proof that the al Qaeda organisation was implicated in the September 11th attacks. Such a salutary move reversed the previous tendency

126. See also Byers, supra note 1, at 407-08.
127. Such circumstances are where there is a continuing threat of acts of international terrorism, on a scale comparable to September 11th attacks, from an identifiable source in another State that proves either unwilling or unable to take necessary preventive action.
128. It is submitted that reference in Article 7 of the Rome Statute to "[murder] in the definition of crimes against humanity can encompass the September 11th attacks, insofar as this was committed against civilian population in a widespread or systematic manner. See also the statement by Mary Robinson, the then U.N. High Commissioner for Human Rights, who qualified the attacks of September 11 as "crimes against humanity." U.N. Daily Highlights, Sept. 25, 2001, at http://www.un.org/News/dh/20010925.htm (last visited Oct. 22, 2002).
of the U.S. administrations to compromise the reporting obligations under Article 51, reinforcing the obligation on a State invoking self-defence to adduce convincing evidence. It is safe to conclude that the adjustment of international law to the new political reality after the September 11th attacks has remained within the tolerable bounds of pre-existing law of self-defence. This concluding observation, however, would not be the same if following the disclosure of evidence of Iraq’s weapons of mass destruction\textsuperscript{130} and of more dubious evidence suggesting Iraq’s alleged link with al Qaeda,\textsuperscript{131} both the United States and the United Kingdom unilaterally start to engage in pre-emptive attacks against Iraq outside the framework of the Chapter VII of the U.N. Charter.


\textsuperscript{131} James Harding et al., US seeks to prove Iraq-al-Qaeda link, Fin. Times, Sept. 26, 2002.