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Lawful Self-Defense to Terrorism

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On October 7, 2001, the United States and the United Kingdom launched operation Enduring Freedom. Enduring Freedom was a massive aerial and land operation on the territory of Afghanistan in response to the September 11 terror attacks on the United States. The two governments justified Enduring Freedom as an exercise of lawful self-defense. This article examines the elements of self-defense, applying them to Enduring Freedom. At the outset, Enduring Freedom did indeed meet the conditions of lawful self-defense, but later stages of the operation may have gone beyond the bounds of proportionality. The article also looks at the alternatives to self-defense for those cases that do not meet the threshold for all-out military action on the territory of a foreign state.

The right to take military action on the territory of another state is at the core of a self-defense and why it is of concern to international society. Governments have decided they cannot eliminate the right to use force in self-defense in all cases. Nevertheless, they have, through international law, limited force in self-defense to the most exigent circumstances. Unless a state has received United Nations Security Council authorization, it must meet four conditions to engage in lawful self-defense: First, the defending state must be the victim of a significant armed attack. Second, the armed attack must be either underway or the victim of an attack must have at least clear and

1. See Patrick E. Tyler, U.S. and Britain Strike Afghanistan, Aiming at Bases and Terrorist Camps; Bush Warns 'Taliban Will Pay a Price,' N.Y. TIMES, Oct. 8, 2001, at A1. On October 7 the US and UK had some military advisers on the ground in Afghanistan. The major part of the operation at the start was from the air.
2. See infra note 9.
3. As will be discussed in Part V below, the United States does not, at the time of writing, have a case for self-defense against Iran, Iraq, or North Korea, the three countries identified as the "axis of evil" by President Bush in his State of the Union Address. See Edward Epstein, Bush's Tough Talk Singles Out 3 Rogue States, Phase II: Addressing the Broader Threat, S.F. CHRON., Jan. 31, 2002, at A1. See MARY ELLEN O'CONNELL, THE AMERICAN SOCIETY OF INTERNATIONAL LAW PRESIDENTIAL TASK FORCE ON TERRORISM, The Myth of Pre-emptive Self-Defense, available at http://www.asil.org (last visited Oct. 13, 2002).
4. The U.N. Charter contains a broad prohibition on force with a narrow exception for self-defense in the face of an armed attack. See infra notes 9-13 and accompanying text.
5. See infra notes 9-24 and accompanying text.
convincing evidence that more attacks are planned. Third, the defending state’s target must be responsible for the significant armed attack in progress or planned. Fourth, the force used by the defending state must be necessary for the purpose of defense and it must be proportional to the injury threatened.

I. THE VICTIM OF SIGNIFICANT ARMED ATTACK

Articles 2(4) and 51 of the United Nations Charter prohibit the unauthorized use of force except in self-defense against an armed attack, and, even then, only until the Security Council acts. Stated positively, “Art. 51 clearly licenses at least one kind of resort to force by an individual member State: namely, the use of armed force to repel an armed attack.” Any other

6. See infra notes 25-72 and accompanying text.
7. See infra notes 73-86 and accompanying text.
8. See infra notes 87-114 and accompanying text.
9. Article 2(4):
   All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, amended 24 U.S.T. 2225, T.I.A.S. 7739, U.N. CHARTER art. 2, ¶ 4 [hereinafter U.N. Charter].
10. Article 51:
   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 Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.


use of armed force must either be authorized by the Security Council\textsuperscript{11} or so minor that it falls under a \textit{de minimis} exception.\textsuperscript{12}

The International Court of Justice, in a case brought by Nicaragua against the United States and decided in 1986,\textsuperscript{13} provides an authoritative interpretation of the right of self-defense as it had evolved by the time of the judgment. The Court explains the requirement for an armed attack and the requirement for the armed attack to be significant before a state may use force on the territory of another state in individual or collective self-defense.\textsuperscript{14} The Court places emphasis for its analysis on the United Nations General Assembly's 1974 Definition of Aggression.\textsuperscript{15} The Definition lists acts that trigger the right of self-defense, when, as the Court emphasizes, the act is on a significant scale. These include invasion of territory, bombardment of territory, blockade of ports, attack on air, sea or land forces, and the "sending \ldots of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."\textsuperscript{16} On the other hand, the Court found that the low-level shipments of weapons and supplies that were

\begin{footnotes}
\item[11.] A number of international law scholars support a right to intervene in humanitarian crises. As of the time of writing, however, no government takes the official position that such humanitarian intervention is a firmly established exception to the Articles 2(4)/51 paradigm. For evidence of the U.S. government position, see Mary Ellen O'Connell, \textit{Authority to Intervene, INTERNATIONAL LEGAL CHALLENGES FOR THE TWENTY-FIRST CENTURY, PROCEEDINGS OF A JOINT MEETING OF THE AUSTRALIA AND NEW ZEALAND SOCIETY OF INTERNATIONAL LAW AND THE AMERICAN SOCIETY OF INTERNATIONAL LAW} 303, 304 (June 26-29, 2000). For a more detailed analysis of humanitarian intervention, see SIMON CHESTERMAN, \textit{JUST WAR OR JUST PEACE?} (2001).
\item[12.] The Definition of Aggression provides:
\begin{quote}
\textit{Article 2.} The first use of armed force by a State in contravention of the Charter shall constitute \textit{prima facie} evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.
\end{quote}
\begin{quote}
\end{quote}
\item[13.] Nicaragua, supra note 12.
\item[14.] Nicaragua, supra note 12, at ¶ 194-95, 211. Strictly, the Court actually interpreted the meaning of self-defense under customary international law rather than Article 51. It found no difference between the two, however. For analyses of this and other issues in the case, see Terry D. Gill, \textit{Litigation Strategy in the Nicaraguan Case at the International Court, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY} 197 (Yoram Dinsein & Mala Taby eds., 1989).
\item[15.] Nicaragua, supra note 12, at ¶ 194-95, 211, citing \textit{Definition of Aggression, supra} note 12.
\item[16.] \textit{Definition of Aggression, supra} note 12, art. 3.
\end{footnotes}
being sent from Nicaragua to rebels fighting the government of El Salvador did not amount to an armed attack on El Salvador that could trigger the right of self-defense.\textsuperscript{17} The Court stated affirmatively that it was unable to consider that the "provision of arms to the opposition in another State constitutes an armed attack on that State."\textsuperscript{18} Nor could the Court find that a "mere" border incursion could trigger self-defense.\textsuperscript{19}

With regard to September 11, Security Council resolutions adopted in the wake of the attacks refer to the right of self-defense. In particular, Resolution 1373 (September 28) reveals the Council's consensus as to self-defense and terrorism shortly before Enduring Freedom was launched:

The Security Council, Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001, Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts . . ., Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001), Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts. . . .\textsuperscript{20}

The operative part of the Resolution mandates economic sanctions to combat terrorism. It does not authorize the use of armed force, nor does it explicitly authorize the United States to use armed force in self-defense to the September 11 attacks.\textsuperscript{21} Nevertheless, the Resolution does support the conclusion that the September 11 attacks were significant enough to trigger the right of self-defense, if the other conditions of legality are met.\textsuperscript{22} In several subsequent resolutions relating to terrorism and the situation in Afghanistan, neither the Security Council nor the General Assembly condemned Enduring Freedom as a violation of the Charter.\textsuperscript{23} Moreover, it is quite clear that the Resolutions did not intend to displace self-defense by the

\textsuperscript{17} Nicaragua, supra note 12, at \textsuperscript{195} 230. It is not entirely clear whether the Court intended to say that providing weapons and other supplies to persons attacking a state could never amount to an attack itself, or only whether the low level shipments proven in the Nicaragua case did not.
\textsuperscript{18} Nicaragua, supra note 12, at \textsuperscript{230}.
\textsuperscript{19} Id. at \textsuperscript{194-95}.
\textsuperscript{21} Id.
\textsuperscript{22} Id.
United States with measures by the Security Council.\textsuperscript{24} Therefore, we can conclude that the first condition for lawful self-defense was met. The United States was the victim of a significant armed attack.

II. TO DETER THE NEXT ATTACK

Armed force in self-defense must have defense as its object. Force in self-defense must aim at stopping an attack in progress, defending against a future attack once an attack has occurred, or ending an unlawful occupation.\textsuperscript{25} Lawful self-defense cannot be a mere act of punishment or revenge. Armed force to "send a message" or to generally deter is unlawful.\textsuperscript{26} Armed counter-attack must have the aim of more specific defense. Where a significant armed attack has already occurred but is not on-going, the defending state must show at least by clear and convincing evidence that future attacks are planned.\textsuperscript{27} In the case where no actual attack has yet struck its intended target, the defending state may act only where it has clear and convincing evidence of an incipient attack—one that is underway, requiring an instant response.\textsuperscript{28}

A use of force not aimed at specific defense could constitute an unlawful armed reprisal if on a small scale or even an act of aggression if on a larger scale. Reprisals are not considered measures of self-defense—they do not repel on-going armed attacks or seek to dislodge an unlawful occupation.\textsuperscript{29} Force unrelated to an actual armed attack or force used long after an armed

\textsuperscript{24} Some scholars seem to believe that Resolution 1373, by mandating economic sanctions, obviates the US/UK right to use force. They argue that the sanctions called for in 1373 are the measures the Council has chosen to deal with the September 11 attacks per Article 51's limitation on the right to use force "until the U.N. Security Council can take steps necessary for international peace and security." See Michael Mandel, Say What You Want, But This War is Illegal, GLOBE & MAIL, Oct. 9, 2001, at A21 (Letter to the Editor). Resolution 1373 has no express terms to the effect that the Council believes it has foreclosed the U.S. use of force in self-defense, nor have any members of the Security Council voting to adopt the Resolution expressed such an interpretation. See U.N. Doc. S/RES/1373, supra note 20.

\textsuperscript{25} Röling, supra note 10, at 3. Reversing the consequences of an attack, such as ending an occupation is also lawful self-defense. Note the example of Kuwait following Iraq’s invasion and occupation, described in Mary Ellen O’Connell, Enforcing the Prohibition on the Use of Force: The U.N.’s Response to Iraq’s Invasion of Kuwait, 15 S. Ill. U. L.J. 453 (1991).

\textsuperscript{26} The ICJ required an armed attack prior to armed force in self-defense. Nicaragua, supra note 12, at ¶¶ 194-95, 211.

\textsuperscript{27} See O’Connell, supra note 3, at 8-10; Mary Ellen O’Connell, Evidence of Terror, 7 J. OF CONFLICT AND SECURITY L. 19, 30 (2002).

\textsuperscript{28} O’Connell, supra note 3, at 8-10.  

\textsuperscript{29} "Because of their nature reprisals come after the event and when the harm has already been inflicted." STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 17-18 (1996).
attack—absent a continuing wrong—is unlawful. The UN General Assembly has resolved that armed countermeasures or reprisals are unlawful and that states have a duty to refrain from them. The International Court of Justice has indicated in both Nicaragua and Corfu Channel that reprisals are unlawful.

Where a state does intend to use force in self-defense, it need not in all cases wait for the initial armed attack to actually strike its target. The Caroline Doctrine describes the conditions under which defense may begin: “[n]ecessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” This suggests that even before the bullets are flying, self-defense may begin if the necessity is overwhelming. Writers often provide the example of Israel in the 1967 war as having engaged in lawful, anticipatory self-defense against Egypt. Israel destroyed Egyptian fighter planes in formation for take-off. Subsequent evidence suggests that Israel knew Egypt did not plan to attack Israel. If so, Israel’s attack was unlawful. But where one state is in the process of launching an attack on another, self-defense may begin. There must be a plan for the attack, and the plan must be in the course of implementation. Once planes are in formation to implement a known plan of attack, a defending state would be justified in launching a pre-emptive attack in self-defense.

Unlike the case where no armed attack has yet occurred, the state, already a victim, may use self-defense even if the next attacks are not yet underway.

32. JOHN B. MOORE, 2 A DIGEST OF INTERNATIONAL LAW 412 (1906); HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 91-96 (1992); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 150-52 (2d ed. 1991).
33. See Le general Robin ne pese pas que Nasser Voulait la guerre, LE MONDE, Feb. 19, 1968. See also John Quigley, The United Nations Action Against Iraq: A Precedent for Israel’s Arab Territories?, 2 DUKE J. COMP. & INT’L L. 195, 203-13 (1992). Dinstein indicates the same conclusion concerning the strength of Israel’s evidence prior to striking: “Hindsight knowledge, suggesting that—notwithstanding the well-founded contemporaneous appraisal of events—the situation may have been less desperate than it appeared, is immaterial.” DINSTEIN, supra note 12, at 173.
34. Further discussion of when self-defense may begin is beyond the scope of this article which focuses on a case where an attack has already occurred. But see O’Connell, supra note 3.
The defending state need only show by clear and convincing evidence that future attacks are planned. In many cases of self-defense, the facts of the attack and the responsible party are evident for all the world to see. Iraq’s 1990 invasion of Kuwait is a case in point. When a less obvious event occurs, like the September 11 attacks, the state contemplating self-defense may have to provide evidence that future attacks are pending.

International law has no generally-accepted law of evidence. Nonetheless, sufficient authority exists to support an argument that any state engaging in self-defense in such circumstances must show by clear and convincing evidence that future attacks are planned. Several international courts and tribunals have addressed the point, as have scholars, and the United States itself has consistently referred to “clear,” “convincing” or “compelling” evidence in such cases. The clear and convincing evidence standard is also the best standard from a policy standpoint to promote the objectives of international society in regulating the use of force between states, that objective being to drastically limit the use of force.

Two binding decisions support the clear and convincing standard as a general standard for international law. In an arbitration between the United States and Canada where the United States claimed Canada was responsible for environmental damage, the arbitrators found “no State has the right to use or permit the use of its territory in such a manner as to cause injury . . . to the territory of another . . . when the case is of serious consequence and the injury is established by clear and convincing evidence.” Also, the Inter-American Court of Human Rights determined in the Velasquez Rodriguez case that forced disappearance could be proven by less than evidence beyond a reasonable doubt. Shelton reasons that clear and convincing evidence is the generally appropriate standard where allegations against states are made of systematic and grave violations of human rights. The European Court of Human Rights has required proof beyond a reasonable doubt in torture cases, but recently moved down from that standard in a forced disappearance case.

37. O’Connell, Evidence of Terror, supra note 27, at 18.
38. For a more complete discussion of this issue of evidence, see id.
39. Id. at 18-21.
43. Gobind Singh Sethi, Comment, The European Court of Human Rights’ Jurisprudence on Issues
The International Court of Justice (ICJ) has no established rules of evidence. However, it has referenced evidence standards from time-to-time. In *Corfu Channel* the court stated, “proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt.” In *Nicaragua v. United States*, however, where the issue of evidence was central to the case, the ICJ referred only to the need for “direct proof.” The United States declined to contest the case on the merits, but under the ICJ Statute, its failure to appear did not entitle Nicaragua to a default judgment. Nicaragua still had to put on a case “well founded in fact and law.” The Court accepted most, but not all, of Nicaragua’s claims. It did not accept Nicaragua’s arguments that the United States was responsible for serious human rights abuses committed by the Nicaraguan rebels known as the Contras. In the most important finding for the purposes of this analysis, the Court decided that “despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf.” Thus, state responsibility for non-state actors will follow only if the state controls the actors, control being proven by “clear evidence.”

United States officials consistently refer to at least “convincing” or “compelling” evidence when responding to terror attacks with armed force. The United States bombed Libya in 1986 in response to the terror bombing of a discotheque in Berlin. The Reagan Administration revealed evidence of the source of the bombing and plans for future attacks. President Reagan called the evidence of Libya’s involvement in the Berlin bombing “irrefutable” and referred to “solid evidence about other attacks Qaddafi has planned against U.S. installations and diplomats, and even American
tourists.” Indeed, in revealing the evidence, the U.S. compromised intelligence sources much to the consternation of the CIA. The U.S. justified the bombing as self-defense.

On June 26, 1993, the United States carried out an armed attack against Iraq in retaliation for an alleged assassination attempt against former president George Bush. President Clinton said the evidence linking the Iraqi government of Saddam Hussein to the plot was “compelling.” At the United Nations, then United States U.N. Representative Madeleine Albright justified the attack as legitimate self-defense.

In 1998, trucks rigged with bombs blew up outside the United States embassies in Kenya and Tanzania killing more than 200 people. On August 20, 1998, the United States launched bombing raids against the training camps in Afghanistan of a wealthy Saudi named Osama bin Laden and a factory in Khartoum, Sudan, also linked to bin Laden. “The president said the U.S. targets were a terrorist base in Afghanistan and a chemical weapons facility in Sudan. ‘We have convincing evidence these groups played the key role in the embassy bombings in Kenya and Tanzania.... We have compelling information that they were planning additional terrorist attacks against our citizens and others.’” Again, the United States reported to the Security Council that the attacks had been in self-defense. In the days that followed, however, several governments and arms control experts questioned the evidence linking the factory to bin Laden and to the production

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61. Id.
of chemical weapons. It became a case where international society judged the evidence insufficient: it was not clear and convincing.

Several prominent scholars also support a clear and convincing standard. In cases of force in response to terror, Greenwood refers to "sufficiently convincing" and "convincing evidence." Lobel advocates "stringent" evidence:

Given the potential for abuse of the right of national self-defense, international law must require that a nation meet a clear and stringent evidentiary standard designed to assure the world community that an ongoing terrorist attack is in fact occurring before the attacked nation responds with force. Such a principle is the clear import of the International Court of Justice's decision in Nicaragua v. United States.

Henkin, as well, finds that international law "recognize[s] the exception of self-defense in emergency, but limit[s it] to actual armed attack, which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication."

In addition to the views of scholars, judicial decisions, and the U.S. position, as a matter of policy, the standard for self-defense should be at least clear and convincing. The drafters of the Charter sought to "cut to a minimum the unilateral use of force in international relations." They aimed at nothing less than finally freeing the world from the scourge of war. In the course of their debates, they did finally concede to one explicit exception to the general prohibition on force. In case the Security Council might not act in time, states could undertake self-defense should they come under an armed attack. Such defense could continue until the Security Council acted. The self-defense exception was to be a very narrow one for extraordinary circumstances. Because the Security Council failed to be a pro-active agency, it has rarely come to the aid of a state suffering armed attack. Nevertheless, the intent of the drafters was clear that the right to use force should be kept to

64. Greenwood, supra note 51, at 935.
68. At the San Francisco Conference to draft the Charter, "[t]here was a presumption against self-help and even action in self-defence within Article 51 was made subject to control by the Security Council." Ian Brownlie, International Law and the Use of Force by States 275 (1963) and references collected therein.
a minimum.\textsuperscript{69} The rules of evidence can support the fulfillment of that intent by requiring clear and convincing evidence before a state may invoke the exception of self-defense. In domestic evidence law, certainly in the U.S., the law will generally require a party wishing to invoke an exception to a rule to do so by clear and convincing evidence. The same standard should apply to international evidence law, for the same underlying reason.

In the case of Enduring Freedom, both the United States and United Kingdom have argued that the September 11 attacks were part of a series of attacks that began in 1993 on the United States. Both have argued that future attacks in the same series were planned. The series began with the first attack on the World Trade Center. It included the embassy bombings in Tanzania and Kenya, and very likely included the attack on the USS Cole. Almost immediately following the September 11 attacks, the United States and several European states apprehended individuals who indicated more attacks were planned.\textsuperscript{70} The evidence was presented to NATO members and was called “compelling.”\textsuperscript{71} Thus, based on publicly available material, the United States and United Kingdom appeared to have clear and convincing evidence that the U.S. faced on-going attacks. Subsequent to the launch of Enduring Freedom, the United States found documentary evidence in Afghanistan confirming that more attacks in the series were indeed being planned.\textsuperscript{72}

III. BY THE RESPONSIBLE STATE

Establishing the need for taking defensive action can only justify fighting on the territory of another state if that state is responsible for the on-going attacks. It may well be that in a world of non-state actors, a group launching significant, on-going armed attacks has no link to a state and so no state can be the target of defensive counter-attack. In those cases, measures other than self-defense on the territory of a state must be taken by the victim. Alternatives to self-defense are discussed in Part V below. This section

\textsuperscript{69} Id.

\textsuperscript{70} Peter Finn, Germans Identify More Terror Suspects; Police Watch Five People Who May Have Provided Support to Sept. 11 Hijackers, WASH. POST, Nov. 17, 2001, at A21, available at 2001 WL 30326105.


addresses situations in which a state is held responsible under international law, and, thus, when the defending state may take the fight to its territory.

In many cases, responsibility is obvious. In others, the defending state may need to provide evidence that the territorial state is responsible for the unlawful acts. Where a case must be made, the defending state must have clear and convincing evidence, based on the same analysis provided above. Some clandestine terror attacks are carried out by government agents, such as the case of the Berlin disco bombing by Libya in 1986.\(^7\) State responsibility was established once clear and convincing evidence was adduced that the agents of that state were involved.\(^7\) A state will also be responsible where it sends persons to carry out the attack even if those persons are not the state’s officials or agents,\(^7\) and it will be responsible where it has developed sufficiently close links with the group even if it does not control them.\(^7\) A recent case at the International Criminal Tribunal for Yugoslavia posits that a “role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group” results in responsibility for the group.\(^7\)

In other cases, with regard to such groups as those operating out of Lebanon against Israel\(^7\) or the Kurdish groups carrying out attacks in Turkey and Iran from bases in Iraq,\(^7\) the territorial state is not responsible for the acts themselves because it cannot control the acts of groups on its territory. In the

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73. Christiane Wirtz, Eine Discotehk würde zum Kriegsschauplatz, Berliner Landgericht; Hochrangig Angehörige des libyschen Geheimdienstes planten den Anschlag, SÜDDEUTSCHE ZEITUNG, Nov. 14, 2001, at 9. And it was confirmed by a Scottish Court that the bombing of an American passenger jet following the disco bombing was also carried out by Libyan agents. Allan Nacheman, Libyan Agent Guilty, Tripoli Blamed at Lockerbie Bombing Trial, AGENCE-FR. PRESSE, Jan. 31, 2001, 2001 WL32222591.


75. See Definition of Aggression, supra note 12, art. 3(g): “The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”

76. The ICJ in Nicaragua found that acts of the Contra rebels were not attributable to the United States because the evidence did not show that the United States exercised “effective control” over the Contras. Nicaragua, supra note 12, at ¶ 114-16.


case of Lebanon, the government was paralyzed because of a civil war; in the case of the Kurds, Iraq is prohibited by the UN from controlling the northern sector of its country, the area where the Kurds in question operate. In these cases, too, defense may be taken to the territory of the failed or impotent state. However, defense should aim at the responsible group and not at the government or the factions struggling for control of the state. Finally, in some cases a state becomes responsible when it adopts the acts of a terror group after the fact.

In the case of Enduring Freedom, the Taliban, Afghanistan's de facto government, developed such close links to the known terrorist organization al Qaeda that it became responsible for the acts of al Qaeda. With that responsibility came the right of the United States and United Kingdom to take the fight to Afghanistan. U.K. lawyers understood the facts they needed to show: the U.K.'s paper of 4 October carefully detailed links between al Qaeda and the Taliban.

The British paper states most significantly, that:

11. In 1996 Osama Bin Laden moved back to Afghanistan. He established a close relationship with Mullah Omar, and threw his support behind the Taliban. Osama Bin Laden and the Taliban regime have a close alliance on which both depend for their continued existence. They also share the same religious values and vision.

12. Osama bin Laden has provided the Taliban regime with troops, arms and money to fight the Northern Alliance. He is closely involved with Taliban military training, planning and operations. He has representatives in the Taliban military command structure. He has also given infrastructure assistance and humanitarian aid. Forces under the control of Osama bin Laden have fought alongside the Taliban in the civil war in Afghanistan.

13. Omar has provided bin Laden with a safe haven in which to operate, and has allowed him to establish terrorist training camps in Afghanistan. They jointly exploit the Afghan drugs trade. In return for active al-Qaeda support, the Taliban allow al-Qa'ida to operate freely, including planning, training and preparing for terrorist activity. In addition the Taliban provide security for the stockpiles of drugs.

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81. In Hostages, the ICJ found Iran was responsible for the hostage-taking at the United States Embassy because of the “failure on the part of the Iranian authorities to oppose the armed attack by militants . . . [and] the almost immediate endorsement by those authorities of the situation thus created.” Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, at 42 (May 24).
83. Id.
An independent expert concluded that the "[t]he Taliban Army . . . includes al Qaeda. . . ." International society appears to accept the Taliban's responsibility. Little criticism has been heard against the United States or United Kingdom for holding the Taliban responsible for the acts of al Qaeda.

On the other hand, the law clearly does not support a standard of responsibility in a case where a state merely harbored terrorists, and certainly not in a case where any link to terrorism was in the past or not to the terrorists who carried out the requisite armed attack. A state commits an act of aggression if it uses significant force against a state where no evidence has been found of the commission of on-going terror acts or where the evidence is insufficient to link the state to the relevant terror acts of a non-state actor. In those cases, as is discussed in Part V, the victim must use responses short of self-defense or obtain Security Council authorization to do more.

IV. USING ONLY NECESSARY AND PROPORTIONAL FORCE

Once the requisite armed attack occurs and is linked to a responsible state, the right of self-defense includes taking the defense to the territory of that state, if necessary to the defense and proportional to the injury threatened. Armed force used in self-defense must be necessary for the objective of defense, and it must be proportional to the injury threatened. The principles of necessity, proportionality, and distinction form the central

85. These examples are all less substantial links than those required by the authorities in notes 74-77, 81.
86. See Definition of Aggression, supra note 12.
88. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶ 141. Necessity restricts the use of military force to the attainment of legitimate military objectives. Proportionality requires that the force needed to attain those military objectives be weighed against possible civilian casualties. If the loss of innocent life or destruction of property is out-of-proportion to the importance of the objective, the objective must be abandoned. Proportionality prohibits force "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which be excessive in relation to concrete and direct military advantage anticipated." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 51, ¶ 5, 1125 U.N.T.S. 3. "In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy." Judith Gardam, Proportionality and Force in International Law, 87 AM. J. INT'L L. 391 (1993).
customary law principles of international humanitarian law. Necessity and proportionality further condition when force may be used in the first place. Necessity refers to military necessity, and the obligation that force be used only if necessary to accomplish a reasonable military objective. According to Bring:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

The military objective of self-defense is to repel on-going and future attacks. Proportionality, which is closely related to necessity, prohibits force “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to concrete and direct military advantage anticipated.”

Israel's response to terror attacks perpetrated by Palestinians and other anti-Israeli groups operating out of Lebanon, Jordan, and Tunisia have been particularly criticized for their lack of proportionality. Israel invaded Lebanon in 1982 in response to attacks by the Palestine Liberation Organization. The invasion went as far as the capital, Beirut, far from the area where attacks on Israel originated. The Israelis remained in Lebanon at that time for three-and-a-half months. Although the United States felt Israel had a right of self-defense with regard to the attacks it was suffering, even it felt Israel's response was out-of-proportion to those attacks.

91. Reisman & Stevick, supra note 90, at 94.
93. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, art. 51, ¶ 5, 1152 U.N.T.S. 3. “In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy.” See also Gardam, supra note 88.
94. See Hufford & Malley, supra note 78, at 155-60; see also Gray, supra note 80, at 116; Gregory M. Travallo, Terrorism, International Law and the Use of Military Force, 18 Wis. INT’L L.J. 145, 169 (2000).
95. Id.
When Kuwait was liberated, the coalition forces did not go all the way to Baghdad and did not eliminate the regime of Saddam Hussein. They liberated Kuwait and provided security for that country in the form of a buffer zone on the territory of Iraq. Operation Enduring Freedom properly aimed at eliminating the military capacity of the Taliban and al Qaeda. Leaders of either group could be apprehended and brought to justice in the United States or elsewhere. Eliminating the whole government structure created by the Taliban, as a war aim was beyond necessary self-defense. Attacking other states is wholly unjustifiable.

Enduring Freedom began consistently with the principles of necessity and proportionality. Secretary Powell indicated that the U.S. would not aim to eliminate the Taliban entirely. Events seemed to have overtaken the United States, however, when suddenly the Northern Alliance continued to Kabul and completely routed the Taliban from power. Judging from Powell's indications, the U.S. apparently did not intend this, and thus it may not be responsible for a disproportionate use of force. Nevertheless, several governments, including Afghanistan's new interim government, criticized the United States for continuing to bomb after the Taliban fell in December 2001. Continuing to use that amount and type of force may have exceeded both necessity and proportionality. The shift to more ground troops starting in January to respond to al Qaeda fighters in the Afghan hills was arguably closer to the necessity and proportionality standards, though bombing continued, with tragic consequences.

V. ALTERNATIVES TO SELF-DEFENSE

Where the conditions for self-defense are not met, a state has three options: it can seek Security Council authorization for the use of force; it can employ coercive countermeasures; or it can engage in cooperative policing.

96. See O'Connell, supra note 25.
The Security Council may authorize the use of armed force and lesser measures by a state when the Council finds a threat to the peace, breach of the peace, or act of aggression. The Council may respond with force to a broader range of violence than may states acting in self-defense because it may respond to mere threats, and not just armed attacks. Again, the force authorized must be necessary, proportional and discriminatory in the circumstances. In two cases where the Security Council sought the extradition of wanted terrorists, it imposed economic sanctions rather than authorizing the use of force or forceful apprehension of persons. The Security Council has also found the September 11 attacks to be a threat to international peace and security. It has called on “all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable.”

It calls on the international community to cooperate to suppress terrorism. It could call on all states to use force, even against states only threatening terror.

Where the right of self-defense against a state is not triggered and where the Security Council does not act, the first alternative for a victim of terror is the domestic criminal justice system of states. Individuals and groups carrying out attacks without the sponsorship of a state are common criminals. They clearly fall under the jurisdiction of the state on whose territory they are found: IRA terrorists in the United States are examples. Territorial states

100. U.N. Charter, art. 39.
104. U.N. Charter, arts. 39, 42.
105. On the rules of jurisdiction in international cases, see JURISDICTION, LIBRARY OF ESSAYS IN INTERNATIONAL LAW (W. Michael Reisman ed., 1999).
have an obligation to extradite or try individuals accused of terrorism.\textsuperscript{106} Trials must be fair and credible.

Failure to fulfill obligations in international law, including obligations to try or extradite accused terrorists, may give rise to the right to take countermeasures. Countermeasures are also the option for a state responding to another state's use of violence or even armed force, if the act is a single incident, rather than an on-going series. In such a case, a state may use countermeasures until the wrongdoer ceases the wrong and provides a remedy.\textsuperscript{107} Appropriate remedies can include compensation and assurances of non-repetition.

Countermeasures are actions which violate the law but are taken in response to prior violations.\textsuperscript{108} Countermeasures must be proportional to the injury suffered and are available only if the parties involved have no explicit commitment to use alternative means of dispute settlement.\textsuperscript{109} Certain measures are prohibited, in particular, armed force and violations of human rights or diplomatic immunity. Countermeasures may be taken by the injured states, but in the case of universal jurisdiction crimes, it may be lawful for any state to take measures.\textsuperscript{110} The attacks of September 11 involved the intentional killing of so many innocent people that they qualify as crimes against humanity, which are universal jurisdiction crimes.\textsuperscript{111} Any state's courts should be able to exercise judicial jurisdiction over persons accused of


\textsuperscript{107} See Responsibility of States, supra note 74.


\textsuperscript{109} Responsibility of States, supra note 74, at 50.

\textsuperscript{110} Id. at arts. 40-41.

universal jurisdiction crimes. Any state may arguably aid in the enforcement of the law prohibiting such crimes by taking countermeasures. Though the most common form of countermeasure is economic sanctions, forceful action short of armed force also fits the definition of lawful countermeasure. For example, a state may be able to send agents to apprehend terrorists from another state that refuses to extradite or try them. A police action or incursion is short of armed force and is arguably proportional to the wrong of harboring terrorists. Support for this interpretation of the law is limited, however. We have examples of police actions and the like on state territory or areas beyond national jurisdiction which states treat as not amounting to prohibited armed force. These police actions are better classified as de minimis uses of force. The best known case is the “volunteer” action to kidnap Eichmann from Argentina on behalf of Israel. The action was condemned. Yet it occurred before the development of the “try or
extradite" principle.\textsuperscript{116} Israel could not justify its action as a countermeasure because it was not responding to a prior wrong by Argentina. On the other hand, no state characterized the kidnapping as a use of armed force or an otherwise-prohibited measure. The better approach for a state interested in taking forceful measures on the territory of another state is to seek Security Council authorization for such an action.\textsuperscript{117} Absent such authorization, however, a state does have alternatives to full-scale self-defense in the light of a significant terror attack.

VI. CONCLUSION

Operation Enduring Freedom took the fight against terrorism to the territory of Afghanistan. This was a lawful decision since the United States had initially been the victim of a significant armed attack and it had clear and convincing evidence of both planned future attacks and Afghanistan’s responsibility for both past and planned attacks. The most serious question regarding the legality of Enduring Freedom concerns whether the operation remained necessary and proportional to America’s self-defense after the fall of the Taliban government. Where states are confronted with attacks that do not permit armed force in self-defense, they must use a criminal law enforcement approach, which can be backed up by countermeasures. These alternatives to self-defense have much to commend them in a world where terrorism appears to be part of our future and where the means of armed force can so often be disproportionate to any injury suffered or threatened.

It appears that proportionality is the concept around which the law of armed conflict and international criminal law enforcement are coming to coalesce.\textsuperscript{118} September 11 and its aftermath show that the once-clear divisions between crime and war are breaking down. That fact should not cause a legal crisis. A state responding to attacks upon it will act lawfully so long as its response is proportional to the injury suffered or threatened.\textsuperscript{119}

\textsuperscript{116} See SCHACHTER, supra note 32, at 163.
\textsuperscript{117} Plainly, secrecy would be required in such a case. The Security Council can operate in secret when necessary.
\textsuperscript{119} Similarly, the law governing individual accountability whether in war or peace is also merging.