Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence

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Abstract

There is controversy about whether and in what circumstances a State may act in self-defence in response to armed attacks carried out by non-State actors. Through an examination of State practice and ICJ decisions, this article examines the requirement that an armed attack must be attributable to the State against which self-defence is exercised. The author argues that there is confusion in the way in which the topic has been dealt with, and seeks to clarify some important conceptual issues. Ultimately, it is argued that the previously accepted 'effective control' attribution threshold permitting self-defence has been altered by the military response in the wake of the 11 September 2001 terrorist attacks, to a test of 'sanctuary and support'.

Introduction

> If country X, within its borders, is openly tolerating or incapable of managing a location where people are consistently attacking a neighbour, is it sufficient to say, 'Well, it's within their sovereign territory, nobody can do anything about it'? I think that's not true and I think there's a serious question about whether that's what the law ought to be.[1]

The phenomenon of modern terrorism has exposed a serious international legal problem affecting global peace and security. The difficulty can be described as follows. Non-State entities, such as terrorists, carry out attacks on a State ('the victim State'), but operate from or take sanctuary in another State ('the sanctuary State'). The victim State wishes to quell the attackers residing within the sanctuary State's borders. The sanctuary State did not actually carry out or direct the attacks, although it may be idle in preventing or removing the presence of the hostile actors from its soil. Can the victim State lawfully take cross-border action to neutralise the non-State attackers?

In this situation, the elimination of hostile actors or terrorists within the territory of another nation collides with two fundamental principles of international law: territorial sovereignty and the prohibition on the use of force prescribed in article 2(4) of the *United Nations Charter* ('*UN Charter*'). The only possible exception to a violation of both of these

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1 Michael Chertoff, former United States (US) Secretary of Homeland Security, quoted in Luke Baker, 'U.S. security chief says cross-border raids necessary', *Reuters*, 31 October 2008.

principles is the right of self-defence set out in article 51 of the *UN Charter*.[2] Under that provision, all States have a right of self-defence in response to an 'armed attack'. But what level of *culpability*, if any, is required on the part of the sanctuary State to permit the victim State to exercise its right of self-defence? This question has given rise to an incredible amount of controversy since it emerged as a topic of major global importance when the United States (US) carried out military activities in Afghanistan in the aftermath of the 11 September 2001 ('September 11') terrorist attacks. The issue is fundamentally that of the link required between the sanctuary State and the non-State entity.

In answering this question, this article advances three ultimate propositions. First, that the current position of international law is that an armed attack must be attributable to the State against which self-defence is exercised. Second, the threshold test for that attribution has changed from a State having 'effective control' over the attackers, to providing the attackers with 'sanctuary and support'. Third, this test of attribution is justified as the best principle for protecting international peace and security, and strikes a reasonable balance between self-defence and territorial sovereignty. Additionally, this article attempts to clarify some confusing conceptual problems that have arisen in discussions on this topic.

The article begins by examining the traditional requirements for a valid exercise of self-defence: Sections 1 and 2 discuss the requirements of 'armed attack', as well as 'necessity' and 'proportionality'. Section 3 examines the requirement that an armed attack must be attributable to the State against which self-defence is sought to be exercised. The decisions of the International Court of Justice ('ICJ') and relevant State practice are examined, and a conclusion on the current state of the law is reached. Section 4 provides a normative evaluation of whether the new, 'sanctuary and support' attribution threshold test is defensible.

1. Armed attack

Under article 51 of the *UN Charter*, all States have a right of self-defence only in response to an 'armed attack'.[3] The term 'armed attack' is not defined in the Charter, but the ICJ in the *Nicaragua* case clarified the concept. The Court effectively set out a test of sufficient gravity, distinguishing between the gravest uses of force constituting armed attacks, and less grave forms.[4] It held that armed attacks were not limited to actions taken by a State's armies across international borders, but also encompassed the sending of irregulars into another State, where the irregulars carried out attacks of similar gravity to regular armed forces. The touchstone of an armed attack is, therefore, the gravity of the attack.[5]

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[2] See also *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty-third Session*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001), art 21, 43 ('*State Responsibility Articles*').

[3] *Oil Platforms (Islamic Republic of Iran v United States of America) (Merits)* [2003] ICJ Rep 161, [43] ('*Oil Platforms*'); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, [193]–[195], [210]–[211] ('*Nicaragua*').

[4] *Nicaragua* [191]; *Oil Platforms* [51].

[5] *Nicaragua* [195].

Two concepts are often elided when discussing self-defence, which can cause confusion, especially in considering the attribution requirement discussed later in this article. One concept is that of whether an 'armed attack' has taken place; and the other concept is that of which entity actually carried out the attack. There has been a tendency to speak of whether or not non-State actor terrorists *can* carry out armed attacks, or whether a government's involvement was sufficiently linked to a non-State actor *so as to constitute* an armed attack. For example, in *Nicaragua*, the ICJ held that 'assistance to rebels in the form of the provisions of weapons or logistical support' could not constitute an armed attack.[6] In the passages surrounding this quote, the Court was attempting to convey two ideas. First, not all forms of force are sufficiently grave to constitute an armed attack. The world would be a very unstable place if mere border incidents or lesser forms of force triggered the gears of self-defence. Second, States will not be responsible for attacks in which they have no involvement. Hence, the Court held that for the attack to be attributed to the State, the State must have 'effective control' over the individuals carrying out the attacks.[7]

However, these are two logically distinct legal ideas and should be treated as such. Any entity is theoretically capable of carrying out an 'armed attack'. Armed attacks do not necessarily emanate only from States. If terrorists carry out continuing attacks of sufficient gravity and take shelter on the high seas, a State should be able to rely on its right of self-defence. In such a scenario, no State would be involved in any possible way, but it does not follow that an armed attack has not occurred. To mingle the concept of the attribution or culpability of a sanctuary State with the concept of the seriousness of the harm inflicted upon the victim State only creates legal confusion.

Accordingly, it is important to be very clear about the two different questions involved when discussing armed attacks. One question is whether the attack was sufficiently grave so as to constitute an armed attack, and the other question is which entity carried out the attack. It is this latter aspect, the question of *attribution*, which is the focus of this article.[8]

2. Necessity and proportionality

The law requires any exercise of self-defence to be both necessary and proportionate.[9] These requirements can be traced to the well-known *Caroline* incident, although they were not universally accepted until after the *UN Charter* was adopted.[10] In 1837, British personnel infiltrated a US port and destroyed the *SS Caroline* because it was being used (by non-State actors) for carrying out attacks in Canadian territory. Britain claimed it was acting in self-defence and the US Secretary of State replied through diplomatic correspondence

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[6] Ibid.

[7] The 'effective control' test set out in the *Nicaragua* case is dealt with below, under Section 3 on 'Attribution'.

[8] It should be noted that 'non-State actor' is a legally sound description for an entity even where that entity's conduct *is* attributable to a State, because attribution does not necessarily make an entity an organ of that State. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ 2, [397] ('*Genocide Case*').

[9] *Nicaragua* [194]; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, [41]–[44] ('*Nuclear Weapons Advisory Opinion*'); *Oil Platforms* [43].

[10] Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (2004) 42.

that self-defence could only justify conduct where it was necessary and where the response was not unreasonable or excessive.[11] Britain accepted this.

Proportionality has not been precisely defined in the context of self-defence and the ICJ has tended to simply review the facts and assert a conclusion that the action was or was not proportionate in the circumstances. The few cases in which proportionality has been explicitly addressed have involved fairly obvious disproportionate exercises of self-defence. In these cases, the Court's method has been to compare the level of force used in the attack to the level of force used in self-defence. For example, in the *Congo v Uganda* decision of 2005, the ICJ held that Uganda acted disproportionately in seizing airports and towns hundreds of kilometres from Uganda's border.[12] In the *Oil Platforms* case, the US had bombed Iranian oil refineries and naval vessels in a clearly disproportionate response to the damaging of a US frigate caused by a mine and the firing of a missile of disputed origin that hit a US oil tanker.

3. Attribution

Currently, the most significant issue in the law of self-defence is whether or not an armed attack must be attributable to the State that is the prospective target of an exercise of self-defence, and if so, what the test for that attribution requirement might be. Three primary views have emerged.[13] First, there is the view that the attribution test set out by the ICJ in the *Nicaragua* case must be satisfied: the State subjected to an exercise of self-defence must have had 'effective control' over the conduct of the individuals who carried out the attacks. Second, some argue that *no* attribution is required.[14] That is, States may exercise self-defence against any State and within any State's borders, regardless of whether or not that State is in any way responsible for the attacks. Third, there is the view that, whilst attribution *is* required, the test for attribution is not so high as to require 'effective control'. Rather, a lower threshold of support, such as acquiescence or harbouring, is said to be sufficient.[15] There are persuasive arguments in support of all three positions.

An examination of the decisions of the ICJ, State practice and *opinio juris* will reveal that the most accurate view is that the attribution threshold is now the provision to the attackers of sanctuary and support.

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[11] Robert Jennings, 'The Caroline and McLeod Cases' (1938) 32 *American Journal of International Law* 82, 90.

[12] *Armed Activities on the Territory of the Congo (Congo v Uganda)* [2005] ICJ 4, [147] ('*Congo v Uganda*').

[13] Tom Ruys, 'Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-Defense against Hezbollah' (2007) 43 *Stanford Journal of International Law* 265, 274.

[14] See, eg Carsten Stahn, 'The Right to Self-Defence, Article 51 (1/2) of the UN Charter, and International Terrorism' (2003) 27(2) *Fletcher Forum of World Affairs* 35.

[15] See, eg Vincent-Joel Proulx, 'Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks?' (2005) 23 *Berkeley Journal of International Law* 615.

A. Decisions of the International Court of Justice

(i) *Nicaragua* case

The starting point for any consideration of this topic is the 1986 decision of the ICJ in the *Nicaragua* case. The Court set out a number of important principles governing the law of self-defence and, most importantly, the link required with non-State actors.

Nicaragua brought claims against the US for acts of force and violations of sovereignty, including the mining of Nicaraguan ports, operations against bases and installations, and supporting contras to fight the Nicaraguan Government. The Court held that these actions were violations of international law. In its defence, the US pleaded collective self-defence, arguing that Nicaragua had been actively supporting armed groups operating in El Salvador through the provision of weapons. However, the ICJ rejected the US's argument, holding that assistance to rebels in the form of the provision of weapons or logistical support could not constitute an armed attack.[16] At the most, such assistance may constitute a threat or use of force, or amount to a violation of the prohibition on intervention. Accordingly, the US could not rely on the right of collective self-defence. The same was also true for Nicaragua, in responding to the contras aided by the US. Both countries had been supplying arms and providing support, but the Court held that 'the provision of arms to the opposition in another State does not constitute an armed attack on that State'.[17]

It may be doubted whether the Court recognised that the threshold test for establishing attribution was significant. The Court did refer to a requirement of 'effective control' over the persons or group in question as the standard for attributing acts to States.[18] However, this did not form the basis of the Court's rejection of self-defence. What the Court said was the following:

> the Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.[19]

A common interpretation of this passage is that the Court was qualifying the test required for attribution; namely, provision of arms or logistical support is insufficient for an armed attack to be attributed to a State. One then reads in the 'effective control' test referred to elsewhere in the judgment[20] and arrives at the conclusion that the Court was, in the above paragraph, merely applying that test of attribution.[21] However, a reading of a later passage in the judgment shows that this interpretation is wrong and shows that the Court was not there addressing the issue of attribution:

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[16] *Nicaragua* [195].
[17] Ibid [230].
[18] Ibid [115].
[19] Ibid [195].
[20] Ibid [115].
[21] See, eg, Andrew Garwood-Gowers, 'Self-Defence Against Terrorism in the Post 9-11 World' (2004) 4(2) *Queensland University of Technology Law & Justice Journal* 1, 5.

> Even assuming that the supply of arms to the opposition in El Salvador could be treated as imputable to the Government of Nicaragua, to justify invocation of the right of collective self-defence in customary international law, it would have to be equated with an armed attack by Nicaragua on El Salvador. As stated above, the Court is unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State.[22]

In other words, even assuming that attribution is made out, the conduct attributed does not constitute an armed attack. Hence, when dealing with the supply of arms earlier, the Court was *not* saying that the supply of arms was insufficient to attribute an armed attack to a State. It was saying that the supply of arms does not *constitute* an armed attack and that attribution of that conduct is a separate issue. The Court thereby seriously confused the issue by asking the wrong question. The correct question was not whether the conduct of supplying arms could *constitute* an armed attack, and then whether that supply could be imputed to Nicaragua. Clearly, there must be some actual attack before self-defence can be triggered. The question that the Court should have asked was whether the supply of arms could impute responsibility for an actual attack. Instead, the Court in the above passage focused on imputing responsibility for the *supply*, when the supply was what was central to imputing responsibility for the *attack*.

Accordingly, it must be the case that the Court was not actually addressing the issue of attribution when discussing the armed attack requirement. This is also consistent with the fact that no reference was made to 'effective control' in the self-defence context, but that this test *was* referred to elsewhere as the test for attribution. In dealing with whether an armed attack had occurred, the Court was drawing on the 'Definition of Aggression' annexed to General Assembly Resolution 3314;[23] it was not referring to general State responsibility standards of attribution. Accordingly, while the Court did set out an 'effective control' test for general State responsibility attribution, in the context of whether an armed attack could be attributed to a State it erred by asking itself the wrong question.

The *Nicaragua* decision was not unanimous: Judges Schwebel and Jennings dissented on the issue of armed attack. Judge Schwebel found that Nicaragua had organised, planned and trained Salvadoran rebels, and had provided communications and sanctuary that enabled the rebels to operate from Nicaraguan territory. He thought that the provision of weapons or logistical support could be tantamount to an armed attack.[24] Moreover, to be entitled to exercise self-defence, a State is not required to demonstrate that the non-State actors operating on the other State's territory act as agents of the foreign State; it is enough to show that the host State is 'substantially involved' in the sending of those irregulars into its territory.[25] Notably, this proposition is not expressed in terms of attribution. However, Judge Schwebel did refer to 'agents' of a State; and it seems that he recognised that imputing responsibility was the determinative issue. In the context of discussing whether

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[22] *Nicaragua* [230].

[23] *Nicaragua* [195]; *Resolution on the Definition of Aggression*, GA Res 3314, UN GAOR, 29th sess, 2319th plen mtg, UN Doc A/Res/3314 (14 December1974) annex, 143 ('*Definition of Aggression*').

[24] *Nicaragua* [171] (Judge Schwebel).

[25] Ibid [165]–[167] (Judge Schwebel).

an armed attack had occurred, he specifically quoted with approval sections of the Nicaraguan Memorial that addressed attribution.[26] The extracts also include reference to article 8 of the *State Responsibility Articles*, which deals with the attribution of actors to States. Also, in contrast to the majority, he correctly perceived the issue as imputability for the *attacks*, not imputability for the supply of arms.

Nevertheless, Judge Schwebel frequently referred to whether the supply and support was 'tantamount' to an armed attack.[27] With respect, this muddles the two distinct questions identified earlier in this article: (1) whether the attack occurred; and (2) which entity was responsible for the attack. Instead, Judge Schwebel asked a single, fused question: could the conduct of the non-State actors with a certain degree of State involvement *constitute* an armed attack. Judge Jennings contended for a comparable view expressed in similarly fused language. Judge Jennings contended that support through 'the provision of arms may … be a very important element in what might be thought to amount to armed attack, where it is coupled with other kinds of involvement'.[28]

It is, however, unclear whether Judges Schwebel and Jennings made the same error contained in the majority opinion. It is true that their opinions are expressed in terms of whether the provision of arms 'amounts to' or was 'tantamount to' an armed attack, as opposed to whether the provision of arms was enough to *attribute responsibility* for the attack. However, there is room here for a favourable interpretation. It is arguable that by 'amount to' and 'tantamount to' what was meant was attribution. In contrast, this reading is unavailable for the majority opinion, because of the quotation discussed above. In any event, such language should be avoided, and the language of State responsibility adopted in this context.

Ultimately, it is desirable to make sense of the majority opinion by adopting a sensible interpretation of the judgment. If the error in the majority opinion is rectified,[29] then we may say that the Court, in stating that the supply of arms and logistical support is insufficient to amount to an armed attack, was really applying the 'effective control' test of attribution. The decision would then stand for the following proposition: a State may not exercise self-defence in response to an armed attack unless the armed attack is attributable to the entity against which self-defence is being exercised — the test for attribution being effective control, and the supply of arms or logistical support clearly being insufficient to satisfy that test.

(ii) *Israeli Wall* case

In 2003, the United Nations ('UN') General Assembly asked the ICJ for an advisory opinion on the legal status of the separation wall that was being built by Israel in the Occupied Palestinian Territory.[30] In justifying the lawfulness of the construction of the

[26] Ibid [157] (Judge Schwebel).
[27] Ibid [16], [42], [154], [161], [171] (Judge Schwebel).
[28] Ibid [543] (Judge Jennings).
[29] Namely, if paragraph 120 of the judgment is ignored.
[30] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, [1] ('*Israeli Wall*').

wall, Israel pleaded, inter alia, self-defence. It argued that it was exercising that right in response to armed attacks by terrorists.[31] Israel relied, in particular, on Resolutions passed by the UN Security Council in the wake of the September 11 attacks that affirmed the right of States to use self-defence in the context of addressing international terrorism.[32]

The majority of the Court rejected Israel's argument, holding that self-defence had no application unless exercised against a *State*.[33] The majority was, therefore, of the view that armed attacks must be 'imputable' to the State against which self-defence is being exercised. Accordingly, it was unnecessary to discuss the precise threshold test for imputing attacks to a State, because Israel did not allege attribution to a State at all. Incredibly, the Court gave no justification in support of the requirement of State involvement. The issue of self-defence was dealt with in a single paragraph, despite vigorous dissenting opinions on the issue.

The majority opinion is seemingly consistent with the *Nicaragua* case, which required some level of attribution. However, *Nicaragua* dealt with a situation where self-defence was exercised against an identifiable State. It did not address the situation that arose in the *Israeli Wall* case where self-defence was not actually used against a State. The logic of requiring some form of culpability on the part of a State before self-defence may be exercised has no application when self-defence is not used against a State.

It is vital to note, however, that if self-defence is exercised *within the territory* of a particular State, this would constitute self-defence *against* that State. The *Israeli Wall* case was a rare situation in which self-defence was not exercised within the territory of an outside State. However, in most cases the defending State will enter into another State's territory. If this occurs, then even though the physical targets may be irregulars or terrorists, the fact that force is used within that State's territory constitutes a use of force against that State. This is an important conceptual point, because some confusion has emerged in discussing self-defence in response to non-State entities. Often the argument is framed as 'whether self-defence can be exercised against terrorists'. For example, Dinstein argues that if certain conditions are met, then the use of force is permissible if strictly limited to acts against private persons and not extended to the State itself.[34] This distinction is mistaken. Every act of self-defence that involves entry into another State is in actuality an exercise of self-defence against a State. To deny this proposition would be to ignore State sovereignty. All sorts of problems arise if a distinction is to be drawn between an action taken against a State, and an action taken against citizens or individuals within that State's borders. It would mean that the use of self-defence against a State would only include targeting government personnel or infrastructure. Such a distinction is absurd. It would follow that firing a biological weapon into a village and killing tens of thousands of citizens would not be an attack on that *State*, so long as those citizens were not employees

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[31] Ibid [139].

[32] *Threats to international peace and security caused by terrorist acts*, SC Res 1368, 4370th mtg, UN Doc S/Res/1368 (12 September 2001); *Threats to international peace and security caused by terrorist acts*, SC Res 1373, 4385th mtg, UN Doc S/Res/1373 (28 September 2001). These Resolutions are discussed below.

[33] *Israeli Wall* [139].

[34] Yoram Dinstein, *War, Aggression and Self-Defence* (3rd ed, 2001), 214–15.

of the government. Once this distinction is removed, it becomes obvious that self-defence may be exercised against *any* entity. The true issue may then be characterised. Namely, in what circumstances may self-defence be exercised against a State, when that State did not in fact carry out the armed attack itself?

Three of the dissenting opinions expressed the more radical view that attribution of the armed attack to a State is not required at all. Judge Higgins said that there is 'nothing in the text of article 51 that … stipulates that self-defence is available only when an armed attack is made by a State'.[35] In other words, self-defence may be used where an armed attack cannot be attributed to a State. As discussed earlier, this must be correct. For example, an exercise of self-defence on the high seas would not be against a State, but would surely be permissible. However, Judge Higgins was saying more than this. She was contending that self-defence may be used *in the territory of another State* in the absence of attribution to that State of an armed attack. Thus, the neutralising of terrorists within another State would be acceptable even if that State had no link or association with the terrorists whatever. This is a significant change from the 'effective control' requirement set down in the *Nicaragua* case.

Judge Kooijmans thought that, whilst the traditional view had been that self-defence was permissible only if a *State* carried out an armed attack, the UN Security Council Resolutions passed after September 11 indicated a change in the state of the law. He said that the Resolutions recognised the right of self-defence 'without making any reference to an armed attack by a State'.[36] These Resolutions referred to international terrorism as a threat to international peace and security authorising the UN Security Council to act under Chapter VII of the *UN Charter*. This was said to be a 'new element' in the law of self-defence.[37]

Judge Buergenthal also dissented. He pointed out that the *UN Charter* does not, by its terms, make the exercise of self-defence dependent on an armed attack *by another State*.[38] Further reliance was placed on UN Security Council Resolutions 1373 and 1368. Resolution 1373 recognises that 'international terrorism constitutes a threat to international peace and security' and contains a paragraph '*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)'. Judge Buergenthal noted that in Resolution 1368, adopted a day after the September 11 attacks, the Security Council invoked the right of self-defence in calling on the international community to combat terrorism. He highlighted that nowhere in the two Resolutions did the Security Council expressly or impliedly limit the application to attacks by States. If anything, he thought the contrary was so.[39] However, if these questionable inferences about what the Security Council meant are to be given any weight, even *assuming* that the Resolution implied what Judge Buergenthal said it did, the argument is still flawed. It is plainly true that the Resolutions did not stipulate that the attack must come from a State. However, merely because non-State actors are capable of triggering a

[35] *Israeli Wall* [33] (Judge Higgins).
[36] *Israeli Wall* [35] (Judge Kooijmans).
[37] Ibid.
[38] Ibid [6] (Judge Buergenthal).
[39] Ibid.

right of self-defence through carrying out an armed attack, does not say anything about the circumstances in which a victim State can enter into another State's territory in self-defence.

In the *Israeli Wall* case, the majority reaffirmed the *Nicaragua* requirement of attribution. But the number of dissenting voices rose to three; and the arguments against attribution had gained significant traction in light of the incidents surrounding September 11.

(iii) *Congo v Uganda* case

In the *Congo v Uganda* case of 2005, the Democratic Republic of the Congo ('DRC') brought proceedings against the Republic of Uganda, claiming that Uganda had committed acts of armed aggression and had supported rebel groups in operations aimed at destabilising the Congo. The facts are highly complicated and will not be traversed in detail here. Relevantly, however, Uganda argued in reply that it was acting in self-defence against rebel forces launching attacks against it from within DRC territory. It argued that an armed attack by a group whose existence is tolerated by a State is enough to attribute the attack to that State.[40] This conception of 'toleration' was said to include a 'failure to control'.[41] The DRC responded that this purported threshold of 'toleration' was contrary to the *Nicaragua* case, and that 'substantial involvement' was required to impute responsibility.[42]

The Court rejected Uganda's argument. It found that the armed attacks against Uganda were not carried out by the DRC, but rather by the Allied Democratic Forces ('ADF').[43] The attacks were not attributable to the DRC because Uganda could provide no satisfactory proof that the attacks emanated from armed bands or regulars sent by or on behalf of the DRC.[44] Accordingly, Uganda's claim of self-defence failed.

Unfortunately, the majority did not properly consider Uganda's contentions regarding the test for attribution. Inexplicably, the Court stated that it did not need to deal with the point.[45] Yet, in rejecting Uganda's argument of self-defence on the basis that Uganda could not be said to have sent the irregulars, the Court *did* implicitly deal with the point by rejecting it without consideration. There is no way that the Court could have arrived at its conclusion without requiring satisfaction of the *Nicaragua* threshold of attribution. This failure to adequately address an issue squarely in dispute was justifiably the subject of criticism.[46]

Four judges did not participate in the majority's peremptory dismissal of the self-defence argument. Judge Kateka, in a separate opinion, held that attribution in the *Nicaragua* sense was not necessary where a State is unable to prevent groups within its territory from carrying out armed attacks on other States. Judge Kateka cited the *Friendly*

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[40] *Congo v Uganda* [21] (Judge Kooijmans).
[41] Ibid.
[42] Ibid.
[43] The rebel group operating against Uganda from Congolese territory.
[44] *Congo v Uganda* [146] (Judgment).
[45] Ibid [146]–[147].
[46] *Congo v Uganda* [22], [25] (Judge Kooijmans).

Relations Declaration[47] and the *Corfu Channel* case,[48] and referred to the duties of a State to refrain from 'organising or encouraging' irregular armed forces from carrying out incursions into the territory of other States, and not to knowingly allow territory to be used for acts contrary to the rights of other States.[49] He also referred to Judge Simma's commentary on the *UN Charter*, in which it is stated that, where a State is *unable* to prevent acts of terrorism stemming from within its territory, the victim State may take action within the territory of the host State in self-defence. Otherwise, according to Judge Simma, failed States would become safe havens for terrorists, and this could not have been the purpose of the Charter.[50] Interestingly, Judge Simma's commentary confines the permissibility of self-defence to where a State is *unable* and not to where a State is *unwilling*.

Judge Kooijmans, in his separate opinion, characterised the issue as 'whether the threshold, which the Court had previously determined as appropriate in characterizing support of activities by irregular bands as an attack by the "supporting" State' was still correct.[51] In answering this question, Judge Kooijmans did not accept that the attribution test of effective control is different in the self-defence context, or that the threshold had been lowered.[52] However, he contended that the Charter does not make attribution a requirement at all[53] and the insistence on such a requirement would deny a victim State the right to self-defence on the unreasonable basis that there is no attacker *State*.[54] Reference was also made, once again, to the Resolutions surrounding September 11, to support the idea that self-defence may be exercised 'against' non-State actors.[55] For these reasons, the fact that attacks could not be attributed to the DRC had 'no direct legal relevance' to whether Uganda was entitled to exercise self-defence.[56]

Judge Koroma, in a separate opinion, referred to the *Nicaragua* and *Oil Platforms* cases and said that merely enabling a group to act against another State could not be characterised as an armed attack. His view was that, although this would constitute a breach of international law for which that State was responsible, the remedy would be for the UN Security Council to take action pursuant to Chapter VII of the *UN Charter*. Judge Koroma expressly notes that the *inability* of a State to prevent the armed activities of rebel

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[47] *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), UN GAOR, 25th sess, 1883rd plen mtg, UN Doc A/Res/25/2625 (24 October 1970) ('*Friendly Relations Declaration*'); *Congo v Uganda* [36] (Judge Kateka).

[48] *Corfu Channel Case (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4 ('*Corfu Channel*'); *Congo v Uganda* [36] (Judge Kateka).

[49] *Congo v Uganda* [37] (Judge Kateka), citing Bruno Simma (ed), *The Charter of the United Nations – A Commentary* (2002) vol 1, 802.

[50] Ibid [37] (Judge Kateka).

[51] Ibid [21] (Judge Kooijmans).

[52] Ibid [24]: 'it cannot be said that a mere failure to control the activities of armed bands present on a State's territory is by itself tantamount to an act which can be attributed to that State'.

[53] Ibid [26], [28]–[29].

[54] Ibid [30].

[55] Ibid [28].

[56] Ibid [32].

groups is 'not tantamount to use of armed force by that State, but a threat to the peace which calls for action by the Security Council'.[57]

Judge Simma, in his separate opinion, said that attacks by non-State actors could still 'qualify as' armed attacks.[58] As discussed earlier, this approach of framing the issue should be avoided.[59] Interpolating however, Judge Simma effectively held that developments following September 11, especially the UN Security Council Resolutions relied on by Judge Kooijmans, had confirmed the view that self-defence was available in circumstances where there was no attribution.[60]

After *Congo v Uganda*, it is no longer possible to say that there is general agreement in the world's highest court on this controversial issue. Arguments have been put that cast serious doubt on the soundness of the 'effective control' attribution requirement.

(iv) *Genocide* case

The last ICJ decision pertinent to attribution is the *Genocide Case* of 2007. Unlike the four cases previously discussed, the Court was not dealing with a claim of self-defence. Under consideration was, inter alia, the issue of whether acts of genocide had been committed during the Bosnian War by persons or organs whose conduct was attributable to Serbia.[61]

In answering this question, the Court applied the attribution test set out in article 8 of the *State Responsibility Articles*.[62] That is, whether in carrying out the conduct in question, the person or group was acting 'on the instructions of, or under the direction or control of' the State. In clarifying the scope of this rule, the Court held that it was not enough that a State had 'overall control' over the actions taken by a group. Rather, there must have been 'effective control' exercised, or instructions given, in respect of *each act* alleged to be attributable.[63] Such a test of 'overall control' had been applied previously in the *Tadić* [64] case, which involved the prosecution of war crimes in the International Criminal Tribunal for the former Yugoslavia ('ICTY'). However, the ICJ drew a distinction between individual and State responsibility, and affirmed the *Nicaragua* test of effective control as the relevant threshold.[65] The Court noted that the lesser test of 'overall control' was problematic because it would broaden the scope of State responsibility far beyond the principle that a State is only responsible for its own conduct.[66]

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[57] Ibid [9] (Judge Koroma).
[58] Ibid [11]–[12] (Judge Simma).
[59] The relevant question should not be couched in terms of whether non-State actors can carry out an armed attack, but whether and in what circumstances the defensive response to that attack may be made against a State.
[60] *Congo v Uganda* [12] (Judge Simma).
[61] This question being distinct from whether the perpetrators of the genocide were organs of Serbia, and from whether Serbia had breached its obligation to prevent genocide. See *Genocide Case* [397].
[62] Ibid [398].
[63] Ibid [400].
[64] *Prosecutor v Tadić (Opinion and Judgment)* (ICTY, Appeals Chamber, Case No IT-94-1-A, 15 July 1999), [120]–[123], [131] (*'Tadić'*).
[65] *Genocide Case* [402]–[406].
[66] Ibid [406].

Interestingly, the Court also stated:

> The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*.[67]

This is an unsurprising and logically sound principle, because it ensures the consistency of the international legal responsibility superstructure. Significantly, however, it does not impede the argument for a different or lower level of attribution in the self-defence context. On the contrary, it supports the possibility of such a difference.

B. State practice

To fully explore the attribution threshold required under article 51 of the *UN Charter*, regard must be had to the practice of States. The Charter does not state whether an armed attack must be attributed to a State before self-defence may be exercised. However, a customary rule may exist to that effect, which supplements or fleshes out the conditions under which the Charter operates. This may be so either through interpreting the scope of article 51 by reference to custom,[68] or by the existence of a customary rule running parallel with, but extending beyond, article 51.[69] An uncontroversial example of a customary rule influencing the operation of article 51 is the requirement that the exercise of self-defence be necessary and proportionate. One way or another, the same mechanism of interaction between article 51 and custom must operate for any purported attribution requirement. As Triggs notes, '[t]he relationship between obligations established by treaties and those created through custom is osmotic; each draws normative principles from the other'.[70] This section will, therefore, examine extensively the State practice and *opinio juris* that might be relied on to assert the existence of a relevant customary rule governing attribution in the self-defence context.

(i) State practice pre-September 11

There are a number of examples prior to September 11 where States have responded to armed attacks by entering the territory of another State to deal with the non-State actor attackers residing on the other State's territory.

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[67] Ibid [401].

[68] Permitted by art 31(3)(c) of the *Vienna Convention on the Law of Treaties*, opened for signature on 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). For a discussion of the role of art 31(3)(c) in the relationship between treaty and custom, see Philippe Sands, 'Treaty, Custom and the Cross-fertilization of International Law' (1999) 1 *Yale Human Rights & Development Law Journal* 85; Hersch Lauterpacht, *The Development of International Law by the International Court* (1958), 27–8: 'In many a case of treaty interpretation the effect of the treaty will depend on our view as to the position of customary international law on the question'.

[69] The ICJ in *Nicaragua* held that customary self-defence coexists with treaty self-defence under the *UN Charter*, and that the two are almost identical: *Nicaragua* [172]–[179].

[70] Gillian Triggs, *International Law: Contemporary Principles and Practices* (2006) 80. See also Oscar Schachter, 'Entangled Treaty and Custom' in Yoram Dinstein (ed), *International Law at a Time of Perplexity* (1989) 717–38; Yoram Dinstein, *War, Aggression and Self-Defence* (4th ed, 2005) 95–7.

In October 1985, Israel carried out an air raid on Palestinian Liberation Organization ('PLO') headquarters in Tunisia.[71] Tunisia protested against the raid and complained to the UN Security Council. Israel justified its conduct as self-defence, but this argument was explicitly rejected by several States.[72] Ultimately, the Security Council adopted a Resolution condemning the attack, citing article 2(4) of the Charter and describing the raid as a 'flagrant violation' of international law.[73] The US abstained from voting, but did voice support for the raid as a legitimate exercise of self-defence. President Reagan said at a press conference that Israel and other nations had the right to strike back at terrorists 'if they can pick out the people responsible'.[74] There have been many more instances where Israel has engaged in cross-border attacks against non-State actors. Numerous raids into Lebanon have taken place, which the US has supported as far back as 1983.[75]

Examples of attacks carried out in the Israeli-Palestinian conflict are, of course, also frequent. However, discussion of these incidents does not assist with the legal issue presently in question, given the unique circumstances of the absence of a sanctuary 'State' in the conventional sense.

Turkey has frequently carried out cross-border raids in Iraq against the separatist Kurdistan Workers' Party ('PKK') in self-defence. In 1995, Turkey sent warplanes and thousands of ground troops into Iraq in pursuit of Kurdish guerrillas.[76] The US was supportive, stating that Turkey's attacks on Kurdish strongholds did not violate international law so long as the force used was necessary and appropriate.[77] However, the European Union said the operation violated international law.[78] Similarly, France, Britain and Germany criticised Turkey's actions as a violation of Iraqi sovereignty.[79] Turkey carried out further cross-border operations in 1996 and 1997.[80] The US was once again supportive.[81]

In 1986, the US carried out air strikes on military targets in Libya in response to the bombing of a West Berlin disco that targeted and killed American servicemen. The Reagan Administration claimed to be acting in self-defence, and that it had a right to use force against States supporting terrorism.[82] The air strikes brought strong and widespread

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[71] Jonathan Randal, 'Raid, Reagan Stun Tunisia U.S. Reaction Protested', *The Washington Post*, 3 October 1985.
[72] SC Res 573, UN SCOR, 40th sess, 2615th mtg, UN Doc S/RES/573 (4 October 1985); UN Doc S/INF/41 (1985).
[73] SC Res 573.
[74] 'Israel had the Right to Strike Back at Terrorists, Reagan Says', *The Washington Post*, 2 October 1985.
[75] Brian Hufford and Robert Malley, 'The War in Lebanon: The Waxing and Waning of International Norms', in W Michael Reisman & Andrew R Willard (eds) *International Incidents: The Law That Counts in World Politics* (1988) 176–80; Bernard Gwertzman, 'Israel and the U.S. Sign an Agreement on Lebanon Raids', *The New York Times*, 18 May 1983.
[76] Aliza Marcus, 'Turkish Force Presses Attack Against Kurdish Rebels in Iraq', *The Washington Post*, 22 March 1995.
[77] Ibid.
[78] Ibid.
[79] Thomas Lippman, 'Turkey Catches Flak in Congress; Several NATO Nations Also Assail Military Incursion Into Iraq', *The Washington Post*, 23 March 1995.
[80] 'Iran Claims Right of Self-Defense in Attacking Rebel Kurds', *Agence France-Presse*, July 30, 1996; Daren Butler, 'Turkish Fighter-Bombers Hit Kurd Camps in Iraq', *The Washington Post*, 16 May 1997.
[81] Butler, ibid.
[82] John Goshko, 'Administration Acts on 'Self-Defense' Principle Espoused by Shultz', *The Washington Post*, 15 April 1986.

condemnation.[83] Importantly, however, the attacks were thought to be directly attributable to Libya. President Reagan said that the attack was 'planned and executed under the *direct orders* of the Libyan regime'.[84] This was not only the belief under which States voiced their reactions to the US response; intelligence also showed this claim to be correct. A cable from Libya to Libyan embassies directed that the bureaus be ready to undertake attacks against American targets and facilities. The embassies were relatively autonomous in orchestrating attacks,[85] but legally would constitute organs of the Libyan State for the purposes of State responsibility.[86]

Accordingly, although this incident is often said to support a general right of self-defence against States involved with terrorism, on closer analysis it does not lend support to the notion that self-defence may be used without attribution to a State, or with the lower attribution threshold of mere toleration.

In 1993, the US carried out missile strikes against Iraq in response to an assassination attempt on former President George H W Bush during his visit to Kuwait. There was widespread support for the response, including approval from the United Kingdom (UK), Italy, Germany, Russia, France and Germany.[87] The Arab League expressed its 'extreme regret' at the strikes.[88] However, the assassination attempt was carried out not by non-State actors, but by personnel under the direct instruction of Iraq. Accordingly, like the 1986 Libya bombing, this event does not support the idea of a right of self-defence without attribution, or with a lower attribution threshold.

In 1998, the US bombed terrorist training camps in Afghanistan, and what was claimed to be a chemical weapons facility in Sudan, in response to terrorist bombings of US embassies in Kenya and Tanzania. President Clinton said the US had 'compelling information that the bin Laden groups had already planned further terrorist attacks' against US citizens.[89] Henry Shelton, chairman of the Joint Chiefs of Staff, said that the raid was 'an exercise of self-defence against an imminent and continuing terrorist threat. There can be no safe haven for terrorists'.[90] The international reaction was generally positive. The

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[83] A UN Security Council Resolution condemning the attacks received support from Bulgaria, China, the Congo, Ghana, Madagascar, Thailand, Trinidad and Tobago, Russia and the United Arab Emirates. The Resolution was vetoed by the US, the UK and France. Australia and Denmark also voted against the Resolution, whilst Venezuela abstained. However, the General Assembly, by a vote of 79 in favour, 28 against and 33 abstaining, adopted a Resolution condemning the attack as a violation of international law: *Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the aerial and naval military attack against the Socialist People's Libyan Arab Jamahiriya by the present United States Administration in April 1986*, GA Res 41/38, 41st sess, 78th plen mtg, UN Doc A/RES/41/38 (20 November1986).

[84] Bob Woodward and Patrick Tyler, 'Libyan Cables Intercepted and Decoded', *The Washington Post*, 15 April 1986.

[85] Bob Woodward, 'Intelligence "Coup" Tied Libya to Blast Berlin Messages Read', *The Washington Post*, 22 April 1986 (emphasis added).

[86] *State Responsibility Articles*, art 4.

[87] Julia Preston, 'Security Council Reaction Largely Favourable to U.S. Raid', *The Washington Post*, 28 June 1993; Craig Whitney, 'European Allies Are Giving Strong Backing to U.S. Raid', *The New York Times*, 28 June 1993.

[88] Whitney, ibid.

[89] Bronwen Maddox, 'US strikes back at terrorists', *The Times*, 21 August 1998.

[90] 'There Can Be No Safe Haven for Terrorists', *The Washington Post*, 21 August 1998.

UK, France, Germany, Spain, Australia and Israel supported the attacks.[91] Britain specifically said that, because the US expected the sites to be used for further terrorist attacks, the bombing was a legitimate exercise of self-defence. Japan expressed mild support. Most Arab and Muslim governments remained silent or equivocal about their views on the strikes.[92] Russia was highly critical.[93]

The foregoing examination reveals that throughout the 1980s and 1990s, the international reaction to purported exercises of self-defence without attribution of an armed attack to a State was generally negative. Some events are red herrings in the debate, in that, on close examination, the necessary lack of attribution that would make international reaction significant was absent. However, of the incidents that were on point, most of these resulted in widespread criticism. The 1998 bombing of Afghanistan (and to a lesser extent Sudan) was the only real exception; and that incident was in fact in the context of a close association between the State of Afghanistan and the attackers. That relationship was similar to the one that resulted in the September 11 attacks, discussed below.

(ii) September 11 and military operations in Afghanistan

The most significant State practice on the issue of self-defence in the absence of the traditional attribution requirement is undoubtedly the response to the September 11 attacks on the US.

There was widespread agreement that the September 11 incident constituted an armed attack.[94] The day after the attacks, the member States of the North Atlantic Treaty Organization ('NATO') issued a statement asserting that, if it was determined that the attacks were directed from abroad, it would be regarded as an action covered by article 5 of the *Washington Treaty*, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.[95] The Organization of American States ('OAS') unanimously passed a Resolution declaring the terrorist attacks to be attacks against all American States, and, in accordance with the *Inter-American Treaty*, vowed to provide assistance to address such attacks.[96] The *Inter-American Treaty* contains a similar provision to the *Washington Treaty*, referring to armed attacks by any State against an American State.[97]

However, the mere fact that an armed attack occurred is not directly relevant. One of the great fallacies often seen in the literature when discussing the September 11 events is

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[91] William Drozdiak, 'European Allies Back U.S. Strikes; Japan Says It "Understands"', *The Washington Post*, 21 August 1998.

[92] Douglas Jehl, 'U.S. Raids Provoke Fury in Muslim World', *The New York Times*, 22 August 1998.

[93] Michael Wines, 'Russia is Critical', *The New York Times*, 22 August 1998.

[94] Few scholars would dispute that the September 11 attacks constituted an 'armed attack'. For a detailed consideration of this issue, see Sean Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter' (2002) 43 *Harvard International Law Journal* 41.

[95] North Atlantic Treaty Organization (NATO), 'Statement by the North Atlantic Council (Invocation Article V – attacks on US)', (Press Release 124, 12 September 2001) <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

[96] Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs, 'Terrorist Threat to the Americas', OAS Doc RC.24/RES.1/01 (21 September 2001), <www.oas.org/OASpage/crisis/RC.24e.htm>.

[97] *Inter-American Treaty of Reciprocal Assistance*, opened for signature 2 September 1947, 21 UNTS 324, art 3.

the error of confusing the two questions of: (1) whether an armed attack has occurred; and (2) in what circumstances a State may be the target of an exercise of self-defence. The true evidence of changing State practice was the international support of the military action taken by the US in the context of the particular relationship between the State of Afghanistan and the perpetrators of the attacks. It is necessary to first examine the global response following the attacks, before turning to the nature of the association between the attackers and Afghanistan.

The international response to the US campaign in Afghanistan was positive and extremely widespread. On 21 September 2001, the European Council met in extraordinary session and concluded that its members would cooperate with the US in a military response to the attacks, and that this response may be 'directed against States abetting, supporting or harbouring terrorists'.[98] When the military operations commenced in early October, numerous countries voiced their support, including Canada, France, Germany, Italy and Russia.[99] China cautiously expressed its support.[100] Several Arab States actively supported the operations, including Egypt, Jordan, Pakistan and Saudi Arabia.[101] At an emergency meeting of the Organisation of Islamic Conference, a gathering of 56 Islamic nations, a statement was issued that did not condemn the United States' military campaign.[102] The European Union expressed its 'full solidarity' and said that the campaign was consistent with the *UN Charter*.[103] Even the Vatican said that Pope John Paul II understood that the US may need to use force against terrorists as a last resort to protect itself from harm.[104]

The international participation in the military operations was also extensive. A number of States contributed personnel to assist with the operation, including Australia, Britain, Canada, the Czech Republic, France, Italy, the Netherlands, New Zealand, South Korea and Turkey.[105] Germany and Japan also provided support, albeit mostly logistical, such as ships to monitor shipping lanes, minesweepers and supply vessels.[106] Germany made 3,900 personnel available for logistical missions in and around Afghanistan, including a small

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[98] 'Conclusions and plan of action of the Extraordinary European Council meeting', EU Doc CL01-057EN, 21 September 2001.

[99] Suzanne Daley, 'European Leaders Voice Support', *The New York Times*, 8 October 2001.

[100] Erik Eckholm, 'China Offers Its Wary Support for Attacks', *The New York Times*, 8 October 2001.

[101] Robert Greenberger, Jonathan Karp and Hugh Pope, 'Another Front: Bush Faces Pressure To Lean on Israelis For Sake of Arab Allies', *The Wall Street Journal*, 22 October 2001.

[102] John Kifner, '56 Islamic Nations Avoid Condemning U.S. Attacks, but Warn on Civilian Casualties', *The New York Times*, 11 October 2001.

[103] William Drozdiak, 'EU Leaders Back Attacks on Afghanistan; Massive Support Pledged for Rebuilding Country Once Taliban is Overthrown', *The Washington Post*, 20 October 2001.

[104] Sharon LaFraniere, 'Vatican Says Use of Force by U.S. Can Be Justified', *The Washington Post*, 25 September 2001.

[105] Richard Beeston and Roland Watson, 'Allies offer special forces for pursuit of bin Laden', *The Times*, 9 October 2001; David Sanger and Michael Gordon, 'U.S. Takes Steps to Bolster Bloc Fighting Terror', *The New York Times*, 7 November 2001; Alan Sipress and Vernon Loeb, 'U.S. Welcoming Allies' Troops; Despite Pentagon's Concerns, Taliban War is Multi-Country', *The Washington Post*, 11 November 2001.

[106] Kathryn Tolbert and Peter Finn, 'Ex-Axis Powers Recast Foreign Military Roles', *The Washington Post*, 30 November 2001.

group of soldiers.[107] The commitment of these two nations is significant, given their great reluctance to deploy military personnel in the sensitive post-World War II political context. Many countries also provided ancillary support, for example by granting air space and landing rights for US aircraft.[108] Iran even agreed to perform search-and-rescue missions for US pilots who crashed on its territory during the campaign;[109] although it was a still critic of the military operations, along with Syria and Iraq.[110]

This international reaction should also be considered in the context of the justification for military action advanced by the US. President Bush advocated the view that States that supported or harboured terrorists were just as culpable as the perpetrators of the attacks.[111] Hence, force might legitimately be used against sanctuary States.[112]

This near unanimous support and widespread participation of nations contrasts with the negative or ambivalent reactions to military operations in the 1980s and 1990s. It is unsurprising that the September 11 events have been taken by many as evidencing a shift in the international legal order. Namely, that State involvement to the degree of the 'effective control' threshold of attribution is no longer required. A lower level of involvement now seems sufficient. It is true that this change has emerged relatively quickly, but the passage of only a short period of time is not necessarily a bar to the formation of custom.[113]

However, the international reaction to and participation in the US military response only lends support to a minimum standard of attribution that was actually present between the State of Afghanistan and the actual attackers. If there was, for example, State encouragement of the attacks through the provision of arms and logistical support, then it could not be said the military operations were State practice in support of a norm that *no* attribution is required. Nor could it be said that State practice supports a test of 'unwillingness or inability'. Hence, it is crucial to understand the precise relationship between the State of Afghanistan and the attackers, and what level of support was actually provided. The relationship in question is between the Taliban (the de facto government of Afghanistan) and al-Qaeda and Osama bin Laden (the perpetrators of the attacks).[114]

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[107] 'Germany in step', *Financial Times*, 8 November 2001; Peter Finn, 'Germany Offers 3,900 Troops To Assist U.S. in Afghanistan', *The Washington Post*, 7 November 2001.

[108] Steven Mufson and Alan Sipress, 'U.S. Gains Allies' Support; Nations Willing to Commit Forces', *The Washington Post*, 8 October 2001; Howard Schneider, 'Ending Doubts, Saudis to Allow U.S. to Use Base', *The Washington Post*, 28 September 2001.

[109] John Anderson, 'Iran Vows to Rescue U.S. Pilots Who Crash on Its Soil', *The Washington Post*, 18 October 2001.

[110] Kifner, above n 102.

[111] Karen DeYoung, 'Allies Are Cautious On "Bush Doctrine"', *The Washington Post*, 16 October 2001.

[112] This was similar to the view espoused by US Secretary of State George Schultz in the 1980s. Shultz said that under international law, 'a nation attacked by terrorists is permitted to use force to prevent or pre-empt future attacks, to seize terrorists or to rescue its citizens, when no other means is available': 'Schultz Supports Armed Reprisals', *The New York Times*, 16 January 1986.

[113] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3, [74].

[114] Regardless of the fact that the international community refused to recognise the Taliban as the legitimate Government of Afghanistan, the Taliban was the de facto government. As such, the attack was directed against the Afghanistan State itself: Andre Nollkaemper, 'Attribution of Forcible Acts to States: Connections Between the Law

[footnote continued on the next page]

Osama bin Laden and al-Qaeda had a close relationship with the Taliban. Bin Laden provided the Taliban regime with troops and arms[115] and al-Qaeda assassinated the Taliban's central opponent, Northern Alliance leader Ahmad Shah Massoud.[116] The Taliban, in return, provided a safe haven and allowed al-Qaeda to operate a network of terrorist training camps.[117] The Taliban protected Osama bin Laden from extradition requests by the US, and failed to hand him over as requested by the UN Security Council.[118]

The State practice surrounding September 11 therefore evidences a standard of attribution of actual *active* support. The perpetrators of the attacks were in a very close relationship with the State of Afghanistan. That association included State sanctuary, but it also included active cooperation through trade of supplies and arms, and other support.[119] This relationship may be contrasted with a situation of passive toleration. As a result, there is now much force in the argument that if a State actively cooperates with, and provides sanctuary and logistical support to, perpetrators of armed attacks, this will be a sufficient association for the purpose of self-defence, even though that State did not effectively control the perpetrators or provide direct instructions.

(iii) Recent State practice

(a) The 2008 Columbian raid in Ecuador

In March 2008, Colombian forces crossed into Ecuador to kill a commander of Revolutionary Armed Forces of Colombia ('FARC') and 23 other hostiles at a guerrilla camp.[120] Colombia justified the raid by saying that Ecuador's Government had tolerated the FARC's presence on its soil.[121] That is, Ecuador had been unwilling to respond to an armed group on its territory that was carrying out attacks in Columbia.

The response in the region was highly condemnatory. Ecuador and its allies, Nicaragua and Venezuela, severed diplomatic ties with Colombia.[122] Mexico also criticised the raid, the Mexican President rejecting 'any action that constitutes a violation of territorial sovereignty'.[123] In an OAS meeting, a number of countries, including Brazil, Chile and Argentina, stated that the raid violated Ecuador's sovereignty and breached international

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on the Use of Force and the Law of State Responsibility' in Niels Blokker and Nico Schrijver (eds), *The Security Council and the Use of Force: Theory and Reality – a Need for Change?* (2005) 133–71, particularly 166–7.

115 Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (2001) 139; Serge Schemann, 'UN Envoy Says All Options are Open on a Post-Taliban Afghanistan', *New York Times*, 18 October 2001.

116 Lawrence Wright, The Looming Tower: Al Qaeda and the Road to 9/11 (2006) 337.

117 SC Res 1333, 4251st mtg, UN Doc S/Res/1333 (19 December 2000); SC Res 1267, 4051st mtg, UN Doc S/Res/1267 (15 October 1999).

118 Ibid.

119 The failure to comply with the UN Security Council's request to hand over an attacker might also be classified as active support rather than mere toleration.

120 James McKinley, 'Nicaragua Breaks Ties With Bogota Over Crisis', *The New York Times*, 7 March 2008.

121 Ibid.

122 Ibid.

123 Alberto Barrera and Jason Lange, 'Mexico criticizes Colombia's Ecuador raid', *Reuters*, 5 March 2008.

law.[124] The OAS ultimately approved a Resolution to this effect.[125] The crisis ended amicably with Colombia apologising.[126] The Colombian President, Alvaro Uribe, promised not to violate another nation's border again.[127] As the events unfolded, the sole international supporter of the raid was the Bush Administration, which said that Colombia was 'defending itself against terrorism'.[128] This incident is, therefore, clear and contrary State practice to the notion that 'toleration' or 'unwillingness' is a sufficient threshold to ground attribution.

(b) Ongoing US raids in Pakistan

Another example of recent State practice is the frequent incursions by the US into Pakistan. The raids target non-State actors that use Pakistan as a base to carry out attacks on US forces stationed in Afghanistan and Iraq.

The Bush Administration made clear that if a country was unable or unwilling to prevent its territory from being used by irregulars to carry out attacks, the US would defend itself by entering into that country and neutralising those forces.[129] A similar stance has been taken by the Obama Administration. During the election debates, Obama said:

> If we have Osama bin Laden in our sights and the Pakistani government is *unable or unwilling* to take them out, then I think that we have to act, and we will take them out.[130]

The US has acted on this principle through numerous incursions into Pakistan in order to attack Taliban forces. Under the Bush Administration, these incursions included at least one covert ground raid in September 2008 and the continued use of remote-controlled attack drones, which carry out attacks in Pakistani territory.[131] Importantly, the commando raids and drone attacks were said to be justified under the international law of self-defence, in response to the unwillingness or inability of Pakistan to deal with the irregulars that had been attacking US forces in Afghanistan.[132] This policy has continued under the Obama Administration.[133]

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[124] Daniel Dombey et al, 'Bogota's rebel attack puts Latin America and US at odds', *Financial Times*, 5 March 2008.

[125] Simon Romero, 'Regional Bloc Says Ecuador's Sovereignty Was Violated', *The New York Times*, 6 March 2008.

[126] Simon Romero and James McKinley, 'Diplomatic Crisis Over Colombian Raid Ends in Handshakes', *The New York Times*, 8 March 2008.

[127] Juan Forero, 'Latin American Crisis Resolved; Colombia Apologizes At Regional Summit', *The Washington Post*, 8 March 2008.

[128] Romero, above n 125.

[129] DeYoung, 'Allies Are Cautious On "Bush Doctrine"', above n 111.

[130] Dan Balz, Anne Kornblut and Michael Abramowitz, 'Economic Crisis Dominates Debate; McCain and Obama Differ Over Causes and Solutions', *The Washington Post*, 8 October 2008 (emphasis added).

[131] Karen DeYoung, 'U.S. Options in Pakistan Limited; Nation Rife With Security Issues, Infighting, Anti-American Sentiment', *The Washington Post*, 4 May 2009.

[132] Jane Perlez, 'Pakistan's Military Chief Criticizes U.S. Over a Raid', *The New York Times*, 11 September 2008; Ann Tyson and Ellen Knickmeyer, 'U.S. Calls Raid a Warning to Syria; Copter-Borne Troops Targeted Key Iraqi Insurgent, Officials Say', *The Washington Post*, 28 October 2008; Demetri Sevastopulo, 'Gates defends operations inside Pakistan', *Financial Times*, 24 September 2008.

[133] Eric Schmitt and Christopher Drew, 'More Drone Attacks in Pakistan Planned', *The New York Times*, 7 April 2009.

Pakistan's reaction to the drone attacks is multifaceted. Publicly, the Pakistani Government has strongly protested and objected to the incursions as violations of its territorial sovereignty.[134] However, it has repeatedly been reported that Pakistan now privately acquiesces to the use of the drones,[135] even if initially its complaints may have been genuine.[136] The Obama Administration has continued to assert that, if Pakistan is unwilling or unable to eliminate the hostile attackers from operating within its territory, the US will take action itself. Since August 2008, there have been at least 40 drone strikes.[137] In recent times the use of drones has intensified to a greater frequency than under the previous Administration.[138]

(c) 2008 US raid into Syria

In October 2008, similar defensive attacks were carried out by US forces in Syria against terrorist groups acting against US forces in Iraq.[139] Four helicopters carrying US troops flew four miles into Syrian territory and killed a leader of a network that channels foreign fighters from Syria into Iraq. The leader, Abu Ghadiya, was the founder of the al-Qaeda insurgent group in Iraq, and Abu Musab al-Zarqawi had named him the organisation's commander for Syrian logistics.[140] The raid was justified on similar grounds to 'unwillingness or inability': if the host country fails to deal with the irregular groups, then action is justified in self-defence.[141] In discussing the legal basis of cross-border operations, Administration officials pointed to a speech given by President Bush to the UN General Assembly a month prior to the Syria raid, in which the President stated, '[Sovereign States] have an obligation to prevent [their] territory from being used as a sanctuary for terrorism'.[142]

Notwithstanding the justification given by the US, the raid resulted in criticism from numerous States. Syria stated that the Bush Administration was following 'the policy of cowboys',[143] and formally protested to the UN Security Council.[144] Russia, China, France, Spain, India, the Arab League, Egypt, Lebanon, Vietnam, Venezuela, Cuba, Iran, and Iraq

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134 Shaiq Hussain, 'U.S. Ambassador Summoned for Protest over Missile Strikes', *The Washington Post*, 30 October 2008; Perlez, 'Pakistan's Military Chief Criticizes U.S. Over a Raid', above n 132.

135 Jane Perlez, 'Pakistan Rehearses Its Two-Step on Airstrikes', *The New York Times*, 16 April 2009; Pir Zubair Shah, '25 Militants Are Killed In Attack In Pakistan', *The New York Times*, 17 May 2009.

136 Matthew Rosenberg, Siobhan Gorman and Jay Solomon, 'Pakistan Lends Support for U.S. Military Strikes – Leaders Continue to Condemn Air Attacks, but a Private Shift in Policy Aims to Aid Drone Assault on Militant Targets', *The Wall Street Journal*, 18 February 2009.

137 Farhan Bokhari, 'US urged to stop drone attacks', *Financial Times*, 25 May 2009.

138 DeYoung, above n 129.

139 Tyson and Knickmeyer, above n 132.

140 Ibid.

141 Ibid; Eric Schmitt and Graham Bowley, 'Syria Orders American School Closed', *The New York Times*, 29 October 2008.

142 Eric Schmitt and Thom Shanker, 'Officials Say U.S. Killed an Iraqi in Raid in Syria', *The New York Times*, 27 October 2008. The Secretary of Homeland Security made similar remarks: Baker, above n 1.

143 Baker, above n 1.

144 Ellen Knickmeyer, 'Syria Protests U.S. Raid To U.N., Orders Closures', *The Washington Post*, 29 October 2008.

all criticised the raid or expressed serious concern.[145] Many of the statements referred to respect for territorial sovereignty. For example, China's foreign ministry stated that Beijing opposes 'any deed that harms other countries' sovereignty and territorial integrity'.[146]

(d) Other recent military operations

Since 2004, the US has carried out numerous covert operations against al-Qaeda around the world.[147] The order authorising the operations identified around 20 countries in which al-Qaeda operatives were believed to be hiding, including Syria, Pakistan, Yemen, Saudi Arabia and several other Gulf States.[148] One of these operations included a raid of a suspected militants' compound in 2006, carried out by a US Navy Seal team in the Bajaur region of Pakistan.[149] As another example, in 2006 the US covertly sent troops into Somalia to hunt senior members of an al-Qaeda cell thought to be responsible for the 1998 American Embassy bombings in Kenya and Tanzania.[150] Assessing international reaction to these incidents is difficult, because the operations were carried out secretly and details emerge only gradually and at later periods in time.

In December 2008, and throughout early 2009, Iran and Turkey continued to carry out raids on PKK operatives in Iraqi territory.[151] Iraq has demanded that these raids cease.[152] Turkey justifies its actions under its right to self-defence.[153] In March 2009, Israel carried out a long-range bombing operation against a convoy in Sudan thought to be supplying arms from Iran to Hamas in the Gaza strip.[154] Sudan recognised that the convoy was illegal, and it does not appear to have protested.[155]

C. Conclusion on the state of the law

The decisions of the ICJ provide limited assistance. Assuming that the ICJ was correct in the *Nicaragua* case when it laid down a test of effective control as the standard of attribution required, its subsequent judgments on the point no longer provide a clear statement of the law. Throughout several cases, from the *Israeli Wall* decision to the most

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[145] Tyson and Knickmeyer, above n 132; 'China condemns US raid into Syria', *Agence France-Presse*, 28 October 2008; Estelle Shirbon, 'France expresses concerns over U.S. raid', *Reuters*, 27 October 2008; 'India "concerned" at Syrian civilian deaths in US raid', *Agence France-Presse*, 4 November 2008; 'Egypt slams US raid as "violation of Syrian sovereignty"', *Agence France-Presse*, 28 October 2008; 'Lebanon condemns US raid in Syria', *Agence France-Presse*, 27 October 2008; 'Iran FM condemns US raid on solidarity visit to Syria', *Agence France-Presse*, 4 November 2008; 'Iraq again denounces US attack on Syrian village', *Agence France-Presse*, 13 November 2008.

[146] 'US under fire for deadly raid on Syria', *Agence France-Presse*, 29 October 2008.

[147] Michael Evans and Deborah Haynes, 'Rumsfeld ordered US special forces to take out terrorists across the world', *The Times*, 11 November 2008.

[148] Ibid.

[149] Eric Schmitt and Mark Mazzetti, 'Secret Order Lets US Raid Al Qaeda in Many Countries', *The New York Times*, 10 November 2008.

[150] Ibid.

[151] Shwan Mohammed, 'Iran helicopters strike Iraq Kurd villages: border guard', *Agence France-Presse*, 2 May 2009.

[152] 'Iraq protests Iran air raid on Kurd villages', *Agence France-Presse*, 5 May 2009.

[153] Hande Culpan, 'Turkish parliament extends mandate on Iraq strikes', *Agence France-Presse*, 9 October 2008.

[154] Michael Gordon and Jeffrey Gettleman, 'U.S. Officials Say Israel Struck in Sudan', *The New York Times*, 27 March 2009.

[155] Ibid.

recent *Congo v Uganda* case, a division has grown in the Court between those jurists espousing the traditional test of attribution and those who perceive the September 11 events as evidencing a new global attitude towards self-defence, particularly in light of the modern threat of terrorism. The advocates of the traditional view on the Bench have ignored completely the recent State practice and failed to address the opinions of the minority. However, even the dissenting judges do not explain or justify their decisions as adequately as might be desired. Furthermore, several conceptual errors identified in this article have added to the confusion. As such, the recent jurisprudence is, with respect, of limited guidance.

The practice and *opinio juris* of States demonstrates that an armed attack must be attributable to the State against which self-defence is exercised. The practice is not entirely consistent, but it does evidence a clear change of attitude. Throughout the 1980s and 1990s the world was generally critical of cross-border raids that were justified on self-defence grounds in the absence of some direct instruction or control by the sanctuary State. In contrast, the September 11 incident resulted in near universal acceptance and widespread participation in the military response by the US, where the traditional attribution requirement of effective control was absent. However, given the close relationship between the Taliban and al-Qaeda, the world reaction can only be said to support a lowering from 'effective control' to active support; not a lowering to a threshold of mere 'toleration' without more. This is consistent with subsequent State practice, as evidenced for example by the response of South American States to Columbia's raid into Ecuador.

The current law may, therefore, be stated as follows. For the purposes of self-defence, an armed attack will be attributable to a State where that State provides sanctuary, and cooperates with or provides logistical or other support, to the actor that actually carries out the armed attack, even if that State does not effectively control or direct that actor to carry out the attack; but the armed attack will not be attributable where that State merely tolerates the presence of the actor on its territory. For convenience, this new threshold of attribution may be referred to as the 'sanctuary and support' principle.

4. Is the new attribution test defensible?

Assuming, then, that the above summary represents the current state of international law, is it morally, rationally and practically defensible? There are several problems with the new sanctuary and support test of attribution. However, these problems do not displace the overall utility of the test in best safeguarding international peace and security.

The first concern is that the moral culpability of a State that fails to thwart terrorist operatives from operating on its soil would seem to be virtually the same as a State that actively supports terrorists. A nation that does nothing to neutralise a real and serious threat to other countries seriously endangers international peace, especially since the power to remove the threat will be almost exclusively within its control. Worse still, a State that malevolently intends and desires that the hostile group will carry out attacks on its enemies will be able to use territorial sovereignty as a legal shield. Ordinary moral reasoning

suggests that omissions should not be treated too differently from active wrongdoing,[156] especially where the consequences of failing to act may be just as grave as positive misconduct.

However, the argument that a State is just as 'morally culpable' for failing to prevent the operations of hostile actors, as a State that provides active support, wrongly places undue emphasis on the ideal of retribution. The notion of moral revenge or reprisal is not the principal concern of the law of self-defence.[157] The grounding principle of the international legal order is international peace and security, and that force may only be used as a last resort. To focus solely on moral culpability would prioritise individual State punishment at the expense of ignoring the consequences for the international community. Due to the serious and irreparable harm that international conflict can entail, it is particularly important that the principle that provides the greatest good for the safety of the world prevails, even if that principle does not correlate exactly with which State is strictly to blame.

Another argument against the sanctuary and support test of attribution is that it may leave victim States with no effective remedy. Where a State tolerates the presence of hostile actors, but does not support those actors, the victim State should have some means available to it to prosecute the sanctuary State for tolerating the presence of the attackers on its territory. Possible avenues open to the victim State include:

a) imposing economic sanctions;

b) taking lawful countermeasures;

c) taking the case to the ICJ; and

d) lodging a complaint with the UN Security Council.

Each of these options has problems. First, economic sanctions are only effective if the sanctuary State is economically vulnerable to them. Second, countermeasures do not affect obligations to refrain from the threat or use of force.[158] Third, the ICJ would not be able to hear the case unless the offending State has consented to the Court's jurisdiction,[159] assuming the breach of an international norm could be identified.[160] There is the further problem that the delay in bringing a claim would render the exercise futile in the face of an imminent peril. Finally, the collective security mechanisms of the UN Security Council are often unreliable, uncertain, delayed and ineffective, depending as the Council does on united political will. As Judge Kateka remarked in *Congo v Uganda*:

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[156] See for example, Peter Singer, *Writings on an Ethical Life* (2000) 105–17.

[157] *Friendly Relations Declaration*; Derek Bowett, 'Reprisals Involving Recourse to Armed Force' (1972) 66 *American Journal of International Law* 1, 3.

[158] *State Responsibility Articles*, art 50(1). Further, the *State Responsibility Articles* are without prejudice to the *UN Charter*: *State Responsibility Articles* art 59; and so the general restriction on force in art 2(4) of the Charter still applies.

[159] Statute of the International Court of Justice art 36(1).

[160] For example, that a State must not 'allow knowingly its territory to be used for acts contrary to the rights of other States': *Corfu Channel* 22.

> It is not enough for the Court to refer Uganda to the Security Council. It bears mentioning that many tragic situations have occurred on the African continent due to inaction by the Council.[161]

Additionally, as Judge Jennings noted in the *Nicaragua* case, the original scheme envisaged by the *UN Charter* whereby the UN would itself engage in the use of force was never implemented.[162] Given this lacuna in the security regime, the ICJ should, therefore, be wary not to curb States' rights to self-defence so as to leave no feasible remedy. The requirement of active State support is especially problematic given 'widespread (but difficult to prove) connivances between States and terrorist organizations'.[163]

These inefficiencies cannot be overlooked, but they do not outweigh the benefits of the sanctuary and support test of attribution. The overwhelming benefit is a high attribution threshold that creates a significant political hurdle for States intending to use force in response to an attack. The argument can much more readily be made that a State is 'not doing enough to fight terrorism' than the argument that a State is actively *supporting* terrorism. The former test is highly subjective, provides far less certainty and allows a wide sphere of debate within which reasonable minds might differ. Identifying the measures that a State ought to have taken to prevent acts of terrorism would be incredibly difficult because the criterion is so perilously vague. With such a subjective standard, the justificatory arguments would be able to be stretched and powerful States would be given room for abuse. Similar problems exist if the criteria 'tolerating' is substituted with 'harbouring'.[164] The sanctuary and support test is, therefore, an important condition precedent; and affixes brakes to 'trigger-happy' States by requiring proof of actual involvement.

A third argument against the sanctuary and support test is that the requirement of necessity already provides an adequate safeguard; and that attribution should be a consideration under that head. For example, it would generally be unnecessary for a State to invade another State to neutralise terrorists if that State was already taking reasonable steps to do so itself. One advantage of this approach is that the debates about self-defence in the UN Security Council have often focused on issues of necessity.[165] The concept requires no legal expertise to understand and provides an accessible platform for practical political discussion. It is unlikely that Security Council representatives would sit for great lengths of time debating the more nuanced and technical aspects of the law of State responsibility if the legal test is too refined and complex.

However, there are two major problems with shifting the role of attribution to necessity and proportionality. The first problem is that there is no support for such a radical departure from established principle in the practice and attitudes of States. There is not a

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[161] *Congo v Uganda* [38] (Judge Kateka).

[162] *Nicaragua* [543]–[544].

[163] Giuliana Ziccardi Capaldo, 'Providing a Right of Self-Defense Against Large-Scale Attacks by Irregular Forces: The Israeli-Hezbollah Conflict' (2007) 48 *Harvard International Law Journal Online* 101, 106.

[164] Hannes Herbert Hofmeister, 'When is it Right to Attack So-Called "Host States"? An Analysis of the Necessary Nexus Between Terrorists and Their Host States' (2007) 11 *Singapore Year Book of International Law* 75, 79–80.

[165] Nollkaemper, above n 114, 146.

single incident of State practice where a significant number of States has approved or acquiesced in an act of self-defence against a State where that State had no involvement with the attack. The notion that attribution is somehow a non-determinative 'factor' within the greater concept of necessity is, therefore, without practical foundation. Attribution has always been treated as a *condition precedent*. The second problem is that such a shift would liberalise permissible recourse to self-defence. The requirements of necessity and proportionality direct attention to the State which is said to be the subject of the armed attack. A court would be asked to examine the requirements of the victim State, rather than the culpability of other States. Some would argue that this is precisely what self-defence entails — a right to defend without regard to what entity may be attacking. This is a pre-Charter view of international law. It is far too simplistic in a system where the prohibition on the use of force is the dominant norm, and in which global peace and security is the most important objective. To shift the focus to necessity and proportionality would be to move towards the idea that a State may take any measures necessary in order to protect itself, notwithstanding the consequences to the international community. This would be a serious step backward for international law.

The sanctuary and support principle strikes a reasonable balance with the right to self-defence, because it does not require a State to have effective control over the perpetrators of an attack. The principle accommodates the reality of autonomous non-State groups who do not operate under direct instructions, and it holds States to account for supplying arms and logistical support to those groups. It is submitted that the new threshold is a reasonable balance between the right of a State to protect itself, the territorial sovereignty of States, and international peace and security.

Perhaps the ideal solution to achieve clarification of the law would be to amend the *State Responsibility Articles* to include a different attribution requirement for self defence. For example:

1) This section applies only for the purpose of determining whether an armed attack is attributable to a State under article 51 of the *UN Charter*.

2) An armed attack will be taken to be attributable to a State if it can be demonstrated by clear and convincing evidence that the State in question:

    a) failed to prevent its territory from being used to carry out an armed attack on another State; and

    b) actively provided support — whether military, logistical, or financial — to the persons or group that, in fact, carried out the armed attack.

The solution suggested above is, of course, unlikely to be agreed upon. Such a clarification would more likely come about through the work of the International Law Commission and a subsequent process of crystallisation. However, the international community has, in the past, coalesced around agreed principles that have helped to create a more nuanced system of international law. The world has proven itself capable of creating agreements relating to the use of force in the *Definition of Aggression* and the *Friendly Relations Declaration*. These agreements typically take a considerable time to develop, but they are possible. The modern consciousness of terrorism provides a great impetus for global cooperation and agreement.

Conclusion

The international reaction to the US military response to the September 11 attacks clearly shows a changing attitude towards the requirements of self-defence. There was almost universal approval and widespread participation in self-defence where the armed attack that occurred could not be attributed to Afghanistan on the traditional 'effective control' test of attribution. However, there was a high level of cooperation between the State of Afghanistan and the perpetrators of the attacks. As such, it would be erroneous to conclude that it is generally accepted that either (a) no attribution is required; or (b) mere toleration of the presence of terrorists is sufficient to ground attribution. The attitude of the international community may be shifting in that direction. But as a matter of international law as it stands today, the only sure conclusion that may accurately be drawn is that the attribution threshold has been lowered from 'effective control' to providing 'sanctuary *and* support'.

This new threshold test is justified as the best compromise between the interests of States in ensuring their individual survival and protecting global peace and security. In a world where individual actors have access to powerful weapons and pose an equal if not greater threat to the lives of citizens than conventional warfare, it seems naïve and unrealistic to espouse a threshold of attribution for armed attacks as high as the *Nicaragua* test. To be sure, the UN Security Council is a crucial mechanism by which world peace and security is maintained; and the law should reflect this. But international law risks losing its respect and relevance if disconnects from reality. If a sanctuary State has knowledge of individuals operating within its borders that have carried out armed attacks on the victim State's territory, and the sanctuary State actively supports those perpetrators although it does not actually instruct them, then there is every reason to attribute the actions of the private individuals to that State for the purposes of self-defence. Ultimately, it is a question of balance. On the one hand, there is a need for States to protect themselves from the risk of impending harm. On the other hand, the international legal order will be more secure and peaceful if States — especially more powerful States — cannot abuse their right of self-defence. Moreover, the use of force should, after all, be the last resort.