The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption

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THE USE OF CONVENTIONAL INTERNATIONAL LAW IN COMBATING TERRORISM: A MAGINOT LINE FOR MODERN CIVILIZATION EMPLOYING THE PRINCIPLES OF ANTICIPATORY SELF-DEFENSE & PREEMPTION

MAJOR JOSHUA E. KASTENBERG

We do not differentiate between those dressed in military uniforms and civilians; they are all targets in this fatwa.

Osama bin Laden

On 11 September 2001, 2,938 persons were killed in New York City and Washington, D.C., after members of an Islamic-based terrorist organization flew hijacked commercial airplanes into the New York World Trade Center towers and the Pentagon building. Another forty-four persons were killed the same day in the Pennsylvania countryside after airplane passengers of United Airlines Flight 93 sought to abort a related terrorist hijacking whose apparent destination was Washington, D.C. On 13 October 2002, over 200 people were killed in a Bali nightclub as a result of the terrorist actions. In the Philippines, violent terrorist attacks against civilians have become so frequent as to seem routine. And, in Kenya and Tanzania, civilians

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4 See http://special.scnp.com (last visited July 1, 2004).


6 There are two principal Islamic terrorist groups operating in the Philippines, namely the “Abu Sayyaf” ("Abu Sayyef" alt. spelling), and the Moro Islamic Liberation Front (MILF). The Abu Sayyaf is examined in this article because of its members’ active support of terrorist

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with no apparent relationship to U. S. foreign policy were killed by persons
who specifically conducted attacks with the intentions of altering U. S. foreign
policy and killing "non-believers." 7

These instances of terrorism directed primarily against civilians have
renewed popular, legal and other scholarly debate regarding the parameters of
use of force in both the international and domestic contexts. For instance, in
response to the 11 September 2001 attack on the World Trade Center, the
United Nations (U.N.) Security Council adopted Resolution 1368, which
recognizes the inherent right of individual or collective self-defense in
accordance with the U.N. Charter. 8 Additionally, President George W. Bush
has advanced a doctrine of enemy status and state responsibility. 9 This
document, apparently loosely based on a traditional law concept of "aiding and
abetting", is summarized in President Bush's statement that the United States
would consider as enemies "terrorists and those who harbor them." 10

In addition to renewed debate on the limits of use of force generally,
there has emerged one regarding use of force in the international context,
focusing on both the notions preemption and anticipatory self-defense. In the
face of mounting international religious-based terrorism and evolving plans to
counter this threat, to a pressing question that has emerged on the world stage
is whether anticipatory self-defense and preemption are legitimate international
law concepts.

This article analyzes the existing concepts of the right of self-defense
and preemption under international law. Part I quickly reviews both the
evolution of warfare and the state of religious-based terrorism. The former
presents a useful starting point for understanding customary international law

activity, their commitment to literalist Quaranic scripture, and their affiliation with al Qaeda.
See, e.g., Headline: Philippines Rebels Raid Towns, Two Civilians Killed, REUTERS, April
24, 2003; see also Headline: Bombs Kill up to 15 at Wharf in the South Philippines, REUTERS,
April 2, 2003. For commentary, see, e.g., Charles V. Pena, Blowback: The Unintended
Consequences of Military Tribunals, 16 NOTRA DAME J. L. ETHICS & PUB POLY 119, 129
(2001). Suicide bombings of the U.S. embassies in Tanzania and Kenya killed more than 200
people, including twelve U.S. citizens, and were allegedly perpetrated by the al Qaeda terrorist
network. In response, in 20 August 1998, the United States launched seventy-nine Tomahawk
missiles against terrorist training camps in Afghanistan and a Sudanese pharmaceutical plant
that the United States identified as a "chemical weapons facility" associated with Osama bin
Laden. See Murphy, supra note 3, at 161. For an insightful statement on the goal of killing
"non-believers," see James V. Schall, S.J., On the Justice and Prudence of this War, 51 CATH.
whitehouse.gov/nsc/nssall.html.
10 See Murphy, supra note 3, at 244, citing Address Before a Joint Session of the Congress on
the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES.
DOC. 1347 (Sept. 20, 2001).
and its subset, generally referred to as "the laws and customs of war." Customary international law provides context to the application and shortcomings of contemporary codified international law, and, therefore, serves an important heuristic function in understanding the international legal limits on combating this increasingly frequent form of terrorism.

It is important to note that this article does not advocate a model of warfare that is either anti-Islamic or that would employ counter-terrorist measures that do not comply with international law. Indeed, it condemns any model that would do either. There is no dispute, however, that members of religious-oriented terrorist groups, typically Islamic fundamentalist organizations, appear, in their rising prominence, to be ever more willing to rely on terrorist tactics, and to view their movement as a new religious war. Because no international law doctrine exists in a vacuum, this section is important in understanding the limits to which the international nations may respond to the new terrorist threats.

In Part II, contemporary instruments of international law are examined. In particular, both Article 51 of the U.N. Charter and the International Court of Justice (ICJ) decision, Nicaragua v. United States, are reviewed for their respective definitions of the right to self-defense. The limitations expressed therein are of particular importance because over time, technical innovations and other societal shifts have changed how war is fought, in a manner beyond what was envisioned when the U.N. Charter was adopted. This is particularly true with respect to unconventional phenomena such as the type of terrorism analyzed in this article. Article 51 of the United Nations (UN) Charter provides state signatories an "inherent" right of self-defense in response to an "armed attack." It allows member states a military-based self-defense in

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1 Islamic terrorist groups are not, of course, the only religious-oriented terrorist organizations. For instance, the U.S. State Department has listed the Kach & Kahane Chai as an illegal terror organization. This Jewish group advances the doctrine of returning Israel to "a biblical state," by any means. Likewise, the State Department placed on this list the Ulster Volunteer Force (UVF), a Protestant group that professes to view Northern Ireland as an exclusive Protestant enclave. However, unlike the Islamic terrorist groups discussed in this article, neither the Kach & Kahane Chai nor the UVH seeks to create an authoritarian religious world.

12 See Khaled Abou El Fadl, The Culture of Ugliness in Modern Islam and Reengaging Morality, 2 UCLA J. ISLAMIC & NEAR E.L. 33, 35 (2003); see also, e.g. Murphy, supra note 3, at 240, quoting, UK Press Release, 10 Downing Street Newsroom, Responsibility for the Terrorist Atrocities in the United States, ¶ 21-22 (Oct. 4, 2001). Id.

13 U.N. CHARTER art. 51.


15 Article 51 reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security
either their respective individual or collective capacities.\textsuperscript{16} Also, although not covered in detail, Article 2(4) of the U.N. Charter places limits on a state’s ability to threaten the use of force against another state.\textsuperscript{17}

While some prominent scholars of international law contend that Article 51, like all articles in the U.N. Charter, is to be read narrowly,\textsuperscript{18} it appears that the current U.S. administration has departed from that view and has opted to adopt the doctrines of both anticipatory self-defense and preemption. For instance, it may be argued that the post-11 September invasion into Afghanistan constituted an act of anticipatory self-defense, while the decision to wage war in Iraq was more a matter of preemption. Examining the status or viability of these two doctrines under international law is the key focus of this article, as well as understanding the distinctions and uses of each within the context of grappling with international religious-based terrorism, the newest threat to international peace and security.

Part III will tie the two prior sections together by analyzing the potential use of preemption in the current context of dealing with terrorism. Part III also provides analyzes of terrorism as an “international crime,” and state assistance to terrorist organizations. This section then assesses the legitimacy of the separate doctrines of anticipatory self-defense and preemption. In the end, this article concludes that both anticipatory self-defense and preemption are credible theories in limited circumstances, including those in which an organization employs a visible strategy of terror.\textsuperscript{19} Where such strategy is employed, the group and its supporters may be permissibly subject to a response employing military force.

\textbf{INTRODUCTION}

\textbf{A. The Evolution of Interstate Warfare, the Doctrine of First Attack, and the Emergence of Modern Terrorism}

The evolution of warfare and the development of customary international law (and its subset, the law of war) are tightly interwoven. It is...
not possible to understand international principles applicable to warfare without their being placed into some historical context. Consistent with this general observation, it is difficult to review and address the vitality of the concepts of self-defense, anticipatory self-defense, and preemption without having an understanding of the evolution of, and interrelationship between, warfare and customary international law. Because these concepts were first developed during a period that pre-dates the rise of modern technology, and during a period in which it was reasonably expected that large scale international violence would be restricted to conventional clashes between large nation states, it is challenging to understand the application of these concepts to modern forms of terrorism. Our discussion, therefore, next examines in some detail conventional customary international law and interstate warfare norms within the context of modern religious-based terrorism.

B. Conventional War Between States and the Interwoven Development of Customary International Law

Warfare has a long history that pre-dates recorded civilization. The fact that civilian populations are victims during warfare is nothing new to history. Indeed, ancient history is replete with instances of cities being sacked and peoples decimated as a norm.\(^2\) For example, the Old Testament states conditions under which enemy cities may be destroyed and people enslaved.\(^2\) And some of the earliest recorded instances of fighting show whole populations were considered as combatants.\(^2\) This ancient view of warfare,

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\(^2\) For example, an ancient norm of war can be found in the Old Testament. The war code of DEUTERONOMY states:

When you draw near a city to fight against it, offer terms of peace to it. And if its answer to you is peace and it opens to you, then all the people who are found in it shall do forced labor for you and shall serve you. But if it makes no peace with you, but makes war against you, then you shall besiege it; and when the Lord your God gives it to your hand you shall put all its males to the sword, but the women, and the little ones, and the cattle, and everything else in the city, all its spoil, you shall take as booty for yourselves; and you shall enjoy the spoil of your enemies, which the Lord your God has given you. Thus you shall do to all the cities which are very far from you . . . .

DEUTERONOMY 20:10.

\(^2\) See, e.g., BRIAN CAVEN, THE PUNIC WARS 273-295 (1980). After Carthage's second revival following the defeat of Hannibal, the Roman Republic's government concluded that the necessity of Carthage's destruction far outweighed any economic gain that Rome could accrue by a continued trade relationship. Id. See also DAWSON, supra note 20, at 1.
which was at one time widely accepted by sovereigns and scholars alike, in part contributed to the destruction of whole societies. For instance, in the *Iliad*, Homer wrote that the sack of Troy included the slaughter of males of all ages. It may also be noted that in the First Crusade (1099-1103), the Christian Crusaders sacked Jerusalem, along with several other cities, and slaughtered the inhabitants regardless of age, gender, or religion.

While this article focuses on modern, international legal concepts of use of force, it is important to note that much of contemporary international laws, particularly “the law and customs of war,” was designed to prevent the type of slaughter witnessed through much of history. Likewise, it is evident, as discussed below, that many modern religious-based terrorists continue to disregard any recognition of these legal concepts.

During the last 400 years, the concept of legitimate self-defense and other accepted practices of warfare have continued to slowly evolve. These norms have developed against the backdrop of the limitations of the technology of the day. Customarily, warfare occurred with ample warning, not only to the participants, but also to states located near the fighting.

For instance, the Thirty Years War (1618-1648) began when ambassadors from the Holy Roman Emperor, Maximilian, notified the leaders of Bohemia that restrictions were being placed on their practice of the Protestant faith. With this notification came a warning that should the restrictions be ignored, armed intervention would result. The Bohemian leaders responded, in what has become known as the “Defenestration of Prague,” by throwing the ambassadors out of a second story window. Austrian Military forces allied to Maximilian then responded by invading

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25 See, e.g., Morris Bishop, *The Middle Ages* 96-99 (1968), citing the Twelfth Century chronicler Raymond of Agiles:

> Some of our men cut off the heads of our enemies; others shot them with arrows, so that they fell from the towers; others tortured them longer by casting them into flames. Pikes of heads, hands, and feet were to be seen in the streets of the city. It was necessary to pick one’s way over the bodies of men and horses. But these were small matters compared to what happened at the Temple of Solomon. If I tell the truth, it will exceed your powers of belief... men rode in blood... Indeed it was a just and splendid judgment of God, that this place should be filled with the blood of unbelievers who had suffered so long under their blasphemies.

*Id.*
27 Wedgewood, *supra* note 26, at 78.
28 *Id.* at 79.
29 *Id.*
Bohemia, eventually leading to a conflict that directly included all major European powers except England.\textsuperscript{30}

The Thirty Years War marked a turning point in international warfare because of the size and scope of the conflict, as well as the impact of that war's conclusion on the borders of Europe.\textsuperscript{31} It also marked a turning point in international law scholarship relating to the laws and customs of war. Notably, during this period of conflict, Hugo Grotius (1618-1648), wrote De Jure Belli Ac Pacis Libiri Tres, which has had a large impact on international law scholarship and what would be viewed as permissible acts of warfare.\textsuperscript{32} Grotius observed that an important distinction should be made between combatants and non-combatants to a conflict, with combatants subject to the rigors of warfare, and non-combatants spared inasmuch as possible.\textsuperscript{33} Additionally, Grotius believed that any resort to armed force should occur only for legitimate purposes and after diplomacy failed.\textsuperscript{34} Other writers also developed notions to make warfare more humane by insisting that warring nations seek to minimize inflicting suffering on non-combatant populations.\textsuperscript{35}

\textsuperscript{30} Id. See also Polisensky, supra note 26, at 258. Polisensky writes, “The War was such a protracted and intensive undertaking that it demanded entirely new methods of military organization and the maintenance of armies.” Id.

\textsuperscript{31} See, e.g., GEOFFREY SYMCOX, WAR DIPLOMACY AND IMPERIALISM 1618-1763 1 (1974), citing MARSHAL SAXE, REVERIES ON THE ART OF WAR.

\textsuperscript{32} In 1625, appalled by the slaughter of the Thirty Years War, Hugo Grotius explained why he chose to write De Jure Belli Ac Pacis Libiri Tres (Three Books on the Law of War and Peace), the work commonly acknowledged as inaugurating the modern law of nations:

Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of. I observed that men rush to arms for slight causes or no causes at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.


\textsuperscript{34} See ROSALYN HIGGINS, GROTIIUS AND THE DEVELOPMENT OF INTERNATIONAL LAW IN THE UNITED NATIONS PERIOD, IN INTERNATIONAL RELATIONS, 267, 275 (Hedley Bull, Benedict Kingsbury & Adam Roberts eds. 1990).


One means for enforcing humanitarian norms in warfare revolved around lessening the efficacy of the "surprise attack." With the rise of the industrial age and the empires of European powers expanding around the world, it became recognized that successful war strategy must emphasize the timing and speed of transporting troops to the battlefield. Moreover, as the population of Europe increased, as other industrialized nations rose to prominence and as economies expanded, the size of standing armed forces grew considerably. By the Nineteenth Century, European wars were won, in large measure, by the military that was mobilized and transported to the front the fastest. For example, in 1870, a Prusso-German Army defeated a larger French Army in France while the latter was still under a state of mobilization.

Also, while surprise attacks were nothing new to warfare, over time, with advances in technology, the ability to carry out such attacks became greater. The Japanese surprise attacks on the Russian Fleet at Tsushima in 1905 and the U. S. Pacific Fleet at Pearl Harbor are examples in which such ability had significant military impacts, at least in the short-term. However, these examples are by no means the only ones. Historically, the use of a "surprise attack" was justified on a claim of self-defense. However, such

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36 Id.
38 NEIL M. HEYMAN, DAILY LIFE DURING WORLD WAR I, 12 (2002). In August 1914, the German Army fielded 800,000 men in uniform, and an additional 2,900,000 men were mobilized from the reserves. The French Army, in comparison, numbered 540,000 men, with an additional 1,400,000 being mobilized as reserves by the end of the month. During World War I, France fielded a military force of 7.8 million men. Roughly one-fifth of the total population wore a military uniform sometime during the war. Over one million of these men were killed in combat. Id. at 15.
39 See, e.g., MICHAEL HOWARD, THE FRANCO PRUSSIAN WAR: THE GERMAN INVASION OF FRANCE, (2001). The Franco-Prussian War of 1870 was a preview of World Wars I and II, in the sense that each war involved a mass mobilization of populations, and industrial advantages played a direct role in victory. See also FERDINAND FOCH (MARSHAL OF FRANCE), THE PRINCIPLES OF WAR (1918).
41 See also, JOHN A. WAITE, THE DIPLOMACY OF THE RUSSO-JAPANESE WAR 125 (1964). Waite writes:
The Japanese principle, stated by Foreign Minister Baron Jurato Komura, was that time was on the Russian's side, who were building up military strength in the region. Japan felt that Korea and Manchuria were rightly theirs. The Japanese could not prevail in a prolonged war and decided to strike first.
42 Id. See also EDWIN A. FALK, FROM PERRY TO PEARL HARBOR, THE STRUGGLE FOR SUPREMACY IN THE PACIFIC (1974).
43 Id. For example, Prime Minister Tojo's cabinet believed that war with the United States was a necessity as a result of the de facto economic blockade policy established by Franklin Roosevelt. While this belief was roundly considered meritless by the war's victors, it did supply the cabinet and emperor the basis for accepting the Pearl Harbor attack and subsequent invasion of the Philippines.
attacks were seldom in actuality a surprise to the warring nations, because often the attacks were preceded by failed diplomacy and national hostility.

Historically, armed conflict between nations was preceded by official warnings. For example, before World War I, Great Britain Prime Minister Herbert Asquith’s government publicly claimed as the justification for Britain's entry into the war alliance obligations and German violation of Belgian neutrality.44 On 4 August 1914, British Foreign Minister Lord Edward Grey warned the German Government “to evacuate Belgium or conflict would ensue.” 45 In response, German Chancellor, Bethman-Holweg, called the neutrality agreement a “scrap of paper,” and proclaimed that “necessity knows no law” to the Reichstag.46

While states rarely took into account the laws of war when formulating strategy, pre-World War I German strategy fundamentally ignored prevailing laws and customs of war.47 For instance, the 1914 invasion of France and Belgium was based in large part on a plan by the then former Chief of the German General Staff Graf Alfred von Schlieffen, which called for an invasion of Luxembourg, Belgium and the Netherlands, regardless of the neutral status of those states.48 Regardless of the conduct of German forces in the occupied portions of Belgium and France, the invasion of a neutral clearly violated an international agreement considered to have the force of law.

After the war, violations of the law of war against civilian populations received some attention in the trials of German officers.49 However, in what has become known as the “Leipzig Trials,” there was a general failure to successfully criminalize the conduct of brutalizing civilians. 50 More importantly, at the time, the German entry into war, was not per se viewed by the international community as an international crime, but rather as a question of responsibility.51 The Treaty of Versailles required Germany to accept all

44 See, e.g., BRIG. GEN. SIR JAMES EDWARDS, A SHORT HISTORY OF WORLD WAR I 9-24 (2d ed. 1968); see also MARC FERRO, THE GREAT WAR 40 (1969); and see also, BARBARA TUCHMAN, THE GUNS OF AUGUST (1959).
45 Ferro, supra note 44, at 45.
46 Id.
47 Id.

The terrible war that began in August 1914 seemed to make a mockery of these legal rules from the previous half century, but it also fueled a demand on the Allied side for

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war guilt and pay reparations. While German political leaders were not specifically charged with aggression or prosecuted for violations of the law of war, the fact that Germany was required to accept all war guilt at Versailles indicated a reticence to permit a "first strike" doctrine in conventional international relations.

The experience of World War II confirmed this reticence, with the adoption of Article 51 of the U. N. Charter. For instance, at the conclusion of World War II, the allies constructed two separate tribunal systems in Europe and Asia for prosecuting individuals who violated the laws and customs of war. These tribunals, called the International Military Tribunals (IMT), de facto criminalized armed aggression because several of the individuals prosecuted had taken part in the respective decisions to wage war. For instance, one of the jurisdictional offenses was titled "crimes against the peace." These crimes were defined as the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan of conspiracy for the accomplishment of any of the foregoing."

Surprise attacks, then, were viewed as a move of armed aggression, but only insofar as these attacks occurred without provocation. Consequently, the tribunal's decision to charge the crime of aggression could not be read so broadly as to prevent a state from defending itself, preemptively, in the face of armed invasion from another state.

A debate over the meaning of self-defense under international law has continued since the IMT. In putting the debate in perspective, some post-war crimes trials for culpable Germans. Most of the attention centered on specific, widely publicized atrocities such as the rape of Belgian women, the machine gunning by U-boat crews of lifeboat victims, the burning of the Louvain library and the destruction of the Soissons and Senlis cathedrals, the executions of British Captain Fryatt and Nurse Edith Cavell, the mistreatment of Allied POWs, and, for American audiences, the sinking of the Lusitania. But a few commentators included the demand that Kaiser Wilhelm II and his senior ministers be punished for planning and initiating a war of aggression ....

Id. citing Otto Erickson, A Judicial Reckoning for William Hohenzollern, 22 LAW NOTES 184, 186 (1919).


53 See Ferro, supra note 44, at 123.


56 Id.


58 Id.

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Second World War examples are helpful. In particular, the Arab-Israeli conflict has been the source of several such examples.

Since World War II, there have been numerous instances in which one state threatens one or more other states with an armed buildup of forces, accompanied by official statements of impending war. The June 1967 so-called "Six Day War" between Israel on one side, and Egypt, Jordan and Syria on the other, is a clear example of this phenomena.\(^5\) In the months prior to the Israeli air attack against Egyptian military targets, Egyptian president Gamel Nasser ordered United Nations peacekeepers out of the Gaza and Sinai regions bordering Israel.\(^6\) The Egyptian leader ordered a massive military buildup in preparation of an armed invasion into Israel.\(^6\) Also, Egyptian and other Arab government officials publicly enunciated their desire to "drive Israel into the sea."\(^7\) In reaction, Israeli strategists were convinced that their best hope of victory was to strike Egyptian military forces first, and subsequently, in June 1967, the Israeli Air Force attacked targets in Egypt.\(^8\) Within six days, Israel secured the Sinai peninsula, the West Bank and Golan Heights.\(^9\) The Israeli decision to engage in a first strike against Egyptian, Syrian, and Jordanian military targets resulted in debate regarding the international law norms for self-defense.\(^10\)

After the Six Day War, the Middle East has continued to be a region of dangerous conflict. There exists little resolution regarding acceptance of Israel by Arab states, and little resolve by Israel to accept a Palestinian state. In 1973, Egyptian and Syrian military forces attacked Israel without diplomatic warning.\(^11\) This attack coincided with the Yom Kippur religious holiday,\(^12\) the most important holiday in Judaism.\(^13\) The Israeli political and military leadership

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\(^6\) *Id.* Israel shares a border with Egypt to its southwest, Jordan to its east, and Syria and Lebanon to its north. In 1967, its only non-hostile border was the Mediterranean Ocean to its west.

\(^7\) *Id.* at 64.

\(^8\) *Id.*

\(^9\) *Id.* at 67. Oren notes that the U. S. government, occupied in Vietnam, made no promise of aiding Israel if Egypt attacked. Moreover, some evidence suggests that the Soviet government encouraged Nasser to strike first. The Israelis were aware of the Kremlin’s interest in such an attack. *Id.*

\(^10\) *Id.* In 1967, the Sinai Peninsula belonged to Egypt. It served as a “buffer region” between Egypt and Israel. Likewise, the Golan Heights, a series of escarpments forming a border between Syria and Israel, has served a similar function.


\(^13\) *Id.*
had believed that their opponents would respect a religious holiday, if nothing
more, out of concern over potential international reaction. Israeli forces
eventually recovered most lost positions with the assistance of U.S. airlift
support. After Israeli forces became poised to conquer Syria, they were
thwarted, in part, by a Soviet threat of entry into the conflict. Although this
conflict ended by agreement between the parties, with the exception of Egypt
and Jordan, most Arab states considered themselves to be in a de facto state of
war with Israel.

Another historical example worth examining for what it may reveal
about the current state of the norm of self-defense in international law, is the
Israeli attack on the Iraqi Osiraq nuclear facility in 1981. In the late 1970s, the
Iraqi government had purchased the facility from France, where it had
undergone construction at Osiraq. Because the reactor was capable of both
supplying energy as well as fissile material for nuclear weapons, and because
the Iraqi government’s continued strong anti-Israeli rhetoric, the Israeli
government concluded that the reactor constituted a significant “downrange”
threat to its existence. In a climate of anti-Israeli terrorism, the possibility of
a nuclear strike was viewed by Israeli officials as so likely as to pose a realistic
threat to Israeli security.

On June 7, 1981, Israeli aircraft destroyed the reactor in a raid that also
resulted in the death of a French engineer. While the Israeli government
claimed a right of self-defense as its justification, its argument was not
generally accepted within the international community. Indeed, both the
General Assembly and the Security Council condemned Israel's use of force
against the reactor. Just as in the case of Israel's first strike during the Six
Day War, Israel's strike against the Iraqi reactor generated further debate over
the parameters of self-defense.
This section has provided just a brief sampling of relevant examples from military history. The instances presented show that conventional international law norms are suited for application to traditional interstate armed-conflict. Nonetheless, this body of law, as conventionally construed by scholars, still presents, at best, a limited framework for defense against modern terrorism. Below, the reasons for this conclusion become clearer as modern terrorism is analyzed.

C. The Reemergence of Religious–based Terrorism (the Islamic Model)

The term "terrorism" is over two centuries old. While there have been different definitions of the term, generally it is meant to refer to the threat or use of violence with the intent of causing fear among the public, in order to achieve political objectives. A component of terrorism is to conduct military-like operations with a strategy of pursuing, at a minimum, political change. However, the most distinguishing difference between terrorist operations and legitimate military operations is the general attention and willingness of the former on threatening to carry out, or carrying out, acts of violence against civilian targets.

It is problematic to consider all groups labeled as "terrorists" as conducting similar operations for like-minded goals. There are simply too many organizations, with many different goals in mind. However, the general philosophical aims and methods employed by such groups have existed for thousands of years, they encompass a strategy seeking to create political, religious, or social change. How wide or encompassing the goal of such social change differs from organization to organization. For instance, the Irish Republican Army (IRA), discussed below, has never intended to create "an


80 One author of a research guide to terrorism listed 109 different definitions of terrorism. A. Schmid, Political Terrorism; A Research Guide (1984); see also World Book Dictionary 135, 2148-49 (1973). Noting that there is not an internationally accepted definition of terrorism, military historian Caleb Carr recently wrote about what an acceptable definition should include: "Certainly terrorism must include the deliberate victimization of civilians for political purposes as a principal feature—anything else would be a logical absurdity." Professor Caleb Carr, Wrong Definition of War, WASH. POST, July 28, 2004, at A19.

81 See W. Thomas Mallison and Sally Mallison, The Concept of Public Purpose Terror in International Law, 67 (M.C. Bassiouni ed. 1975).

82 See, e.g., James M. Poland, Understanding Terrorism: Groups, Strategies and Responses 11 (1988).

83 Biggio, supra note 79, citing Richard Clutterbuck, Terrorism in an Unstable World 3 (1994).
Irish World." In contrast, the fundamentalist Islamic movements discussed in this article desire to spread the word of "the Prophet" throughout the world through armed means.

Towards the close of the Twentieth Century, Western nations began recognizing terrorism as the preeminent threat of the day and, accordingly, began defining it in precise legal terminology. The United States has recently called it "the biggest threat to our country and the world" and the United States Code now defines terrorism as "premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents." The Department of Defense (DOD) recently defined terrorism as "the calculated use of unlawful violence or the threat of unlawful violence to inculcate fear, intended to coerce or intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological." British law now defines terrorism in a similar way. Part 20 of the British Prevention of Terrorism Act of 1989 states that: "terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear." Although reflecting the still underdeveloped municipal law of nations grappling with terrorism, both the United States and Britain have criminalized terrorism, but have not differentiated between types of terrorism within their respective criminal codes.

While terrorist groups are not necessarily dependent on state support, religious-based terrorist groups often receive support from states via

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84 See, e.g., U.S. Department of State, Appendix B: Background on Terrorist Groups for 2000. The State Department description of the IRA's goals is fairly benign. It reads as follows:

Terrorist group formed in 1969 as clandestine armed wing of Sinn Fein, a legal political movement dedicated to removing British forces from Northern Ireland and unifying Ireland. Has a Marxist orientation. Organized into small, tightly knit cells under the leadership of the Army council.

Id. Yet, it should be noted that the IRA, according to the State Department, relied on state-sponsorship and has received funds and training from sympathizers in the United States.


governmental-sponsored support for fundamentalist Islamic movements.\textsuperscript{90} The origins of some of these religious-based terrorist groups can be traced to the failed Pan-Arab and Pan-Islamic movements, which began in the Nineteenth Century.\textsuperscript{91}

Each major world religion has a core constituency of possible terrorist groups. However, since World War II, fundamentalist Islamic movements have emerged in the forefront of those groups willing to engage in acts of terrorism with state backing. For instance, the organization al Qaeda, backed by the government of Afghanistan, was based in Afghanistan until being substantially defeated there by the U.S.-led war there.\textsuperscript{92} Likewise, other groups have received sanctuary and backing from such states as Syria, Libya, Iran, and Iraq.\textsuperscript{93} Moreover, Hizballah has received considerable aid from Syria and Iran.\textsuperscript{94} Hamas, too, has received financial and weapons support from not only Syria and Iran, but also from Saudi Arabia.\textsuperscript{95} And the Philippine-based

\textsuperscript{90} See, e.g., Audrey K. Cronin, \textit{Rethinking Sovereignty: American Strategy in the Age of Terrorism}, in 44 Survival #2, 122 (2002). Cronin writes:

Despite its nomenclature, religious terrorism actually mixes both political and religious motivations and is, as a result, probably the most dangerous - it has open-ended or less “rational” aims, is less predictable and, in recent years at least has tended to aspire to cause more casualties than other types. Religious terrorism represents a dangerous combination of political aims animated by the ideological fervour of a deeply spiritual commitment - either real or (depending on the group - or even the individual) contrived. In this type of terrorism, the “audience” may or may not have human form, and the aims may or may not reflect a rationality that is obvious to anyone but the “divinely inspired” perpetrator (or his followers).


\textsuperscript{92} Id. However, it had operated from the Sudan, Somalia, and Saudi Arabia, and it received considerable financial support from persons in several other areas. \textit{Id.}

\textsuperscript{93} See, e.g., Professor Sompong Sucharitkul, \textit{Jurisdiction, Terrorism and the Rule of International Law}, 32 Golden Gate U. L. Rev. 311, 316 (2002).

\textsuperscript{94} See, e.g., Global Security website at, http://www.globalsecurity.org. Hizballah is also known by different names, such as “Islamic Jihad,” “Islamic Jihad for the Liberation of Palestine,” “Organization of the Oppressed, Revolutionary Justice Organization,” and “Ansarollah” (trans. “Partisans of God”). See Yonah Alexander, \textit{Middle East Terrorism: Selected Group Profiles} 33-47 (JINSA 1994) (hereinafter Group Profiles). Hizballah is mainly dedicated to the creation of a wholly fundamentalist Shia Islamic state in Lebanon and the destruction of Israel. See also Terrorist Group Profiles, U. S. Navy, Naval Post-Graduate School, Dudley Knox Library (in possession of author); and Global Security website at http://www.globalsecurity.org, describing Hizballah’s activities, ranging from the murder of Israeli citizens to hostage taking of European and American citizens. \textit{Id.}

\textsuperscript{95} See, e.g., U.S. Dept. of State release, Patterns of Global Terrorism (2000), at Appendix B., (in possession of author). Formed in late 1987 as an outgrowth of the Palestinian branch of the Muslim Brotherhood, various Hamas elements have used politically motivated violent and non-violent means, including terrorism, to pursue the goal of establishing an Islamic Palestinian state in place of Israel. Hamas is a loosely structured organization, with some elements working clandestinely, and others working openly through mosques and social
Abu-Sayyef Group (ASG) has received aid from various Arab entities. It should be noted that some scholars of terrorism believe that fundamentalist Islamic movements are increasingly evolving away from state sponsorship and toward complete independence, arguably making them freer to pursue even more dangerous acts. At the philosophical and theological core of these movements is the concept of “Jihad,” meaning “holy war.” The concept is generally premised on condemning warfare against perceived enemies of Islam, employing a literalist reading of select verses of Islamic scripture.

Typically, the goals of religious-based terrorism include gross societal change, rather than national self-determination, which is often the goal of non-religious-based forms of terrorist organizations. Unlike state-centered warfare, terrorism employs secrecy as its core attack strategy. Most terrorist groups, whether religious-based or not, strike without any warning. And while the ultimate aim of such groups may be to affect policy change, unlike the conduct of the military forces of modern nations, their attacks generally focus on civilian non-military targets. To militant fundamentalist Islamic terrorist groups, the conventional “laws of war” become an unused guideline, in part, because such laws are hardly divine. Thus, international law has little or no influence on these non-state, terrorist actors.

Service institutions to recruit members, raise money, organize activities, and distribute propaganda. Hamas personnel have conducted many attacks—including large-scale suicide bombings—against Israeli civilian and military targets. In the early 1990s, they also targeted suspected Palestinian collaborators and Fatah rivals. They also have received funding from Palestinian expatriates, Iran, and private benefactors in Saudi Arabia and other Arab states. See id. Some fundraising and propaganda activities take place in Western Europe and North America. See id.

ASG engages in bombings, assassinations, kidnappings, and extortion to promote an independent Islamic state in western Mindanao and the Sulu Archipelago, areas in the southern Philippines heavily populated by Muslims. ASG raided the town of Ipil in Mindanao in April 1995—the group’s first large-scale action—and kidnapped more than thirty foreigners, including a U.S. citizen in one year alone. See id.


See, e.g., El Fadl, supra note 12, at 60. El Fadl writes:

> In the age of post-colonialism, Muslims have become largely preoccupied with the attempt to remedy a collective feeling of powerlessness and a frustrating sense of political defeat, often by engaging in highly sensationalistic acts of power symbolism.

See, e.g., El Fadl, supra note 12, at 67-68. El Fadl writes:

With the deconstruction of the traditional institutions of religious authority emerged organizations such as the Jihad, al Qa’ida, and the Taliban, who were influenced by the resistance paradigms of national liberation and anti-colonialist ideologies, but also who anchored themselves in a religious orientation that is distinctively puritan,
Despite the denial by many terrorist groups that international applies to them, it has been more frequently argued by scholars and statesmen that a terrorist constitute a *hostis humani generis*, or "enemy of the human race." While this term emerged in the Eighteenth Century as chiefly applicable to pirates, certain practices, universally condemned under international law, are now embraced within the ambit of the term as well. Similarly, a growing body of law and scholarship considers terrorist acts as *jus cogens* violations, making states that aid and abet such organizations also joining in the illegal terrorist acts.

Religious-based terrorists, such as al Qaeda, have shown a preference for terms normally associated with warfare. The use of these terms evidences an aim of equating their actions of violence, such as crashing airlines into buildings, with that of battlefield actions taken by opposing armies. However, unlike the conventional actions of opposing armies, religious-based terrorists have generally intentionally targeted civilians and civilian-related infrastructure. This new form of terrorism, often accompanied by the rhetoric of warfare and religious ideology, has become the newest threat to the international order in general, and the United States in particular. Professor Audrey Cronin states:

> [W]hile we have not seen the last of inter-state war, war between organized states will no longer be the driving force that it has been for

supremacist, and thoroughly opportunistic in nature. This theology is the by-product of the emergence and eventual primacy of a synchronistic orientation that unites Wahhabism and Salafism in modern Islam. Puritan orientations, such as the Wahhabis, imagine that God's perfection and immutability are fully attainable by human beings in this lifetime.


*Id.* For instance, torture, hostage taking, forced labor (a modern variant of slavery), and summary execution are now condemned as *jus cogens* violations. The targeting of civilians is proscribed under several treaties and is virtually universally condemned by the international community, thus constituting *jus cogens* actions. Any persons involved in any of these activities may be seen as "an enemy of mankind."

*Id.* See, e.g., Smith v. Libya, 101 F.3d 239 (2nd Cir. 1996). The court in *Smith* defined *jus cogens* norms as follows:

> *Jus cogens* norms . . . do not depend on the consent of individual states, but are universally binding by their very nature. Therefore, no explicit consent is required for a state to accept them; the very fact that it is a state implies acceptance. Also implied is that when a state violates such a norm, it is not entitled to immunity.


*Id.* Cronin, *supra* note 90, at 124.
the last 400 years orso. Ideology will be; and the underlying legitimacy of the ideology will provide the centre of gravity for each side.\textsuperscript{109}

This ideology is best observed in the statements of al Qaeda, which include the declaration that "to kill the Americans and their allies - civilians and military - is an individual duty for every Muslim who can do it in any country in which it is possible to do it,"\textsuperscript{110} and, "every Muslim who believes in God and wishes to be rewarded [has a duty] to comply with God's order to kill the Americans and plunder their money wherever and whenever they find it."\textsuperscript{111} Likewise, the Hamas charter provides a commandment that constitutes a Quaranic interpretation to kill "non-believers" who govern over Muslims, whether under democratic institutions or otherwise.\textsuperscript{112}

There is hardly a clearer example of the practices of terrorist organizations conflicting with conventional norms of war, than their efforts to directly target civilians. It has been long accepted that non-combatants must be afforded greater protections than combatants. In the 1949 Geneva Convention (IV) on the treatment of civilians in wartime, the signatory states adopted this premise.\textsuperscript{113} Likewise, in 1978, the International Committee of the Red Cross, concerned that the four 1949 Geneva Conventions had become too complex as a guiding statement on the laws of armed conflict, condensed related principles into the "Fundamental Rules of Humanitarian Law Applicable in Armed Conflicts."\textsuperscript{114} One such rule, Principle 7, states:

\textsuperscript{109} Id.
\textsuperscript{111} Id.

There is no solution to the Palestinian problem except by Jihad .... In order to face the usurpation of Palestine by the Jews, we have no escape from raising the banner of Jihad .... We must imprint on the minds of generations of Muslims that the Palestinian problem is a religious one, to be dealt with on this premise .... I swear by that who holds in His Hands the Soul of Muhammad! I indeed wish to go to war for the sake of Allah! I will assault and kill; assault and kill, assault and kill.

Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.\textsuperscript{115}

In contrast, al Qaeda’s core philosophy includes a literal reading of the Quaran, which states, “fight and slay the pagans wherever you find them, and seize them, beleaguer them, and lie in wait for them, in every stratagem.”\textsuperscript{116} Likewise, al Qaeda members are guided by the Quaranic phrase “Then nations, however mighty, must be fought until they embrace Islam.”\textsuperscript{117}

Thus, for a number of years the international community has embraced the principle that the direct targeting of civilians is a clear violation of the laws of war. Yet, this international standard is utterly rejected by key militant Islamic-based terrorist groups. Nevertheless, it is beyond dispute that the laws of war apply to them, as it does to other non-state actors.\textsuperscript{118}

International law regarding the use of military force was designed to regulate conventional interstate warfare in the long-term interest of nations, and to protect civilian populations from the horror of war, to the extent possible. Terrorist acts, which are by design and execution carried out by those who abrogate this basic precept, and which may be supported by abettors who do the same, must not be tolerated when there already exists important international legal norms that may be readily brought to bear on them.\textsuperscript{119}

\textsuperscript{115} Id.

\textsuperscript{116} Schall, supra note 6, at 12, citing Paul Johnson, Relentlessly and Thoroughly, NAT’L REV. 20-21 (Oct. 15, 2001).

\textsuperscript{117} Id.


\textsuperscript{119} In contrast, the case has been made that the codified contemporary international system appears prostrate in its ability to defend civilians. See Walter Gary Sharp, Sr., American Hegemony and International Law: The Use of Armed Force Against Terrorism, 1 CHI. J. INT’L L. 37, 38 (2000), citing Thomas and Hirsh, The Future of Terror, NEWSWEEK 35 (Jan. 10, 2000); Raymond Close, Hard Target: We Can’t Defeat Terrorism With Bombs and Bombast, WASH. POST Aug. 30, 1998, at C1; Ralph Peters, We Don’t have the Stomach for This Kind of Fight, Id. ; Gregory Vistica and Evan Thomas, Hard of Hearing, NEWSWEEK 78 (Dec. 13, 1999) ("Washington has had difficulty finding its most-wanted terrorist, Osama bin Laden, because Islamic extremists use European-made encrypted mobile phones."); Russell Watson and John Barry, Our Target Was Terror, NEWSWEEK 24 (Aug. 31, 1998).
II: International Legal Definitions, Origin, Sources and Debate on the Theories of Self-Defense, Anticipatory Self-Defense, and Preemption

A. Evolution and the Use of a Self-Defense Doctrine in International Law

The international community recognized the legitimacy of a self-defense doctrine long before the United Nations ever existed.\(^{120}\) The concept of a right of self-defense is rooted both the belief that a state has the right to protect its interests and citizens where they reside, and in criminal law.\(^{121}\) At common law, criminal law courts directed juries to consider whether claims of self-defense were justified by the surrounding circumstances, including whether a claimant had the opportunity to extricate himself or herself from the affray.\(^{122}\) Recognizing that the actions of a state can involve far more complexities and intricacies than that of any single person, unlike in criminal law, in international law, to constitute self-defense in international law, an act need not be instantaneous, or even contemporaneous following an attack.\(^{123}\) Also because of the complexities and intricacies of relations among states relative to individual human interaction, international law departs from the extrication principle.\(^{124}\)

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\(^{121}\) Arend and Beck write:

[T]he right of self-defense is one of the oldest legitimate reasons for states to resort to force. Aristotle, Aquinas, and even the framers of the restrictive Kellog-Briand Pact all acknowledged that it was permissible to take recourse to arms to defend oneself. Under pre-Charter customary international law, a state could take recourse to force to defend itself not only in response to an actual armed attack, but also in anticipation of an imminent armed attack.

\(^{122}\) Id. at 72.

\(^{123}\) See, e.g., D.P. CONNELL, INTERNATIONAL LAW 338 (1st ed. 1965). The right to self-defense is a right fundamental to every legal system and is circumscribed only to the extent to which formal law assumes the responsibility for defending the individual. \textit{Id.}


The sources of international law provide a fairly consistent interpretation of the requirement to exhaust alternative means. In most instances, satisfaction of the requirement has ultimately depended less on the vigor with which alternative means have been pursued than on the perception that the situation has become so desperate that no time for nonmilitary efforts remained. When the \textit{imminency} requirement has been satisfied, the alternative means requirement has also been found to be satisfied,
These departures are well-rooted in customary international law. For instance, in the 1837 *Caroline Case*, which is generally accepted by international law scholars as the leading case on the customary international law of self-defense, U.S. Secretary of State Daniel Webster wrote that in order for an act to qualify as an exercise of self-defense, a state must be able to show a "necessity of self-defense, instant, overwhelming, leaving no moment for deliberation." However, during the period between the *Caroline Case* and the formation of the United Nations, states also considered it acceptable to engage in military action where a state's neighbor state had massed forces along the border between the two. The acceptability of a first strike was also gauged against the level of threat of invasion from the invaded state. No doubt, the existence of traditional ethnically-rooted or nationalist-based hostilities explained why the first strike doctrine of self-defense possessed some credence: the Nineteenth Century is replete with examples in which one state invaded a region to protect its nationals or for the protection of others. Indeed, in World War I, Tsarist Russia declared war on Habsburg Austria as part of a policy of protecting Russia's "Slavic brethren." However, following World War II, this concept of lawful military aggression has largely been limited to situations of specific self-defense.

often without analysis of whether peaceful modes of resolution had been vigorously sought.

*Id.* 30 *BRITISH & FOREIGN STATE PAPERS* 193 (1843), reprinted in Jennings, *The Caroline and McLeod Cases*, 32 *AM. J. INT'L L.* 82, 89 (1938). The facts of the *Caroline Case* arose in the context of an insurrection in Canada in 1837, where insurgents moved supplies and gained recruits from the United States. The *Caroline* was a steamer employed by an insurgent group. On 29 December 1837, while the steamer was docked on the American side of the Niagara River, Canadian soldiers crossed to the American side of the river, destroyed the ship, and caused casualties among American citizens defending the vessel. British Foreign Minister Lord Palmerston claimed a right of self-defense. However, after negotiations, his government disagreed with this assessment and settled the case. *See also* note 176, *infra.*


127 *Id.*

128 *Id.*

129 *Id.*

B. U. N. Charter Article 51

In 1949, Article 51 of the U.N. Charter was incorporated, enshrining states' inherent right of self-defense. In a brief discussion of its history is important for a contextual understanding of this provision.

Article 51 was not found in the initial proposals for a United Nations. The concept of a right of self-defense was introduced by the United States at the urging of Central and South American governments, which desired recognition of a right of collective self-defense. Additionally, the signatories to the Charter recognized that the right of armed self-defense could exist in situations before the Security Council could act. Thus, a state would have to remain passive against an attack when the Security Council has not yet acted on its behalf. Further, it does not appear within the debates surrounding the implementation of Article 51 that any rejection of customary international law occurred. Indeed, there are clear indications that Article 51 did not bar the use of force in self-defense even after the Security Council took action.

No single international convention interprets or defines the threshold of Article 51. Thus, academic analysis is required to determine what conditions are required under the general rubric of "defense," in order for a state to permissibly respond to acts of terrorism. The International Court of Justice (ICJ) has provided some guidance that is useful in this area, to which our discussion next turns.

1. Nicaragua v. United States

While the plain language of Article 51 provides an inherent right of self-defense, the concept of self-defense was not provided any definition within the U.N. Charter itself. However, in the 1984 ICJ decision, Nicaragua v. United States, some parameters were established as to what fails to

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132 See id. Halbertsam writes:
Article 51 was not in the Dumbarton Oaks Proposals for an International Organization. It was added at the San Francisco Conference, by the United States at the urging of the American republics. Some of the American republics were concerned that the powers given to the Security Council might undermine the regional security arrangement provided for by the Act of Chapultepec.
133 Halberstam, supra note 131, at 241.
134 Id. at 242.
135 Id. at 247.
136 Halberstam, supra note 131, at 248.
137 See, e.g., Sharp, supra note 119, at 41.
constitute self-defense. Both the facts and the holding of Nicaragua have a bearing on the thesis of this article inasmuch as Nicaragua is distinguishable from issues relating to terrorism, as will be explained.

In Nicaragua, the country of Nicaragua brought a claim before the ICJ against the United States, specifically accusing the United States of attacking oil pipelines, mining ports and violating air space. Nicaragua also charged the United States with training, arming, financing and supplying internal paramilitary activities against the Nicaraguan government. In turn, the United States asserted a claim of collective self-defense as envisioned under Article 51.

As a starting point in its ensuing decision, the ICJ enunciated that it was adhering to the principle of non-intervention, when measured against the claimed right of self-defense. The ICJ acknowledged that states have a right of self-defense and conducted a lengthy customary international law analysis. However, the ICJ also held “States do not have a right of “collective” armed response to acts which do not constitute an “armed attack.” Additionally, the ICJ stated, “the right of collective self-defense presupposes that an armed attack has occurred.” Additionally, it stated, in the case of collective self-defense, the third-party state does not possess a right to interpret the danger to the victim state without the latter’s own assessment.

While an interpretation of the right of collective self-defense was central to the Nicaragua decision, the parameters surrounding the concept of self-defense were also enunciated. Yet, the limitations as to attacks on the sovereignty of a state were not set within the plain language of Article 51.

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138 While the United States asserted that the ICJ lacked jurisdiction to hear Nicaragua’s claims, the ICJ disagreed and heard the case with the United States in absentia. See Nicaragua v. United States, 1986 I.C.J. 14, ¶¶ 24-26 (27 June) (Nicaragua).
139 Id. ¶ 15(b). Nicaragua alleged that the mining of its harbors were carried out by persons in the direct pay of the U.S. Government and under the command of U. S. personnel, who also participated. Id. ¶ 20. Additionally, Nicaragua claimed that there was damage to two fishing vessels as a result of colliding with mines. During this time, Nicaragua attributed two deaths and fourteen injured people to the mining. See id. ¶ 76.
140 Id. ¶ 15(a).
141 See id. ¶ 165.
142 Id. ¶ 202. The Court held:
[T]he United States of America, by training, arming, equipping, financing, and supplying the contra forces or otherwise, encouraging, supporting, and aiding military and paramilitary activities in and against Nicaragua, has acted against the Republic of Nicaragua in breach of its obligation under customary international law not to intervene in the affairs of another state.

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Despite its lengthy analysis, the ICJ never mentioned any of the several concepts pertinent to modern aspects of sovereignty, namely, aiding and abetting terrorist organizations, anticipatory self-defense, and preemption. Indeed, the ICJ’s reliance on customary international law seems to indicate that Article 51 did not eviscerate its usage.\textsuperscript{147}

\section*{C. Unresolved Definitions of Self-Defense}

In part because of lack of clarity as to what constitutes a threat of force, the conditions under which the right of self-defense may be applied, continue to be debated.\textsuperscript{148} Some scholars argue that the right of self-defense only may be invoked after a state seeking to use force presents the international community with credible evidence that it has suffered an attack, that a specific entity is guilty of the attack, and that use of force is necessary to protect the state from further injury.\textsuperscript{149} Other scholars argue that the right of self-defense has no such requirement because warfare is a continuing action until conclusion by agreement, treaty or surrender.\textsuperscript{150} However, a general consensus exists that before self-defense is invoked, a state must have exhausted all practicable means of forestalling the threatening attacks.\textsuperscript{151} Additionally, a consensus exists as to the requirements of necessity and proportionality as elements to a response.\textsuperscript{152}

\textsuperscript{147}Id.,\textsuperscript{183} The Court held:

It is of course axiomatic that the material of customary international law is to be looked primarily in the actual practice and \textit{opinio juris} of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.

\textit{Id.}, citing \textit{Continental Shelf}, ICJ reports 1985, at 29-30 \textsuperscript{27}. It is worth noting, however, that the ICJ could only rely on customary international law, and not the U. N. Charter in its decision because of the United States’s multi-lateral treaty reservation to the jurisdiction of the ICJ.


What is meant by a “threat of force” has received rather less consideration. Clearly a threat to use military action to coerce a state to make concessions is forbidden. But, in many situations, the deployment of military forces or missiles has unstated aims and its effect is equivocal. The preponderance of military strength in some states and their political relations with potential target states may justifiably lead to an inference of a threat of force against the political independence of the target state.

\textit{Id.}


\textsuperscript{150} See, Dunlap, supra note 88, at 8.


\textsuperscript{152} \textit{Id.} Regarding the necessity requirement, traditionally in order for an action to be deemed a “necessity” of self-defense, the use of military coercion as a defensive measure must be in reaction to the presence of an imminent threat, and must be limited to circumstances in which

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D. Anticipatory Self-Defense

The notions that the right of self-defense extends to circumstances in which an attack is anticipated – and that a nation need not wait until it experiences the consequences of an actual attack, date far back into history, at least to the Seventeenth Century, as reflected in the writings of Grotius. A number of international law scholars, including Anthony d' Amato and Louis Rene Beres, define anticipatory self-defense along the lines of the Caroline Case, as "an entitlement to strike first when the danger posed is instant, overwhelming, leaving no choice of means, and no moment for deliberation." Differences between self-defense, as envisioned under Article 51, and anticipatory self-defense, may also be found in Professor Schachter's distinction between cases in which an armed attack is occurring, and, those in which an armed attack has already occurred but additional attacks are expected. It may be the case that anticipatory self-defense applies to situations where the claimant state possesses intelligence of an imminent attack upon its territory or its nationals but no prior attack has occurred. In such a case, the use of force does not constitute an act of reprisal, but rather should the facts reasonably show a continuing threat of armed attack, use of force would constitute permissible anticipatory self-defense. This scenario appears to address the realities of warfare, both historic and modern. Of course, justifications for anticipatory self-defense must still comply with necessity and proportionality requirements.

There is general agreement among international legal scholars that customary international law recognized a right to anticipatory self-defense long

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no effective peaceful alternative is available given the time constraints involved. See Capt. Samuel R. Maizel, Intervention in Grenada, 35 NAVAL L. REV. 47, 71-72 (1986). Regarding the "proportionality" requirement, the traditional formulation is as follows: Force used must be proportionate to the threat and cannot exceed measures strictly necessary to repel a threat. Id. at 73. The implication is that the threatening source is where a response should be directed. One U.N. Resolution expresses this sentiment: "In the conduct of military operations every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be made to avoid injury, loss or damage to civilian populations." G.A. Res. 2675 (XXV), Resolution On Protection of Civilians, reprinted in 1 THE LAW OF WAR 755 (Friedman, ed. 1972).


154 Anthony d'Amato, Open Forum: Israel's Air Strike Against the Osiraq Reactor: A Retrospective, 10 TEMP. INT'L & COMP. L. J., 259, 261 (1996), citing Louis Rene Beres & Yoash Tsiddon-Chatto, supra note 78, at 438.


156 Id.
before Article 51 existed. The *Caroline Case* not only enunciated the standard of anticipatory self-defense, it also provided an example of when anticipatory self-defense measures were not justified. From the facts of the case, it could hardly be argued that the threat of attack was so imminent as to allow Canadian forces to respond with military force against the vessel.

While the *Caroline Case* may be seen as a "negative" example in the sense of showing what did not constitute a right of self-defense, the 1967 Six Day War provides a positive example. In the Six Day War example, described earlier in this article, Egyptian forces had not yet crossed into Israel when the Israeli government initiated an attack. However, Israeli intelligence confirmed, and the Egyptian government later admitted, an Egyptian attack was imminent by the time the Israeli strike occurred. Consequently, there has been little serious criticism by international law scholars of the involved Israeli military actions.

The Israeli strike on the Osiraq nuclear facility provides another example to explore the limits of anticipatory self-defense. The Iraqi government pursued the acquisition of fissile material to construct a nuclear weapon, and had made public anti-Israeli statements prior to the Israeli attack, calling for the destruction of Israel. Moreover, the Iraqi government supported other anti-Israeli entities. However, because there was no imminent threat to Israel posed by the Iraqi nuclear facility, even though Israel viewed the reactor as a long-term threat, it is doubtful that the Israeli response qualifies as an act of anticipatory self-defense. Professors d'Amato and Beres differ over the legality of the Israeli use of force in the Osiraq incident. Beres views the Israeli destruction of the Osiraq nuclear facility as a justified act of anticipatory self-defense. However, D'Amato disagrees, opining that the use of this doctrine is narrowly limited to situations involving an imminent threat to survival. As discussed below, the Israeli strike was more likely an act of preemption than anticipatory self-defense.

Anticipatory self-defense is not codified anywhere in the U.N. Charter, including Article 51, which, as noted above, addresses permissible self-defense. As a result, some scholars and practitioners of international law argue that

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159 The Six Day War occurred after sustained threats by Arab governments, including Egypt, Jordan, and Syria, indicating their intentions to attack Israel, culminating with a large buildup of forces on Israeli borders. The Israeli government opted to strike first against its opposing forces.


161 *Id.*

162 See, e.g., Sucharitkul, *supra* note 93, at 318.

163 *Id.*

164 D'Amato, *supra* note 154, at 263.
because the charter does not provide such a right, usage of anticipatory self-defense is no longer recognized as valid under international law. Moreover, “plain language” school adherents have argued that Article 51 allows the right of self-defense "only if an armed attack occurs." Their view is that since the adoption of the U.N. Charter, any position supporting anticipatory self-defense would render Article 51 superfluous.

The "restrictionist" argument is based essentially on three premises. First, it assumes that it is solely the responsibility of the United Nations to ensure the maintenance of international peace and security. Second, it assumes that the United Nations has sole authority over the lawful use of force, with the narrow exception of self-defense cases in which an armed attack has occurred on the territory of a state. Third, it assumes that if any states were permitted to use force for any reason beyond clear individual or collective self-defense, they would inevitably broaden this narrow mandate, using it as a pretext for desired policy ends.

Those taking a much broader view of permissible use of force, sometimes referred to as “counter-restrictionists,” argue that customary international law pre-dating Article 51 remains viable so long as it is not prohibited by codified law or newer custom. The fact that Israel was never

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165 See AREND & BECK, INTERNATIONAL LAW AND THE USE OF FORCE 131(1993) (discussing the “restrictionist” viewpoint, which the authors ultimately reject).
167 Jessup, supra note 158, at 165. Jessup used as an example the British seizure of the Danish fleet in 1807. Id. At the time of the seizure, Denmark was a neutral country. However, Napoleon had clear designs on the occupation of Denmark as a strategic move to block British commerce into Russia, as evidenced by his military strategy of isolating Britain from commerce, and his building of alliances against Britain. Id. In anticipation of Napoleon's invasion of Denmark, the Royal Navy seized the Danish fleet. According to Jessup, such a move would have been in violation of Article 51 of the U.N. Charter. Id. at 166.

In contrast, Jessup indicated that the U. S. pursuit of Pancho Villa's forces into Mexico in 1916 would have been permitted if it were judged under an Article 51 standard. Id. Likewise, Jessup also believed the movement of British, French, German, Russian, Italian, and Japanese forces into Peking in 1900 during the Boxer Rebellion was also justified because their purpose was to protect nationals at the legations in that city. Id. at 170.


169 Thomas C. Wingfield, Forcible Protection of Nationals Abroad, 104 DICK. L. REV. 439, 461 (2000), citing Ronald R. Riggs, The Grenada Intervention: A Legal Analysis, 109 MIL. L. REV. 1, 22 (1985). See also Charney, supra note 149, at 836. Charney writes, “To limit the use of force in international relations, which is the primary goal of the U.N. Charter, there must be checks on its use of self defense... It is limited to situations where the state is truly required to defend itself from serious attack.” Id.


171 Wingfield, supra note 169, at 462.

172 Id. at 462.

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universally condemned by the international community for its use of anticipatory self-defense measures in the Six Day War would have significance to them in evaluating the international permissibility of the Israeli measure.¹⁷³

Counter-restrictionists have argued that this lack of condemnation shows the continued viability of anticipatory self-defense as a principle of customary international law. Indeed, the U.N. General Assembly did not condemn the Israeli strike.¹⁷⁴ Of course, restrictionists could argue that in the post-Cold War era, the Six Day War example is less significant than counter-restrictionists might claim, because the threat to Israel consisted of significantly numerically superior opposing forces that were Soviet-backed and equipped, a situation no longer existing. However, the reality remains that even in recent years, there has been authoritative reliance on the existence of anticipatory self-defense as formulated and sustained by customary international law. In this respect, the discussion of anticipatory self-defense in the Nicaragua decision is particularly important. As noted above, the ICJ held that the U.N. Charter did not supersede custom, but exists alongside it.¹⁷⁵

The U.S. position is that anticipatory self-defense is inherent in the basic right of self-defense.¹⁷⁶ The current U.S. administration has incorporated the doctrine as part of its overall national security policy, claiming the right to

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¹⁷⁴ Polebaum, supra note 124, at 193.

¹⁷⁵ See, Nicaragua v. United States 1986 I.C.J. 14 ¶ 183 (27 June). See, also, Maureen F. Brennan, Avoiding Anarchy: Bin Ladin Terrorism, The U.S. Response and the Role of Customary International Law, 59 LA. L. REV. 1195, 1200 (1999). It must be noted that the ICJ expressly held that it was not addressing the legality of anticipatory self-defense because the issue had not been raised.

¹⁷⁶ Dunlap, supra note 80, at 26, citing Int'l and Operational Law Dep't, The Judge Advocate General's School, U.S. Army, JA 422, OPERATIONAL LAW HANDBOOK 4-5 (2003). Dunlap writes:

The accepted customary international law rule of anticipatory self-defense has its origin in an 1842 Incident in which the British navy caught the American steamship, the Caroline ferrying rebel forces and supplies into Canada.... They ultimately agreed that customary international law allows for the use of force against an imminent threat if such force constitutes, "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."

This restrictive definition of anticipatory self-defense is still widely accepted as customary international law, despite its obvious limitations in a modern era of intercontinental ballistic missiles, long-range supersonic aircraft, nuclear submarines, cruise missiles, and biological weapons.

Id.
attack terrorists and their supporters before they strike first. This claim has been extended to protection of allies and national interests.

E. Definition of Preemption

As noted above, the concept of anticipatory self-defense dates back to at least Grotius, who thought that nations are entitled to the same principle enjoyed by persons, who may lawfully kill whomever is attempting to kill them. The concept of preemption in customary international law also has a long history, first articulated in rudimentary form by de Vattel, who wrote:

The safest plan is to prevent evil where that is possible. A nation has the right to resist the injury another seeks to inflict upon it, and to use force and every other just means of resistance against the aggressor. It may even anticipate the other’s design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming the aggressor.

Given the current U.S. administration’s widely publicized justification for its military operations against Iraq, preemption may be viewed by some as a new doctrine. It may be argued that it is indeed a new, and not widely accepted, term to international law. In reality, however, preemption has been a long-standing international legal doctrine, which differs from anticipatory self-defense primarily in its timing. More specifically, the former doctrine allows states greater leeway, in the presence of hostile intentions and capabilities, to mount an attack to avert an opposing attack, rather than require a nation to wait until shortly before, or even after, an attack is absorbed, as the latter doctrine contemplates. The preemption doctrine presupposes that in situations in which a state believes an attack on itself is likely, given available intelligence emanating from another state, the concerned state may respond militarily to protect itself.

177 The White House National Security Strategy of the United States of America 12 (2002). This Strategy Statement reads, in pertinent part:

We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends... It has taken almost a decade for us to comprehend the true nature of this new threat. Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not permit that option. We cannot let our enemies strike first.

Id., in Dunlap, supra note 88, at 27.

178 Id.

179 Beres, supra note 153, at 31, citing Grotius.

180 Beres, supra note 153, at 31, citing EMERICH DE VATTEL, THE LAW OF NATIONS, Book II (1758).

181 Id.

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As referenced above, an example of preemptive military action may be found in the Israeli strike on the Osiraq nuclear facility. In that situation, Iraq had not engaged in a military strike on Israel or made specific threats regarding the possibility of a nuclear or other attack on Israel, nevertheless the Israeli government became convinced that the primary purpose of the facility was to enable a future strike against Israel, given prior threatening statements and actions of the Iraqi regime.

Other examples of preemption include certain U.S. responses to prior acts of terrorism. For instance, on April 14, 1986, in response to a bombing of a West German discotheque in which an American serviceman and a Turkish woman were killed, and more than 230 other persons injured, the United States launched air strikes against five terrorist-related targets in Libya. Based on intercepted and decoded exchanges between Tripoli and the Libyan embassy in East Berlin, the United States claimed that this attack was one of a continuing series of Libyan state-ordered terrorist attacks.

This argument had some appeal since Libyan leader Colonel Momar Qadhafi had made frequent public statements announcing Libya's right to export terrorism. Moreover, it was estimated that Libya spent an estimated 100 million dollars annually operating over a dozen camps where over 1,000 terrorists were trained in guerrilla warfare, explosives, and arms for use in sabotage.

In the aftermath of its attack on Libya, the United States argued to the U.N. Security Counsel that it had acted in self-defense, in response to a continuing series of attacks. However, the actions of the United States comport more with preemption than anticipatory self-defense. As the United States did not have intelligence indicating a specific attack was likely at a certain point in the near future, it cannot be reasonably argued that the United States faced a situation in which it was facing a danger that was instant, overwhelming, leaving no choice of means, and no moment for deliberation. In short, while the likelihood of Libyan state-sponsored terrorism continued, the United States could not assess with particularity when a terrorist strike would occur.

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183 Id., citing Bob Woodward & Patrick E. Tyler, Libyan Cables Intercepted and Decoded, WASH. POST, Apr. 15, 1986, at A1. Libya disclaimed responsibility for the discotheque bombing. Eleven years later, the United States permitted decoded interception transcripts to be made public in the Berlin Chamber Court. Consequently, persons affiliated with the Libyan embassy in East Berlin were indicted in the court for the bombing. Id.
185 Id.
186 Id.
III. VIABILITY OF PREEMPTION UNDER INTERNATIONAL CRIMINAL LAW

Historically, the United States and the international community have viewed acts of terrorism as crimes, rather than acts of war. In part, this may be due in part because of the constrained resources of terrorists, who historically have conducted mainly limited attacks with high symbolism, such as political assassinations. Whatever the reason, the United States generally pursued a theory that it has "long-arm" jurisdiction to prosecute airplane hijackers in the Middle East and elsewhere, in circumstances where U.S. citizens or its nationals were victimized. Further, U.S. courts also have allowed trials of terrorists to be held notwithstanding protests by the defendants that their actions constituted acts of war. Individuals implicated in the 1993 attempted destruction of the World Trade Center, for instance, were prosecuted before a U.S. District Court, despite the individuals' contention of being engaged in a holy war. Further, the international community has permitted the prosecution of crimes before civilian tribunals. In both the International Tribunal for the former Yugoslavia (ICTY), and the International Tribunal for Rwanda (ICTR), civilians, government officials, and military officers and enlisted men, have been prosecuted for jus cogens crimes.

While international law regarding the use of force by states sheds important light on how nations may fight to defend their citizens against non-state actors such as terrorists, international criminal law provides less guidance on how a nation may take legal action against terrorists abroad. In part, this lack of clarity is due to the jeolous manner in which each state has protected its

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188 See, e.g., United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989); see also 101 F.3d 239 (2d Cir. 1996).
191 See, e.g., Timothy L.H. McCormack, Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law, 60 ALB. L. REV. 681, 730-31 (1997). McCormack argues that state interest is likely to hamper prosecuting certain classes of offenses before the International Court. Id. See also, e.g., Susan Dente Ross, In the Shadow of Terror: The Illusive First Amendment Rights of Aliens, 6 COMM. L. & POLY’ 75 (2001). Ross writes that prior to 11 September 2001, the Clinton administration attempts to curb terrorism through criminal law were sometimes criticized as gifts to Israel. Id. at 78. That is, several of the individuals prosecuted for terrorist acts during the Clinton administration were primarily interested in the destruction of Israel. Opponents of Israel felt that the United States court system should not be utilized to remove these individuals from the opportunity to attack Israeli interests.
own jurisdiction to prosecute domestic crimes that occur within their own borders.

It is, however, well accepted that states possess a right to prosecute individuals for *jus cogens* offenses such as “crimes against humanity.” For example, it has been widely accepted that Israel possessed the right to prosecute Adolf Eichmann, who oversaw the massacres of Jews and other target groups during the period of Nazi Germany. Eichmann was ultimately prosecuted before a public Israeli tribunal, and Argentina received nothing more than an explanation from the Israeli government after his abduction from Argentina to Israel. The abduction nevertheless generated both diplomatic and scholarly debate. Indeed, the Argentine Government, which had earlier disavowed knowledge of Eichmann’s whereabouts, complained to the Security Council, which indicated that Israel should make reparations to Argentina. Thus, the means of obtaining jurisdiction over the person remains problematic given the current state of international law.

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Other authorities justify Israel's action under the international legal principle of “extradite or prosecute.” This principle holds that no state should offer a safe haven to individuals who are accused of serious crimes under international law. Applying this theory to the Eichmann abduction, because Argentina had made no attempt to prosecute Eichmann in the ten years he had been living in Argentina, Israel had an international right to abduct Eichmann and adjudicate his case. Many commentators have suggested that Eichmann's abduction may have been justified due to the “nature and extent of the crimes charged” and “the impossibility of extradition of Nazis from Argentina;” in some situations, they argued, “positive law must yield to the natural and moral law.”


194 *Id.*


196 *See Id.* In response, the Security Council adopted a resolution that read:

Considering that the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations . . . [and n]oting that the repetition of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded creating an atmosphere of insecurity and distrust incompatible with the preservation of peace . . . the Government of Israel [is] to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law.
In recent years, states have successfully prosecuted *jus cogens* offenses after obtaining personal jurisdiction over individuals. For instance, Switzerland prosecuted and convicted before a military court, a former Rwandan mayor, who initially entered Switzerland under a grant of asylum. Before trial, the Swiss government refused to allow him to leave Switzerland.

Prosecuting terrorists under the approach used by the Swiss is problematic for several reasons. First, the state must have possession of the individual, which is particularly problematic for countries, such as the United States, which would like to pursue many known terrorist enemies located abroad. Second, there is no accountability for states that may have harbored, or otherwise supported, terrorists. Otherwise stated, the Swiss approach focuses on the individuals who directly perpetrate terrorist acts, as opposed to the states that may indirectly support such acts. This may be as a result of limited Swiss law enforcement and military capabilities. In any event, the Swiss approach, which is limited to situations in which a terrorist is found within the jurisdiction of the state willing to prosecute, does not address the reality and global scope of modern terrorism.

In addition to reviewing the doctrines of preemption and anticipatory self-defense with a view toward how they may be useful in taking action against terrorism, the international community must more fully acknowledge the criminality of terrorism. U.N. action over the past thirty-five years provides evidence that this recognition is taking hold. In 1970, General Assembly Resolution 2625 affirmed that:

*Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.*

Additionally, on December 9, 1985, the U.N. General Assembly unanimously approved Resolution 40/61, which not only unequivocally condemned all acts of terrorism as criminal, but also called upon states "to fulfill their obligations under international law to refrain from organizing, instigating, assisting, or participating in terrorist acts against other states, or acquiescing in activities within their territory directed towards the commission of such acts." Moreover, in March of 1992, the U.N. Security Council

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197 See *e.g.* Broomhall, *supra* note 192, at 405.

198 *Id.*


explicitly linked a state's involvement with terrorism to its obligations under U.N. Charter Article 2, Paragraph 4.\textsuperscript{201}

Fortunately, an increased willingness exists in the international community to take action against those who would support terrorists. For example, in Resolution 748, the Security Council imposed economic sanctions on Libya for its continuing involvement with terrorist activities and its refusal to extradite two Libyan nationals alleged to have been involved in the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland. In Resolution 748, the Council reaffirmed a principle reflected in General Assembly Resolution 2625, stating:

In accordance with Article 2, paragraph 4 of the Charter of the United Nations, every State has a duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed toward the commission of such acts, when such acts involve a threat or use of force.\textsuperscript{202}

Thus, in recent years, there has been greater international recognition that terrorism is not merely a phenomenon that can be considered to an alternative to conventional use of force by states; rather, it is a crime that must be addressed by the world community as a crime.\textsuperscript{203} The specific goals of Islamic-based terrorist movements, such as al Qaeda include the forced subjugation of religious and other freedoms to a theocracy.\textsuperscript{204} This demonstrates an open willingness to defy basic rights recognized as belonging to all humanity. Furthermore, the methods used to achieve their aims, particularly the targeting of civilians, as noted above, stand clearly contrary to international law.\textsuperscript{205} Thus, this contemporary form of religious-based terrorism cannot be equated with traditional state use of force; rather it constitutes a crime under international law.

Beyond attaching criminal liability to those individuals who engage in terrorist acts, international law also assigns analogous responsibility to states that support such individuals.\textsuperscript{206} The Security Council reaffirmed this principle

\textsuperscript{201} Beard, supra note 182, at 580.
\textsuperscript{203} See e.g., President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001). See also, e.g., State Department, Fact Sheet: Usama bin Ladin (Aug. 21, 1998), at http://www.state.gov/www/regions/africa/fs<uscore>bin<uscore>ladin.html.
\textsuperscript{204} Id.
\textsuperscript{205} Id.
in response to Libyan sponsorship of terrorist groups, stating that state support of terrorism constituted an inherently illegal activity. 207

Despite these “gains” in the effort to counter terrorism, international law has yet to fully wed a standard of “aiding and abetting” to the doctrine of state responsibility. Nevertheless, the Security Council, after the 11 September 2001 attacks, may have indirectly reflected a preemptive right against states that support terrorism under certain conditions, through its adoption of Resolution 1373. 208 In this ground-breaking resolution, the Security Council ordered states to refrain from various actions likely to aid terrorism. 209 These actions include state financing of terrorist activities as well as prohibiting nationals, or other persons within state borders from financing terrorist activities. 210 Additionally, the Security Council resolution requires states to refrain from providing active or passive support for persons involved in terrorist acts. 211 Most importantly, the resolution proscribes states from providing safe haven to not only terrorist organizations, but also to individuals who actively aid them. 212 While the Security Council cannot create binding international law, the Council’s ability to authorize enforcement of resolutions through U.N. Charter, Chapter VII authority, should give states pause. 213 Moreover, Resolution suggests that if preemption against a criminal organization is warranted, the concept of “aiding and abetting” could possibly be used to justify preemptive use of force against states that aid and abet terrorist organizations and refuse to remove them from their respective territories.

A. Aiding and Abetting: a Key to the Viability of Preemption Doctrine

Both anticipatory self-defense and preemption appear to have gained greater vitality as usable doctrines in the fight against terrorism in light of the Security Council’s relatively new Resolution 1373 “aiding and abetting” standard. States may forfeit their traditional international law protections when they aid and abet a religious-based terrorist organization that plans to commit jus cogens offenses.

Although each state has a different criminal code, it may be helpful to understand the potential vitality of “aiding and abetting” in light of U.S. domestic law, which treats “aiding and abetting” as a recognized offense.

210 S.C. Res/1373 at 1(a),(d).
211 S.C. Res/1373 at 2(a).
212 S.C. Res/1373 at 2(c).
213 See U.N. CHARTER Chap. VII; see Szasz, supra note 209, at 902-904.
“Aiding and abetting” does not constitute any element of a particular crime because the concept provides a means for convicting a person for an offense caused by a principal. In the domestic context, there are usually two components to criminal offenses: actus reus and mens rea. Actus reus refers to the actual physical act or behavior, while mens rea denotes the actor’s mental state.

In U.S. municipal criminal law, to constitute “aiding and abetting,” (1) the principal must commit a substantive offense; and (2) the defendant charged with the aiding and abetting must have consciously shared the principal’s knowledge of the underlying criminal act, and intended to help the principal. The actus reus element of aiding and abetting is generally easy to discern because under a theory of accomplice liability, to be guilty, the defendant must commit an act in furtherance of the principal’s offense.

For example, where a defendant supplied the principle with a weapon later used in a bank robbery, the actus reus requirement is satisfied. On the other hand, the defendant's mental state is important in assessing whether the mens rea was present to prove guilt. Indeed, the defendant's beforehand knowledge of the principal’s offense is central in determining applicable mens rea for accomplice liability. However, a classic formulation of aider and abettor liability does not make the knowledge requirement facially clear because some courts have construed this requirement to mean less than full knowledge of an intended act. That is, the quantum of knowledge required to constitute criminality is often a matter for the trier of fact to decide. For example, in United States v. Hill, a case involving an illegal gambling enterprise, the Sixth Circuit defined knowledge as "the general scope and nature... and awareness of the general facts concerning the venture." Thus, the knowledge requirement is less than a full knowing of the intricacies of a perpetrated crime, but rather, knowledge of the general purpose of the related action.

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214 See 18 U.S.C. § 2. The statute does not define a separate crime, but rather provides another means of convicting someone of assisting another in committing the underlying offense. See, e.g., United States v. Sorrells, 145 F.3d 744, 751 (5th Cir. 1998). In that case, the Fifth Circuit listed three elements of proof to establish guilt of “aiding and abetting” under 18 U.S.C. § 2. First, the defendant must have been associated with the criminal venture. Second, the defendant must have participated in the venture. Third, the defendant must have sought by action to make the venture succeed. Id.

215 Blacks Law Dictionary defines actus reus as the “physical aspect of a crime”, whereas mens rea involves the intent factor, or the “subjective mindset”. BLACKS LAW DICTIONARY 36 (6th ed. 1990).

216 See, e.g., 18 U.S.C. § 2(a); see also, Nye & Nissan v. United States, 336 U.S. 613 (1949); see also United States v. Spinney, 65 F.3d 231 (1st Cir 1995).

217 See, e.g., United States v. Pipola, 83 F.3d 556, 562 (2d Cir. 1995).

218 Id.


220 Id.
Similar concepts are applicable in the international law context. For instance, in the ICTY case, *Prosecutor v. Furundzija*, the trial and appellate chamber recognized the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. Moreover, such assistance "need not constitute an indispensable element, that is a *conditio sine qua non*, for the acts of the principle." In this case, Furundzija was found to have aided and abetted several crimes against humanity by encouraging others to commit those crimes. And in another case, in *Prosecutor v. Musema*, the ICTR defined the *actus reus* element as "all acts of assistance in the form of either physical or moral support that substantially contribute to the commission of the crime." As reflected in these cases, it is not necessary for an accomplice to share the *mens rea* of the perpetrator, in the sense of a positive intention to commit the crime; instead, the threshold requirement is merely that the accomplice have knowledge that his actions will assist the perpetrator in the commission of the crime. In *Musema*, the tribunal defined *mens rea* as, "[knowledge] of the assistance he was providing in the commission of the actual offense." Illustrating an application of these standards in another ICTR case, in *Prosecutor v. George Ruggio*, the tribunal found a journalist guilty as a *de facto* aider and abettor by the journalist’s making several broadcasts encouraging Hutu to kill Tutsi.

It follows logically from the above discussion that where states knowingly harbor international terrorist organizations, they are “aiding and abetting” those organizations. It was widely reported that the Taliban government in Afghanistan did so with respect to al Qaeda. Likewise, the Libyan government’s sponsorship of individuals implicated in the Lockerbie aircraft bombing would also constitute aiding and abetting under international law.

When a state is harboring or otherwise supporting a terrorist organization planning attacks in contravention of the laws of war, such as is the case in which a terrorist group intentionally targets civilian and clearly

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222 *Id.* at 45.
223 *Id.*
226 *Id.* ¶ 126.
228 *Id.* at 181.
230 *Id.*
non-military structures, the potentially impacted state must be allowed to respond to avert the attacks. There is sufficient existing doctrine and precedence under international law to allow a state to exercise preemptive force against such terrorist organizations. This is an important principle because of the unpredictability and lawlessness of the terrorist organizations acts, magnified by the potentially huge damage that they could cause, given technological advances. This right of preemption should be narrowly construed, however, in recognition of its potential for abuse, with applicability only to organizations espousing and practicing activities that clearly violate the laws and customs of war.

IV. CONCLUSION

With the end of the Cold War, terrorism has emerged as the gravest threat facing national and international security. A new wave of terrorism driven by an extremist theology presents a particular ongoing threat. For instance, the several terrorist organizations discussed in this article, eschew contemporary well-settled international understandings of human rights as well as the laws and customs of war. While there is an international law consensus against the direct targeting of civilians, these groups and others simply do not subscribe to this prohibition.

Not all terrorist organizations use the same means for achieving their desired goals. Particularly dangerous, however, are some militant Islamic groups whose stated views are Islamicizing regions of the world by waging a "holy war" and who have no compunction against murdering the innocent in pursuant of this quest. Their literal interpretation of Quaranic scripture coupled with their conduct in resorting to violent acts of terrorism, certainly provides evidence as to this goal.

International law regarding the use of force has developed in response to centuries of interstate warfare. U.N. Charter Article 51 reflect this history. However, reliance on the protections of Article 51 alone would leave governments prostrate in defeating the threat of terrorism. States not only have a duty to ensure basic human rights are enforced, they also have an obligation to protect their citizens and residents from crime. Terrorism is not only a

threat to national security; it constitutes a *jus cogens* crime. Within the context of areas of the law in which criminal law and international law have merged the protections of both anticipatory self-defense and preemption must be asserted. Given modern advances in destructive capability and the growing willingness of groups to take the lives of the innocent to further religious their own beliefs, there is no reasonable alternative. Because of the dangers of abuse and military adventurism, each doctrine must be used sparingly, and applications carefully scrutinized. Where one state threatens another directly or indirectly by granting terrorist groups safe haven or other support, the anticipatory self-defense doctrine may prove to be an acceptable response, provided the response meets the proportionality and necessity tests. Likewise, where a state grants terrorist groups safe haven or offers other support, the state may be subject to military attack through the preemption doctrine. Finally, where a non-state actor is able to conduct its operations without state assistance, even though these operations are clandestinely effected without state knowledge, the situs of terrorist activity should be considered a legitimate target under either doctrine. However, the particular acts of terrorism in either case must be the key to an assessment of the permissible use of either doctrine under the circumstances. The terrorist organization must, through evidence of past actions and stated doctrine (*e.g.*, disavowal of international law) pose a threat to the freedoms, health, and safety, of the citizens and residents of the state. In these circumstances, the use of military force should be justifiable.