

Terrorism, pre-emptive self defence and state interests: what challenges for contemporary international legal order?

by Imran O Smith

“International peace and security have seldom felt so far away. Decision makers, like the persons in the streets, feel equally at risk from random acts of violence. . . Political leaders are nervous; and nervous riders make for nervous horses. If we are not all living on the edge, the perception, at least is that we are.” (Virginia Gamba: “Challenges to International Peace and security: An alternative view”, International Summit on Democracy, Terrorism and Security March 8–11, 2005, Madrid)

Devastating as the two world wars were, the emergence of the United Nations (the UN) with a Charter (the Charter) could be seen as a ray of hope for international peace and security. The linchpin of the Charter is the prohibition of war, aggression (or armed attack) and the recognition of self defence within regulated parameters. Negotiation, mediation and conciliation became the watch words, while armed conflicts were to be nipped in the bud through the instrumentality of international norms and co-operation of states.

However, in the past decade the new international legal order started to wake up to the fact that conflict had not been particularly reduced by the wish to generate more effectiveness out of the old system, and it was to be realised too soon that the system was impotent to resolve violent conflict. The effect was that many policy makers started dissipating energy on conflict prevention rather than conflict resolution processes.

Whilst terrorism became a major public issue in the 1980s, and reached the level of actual frenzy in the mid 1980s, the “evil scourge” had always been state-directed and was tamed by the efforts of states, particularly the United States (US). Individual or group terrorists engaged themselves in non-state violence and were not subject to international law. In any case, the impact of non-state violence on the peace and security of the international communities was minimal.

Then came the terrorist attacks of the US in September 11, 2001 and the emergence of the final shift from conflict prevention, management and resolution to the pre-emption and deterrence of conflict before it evolves. The victim state was in the fore front of the new “defence crusade” or war against terrorism. President Bush declared that it would seek to prevent the activities of rogue states and their terrorist clients before they were in a position to threaten or to use weapons of mass destruction (WMD). The National Security strategy of the US (NSS) stated that in order “to forestall or prevent such hostile acts [we will] if necessary, act pre-emptively”.

However, as subsequent events showed, the US Declaration left many questions unanswered. First, how would the international community ensure that states are prevented from acting liberally behind the façade of excuses and justification on the ground of pre-emptive self defence? When and on what terms will it be acceptable for one state to attack terrorists residing in another sovereign state? Who will be responsible for drawing the lines of legality, and deciding when a terrorist threat is grave and imminent enough to justify pre-emptive actions? How could it be ensured that pre-emptive self defence is not a disguised form of reprisal (an action outlawed by the UN Charter) or coloured by pure state interest – political, economic or ideological? The Charter’s effectiveness, along with international peace and security, are threatened by the dangers posed by these missing links.

This paper attempts a re-statement of the concept of pre-emptive self defence against terrorist attack as a supposed norm of international law. It also demonstrates that the solution to terrorism lies not mainly in counter attacks, as recent events have shown, but in understanding and addressing the dynamics of the changing world order.

TERRORISM AND INTERNATIONAL LAW

Definition of terrorism

The international community has never succeeded in developing an accepted comprehensive definition of terrorism. During the 1970s and 1980s United Nations attempts to define the term foundered, mainly due to differences of opinion between various members about the use of violence in the context of conflicts over national liberation and self determination. Whilst the problem of defining terrorism remains, it would appear that the definition by the Australian Defence Force (ADF) is broadly consistent with most definitions in academic literature. The ADF defines terrorism as:

“The use or threatened use of violence for political ends or any use or threatened use of violence for the purpose of putting the public or any section of the public in fear”.

Two elements are discernible from the above definition namely: (1) actual or threatened violence against civilians or persons not actively taking part in hostilities and (2) the implicit or explicit purpose of the act is to intimidate or compel a population, government or organization into some course of action. These elements are exhibited, as we shall see, in various forms of terrorist attacks.

Outlawing terrorism

Terrorism in all its forms is considered a criminal act under international law, but historically terrorists have generally been punished under the domestic law of the country harmed by the specific act in question. It is arguable that the mass murders committed on September 11, 2001 in the US by the hijackers probably constituted a crime against humanity under Article 7 (a) of the Rome Statute of the International Criminal Court (ICC). The first major step in the modern era in outlawing terrorism under international law was made through the Convention for the Prevention and Punishment of Terrorism, developed by the League of Nations in the 1930s. However, the Convention never came into force. A number of Conventions were developed during the 1960s and 1970s to address specific types of violent acts such as aircraft hijacking, kidnapping of diplomats, and the taking of hostages. These generally obligated parties to the Convention to either prosecute offenders or extradite them to countries in which the act in question took place.

In spite of its failure to define terrorism, in 1985 the United Nations General Assembly adopted a Resolution:

“unequivocally condemn[ing], as criminal, all acts, methods and practices of terrorism wherever and by whomever committed and calling upon all States to fulfill their obligations under international law to refrain from organizing, instigating, assisting, or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts”.

Many subsequent General Assembly and Security Council Resolutions over the last 18 years contain similar words of prohibition. Many of these Resolutions also state that terrorism is contrary to the purposes and the principles of the United Nations and represent a threat to international peace and security.

Concerted efforts by the UN to develop a more comprehensive approach to combating terrorism resulted in the 1997 International Convention for the Suppression of Terrorist Bombings (the Bombing Convention) and the 1997 International Convention for the Suppression of the Financing of Terrorism (the Financing Convention). Under the Bombing Convention, which came into force in May 2001, a person or group commits an offence if it unlawfully and intentionally uses an explosive or lethal device against a public place, a government facility, infrastructure, or transport craft or system, either with the intent to cause death or serious bodily injury or extensive destruction of such a place, facility or system resulting in major economic loss. However, acts that occur within the boundaries of a country and do not involve foreign nations do not come within the Convention, nor do acts by armed forces involved in armed conflict.

The Bombing Convention aims to deny safe havens to persons wanted for terrorist bombings (including accomplices) by obligating each state party to prosecute such persons if it does not extradite them to another state that has issued an extradition request. A country cannot decline to extradite a person on the basis that a bombing within the meaning of the Convention was a “political offence”. Importantly, parties to the bombing Convention are also obliged to take all practical measures to prevent preparation of terrorist acts where they take place within their territories.

The Financing Convention provides that an offence occurs where a person unlawfully provides or collects funds with the intention that the funds should be used, or in the knowledge that they are to be used, to carry out various acts. These acts include an offence under the other various “Terrorist Conventions” or any other act intended to cause death or serious bodily injury to a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an act is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. Accomplices, defined in a similar way as in the Bombing Convention, are also deemed as committing an offence.

Again, acts that occur within the boundaries of a country and do not involve foreign nationals do not come within the Convention, nor the acts by armed forces involved in armed conflict. The Convention obligates state parties either to prosecute or to extradite persons accused of funding terrorist activities, and requires banks to enact measures to identify suspect transactions. It also forbids the use by a country of its bank secrecy laws as an excuse for not providing assistance to other parties in their investigations of possible offences.

LEGAL PROHIBITION ON THE USE OF FORCE

After the two world wars in the first half of the twentieth century, many states including the US were fully committed in 1945 to establishing a broad, legal prohibition on the use of force, as well as an institution to enforce that prohibition. The United Nations Charter, a binding treaty to which all but a few states of the world adhere, contains the prohibition on force in Article 2(4), and establishes the Security Council as the authority to take measures against “threat to peace, breaches of the peace and acts of aggression”

The general prohibition on the use or threat of force

The prohibition of force in Article 2(4) of the UN Charter is the most basic and important principle of the Charter. It provides that:

“All members of 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.”

A striking feature of this provision is the proscription of all levels of force or threat of force short of war; a major improvement compared with earlier treaties. It also deals with armed force directly, (such as the open incursion of regular military forces into the territory of another state or cross border shooting into that territory) or indirectly, (such as the participation of one state in the use of force by another state or a state’s participation in the use of force by unofficial bands organized in a military manner) and not other kinds of force. Support for this view can be found in the GA Friendly Relations Declaration in the eighth and ninth paragraphs of its section dealing with the prohibition of force.

Whilst an isolated reading of the provision may suggest that force not directed against “the territorial integrity or political independence” of any state is permitted under the Charter, the preparatory works do not support this reading of the prohibition. Rather, both values should be read together to mean “territorial inviolability” in line with the historical antecedent of the Charter and general principle behind the prohibition of force as contained in the provision of Article 2(3) which is that “[a]ll members shall settle their international disputes by peaceful means in

such a manner that international peace and security, and justice are not endangered”. According to the rules of treaty interpretation, a treaty should be read as a whole, and Article 2(3) is the positive expression of the obligation in Article 2(4).

The primary purpose of the UN being the maintenance of peace and security, and the taking of collective measures to that end, any form of unilateral use of force inconsistent with this purpose is prohibited. This is reinforced by the Preamble to the Charter which states that force shall not be used, “save in the common interest.”

One important effect of Article 2(4) is that armed reprisals are illegal under the UN Charter, as has been clarified by the Security Council in many cases including the British air attack on territory of the Yemen Arab Republic in 1964; Israel’s acts of military reprisals against its neighbouring states; and as confirmed by the GA Friendly Relations Declaration 1970. However, Article 2(4) of the Charter does not prevent a country from defending itself in response to acts of aggression. The two exceptions to the rule are contained in Article 51, which creates the right of self defence in appropriate cases, and Article 42 which authorises the use of force by states individually or collectively if specifically authorised by the Security Council.

The concept of self defence under Article 51

Article 51 of the Charter provides 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. Measures taken by Members in the exercise of this right of self defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security”.

The above Article accommodates the use of force in self defence against an armed attack mainly. This reading is consistent with the plain words of Article 51, with the drafting history, and official government positions. It is also consistent with authoritative interpretation of Article 51 by the International Court of Justice (ICJ). There are still questions concerning when an armed attack “begins” for purposes of the right of self defence, but the Security Council and governments have clarified some issues since the US attack of September 11, 2001. An attack must be under way or must have already occurred in order to trigger the right of unilateral self defence. Any earlier response requires the approval of the Security Council. There is no self appointed right to attack another state because of fear that the state is making plans or developing weapons usable in a hypothetical campaign.

The requirement of actual armed attack:

The express terms of Article 51 refer to the right of self defence if an armed attack occurs. The text has been interpreted by the ICJ on several occasions. The court held in the case of *Nicaragua v US* that the right of individual or collective self defence is triggered only by acts grave enough to amount to an armed attack. The court relied in part on the UN General Assembly's definition of aggression to conclude that an "armed attack" triggering unilateral self defence may include "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...an armed attack conducted by regular forces..."

The court was assessing the US claim that its use of force against Nicaragua was a lawful act of collective self defence of El Salvador. The US argued that Nicaragua had used unlawful force in the first instance by providing weapons and supplies to El Salvador rebels, and further that even if it had done so, the supply of weapons was not the same as an armed attack. Moreover, El Salvador has not reported to the Security Council, nor had it invited the US to assist in its self defence. With Nicaragua in mind, we may conclude that where a state is threatened by force not amounting to an armed attack, it must resort to measures less than armed defence, or it must seek Security Council authorisation to do more.

Further, states are limited by the principles of state responsibility, and prohibition on armed reprisals. An armed reprisal is the use of force for revenge, punishment or general deterrence. The UN General Assembly has resolved that armed reprisals are unlawful and that states have a duty to refrain from using them. The right of self defence is limited to the right to use force to repel an attack in progress, to prevent future enemy attacks following an initial attack, or to reverse the consequences of an enemy attack, such as ending an occupation. The state acting in self defence may seek the destruction of an attacking enemy force if that is necessary and proportional. The defensive use of force may be delayed after an unlawful armed attack, depending on the circumstances. Taking a reasonable amount of time to organise the defence is permissible.

Force can be used in self defence only against a state legally responsible for the armed attack. It is generally not enough that the enemy attack originated from the territory of a state. Rather, legal responsibility follows if a state used its own agents to carry out the attack; if it controlled or supported the attackers; or where it subsequently adopted the acts of the attacker as its own.

Any use of force in self defence must respect the principle of necessity and proportionality. Necessity restricts the use of military force to the attainment of legitimate military objectives. Proportionality requires that possible civilian casualties must be weighed in the balance.

If the loss of innocent life or destruction of civilian property is out of proportion to the importance of the objective, the attack must be abandoned. Although Article 51 does not expressly state any limitations of the right of self defence, they were part of the customary international law taking root from the Webster Declaration in the *Caroline* case, and are implicitly an important part of the provision

Self defence against terrorism

In principle at least, it has always been possible to accommodate the use of force in response to terrorism within the traditional inter-state self defence paradigm outlined above. For this to occur, three conditions need to be satisfied. First, a state must suffer a terrorist attack which meets the gravity threshold of an "armed attack". Second, those terrorist attacks must be attributable to another state. Third, the use of force in self defence must be necessary and proportionate.

In practice, however, the nature of terrorist acts and non-state terrorist organisations means that it is often difficult to satisfy these conditions. There are two major difficulties. The first concerns the gravity threshold for an "armed attack", while the second related to the attribution requirement.

Prior to the September 11 incident in the US, few individual terrorist attacks were serious enough to meet the ICJ's high threshold for an "armed attack" in the *Nicaragua* case. The majority of international terrorist acts consisted of relatively minor attacks on nationals abroad, rather than large scale attacks on the actual territory of the victim state. It was therefore difficult to equate terrorist acts committed by non-state actors with conventional attacks by a state. As such, it was rare for an individual act of terrorism to qualify as an "armed attack" triggering a victim's state right of self defence.

In an attempt to overcome this difficulty, the US and Israel have adopted the "cumulative effect" argument. Under this approach, rather than measuring the gravity of each individual terrorist attack according to the threshold for an "armed attack", consideration is given to the cumulative effect of a series of attacks. Hence, the argument is that an ongoing campaign of terrorist acts, viewed collectively, can amount to an "armed attack". This approach, which appears to have been accepted by the ICJ in the *Nicaragua* case, has played a major role in attempts by the US and Israel to establish that terrorist acts should be treated as "armed attacks".

The second major difficulty with non-state terrorism is satisfying the attribution requirement. As pointed out earlier, to qualify as an "armed attack", terrorist acts by non-state groups must be attributable to a state. However, in the case of non-state terrorist groups, it is often difficult to fulfil the "effective control" test or other applicable bases for attribution. Such groups may receive varying

levels of support from a host state. This support can range from the state having complete operational control over the non-state actor, to the provision of weapons and funding, to mere acquiescence or toleration of the group's presence on the state's territory. Only in the first scenario is the connection between the two entities sufficiently close to satisfy the "effective control" test. In circumstances where support falls below this level, a state is not considered responsible for the acts of a non-state terrorist group. The assertion of the US and Israel that any form of assistance, or even mere acquiescence or toleration of a terrorist group, should make a host state responsible for the conduct of that group, remained highly controversial before the US September 11 terrorist attacks.

In any case, state practice involving the use of force against non-state actors is not unknown. The famous *Caroline* incident of 1837, which led to the formulation of the necessity and proportionality criteria governing self defence, is one such example. More recently, from the 1960s onwards, Israel and apartheid South Africa used military force on numerous occasions to respond to cross-border attacks by non-state groups based in neighbouring states. These responses were generally condemned by the Security Council and the international community. In addition, since 1991 Turkey and Iran have made a number of incursions into Iraq to target Kurdish military groups operating there.

In the context of self defence against terrorism, there were four major events prior to September 11. The first occurred in October 1985, when Israel bombed the Palestinian Liberation Organisation (PLO) headquarters in Tunisia in response to series of terrorist attacks on Israeli citizens. Israel's argument that Tunisia's toleration of the PLO's presence on Tunisian territory had made it necessary for Israel to act in self defence to prevent further attacks was not accepted by the international community. The Security Council condemned Israel's response as an act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the UN, international law and norms of conduct.

The second major incident occurred in April 1986, when the US attacked Libyan government facilities in Tripoli following a terrorist attack on a Berlin night club which targeted US service personnel. Despite the US claims that the Libyan government had been directly involved in planning the night club attack, the international community condemned the US response. The US again used force to respond to terrorism when it fired cruise missiles at Iraq in 1993, following the discovery of a plot to assassinate former President George H Bush while in Kuwait. Although the plot was foiled, the US claimed that it still amounted to an armed attack triggering the right to use force in self defence.

The response of the international community to this incident was mixed. While the UN's action was supported

by the UK and Russia, there was criticism from China and the Arab States. On the whole however, the international community's reaction indicated a growing acceptance among states of the need to use military force against terrorism, although this could not be considered as clear endorsement of the legality of the US action.

The final significant incident prior to September 11 occurred in 1998 when the US attacked an Al Qaida terrorist training camp in Afghanistan and an alleged chemical weapons factory in Sudan. This was in response to the bombing of the US embassies in Kenya and Tanzania, which the US blamed on Al Qaida. The US claim that it had acted in self defence to prevent these attacks from continuing received support from several states. However, there were condemnations from Russia, Pakistan and the Arab states, although neither the Security Council nor the General Assembly took any formal action. At least part of the concern over the US action stemmed from the fact that the territorial integrity of the Sudan and Afghanistan had been violated not in an attempt to target those states themselves, but rather to attack non-state terrorists located there.

The international community's response to these incidents indicates that even prior to September 11, there was some acceptance by states of the need to use military force against terrorism. However, it is clear that in the cases discussed above, there were doubts as to whether the particular factual circumstances satisfied the traditional requirements of self defence.

POST SEPTEMBER 11 AND EXTENDED RIGHT OF SELF DEFENCE

The September 11 attacks of the US by terrorists and the immediate response by the international community marked a turning point in the exercise of the right of self defence. The Security Council responded by passing Resolution 1368 affirming a member's right under Article 51 to respond to terrorist attacks, and Resolution 1373 unanimously forbidding the aiding or funding of terrorist groups and establishing the Council's Counter Terrorism Committee to monitor Member States' implementation of its provisions. In addition, NATO determined that the terrorist attacks amounted to an armed attack and invoked Article V of the 1949 Washington Treaty for the first time. This was followed by invocation of the ANZUS Treaty. When the US-led military action in Afghanistan began on October 5, 2001, there was almost unanimous international support for the use of force.

The international acceptance of the use of force against Afghanistan can be explained largely by factual differences between the September 11 attacks and previous incidents involving military responses to terrorism. In several respects, the Afghanistan war was easier to accommodate within the traditional self defence paradigm than were

previous incidents involving the use of force against terrorism.

First, the September 11 attacks were clearly serious enough to meet the gravity threshold for an armed attack, whereas previous terrorist attacks were less likely to satisfy this threshold. Second, the fact that the September 11 attacks occurred on the territory of the victim state, rather than being attacks on overseas targets, made it easier to classify them as an armed attack against the US. Third, the US went to significant lengths to provide evidence linking Al-Qaida to the terrorist attacks; evidence which was accepted by other states. This prevented the types of evidential doubts which undermined previous incidents.

However, the requirement that an armed attack must be attributable to a state appears not to have been satisfied to the extent of not passing the “effective control” test as laid down by the ICJ in the *Nicaragua* case. It can be argued that the response of the international community in the aftermath of September 11 has given rise to a new principle of customary international law that permits the use of force in self defence in response to “armed attacks” committed by non-state terrorist organizations. The new post-September 11 threshold for attribution is whittled down considerably so that any level of support for – or even willing hosting, tolerating or harbouring – terrorists will be sufficient to make a state responsible for the conduct of those non-state actors. This new standard will cover most situations where a non-state actor operates on the territory of another state.

One scenario that would not satisfy the new attribution threshold involves weak or failed states that are unable to prevent terrorist groups from operating on their territory due to lack of control or resources. While this anomaly may rule out self defence as a legal basis for military action on the territory of that host state, it does not render a victim state powerless. It may be possible for a victim state to obtain the host state’s consent to intervene on its territory in order to target a non-state terrorist group located there.

Imprecise conditions and uncertainties

The post September 11 right to use force in self defence against states that host or harbour terrorist organisations that have already committed serious terrorist attacks raises three main concerns.

The first relates to the range of targets that may be the subject of force in self defence. Given that transnational terrorist organizations such as Al-Qaida may have cells in many different states, the post September 11 right to use force against states that host or harbour such groups could potentially allow each of these states to be targeted by military action. At present, the doctrine of harbouring or hosting appears to make no distinction between a state that hosts or harbours one terrorist who poses little ongoing

threat, and another state that hosts an entire terrorist network which continues to commit acts of violence.

There are also potential problems relating to the duration of military action taken in self defence. In the context of international terrorist threats it may be difficult to determine when action in self defence is complete. Such uncertainties over the duration of self defence create the potential for conflict between a victim state’s right to defend itself against ongoing threats and the Security Council’s role in maintaining international peace and security.

Another significant concern about the extended right of self defence against terrorism relates to evidence provision and the authority of a state to make unilateral decisions to respond with force. Unless states are required to present clear and convincing evidence of the need to use military force in self defence against a state that harbours or hosts terrorist groups, there is a danger that this new right of self defence may be abused. To avoid such a problem, it has been argued that only “the Security Council should decide whether, and on what conditions, to authorize the use of force against specific states on the basis of compelling evidence showing that those states, instead of stopping the action of terrorist organizations and detaining its members, harbour, protect, tolerate or promote such organizations”. Establishing a Security Council-based mechanism of this nature is vital to ensuring the legitimacy of further military responses to terrorism.

PRE-EMPTIVE USE OF FORCE IN SELF DEFENCE

How legitimate?

Given the weight of opinion in support of the expansive interpretation of self defence doctrine as outlined above, it is arguably legitimate to grant UN Member States a right to pre-emptive self defence. Arguments for and against the existence of such a right have sought support in the writings of legal philosophers. Hugo Grotius stated the danger “must be immediate and imminent in point of time...but those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived and deceive others”. Emmerich De Vattel, on the other hand, argued a nation has “the right to prevent an injury where it sees itself threatened with one.”

The position of this paper however, is that the notion of pre-emption in relation to the use of force in self defence is neither supported by international law nor by state practice. Proponents of pre-emptive self defence generally base their arguments on the word inherent in Article 51. The argument is that Article 51, by pledging to “Impair the inherent right of self defence,” left intact the unchanged law of customary self defence predating the adoption of the UN Charter, citing the *Caroline* case as authority for this proposition.

It is suggested that inherent right theory has many weaknesses starting with the interpretation of customary international law before the adoption of the Charter. At the time of the *Caroline* case, the use of force was generally lawful as an instrument of national policy. The UN Charter was adopted for the very purpose of creating a far wider prohibition on force than existed under treaty or custom in 1945, let alone 1842 when the *Caroline* case was decided. Even if earlier custom allowed pre-emptive self defence, arguing that it persisted after 1945 for UN Members requires privileging the word “inherent” over the plain terms of Article 2(4) and the words “armed attack” in Article 51 of the Charter. Permitting pre-emptive self defence at the sole discretion of a state is fundamentally at odds with the Charter’s design. It is an exception that would overthrow the prohibition on the use of force in Article 2(4) and thus the very purpose of the UN. The ICJ in the *Nicaragua* case rejected the right to use force in the absence of an armed attack.

Some writers promoting the inherent right theory argue that the parameters of the right of self defence are unchangeable by Charter text and subsequent state practice, being *jus cogens*. But no authority has ever identified a unilateral right of anticipatory self defence as a *jus cogens* principle. The Charter’s expectation was that states would rely on the decision of the Security Council to deal with the early concerns about international security. Indeed, the ICJ has identified the Charter prohibition on the use of force, Article 2(4), as *jus cogens*, not self defence.

Some writers question the viability of any rules on prohibition of the use of force. They cite states’ continuing breach of Charter rules and conclude that the Charter regime and its rules are no longer viable, as they have slipped into desuetude because they are so widely ignored. The simple response to this view is contained in the often cited view of the ICJ in the *Nicaragua* case. As the judges noted in that case:

“The court does not consider that, for a rule to be established as Customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of the attitude is to conform rather than to weaken the rule”.

As long as inconsistent state practice is treated as law violation and as practice moves toward a new customary rule, the rules remain viable. If the international

community continues to express support for the rules – another form of state practice – the rules remain.

It has also been argued that recent international events, such as the September 11, 2001, terrorist attacks on the US, have resulted in a need to wholly reassess the self defence doctrine having due regard to the contemporary capabilities of adversaries and their apparent determination to achieve their goal. It has further been claimed that the September 11 attacks have changed “the strategic responsibilities of democratic states”. With the steady emergence of weapons of mass destruction, it is reasonable to suggest that even those steadfast against allowing pre-emption in international law must reconsider the effect of the doctrine. Requiring states to wait until actually attacked before mounting a defence is unrealistic in modern conflict. To do so makes “sitting ducks” of states, opening them not only to collateral damage, but also the potential destruction of any means of defence subsequent to an aggressor’s assault. It is arguable that the Bush administration sought to justify its operations in Iraq on the basis of liberal interpretation of the right to anticipatory self defence. But what is the legitimacy of such a claim?

Following the events of September 11, the Bush administration declared an intention to seek and destroy international terrorist networks, vowing to rid the world of terror once and for all. The valiant charge was backed by the release of the administration’s new strategic doctrine, claiming the right to use force in pre-emption of potential threats to the US, including weapons of mass destruction and terrorism – the first divergence from the US deterrence and containment rhetoric since the cold war.

Applying the law of self defence, as discussed earlier, to the facts surrounding US operations in Iraq, it is clear that no elements of pre-emptive self defence were present, and justification on this basis is void. As pointed out by commentators, the necessity of their self defence was not instant or urgent. Iraq had not indicated an intention to attack the US or any other country. The US had expressed an intention to invade Iraq months before actually doing so. Further, there were alternatives available to the Bush administration to avert any threat posed by Iraq. Most commentators would also have difficulty finding the scale of attack carried out by the coalition forces was proportional to any perceived threat. The violent US offensive was one of the most severe seen in modern days. It caused mass destruction of lives, infrastructure and ultimately, Saddam’s regime. Where proportionality is to be assessed with reference to the threat posed, it is arguable little to no threat was posed by Iraq at the time, and it would follow that the actions of the US and coalition forces were anything but proportional.

The principal reason given for the invasion was to prevent the stockpile and use of weapons of mass destruction, including biological and chemical weapons.

No firm evidence of the existence of such weapons was presented by the US or the British ally, and there was certainly no sign Iraq had threatened to use weapons allegedly held within the territory. As commentators argued, the subsequent events of the invasion were illustrative that Saddam Hussein's regime was not in possession of weapons of mass destruction; or at least, that they were not inclined to use them, even in the face of dire circumstances such as the wholesale death and destruction caused by the coalition invasion. Further, there was no evidence of Iraqi's intention to attack any other state in over a decade.

A counter argument with reference to the events of the years preceding the second Gulf war is that, viewed as the final episode in a conflict initiated more than a dozen years earlier by Iraq's invasion of Kuwait, the issue of pre-emption does not enter into the debate. Alternatively, it is suggested that the risk embodied in allowing the Iraqi regime to defy the international community by pursuing weapons of mass destruction was sufficient to justify pre-emption and, viewed in the context of past actions of Iraq and threats posed over a protracted period of time, lawful under international law and justified on the basis of Security Council Resolutions between 1990 and 2003. But a simple reaction to this is that the doctrine of pre-emption plainly does not encompass the overthrow of regimes with records of aggressive behaviour. Nor does it legitimise the use of force against states deemed unfriendly in order to deny them weapons systems already deployed by other sovereign states.

Effect on the operation of the United Nations Charter System

Reliance on pre-emptive self defence in the use of force under the guise of Article 51 of the UN Charter has distorted the concept of a universal prohibition on the use of force under Article 2(4) of the Charter. A commentator offers several possible explanations of the effect of the conflict. The first is that the US as the dominant state in the contemporary world order is exempt from accountability for the use of force, which is irreconcilable with the Charter. States who do not enjoy an exemption for association would, by contrast, be held to account. Secondly, it is argued, the conflict demonstrates that the Charter system no longer accords with modern political realities and is no longer authoritative on the validation of such actions. Thirdly, it is suggested that the tension between the conduct of the US and the Charter is one which respects the underlying values of the international community and requires an organic approach to legality—not a question of either/or, but a question to be answered having regard to all the circumstances of the case. In the light of the escalation of terrorism, pre-emptive force, in order to seek out and destroy terror networks should be considered in terms of an expansion of the self defence justification. Finally, it is said that the source of

legitimization may be found in the end result of the conflict which, in the case of the Iraqi attack, is:

“the emancipation of the Iraqi people from an oppressive regime, reinforced by the overwhelming evidence that Baghdad rulers were guilty of systemic, widespread, and massive crimes against humanity, and an occupation that prepares the Iraqi people for political democracy and economic success.”

The implications in international law of the kindred justification will be examined later.

One fundamental question is whether the US will seek Security Council authorization before carrying out future military operations against rogue states, or if it will consider itself vindicated by the apparent achievement of its objective in taking unilateral action supported by allies, using the Iraq as a model for future conflicts. The US, incidentally has dangerously assumed a special legal status, in which it has rights not available to others. At the West Point Commencement in 2002, President Bush intimated that the US can make choices unavailable to others and yet, the US is equal before the law with all other foreign states. If America creates a precedent through its practice, that precedent will be available, like a loaded gun, for other states to use as well. The pre-emptive use of military force would establish a precedent that the US has worked against since 1945, and would provide legal justification for Pakistan to attack India, for Iran to attack Iraq, for Russia to attack Georgia, for Azerbaijan to attack Armenia, for North Korea to attack South Korea, etc. Any state that believes another regime poses a possible future threat – regardless of the evidence – could cite the US invasion of Iraq.

Pre-emptive self defence not only undermines the restraint on when states may use force, it also undermines the restraints on how states may use force. In a clear case of actual armed attacks, the victim state measures proportionality against attacks that have occurred or that are planned. What measure can be used to assess proportionality against a possible attack? The state acting pre-emptively is making a subjective determination about future events that will need to make a subjective determination about how much force is needed for pre-emption. As in the case of Iraq, massive force may be employed to take over the whole country and eliminate its government

The dangerous trend set by the principle of pre-emptive self defence has the implication that states now have an incentive to by-pass the Security Council and, take unilateral action in self defence instead. Situations in which military actions are taken by group of states acting outside the UN collective security framework may be evidence of a trend in which multilateral coalitions are increasingly replacing the UN as the body responsible for maintaining international peace and security. Given that these coalitions may be used by stronger states to further their own interests, this may prove to be an undesirable development.

WAR AGAINST TERRORISM OR A NEW FORM OF IMPERIALISM?

Barring the catastrophic event of September 11, 2001, and the consequent befitting response of the international community, it is said that the US military attacks on Afghanistan and Iraq were propelled by the geo-political aims of US imperialism. Reference has been made to a letter by the US Ambassador to the UN, John Negroponte where he remarked that: “We may find that our self defence requires further action with respect to other organizations and other states”. Events following the military attacks have shown that the US effort is not confined to the selection of targets for military attack, but goes to the determination of what form of rule is to be set in place by the imperialist powers at the conclusion of the military intervention. Commentators drew a comparison between the war against piracy in the nineteenth century as an important element in the expansion of colonialism and the war against terrorism which is being pursued for the same aims. In the words of Paul Johnson:

“America and her allies may find themselves, temporarily at least, not just occupying with troops but administering obdurate terrorist states . These may eventually include not only Afghanistan but Iraq, Iran, Sudan, Libya, and Syria. Democratic regimes willing to abide by international law will be implanted where possible, but a Western presence seems unavoidable in some cases.”

The best medium-term solution, it is said, is to be found perhaps in the old League of Nations mandate system which served well as a respectable form of colonialism between the wars. Syria and Iraq were once highly successful mandates. Sudan, Libya and Iran have likewise been placed under special regimes by international treaty. According to Johnson:

“Countries that cannot live at peace with their neighbours and wage covert war against the international community cannot expect total independence. With all the permanent members of the Security Council now backing, in varying degrees, the American led initiative, it should not be difficult to devise a new form of UN mandate that places terrorist states under responsible supervision”.

The League of Nations’ initiative of the mandate system has already started in the 90s with the placing of East Timor, Cambodia, Kosovo and Bosnia under UN rule.

In what he called “defensive imperialism”, Wolf based his justification on “failed states”. He maintained that if the failed states became too dangerous for the established states to tolerate, it is possible to imagine a defensive imperialism. He maintains that the central problem confronting the “failed states” is that there is no organized state apparatus capable of imposing order, the pre-condition for civilized life, with the result that such states become trapped in a vicious circle in which poverty begets lawlessness and lawlessness begets more poverty. He cited

Afghanistan as an example of a tribal grouping desperately poor with war as a way of life and the ruling regime funding itself with money from the export of hard drugs, with Osama bin Laden as the godfather.

The foregoing argument appears specious and hypocritical. The so-called failed state is a direct product of the interventions of the imperialist powers – organizing coups, stocking up civil wars and ethnic conflicts for their own purposes, arming repressive regimes, and the imposition of economic policies that have created a social disaster for the people of these countries. The impoverishment of the entire sub Saharan Africa – the region of many such failed states – stems from the fact that in any year, the repayment of loans and interest to the major western banks and bodies such as the IMF is greater than the entire budget for health and education. Also, the facts are completely ignored concerning the role of the US, in collaboration with the Saudi regime and Pakistan, in financing the warring factions to the tune of at least \$10 billion, the support provided to the Taliban, and the promotion of Osama bin Laden when it served the interests of the imperialist powers.

If a failed state is to be rescued, Wolf writes, the essential parts of honest government – above all, the apparatus – must be provided from outside. That is what the west is doing today in the former Yugoslavia. He says what is needed is not pious aspirations but an honest and organized coercive force. There are two reasons why the idea will cause horror: imperialism remains suspect and the effect will be costly. Yet these objections can be met through the creation of some form of UN temporary protectorate.

TERRORISM AND STATES’ INTERESTS

The politics of international relations lies most essentially in the interests of subjects of international law. Whilst the UN Charter and the various organs of the UN appear to provide a common front towards the realization of international peace and security, the perspective of states to issues including the thorny issue of terrorism is coloured by an individual state’s interest. There are two vital dimensions to this: (1) states’ interests as the precipitating factor culminating in, and fuelling of terrorist activities and (2) counter-measures dictated and guided by states’ interests.

A dispassionate assessment of the regime of terrorism shows that terrorism arises in situations where there is despair, humiliation, poverty, political oppression, extensive human rights abuses, foreign occupation and weak state control, and victims of such terrorist attacks have been identified as being responsible for the sorry state of affairs in an endeavour to actualize certain political, social, economic, or ideological objectives. This is true of the situation in the Middle East, Kashmir, Iran, Iraq, and to some extent, Pakistan. Agitations in reaction to

frustrations resulted in violence and terrorist tactics as the lone solution to their problems. Modern communications enable deprived people to get together and unite quickly, and human rights organizations around the world increase their awareness. Handy modern weapons with tremendous power help them fight the system when they want to.

Counter-terrorist measures however take the form of military attacks seeking to physically destroy terrorism. But behind the facade of military solution as demonstrated in Iraq and Afghanistan is an interest in creating an effective democratic infrastructure as part of the overall strategy. The argument is that democracies do not support terrorism, and that the condoning of ugly dictatorships by states often results in violation of human rights.

At this point, it could be said that the argument of the victim of terrorist attack lacks any legal base. The recent international legal order put in place in 1945 does not recognize the legality of military intervention even in cases of genocide or ethnic cleansing, and *ipso facto* would not recognize an intervention to defend human rights by putting a democratic regime in place. There is no provision in the UN Charter or in any international instrument which would permit such intervention. Under the UN Charter, force may only be used in self defence or on authorization by the UN Security Council. The purpose of and reasons for the use of force, and the enforcement of protected human values, were not distinguished. The Charter did not authorize the use of armed force by any state against another state for the protection of human rights or the establishment of democratic institutions, or for any other cause.

THE PROBLEM OF LEGALITY OF COUNTER-TERRORISM OPERATIONS

The extension of the notion of self defence undermines existing legal inhibitions for the use of force in international relations. The veracity of the claim that any state victim of a terrorist attack could act militarily against another by claiming that the perpetrators responsible for the attack are installed in its territory will prove difficult to determine, since evidence is normally furnished by secret services, and is not made public. In principle, any state victim of a terrorist attack could inculcate another, using Article 51 as a pretext. Here, the danger of abuse is evident.

It is apparent that a Security Council intervention would have been a far more suitable response to a terrorist attack than a self defence, because the Council could determine the scope of its action. However, having refrained from intervening twice, it seems rather unlikely that it will behave differently in future. This means that irregularities in the conduct of self defence operations will most probably become more frequent. This conduct by the Security Council has contributed towards undermining its

own significance as the body primarily responsible for the maintenance of international security.

The need for regulation

The problem of the legality of counter-terrorism operations could be solved by means of a Regulation of the use of force in response to international terrorist attacks through the adoption of an international Convention. This Convention should include at least the following elements:

- an agreed definition of terrorism, with criteria determining what kinds of actions qualify as terrorist acts;
- the specific conditions under which forcible action is permissible; and
- the conditions and limits to which the recourse to force is subject.

Codifying the use of force against terrorism would allow the international community to influence the responses to the attacks to come before they occur. Through such a Convention, forcible measures against international terrorists should be incorporated into legality in a concerted and controlled way. The Convention should permit states to react to terrorist attacks without undermining the existing non-interventionist system. This is however a delicate balance that can only be achieved through careful design. It should be borne in mind that the current system of collective security is founded upon the prohibition of the use of force. Exceptions to this ban need to be interpreted narrowly. It is therefore necessary to impose clear limits on these exceptions in order to reduce their inherent perils of abuse.

Codification is a better alternative than continuing to broaden the right of self defence. The system we need for the future will have to accommodate new threats while essentially preserving the non-interventionist regime. Since there is still no perfect formula suggesting how this should be done, it is time for the international community to start thinking about how to cope with the new environment. It is unwise to let new rules develop as events unfold, leaving their formulation to the will of the powers that happen to be involved.

THE PARADIGM SHIFT

One hard fact stares the whole world in the face after September 11. It is now clear that in a rapidly globalising world, the fallout from major lasting acts of injustice cannot be confined to that area or region, and that the victims of that injustice or grave wrongdoing are ultimately bound to go underground and pay back in their own way. Whilst the US for example, says those who support, shield, or harbour terrorists should be treated like terrorists, the victims of prolonged injustice around the world also think that those who support the countries or groups who inflict

miseries on them should also be treated like perpetrators of such injustice or inhumanity.

Today, the world is poised to fighting an enemy who seems to be in places but is not really visible or easily identifiable. Terrorist actions are peculiarly sporadic and globalized, with ideological intent revolutionizing a terrorist crusade for recognition and respect for human rights and self determination. Whilst the international community remains divided over the Middle East crises, those seeking to vent their grievances went underground to deliver violent responses. Also in Kashmir, the agitation for the right to self determination fell on deaf ears, resulting in the use of violence and terrorist tactics as the attempted solution to the problem.

It is said that the much touted globalisation cannot be only for trade or movement of money and services. It has also to bring about a just and fair world where injustice, intolerance and oppression are not permitted, much less encouraged in a partisan manner. If the world must fight terrorism, the root of that pervasive malady has to be attended to. It is submitted that the root of terrorism lies in man's deprivation, discrimination, impoverishment, and eventual social isolation. The international community should therefore:

- Recognise and respect human rights across the globe generally, and, in particular, the majority community should try to absorb the minorities politically and concede their religious and social rights. Alienation, or a sense of deprivation and ultimate outrage, is the seed of terrorism.
- Act as objective observers and encourage effective reconciliation of warring parties over political, social, religious or ideological differences.
- Dialogue through the machinery of the UN and other regional organisations and collective actions of states will go a long way in doing justice in conflict situations.
- Ensure the upholding of the tenet of equality of states, notwithstanding the imbalances in the structure of the UN organs. The political and economic strength of the US should be harnessed towards the actualization of international peace and security, and in fostering social and economic emancipation of weaker states.
- Sovereignty of states and their territorial integrity remain inviolable under the UN Charter and hence, in reacting to terrorist attacks, due consideration shall be


given to the fundamental principles of attribution and State responsibility.

CONCLUSION

There is no doubt that terrorists must be hunted down and brought to justice. It may take military action to do this, but the action must be proportionate, so that the culprits are punished without inflicting more deaths on innocent civilians. It is not a US led war that is required but a humanitarian-centred response that includes appropriate military action with a range of comprehensive measures to uproot terrorism.

Not only must any military strike under the aegis of the self defence article of the UN be within the confines of international law, it must also be in part effective international co-operation to combat terrorism based on the principles of the Charter of Rights and Freedoms, including respect for international humanitarian law and human rights. At the very least, any military response must be limited to the least possible damage.

However, at this turning point for the world, we need to face up to a hard reality: military might alone will not defend us from against those who lash out at humanity itself because of their consuming hatred. Such hatred exploits the brutalities of poverty, oppression, power, greed, and similar characteristics of modern society. Thus, our long range defence will lie in addressing the great injustices that today are worsening the divisions between rich and poor, the powerful and the vulnerable, the triumphant and the despairing.

The emphasis on militarism stands in sharp contrast to the social deficit of humanity. Almost half the world's people live in abject poverty. Of the 4.6 billion people in developing countries, one billion lack access to clean water and 2.4 billion do not have basic sanitation. The richest 1 per cent of the world's people receive as much income as the poorest 57 per cent. Sixty six countries are now poorer than they were a decade ago. Stamp out today's terrorists without stamping out the problem that spawned them and we will have accomplished little to ensure our safety. For tomorrow's terrorists are the children in today's refugee camps. 

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