SHORTER ARTICLES, COMMENTS, AND NOTES

BACK TO BASICS: NECESSITY, PROPORTIONALITY, AND THE RIGHT OF SELF-DEFENCE AGAINST NON-STATE TERRORIST ACTORS

I. INTRODUCTION

The International Court of Justice's decision in *DRC v Uganda* touches on, but fails to address, the circumstances under which a State has a right to use force in self-defence against non-State actors.[1] In particular, the Court holds that, because the attacks carried out by anti-Ugandan rebels operating from the Democratic Republic of Congo's (DRC) territory are not attributable to the DRC, Uganda has no right to use force in self-defence *against the* DRC.[2] The separate opinions in *DRC v Uganda* lament the Court's failure to take the opportunity to address the right to act in self-defence against non-State actors[3]—an issue of such obvious importance to the international community in an age of terrorism. As will be examined below, there are arguably good reasons—on the facts of the case—for the Court's refusal to pronounce itself on the matter. Furthermore, its decision need not be read as absolutely precluding a use of force in foreign territory in response to armed attacks by non-State actors. The Court's continued refusal to engage the issue, however, has resulted in scholars taking extreme positions regarding the right to use force in self-defence against non-State actors—either reading the Court's jurisprudence as requiring that armed attacks always be attributable to a State before they give rise to a right to use force in self-defence in foreign territory (or supporting a similar position),[4] or arguing that there is an emerging right under international law to use force in self-defence directly against non-State terrorist actors, irrespective of the territorial host State's non-involvement in the terrorist attacks.[5] The starting point of this comment is that the International Court's jurisprudence need not

[1] *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, 19 Dec 2005, <www.icj-cij.org> [*DRC v Uganda*].

[2] *DRC v Uganda* para 147.

[3] Separate Opinion of Judge Simma, *DRC v Uganda* para 8; Separate Opinion of Judge Kooijmans, *DRC v Uganda* para 25.

[4] See, eg, Antonio Cassese, 'The International Community's "Legal" Response to Terrorism' (1989) 38 ICLQ 589, 596–7 (requiring attributability under the law of State responsibility, but, in line with the dissents in *Nicaragua*, describing State support and acquiescence in terrorism as a 'grey' area in the law that might form the basis of attribution); Peirluigi Lamberti Zanardi, 'Indirect Military Aggression' in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Kluwer Academic, London, 1986); Luigi Condorelli, 'Les attentats du 11 septembre et leur suites: où va le droit international?' (2001) 105 RGDIP 829, 838; Olivier Corten et al, 'Opération "liberté immuable": Une éxtension abusive du concept de légitime défence' (2002) 106 RGDIP 51, 55.

[5] See, eg, Yoram Dinstein, 'The International Legal Response to Terrorism' in Pierluigi Lamberti Zanardi et al (eds), *International Law at the Time of its Codification, Essays in Honour of Roberto Ago* (Giuffrè, Milan, 1987) 146; Yoram Dinstein, *War Aggression and Self-Defence* (CUP, Cambridge, 2005) 206–8; Daniel Janse, 'International Terrorism and Self-Defence' (2006) 36 Israel Ybk HR 149, 170–1 (noting that, in the case of failed States, defensive force must be strictly and exclusively directed against the terrorist actors). See also Separate Opinion of Judge

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be read as absolutely requiring that armed attacks be launched by (or attributable to) a State before the right to use force in self-defence is engaged. This should not mean, however, that there is a right to use force in self-defence against non-State actors irrespective of the host State's non-involvement in their terrorist activities. Such a right would sit uneasily within the UN Charter paradigm, which prohibits uses of force against the territorial integrity (and political independence) of States[6] but provides for the limited exception of self-defence set forth in Article 51 of the UN Charter. The balancing mechanism between the right of self-defence against non-State actors in foreign territory and the right of States to respect for their territorial integrity lies within the customary law requirements to which the legitimate exercise of the right of self-defence is subject—in particular, the requirement that a use of force be necessary and proportionate.

II. THE ICJ AND THE RIGHT OF SELF-DEFENCE AGAINST NON-STATE TERRORIST ACTORS

Uses of force in self-defence against non-State terrorist actors can take two separate forms. The first involves a use of force which only targets the non-State actors and their bases of operation in foreign territory. The second is where the use of force (also, or perhaps only) targets the State from whose territory the non-State actors operate. A majority of the International Court of Justice has consistently held that the right to use force in self-defence against an attack by non-State actors only applies where the attack is attributable to the State in whose territory defensive force is being used.[7] This position has been widely criticized, but might be explained by the distinction set forth above. In both the contentious cases addressing the right of self-defence against non-State actors, defensive uses of force were not directed solely at the non-State actors alleged to have launched armed attacks. The defensive uses of force were equally (if not exclusively) directed at the State from whose territory the non-State actors operated. It seems far less incredible that the Court required that the armed attacks mounted by non-State actors be attributable to the State in whose territory defensive force was being used when one considers that the territorial State was itself the subject of defensive measures.

In *Nicaragua*, the Court considered whether American assistance to the Nicaraguan *contra* forces[8] amounted to a legitimate exercise of the right of collective self-defence.

Kooijmans, *DRC v Uganda* paras 26–9. Some authors have taken a middle of the road position and accept that a certain level of host State involvement (whether acquiescence or active support) in non-State terrorist activities is required before the right of self-defence is engaged. See for eg Ruth Wedgwood, 'Responding to Terrorism: The Strikes Against bin Laden' (1999) 24 Yale J Intl L 559, 565 (arguing that, where a host country permits the use of its territory as a staging area for terrorist attacks when it could shut those operations down, and refuses requests to take action, the host government cannot expect to insulate its territory against measures of self-defence); Tom Ruys et al, 'Attacks by Private Actors and the Right of Self-Defence' (2005) 10 JCSL 289.

[6] Art 2(4), Charter of the United Nations, UNCIO XV, 335; amendments by General Assembly Resolution in UNTS 557, 143/638, 308, 892, 119.

[7] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) ICJ Reports (1986) 14 [*Nicaragua*]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004) 135 [*Wall Advisory Opinion*]; *DRC v Uganda*.

[8] The Court held that the United States was responsible for financing, training, and providing logistical support to the *contras* (including the supply of intelligence as to Nicaraguan troop movements). *Nicaragua* paras 101–4 and 106–8.

The US claimed to be acting (primarily) in defence of El Salvador, which was the victim of armed attacks by rebel groups allegedly supplied with arms through Nicaragua with the active support, or at the very least complicity, of the Nicaraguan Government.[9] The *contras*' main targets were Sandinista troops, although there were numerous reports of attacks on non-combatants[10] and Nicaragua alleged a US-devised strategy for the *contras* to attack 'economic targets like electrical plants and storage facilities' in Nicaragua.[11] Given the objective of defending El Salvador against Nicaraguan supported rebels, one might have expected American defensive measures to be aimed at forestalling the arms traffic or repelling the rebel attacks—rather than the more offensive type measures taken against Nicaraguan targets. The Court noted that, to prevent the arms traffic, the US might have arranged for a strong patrol force in El Salvador along its border with Nicaragua, and that 'it is difficult to accept that [the US] should have continued to carry out military and paramilitary activities against Nicaragua if their only purpose was, as alleged, to serve as a riposte in the exercise of the right of self-defence'.[12] Given that the US-supported *contras* were directly targeting the Nicaraguan Government and military, the circumstances under which a State could legitimately use force against non-State actors in foreign territory was not in issue. To legitimate the US use of force (in the form of support for the *contras*, as the Court found that the particular activities of the *contras* were not attributable to the US) as a measure of self-defence, the Court therefore considered that the armed attacks by rebel groups against El Salvador needed to be attributable to Nicaragua.

The Court's decision in the *Wall Advisory Opinion* is much more difficult to reconcile with the reading of *Nicaragua* set forth above. In that case, the Court gave brief consideration to whether Israel's construction of a security wall within the Occupied Palestinian Territories might be justified as a measure of self-defence. The Court considered Israel's public justification for the construction of the wall to be one based on the right of States to defend themselves against terrorist attacks under Article 51 of the UN Charter, as recognized in Security Council Resolutions 1368 (2001) and 1373 (2001). The Court gave very limited consideration to Israel's argument that the Wall was a defensive measure against repeated and continuing terrorist attacks—reaffirming the position it took in *Nicaragua* that armed attacks giving rise to the right of self-defence must be imputable to a foreign State.[13] The Court also took a very narrow approach to the applicability of Security Council resolutions 1368 (2001) and 1373 (2001), holding that the occupied territories from which terrorist attacks were launched were under Israeli control and therefore could not be considered in the context of resolutions addressing the terrorist attacks of 11 September, where attacks were directed from abroad.[14] The Court's refusal to genuinely engage the Israeli claim to be acting in self-defence, while mechanically repeating the position it adopted in *Nicaragua*

[9] The Court held that Nicaragua was not in fact responsible for the arms traffic, to the extent such arms traffic existed. *Nicaragua* paras 154–5.

[10] *Nicaragua* para 113.

[11] ibid para 105.

[12] ibid para 156.

[13] *Wall Advisory Opinion* para 139.

[14] But see separate opinion of Judge Higgins, para 34 and Declaration of Judge Buergenthal, para 6, *Wall Advisory Opinion*, for a critique of the Court's position, arguing that if Palestine is sufficiently an international entity for the purposes of appearing before the Court, and benefiting from the protections of international humanitarian law, then it should be sufficiently international for the purposes of applying the prohibition of armed attacks on other States.

requiring the attribution of armed attacks by non-State actors, has subjected it to severe criticism,[15] and arguably limits the authoritative nature of the decision as regards self-defence against non-State actors. It bears noting that the difficulty regarding a State's right to use defensive force directly against non-State actors in foreign territory results from the apparent irreconcilability of this right with the inviolability of the territorial State's sovereignty. In the Israeli/Palestinian context, given the occupied status of the territory from which terrorist attacks are launched, the Court could not have shed any light on this issue in its decision.

In *DRC v Uganda*, the Court held that the attacks carried out by rebel groups operating from the DRC's territory against Uganda are 'non-attributable to the DRC',[16] and because the legal and factual circumstance giving rise to the right to self-defence are not satisfied, that 'there is no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces'.[17] The Court reaffirmed its position, taken in *Nicaragua*, that a State's sending armed bands into another State, within the meaning of Article 3(g) of the Definition of Aggression,[18] amounts to an armed attack giving rise to the right of self-defence against the sending State.[19] As in *Nicaragua*, the Court did not explicitly rule out that a lesser degree of State involvement (such as acquiescence) could form the basis for attributing the armed activities of irregular forces to the State from whose territory they operate[20]—but implicitly regarded attributability for the purposes of an 'armed attack' as limited to the circumstances of Article 3(g) of the Definition of Aggression.[21] The Court did not expressly stipulate that armed attacks in the sense of Article 51 of the UN Charter require an

[15] See Christian J Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case' (2005) 16(5) EJIL 965; Sean D Murphy, 'Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?' (2005) 99 AJIL 62. But note that the Court's Opinion has been interpreted as at least implicitly recognizing a right to use force in self-defence against non-State terrorist actors, while refusing to accept such a right as applicable in the circumstances. See Iris Canor, 'When *Jus ad Bellum* meets *Jus in Bello*: The Occupier's Right of Self-Defence against Terrorism Stemming from Occupied Territories' (2006) Leiden J Intl L 129, 132.

[16] *DRC v Uganda* para 146.

[17] ibid para 147.

[18] Under Art 3(g), States are prohibited from sending armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to an act of armed aggression. GA Res 3314 (XXIX), 14 Dec 1974 [Definition of Aggression].

[19] *DRC v Uganda* para 146.

[20] See Christine Gray, *International Law and the Use of Force* (Oxford, OUP, 2004) 99.

[21] Interestingly, both the DRC and Uganda, in their pleadings, accepted a lesser degree of State involvement than that set forth in *Nicaragua* as a basis for attributing the activities of armed bands to the host State for the purposes of self-defence. In particular, the DRC, in its oral pleadings, states that 'It is necessary in the present case to maintain the distinction between the situation of a State which massively supports armed groups, *including by deliberately allowing them access to its territory*, and a case of mere negligence, such as would enable groups of this type to act against a third State. Only the first hypothesis could be characterized as an "armed attack" within the meaning of Article 51 of the Charter, thus justifying a unilateral response' (emphasis added). *DRC v Uganda*, CR 2005/03 (translation), 12 Apr 2005, para 21. Because the Court found 'no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC' (*DRC v Uganda* para 146)—it had no cause to reconsider its conclusion in *Nicaragua* that the supply of arms to armed bands does not meet the requisite threshold of State involvement in the activities of armed bands for the purposes of attribution.

armed attack by one State against another (as it did in the *Wall Advisory Opinion*).[22] Instead, the Court emphasized that Uganda's defensive measures were carried out *against* the DRC,[23] and therefore focused its decision on the grounds of attribution. The Court's statement that 'there is no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces'[24] should be read in light of its findings regarding the defensive measures Uganda took within DRC territory. In particular, Ugandan military action was directed largely against towns and villages far removed from the territory from which anti-Ugandan rebels operated.[25] One should therefore read the Court's decision as reflecting the distinction set forth above between force used in self-defence *against the DRC* (which would require that the armed attacks being responded to are attributable to the DRC), and force used in self-defence directed against non-State actors *within the DRC*, while expressly refusing to address the conditions under which the latter use of force would be permissible.[26] As Uganda's use of force was not principally directed against anti-Ugandan rebel groups along the border—the Court did not consider the circumstances under which such a use of force would be legitimate. Nor, however, should its opinion be read as ruling out such uses of force.

III. BACK TO BASICS: THE CUSTOMARY LAW REQUIREMENTS OF NECESSITY AND PROFITABILITY

The International Court has provided no guidance on the circumstances under which a victim State is entitled to use force in self-defence directly against non-State actors. The Court's decisions in *Nicaragua* and *DRC v Uganda* should not be understood as ruling out the legitimate use of defensive force against non-State actors unless the armed attacks of such non-State actors are attributable to a State. Instead, the Courts' decisions should be understood as requiring that armed attacks be attributable to a State if the State *itself* is to be the subject of defensive uses of force. This begs the question, particularly in light of recent State practice, regarding the circumstances under which a State can respond to armed attacks by non-State terrorist actors with force which specifically targets those non-State actors. The appropriate framework for considering this question is Articles 2(4) and 51 of the UN Charter. Article 2(4) prohibits the threat or use of force against the territorial integrity or political independence of any State. Using force against the base of operations of non-State terrorist actors within another State's territory surely amounts to a violation of that State's territorial integrity, even if the use of force is defensive and not targeted at the State's apparatus. While it has

[22] *Wall Advisory Opinion* para 139.
[23] *DRC v Uganda* paras 118 and 147.
[24] ibid para 147.
[25] ibid paras 81–6.
[26] Both Judges Simma and Kooijmans, in their separate opinions, consider this to be the Court's approach, but lament the Court's refusal to consider the right to act in self-defence *against* non-State actors (as opposed to *against* the DRC) and to evaluate Uganda's military activities against the DRC through the prism of 'necessity'. Such an evaluation would have enabled the Court to find that Uganda's use of force far from the border region in which anti-Ugandan rebels operated was not necessary for the purposes of responding to armed attacks by those non-State actors. Separate Opinion of Judge Simma, *DRC v Uganda* paras 6–14; Separate Opinion of Judge Kooijmans, *DRC v Uganda* paras 26–9 and 34.

been correctly highlighted that nothing in Article 51 limits the actors against whom defensive force can be used[27]—this to a certain extent fails to address the crucial issue. Article 51 is an exception to the prohibition on the use of force against the territorial integrity (or political independence) of a State. As a matter of logic, a use of force pursuant to Article 51 of the UN Charter should only properly qualify as an exception to the prohibition on the use of force if it 'excuses' the violation of territorial integrity (or political independence). When the State in whose territory defensive force is employed is the aggressor or perpetrator of the armed attack (or the armed attack is attributable to it), the excuse for violating that State's territorial integrity is readily available. The argument that there is a right to use force directly against non-State actors operating from foreign territory, irrespective of the territorial State's non-involvement in their terrorist activities, not only fails to 'excuse' the violation of the territorial State's sovereignty—it fails to address the issue at all.

The way to reconcile the need to respond to armed attacks by non-State terrorist actors operating from a foreign State's territory, and the prohibition on the use of force in violation of a State's territorial integrity, lies in the customary law elements[28] of a legitimate exercise of the right of self-defence.[29] Necessity and proportionality operate to limit the right to use force in self-defence in two ways. The first bears on the question of whether a use of force is necessary at all—particularly where there are alternative (peaceful and diplomatic) mechanisms for protecting a State's fundamental interests.[30] The principle of proportionality then operates in tandem with the requirement that a use of force in self-defence be necessary—namely that the defensive force be tailored, and not go beyond what is necessary to halt or repeal the armed attack to which it is responding.[31] These customary requirements operate as a mediator between the competing security interests of States victim to armed attacks by non-State terrorist actors operating from foreign territory, and States in whose territory terrorists oper-

[27] See Separate Opinion of Judge Higgins, *Wall Advisory Opinion* para 33; Separate Opinion of Judge Kooijmans, *Wall Advisory Opinion* para 35; Separate Opinion of Judge Kooijmans, *DRC v Uganda* para 28. See also Wedgwood (n 5) 564; Thomas Franck, 'Terrorism and the Right of Self-Defence' (2000) 95 AJIL 839, 840; Sean D Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter' (2001) 43 Harvard J Intl L 41, 50; Jordan Paust, 'Use of Force against Terrorists in Afghanistan, Iraq and Beyond' (2002) 35 Cornell Intl L J 533, 534.

[28] In *Nicaragua*, the ICJ held that the right to use force in self-defence was subject to the customary law requirements of necessity and proportionality. *Nicaragua* para 176. In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996(I)) 65, para 41, the Court held that the customary law requirements of necessity and proportionality apply equally to the exercise of the right of self-defence set forth in Art 51 of the UN Charter.

[29] See Oscar Schacter, suggesting that a State's complicity in terrorist bases in its territory might be one basis on which the necessity of a defensive use of force could be justified. 'The Extraterritorial Use of Force against Terrorist Bases' (1988–9) 11 Houston J Intl L 309, 314. See also Murphy (n 15) 66–7, exploring the requirement of necessity in the context of Israel's construction of the Wall and the ICJ's *Wall Advisory Opinion*.

[30] See *Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ Reports (2003), para 76 ('there is no evidence that the United States complained to Iran of the military activities of the platforms, . . . which does not suggest that the targeting of the platforms was seen as a necessary act'). See also Yoram Dinstein, *War Aggression and Self-Defence* (n 5) 209–10.

[31] Proportionality is often interpreted as requiring that defensive force be of the same intensity as the offensive force to which it is responding. For a very helpful overview of the requirement that force be proportional in the self-defence context, see Frederic L Kirgis, 'Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon' (ASIL Insight, 17 Aug 2006) <http://www.asil.org/insights/2006/08/insights060817.html>.

ate. In cases where a State is actively countering the terrorist activities of non-State actors operating from its territory, and doing all that can be done to prevent such terrorists from using its territory to organize or launch attacks, a victim State's use of force against non-State actors in the territorial State (amounting to a violation of that State's territorial integrity) is simply not a necessary use of force. It is the substitution (and imposition) of the victim State's views on how to deal with the terrorist threat emanating from the host State's territory for those of the host State, which amounts to an illegal intervention.[32] To the extent that the victim State believes that further action could be taken by the host State to respond to the terrorist threat, the issue can be dealt with as a matter of criminal law enforcement, through cooperative arrangements with the host State. Where, however, a host State is unwilling (or, in some cases, unable)[33] to prevent its territory from being used as a base of terrorist operations, in contravention of its obligations under customary international law,[34] the victim State is left with little choice. Either it respects the host State's territorial integrity at great risk to its own security, or it violates that State's territorial integrity in a limited and targeted fashion, using force against (and only against) the very source of the terrorist attack. As examined below, States which have targeted defensive force against non-State terrorist actors in foreign territory have often relied (albeit not expressly) on the 'necessity' and 'proportionality' of the defensive operation (given an inability to rely on the host State to act in protection of the victim State's security interests) in legitimizing the resulting violation of the host State's territorial integrity.

In 1976, Israel mounted a rescue operation at Entebbe airport, in response to the

[32] The Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, GA Res 2625 (XXV), 24 Oct 1970 [Declaration on Friendly Relations], stipulates that 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State'.

[33] Where a State is unable to meet its terrorism prevention obligations, either because it lacks the territorial control necessary to do so, or because it does not have the relevant human or financial resources available, it is arguably under an obligation to accept offers of counter-terrorism assistance, or even to seek such assistance. A State's consistent failure to address its counter-terrorism incapacity, where such assistance is available, could be interpreted as an unwillingness to meet its international terrorism prevention obligations. On the issue of an obligation to develop counter-terrorism capacity, see Tal Becker, *Terrorism and the State; Rethinking the Rules of State Responsibility* (Hart Publishing, Portland, 2006) 144–6. The international community has not been entirely consistent on the issue of self-defence necessitated by a State's inability to meet its counter-terrorism obligations. It rejected Turkey's invocation of the right to use force in self-defence in Iraqi territory against PKK bases because of Iraq's inability to control its northern border and prevent acts of terrorism (UN Doc S/1995/605). See UN Doc S/1997/461 (Arab League); Keesing's Record of World Events (1995) 40474, 40522 (European Union); Keesing's Record of World Events (1995) 40474 (United States). See also Ruys et al (n 5) 295–6. But the Lebanese Government's continued failure to heed Security Council calls for it to extend its control over all Lebanese territory (see SC Res 1559 (2004) paras 1–3; SC Res 1583 (2005) paras 3–4; SC Res 1655 (2006) paras 3, 6, and 8; SC Res 1680 (2006) preamble), influenced the position States took vis-à-vis Israel's use of force in Lebanon in July/August 2006. See below notes 70–81 and accompanying text.

[34] A State's obligation to 'refrain from organizing, instigating, assisting or participating in [. . .] terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force' set forth in the Declaration on Friendly Relations (n 32), was held to be declaratory of customary international law in *DRC v Uganda* para 162.

hijacking of an aircraft bound for Tel Aviv and diverted to Uganda.[35] Its defensive measures were directed at the persons responsible for the hijacking and hostage crisis. As the raid was a commando operation, the Israelis were operating without Ugandan permission and were therefore violating Ugandan territorial integrity. Israel specifically claimed that its 'rescue operation was not directed against Uganda. Israeli forces were not attacking Uganda—and they were certainly not attacking Africa. They were rescuing their nationals from a band of terrorists and kidnappers who were aided and abetted by the Ugandan authorities'.[36] While not framed in these terms, the invocation of Ugandan complicity with the hijackers reads like an argument regarding the 'necessity' and 'proportionality' of the rescue operation. Had Uganda been negotiating with the hijackers in good faith, and been on the verge of successfully safeguarding the release of the hostages, the use of force in Ugandan territory (and resulting violation of Ugandan territorial integrity) would hardly have been necessary. Furthermore, Israel emphasized that its use of defensive force was specifically targeted at the hijackers, thereby speaking to its proportionality. Much of the condemnation of the rescue operation before the Security Council appears to be based on a belief that Idi Amin was personally working to secure the release of the hostages.[37] Because States rejected the factual basis of Israel's justification for violating Ugandan territorial integrity, there is no indication in any of the statements condemning the Israeli raid as an act of aggression that Ugandan complicity, had it been more widely accepted, would nevertheless not have served to justify Israel's use of force.

On 1 October 1985, Israel bombed the Palestine Liberation Organization's headquarters in Tunisia, in response to the murder of three of its citizens in Cyprus, allegedly carried out by the bodyguard unit of PLO Chairman Yassar Arafat.[38] Israel asserted a right to use force in self-defence in Tunisian territory against the PLO headquarters there, which it claimed had organized and launched hundreds of terrorist attacks against Israel and Israeli targets. Israel further claimed that Tunisia 'knowingly harboured the PLO and allowed it complete freedom of action in planning, training, organising and launching murderous attacks from its soil'.[39] Israel's argument before the Security Council is interesting in that it invokes a right of self-defence directly against non-State actors,[40] and justifies the violation of Tunisia's sovereignty and territorial integrity based on the fact that 'Tunisia did not show an inkling of a desire or an intention to prevent the PLO from planning and initiating terrorist activities from its soil'.[41] Israel again appears to be arguing that its use of force is necessary and propor-

[35] [1976] UN Ybk 319–20.

[36] UN SCOR, 1939th Meeting 9 July 1976, para 121.

[37] See, eg, the comments of the representatives of Cameroon (UN SCOR, 1939th Meeting 9 July 1976, paras 214–15); Mauritania (UN SCOR, 1939th Meeting 9 July 1976, para 45); Guinea (UN SCOR, 1940th Meeting 12 July 1976, para 35); Benin (UN SCOR, 1941st Meeting 12 July 1976, paras 10–18); Libyan Arab Republic (UN SCOR, 1943rd Meeting, 14 July 1976, paras 7–20).

[38] UN Doc A/40/688–S/17502 (1985).

[39] UN Doc S/PV.2611 (1993) 22–5.

[40] Israel specifically argued that it was not using force against Tunisia itself, but against the PLO headquarters located in Tunisia, thereby avoiding having to argue that Tunisia's acquiescence in the PLO's activities was a basis for attributing PLO terrorism to Tunisia. In particular, Israel stated that '[i]t was against [the PLO] that our action was directed, not against their host country. Nevertheless, the host country does bear considerable responsibility'. UN Doc S/PV.2611 (1993) 22–5.

[41] UN Doc S/PV.2611 (1993) 26.

tionate (and the resulting violation of Tunisian territorial integrity thereby excused) given Tunisia's failure to prevent its territory from being used as a base for terrorist operations and the targeted nature of the Israeli operation. Interestingly, Tunisia went to great lengths to refute the claim that its territory served as a base for terrorists and denied that any act of terrorism has been perpetrated from its territory or that any Tunisian had been implicated in any acts of terrorism.[42] States did not address Israel's novel legal argument, and instead denied that Tunisia, even if it did harbour the PLO, could be held responsible for its conduct.[43] This line of argument is in line with some of the cotemporaneous thinking on the right of self-defence. Notwithstanding the interpretation offered above for the Court's decision in *Nicaragua*, many scholars at the time argued that the right of self-defence could only be invoked in response to an armed attack by a State,[44] and acquiescence in terrorist activities was evidently rejected as a basis for attribution.

Times have changed since 1985. The emergence of Al Qaeda as a threat to international peace and security heralds a new beginning for Israel's argument that a use of force against non-State actors is a legitimate exercise of the right self-defence, and serves to highlight the role necessity and proportionality might play in legitimizing defensive uses of force against non-State actors in foreign territory. In response to the 1998 terrorist attacks on its embassies in Ethiopia and Kenya, the United States attacked terrorist training camps in Afghanistan and a pharmaceutical plant in Sudan. In a letter dated 20 August 1998 to the Security Council, the United States claimed to have been exercising its right of self-defence. The United States noted that its use of force was only directed against installations and training camps used by the Bin Laden organization and was 'carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Laden organization'.[45] The United States was charging the Taliban and Sudan with acquiescing in Bin Laden's terrorist activities, and basing its right to specifically target non-State actors in foreign territory on an inability to rely on the host States in counter-terror efforts. The international community widely condemned the attacks in Sudan—primarily based on an absence of evidence that the pharmaceutical plant was used for anything other than civilian purposes.[46] There was no similar condemnation of the use of force in Afghanistan. Reminiscent of Israel's use of force in Uganda in 1976 and Tunisia in

[42] UN Doc S/PV.2610 (1993) 11; UN Doc S/PV.2615 (1993) 82. Like Tunisia, many States making presentations to the Security Council did not accept that the PLO's activities could be characterized as terrorist, invoking the long debated distinction between terrorism and the right of peoples to struggle for self-determination. UN Doc S/PV.2610-13 (1993).

[43] UN Doc S/PV.2611 (1993) 41 (United Kingdom); S/PV.2613 (1993) 11 (Madagascar).

[44] Arguing that an 'armed attack' is limited to uses of force by one State against another, see, eg, Cassese (n 4); Zanardi (n 4). But see Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press, Oxford, 1963) 278–9; Dinstein, 'The International Legal Response to Terrorism' (n 5) 144–6; Jean Combacau, 'The Exception of Self-Defence in UN Practice' in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Kluwer Academic, London, 1986) 9, 26.

[45] UN Doc S/1998/780.

[46] The Sudan, in a letter to the Security Council, denied that the pharmaceutical plant in Khartoum was used for terrorist purposes. UN Doc S/1998/786. Kuwait on behalf of the League of Arab States, condemned the United States for its attack on the Sudan. UN Doc S/1998/789; UN Doc S/1998/800. The Movement of Non-Aligned Countries similarly condemned the attack against Sudan as a unilateral and unwarranted act of aggression. UN Doc S/1998/879.

1985, the US 1998 campaign in Afghanistan was directed solely against Al Qaeda facilities, and not against Afghanistan.[47]

The Taliban's acquiescence in terrorism very clearly played a role in the international community's accepting a use of force in Afghan territory in response to the 1998 embassy attacks. This State practice, however, appears to be inconsistent with a strict interpretation of the ICJ's jurisprudence examined above—which could (but should not) be read as holding uses of force against non-State actors to be illegitimate exercises of the right of self-defence unless the armed attacks carried out by those non-State actors are attributable to the State in whose territory defensive force is used. One might be tempted to reconcile the central role Afghan acquiescence played in legitimizing the US use of defensive force with an attribution based approach to the definition of 'armed attack' by positing that acquiescence now forms a basis for attributing non-State terrorist conduct to a State.[48] The better explanation, as suggested above, is to admit that the Court has yet to engage recent State practice of using defensive force against non-State actors in reliance on Article 51 of the UN Charter, and to consider acquiescence in terrorism (or worse, active support for terrorists operating from a State's territory) as the element which accounts for the necessity of the defensive use of force. While this argument was rejected by the international community in 1976 and 1985, largely based on the facts, the fact of Taliban acquiescence in Al Qaeda terrorist activities in Afghanistan is uncontroversial. To the extent that there has been any change in the *jus ad bellum* based on the 1998 military campaign in Afghanistan—it is not a shift in the rules on attribution, or the emergence of a right to violate a State's territorial integrity irrespective of that State's non-involvement in terrorist attacks launched from its territory. It is more likely a broader acceptance that non-State actors themselves (as distinct from the State from whose territory they operate) can be the target of defensive force under Article 51 when that use of force is necessary given an inability to rely on the host State's cooperation in counter-terrorism.[49]

The 2001 military campaign in Afghanistan is harder to test against a necessity and proportionality based justification for uses of defensive force against non-State actors in foreign territory because it targeted both non-State actors and Afghanistan's de facto

[47] The US position at the time was that Al Qaeda operated on its own, without having to depend on a State sponsor for support (although depending on State acquiescence). See 'Contemporary Practice of the United States' (2000) 94 AJIL 367.

[48] For an argument to this effect, see 'Remarks by Derek Jinks' (2003) 97 American Soc'y Intl L Proceedings 144; Derek Jinks, 'State Responsibility for the Acts of Private Armed Groups' (2003) 4 Chicago J Intl L 83; Daniel Janse (n 5) 168–9.

[49] See Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993, 997, arguing that terrorist organizations (and not the State from whose territory they operate) might be legitimate targets of defensive force, and that the violation of the host State's sovereignty is legally justified by its aiding and abetting terrorism, in violation of its duty to refrain from doing so. Cassese does not legitimate a defensive use of force against non-State actors, in violation of the territorial State's territorial integrity, based on the 'necessity' requirement to which the exercise of self-defence is subject, but recognises that there cannot be a use of force in a foreign State's territory against terrorists absent a justification for the violation of territorial integrity and sovereignty. See also Jack Beard, arguing that a right to use force in self-defence against an 'armed attack' by non-State actors should be coupled with a State's violation of Art 2(4) (in supporting or acquiescing in terrorism), thereby rendering the relevant State susceptible to uses of force against non-State actors in its territory. 'America's New War on Terror: The Case for Self-Defence under International Law' (2002) 25 Harvard J L & Public Pol'y 559, 580–2.

Government. The United States, in its letter to the Security Council dated 7 October 2001, informed the Council that

> [it had] initiated actions in the exercise of its inherent right of individual and collective self-defence following the *armed attacks* that were carried out against the United States on 11 September 2001 . . . The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization *have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation* . . . In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and *military installations of the Taliban regime in Afghanistan*.[50]

The Security Council is widely considered to have endorsed and even invited the United States' position that the terrorist attacks of 11 September gave rise to the right to use force in self-defence. In particular, Security Council Resolution 1368 condemned the terrorist attacks of 11 September 2001 and '*Recogni*s[*ed*] the inherent right of individual or collective self-defence in accordance with the Charter.'[51] Both NATO and the Organization of American States, which at their inception had required armed attacks to be attributable to a State before force in self-defence would be justified,[52] invoked their collective security arrangements in response to the 9/11 terrorist attacks.[53] States informing the Security Council of measures taken in Afghanistan in exercise of the collective right of self-defence emphasized that uses of force were directed against both Al Qaeda bases and the Taliban which supported and harboured Al Qaeda (but not against the Afghan people or Islam).[54] Unlike the military campaign in 1998, the international community viewed both Al Qaeda and the Taliban as legitimate targets of defensive force.[55] If we accept that the ICJ's decisions in *Nicaragua*

[50] (emphasis added) UN Doc S/2001/946. While accusing the Taliban of acquiescence, the letter stopped short of alleging that the Taliban was, as a matter of international law, responsible for the 9/11 terrorist attacks. See Christopher Greenwood, 'International Law and the "War against Terrorism" ' (2002) 78 Intl Affairs 301, 311–12.

[51] SC Res 1368 (2001). The Council again reaffirmed the right to individual and collective self-defence in SC Res 1373 (2001).

[52] The Foreign Relations Committee of the United States, in commenting on the phrase 'armed attack' in Art 5 of the North Atlantic Treaty, 4 Apr 1949, <www.nato.int/docu/basictxt/treaty.htm>, stated that 'the words "armed attack" clearly do not mean an incident created by irresponsible groups or individuals, but rather an attack by one State upon another'. US Senate, Report of the Committee on Foreign Relations on the North Atlantic Treaty, Exec Rep No 8, 13. Similarly, Art 3 of the Inter-American Treaty of Reciprocal Assistance, 2 Sept 1947, 21 UNTS 77, stipulates that 'The High Contracting Parties agree that *an armed attack by any State* against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties *undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nation*' (emphasis added).

[53] See NATO update, 2 Oct 2001, available at <www.nato.int/docu/update/2001/1001/e1002a.htm>; Convocation of the Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs to Serve as Organ of Consultation in Application of The Inter-American Treaty of Reciprocal Assistance, CP/RES. 797 (1293/01), 19 September 2001, <www.oas.org/ main/main.asp?sLang=E&sLink=http:/ /www.oas.org/OASpage/press_releases/home_eng>.

[54] See UN Doc S/2001/967 (European Union); UN Doc S/2001/1005 (Canada); UN Doc S/2001/1127 (Germany); UN Doc S/2001/1193 (New Zealand).

[55] But see Jordan Paust, arguing that Al Qaeda was a legitimate target of defensive force, but that the Taliban, to which the 11 September attacks could not be attributed (because acquiescence is not a basis for attribution) , was not a legitimate target. Paust (n 27) 540–3.

and *DRC v Uganda* require attributability before the territorial State can *itself* be the subject of defensive force, the targeting decisions in the 2001 US-led campaign appear to support the argument that acquiescence in terrorism was accepted as a basis for attributing a terrorist attack to the State from whose territory the terrorists operated. Some authors have argued that support for targeting the Taliban in 2001 is based on the attributability of the 9/11 terrorist attacks to the Taliban, but reject acquiescence as the basis of attribution. Rather, the argument is that active Taliban support for Al Qaeda forms the basis for attribution.[56] These arguments, while correctly refusing to stretch the grounds on which conduct will be attributable to a State, do not account for the fact that States invoking the right of collective self-defence emphasized the Taliban's acquiescence in (not support for) Al Qaeda's terrorist activities.[57]

In the post-Al Qaeda world, the 2001 Afghan military campaign remains the only case in which the international community accepted a State's right to use force in self-defence against both non-State terrorist actors *and* the State from whose territory such terrorist actors operated. Subsequent invocations of the right of self-defence in response to terrorist attacks have invoked the right only as against non-State actors. For instance, following a terrorist attack on a café in Haifa in 2003, Israel launched a guided missile attack in Syrian territory—targeting what it claimed to be a terrorist base used by Syrian and Iranian sponsored Islamic Jihad—responsible for terrorist attacks against Israel (including the Haifa suicide attack).[58] Reminiscent of its legal arguments in 1985, and following the example of the 1998 US military campaign in Afghanistan, Israel accused Syria of complicity in terrorist attacks by Islamic Jihad, but was very careful to emphasize that its military operation was directed specifically at the Ein Saheb terrorist base.[59] The argument therefore sounds very much like one justifying incursions into Syrian territory based on Syrian complicity in terrorism, a resulting inability to rely on Syria to address Israel's security concerns, and the targeted nature of the defensive measures. The Security Council considered the matter following letters of complaint by Syria[60] and Lebanon.[61] Despite Islamic Jihad being recognised

[56] See Ratner, '*Jus Ad Bellum* and *Jus In Bello*' (2002) 96 AJIL 905, 913, arguing that States supported the 2001 US-led campaign against the Taliban not because acquiescence is a basis for attributing non-State conduct to a State, but because there were in fact very strong ties between the Taliban and Al Qaeda. O'Connell argues that, based on evidence that the Taliban and Al Qaeda mutually depended on each other for their continued existence, the case might be made that Al Qaeda's terrorist attacks are attributable to the Taliban, particularly under the *Tadić* standard, thereby justifying uses of force against both Al Qaeda and the Taliban. Mary Ellen O'Connell, 'Evidence of Terror' (2002) 7 JCSL 19, 32. Stahn argues that support for the decision to target the Taliban in the 2001 US-led campaign in Afghanistan amounts to an overturning of the effective control test set forth in *Nicaragua* as a basis for attribution, and the adoption of the overall control test set forth in *Tadić*—and that the 9/11 terrorist attacks are attributable to the Taliban on the basis of the overall control test given its provision of financial, logistical or other support to Al Qaeda. Stahn rejects acquiescence as a legitimate basis for targeting a State in response to terrorist attacks by non-State actors operating from its territory. Carsten Stahn, 'Terrorist Acts as "Armed Attack": The Right to Self-Defence, Article 51(1/2) of the UN Charter, and International Terrorism' (2003) 27 Fletcher Forum of World Affairs 35, 42–9.

[57] See also National Commission on Terrorist Attacks upon the United States, *Final Report of the National Commission on Terrorist Attacks upon the United States* (WW Norton & Co, New York), which called into doubt the degree of control the Taliban exercised over Al Qaeda, instead finding that senior officials in the Taliban regime were opposed to the 11 September attacks.

[58] UN Doc S/PV.4836 (2003) 5.

[59] ibid.

[60] UN Doc S/2003/939.

[61] UN Doc S/2003/943.

as a terrorist organization by the EU,[62] EU Member States condemned Israel's military response to the Haifa bombing,[63] as did most other States appearing before the Council.[64] The Secretary General condemned both the Israeli attack in Syria and the preceding terrorist attack in Haifa.[65] While the expressions of condemnation before the Security Council have been interpreted as an absence of general support for a wide right to use force against terrorist training camps in a third State,[66] this is not necessarily the lesson to be drawn from the condemnations. Most States firmly situated their comments on the terrorist attack in Haifa and the Israeli response thereto within the broader framework of the Middle East peace process. Their expressions of condemnation were based on the effect both attacks would have on the implementation of the Road Map devised by the Quartet, which was released in between the attack on Haifa and Israel's military campaign in Syria.[67] None of the delegations making presentations before the Security Council specifically addressed the legality of defensive force specifically targeting terrorist bases in a third State given that State's complicity or acquiescence in terrorist operations planned or launched from its territory.

On several occasions throughout 2002, the Russian Federation reserved the right to use force in self-defence in Georgian territory against Chechen and terrorist bases from which attacks were launched against it. In particular, the Russian Federation claimed that despite assurances by Georgia that it was restoring order along its border (including claims to be eliminating the possible use of its territory by international terrorist structures with the help of friendly States, including the United States),[68] Georgia was in fact unwilling to take measures to halt terrorist attacks against Russian territory from its border region. As a result, 'the responsibility for the consequences of the armed incursion by bandits' into Russian territory 'lay fully with Georgia'.[69] Russia has therefore asserted a right to use force directly against non-State actors and its accusation that Georgia is unwilling to take measures to prevent its territory from being used as a terrorist base again reaffirms the role necessity and proportionality play in a State's conception of its own legitimate right to use force in self-defence against non-State actors. No Security Council action has been taken on the matter, but Georgia did object to Russia's interpretation of Article 51 of the UN Charter, claiming that Russia's characterization of the facts was not accurate, and that the Russian Federation has not been subjected to armed aggression by Georgia.[70]

In July 2006, Hizbollah abducted two Israeli soldiers and launched a number of rockets from southern Lebanon into northern Israeli towns. Israel's consequent use of force in Lebanese territory is the most recent example of an invocation of the right of self-defence in response to attacks by non-State actors.[71] As has been Israel's consis-

[62] Official Journal of the EU, Council Common Position 2005/847/CFSP of 29 Nov 2005.

[63] UN Doc S/PV.4836 (2003) 9 (Spain, United Kingdom) 10 (Germany), 11 (France).

[64] UN Doc S/PV.4836 (2003) 10: Only the US, which also characterizes Islamic Jihad as a terrorist organization, did not condemn the Israeli attack and admonished Syria for 'harbouring and supporting the groups that perpetrate terrorist acts'.

[65] UN Press Release, SG/SM/8918, 6 Oct 2003.

[66] See for eg Gray (n 20) 175.

[67] Released 30 Apr 2003. See <http://www.un.org/News/dh/mideast/roadmap122002.pdf>.

[68] UN Doc S/2002/250.

[69] UN Doc S/2002/854. See also UN Doc S/2002/1012.

[70] UN Doc S/2002/1035. UN Doc S/2002/1033.

[71] It should be noted that Israel was not considered to be acting solely in response to Hizbollah's abductions or rocket launchings, but in response to the unacceptable terrorist threat

tent practice, it claimed not to be acting against the territorial host State, but primarily against non-State terrorists.[72] The scale of Israel's use of force in Lebanese territory, particularly as regards the destruction of all three runways at Beirut International Airport[73] and the significant number of civilian deaths,[74] militated against broader acceptance of Israel's characterization of its defensive measures.[75] Nevertheless, Israel consistently maintained that it was targeting Hizbollah strongholds or weapons delivery routes, and that casualties were the result of Hizbollah's practice of using civilians as human shields.[76]

A majority of Security Council members recognized Israel's right to defend itself,[77] implicitly accepting a right to use force in self-defence against non-State actors. These States also underlined the need for Lebanon to extend its exclusive control over all of its territory or to act in prevention of Hizbollah's attacks against Israel.[78] Taken together, these positions amount to a recognition that defensive force in foreign territory against non-State actors is sometimes necessary given the host State's failure

posed more generally by Hizbollah. See the statement by Mr Nambiar (Special-Adviser to the Secretary-General) to the Security Council, UN Doc S/PV.5493 (2006) 5. Whether Hizbollah's provocations amounted to an 'armed attack' within the meaning of Art 51 of the UN Charter is beyond the scope of this paper, but raises additional concerns about the scale of Israel's response and the legality of preventive self-defence.

[72] Israel claimed that it 'has repeatedly been compelled to act not against Lebanon, but against the forces and the monstrosity which Lebanon has allowed itself to be taken hostage by'. S/PV.5503 (2006) 4. Israel also invoked Lebanese, Iranian, and Syrian responsibility for Hezbollah's activities, but such invocations did not appear to be in support of a further claim of attributability for the purposes of a defensive use of force. See S/PV.54899 (2006) 6.

[73] See 'Israel Imposes Labanon Blockade' *BBC* (13 July 2006) <http://news.bbc.co.uk/2/hi/middle_east/5175160.stm>.

[74] The UN High Commissioner for Human Rights and segments of civil society suggested that Israel's indiscriminate use of force and its impact on Lebanon's civilian population may have amounted to war crimes. See 'Q&A: mid-East War Crimes' *BBC* (21 July 2006) <http://news.bbc.co.uk/2/hi/middle_east/5198342.stm.>; Human Rights Watch, 'Fatal Strikes; Israel's Indiscriminate Attacks against Civilians in Lebanon' <http://hrw.org/reports/2006/lebanon0806/>; Amnesty International, 'Deliberate destruction or "collateral damage"? Israeli attacks on civilian infrastrcuture' <http://web.amnesty.org/library/print/ENGMDE180072006>.

[75] eg. Qatar characterized Israel's use of force as beyond its stated objective, given the civilian nature of the Israeli targets. UN Doc S/PV.5493 (2006) 14. Lebanon clearly rejected Israel's contention to be acting primarily against non-State terrorist targets: 'It has been very clear from the beginning that it was not Hizbollah that was the target. It was Lebanon that was the target. Infrastructure was targeted and hundreds of civilians were killed before Israel even took up any campaign against Hizbollah and its positions', S/PV5498 (20067) 6. The Secretary General also characterized Israel's use of force as 'collective punishment of the Lebanese people', S/PV.5492 (2006) 3. Argentina similarly qualified Israel's use of force as 'collective punishment', S/PV.5489 (2006) 9.

[76] See S/PV.5508 (2006) 5.

[77] S/PV.5489 (2006), Argentina 9; Japan 12; United Kingdom 12; Peru 14; Denmark 15; Slovakia 16; Greece 17; France 17. S/PV.5493 (2006), United States of America 17. The Secretary General also acknowledged Israel's right to defend itself against Hizbollah attacks, under Art 51 of the UN Charter. S/PV.5492 (2006) 3; S/PV.5498 (2006) 3.

[78] S/PV.5489 (2006), Argentina 9; United States of America 10; Japan 12; United Kingdom 13; United Republic of Tanzania 14; Peru 14; Denmark 15; Greece 17; France 17. See the statement of the Secretary General to the Security Council. S/PV.5492 (2006) 4. See also SC Res 1559 (2004) paras 1–3; SC Res 1583 (2005) paras 3–4; SC Res 1655 (2006) paras 3, 6 & 8; SC Res 1680 (2006) preamble; SC Res 1701 (2006) para 3.

(rather than its unwillingness)[79] to prevent its territory from being used as a base for terrorist operations.[80] All but one of the States recognizing Israel's right to act in self-defence also characterized Israel's use of force in July 2006 as disproportionate or excessive.[81] Again, underlying such claims is an acceptance of the necessity of resorting to defensive force, while rejecting the scale of that force as a proportionate response to the particular threat posed.

All invocations of the right to use force in self-defence against terrorist attacks since the 2001 US-led campaign in Afghanistan purport to be based on a right to use defensive force against non-State terrorist actors, not against the State acquiescing in their activities. These invocations are consistent with the position of this paper—that a middle ground can be found between the two extremes that either hold that terrorist attacks must be attributable to a State before a use of force in self-defence within that State's territory is legitimate, or posit that a right to use defensive force against non-State actors exists irrespective of the territorial State's non-involvement. The middle ground accounts for the place a State's acquiescence in or consistent failure to suppress terrorist activities occupies in the self-defence equation. Provided that a use of defensive force is appropriately targeted, the attendant violation of the host State's territorial integrity falls within the scope of the Article 51 exception when that use of force is also necessary. And it is the State's acquiescence in or consistent failure to suppress international terrorism that responds to the requirement that the use of force be necessary, given an inability to rely on the host State to prevent its territory from being used as a base for terrorist operations.

IV. CONCLUSION

A right to use force in self-defence targeted against non-State actors in the territory of a State that is acquiescing in their terrorist activity explains the 2001 military campaigns against Al Qaeda bases in Afghanistan. It does not explain the use of force against the Taliban itself. What we are left with is the possibility that in the terrorism context, acquiescence is a basis for attributing non-State conduct to a State. That or acquiescence in terrorism itself amounts to an armed attack which gives rise to the right of self-defence. This latter position is extreme, and is not generally reflected in the literature as a realistic interpretation of any changes to the *jus ad bellum* resulting from post-11 September practice, not least because of the grave risks involved that aggressive force will be disguised as self-defence in the 'war on terror'.[82] Despite the overwhelming support for

[79] Lebanon expressly acknowledged that it needed to extend its authority throughout its territory. S/PV.5493 (2006) 13.

[80] On the use of defensive force against non-State actors in the territory of a State that is incapable of fulfilling its duty of diligent terrorism prevention, see Yoram Dinstein, 'The International Legal Response to Terrorism' (n 5) 146. See also *DRC v Uganda*, Separate Opinion of Judge Kooijmans, paras 27–31.

[81] S/PV.5489 (2006), Argentina 9; Japan 12; United Kingdom 12; United Republic of Tanzania 13–14 (considered Israel's use of force as disproportionate without having expressly recognized Israel's right to use force in self-defence); Peru 14; Denmark 15; Slovakia 126; Greece 16; France 17. The United States is the only State to have explicitly recognized Israel's right to defend itself without characterizing Israel's defensive measures as disproportionate or excessive. The Secretary General also condemned Israel's excessive use of force. S/PV.5492 (2006) 3; S/PV.5498 (2006) 3.

[82] See Jules Lobel, 'The Use of Force to Respond to Terrorist Bombings: The Bombing of

the 2001 US-led campaign in Afghanistan, it remains the only internationally accepted example of a use of force directed against a State's apparatus, where that State did not launch the armed attacks being responded to. And while it is still too early to tell whether this practice will develop into a rule recognizing a State's acquiescence in, or failure to suppress, international terrorism as a basis of attribution, the international community's reaction to Israel's 2006 military campaign in Lebanon, and its repeated calls for Israel to refrain from targeting Lebanese infrastructure, militate against such a development. In the meantime, State practice strongly suggests that the international community has recognized a right to use force in self-defence targeting non-State actors in foreign territory to the extent that the foreign State cannot be relied on to prevent or suppress terrorist activities. We have not had to stray far to explain the recent State practice, and certainly not as far as giving victim States a carte blanche in using force in foreign territory against non-State actors. The balancing mechanism, between the right of defence against armed attacks, and the prohibition against violations of a State's territorial integrity, lies in the customary law elements of the right of self-defence itself. Little has therefore changed. A use of force must be necessary and proportionate in order to amount to a legitimate exercise of self-defence. In an era of terrorism carried out by non-State actors, the necessity and proportionality requirements allow States to resort to defensive force against terrorist attacks, but only in circumstances where the resulting violation of the host State's territorial integrity would be legitimate based on that State's refusal to meet its obligations to prevent and suppress international terrorism.

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Sudan and Afghanistan' (1999) 24 Yale J Intl L 527, 543; Michael Byers, 'Terrorism, the Use of Force, and International Law after 11 September' (2002) 51 ICLQ 401, 411–14. But see W Michael Reisman, 'International Legal Responses to Terrorism' (1999) 22 Houston J Intl L 37, making a policy argument that States which sponsor or acquiesce in terrorism should not be insulated from highly coercive measures which might serve to deter future acts of international terrorism. See also Franck (n 27) 841, suggesting that the Taliban's responsibility for placing its territory at the disposal of terrorists, and for harbouring the perpetrators of terrorism (as reaffirmed by Security Council resolution 1368), makes it susceptible to defensive uses of force directed against it (as distinguished from uses of force directed against Al Qaeda).

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